

Review of the Solomon Islands *Penal Code* [Cap 26] Property Offences



2012

This Issues Paper is the result of collaboration between officers of the Solomon Islands Law Reform Commission and the International Legal Assistance Branch of the Australian Attorney General's Department. This Paper is intended to be used as a policy aid only.

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Introduction

The Australian Attorney-General's Department (AGD), under the Pacific Police Development Program, provides law and justice assistance to Pacific island countries to strengthen legal frameworks.

In October 2011, the Solomon Islands Law Reform Commission (LRC), requested AGD assistance to review current property offences in the Solomon Islands *Penal Code* [Cap 26] (Penal Code). AGD's review of property offences forms part of a broader review being undertaken by the LRC to examine the Penal Code and the Solomon Islands *Criminal Procedure Code* [Cap 7] (Criminal Procedure Code). The common purpose of these reviews is to identify whether current legislation is operating effectively and fairly, and to ensure consistency of criminal justice legislation with contemporary domestic and international obligations and best practice.

Scope of the Terms of Reference

On 21 December 2011, the LRC and AGD signed Terms of Reference to jointly review current property offences in the Solomon Islands. AGD would focus on offences identified in Chapter 9 of the LRC Review of the Penal Code and Criminal Procedure Code, Issues Paper 1, including:

- stealing
- burglary
- robbery
- unlawful use (possession and control) and additional theft related offences
- extortion
- fraud
- forgery
- currency offences
- arson, and
- damage to property.

AGD agreed to undertake a more detailed analysis of these property offences, consider relevant case law and develop options for reform, highlighting the strengths and weaknesses of these options for the context of Solomon Islands. These papers will be submitted to the LRC for a peer review process and then reviewed by AGD. They will then be submitted to the LRC Commissioners as options papers containing recommendations for reform.

Background to the Solomon Islands Penal Code

The Penal Code is the key legislation governing domestic criminal offences in Solomon Islands. It is supplemented by other legislation dealing with international crime, such as the *Money Laundering and Proceeds of Crime Act 2002*.

The Penal Code was enacted in 1961, prior to the independence of Solomon Islands. It was influenced by English statute law and common law in force at the time of its development, as well as the Griffith code of criminal law enacted in 1899 for Queensland (Australia) and the Indian Penal Code, enacted in 1860.¹ The property offences in the Penal Code are based on the United Kingdom *Larceny Act 1916*, which has since been repealed and replaced with the *Theft Act 1968*.²

While the Penal Code does not currently refer to customary law and values, the Solomon Islands *Constitution 1978* provides that customary law is part of the law in Solomon Islands to the extent that it is consistent with the Constitution and Acts of Parliament.³ 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. The majority of land in Solomon Islands is held under customary land tenure and communal ownership of property is common, this has raised a number of issues in villages and in Solomon Islands courts pertaining to matters of ownership.⁴ While the Penal Code does not extend to cover land, reform of the property offences provides the opportunity for the LRC to take into account customary rights and interests when considering the concept of property, for example in stealing, unlawful use and criminal damage offences.

¹ Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code*, Issues Paper 1, 2008, paragraph 1.3.

² This Act was amended by the *Theft Act 1978*.

³ Schedule 3 to the Constitution provides:

- (1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.
- (2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.
- (3) An Act of Parliament may:-
 - (a) provide for the proof and pleading of customary law for any purpose;
 - (b) regulate the manner in which or the purposes for which customary law may be recognized;
 - and
 - (c) provide for the resolution of conflicts of customary law.

⁴ See, Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code*, Issues Paper, 2008, paragraph 9.2.

Resources

This Issues Paper builds on research and consultations already undertaken in Solomon Islands, including:

- the LRC Review of Penal Code and Criminal Procedure Code, Issues Paper 1 (LRC 2008 Review) (**Appendix 1**)
- feedback from consultations undertaken by the LRC in regards to property offences in Solomon Islands (**Appendix 2**), and
- policy direction provided by the LRC to AGD in May 2012 (**Appendix 3**).⁵

In preparing this paper, AGD has also looked to a number of jurisdictions and considered emerging legislative approaches, before developing options for reform for the context of Solomon Islands. Where appropriate, legislative examples from other jurisdictions are provided to assist in demonstrating how elements of an offence can be applied. These examples are not intended to be taken as recommended provisions, rather an illustrative example of the application of specific points of law being discussed. United Kingdom and Queensland legislation are of particular relevance in this regard, given Solomon Islands adoption of provisions modelled on the United Kingdom *Larceny Act 1916* and its historical background as a 'Griffith Code' jurisdiction. For this reason, examples from Queensland and the United Kingdom have been used to demonstrate contemporary models for property offences that will be recognisable to Solomon Islands.⁶

The Australian Model Criminal Code has also been extensively cited throughout the Issues Paper.⁷ The Model Criminal Code was developed by the Model Criminal Code Officers Committee (MCCOC), which was established by the Standing Committee of Attorneys-General in 1991 to develop a national model criminal code for Australian jurisdictions. The recommendations of the Final Report delivered by the MCCOC formed the basis for the Commonwealth Criminal Code Bill 1994, which was passed by the Commonwealth Parliament in 1995.

Other examples have been drawn from a range of common law jurisdictions including New Zealand, the Australian Commonwealth jurisdiction, New South Wales, South Australia, Victoria and the Northern Territory. These jurisdictions offer a variety of perspectives and approaches to criminalising offending conduct and benefit from a history of ongoing review and reform.

⁵ This policy direction responds to questions 119-136 of the LRC 2008 Review regarding property related offences.

⁶ For further information on the history and content of 'Griffith Code' jurisdictions, including Solomon Islands, see Eric Colvin, "Criminal Procedure in the South Pacific" (2004) *Journal of South Pacific Law*, Volume 8(1), 1.

⁷ Available at the Standing Committee of Attorneys-General website, viewed 20 April 2012, <http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_mcloc>.

As was the case in Solomon Islands, crimes legislation in Pacific jurisdictions has generally been adopted by reference, and in the property context, has not undergone the same process of ongoing review and reform as in larger common law jurisdictions. While a number of Pacific jurisdictions are currently in the process of updating their crimes legislation, including Samoa, Cook Islands and Nauru, these processes are ongoing and revised legislation has not yet been enacted. This paper will endeavour to use provisions from Pacific jurisdictions, where available, to demonstrate the application of specific points of law in a Pacific islands context.

Chapter 1— Stealing Offences

Stealing is one of the most common crime types in Solomon Islands, and takes up significant time and resources of the criminal justice system. This Chapter examines offences relating to stealing in the Penal Code and considers options for reform of these offences.

1.1 Current law

a Legislation

Stealing offences are currently captured in Parts XXVII to XXIX of the Penal Code and are based on the United Kingdom *Larceny Act 1916*.⁸ The relevant definitions and general offence for stealing are set out below.

Stealing is defined at section 258(1) of the Penal Code as:

A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.

Things capable of being stolen are defined at section 257(1) as:

Every inanimate thing which has value and is the property of any person, and if adhering to the realty then after severance therefrom, is capable of being stolen...

Animals are also capable of being stolen.⁹ The definition of things capable of being stolen is limited to tangible things and therefore excludes land and intangible property such as electricity.¹⁰

A simple larceny offence is provided at section 261 of the Penal Code, which states:

(1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years...

These provisions are supplemented by over 20 specific stealing offences in the Penal Code.¹¹ These specific offences criminalise theft according to the nature of the goods stolen (such as

⁸ This Act has since been repealed and replaced with the Theft Act 1968 (UK).

⁹ Penal Code, subsections 257(2)-(7).

¹⁰ See Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code, Issues Paper 1*, 2008 (LRC 2008 Review), paragraph 9.8.

¹¹ Refer to the Solomon Islands Penal Code[Cap 26] Part XXVII—larceny, embezzlement and conversion—sections 257-278, Part XXVIII—stealing and damaging trees fixtures, etc—sections 279-282, and Part XXIX—other offences allied to stealing—sections 287-291.

electricity, cattle, fruit or vegetables), where the goods were stolen (for example from a dwelling or house, ship or dock), and who stole the goods (a tenant or lodger, clerk or servant).

Under the current provisions, a court must focus on the physical act of the defendant taking property from another person, where the fault element is fraudulence and intention to permanently deprive.

b Case Law

As noted in the LRC *Review of Penal Code and Criminal Procedure Code, Issues Paper 1* (LRC 2008 Review), the term ‘fraudulently’ is not expressly defined in the Penal Code and the courts in Solomon Islands have relied on cases decided under the repealed United Kingdom *Larceny Act 1916* to interpret this key term.¹²

The replacement of the *Larceny Act 1916* with the *Theft Act 1968*, has halted the development of the English common law on theft that applies in Solomon Islands. This issue was discussed in *Toritelia v Regina*.¹³

...the Theft Act 1968 has not become part of the law of Solomon Islands... Merely because the word ‘dishonestly’ which is used to identify the *mens rea* called for under the Theft Act has, as a matter of language, a meaning similar to the word ‘fraudulently’ provides no warrant for discarding the body of law which has grown up as a matter of judicial exposition in relation to the common law and its codification and substituting for that a test newly devised by the Court of Appeal in England to meet the requirements of altogether different legislation.

Applying the common law interpretation of ‘fraudulently’, the Court of Appeal in *Toritelia v Regina* held that to be acting ‘fraudulently’, a person needed to have an intention to deprive the owner permanently of his property, although conduct would not be fraudulent if done under an honest claim of right or an honest and reasonable belief that the taking was not against the will of the owner.

The High Court of Solomon Islands has, at times, been highly critical of theft offences under the Penal Code. In *obiter* in *Regina v Saungao*,¹⁴ Lungole-Awich J set out the history of laws relating to theft under the Penal Code and argued strongly for the need to reform these laws:

Our laws on stealing and related dishonesty with property are codified in the Penal Code... They were copied from the provisions in the English *Larceny Act 1901*,¹⁵ 1 Edw. 7, c.10 and are archaic. Several legal technicalities were encountered in England in the application of the Larceny Act 1901 and so, *Theft Acts 1968* and *1978* were enacted to replace it. Need

¹² LRC 2008 Review, paragraph 9.8.

¹³ [1987] SBGA 1.

¹⁴ [1997] SBHC 60

¹⁵ This Act was repealed and replaced by the *Larceny Act 1916*.

we wait until the technicalities encountered in England have been experienced in Solomon Islands before we change the laws on stealing?¹⁶

1.2 Policy considerations

The LRC indicated in their policy direction of 16 May 2012, that laws relating to stealing in the Penal Code should be simplified by enacting a general theft offence. The LRC policy direction notes that the fault element for this offence should be dishonesty, and that the general offence should contain clearly defined terms. These recommendations reflect input from community consultations undertaken by the LRC in regards to property offences in Solomon Islands.

Options for a general theft offence are examined below, together with discussion of options for defining key terms, defences and penalties relating to the offence. A general theft offence could be supplemented by a few specific theft-related offences such as making off without payment and receiving. These additional offences are covered in Chapter 4-*Unlawful Use and other offences related to theft*.

a General theft offence

General theft offences have been adopted in the reform of stealing and larceny provisions in a number of jurisdictions. The United Kingdom *Theft Act 1968* consolidated a number of larceny offences under the *Larceny Act 1916*, into a single offence of ‘theft’, supported by general theft-related provisions. In Australia, the Australian Capital Territory, South Australia and Victoria have simplified their criminal frameworks on theft by adopting general theft offences in their crimes legislation. The enactment of a general theft offence is an approach that is also supported by the MCCOC.¹⁷ A Model Criminal Code has been prepared in response to the MCCOC Report.¹⁸ Section 3.2.1 of the Model Criminal Code provides:

A person who dishonestly appropriates property belonging to another, with the intention of permanently depriving the other of it, is guilty of the offence of theft.

This is similar to subsection 1(1) of the United Kingdom *Theft Act 1968*, which provides:

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly.

Section 308 of the Australian Capital Territory *Criminal Code 2002* provides:

¹⁶ The technicalities that Lungole-Awich J refers to, lie within the offences themselves. For example, the large variety of different fault elements required to prove various individual offences, which has led to complex charges and have made it more likely that a prosecution could fail on a technical point of law.

¹⁷ Model Criminal Code Officers Committee (MCCOC), Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, 1995, p 6.

¹⁸ Parliamentary Counsel’s Committee, Model Criminal Code, 1st Edition, 28 May 2009. Available at: <[http://www.pcc.gov.au/uniform/crime%20\(composite-2007\)-website.pdf](http://www.pcc.gov.au/uniform/crime%20(composite-2007)-website.pdf)>.

A person commits an offence (theft) if the person dishonestly appropriates property belonging to someone else with the intention of permanently depriving the other person of the property.

The focus of these offences is on the interference with interests or rights in property, rather than on the physical act of taking the property of another person. In reforming offences in these jurisdictions, the original fault element of fraudulence has been replaced with dishonesty and intention to permanently deprive.

Question 1.2.1

Does Solomon Islands wish to replace the current theft offences under the Penal Code with a single broad offence of theft?

The LRC have indicated that they wish to adopt clear definitions of key terms in a new general theft offence. Clear definitions will assist with clarity and consistency in interpretation and application of the law against theft. Possible definitions for the fault elements of a general offence, along with the definition of other key terms, are examined below.

b Key terms and fault elements

The LRC policy direction indicated that dishonesty should be a fault element of this offence. The LRC has not indicated whether it wishes to retain 'intention to permanently deprive', which is currently included in the provisions of the Penal Code as a fault element of stealing. Solomon Islands may therefore wish to consider including an intention to permanently deprive, in addition to dishonesty, as a fault element for stealing offences. This issue will be discussed below.

In addition, consideration could be given to whether it would be beneficial for Solomon Islands to define other key terms used in a general theft offence. Common terms such as 'property', 'appropriation' and 'belonging to another', are discussed below.

Definition – Property

Modern theft offences contain reference to the term property within their general theft offence. Property is currently defined in section 4 of the Penal Code as including:

any description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

Solomon Islands could consider simplifying this definition. This would also allow for the repeal or simplification of the current list of ‘things capable of being stolen’ provided under section 257 of the Penal Code.

The Australian Model Criminal Code suggests the following definition of property:

‘property’ includes all real or personal property, including:

- (a) money; and
- (b) things in action or other intangible property; and
- (c) electricity; and
- (d) a wild creature that is tamed or ordinarily kept in captivity or that is reduced (or in the course of being reduced) into the possession of a person.

It should be noted that, while land is property, the Model Criminal Code theft provisions excludes land from being stolen except in limited cases.¹⁹ The Solomon Islands currently excludes land from its theft provisions and may wish to consider continuing to do so. The UK Theft Act and a number of Australian jurisdictions exclude land and deal with theft of land in their fraud provisions.²⁰

Section 2(1) of the New Zealand *Crimes Act* provides a broader definition of property which includes all rights and interests. It states:

property includes real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest.²¹

Question 1.2.2

Does Solomon Islands wish to include a revised definition of ‘property’ in the revised legislation?

Question 1.2.3

If so, how should ‘property’ be defined?

Question 1.2.4

Does the Solomon Islands wish to continue to exclude land as capable of being stolen?

Definition – Appropriation

¹⁹ See section 3.2.4.

²⁰ See further the discussion in MCCOC, Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, pages 41-43.

²¹ The Cook Islands uses a similar definition in section 2 of their *Crimes Act 1969*.

Under a general theft offence, the requirement of ‘appropriation’ could replace the requirement to prove that the accused physically took and carried away the property in question (see section 258 of the Penal Code) or ‘converted’ it for his or her own use. The types of behaviour which would be covered by the term ‘appropriation’ would include using, destroying, selling or pledging the property, lending or borrowing on the property, and retaining or refusing to return the property.²² Appropriation has been included as a key term in a number of jurisdictions including, the United Kingdom, Victoria and the Australian Capital Territory.²³

Amending the requirement to physically convert property to refer to appropriation recognises that there are some types of property, such as a debt, which cannot be carried away or converted.

The LRC consultations raised the issue of how to deal with a person who innocently buys stolen goods. The view was this person should not be prosecuted for theft. This could be achieved by including dishonesty as an element of the offence. This would ensure that innocent takings are not caught by the theft offence.

To strengthen this protection, Solomon Islands may wish to consider including an exception for persons who acquire interests in property in good faith, even if the person who sold or gave the property to the acquirer did not own or have the right to deal with it. An example of this kind of provision can be seen in subsection 304(3) of the Australian Capital Territory *Criminal Code 2002*. This is a broadened adaptation of the traditional ‘bona fide purchaser for value’ exception, and would ensure that the theft provisions do not cover persons who come by stolen property innocently.

The Australian Capital Territory Criminal Code includes the requirement that, for there to be an appropriation, the assumption of the rights to ownership, possession or control of property has to occur without the consent of a person to whom the property belongs. This retains the distinction between theft and obtaining property by deception (also known as fraud), discussed in Chapter 5. The phrase ‘rights of an owner to ownership, possession or control’ also limits appropriation so that it does not apply to the assumption of ‘trivial’ rights of an owner (for example, picking up an item from a supermarket floor and putting it back on the shelf).²⁴

Appropriation has been included as a key term in a number of jurisdictions including, the United Kingdom, Victoria and the Australian Capital Territory.

²² S Bronitt and B McSherry, *Principles of Criminal Law* (3rd edition, 2010), p.734.

²³ An alternative term which could be considered at the drafting stage is the term ‘dealing’, which is used in South Australia and New Zealand. See Section 130 *Criminal Law Consolidation Act 1935* (South Australia), and section 219 of *Crimes Act 1961* (New Zealand).

²⁴ MCCOC, Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, 1995, p 41.

Section 304 of the Australian Capital Territory *Criminal Code 2002* defines appropriation as follows:

- (1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom the property belongs, is an appropriation of the property.
- (2) If a person has come by property (innocently or not) without committing theft, subsection (1) applies to any later assumption of those rights without consent by keeping or dealing with it as owner.
- (3) If property is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights the person believed the person was acquiring is not an appropriation of property because of any defect in the transferor's title.

Under this provision, an appropriation will be dishonest where a person innocently comes by property without stealing it, and then decides to keep the property or deal with it as if they were the owner.

Question 1.2.5

Does Solomon Islands wish to include a definition of 'appropriation' in the Penal Code?

Question 1.2.6

If so, what types of interference with property should be captured by a definition of 'appropriation'?

Question 1.2.7

Does Solomon Islands want a definition of 'appropriation' that requires an assumption as to the rights to ownership, possession or control of property to occur without the consent of the person to whom the property belongs?

Question 1.2.8

If a definition of 'appropriation' is included, does Solomon Islands want to include an exception in the definition for persons who acquire an interest in stolen property in good faith?

Definition – Property belonging to another

A general theft offence such as one suggested by MCCOC at 1.2(a) above, also requires that the property in question belongs to another person. Subsection 301(1) of the ACT Criminal Code uses the following definition of 'person to who property belongs':

Property belongs to anyone having possession or control of it, or having any proprietary right or interest in it (other than an equitable interest arising only from an agreement to transfer or grant an interest, or from a constructive trust).

Under this definition, co-owners or people with different interests in the same property could still be found guilty of theft by taking the property away from the other person who has an interest in it without their consent. This was raised as a concern during consultations conducted by LRC, which provided policy direction to AGD that ‘the Penal Code needs to take into account “collective ownership” of property.’ This is discussed further in Chapter 4 of this paper.

A definition of property similar to the Australian Capital Territory model will ensure that a defendant will not be guilty of theft offence where the owner has particular types of equitable interest in the property, such as a constructive trust which is imposed by a court to enforce a promise or a gift. The rationale is that the unlawful ‘taking’ of such interests is adequately dealt with by the civil law doctrines of unjust enrichment and unconscionable dealing, and that to include these interests in the definition of property for theft would stray too far from the common perception of the offence.²⁵

Question 1.2.9

Does Solomon Islands wish to include a definition of ‘person to who property belongs’ in the revised legislation?

Question 1.2.10

If so, does Solomon Islands wish to include the exception for equitable interests in the definition?

Fault Element - Dishonesty

The concept of dishonesty differentiates theft from innocently taking something. Whether a defendant is dishonest is determined by the trier of fact in view of the circumstances of each case. Dishonesty is a simpler standard than ‘fraudulently’, which relies on common law and can be considered to be more precise but less responsive to the circumstances of individual cases.²⁶ Dishonesty can be defined by including objective and subjective elements, or only a subjective element.

A definition which incorporates both objective and subjective elements for dishonesty can be found in subsection 3.1.2(1) of the Model Criminal Code:

...*dishonest* means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

In this example, whether the conduct was dishonest according to the standards of ordinary

²⁵ S Bronitt and B McSherry, *Principles of Criminal Law* (3rd edition, 2010) pp 674–675.

²⁶ See MCCOC, Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, 1995, pages 21-23.

people is objective and whether the person knows that his or her conduct is dishonest according to those standards is subjective. It would be for the trier of fact in a matter to determine whether dishonesty is established according to this definition. The definition retains the element of moral wrongdoing in the offence through reference to general standards of honesty and integrity in the community.²⁷ This aspect of the definition means that it can be readily adapted to evolving community standards without the need for legislative amendment.

Alternatively, Solomon Islands may wish to consider a definition of ‘dishonest’ without an objective element. Section 217 of the New Zealand *Crimes Act 1961* provides a useful example of a definition of ‘dishonestly’ based on a subjective test:

...*dishonestly*, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.²⁸

‘Dishonesty’ using this definition is established by a lack of belief as to consent. A possible pitfall of this definition is that it may protect a defendant who has an unreasonable belief that the person in possession of the property consented to the accused taking it. This definition is also narrower than the definition with both objective and subjective elements.

Question 1.2.11

Solomon Islands could consider including dishonesty as a fault element of a new general theft offence.

If so, how should ‘dishonesty’ be defined in Solomon Islands?

Fault Element – Intention to permanently deprive

A second fault element of a general theft offence can be that the accused intended to permanently deprive the owner of the relevant property. The LRC policy direction did not indicate whether Solomon Islands wishes to retain ‘intention to permanently deprive’ as an additional fault element.

If the ‘permanently deprive’ element is not included, the theft offence may criminalise ‘dishonest borrowings’ (e.g. where an employee who has been unfairly dismissed borrows a filing cabinet to move his or her things out of the office, intending to return it within a few days), as well as traditional theft cases (where the victim suffers a permanent loss). The MCCOC also noted that removing this fault element would not just include dishonest borrowings within the scope of the theft offence, but, given that the offence extends to all rights of property ownership, would also extend to assumptions of minor property rights of the

²⁷ MCCOC, Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, 1995, p 25.

²⁸ Crimes Act 1961 (New Zealand), section 217.

owner, using the example of writing on the first page of her book, which, as the MCCOC notes 'might be wilful damage but is hardly theft.'²⁹

The Australian Capital Territory *Criminal Code 2002* defines an intention to permanently deprive in the context of theft. This section is designed to assist with interpretation and therefore does not limit the circumstances where an intention to permanently deprive will be an element of an offence. Section 306 of the Australian Capital Territory *Criminal Code 2002* provides:

Intention of permanently depriving for pt 3.2

- (1) A person (**A**) has the intention of permanently depriving someone else (**B**) of property belonging to B if—
 - (a) A appropriates property belonging to B without meaning B to permanently lose the property; and
 - (b) A intends to treat the property as A's own to dispose of regardless of B's rights.
- (2) For subsection (1), if A borrows or lends property belonging to B, the borrowing or lending may amount to treating the property as A's own to dispose of regardless of B's rights if, but only if, the borrowing or lending is for a period, and in circumstances, making it equivalent to an outright taking or disposal.
- (3) Without limiting this section, if—
 - (a) A has possession or control (lawfully or not) of property belonging to B; and
 - (b) A parts with the property under a condition about its return that A may not be able to carry out; and
 - (c) the parting is done for A's own purposes and without B's authority;the parting amounts to treating the property as A's own to dispose of regardless of B's rights.
- (4) This section does not limit the circumstances in which a person can be taken to have the intention of permanently depriving someone else of property.³⁰

Under this definition, the intention to permanently deprive is expanded to include a person borrowing or lending another's property, in circumstances and for a length of time that effectively make this the same as if the person had taken or disposed of the property outright.

A decision to exclude intention to permanently deprive would lead away from the current state

³⁰ Note, a similar definition is given in MCCOC, Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, 1995, p 70.

of the law of stealing in Solomon Islands, which includes an intention to permanently deprive as an element of stealing offences.

Question 1.2.12

Does Solomon Islands wish to include the element of ‘intention to permanently deprive’ in the theft offence of the revised legislation?

Question 1.2.13

If Solomon Islands includes ‘intention to permanently deprive’ as a fault element for theft, should this element be defined?

1.3 Defences

The defence of claim of right allows a person to be excused from criminal liability where he or she was under the mistaken belief that the property he or she took was his or her own. In many pieces of criminal legislation this is cast as a defence. This is in contrast to the Solomon Islands Penal Code, where it currently forms an element of the definition of theft under section 258(1) of the Penal Code.

A defence of claim of right allows, a person (A) defending or trying to take back property to which he or she has a claim of right is permitted to use such force as is reasonably necessary to defend or take back the property from another person (B), provided that A does not do bodily harm to B.

Similar defences are found in criminal legislation in Cook Islands, New Zealand and Papua New Guinea. Some jurisdictions have included an updated defence of property provision within³¹ or next to³² their self-defence provisions. If Solomon Islands wishes to recast claim of right as a defence (which is the case in most Pacific jurisdictions), it could include a section that details general exceptions to criminal liability (such as self-defence, sudden and extraordinary emergency etc). If this option is pursued, it would be important for Solomon Islands to consider what kind of force should be allowed in defence of property.

A common option is to state that reasonable use of force in the defence of property is permitted as long as this does not involve bodily harm to the other person. Section 10.4 of the Australian Commonwealth *Criminal Code 1995* provides one example of how this kind of defence can be applied:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

³¹ See, for example, Penal Code [Cap 135] (Vanuatu), section 23; Criminal Code Act 1995 (Commonwealth), section 10.4.

³² See, for example, the Criminal Law Consolidation Act 1935 (South Australia), section 15A.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

...

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property;

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

Question 1.3.1

Does Solomon Islands want to include in the revised Penal Code a claim of right type defence to theft?

Question 1.3.2

If so, does Solomon Islands wish to include an updated defence within or next to the updated self-defence provision?

Question 1.3.3

If so, what kind of force does Solomon Islands want to allow in defence of property?

1.4 Escalated categories of theft and penalty provisions

The general punishment for theft (otherwise known as simple larceny at section 261) is punishable by five years' imprisonment. The Solomon Islands Penal Code also provides for a range of very specific theft type offences, with increased penalties depending on the perceived gravity of the particular conduct:

- simple larceny after a previous misdemeanour under Part XXVII or Part XXXV—punishable by seven years imprisonment (section 261)
- simple larceny after previously being convicted of a felony—punishable by ten years imprisonment (section 261)
- larceny of postal packets—punishable by ten years imprisonment (266)

- larceny in dwelling-house, larceny from ship or dock, larceny and embezzlement by clerks or servants—punishable by 14 years’ imprisonment (sections 269, 271, 273), and
- serious special cases such as stealing wills, embezzlement by officer of post office of postal packet containing chattel, money or valuable security—life in prison (section 262, 267).

In jurisdictions with single theft offences, specific theft provisions such as these have generally been eliminated, with the circumstances/conduct in question to be covered by the more general theft offence. Where an offence is covered by a single broad provision designed to cover all circumstances in which that offence may occur, it is also advisable that sentencing guidelines are developed to ensure that sentences handed down for an offence are consistent and are not too lenient or severe. This consideration applies to all offences, however it has been given particular consideration in Chapter 3 – Burglary. This is because burglary carries a maximum penalty of life in the United Kingdom, giving a much wider discretion to the judiciary than applies to most other United Kingdom theft offences.

However, if Solomon Islands wishes to include increased penalties for any types of theft considered to be particularly serious, a detailed penalty provision could be included that sets out escalated penalties depending upon the property taken or the position of the accused. A detailed penalty provision would address concerns raised in LRC consultations regarding the need to retain a range of penalties.

The penalty for general theft offences across the Pacific is generally three to seven years’ imprisonment,³³ with up to 10 years’ imprisonment in a number of Australian jurisdictions³⁴ and 12 years’ imprisonment in Vanuatu.³⁵ Solomon Islands could consider adopting a maximum penalty for the general theft offence and any related offences within this range.

Question 1.4.1

Does Solomon Islands wish to include a penalty provision setting out a scale of penalties for particular types of theft?

1.5 General deficiencies in money or other property

The revised legislation could also include an evidence provision to cover the situation where the prosecution cannot identify particular sums of money or property taken, but can prove a general deficiency in the victim’s money or property that can be traced back to the accused.

³³ For example, Criminal Code Act 1974 (Papua New Guinea), section 372; Crimes Act 1969 (Cook Islands), section 249; Penal Code [Cap 17] (Fiji), section 262.

³⁴ For example, Criminal Code Act 1995 (Commonwealth), section 131.1; Criminal Code 2002 (Australian Capital Territory), section 308; Criminal Law Consolidation Act 1935 (South Australia), section 134.

³⁵ Penal Code [Cap 135] (Vanuatu), section 125.

This provision would cover circumstances where, for example, an employee takes small amounts of money from the till over a period of time.³⁶ Including this provision would mean it is not necessary for the prosecution to identify each particular sum stolen over time but rather could rely on establishing the general deficiency in money or other property. This would reduce the evidentiary burden for police and prosecutors.

An example of this type of provision is section 136 of the South Australian Criminal Code:

General deficiency

- (1) A person may be charged with, and convicted of, theft by reference to a general deficiency in money or other property.
- (2) In such a case, it is not necessary to establish any particular act or acts of theft.

The Model Criminal Code contains a similar provision. Section 3.2.7 of the Model Criminal Code provides:

A person may be convicted of theft of all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were appropriated over a period of time.

Question 1.5.1

Does Solomon Islands wish to include an evidence provision about general deficiency of money or property in the revised legislation?

1.6 Related Offences

Theft is the central basic property offence. Other offences about property draw on definitions and concepts that support theft provisions. Theft is included as an element of robbery, and as one of the secondary purposes for burglary. It is also closely related to fraud, where property is obtained through deception, and blackmail, where property is obtained by threats. Provisions about unlawful use of property and damage to property rely on definitions and concepts that also apply to theft.

Solomon Islands may wish to consider how policy decisions made in relation to theft will affect other property offences discussed elsewhere in this Issues Paper.

³⁶ MCCOC, Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences, 1995, p 77.

Chapter 2 — Burglary

Burglary is the offence of using force to enter private property without the consent of the owner or occupier and with intent to commit a second offence. The second offence is usually limited to theft, assault or criminal damage to property, but may also include other serious offences including sexual offences. To prove burglary, it is not necessary that the defendant is successful in carrying out the secondary offence. All that needs to be proved is that they entered with the intent of committing the secondary offence.

2.1 Current legislation and case law

The Solomon Islands Penal Code currently contains provisions that distinguish between burglaries, which occur at night, and housebreaking, which occurs during the day. These offences use ‘break and enter’ and specify particular kinds of buildings or places as elements of the offence. Sections 299-301 of the Penal Code provide:

299 Burglary

Any person who in the night -

- (a) breaks and enters the dwelling-house of another with intent to commit any felony therein; or
- (b) breaks out of the dwelling-house of another, having-
 - (i) entered the said dwelling-house with intent to commit any felony therein; or
 - (ii) committed any felony in the said dwelling-house,

is guilty of the felony called burglary, and shall be liable to imprisonment for life.

300 Housebreaking and committing felony

Any person who -

- (a) breaks and enters any dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory or workshop, or any building belonging to Her Majesty, or to the Government, or to any Town Council, local government council or other public authority, and commits any felony therein; or
- (b) breaks out of the same, having committed any felony therein,

is guilty of a felony, and shall be liable to imprisonment for fourteen years.

301 Housebreaking with intent to commit felony

Any person who, with intent to commit any felony therein-

- (a) enters any dwelling-house in the night; or

(b) breaks and enters any dwelling-house, place of divine worship or any building within the curtilage, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory or workshop, or any building belonging to Her Majesty, or to the Government, or to any Town Council, local government council or other public authority,

is guilty of a felony, and shall be liable to imprisonment for seven years.

The key element that defines burglary under Solomon Islands law is the requirement that the defendant ‘breaks and enters’ to enable the commission of another offence. This common law rule was stated in *Archibold’s Criminal Pleading, Evidence and Practice*.³⁷

To constitute burglary, there must be a breaking of the house, either actual or constructive. If a man leaves his doors or windows open, and another enters therein with intent to commit a felony, it is no burglary: 1 Hale 551; 3 Co. Inst. 64. So if there is an aperture in a cellar window to admit light, through which a thief enters in the night, this not burglary: *R v. Lewis*, 2 C. & P. 628; *R. v. Spriggs and Hancock*, 1 M. & Rob. 357.

...An actual breaking is, where the offender for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting a latch, or unlooses any other fastening to doors or windows which the owner has provided

This common law requirement was affirmed by the High Court of Solomon Islands in *Solo v Regina*,³⁸ which also stated:

The consequence of failing to prove the elements of “breaking” and “entering” is that the accused person may be convicted of simple larceny.

In *Luke Misitana v R*³⁹ the Court stated that pushing or pulling a door to gain entrance to a place would satisfy the requirement of ‘breaking’:

It must be noted that under the section 290 definition [now section 297], it is sufficient to constitute “breaking” any part of a building if a person pulls or pushes any door of a building which is closed.

2.2 Policy considerations

a General burglary offence

After conducting consultations, the LRC has recommended that the revised legislation should omit distinctions between burglary offences that occur at night and those that occur during the

³⁷ T.R. Fitwalter Butler and Marston Garsia, *Archibold’s Criminal Pleading, Evidence and Practice* (1966, 36th Edition) pages 656-657.

³⁸ [2000] SBHC 20; See also, *Regina v Pilly* [2001] SBHC 64.

³⁹ Unreported Criminal Appeal Case No. 7 of 1996, Muria CJ.

day. This change would mirror changes to the law of burglary in other common law jurisdictions.

Solomon Islands may also wish to consider excluding distinctions between various types of building or structure. Doing so would allow Solomon Islands to include a general offence about burglary to cover all situations currently criminalised under the Penal Code.

Section 231 of the New Zealand *Crimes Act 1961* provides a simple general offence of burglary:

- (1) Every one commits burglary and is liable to imprisonment for a term not exceeding 10 years who—
 - (a) enters any building or ship, or part of a building or ship, without authority and with intent to commit a crime in the building or ship; or
 - (b) having entered any building or ship, remains in it without authority and with intent to commit a crime in the building or ship.
- (2) In this section and in section 232, building means any building or structure of any description, whether permanent or temporary; and includes a tent, caravan, or houseboat; and also includes any enclosed yard or any closed cave or closed tunnel.
- (3) For the purposes of this section and section 232,—
 - (a) entrance into a building or ship is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by that person, is within the building or ship; and
 - (b) every one who gains entrance to a building or ship by any threat or artifice used for that purpose is to be treated as having entered without authority.

Subsection 231(2) of the New Zealand Act provides that ‘building’ means ‘any building or structure of any description, whether permanent or temporary’. This definition does not require that the building or structure be inhabited, which is intended to ease the burden of proof on the prosecution and to broaden the overall scope of the offence.

The Model Criminal Code contains a similar offence but includes structures, vehicles and vessels that can be used for residential purposes as part of the definition of ‘building’. Section 3.2.10 of the Model Criminal Code provides:

- (1) A person who enters or remains in any building as a trespasser with intent:
 - (a) to commit theft in the building, or
 - (b) to commit an offence in the building that is punishable with imprisonment for 5 years or more and that involves causing harm to a person or damage to property, is guilty of the offence of burglary.

Maximum penalty: Imprisonment for 12 years and 6 months.

(2) A person is not a trespasser merely because the person is permitted to enter or remain in the building for a purpose that is not the person's intended purpose, or as a result of fraud, misrepresentation or another's mistake.

(3) In this section, ***building*** includes:

(a) a part of a building, or

(b) a structure (whether or not moveable), a vehicle, or a vessel, that

is used, designed or adapted for residential purposes.

Question 2.2.1

Does Solomon Islands wish to include a general offence to cover all circumstances involving burglary?

Question 2.2.2

What types of building or structure should be covered by provisions about burglary?

b Secondary offences for the purpose of burglary

To be found guilty of burglary, a person who enters a building without being authorised to do so must enter or remain in the building for the purpose of committing a secondary offence.

These offences generally include theft, offences against the person, sexual offences and damage to property. Solomon Islands may wish to consider what kinds of secondary offences should be included in provisions about burglary.

There are two broad approaches to this aspect of burglary offences. The main difference between these approaches is the number of secondary offences that can substantiate a charge of burglary. Solomon Islands may wish to consider how broadly the crime of burglary should apply when choosing between these approaches.

The first approach is to state that a person is guilty of burglary if they enter with intent to commit any offence. This gives the broadest possible application to burglary offences. For example, subsection 231(1) of the New Zealand *Crimes Act 1961* provides:

Every one commits burglary and is liable to imprisonment for a term not exceeding 10 years who—

(a) enters any building or ship, or part of a building or ship, without authority and with intent to commit a crime in the building or ship; or

(b) having entered any building or ship, remains in it without authority and with intent to commit a crime in the building or ship.

The second approach is to list each of the secondary offences that can give rise to charges of burglary. This approach has been favoured in the United Kingdom and presents the most focussed application for burglary offences. Section 9 of the *Theft Act 1968* provides:

- (1) A person is guilty of burglary if—
 - (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
 - (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.
- (2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm therein, and of doing unlawful damage to the building or anything therein.

This burglary provision is limited to circumstances where a person intends to commit theft, grievously injure a person or damage property. This section previously included circumstances where a person intends to commit rape. This part of the provision has been repealed and replaced by section 63 of the United Kingdom *Sexual Offences Act 2003* which provides a much broader offence of trespassing in any premises with intent to commit a sexual offence.

Another example of the second approach can be seen in the Model Criminal Code, which limits burglary to circumstances where a defendant enters with intent to commit theft or to commit an offence against a person or property which is punishable by 5 years imprisonment or more. Subsection 3.2.10(1) of the Penal Code provides:

- A person who enters or remains in any building as a trespasser with intent:
- (a) to commit theft in the building, or
 - (b) to commit an offence in the building that is punishable with imprisonment for 5 years or more and that involves causing harm to a person or damage to property, is guilty of the offence of burglary.

Solomon Islands may wish to consider what secondary offences should apply to burglary provisions under the revised legislation.

Question 2.2.3

What secondary offences should apply to burglary provisions under the revised legislation?

c Aggravated burglary offence

In addition to a basic burglary offence, Solomon Islands may wish to include an aggravated burglary provision. This kind of offence would cover circumstances where a person, for

example, commits burglary in the company of others or with a dangerous weapon. Including a separate aggravated burglary offence would allow for higher penalties that reflect the seriousness and potentially dangerous impact of these aggravating factors.

If Solomon Islands chooses to include a provision about aggravated burglary, it may wish to consider whether this provision should line up with other aggravated offence provisions in the revised legislation. For example, Solomon Islands may wish to consider whether aggravating factors for the purpose of robbery should be the same as those for burglary.

Section 3.2.11 of the Model Criminal Code provides:

A person who:

- (a) commits any burglary in company with one or more other persons, or
- (b) commits any burglary and at the time has an offensive weapon with him or her, is guilty of the offence of aggravated burglary.

Maximum penalty: Imprisonment for 15 years.

Section 10 of the United Kingdom *Theft Act 1968* provides:

- (1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for this purpose—
 - (a) “firearm” includes an airgun or air pistol, and “imitation firearm” means anything which has the appearance of being a firearm, whether capable of being discharged or not; and
 - (b) “weapon of offence” means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and
 - (c) “explosive” means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.
- (2) A person guilty of aggravated burglary shall on conviction on indictment be liable to imprisonment for life.

Question 2.2.4

Does Solomon Islands wish to include an aggravated burglary offence?

Question 2.2.5

If Solomon Islands chooses to include an aggravated burglary offence, should the aggravating factors match those for other aggravated offences in the revised legislation?

2.3 Penalties

As noted by the LRC,⁴⁰ the current maximum penalty for burglary offences is life imprisonment with lower penalties of seven and fourteen years imprisonment for housebreaking offences. Burglary is regarded as a very serious offence in Solomon Islands, with a conviction generally resulting in a custodial sentence.⁴¹ The Solomon Islands Court of Appeal has noted that that both burglary and causing grievous harm with intent are punishable by life imprisonment, but has been cautious to note that these offences are not:⁴²

...of the same order of seriousness... As serious as burglary is, yet it remains an offence against property. The infliction of grievous harm with intent is a violent attack upon the person. They are in principle fundamentally different crimes, with the latter crime potentially of very much greater seriousness

In comparison Victoria⁴³ and New Zealand⁴⁴ set a penalty of 10 years imprisonment for basic burglary offences. The Australian Capital Territory,⁴⁵ New South Wales⁴⁶ and Queensland⁴⁷ each provide penalties of 14 years for burglary. Western Australia provides a penalty of 18 years imprisonment for basic burglary offences where a person enters a place 'ordinarily used for human habitation'.⁴⁸

Aggravated burglary offences carry higher penalties ranging from 14 years in New Zealand,⁴⁹ 17 years in the Australian Commonwealth jurisdiction,⁵⁰ 20 years in Western Australia,⁵¹ and 25 years in Victoria⁵² and New South Wales.⁵³ Aggravated burglary carries a maximum penalty of life imprisonment in Queensland.⁵⁴

Question 2.3.1

What penalty levels do Solomon Islands consider to be appropriate for burglary offences under the revised legislation?

⁴⁰ Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code*, Issues Paper, 2008, paragraph [9.38-9.40].

⁴¹ See *Bade v Reginam* [1988] SBCA 5.

⁴² *Regina v Kada* [2008] SBCA 9, paragraph [13].

⁴³ *Crimes Act 1958* (Victoria), section 77.

⁴⁴ *Crimes Act 1961* (New Zealand), section 231.

⁴⁵ *Criminal Code 2002* (Australian Capital Territory), section 311.

⁴⁶ *Crimes Act 1900* (New South Wales), section 109.

⁴⁷ *Criminal Code Act 1899* (Queensland), section 419.

⁴⁸ *Criminal Code Compilation Act 1913* (Western Australia), section 401.

⁴⁹ *Crimes Act 1961* (New Zealand), section 232.

⁵⁰ *Criminal Code Act 1995* (Commonwealth), section 132.5

⁵¹ *Criminal Code Compilation Act 1913* (Western Australia), section 401.

⁵² *Crimes Act 1958* (Victoria), section 78.

⁵³ *Crimes Act 1900* (New South Wales), section 109.

⁵⁴ *Criminal Code Act 1899* (Queensland), section 419.

2.4 Related provisions

Burglary is the offence of using force to enter private property without the consent of the owner or occupier and with intent to commit a second offence. The second offence is usually limited to theft, assault or criminal damage to property, but may also include other serious offences including sexual offences.

Solomon Islands may wish to consider the interaction of definitions and concepts that are shared across the theft, assault and criminal damage crime types and the way that they may interact under proposed burglary provisions. Solomon Islands may therefore wish to consider how preferences about policy options discussed in this chapter relate to policy preferences in relation to both theft offences and offences against the person. For further discussion of policy options for theft offences, see Chapter 1 – Stealing offences.

Chapter 3— Robbery

Robbery involves the use of force to commit theft. The inclusion of this offence serves to protect people against injury and to protect property. The combination of assault and theft into a single offence of robbery has led to robbery being described as a 'hybrid offence'.⁵⁵

3.1 Current legislation and case law

The Penal Code currently contains a single robbery offence. Section 293 provides:

- (1) Any person who -
 - (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; or
 - (b) robs any person and, at the time of or immediately before or immediately after such robbery, uses or threatens to use any personal violence to any person,is guilty of a felony, and shall be liable to imprisonment for life.
- (2) Any person who robs any person is guilty of a felony, and shall be liable to imprisonment for fourteen years.
- (3) Any person who assaults any person with intent to rob is guilty of a felony, and shall be liable to imprisonment for five years.

Although 'robbery' is not defined under the Penal Code, it has been defined in common law. In *R v Harding* the United Kingdom Court of Criminal Appeal held that:⁵⁶

[R]obbery consists in the violent and forcible taking from the person of another or in his presence and against his will of any money or goods to any value of violence, or putting him in fear... The person robbed need not be the owner of the property.

Although robbery is closely related to theft, these offences are treated as separate concepts under Solomon Islands law. This has resulted in the need for complex judicial interpretation, for example, in *Regina v Mae*, the High Court stated that:⁵⁷

...there is no definition of robbery in the Penal Code. It has been defined as the felonious taking of property from a person by the use of or threat of force... Under our law there is a separate offence of larceny from a person [Penal Code, section 270], there are also the offences of robbery set out in section 293. Robbery then appears to be a 'term of art' under our law and you cannot simply say that robbery is larceny from a person with or without force or threats.

⁵⁵ David Omerod, *Smith and Hogan's Criminal Law* (13th edition, 2011), page 846.

⁵⁶ (1929) 21 CrAppR 166, 170.

⁵⁷ [2006] SBHC 10.

The relevance of this point is that the section defining theft [Penal Code, section 258] says that theft (or larceny) occurs where someone:-

'without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.'

There is no reference in section 293 as to 'fraudulently' or 'a claim of right made in good faith' etc... [S]ection 258 [theft] has little relevance to robbery even though the latter must logically involve an element of larceny.

One of the consequences of this artificial split between robbery and theft is that different defences apply to each offence. For example, a person charged with theft can rely on the defence provided under section 258 of the Penal Code, while a person charged with robbery must rely on the similar defence provided under section 8. This sits in contrast with the common law, which recognises that the concept of theft informs the definition of robbery and therefore that defences for theft also apply to charges of robbery. The common law case of *R v Skivington*⁵⁸ states that:

The question is whether that defence to larceny applies equally when the offence with which one is concerned is really an aggravated larceny, such as in this case of robbery, or whether the honest belief must extend to being entitled to take the money by force. In the opinion of the court, both on principle and on the cases, it is clear that it can be a defence. So far as principle is concerned, it can be stated in the simple form that larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defence to larceny, then it negatives one of the ingredients in the offence of robbery, without proof of which the full offence is not made out. That principle simply stated as such has been upheld in case after case.

3.2 Policy considerations

a Definition of robbery

After conducting consultations, the LRC concluded that the revised legislation should provide a definition of robbery. This conclusion mirrors the approach taken in the majority of common law jurisdictions. However, Solomon Islands may wish to consider whether the current robbery provision can be improved by the addition of a discrete definition of 'robbery' or whether it would be preferable to replace current provisions about robbery with a new offence that incorporates a definition of robbery.

In resolving this question, Solomon Islands may wish to consider the operation of the terms of the current robbery offence under section 293 of the Penal Code when modified with a

⁵⁸ [1968] 1 QB per Parker LCJ at 170, affirmed in *Regina v Maoma* [2008] SBHC 48 paragraph 729, *Fefe v Director of Public Prosecutions* [1987] SBHC 5.

discrete, placeholder definition of ‘robbery’. A simple definition of rob (to ‘deprive another person of something by force or threat of violence’)⁵⁹ can be inserted for this purpose:

- (1) Any person who -
 - (a) being armed with any offensive weapon or instrument, or being together with one other person or more, ~~robs~~ [deprives another person of something by force or threat of violence], or assaults with intent to ~~rob~~ [deprive another person of something by force or threat of violence], any person; or
 - (b) ~~robs~~ [deprives another person of something by force or threat of violence] any person and, at the time of or immediately before or immediately after such ~~robbery~~ [act], uses or threatens to use any personal violence to any person,is guilty of a felony, and shall be liable to imprisonment for life.
- (2) Any person who ~~robs~~ [deprives another person of something by force or threat of violence] any person is guilty of a felony, and shall be liable to imprisonment for fourteen years.
- (3) Any person who assaults any person with intent to ~~rob~~ [deprive another person of something by force or threat of violence] is guilty of a felony, and shall be liable to imprisonment for five years.

Without additional consequential amendments, the addition of a separate definition of robbery will complicate the operation of robbery provisions. This can be seen in paragraph (1)(b), which refers to personal violence twice and subsection (3) which would apply where A assaults B with intent to cause C to hand over money, but may not apply where A assaults C with intent to cause C to hand over money. Another complicating factor is the existing uncertainty within these provisions as to whether the defendant must deprive a person of something with the intent to permanently deprive, or whether the act of taking something is sufficient.

As an alternative, Solomon Islands may wish to consider including new provisions about robbery in the revised legislation which include a definition of robbery within the terms of the offence. For example, section 3.2.8 of the *Model Criminal Code* provides:

A person who commits theft and, at the time of or immediately before or immediately after doing so:

- (a) uses force on any person, or
- (b) threatens to use force then and there on any person,

with intent to commit theft or to escape from the scene, is guilty of the offence of robbery.

This provision was based on the terms of subsection 8(1) of the United Kingdom *Theft Act 1968*, which provides:

⁵⁹ See *Macquarie Dictionary*, ‘rob’ def. 1 and *Oxford English Dictionary*, ‘rob’ def 1, 3a.

A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

The United Kingdom and MCCOC approach uses provisions about theft to provide many of the fault elements for the offence. This ensures that these fault elements are consistent across theft and robbery, which may assist with interpretation and in the development of case law. This also helps to simplify provisions about robbery, while making it clear that robbery is an offence that comprises elements of theft and assault.

Question 3.2.1

Does Solomon Islands wish to include a definition of robbery in the Penal Code, or does it prefer to replace current provisions about robbery with new offences that incorporate a definition of robbery?

Question 3.2.2

If Solomon Islands chooses to include a definition of robbery in the Penal Code, should the part of this definition dealing with taking property use the same fault elements that will apply to stealing?

b Timing

The central element of robbery is that the act or threat of violence must be used with the intent that it will allow the defendant to steal something. Robbery can be distinguished from blackmail on the basis that a blackmailer threatens to do something in the future, while a robber acts violently to immediately take property from a victim.

This is reflected in paragraph 293(1)(b) of the Penal Code, which provides:

(1) Any person who -

...

(b) robs any person and, *at the time of or immediately before or immediately after* such robbery, uses or threatens to use any personal violence to any person,

is guilty of a felony, and shall be liable to imprisonment for life (emphasis added).

This formulation is identical to the terms of section 3.2.8 of the Model Criminal Code. The MCCOC elected to use this formulation after considering the terms of the United Kingdom *Theft Act 1968*, which limit the application of robbery to circumstances where a defendant uses force ‘immediately before or at the time of’ committing theft by appropriating property.⁶⁰ This limit has led to the United Kingdom Courts adopting a broad interpretation of the robbery

⁶⁰ *Theft Act 1968* (United Kingdom), subsection 8(1).

provision. This is because a precise application of the legal definition of ‘appropriates’ means that a person deals with property as though it is his own, and therefore appropriates it, from the moment that they first touch the property.⁶¹ This means that the theft may be technically complete before the defendant uses any amount of force. For example, a person who picks their victims pocket and becomes involved in a struggle as they attempt to escape would not use force immediately before or at the time of appropriating the victim’s property within a strict, technical reading of the provision. United Kingdom courts have therefore adopted a more ‘pragmatic’ interpretation,⁶² by regarding appropriation as a continuing act which encompasses acquiring property as well as acts to secure possession of the property immediately following the acquisition.⁶³

The Model Criminal Code approach seeks to avoid technical arguments about whether force was used before or after the theft by explicitly stating that an assault immediately after a theft will satisfy the elements for robbery.⁶⁴ Section 3.2.8 of the *Model Criminal Code* provides:

A person who commits theft and, *at the time of or immediately before or immediately after* doing so:

(a) uses force on any person, or

(b) threatens to use force then and there on any person,

with intent to commit theft or to escape from the scene, is guilty of the offence of robbery (emphasis added).

Question 3.2.3

Should an assault that occurs after a theft satisfy the requirements for robbery, or should robbery be limited to occasions where the assault occurs immediately before or at the time of the theft?

c Aggravating factors

After conducting consultations, the LRC has concluded that:

There should be a distinction between maximum penalties for robbery, robbery with others, robbery with a weapon and robbery resulting bodily harm. The maximum penalty for each offence should be determined on the circumstances and the aggravating nature of each case.

⁶¹ David Omerod, *Smith and Hogan’s Criminal Law* (13th edition, 2011), page 847.

⁶² David Omerod, *Smith and Hogan’s Criminal Law* (13th edition, 2011), page 847.

⁶³ See Hale (1978) 68 Cr App R 415; Lockley [1995] Crim LR 656; Hayward v Norwich Union Insurance Ltd [2000] Lloyd’s Rep IR 382.

⁶⁴ MCCOC, *Final report: Theft, Fraud, Bribery and Related Offences* (December 1995), page 79.

Broadly speaking, there are two ways to achieve this purpose. The first option is to create one or more offences about robbery in aggravating circumstances. This option would list a series of specific aggravating factors that justify the imposition of a more severe penalty. This option has the advantage of clearly stating an intention that certain kinds of robberies are to be regarded as being more serious than others. However, aggravated offences about robbery may complicate prosecutions as it will be necessary to prove the aggravating circumstances beyond reasonable doubt in order to satisfy the elements of the offence. The difficulty in doing so will vary from one offence to another, but it remains the case that an aggravated offence introduces additional elements that must be proved before a defendant can be convicted.

An example of the first option can be seen under New Zealand legislation. Section 235 of the New Zealand *Crimes Act 1961* provides:

Every one is liable to imprisonment for a term not exceeding 14 years who—

- (a) robs any person and, at the time of, or immediately before or immediately after, the robbery, causes grievous bodily harm to any person; or
- (b) being together with any other person or persons, robs any person; or
- (c) being armed with any offensive weapon or instrument, or any thing appearing to be such a weapon or instrument,

robs any other person.

This provision criminalises each of the aggravating factors identified by the LRC, but does not specify different maximum penalties for each aggravating factor. New South Wales legislation provides an example of the first option discussed above that also provides a different penalty for robbery with wounding, which could be considered more serious than other circumstances of aggravation. Sections 95 and 96 of the New South Wales *Crimes Act 1900* provide:

95 Same [robbery] in circumstances of aggravation

- (1) Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money, or valuable security, from the person of another, in circumstances of aggravation, shall be liable to imprisonment for twenty years.
- (2) In this section, *circumstances of aggravation* means circumstances that (immediately before, or at the time of, or immediately after the robbery, assault or larceny) involve any one or more of the following:
 - (a) the alleged offender uses corporal violence on any person,
 - (b) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person,
 - (c) the alleged offender deprives any person of his or her liberty.

96 Same (robbery) with wounding

Whosoever commits any offence under section 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

(emphasis in original)

A second option is to limit all robberies to a single offence, which is supported by a high maximum penalty and detailed sentencing guidelines. The most important factor in this second approach is the provision of sentencing guidelines to the Courts to ensure consistency across all robbery matters considered by the Court. A lack of guidance on sentencing under this second approach may lead to an increase in appeals on the ground that a sentence is manifestly excessive or may lead to inadequate sentences being handed down.

The United Kingdom *Theft Act 1968* provides an example of the second option discussed above. Section 8 of this Act sets out a single robbery offence with a maximum penalty of life imprisonment and does not list any aggravating factors. This provision is supported by detailed guidance on sentencing provided by the United Kingdom Sentencing Guidelines Council, which was created by the United Kingdom *Coroners and Justice Act 2009*. The guidelines take into account the severity of the violence used or threatened as well as a range of aggravating and mitigating factors and suggest a 'starting point' and 'sentencing range' to assist with the calculation of sentences.⁶⁵

However, the importance of creating sentencing guidelines cannot be understated for either model. For example, the Full Bench of the New South Wales Court of Criminal Appeal issued a guideline judgment in *R v Henry Barber Tran Silver Tsoukatos Kyroglou Jenkins* to counter inconsistent and lenient sentencing practices for offences under subsection 97(1) of the *Crimes Act 1900* relating to armed robbery and robbery in company.⁶⁶

Solomon Islands may wish to consider which of these models is most suitable in Solomon Islands.

Question 3.2.4

Does Solomon Islands wish to create an offence of aggravated robbery, or does it prefer to use a single broad provision with a high maximum penalty which is informed by detailed sentencing guidelines?

⁶⁵ See Sentencing Guidelines Council, "Robbery: Definitive Guideline" (July 2006).

⁶⁶ (1999) 46 NSWLR 346; (1999) 106 A Crim R 149; See Judicial Commission of New South Wales, "Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in *R v Henry*" (No 26, February 2003).

d Assault with intent to rob

Subsection 293(3) of the Penal Code provides the offence of assault with intent to rob. This provision covers offences where a defendant assaults the victim with intent to steal from them, but is unable to take possession of the property, for example because the victim resists the taking of the property. In the United Kingdom, it has been held that a defendant who sought to take a victim's handbag by force but dropped the handbag in the course of escaping was guilty of robbery, as the theft was complete when the handbag was snatched from the victim's hands.⁶⁷ Although this case may be of assistance in understanding the scope of provisions about assault with intent to rob, it should be noted that the United Kingdom *Theft Act 1968* subsumes the offence of assault with intent to rob into the main robbery offence.⁶⁸

The Model Criminal Code deals with assaults with intent to rob under the law of attempts. The MCCOC stated that:⁶⁹

The MCC will deal with failed robberies – where, for example, the defendant uses force or threats of force but the victim resists the defendant's efforts to steal his or her wallet – under general attempt provisions in the MCC rather than as a separate offence of assault with intent to rob. In those cases the defendant will be dealt with for attempted robbery... under the general attempt provisions.

This reasoning sits somewhat at odds with the main policy reason for creating offences about robbery in addition to offences about theft. The key element of robbery offences is the use of force against a person to enable theft. Solomon Islands may wish to consider whether a specific offence is warranted for circumstances where a defendant completes the major part of the robbery offence by assaulting the victim. If a specific offence about assault with intent to rob is not included, Solomon Islands may wish to consider whether other laws about assault and attempts will allow prosecutors to achieve a satisfactory outcome or whether a specific offence should be included in the revised legislation. For example, current Penal Code provisions about attempts state that the maximum penalty for attempted robbery is seven years imprisonment.⁷⁰

New Zealand legislation contains an example of an assault with intent to rob offence. Section 236 of the New Zealand *Crimes Act 1961* provides:

- (1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to rob any person,—
- (a) causes grievous bodily harm to that person or any other person; or

⁶⁷ *Corcoran v Anderton* (1980) 71 Cr App R 104.

⁶⁸ See *Theft Act 1968*, subsection 8(2).

⁶⁹ MCCOC, *Final report: Theft, Fraud, Bribery and Related Offences* (December 1995), page 79.

⁷⁰ Penal Code, section 380.

(b) being armed with any offensive weapon or instrument, or any thing appearing to be such a weapon or instrument, assaults that person or any other person; or

(c) being together with any other person or persons, assaults that person or any other person.

(2) Every one who assaults any person with intent to rob that person or any other person is liable to imprisonment for a term not exceeding 7 years.

Question 3.2.5

Does Solomon Islands wish to include an assault with intent to rob offence?

3.3 Penalties

Current penalties for robbery offences under the Penal Code range from 5 years imprisonment for assault with intent to rob,⁷¹ fourteen years imprisonment for robbery,⁷² and life imprisonment for robbery in aggravating circumstances.⁷³

Robbery offences in New Zealand carry a penalty of ten years imprisonment,⁷⁴ compared with imprisonment for a maximum of 14 years in the Northern Territory,⁷⁵ Australian Capital Territory,⁷⁶ Queensland,⁷⁷ New South Wales⁷⁸ and Western Australia.⁷⁹ In Victoria,⁸⁰ South Australia⁸¹ and the Australian Commonwealth jurisdiction⁸² robbery carries a 15 year maximum penalty.

Aggravated robbery carries higher penalties ranging from 14 years in New Zealand to life imprisonment in the Northern Territory,⁸³ Queensland⁸⁴ and South Australia.⁸⁵

The MCCOC recommended penalties of 12 years and six months and 20 years for robbery and aggravated robbery respectively.⁸⁶ In contrast, the United Kingdom punishes all robberies with a maximum sentence of life imprisonment.⁸⁷

⁷¹ Penal Code, subsection 293(3).

⁷² Penal Code, subsection 293(2).

⁷³ Penal Code, subsection 293(1).

⁷⁴ *Crimes Act 1961* (New Zealand), section 234.

⁷⁵ *Criminal Code Act* (Northern Territory), section 211.

⁷⁶ *Criminal Code 2002* (Australian Capital Territory), section 309.

⁷⁷ *Criminal Code Act 1899* (Queensland), subsection 411(1).

⁷⁸ *Crimes Act 1900* (New South Wales), section 94.

⁷⁹ *Criminal Code Compilation Act 1913* (Western Australia), section 392.

⁸⁰ *Crimes Act 1958* (Victoria) section 75.

⁸¹ *Criminal Law Consolidation Act 1935* (South Australia), section 137.

⁸² *Criminal Code Act 1995* (Commonwealth), section 132.2.

⁸³ *Criminal Code Act* (Northern Territory), section 211.

⁸⁴ *Criminal Code Act 1899* (Queensland), subsection 411(2).

⁸⁵ *Criminal Law Consolidation Act 1935* (South Australia), section 137.

⁸⁶ Model Criminal Code, sections 3.2.8, 3.2.9.

⁸⁷ *Theft Act 1968* (United Kingdom), section 8(2).

Question 3.3.1

What penalty levels do Solomon Islands consider to be appropriate for robbery offences in the revised legislation?

3.4 Related provisions

Robbery combines elements of offences against the person and theft. Solomon Islands may wish to consider the interaction of definitions and concepts that are shared across these crime types and the way that they may interact under proposed robbery provisions. Solomon Islands may therefore wish to consider how preferences about policy options discussed in this chapter relate to policy preferences in relation to both theft offences and offences against the person. For further discussion of policy options for theft offences, see Chapter 1– Stealing Offences.

Chapter 4— Unlawful use and other offences related to theft

This chapter addresses a number of offences that complement the general theft provisions discussed in Chapter 1 – Stealing Offences. These offences are ‘unlawful use, possession or control’, ‘making off without payment’ and ‘receiving stolen property’. Each offence is intended to cover particular kinds of behaviour that do not satisfy all of the elements of a general theft offence.

This chapter also discusses issues regarding the revision of provisions relating to going equipped for theft, robbery or burglary and considerations arising from shared ownership of property.

4.1 Unlawful use

a Current law

The Solomon Islands *Penal Code* [Cap 26] (Penal Code) currently includes an offence for taking a vessel or animal in circumstances that do not amount to stealing. Section 292 provides:

Any person who unlawfully and without colour of right, but not so as to be guilty of stealing, takes or converts to his own use or to the use of any other person, any draught or riding animal, or any vessel, is guilty of a misdemeanour, and shall be liable to imprisonment for six months, or to a fine of two hundred dollars, or to both such imprisonment and such fine.

There are no reported cases on section 292 of the Penal Code available to AGD.

As noted by the Solomon Islands Law Reform Commission (LRC), this offence does not cover circumstances where a person takes a car without the owner’s consent.⁸⁸ Taking a vehicle without the owner’s consent is currently captured under Subsection 59(1) of the Solomon Islands *Road Transport Act* [Cap 131].⁸⁹

(1) A person who takes and drives away a vehicle without having either the consent of the owner thereof or other lawful authority shall (subject to the next following subsection) be liable—

(a) on conviction by the High Court, to a fine of five hundred dollars or to imprisonment for six months or to both such fine and such imprisonment;

(b) on conviction by a Magistrate's Court, to a fine of two hundred dollars or to imprisonment for three months.

⁸⁸ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code*, Issues Paper 1 November 2008, paragraph [9.12].

⁸⁹ Formerly the *Traffic Act* [Cap 131]. The title of this Act was amended by the *Traffic (Amendment) Act 2009*. For an example of enforcement of this provision see *Regina v Leliana* [1998] SBHC 138; *Regina v Wale* [1997] SBHC 72.

Solomon Islands legislation does not provide similar offences with respect to aircraft or vessels.

b Policy considerations

The offence of unlawful use exists to ensure that a person who takes something, without an intention to permanently deprive, can still be successfully prosecuted for committing an offence. This offence will only be required where an intention to permanently deprive is included as an element of a general theft offence. Consideration as to whether intention to permanently deprive should be included as an additional fault element is discussed in Chapter 1 – Stealing Offences.

The Model Criminal Code Officers Committee (MCCOC) recommended that the application of unlawful use offences should be restricted to apply only to the kind of offending behaviour which is targeted by the underlying policy for introducing this kind of offence. For example, if the policy justification for the introduction of an unlawful use offence is the high incidence of unauthorised use of motor cars, this scope should be reflected in provisions about unlawful use.⁹⁰

In the LRC *Review of the Penal Code and Criminal Procedure Code* (2008 LRC Review), options for the scope of unlawful use provisions included ‘motor vehicles’, ‘aircraft’ and ‘vessels’.⁹¹ The LRC confirmed in their policy direction of 16 May 2012, that the Penal Code should contain ‘an offence of unlawful use of a motor vehicle, aircraft or vessel’. This requires that the scope of the current provision be extended to capture motor vehicles and aircraft, while reference to the unlawful use of ‘any draught or riding animal’ be repealed.

The Model Criminal Code contains a provision which may be of assistance as an example of a basic unlawful use provision. Section 3.2.12 of the Model Criminal Code provides:

A person:

- (a) who dishonestly takes a motor vehicle belonging to another person, and
- (b) who does not have consent to do so from a person to whom the vehicle belongs,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years. Although this provision is limited to apply only to motor vehicles, it could be altered to also apply to vessels and aircraft.

⁹⁰ MCCOC, *Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, page 95.

⁹¹ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code*, Issues Paper 1 November 2008, paragraph [9.12-9.14].

Question 4.1.1

Does Solomon Islands also wish to include an offence about unlawful use in the revised legislation? (Note: this is only necessary if intention to deprive is included as a fault element of a general theft offence, see Chapter 1 – Stealing Offences).

Question 4.1.2

If so, should the scope of this offence capture the unlawful use, possession or control of motor vehicles, aircraft and vessels?

Question 4.1.3

If Solomon Islands chooses to include an offence about unlawful use in the revised legislation, should similar offences currently located in the Road Transport Act and the Penal Code be repealed?

c Penalties

As noted by the LRC, current penalties for unlawful use offences in Solomon Islands carry penalties of up to six months imprisonment and fines of \$200 for an offence under the *Penal Code* and six months imprisonment and a fine of \$500 for an offence under the *Traffic Act*.⁹² In comparison, South Australia provides penalties of two years imprisonment for first time offenders and four years for repeat offenders.⁹³ Queensland⁹⁴ and New Zealand⁹⁵ both provide penalties of seven years for this offence.

New South Wales and Western Australia treat the offence of unlawful use as being analogous to theft and therefore provide penalty levels in line with theft offences. This means that unlawful use is penalised by five years imprisonment in New South Wales⁹⁶ and by seven years imprisonment in Western Australia.⁹⁷ This approach was not recommended by the MCCOC, which argued that unlawful use should be penalised less severely than theft as a person convicted of unlawful use does not need to have the more serious criminal intention to permanently deprive a person of their property.⁹⁸

Question 4.1.4

What penalty level does Solomon Islands consider to be appropriate for unlawful use offences?

⁹² Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code*, Issues Paper 1 November 2008, paragraph [9.13].

⁹³ *Criminal Law Consolidation Act 1935* (South Australia), section 86A.

⁹⁴ *Criminal Code Act 1899* (Queensland), subsection 408A(1)

⁹⁵ *Crimes Act 1961* (New Zealand), section 226.

⁹⁶ *Crimes Act 1900* (New South Wales), section 154A.

⁹⁷ *Criminal Code Act Compilation Act 1913* (Western Australia), section 371A.

⁹⁸ MCCOC, *Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, page 97.

4.2 Making off without payment

Although a provision about ‘making off without payment’ was not discussed in the 2008 LRC Review, this kind of provision could be included in revised legislation to cover circumstances where the owner of the property intends that the defendant take possession of the property before paying, and the defendant later decides to leave without paying. Common examples of this kind of arrangement include self-service petrol stations, restaurants, hotels and taxis.

Where a person has a dishonest or fraudulent intention at the time of acquiring property, they may properly be charged with theft or fraud as appropriate.⁹⁹ This pattern of behaviour will not fit neatly within a general theft offence because the defendant has legitimately obtained possession of the property and does not practice any dishonesty at the time of obtaining the property.

a Current law

The current definition of theft under the Penal Code may cover some circumstances where a person fails to pay after lawfully taking possession of property. Subsection 258(1) of the Penal Code provides:

...a person may be guilty of stealing any [thing capable of being stolen] notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.

However, this provision will only apply in circumstances where a person is a part owner of the property or where a person who has acquired the property as a form of security against a debt or other obligation and then fraudulently converts the property. It would not cover circumstances where a person who is not a part owner or bailee leaves a place without paying after lawfully acquiring property from the victim.

The current offence of conversion may also capture the type of offending behaviour targeted by ‘making off without payment’ offences. Subparagraph 278(1)(c)(i) of the Penal Code provides:

[Any person who] being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof [is guilty of a misdemeanour, and shall be liable to imprisonment for seven years]

⁹⁹ MCCOC, *Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, p 99.

While this provision has been used as the basis of a number of prosecutions in Solomon Islands, these prosecutions have been based on conduct where a person has converted money in their possession to their own purpose.¹⁰⁰ While there is potential for this offence to capture the type of circumstances that a making off without payment offence seek to capture, there are currently no reported decisions that demonstrate the use of this provision for this purpose.

b Policy considerations

If Solomon Islands chooses to include a general theft provision in the revised legislation, then consideration could also be given to including a making off without payment offence. This will ensure that the repeal of specific offences, including conversion from the Penal Code, will not allow a person who legitimately obtains possession of property to later decide to leave without paying for that property.

Section 144 of the South Australian *Criminal Law Consolidation Act 1935* provides an example of a simple provision about making off without payment:

A person who, knowing that payment for goods or services is required or expected, dishonestly makes off intending to avoid payment is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

A similar offence is provided by section 322A of the Australian Capital Territory *Criminal Code 2002*:

(1) A person commits an offence if—

- (a) the person knows he or she is required or expected to make immediate payment for goods or services supplied by someone else; and
- (b) the person dishonestly makes off—
 - (i) without having paid the amount owing; and
 - (ii) with intent to avoid payment of the amount owing.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

Question 4.2.1

Does Solomon Islands wish to include an offence about making off without payment?

c Penalties

The maximum penalty level for offences about making off without payment is generally two years imprisonment. This is the case in the Australian Commonwealth jurisdiction,¹⁰¹

¹⁰⁰ See, for example, *Regina v Ashley* [2011] SBHC 169; *Regina v Maoma* [2008] SBHC 48; *Foli v Reginam* [2004] SBHC 34; *Kemakeza v Regina* [2012] SBHC 40; *Dausabea v Regina* [2008] SBHC 30.

¹⁰¹ *Criminal Code Act 1995* (Commonwealth), section 132.6.

South Australia¹⁰² and the Australian Capital Territory¹⁰³ as well as under the Model Criminal Code.¹⁰⁴ A higher penalty level of five years imprisonment is provided in Queensland, where the offence is treated as a form of fraud.¹⁰⁵

Question 4.2.2

What penalty level does Solomon Islands consider to be appropriate for making off without payment offences?

4.3 Receiving stolen goods

Receiving relates to the receiving of stolen property with knowledge (or in some jurisdictions belief or recklessness) that the property was stolen or dishonestly obtained. Although this kind of offence was not discussed in the 2008 LRC Review, Solomon Islands may wish to revise current provisions about receiving stolen goods to ensure that a person who knowingly receives stolen or fraudulently obtained property can be appropriately prosecuted.

Provisions on receiving could set out the crime of receiving and clarify when the act of receiving is considered to be complete at law. These provisions could also set out the circumstances in which receiving stolen goods would not be an offence, for example when the person who receives property obtained by crime holds legal title to the property.

a Current law

Receiving is currently an offence under subsection 313 of the Penal Code, which provides:

- (1) Any person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, is guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable-
 - (a) in the case of felony, to imprisonment for fourteen years; and
 - (b) in the case of misdemeanour, to imprisonment for seven years.
- (2) Any person who receives any mail bag, or any postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling or secreting whereof amounts to a felony or misdemeanour under the Post Office Act or this Code, knowing the same to have been so feloniously stolen, taken, embezzled or secreted, and to have been sent or to have been intended to be sent by post, is guilty of a felony or misdemeanour as the case may be and shall be liable to the same punishment as if he had stolen, taken, embezzled or secreted the same.

¹⁰² *Criminal Law Consolidation Act 1935* (South Australia), section 86A.

¹⁰³ *Criminal Code 2002* (Australian Capital Territory), section 322A

¹⁰⁴ Model Criminal Code, section 3.2.13.

¹⁰⁵ *Criminal Code Act 1899* (Queensland), subparagraph 408C(1)(h).

- (3) Every such person may be proceeded against on information and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice.

It is also an offence under section 314 of the Penal Code to receive stolen goods outside of Solomon Islands if the act would have been illegal if it was carried out within Solomon Islands. The continued need for this kind of provision was raised by Police during consultations conducted by LRC in Choiseul Province in October 2009.

The term 'receive' is not defined by the Penal Code, however the English common law provides a good definition of the scope of this offence:¹⁰⁶

Even if there is proof of a criminal intent to receive and a knowledge that the goods are stolen, if the exclusive possession still remains in the thief, a conviction for receiving cannot be sustained... I do not think it necessary that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the receivers may not be convicted as a receiver; but, I think, to make a person liable as a receiver the goods must be under his control.

The importance of knowledge that the received goods have been stolen was examined in the case of *Regina v Mendana*¹⁰⁷ where the conviction on the basis of guilty pleas made by three unrepresented defendants was overturned on appeal. In handing down its decision, the High Court held that the Court of first instance should not have accepted the defendant's guilty pleas. This was because the defendants, if properly advised, could have raised a defence about their lack of knowledge or suspicion that the property was stolen.

b Policy considerations

Retaining a separate receiving offence

Solomon Islands may wish to consider whether it wishes to retain a separate receiving offence. During its research and consultations, the MCCOC concluded that retaining a separate receiving offence was consistent with community understanding of theft and receiving. A separate receiving offence also covers property obtained by fraud.¹⁰⁸

Section 246 of the *Crimes Act 1961* (New Zealand) provides:

- (1) Every one is guilty of receiving who receives any property stolen or obtained by any other crime, knowing that property to have been stolen or so obtained, or being reckless as to whether or not the property had been stolen or so obtained.

¹⁰⁶ *R v Seiga* (1960) 44 CrAppR 26, 30 (Ashworth J) citing *R v Berger* (1915) 11 CrAppR 72, 74 (Lord Chief Justice Isaacs).

¹⁰⁷ [2004] SBHC 15.

¹⁰⁸ MCCOC, *Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, pages 107–109.

- (2) For the purposes of this section, property that was obtained by any act committed outside New Zealand that, if it had been committed in New Zealand, would have constituted a crime is, subject to subsection (5), to be regarded as having been obtained by a crime.
- (3) The act of receiving any property stolen or obtained by any other crime is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of, or control over, the property or helps in concealing or disposing of the property.
- (4) If—
 - (a) any property stolen or obtained by any other crime has been returned to the owner; or
 - (b) legal title to any such property has been acquired by any person,—
 A subsequent receiving of it is not an offence, even though the receiver may know that the property had previously been stolen or obtained by any other crime.
- (5) If a person is charged with an offence under this section and the property was obtained by an act committed outside New Zealand, it is to be presumed, unless the person charged puts the matter at issue, that the doing of the act by which the property was obtained was an offence under the law of the place where the act was done.

In comparison, the United Kingdom *Theft Act 1968* provides a broader offence that covers the handling of stolen goods more generally, including both receiving and dealing in stolen goods independently of the initial receiving. Section 22 of the *Theft Act 1968* provides:

- (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so. .
- (2) A person guilty of handling stolen goods shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years.

The MCCOC elected not to follow this broader approach since the more narrow offence of ‘receiving’ stolen property is more commonly understood in Australia, and other forms of handling such as dealing in stolen goods are better dealt with under ordinary principles of complicity, which would cover the conduct of people who assist thieves or receivers of stolen property, for example by buying and re-selling stolen goods.¹⁰⁹

¹⁰⁹ ; MCCOC, *Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, pp 107–111; Bronitt and McSherry, *Principles of Criminal Law* (3rd edition, 2010) p 695; MCCOC.

Question 4.3.1

Does Solomon Islands wish to retain and revise the current receiving offence under the Penal Code in the revised legislation?

Question 4.3.2

If Solomon Islands chooses to revise provisions about receiving, should this provision address only the act of receiving stolen property, or should it cover handling stolen property more generally?

Fault elements for receiving

At present, knowledge is the only mental element for receiving offences under the Penal Code. Limiting the mental element of this offence to 'knowledge' could lead to difficulties in successfully prosecuting this offence. This is because it is difficult to prove that a defendant knew that the property in question was stolen or obtained as a result of an offence.

In comparison, the fault elements in the above examples from New Zealand and the United Kingdom are knowledge or recklessness. This allows the prosecution of defendants who actually know, or who should have known, that the property they received had been stolen or otherwise improperly obtained. This ensures that a person cannot avoid liability for receiving if they do not inquire into the source of the property that they receive. For example, a defendant may be reckless if they know that the person offering an item of property for sale often sells stolen or fraudulently obtained property but fail to inquire as to the source of that item.

The Australian Model Criminal Code has incorporated a dishonesty element into the offence, in addition to knowledge or belief. This is to ensure that the receiving offence does not cover a person who receives stolen property, in the belief that the person to whom the property belongs can be located by taking reasonable steps.¹¹⁰ This could include a person who attempts to return the property or bring the situation to the attention of the authorities.¹¹¹ While the Model Criminal Code does not include 'recklessness' as a fault element for receiving, a defendant who receives property from a person who they know often sells stolen or fraudulently obtained property may 'believe' that the property is stolen, even if they do not inquire as to the source of that item. Subsection 3.2.15(1) of the Model Criminal Code provides:

A person who dishonestly receives stolen property, knowing or believing the property to be stolen, is guilty of the offence of receiving.

¹¹⁰ See Model Criminal Code, section 3.2.2.

¹¹¹ MCCOC, *Final Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, p 117.

Question 4.3.3

What fault elements should apply to the offence of receiving stolen property?

Alternative verdicts

The close relationship between theft and receiving is demonstrated by subsection 171(a) of the Solomon Islands *Criminal Procedure Code* [Cap 7] (Criminal Procedure Code), which provides:

When a person is charged with stealing anything and –

- (a) it is proved that he received the thing knowing the same to have been stolen, he may be convicted of the offence of receiving although he was not charged with it;

In applying the provision, the Court in *David Kio v R*¹¹² stated that:

...where there is a possibility of the court finding the accused not guilty of stealing but guilty of receiving, I recommend that the accused be charged with stealing alone. Where this is done the prosecutor should always draw to the court's attention the provisions of section 171(a) of the Criminal Procedure Code.

However, it should be noted that there is no provision in the Criminal Procedure Code to allow a person who is charged with receiving to be convicted of stealing. In comparison, English common law allows a person who is found to be in possession of stolen property to be convicted of either theft or receiving, even if the finder of fact is unable to definitively state which offence the defendant has committed.¹¹³ The Model Criminal Code contains a specific provision to achieve this purpose. Subsections 13.2.15(4) and (5) of the Model Criminal Code provide:

- (4) A person charged with theft may be convicted of receiving and a person charged with receiving may be convicted of theft. If the trier of fact is satisfied beyond reasonable doubt that a person has committed either theft or receiving but is unable to determine which of those offences the person has committed, the person is to be convicted of whichever of those offences is the more probable or, if they are equally probable, the person is to be convicted of theft.
- (5) A person may not be convicted of both theft and receiving in respect of the same property if the person retains possession or custody of the property.

Question 4.3.4

Does Solomon Islands wish to include a provision to ensure that a person who is in possession of stolen property can be convicted of either theft or receiving?

¹¹² Unrep. Criminal Appeal Case No. 11 of 1977 (Davis CJ).

¹¹³ *R v Langmead* (1864) Le & Ca 427; 169 ER 1459 (Blackburn J).

Question 4.3.5

If Solomon Islands chooses to include a provision to ensure that a person who is in possession of stolen property can be convicted of either theft or receiving, should this provision be located in the revised legislation or in the Criminal Procedure Code?

c Penalties

The current penalty for receiving under the Penal Code is seven years in the case of circumstances amounting to a misdemeanour and 14 years in circumstances amounting to a felony. New South Wales features a similar division between serious and less serious offences with penalties of 12 years for serious receiving offences and three years for less serious offences.¹¹⁴ New Zealand legislation creates a scale of penalties between three months and seven years imprisonment depending on the value of the goods received.¹¹⁵

However, if Solomon Islands chooses to remove the distinction between serious and less serious crimes from its revised legislation, it may wish to consider penalty levels in jurisdictions that do not make this distinction. For example, the Model Criminal Code¹¹⁶ and the Australian Capital Territory¹¹⁷ provide a maximum penalty of 10 years for receiving offences. Queensland¹¹⁸ and Western Australia¹¹⁹ provide more severe penalties of 14 years, with Victoria providing for a maximum of 15 years imprisonment.¹²⁰

Question 4.3.6

What penalty level does Solomon Islands consider to be appropriate for receiving offences?

d Related Provisions

There is a close relationship between receiving, theft and other theft related offences. Receiving can also occur where property has been dishonestly acquired otherwise than by theft. For example, property can be illegally obtained through fraud. In revising provisions about receiving, Solomon Islands may therefore wish to consider the structure and content of provisions relating to the dishonest acquisition of property generally to ensure that the proceeds of these crimes are adequately covered by receiving provisions.

Solomon Islands may also wish to consider how provisions about alternative verdicts for theft and receiving will be affected by any changes made to the Penal Code.

¹¹⁴ *Crimes Act 1900* (New South Wales), sections 188-189.

¹¹⁵ *Crimes Act 1961* (New Zealand), section 247.

¹¹⁶ Model Criminal Code, subsection 3.2.15(1).

¹¹⁷ *Criminal Code 2002* (Australian Capital Territory), section 313.

¹¹⁸ *Criminal Code Act 1899* (Queensland), section 433.

¹¹⁹ *Criminal Code Compilation Act 1913* (Western Australia), section 414.

¹²⁰ *Crimes Act 1958* (Victoria), section 88.

4.4 Going equipped for theft, robbery or burglary

a Current law

The Penal Code makes it an offence to be ‘found by night armed or in possession of housebreaking implements’. These prohibited implements are listed in the provision, which also criminalises the use of disguises. Section 302 of the Penal Code provides:

Any person who is found by night -

- (a) armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any building and to commit any felony therein; or
- (b) having in his possession without lawful excuse (the proof whereof shall lie on such person) any key, picklock, crow, jack, bit or other implement of house-breaking; or
- (c) having his face masked or disguised with intent to commit any felony; or
- (d) in any building with intent to commit any felony therein,

is guilty of a misdemeanour, and shall be liable-

- (i) if he has been previously convicted of any such misdemeanour or of any felony, to imprisonment for ten years; and
- (ii) in all other cases to imprisonment for five years.

This provision is located with other provisions about burglary, however parts of the provision could apply to behaviour in preparation for a number of other offences not related to burglary. For example, paragraph 302(c) could apply to any circumstance where a person adopts a disguise to commit a felony offence.

b Policy considerations

LRC indicated in their policy direction of 16 May 2012, that the distinction between ‘breaking and entering premises during the day and night should be abolished’. The following discussion assumes that LRC intends that distinctions between times of day should be removed from all theft related provisions in the Penal Code, including offences for going equipped to commit property offences. In reviewing the offence of going equipped to commit theft or a related offence, Solomon Islands may wish to consider making it an offence for a person to have in his or her possession any instrument capable of being used for theft or a related offence such as burglary, with the intent to use the instrument for such a purpose. For example, sections 315 and 316 of the Australian Capital Territory *Criminal Code* 2002 provide:

315 Going equipped for theft etc

- (1) A person commits an offence if the person, in any place other than the person's home, has with the person an article with intent to use it in the course of or in relation to theft or a related offence.

Maximum penalty: 300 penalty units, imprisonment for 3 years or both.

- (2) In this section:

related offence means any of the following:

- (a) robbery;
- (b) aggravated robbery;
- (c) burglary;
- (d) aggravated burglary
- (e) an offence against section 318 (Taking etc motor vehicle without consent);
- (f) obtaining property by deception.

316 Going equipped with offensive weapon for theft etc

- (1) A person commits an offence if the person, in any place other than the person's home, has with the person an offensive weapon with intent to use it in the course of or in relation to theft or a related offence.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

- (2) In this section:

related offence means any of the following:

- (a) robbery;
- (b) aggravated robbery;
- (c) burglary;
- (d) aggravated burglary.

These provisions would not cover a situation where a person has concealed his or her face or uses a disguise to commit an offence. Evidence of these acts would be used to prove intention in prosecuting the related offence. All of the conduct targeted by these provisions could be used to prove intention of the main, 'related' offence or an attempt to commit one of these offences. The purpose of this kind of provision is to provide an alternative to prosecuting a defendant for attempting to commit a theft related offence. This would be of use in circumstances where there is insufficient evidence to prosecute for an attempt to commit theft or another related offence.

Question 4.4.1

Does Solomon Islands wish to include revised provisions about going equipped for theft and other theft related offences?

c Penalties

The current penalty under section 302 of the Penal Code for being found by night armed or in possession of housebreaking implements is five years. This section also allows repeat offenders and those who have been convicted of an indictable offence may be penalised by up to ten years imprisonment.

Solomon Islands may wish to consider the range of penalties for going equipped to commit theft or a related offence in other jurisdictions. These penalties range from two years imprisonment in Victoria,¹²¹ to 10 years imprisonment in New South Wales for the related offence of being armed with intent to commit an indictable offence.¹²² Maximum penalties of three years imprisonment apply in the United Kingdom¹²³ and the Australian Capital Territory, which also provides a penalty of five years imprisonment if the Defendant is armed with an offensive weapon.¹²⁴ The Model Criminal Code also recommends a maximum sentence of three years imprisonment.¹²⁵

South Australia provides for a different model of penalties with a maximum of 7 years imprisonment. Under this model, the penalty for going equipped with intent to commit an offence is half of the maximum penalty set for the offence that the Defendant was equipped with intent to commit.¹²⁶

Question 4.4.2

What penalty level does Solomon Islands consider to be appropriate for the offence of going equipped to commit theft or a related offence?

4.5 Shared ownership of property

a Liability of husbands and wives

The Penal Code currently provides that when a husband and wife are living together, they cannot be held criminally responsible for any acts of larceny with respect to the property of their spouse, other than when the act was done in the course of leaving or deserting the spouse. Section 260 of the Penal Code provides:

¹²¹ *Crimes Act 1958* (Victoria), section 91.

¹²² *Crimes Act 1900* (New South Wales), section 114.

¹²³ *Theft Act 1968* (United Kingdom), section 25

¹²⁴ *Criminal Code 2002* (Australian Capital Territory), sections 315, 316.

¹²⁵ Model Criminal Code, section 13.2.14.

¹²⁶ *Criminal Law Consolidation Act 1935* (South Australia), section 270C.

- (1) A wife has the same remedies and redress under this Code for the protection and security of her own separate property as if such property belonged to her as a femme sole:

Provided that no proceedings under this Part of this Code shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife or for the purpose of giving it to a paramour.

- (2) A wife doing an act with respect to any property of her husband, which, if done by the husband in respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Part of this Code, shall be in like manner liable to criminal proceedings by her husband.

This provision reflects a traditional view of the marital relationship under English law; in particular that all property is either the property of the husband or shared between both spouses and therefore not capable of being stolen by one spouse. However, in many modern marital relationships, it is common for a spouse to own property in his or her own right, independent from the relationship and the other spouse. Accordingly, Solomon Islands may wish to consider whether this provision reflects current views about spousal relationships in Solomon Islands and whether it would be appropriate to exclude this kind of provision from the revised legislation. Excluding this provision would mean that the offence of theft would apply to thefts of property between spouses and persons in a de facto relationship at the time of the theft.

If Solomon Islands decides that this provision could be repealed, then consideration could also be given as to whether it should be replaced by a new provision which provides certainty about the state of the law. This could be achieved by adopting a specific provision to clarify that spouses and civil partners can be prosecuted for theft of property owned by the other or owned jointly by the spouses. Adopting a specific provision has the advantage of clearly stating the intention of parliament on the issue of property stolen by spouses. This has been done in the United Kingdom,¹²⁷ and the Model Criminal Code also contains an optional provision that can be included for this purpose. Section 3.1.6 of the Model Criminal Code provides:

Despite anything to the contrary in any other Act, proceedings for an offence against this Chapter relating to property belonging, or claimed to belong, to a person who was married at the time of the alleged offence may be taken by the person against the other party to the marriage, whether or not the parties were living together at the time of the alleged offence.

¹²⁷ See section 30 of the *Theft Act 1968*.

However, MCCOC emphasises that the provision is not required unless there is a need to remove uncertainty about the state of the law.¹²⁸

Question 4.5.1

Does Solomon Islands wish to exclude provisions that limit the application of theft in relation to husbands and wives?

Question 4.5.2

Does Solomon Islands wish to include a provision to clarify that spouses can be held criminally responsible for any acts of larceny with respect to the property of their spouse?

b Collective ownership as a defence to stealing

Question 121 of the 2008 LRC Review asks:

Should the Penal Code specifically state that collective ownership of property is not a defence to stealing?

After consultations conducted by the LRC, the policy direction given to AGD was that:

The Penal Code needs to take into account 'collective ownership' of property. In Solomon Islands, people in positions of power or those in connection with a tribe who might, or might not, have rights to the property can use such position to extract resources for their own benefit at the expense of the whole tribe or clan in deceitful manners. This was not the case in the past where people use the resources mainly for subsistence and for trade using the barter system. Nowadays, people rely heavily on money for daily needs, school fees and for other personal benefits. So, problems arise when natural resources on customary land (e.g. Trees) are marked for commercial activities like logging where huge sums of money are involved. It has become common that people in positions – like educated men, chiefly or big men), who are said to be representing their tribes in the negotiation stages with developers keep the proceeds for themselves or unfairly distribute the benefits (esp. in money) to other members of the tribe.

The current legal approach in Solomon Islands to issues arising in connection with customary ownership of land and resources is based in civil law rather than criminal law. For example, the Solomon Islands *Forest Resources and Timber Utilisation Act* [Cap 40] requires that a person is issued with a permit for logging activities whenever customary interests will be affected.

Subsection 7(1) of the Act provides:

Any person who wishes to carry on business in Solomon Islands as a timber exporter or sawmiller, and desires to acquire timber rights on customary land shall make application to the Commissioner in the prescribed form and manner and obtain his consent to negotiate with the appropriate Government, the area council and the owners of such customary land.

¹²⁸ MCCOC, *Chapter 3: Theft, Fraud, Bribery and Related Offences* (Final Report, December 1995), page 129.

The procedure for obtaining this permit seeks to identify customary owners of the land in question and to:

...determine with the customary landowners and the applicant matters relating to -

- (a) whether or not the landowners are willing to negotiate for the disposal of their timber rights to the applicant;
- (b) whether the persons proposing to grant the timber rights in question are the persons, and represent all the persons, lawfully entitled to grant such rights, and if not who such persons are;
- (c) the nature and extent of the timber rights, if any, to be granted to the applicant;
- (d) the sharing of the profits in the venture with the landowners; and
- (e) the participation of the appropriate Government in the venture of the applicant.

In the event that customary landowners and the applicant are able to reach an agreement, the next step is to produce a written agreement which states both the quantum of profit sharing and the extent of government involvement, if any, in the logging activities of the applicant.¹²⁹ A successful applicant will be granted a Certificate of Approval to conduct their logging business.¹³⁰

Expanding the definition of property to include 'collective ownership' may expand the ambit of theft offences. However, it may be preferable to review the operation and effectiveness of existing legislation before turning to criminal penalties as a method of protecting customary interests. In the context of logging, the introduction of criminal penalties may result in overlap with existing civil law dispute resolution mechanisms and Court processes, including those under the Solomon Islands *Forest Resources and Timber Utilisation Act*. A review of the operation of civil legislation dealing with customary interests in property is beyond the scope of this paper.

In response to the question of whether a claim of collective ownership over property can provide a defence to a charge of theft, it is noted that section 7 of the Solomon Islands *Customs Recognition Act 2000* provides:¹³¹

Subject to the provisions of this Act, the law of evidence and to any other law, custom may be taken into account in a criminal case only for the purposes of-

- (a) ascertaining the existence or otherwise of a state of mind of a person;
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person;
- (c) deciding the reasonableness or otherwise of an excuse;

¹²⁹ *Forest Resources and Timber Utilisation Act* [Cap 40] (Solomon Islands), subsection 8(4).

¹³⁰ *Forest Resources and Timber Utilisation Act* [Cap 40] (Solomon Islands), section 12.

¹³¹ AGD understands that this Act has not yet commenced.

- (d) deciding, in accordance with any other law whether to proceed to the conviction of a guilty party;
- (e) determining the penalty (if any) to be imposed on a guilty party; or
- (f) taking the custom into account in order to avoid any injustice that may be done to a person.

The taking of property by a defendant claiming to have customary right to the property taken has been the subject of a number of reported decisions in Solomon Islands. In *Tahiuru & Periporo v Regina*, the Court considered whether a defendant could raise a 'claim of right' defence which is based on a claimed customary right.¹³² In handing down its decision, the Court favoured an approach which separated laws made by Parliament from those derived from customary law.

Demanding compensation in custom cannot be a claim of right to property under section 8 of the Penal Code because a claim for compensation is the atonement for a custom wrong... The party demanding payment of atonement does not have a claim of right to ownership of anything until the atonement in kind is handed over to him. A claim of right under section 8 of the Penal Code therefore does not have a place in the custom practice of atonement.

In *Regina v Maoma*, the Court also followed an approach that separated legislation from customary law. In this case, the Court considered whether the fifth defendant, Daniel Kapini, had a legitimate claim of right based on customary law after he took an amount of money in an alleged robbery.¹³³ *Regina v Moama* is notable for the way that evidence about a claim of rights in custom was able to raise a valid defence at law, but was not sufficient by itself to excuse the defendant from liability. In finding the defendant not guilty, the Court:

...disallowed reference to Customary law. It was not a relevant matter... [the main issue] is the accused Daniel Kapini's bona fide belief that he had a right to take money from... Warren Manemala because it was owed by Manemala to Daniel's brother ...

I find that the accused Kapini clearly held a firm view that his family was wronged and when he saw Manemala, he firmly had a belief that Manemala owed the Kapini's money and demanded it. The Crown must disprove the existence of Kapini's belief beyond reasonable doubt. It has not done so.

A belief genuinely held in a claim of right negates any charge an element of which is stealing. I find here that there was always a genuine belief held by Kapini when he demanded money from Manemala.

In making this finding, the Court divided the issue of custom from the issue of having a genuine claim of right. On one hand, evidence about customary law was held to be irrelevant to the

¹³² [2005] SBHC 161.

¹³³ [2008] SBHC 48, [722 ff].

questions at issue. On the other, the fact that Daniel Kapini held a bona fide belief that he was entitled to collect a sum of money from Manemala on behalf of his brother was sufficient to establish a defence of claim of right, regardless of whether this belief was based on custom or otherwise. This is consistent with English common law, which states:

...a claim of right exists whenever a man honestly believes that he has a lawful claim even though it may be completely unfounded in law or in fact.¹³⁴

Solomon Islands may wish to consider the approach taken to customary claims about property as a defence to theft in other Pacific jurisdictions. For example, Tongan legislation provides that custom does not provide a defence to taking property that is owned in common.

Section 147 of the Tongan *Criminal Offences Act* provides:

Every Tongan who following the former Tongan custom takes anything capable of being stolen belonging to any of his relatives without the permission of its owner and with intent to deprive such owner permanently of such thing shall be liable to the same punishment as if he had committed theft.

The Papua New Guinea Criminal Code Act 1974 provides that custom is not a defence to 'receiving, soliciting, giving or offering of a valuable consideration' in relation to a secret commission, but is silent on the application of custom to the law of theft.

Question 4.5.3

Does Solomon Islands wish to include a provision to state that collective ownership of property is not a defence to stealing?

¹³⁴ *R v Skivington* [1968] 1 QB 170 (Parker LCJ).

Chapter 5—Fraud

5.1 Introduction

The term ‘fraud’ covers a range of behaviours where property or financial advantage is obtained by deception. While the precise definition of fraud varies across jurisdictions, fraud is the offence of ‘dishonestly obtaining a benefit, or causing a loss, by deception or other means’.¹³⁵ This can include knowingly making a false representation, failing to disclose information when there is a duty to do so, or by abusing one’s position in order to make a gain or to cause loss to another person.

Fraud can significantly affect individuals, corporations and Government. The development of new technologies, such as computers and internet communications, has created additional opportunities for fraudulent appropriation of property and presents further challenges for the criminal law.

Solomon Islands Law Reform Commission (LRC) has indicated in its policy direction of 16 May 2012 that it wishes to include new offences about obtaining property or financial advantage by deception in the revised Penal Code.¹³⁶ This Chapter examines a number of policy issues that LRC may wish to consider in including new offences about fraud and in repealing existing offences.

5.2 Current legislation and case law

There are a large number of offences concerning fraud under the Penal Code. The structure of these current provisions focus on criminalising fraudulent wrongdoing in specific circumstances.

As observed by the LRC in 2008, the current range of fraud offences in Solomon Islands do not adequately cover the range of situations where property is acquired by deception.¹³⁷ For example, the general offence of false pretences under section 308 of the Penal Code states:

Any person who by any false pretence -

- (a) with intent to defraud, obtains from any other person any chattel, money or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or

¹³⁵ Attorney-General’s Department, *Commonwealth Fraud Control Guidelines*, 2011, viewed 22 May 2012, <<http://www.ag.gov.au/Documents/Commonwealth%20Fraud%20Control%20Guidelines%20MARCH%202011.pdf>>.

¹³⁶ Policy direction from the LRC on property related offences (covering questions 119-136 of the LRC 2008 Issues Paper)

¹³⁷ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code*, Issues Paper 1 November 2008, 125-126.

(b) with intent to defraud or injure any other person fraudulently causes or induces any other person-

(i) to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security; or

(ii) to write, impress, or affix his name or the name of any other person or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security,

is guilty of a misdemeanour, and shall be liable to imprisonment for five years.

As noted by the LRC, this offence may not cover all circumstances where a person dishonestly obtains a financial advantage.¹³⁸ For example, this provision covers circumstances where the person making the false pretence intends to defraud another person, but would not cover a situation where that person makes a representation and is reckless as to the truth of that statement.¹³⁹

In addition to the offence of false pretences, which operates as a general fraud offence, there are a number of other property offences in the Penal Code that incorporate the concept of fraud into the elements of the offence. However, as noted in Chapter 1-Stealing Offences, these offences do not define the term 'fraudulently'. For example, the definition of larceny given in section 258(1) of the Penal Code includes elements of fraud:

A person steals who, without the consent of the owner, *fraudulently* and without claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, of, being a bailee or part owner thereof, he *fraudulently* converts the same to his own use or the use of any person other than the owner.¹⁴⁰

The lack of clear distinction between fraud and theft has been commented on by Lord Parker CJ in the United Kingdom Court of Criminal Appeal. According to His Honour, the distinction between fraud and theft under UK laws equivalent to current Solomon Islands law is 'a very fine one and ... often largely academic'. The Court went on to say that:

The guiding test in each case is whether the person whose money is obtained meant to part with the property in the money, in which case it would, if the representation was false and as to an existing fact be false pretences, or whether he meant only to part with possession,

¹³⁸ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code*, Issues Paper 1, November 2008, paragraph 9.25.

¹³⁹ See Penal Code, section 9 for a definition of 'intention'.

¹⁴⁰ Emphasis added.

in which case, whether the false representation was to an existing fact or as to the future, it would be a case of larceny by trick.¹⁴¹

Penal code offences which incorporate the concept of fraud include larceny under sections 259, 262-267, 269-276, 279-281 and 289-290 of the Penal Code, as well as other offences which can be accomplished through:

- making false claims
 - fraudulent falsification of accounts (*Penal Code*, section 306)
 - obtaining credit by false pretences, (*Penal Code*, section 309)
 - obtaining registration etc by false pretences (*Penal Code*, section 311)
- holding, or appearing to hold, a position of authority or trust
 - frauds and breaches of trust by person in the public service (*Penal Code*, section 129)
 - embezzlement (*Penal Code*, sections 259, 267, 273)
 - conversion by trustee (*Penal Code*, section 304)
 - director etc of any body corporate or public company wilfully destroying books etc (*Penal Code*, section 305)
- destroying, altering or forging official documents or records
 - fraudulent destruction of legal documents (*Penal Code*, sections 283-286)
 - removing Boundary marks with intent to defraud (*Penal Code*, section 329)
 - forgery of certain documents with intent to defraud (*Penal Code*, section 336)
 - forgery of certain documents with intent to defraud or deceive (*Penal Code*, section 337)
- personal and sexual relationships
 - procuring defilement of woman by threats or fraud or administering drugs (*Penal Code*, section 145)
 - fraudulent pretences of marriage (*Penal Code*, section 169)
 - marriage ceremony fraudulently gone through without lawful marriage (*Penal Code*, section 171)

¹⁴¹ *R v Caslin* (1960) 44 CrAppR 47, [1961] 1 WLR 59; [1961] 1 All ER 246.

If Solomon Islands chooses to include new broad provisions about obtaining property or financial advantage by deception, then a large number of current offences dealing with obtaining property by fraud are likely to be captured. The final list of provisions that may be captured will depend on the scope of the replacement provision.

The issue of maintaining a clear distinction between fraud and theft will be discussed further under ‘policy considerations’ below. This issue was also raised in Chapter 1 -Stealing Offences, which suggested an alternative fault element to fraud for inclusion in a new general theft offence.

Another consequence of the range of offences covering fraudulent behaviour, and the lack of clear distinctions between these offences, is that persons accused of fraud may be charged and convicted under an incorrect offence. This occurred in *Regina v Maebinoa*¹⁴² where Mr Maebinoa pleaded guilty in the Principal Magistrate Court to the offence of obtaining credit by false pretences under section 309 of the Penal Code and was sentenced to imprisonment for one year. On appeal to the High Court of Solomon Islands, the conviction was set aside on the basis that Mr Maebinoa had been charged with the wrong offence. The Court held that he should have been charged with an offence under section 308 (false pretences) of the *Penal Code*.¹⁴³

During consultations for the Review of the Solomon Islands Penal Code, concerns were also raised about fraud offences being committed by people who collect donations by posing as representatives of churches or villages. Consultations also recorded concerns about fraudulent ‘sales’ of unregistered interests in real property. Although these kinds of criminal behaviour should be covered by the existing ‘false pretences’ offence under section 308 of the Solomon Islands *Penal Code* [Cap 26] (Penal Code), the fact of their discussion during community consultations suggests that these laws may not be properly understood or easily clarified

5.3 Policy Considerations

The above analysis of the current state of Solomon Islands law regarding fraud reveals two major issues that Solomon Islands may wish to address in revising the Penal Code. Firstly, the lack of clear distinction between fraud and theft offences and secondly, the sheer number of offences dealing with fraud. This second issue was also discussed in the LRC 2008 Review.

An alternative to the current approach would be to criminalise fraudulent acts under a single provision with general application. Other policy considerations relevant to this discussion include determining key definitions of a new offence and whether there is a need to retain or

¹⁴² [1994] SBHC 136.

¹⁴³ Importantly, the Court in *Regina v Maebinoa* noted that it was open to the Magistrate at first instance to amend the charge, by exercising a power granted under section 201 of the Solomon Islands *Criminal Procedure Code* [Cap 7].

include additional specific fraud related offences to sit alongside an offence of more general application. This section of the paper will discuss the policy considerations that attach to each of these issues.

a The distinction between fraud and theft

Current Solomon Islands law regards fraud and theft as two separate offences. However, this distinction is blurred by the inclusion of fraudulent intention as an element of theft and other property offences. This issue, including the interpretation of 'fraudulently' was raised in Chapter 1-Stealing Offences. Solomon Islands may wish to consider the policy options discussed in this chapter and in Chapter 1 simultaneously to ensure that preferred policy options for fraud and theft offences complement one another.

The Model Criminal Code Officer's Committee (MCCOC) report stated that the 'most fundamental question' with regard to fraud was whether to retain a separate offence for fraud or to fold the concept of fraud in with the concept of theft.¹⁴⁴ The MCCOC argued that:

The main argument in favour of maintaining two offences is the traditional conceptual separation between takings without the owner's consent and those which occur with the owner's consent, where the consent was obtained by fraud.¹⁴⁵

The traditional conceptual separation identified by the MCCOC is the same distinction as was referred to by Lord Parker CJ in *R v Caslin* (see discussion under previous heading). The MCCOC also remarked on the existence of 'public understanding' of fraud and theft as two different offences and the relative legal complexity of combining the two offences compared to retaining two stand alone crime types.¹⁴⁶

However, an interpretation of law in the United Kingdom, now overturned, merged fraud and theft into a single offence. The House of Lords in *R v Gomez*¹⁴⁷ held that as consent was not an element of the offence of theft under the *Theft Act 1968* (United Kingdom), the consent based distinction between fraud and theft could not be maintained. In so finding, the Court ruled that:

¹⁴⁴ Model Criminal Code Officer's Committee, *Chapter 3: Theft, fraud, Bribery and Related Offences*, Final Report 1995, page 131.

¹⁴⁵ Model Criminal Code Officer's Committee, *Chapter 3: Theft, fraud, Bribery and Related Offences*, Final Report 1995, page 131.

¹⁴⁶ Model Criminal Code Officer's Committee, *Chapter 3: Theft, fraud, Bribery and Related Offences*, Final Report 1995, page 133.

¹⁴⁷ [1992] 3 WLR 1067, [1993] AC 442.

The words of the Act drive one to the conclusion that consent is immaterial... Any conduct capable of being within section 15 [Obtaining property by deception] is also capable of being within section 1 [Basic definition of 'theft'].¹⁴⁸

This decision had far reaching consequences, which included expanding theft to capture doing almost anything to property belonging to another where there is a dishonest intention to permanently deprive the owner of that property by that act or any subsequent act, even if the original act itself is consented to.¹⁴⁹ The decision also went against the intention of the *Theft Act 1968*, which set out separate offences for fraud and theft.¹⁵⁰ The intention of the British Parliament to maintain two separate offences was affirmed with the introduction of the *Fraud Act 2006*, which now operates alongside the *Theft Act 1968*.

In determining whether to create a clear distinction between fraud and theft, Solomon Islands may wish to consider the concluding remarks of the MCCOC, which recommended:

...continuation of the separate offences of theft and fraud on the basis of comprehensibility both for the public generally, and for police and juries... Defining fraud as theft by including deception within the scope of appropriation does not serve the cause of clarity.

Question 5.3.1

Does Solomon Islands wish to create a clear separation between fraud and theft offences?

b The number of offences dealing with fraudulent or deceptive behaviour

In its report on theft, fraud, bribery and related offences, the Model Criminal Code Officers' Committee noted that having multiple offences that deal with specific circumstances can hinder police investigations and prosecutions. Particularly in Australian jurisdictions that have based their fraud offences on the common law or in jurisdictions that have adopted the *Criminal Code Act 1899* (Queensland) (Griffith Code), police officers are forced to deal with a 'myriad of specific theft or fraud type offences cobbled together over the years to plug gaps in the pre-existing law.'¹⁵¹ Similarly, the Penal Code provisions relating to fraud are numerous and criminalise specific circumstances that constitute fraud, rather than relying on a general offence against obtaining property or other benefit by deception.

There are two main consequences of maintaining a large number of fraud related offences. The first is that there may be difficulties in effectively prosecuting fraud offences. This is because a

¹⁴⁸ *R v Gomez* [1992] 3 WLR 1067, [1993] AC 442, 452. NB: Section 15 of the *Theft Act 1968* (United Kingdom) was repealed by the *Fraud Act 2006*.

¹⁴⁹ David Omerod, *Smith and Hogan's Criminal Law* (13th Ed, 2011), 787.

¹⁵⁰ David Omerod, *Smith and Hogan's Criminal Law* (13th Ed, 2011), 788.

¹⁵¹ MCCOC, *Commonwealth Model Criminal Code Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, p 5.

larger number of offences mean that there will often be difficulties in determining the correct offence to charge, as was the case in *Regina v Maebina*.

The second consequence is that patterns of clearly fraudulent behaviour may not fall within any of the circumstances that are criminalised under current Solomon Islands law. An example of this can be seen in section 306 of the *Penal Code* which criminalises a fraudulent falsification of accounts by “any clerk, officer or servant”. This kind of offence places an emphasis on who conducts the fraud, rather than on the criminal nature of fraud generally. Fraud offences that are structured to require that the fraud is carried out using a particular method or medium may also be susceptible to changes in technology or operating practices.

Australia’s Commonwealth jurisdiction,¹⁵² the United Kingdom¹⁵³ and New Zealand¹⁵⁴ have consolidated their fraud offences to provide a single set of general offences that apply to all instances of fraud. This approach was preferred by the MCCOC, which described the fraud offences under the *Theft Act 1968* (United Kingdom) as able to ‘virtually do away with the necessity to have a multiplicity of offences depending on the type of object taken, the category of defendant or victim and so on.’¹⁵⁵

Section 240 of the *Crimes Act 1961* (New Zealand) contains a single general offence against obtaining property or benefit by deception, or causing loss by deception:

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—
 - (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
 - (b) in incurring any debt or liability, obtains credit; or
 - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
 - (d) causes loss to any other person.

The advantage of this provision is that it criminalises the majority of behaviours that could be considered to be fraud under a single provision. It also lists a broad range of things, both financial and non-financial, which may be deceptively obtained, including property or any privilege, service, pecuniary advantage, benefit or valuable consideration.

¹⁵² See, for example, *Criminal Code Act 1995* (Commonwealth), Part 7.3; *Crimes Act 1958* (Victoria), sections 81-82.

¹⁵³ *Fraud Act 2006* (United Kingdom).

¹⁵⁴ *Crimes Act 1961* (New Zealand), section 240.

¹⁵⁵ MCCOC, *Commonwealth Model Criminal Code Report: Chapter 3—Theft, Fraud, Bribery and Related Offences*, 1995, p 5.

By comparison, United Kingdom law contains separate provisions for frauds committed by false representation, failing to disclose information and abuse of position. Sections 2, 3 and 4 of the *Fraud Act 2006* (United Kingdom) provide:

2 Fraud by false representation

- (1) A person is in breach of this section if he—
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A representation is false if—
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of—
 - (a) the person making the representation, or
 - (b) any other person.
- (4) A representation may be express or implied.
- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

3 Fraud by failing to disclose information

- A person is in breach of this section if he—
- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
 - (b) intends, by failing to disclose the information—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

4 Fraud by abuse of position

- (1) A person is in breach of this section if he—
 - (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

These provisions set out a range of broad offences designed to cover all types of frauds. Where the New Zealand Act contains a single fraud offence designed to cover the broadest possible range of offending behaviour, the United Kingdom provisions criminalise three kinds of circumstance that constitute fraud. Both the New Zealand and United Kingdom approaches focus on the ‘deceptive’ or dishonest’ nature of the offender’s conduct, as assessed by reference to the standards of the community, rather than on the method or medium used to perpetrate the deception or dishonesty. This means that both approaches can be applied to frauds involving computers and other technology, including technology that is yet to be invented. For example, in the United Kingdom, one of the considerations taken into account in choosing to include a small number of broad offences about fraud concerned the question of whether a fraud could be committed on a machine.¹⁵⁶

The Model Criminal Code provides another example of a small number of broad provisions about fraud. Sections 3.3.2 and 3.3.3 of the Model Criminal Code provide:

3.3.2 Obtaining property by deception

(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) For the purposes of this section, a person is to be treated as **obtaining property** if the person obtains ownership, possession or control of it, and **obtain** includes obtaining for another or enabling oneself or another to obtain or to retain.

(3) A person's obtaining of property belonging to another may be dishonest notwithstanding that the person is willing to pay for the property.

(4) Section 3.2.6 applies to this section as if references to appropriating property were references to obtaining property.

(5) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.

¹⁵⁶ See David Omerod, *Smith and Hogan's Criminal Law* (13th Ed, 2011), 870-871.

- (6) A conviction for an offence against this section is an alternative verdict to a charge for the offence of theft and a conviction for the offence of theft is an alternative verdict to a charge for an offence against this section.

3.3.3 Obtaining financial advantage by deception

A person who by any deception dishonestly obtains for himself, herself or another any financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

The Model Criminal Code also makes use of a small number of broad offences to cover all types of frauds. As with the United Kingdom and New Zealand Acts, the Model Criminal Code adopts a principled approach that focuses on the ‘deceptive’ or dishonest’ nature of the offender’s conduct, rather than on the method or medium used to perpetrate the deception or dishonesty. All three examples discussed above make use of a small number of broad provisions that are designed to apply generally to fraudulent behaviour.

Question 5.3.2

Does Solomon Islands wish to include a smaller number of broad offences in the revised legislation?

Question 5.3.3

Should offences about fraud focus on the deceptive or dishonest nature of the offender’s conduct rather than on the method or medium used to perpetrate the deception or dishonesty?

c Definitions

Defining dishonesty or deception (depending on whether Solomon Islands prefers the United Kingdom, New Zealand or Model Criminal Code models of fraud offences) may lend further clarity to fraud provisions in the revised legislation. For example, a definition for ‘dishonest’ may limit uncertainty in interpretation of the provision, as the concept of ‘dishonesty’ can be determined either subjectively, by reference to the belief of the accused, or objectively, for example by reference to the standards of a reasonable or ordinary person. It is also possible to define dishonesty.

Under section 3.1.2 of the *Model Criminal Code*, ‘dishonest’ is defined using a combination of both subjective and objective tests:

dishonest means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

In contrast, subsection 240(2) of the *Crimes Act 1961* (New Zealand) defines deceptive using a subjective standard:

(2) In this section, deception means—

- (a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—
 - (i) knows that it is false in a material particular; or
 - (ii) is reckless as to whether it is false in a material particular; or
- (b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
- (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

The *Fraud Act 2006* (United Kingdom) does not define ‘dishonesty’, but instead relies on a combination of objective and subjective tests at common law. The ‘*Ghosh* direction’ states that the test to determine dishonesty requires the trier of fact to answer two questions:

- (1) Was what was done dishonest according to the ordinary standards of reasonable and honest people? If no, D[efendant] is not guilty. If yes:
- (2) Did the defendant realize that reasonable and honest people regard what he did as dishonest? If yes, he is guilty; if no, he is not.¹⁵⁷

Solomon Islands may wish to consider including a definition for dishonesty that could be applied to all property offences in the revised legislation, including fraud. Solomon Islands may therefore wish to consider this issue as it applies to other policy options discussed in other chapters of this paper, including Chapter 1-Stealing Offences.

Question 5.3.4

Does Solomon Islands wish to include a definition for dishonesty or deception that could be applied to all property offences in the revised legislation, including fraud?

Concepts of ‘gain’ and ‘loss’ are not included in current Solomon Islands legislation, which generally specifies the precise form of property that can be gained by fraud. If Solomon Islands chooses to adopt provisions with more general application, it may also wish to consider defining concepts of gain and loss to give clarity to interpretation of central elements of these general fraud offences. It may also wish to consider whether gains or losses caused by fraud should be limited to property, or whether frauds causing gains or losses should also extend to supply of services.

Ensuring that the fraud provisions in the revised legislation extend to cover the dishonest gain or loss of services would better protect victims of fraud from being deceived into performing economically valuable activities that ultimately benefit the defendant. This is especially important as ‘the private law has been reluctant to give restitution for services unless they

¹⁵⁷ *Ghosh* [1982] QB 1053, cited in David Omerod, *Smith and Hogan’s Criminal Law* (13th Ed, 2011), 829.

generate an end product [and criminal law exhibits a] tendency to understand economic wealth in [purely] tangible terms.¹⁵⁸

For example, United Kingdom law limits gain or loss to property only. Section 5 of the *Fraud Act 2006* (United Kingdom) provides:

- (2) “Gain” and “loss”—
 - (a) extend only to gain or loss in money or other property;
 - (b) include any such gain or loss whether temporary or permanent; and “property” means any property whether real or personal (including things in action and other intangible property).
- (3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.
- (4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

This provision limits ‘gain’ and ‘loss’ to apply ‘only to gain or loss in money or other property’.¹⁵⁹ This definition does not capture deception to obtain services or to cause loss of services. A more expansive interpretation of ‘gain’ and ‘loss’ may enhance the effectiveness of fraud offences. Section 300 of the Criminal Code Act (Commonwealth) defines ‘gain’ to include services, as follows:

- ‘gain’ means—
 - (a) a gain in property, whether temporary or permanent; or
 - (b) a gain by way of the supply of services;
- and includes keeping what one has.

Inserting a definition of the kind of property or benefit that can be gained by fraud may assist the Courts in interpreting whether a fraud has been committed. In choosing what the scope of such a definition should be, Solomon Islands may wish to consider whether gains or losses caused by fraud should be limited to property, or whether frauds causing gains or losses be extended to supply of services.

Question 5.3.5

Does Solomon Islands wish to define concepts of ‘gain’ and ‘loss’ for the purpose of fraud offences?

¹⁵⁸ A P Simester and W J Brookbanks, *Principles of Criminal Law*, 2007, p 713.

¹⁵⁹ *Fraud Act 2006* (United Kingdom), paragraph 5(2)(a).

Question 5.3.6

If so, should definitions of 'gain' and 'loss' extend to gains and losses by way of supply of services?

d Other fraud related offences

Conspiracy to defraud

Conspiracy to defraud is a common law offence, which remains in effect either at common law or in statute in all Australian jurisdictions.¹⁶⁰ The *Penal Code* does not currently contain a specific offence for conspiring to commit fraud. However, this offence would likely be covered by sections 383 (Conspiracy to commit felony) and 384 (Conspiracy to commit misdemeanour). Conspiracy is discussed as an extension of criminal responsibility in the LRC 2008 Review from paragraph 4.53.

Conspiracy to defraud is one of a category of conspiracy offences where the agreed conduct would not amount to a criminal offence if it had been committed by an individual.¹⁶¹ This makes it possible to prosecute any party to an agreement to defraud, even though they may not have actually committed an act in furtherance of the offence. However, the prosecution must still prove that the person charged firstly intended to enter an agreement, and secondly that the substance of the agreement was to defraud a third party.

The offence of conspiracy to defraud is well established in criminal law and 'supplies a legitimate and necessary means of catching novel forms of dishonesty which have escaped the specific attention of the legislature.'¹⁶² It also allows for the prosecution of parties to a fraud in circumstances where a person assists another to carry out a fraud, but does not take part in any of the deceptive acts constituting that fraud.

Section 17.4 of the Commonwealth Model Criminal Code provides the following offence for conspiracy to defraud:

- (1) A person who conspires with another person to do something dishonestly:
 - (a) with the intention of obtaining a gain; or
 - (b) with the intention of causing a loss or being reckless with respect to that result; or
 - (c) with the intention of influencing the exercise of a public duty,

¹⁶⁰ The offence is prescribed by the criminal laws of the Commonwealth (*Criminal Code Act 1995*, section 135.4), Northern Territory (*Criminal Code Act*, section 284), Queensland (*Criminal Code 1899*, section 408C, 541), Tasmania (*Criminal Code Act 1924*, section 297(1)(d)), Australian Capital Territory (*Criminal Code 2002*, section 334) and Western Australia (*Criminal Code 1913*, section 409, 558, 560). New South Wales (*Crimes Act 1900*, schedule 10, section 1(e)), South Australian (*Criminal Law Consolidation Act 1935*, section 133), and Victorian (*Crimes Act 1958*, section 321F(2)) legislation states that conspiracy to defraud remains an offence at common law.

¹⁶¹ MCCOC, *Commonwealth Model Criminal Code Report: Chapter 3—Conspiracy to defraud*, 1997, page 1.

¹⁶² MCCOC, *Commonwealth Model Criminal Code Report: Chapter 3—Conspiracy to defraud*, 1997, page 26.

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) For the person to be guilty:

- (a) the person must have entered into an agreement with one or more other persons;
and
- (b) the person and at least one other party to the agreement must have intended to do the thing pursuant to the agreement; and
- (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(3) A person may be found guilty of an offence against this section even if:

- (a) doing the thing, or obtaining the gain or causing the loss, or influencing the exercise of the public duty is impossible; or
- (b) the only other party to the agreement is a body corporate; or
- (c) each other party to the agreement is at least one of the following;
 - (i) a person who is not criminally responsible;
 - (ii) in the case of an agreement to commit an offence – a person for whose benefit or protection the offence exists; or
- (d) subject to subsection (4), all other parties to the agreement have been acquitted of the offence.

(4) A person cannot be found guilty of an offence against this section if:

- (a) all other parties to the agreement have been acquitted of such an offence and a finding of guilty would be inconsistent with their acquittal; or
- (b) in the case of an agreement to commit an offence - he or she is a person for whose benefit the offence exists.

(5) A person cannot be found guilty of an offence against this section if, before the commission of an overt act pursuant to the agreement, the person:

- (a) withdrew from the agreement; and
- (b) took all reasonable steps to prevent the doing of the thing.

(6) A court may dismiss a charge of an offence against this section if it thinks that the interests of justice require it to do so.

(7) In the case of an agreement to commit an offence, any defences, procedures, limitations of qualifying provisions that apply to the offence apply also to the offence against this section.

- (8) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence against this section before the necessary consent has been given.

Question 5.3.7

Does Solomon Islands wish to include an offence for conspiracy to defraud?

Fraud statements by promoters

Section 305(1)(c) of the Penal Code creates a specific offence for circumstances where directors, managers or public officers of a company make false statements to induce third parties to acquire an interest in a company:

Any person who-

...

- (c) being a director, manager or public officer of any body corporate or public company, makes, circulates or publishes, or concurs in making, circulating or publishing, any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof,

is guilty of a misdemeanour, and shall be liable to imprisonment for seven years.

Although the kind of conduct addressed by this offence could be adequately covered by a general provision that criminalises deceptive or dishonest conduct, it may be considered desirable to include a separate provision to criminalise false statements by promoters, as this behaviour can lead to significant losses by investors and undermine trust in business ventures. In some cases, particularly where the promoter of a business venture is not a director of the company, there may be no valid contract between the promoter and the person relying on the false statement.¹⁶³ This will mean that the victim will be unable to seek a civil remedy. Solomon Islands may therefore consider that it is desirable to retain an offence for making or publishing a false statement to induce any person to invest in property or security.

New Zealand legislation contains a similar offence to the current paragraph 305(1)(c) of the Penal Code, however this provision is broad enough to ensure that anyone who promotes a

¹⁶³ In these circumstances, it is arguable that a contractual obligation to be bound was not intended on the part of the promoter and therefore, as there is no valid contract, the party that relied on the false statement of the promoter cannot rely on contract law for any remedies. See, for example, *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225 at 263.

company by making a false statement can be held criminally liable for their conduct. Section 242 of the *Crimes Act 1961* (New Zealand) provides:

Section 242 False statement by promoter, etc

(1) Every one is liable to imprisonment for a term not exceeding 10 years who, in respect of any body, whether incorporated or unincorporated and whether formed or intended to be formed, makes or concurs in making or publishes any false statement, whether in any prospectus, account, or otherwise, with intent—

(a) to induce any person, whether ascertained or not, to subscribe to any security within the meaning of the Securities Act 1978; or

(b) to deceive or cause loss to any person, whether ascertained or not; or

(c) to induce any person, whether ascertained or not, to entrust or advance any property to any other person.

(2) In this section, false statement means any statement in respect of which the person making or publishing the statement—

(a) knows the statement is false in a material particular; or

(b) is reckless as to the whether the statement is false in a material particular.

This provision has recently been used by the New Zealand Serious Fraud Office to ground charges against three company directors relating to the alleged non-disclosure of related party lending totaling approximately \$14.5 million.¹⁶⁴ Such a provision could help to build public confidence in the integrity of Solomon Islands' financial markets as it allows directors to be charged where they are responsible for the collapse of the finance company.

Question 5.3.8

Does Solomon Islands wish to retain a provision that it is an offence to make or publish a false statement to induce a person to invest in property or security in the new revised legislation?

Question 5.3.9

If so, does Solomon Islands wish to broaden this provision so that anyone making a false statement to induce a person to invest in property or security may be prosecuted?

¹⁶⁴ Serious Fraud Office, 'Directors of Capital + Merchant face further SFO charges' July 2011, viewed at 23 May 2012 <http://www.sfo.govt.nz/n209,21.html>.

e Frauds involving dealings with personal financial information-credit card skimming

Credit card skimming is an offence involving illicitly capturing financial data which can be used to conduct fraudulent transactions. This can be done by ‘skimming’ information from credit cards or by intercepting financial data during transmission from points of sale to financial institutions.¹⁶⁵

Although some jurisdictions, including Canada and the USA, consider that credit card skimming is a form of identity theft, the data is generally used to produce counterfeit credit cards, which are in turn used to conduct fraudulent transactions.¹⁶⁶ Although creating a counterfeit credit card would fall under offences about forgery, and knowingly using a counterfeit card would likely be considered to be fraud, skimming presents challenges to prosecution because the data is often skimmed in one jurisdiction before being sent to another jurisdiction where the acts of forgery and fraud take place.¹⁶⁷ Even where the skimming and fraud take place in the same jurisdiction, it is often difficult to prosecute skimmers for being complicit in the fraud as this can only be done once a fraud has been committed, investigated and successfully prosecuted.¹⁶⁸

If Solomon Islands considers that credit card skimming is, or may become, a matter of concern in Solomon Islands, it may wish to consider including a specific offence that criminalises dealing in personal financial information. Section 3.3.5 of the Model Criminal Code contains an example of a provision for this purpose:

(1) In this section:

personal financial information means information relating to a person that may be used (whether alone or in conjunction with other information) to access funds, credit or other financial benefits.

(2) A person who dishonestly obtains or deals in personal financial information without the consent of the person to whom it relates is guilty of an offence. Maximum penalty: imprisonment for 5 years.

(3) For the purposes of this section:

i. obtaining personal financial information includes possessing or making any such information, and

¹⁶⁵ Model criminal Code Officer’s Committee, *Model Criminal Code Chapter 3, Credit Card Skimming Offences*, Final Report, 2006, page 3.

¹⁶⁶ Model criminal Code Officer’s Committee, *Model Criminal Code Chapter 3, Credit Card Skimming Offences*, Final Report, 2006, page 4.

¹⁶⁷ Model criminal Code Officer’s Committee, *Model Criminal Code Chapter 3, Credit Card Skimming Offences*, Final Report, 2006, page 9

¹⁶⁸ Model criminal Code Officer’s Committee, *Model Criminal Code Chapter 3, Credit Card Skimming Offences*, Final Report, 2006, page 9.

ii. dealing in personal financial information includes supplying or using any such information.

(4) For the purposes of this section, a person is taken to obtain or deal in personal financial information without the consent of the person to whom it relates if the consent of the person is obtained by any deception.

(5) This section extends to personal financial information relating to a natural person or a body corporate, or to a living or dead person.

The review of the Penal Code presents a good opportunity to consider including an offence that criminalises dealing in personal financial information. While this kind of provision was introduced to target a relatively new crime type, credit card skimming, the terms of the Model Criminal Code provision outlined above are sufficiently broad to criminalise fraudulent behaviour involving unauthorised dealings with personal financial information more generally.

Question 5.3.10

Does Solomon Islands wish to include a specific offence that criminalises dealing in personal financial information?

5.4 Penalties

Penalties for fraud offences under the Penal Code currently vary from one¹⁶⁹ to seven years.¹⁷⁰ imprisonment. In determining penalties under the revised legislation Solomon Islands may wish to compare the current penalties with the level of penalties provided for fraud offences in other jurisdictions.

As noted in the LRC 2008 Issues Paper,¹⁷¹ the MCCOC suggests that fraud offences should be punishable by a maximum period of 10 years imprisonment. In contrast, the *Crimes Act 1961* (New Zealand) provides a tiered scale of penalties depending on the value of the property lost or obtained as a result of the fraud. This scale provides penalties ranging from three months to seven years imprisonment.¹⁷² The *Fraud Act 2006* (United Kingdom) provides penalties of 12 months imprisonment on summary conviction and 10 years imprisonment if convicted on indictment.

Question 5.4.1

What level of penalty does Solomon Islands consider to be appropriate for fraud offences under the revised legislation?

¹⁶⁹ *Penal Code*, section 309 (Obtaining credit by false pretences)

¹⁷⁰ *Penal Code*, sections 305 (Director, etc., of any body corporate or public company wilfully destroying books, etc.) and 306 (Fraudulent falsification of accounts).

¹⁷¹ Solomon Islands Law Reform Commission, Review of the Penal Code and Criminal Procedure Code, Issues Paper 1, November 2008, paragraph 9.26.

¹⁷² *Crimes Act 1961* (New Zealand), section 241.

5.5 Related Provisions

It is understood that Solomon Islands will be reviewing the territorial application of the Penal Code. This revision is especially important in the context of fraud offences, which may often be committed using computers and are often transnational in nature. Solomon Islands may wish to consider whether the current provisions regarding territorial application of the Penal Code are sufficient to ensure that Solomon Islands is able to effectively prosecute fraud offences, especially those offences where the criminal conduct occurs outside of Solomon Islands and the results of that conduct fall within Solomon Islands.

Theft and fraud are closely related offences that share a number of definitions and concepts. Solomon Islands may therefore wish to consider how preferences about policy options discussed in this chapter relate to policy preferences in relation to theft offences. For further discussion of policy options for theft offences, see Chapter 1-Stealing Offences .

Other provisions that incorporate fraud as an element of the offence may be affected by changes made to primary offences about frauds to property. It would be advisable for Solomon Islands to ensure that any offences that currently involve elements of fraud, but that do not focus primarily on criminalising behaviour where property or financial advantage is obtained by deception, are considered as part of the review process.

If Solomon Islands chooses to revise provisions in the Penal Code dealing with fraud, it may wish to repeal current provisions that use ‘fraudulent’ conduct as an element of an offence. If Solomon Islands chooses to include a broad fraud offence, as discussed above, it is suggested that where a current provision criminalises deceptive behaviour to obtain property or financial advantage, it should be repealed. Solomon Islands may also wish to revise other offences currently included in the Penal Code to eliminate references to ‘fraudulent’ conduct.

Chapter 6— Forgery

6.1 Introduction

Forgery refers to the creation and alteration of a document so that it appears to be an original, and therefore trustworthy, document. The target of forgery offences is the false document itself; whether what a forged document says on its face is true or otherwise is not relevant to proving that a forgery offence has taken place.

Forgery is essentially a preparatory offence, and commonly enables substantive fraud offences. For further discussion on fraud offences, see Chapter 5. The intention of forgery offences is to cause a person to rely on the forged document to cause that person, or another person, to gain something or to cause a loss to the victim. Unlike fraud, forgery offences do not require the accused to have obtained property or a financial benefit as a result of the offence. It is sufficient that the accused has falsified an instrument or document with the intention to make a personal gain or to cause a loss to another.

This chapter examines the current state of laws relating to forgery in Solomon Islands and suggests a number of policy issues that Solomon Islands may wish to consider in reviewing these offences. The Solomon Islands Law Reform Commission policy direction of 16 May 2012, stated that the ‘forgery offences in the Penal Code should be replaced with offences of possessing, making or using a false document to do something prejudicial to a person’. Although consultations for the Review of the Solomon Islands Penal Code received few comments specific to forgery offences, this position was supported in those comments that were received.

The LRC policy direction is reflected in the discussion under ‘policy considerations’ below. Considerations raised in this part include possible definitions, fault elements, the purpose of forgery provisions, and whether the current range of offences about forgery could be consolidated into a smaller number of broad offences. Other forgery related offences are discussed towards the end of the chapter.

6.2 Current legislation and case law

The Solomon Islands *Penal Code* [Cap 26] (Penal Code) contains 20 provisions about forgery which include definitions of key terms, a provision stating when intent to defraud will be presumed, as well as a range of offences for forging various kinds of documents, and for using forged documents in a variety of particular circumstances. Penal Code provisions relating to forgery include:

- Section 332 – Definitions for the purposes of sections relating to forgery, etc.
- Section 333 – Definition of forgery

- Section 334 – False Document
- Section 335 – Intent to defraud
- Section 336 – Forgery of certain documents with intent to defraud
- Section 337 – Forgery of certain documents with intent to defraud or deceive
- Section 338 – Forging copies of certificates of records
- Section 339 – Forging registers of births, baptisms, marriages, deaths or burials
- Section 340 – Making false entry in copies of register sent to registrar
- Section 341 – Forgery of other documents with intent to defraud or deceive a misdemeanour
- Section 342 – Forgery of seals and dies
- Section 343 – Uttering
- Section 344 – Uttering cancelled or exhausted documents
- Section 345 – Demanding property on forged documents
- Section 346 – Possession of forged documents, seals and dies
- Section 347 – Making or having possession paper or implements for forgery¹⁷³
- Section 349 – Falsifying warrants for money payable under public authority
- Section 350 – Procuring execution of documents by false pretences
- Section 351 – Letter written for certain persons to be signed, etc., by writer

The complexity of having such a wide array of provisions relating to fraud was demonstrated in the case of *Regina v Solomon Islands National Provident Fund*.¹⁷⁴ In this case, the defendant was charged with uttering a forged document. The document in question was a 'Feasibility Study Report purporting to be made by Pacific Actuarial Solutions Limited'.¹⁷⁵ The defendant successfully applied for the charge to be struck out on the grounds that there is no offence under Solomon Islands law for uttering a forged, non-public document with intent to deceive. Palmer ACJ summarised the forgery provisions under the Penal Code as they applied to the defendant's application by stating:

Section 332 is the definition section. Section 333 gives the definition of forgery, Section 334 the definition of a false document, Section 335 the meaning of "intent to defraud".

¹⁷³ Section 348—purchasing or having in possession certain paper before it has been stamped and issued, is a provision solely related to currency offences.

¹⁷⁴ [2001] SBHC 147.

¹⁷⁵ [2001] SBHC 147.

Sections 336 to 341 specify the type of documents that are capable of being forged. An Insurance Feasibility Study Report does not fall within the description of documents referred to in Sections 336 to 340, at least there has been no suggestion that it does. The only provision that is capable of applying to this type of document is the type described in Section 341. Subsection 341(2) deal with public documents. There has been no suggestion that the Insurance Feasibility Study Report is a public document. Subsection 341(2) therefore cannot apply. The only other provision that would apply is Subsection 341(1). This provision however confines the requisite intent in forgery of documents to “with intent to defraud”. It follows any offences of uttering of such forged document must be confined to the requisite intent of “with intent to defraud” and not “with intent to deceive”.

This excerpt demonstrates the complexity of the provisions under the current criminal code as well as some of the resulting difficulties associated with correctly charging offences. Options for reducing the overall number of provisions under Solomon Islands law are discussed under ‘policy considerations’ below. *Regina v Solomon Islands National Provident Fund* also demonstrates the kinds of difficulties that arise out of maintaining distinctions between ‘public’ and ‘private’ documents and different fault elements for various offences about forgery (‘intent to defraud’ and ‘intent to deceive’).

One common factor across all of these provisions is the definition given to the concept of ‘forgery’. In determining this definition, Solomon Islands Courts have referred to both the Penal Code and the Solomon Islands *Interpretation & General Provisions Act* [Cap 85], in addition to the common law. Section 333 of the Penal Code provides a definition of ‘forgery’:

- (1) Forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Part of this Code the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, shall be punishable as provided in this Part of this Code.
- (2) It is immaterial in what language a document is expressed or in what place within or without Her Majesty's dominions it is expressed to take effect.
- (3) Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law.
- (4) The crossing on any cheque, draft on a banker, post office money order, postal order, coupon, or other document the crossing of which is authorised or recognised by law, is a material part of such cheque, draft, order, coupon, or document.

The definition of ‘document’ given by section 16 of the Solomon Islands *Interpretation & General Provisions Act* includes:

any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter.

Section 334 defines ‘false document’:

- (1) A document is false if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number of any distinguishing mark identifying the document is falsely stated therein; and in particular a document is false-
 - (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; or
 - (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; or
 - (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.
- (2) A document may be a false document for the purposes of this Part of this Code notwithstanding that it is not false in any such manner as is described in subsection (1) of this section.

These provisions are potentially broad enough to mean that both a materially false document as well as a document which is true in form but which contains a false statement could be considered forgeries. However, the scope of these definitions has been limited by reference to the common law. In *Regina v Solomons Mutual Insurance Ltd*,¹⁷⁶ Palmer J cited the common law definition of a forgery, which has been accepted in both English¹⁷⁷ and Australian¹⁷⁸ common law. According to common law:

...a forgery is a document which not only tells a lie, but tells a lie about itself.¹⁷⁹

Due to the introduction of new legislation about forgery offences, this common law definition is no longer relied on in the United Kingdom or in some Australian jurisdictions to determine

¹⁷⁶ [2002] SBHC 116.

¹⁷⁷ See *Regina v More* (1987) 1 WLR 1578, at p 1585; (1987) 3 All ER 825, 830; *Regina v Dodge* (1972) 1 QB 416, 419 (Phillimore LJ).

¹⁷⁸ See *Brott v R* [1992] HCA 5, [2-3]; (1992) 173 CLR 426.

¹⁷⁹ This formulation was first stated by Kenny and Turner, *Kenny's Outlines of Criminal Law* (1902) page 257. It was later adopted into the English and Australian common law on forgery.

whether a forgery has taken place. A discussion of how the common law approach to defining forgery has been incorporated into modern fraud offences is outlined below.

6.3 Policy considerations

a Definition of 'document'

The current definition of 'document' under Solomon Islands law is broader than the definition relied on in other jurisdictions for the purpose of forgery. This means that Solomon Islands may not be able to introduce provisions similar to those recommended by the United Kingdom Law Commission and the Model Criminal Code Officers Committee (MCCOC). Section 16 of the Solomon Islands *Interpretation & General Provisions Act* provides that a 'document' includes:

any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter.

In comparison, the Commonwealth *Criminal Code Act 1995* provides a more limited definition of 'document' that applies only to forgery provisions:

(1) In this Part:

document includes:

- (a) any paper or other material on which there is writing; or
- (b) any paper or other material on which there are marks, figures, symbols or perforations that are:
 - (i) capable of being given a meaning by persons qualified to interpret them; or
 - (ii) capable of being responded to by a computer, a machine or an electronic device;or
- (c) any article or material (for example, a disk or a tape) from which information is capable of being reproduced with or without the aid of any other article or device.

The major difference between the current Solomon Islands definition and the narrower Commonwealth definition is that the Solomon Islands provision states that a document is comprised of both what the document is written on and what is written. In comparison, the Commonwealth provision states that a document is the material that it is written on and does not include what is written. The Australian Capital Territory¹⁸⁰ and the United Kingdom¹⁸¹ have similar definitions to the Commonwealth definition of 'document'.

¹⁸⁰ *Criminal Code 2002* (Australian Capital Territory), section 343.

¹⁸¹ *Forgery and Counterfeiting Act 1981* (United Kingdom), section 8.

Question 6.3.1

Does Solomon Islands wish to include a definition of document to apply to forgery offences that states that a document is the material that it is written on and does not include what is written?

b Definition of a ‘false document’

As noted above, the current position of the law in Solomon Islands is that a forged document tells a lie about itself. According to the MCCOC, this means that:

Forgery at common law applies to false *documents*, not false *statements* contained in documents (emphasis is original).¹⁸²

However, the MCCOC has also noted that determining what is and is not a forgery can be difficult and that the common law position, while pithy, is not instructive in determining hard cases.¹⁸³ The approach favoured by the United Kingdom Law Commission,¹⁸⁴ has been to maintain the common law’s focus on the falsity of the document itself rather than the statements contained within the document:

[42]...the primary reason for retaining a law of forgery is to penalise the making of documents which, because of the spurious air of authenticity given to them, are likely to lead to their acceptance as true statements of the facts related in them. We do not think that there is any need for the extension of forgery to cover falsehoods that are reduced to writing, and we do not propose any change in the law in this regard.

[43] The essential feature of a false instrument in relation to forgery is that it is an instrument which “tells a lie about itself” in the sense that it purports to be made by a person who did not make it (or altered by a person who did not alter it) or otherwise purports to be made or altered in circumstances in which it was not made or altered.

Following the report of the United Kingdom Law Commission, the United Kingdom introduced the following definition of ‘false document’:¹⁸⁵

- (1) An instrument is false for the purposes of this Part of this Act—
- (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
 - (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or

¹⁸² Model Criminal Code Officers Committee, Chapter 3 – Theft, Fraud, Bribery and Related Offences (Final Report, 1995), page 211.

¹⁸³ Model Criminal Code Officers Committee, Chapter 3 – Theft, Fraud, Bribery and Related Offences (Final Report, 1995), page 213.

¹⁸⁴ United Kingdom Law Commission, *Report on Forgery and Counterfeit Currency* (1973, Report No. 55) paragraphs 42-43.

¹⁸⁵ See *Forgery and Counterfeiting Act 1981* (United Kingdom), section 9(2).

- (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
- (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or
- (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
- (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
- (g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
- (h) if it purports to have been made or altered by an existing person but he did not in fact exist.

(2) A person is to be treated for the purposes of this Part of this Act as making a false instrument if he alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

In Australia, the Commonwealth,¹⁸⁶ Victoria,¹⁸⁷ New South Wales,¹⁸⁸ and the Australian Capital Territory¹⁸⁹ have introduced similar legislation to the United Kingdom model.

Question 6.3.2

Does Solomon Islands wish to include a definition of 'false document'? If so, what should this definition be?

The Commonwealth of Australia,¹⁹⁰ New South Wales¹⁹¹ and the Australian Capital Territory¹⁹² also include an additional provision to ensure that a copy of a document is treated in the same way as the document that was copied would be. This means that a person who falsifies a document by copying it, for example by copying a draft onto letterhead paper,¹⁹³ or who copies a document to disguise the fact that it has been falsified will not be able to escape prosecution by claiming that the copy is not, and does not purport to be, the false document and therefore cannot provide evidence of forgery. Section 143.2(3) of the Criminal Code (Commonwealth) provides:

¹⁸⁶ See *Criminal Code Act 1995* (Commonwealth), section 143.2

¹⁸⁷ See *Crimes Act 1958* (Victoria), section 83A.

¹⁸⁸ See *Crimes Act 1900* (New South Wales), section 253.

¹⁸⁹ See *Criminal Code 2002* (Australian Capital Territory), section 344.

¹⁹⁰ See *Criminal Code Act 1995* (Commonwealth), section 143.2(3)

¹⁹¹ See *Crimes Act 1900* (New South Wales), section 250(3).

¹⁹² See *Criminal Code 2002* (Australian Capital Territory), section 344(3).

¹⁹³ See Model Criminal Code Officers Committee, Chapter 3 – Theft, Fraud, Bribery and Related Offences (Final Report, 1995), page 227.

This section has effect as if a document that purports to be a true copy of another document were the original document.

Section 2 of the *Forgery and Counterfeiting Act 1981* (United Kingdom) creates a separate offence for copying a false instrument:

It is an offence for a person to make a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

The United Kingdom provision is slightly narrower than the Commonwealth provision. It potentially excludes the act of copying a true document with the intention of obscuring a change to the contents of the document that would make it a false document, as in the example of copying a draft document onto letterhead.

Question 6.3.3

Does Solomon Islands wish to include a provision to ensure that a document that purports to be a true copy of an original document is treated as if it were the original document or does it wish to include a separate offence for this purpose?

c General forgery offences

Solomon Islands has indicated that it wishes to replace the current suite of forgery related provisions in the *Penal Code* with a small number of general offences about making, using or possessing a false document.¹⁹⁴ Doing so would provide offences about forgery that are broadly applicable to a range of circumstances and varieties of documents. This, in conjunction with revised definitions as discussed above, would also simplify prosecutions by removing a number of sub-groups of offences that exist in current Solomon Islands law. For example, section 341 of the Penal Code distinguishes between public and private documents and applies different fault elements to each. A preference for a small group of broad offences, as indicated by Solomon Islands, could simplify prosecutions for forgery by removing unnecessary distinctions without reducing Solomon Islands capacity to prosecute a wide range of forgery offences.

New Zealand,¹⁹⁵ United Kingdom¹⁹⁶ and a number of Australian jurisdictions have adopted a simplified approach to forgery, which involves enacting a broad offence against making false documents. Separate offences about using or possessing false documents criminalise related

¹⁹⁴ Policy direction from the LRC on property related offences, received 16 May, 2012 (covering questions 119-136 of the LRC 2008 Review).

¹⁹⁵ *Crimes Act 1961* (New Zealand), sections 256-259.

¹⁹⁶ *Forgery and Counterfeiting Act 1981* (United Kingdom).

conduct. Together, these provisions create a simple and comprehensive legal framework against forgery. For example, the Model Criminal Code provides:¹⁹⁷

19.3 Forgery - making false document

A person who makes a false document with the intention that the person or another will dishonestly use it:

- (a) to induce some person to accept it as genuine; and
- (b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.4 Using false document

A person who dishonestly uses a false document, knowing that it is false, with the intention of:

- (a) inducing some person to accept it as genuine; and
- (b) by reason of so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

19.5 Possession of false document

A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will dishonestly use it:

- (a) to induce some person to accept it as genuine; and
- (b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

The general offence provisions in the Model Criminal Code are based on sections 1-3 of the *Forgery and Counterfeiting Act 1981* (United Kingdom), which provide:

¹⁹⁷ MCCOC (1995), *Final Report—Chapter 3: Theft, fraud, bribery and related offences*, pp 320-321. Other forgery-related provisions in Australian jurisdictions include: *Criminal Code Compilation Act 1913* (Western Australia), section 474; *Criminal Code Act* (Northern Territory), section 258; *Criminal Law Consolidation Act 1935* (South Australia), subsection 140(3); *Criminal Code Act 1899* (Queensland), section 488; *Crimes Act 1900* (New South Wales), sections 253-255; *Criminal Code 2002* (Australian Capital Territory), section 346-348; *Crimes Act 1961* (New Zealand), sections 256-257; *Penal Code [Cap 135]* (Vanuatu), sections 139-140; *Criminal Offences Act [Cap 18]* (Tonga), sections 170-171.

1 The offence of forgery

A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

2 The offence of copying a false instrument

It is an offence for a person to make a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

3 The offence of using a false instrument

It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Question 6.3.4

How does Solomon Islands wish to frame general offences about making, using or possessing a false document?

d fault elements: 'intent to cause prejudice' and 'dishonesty'

Solomon Islands has indicated a preference that intent to prejudice a person should be the mental fault element for new forgery offences under the revised Penal Code.¹⁹⁸ This section discusses prejudice as a fault element in comparison with dishonesty. This discussion may be of benefit to Solomon Islands in determining which approach is the most suitable for the needs of Solomon Islands. 'Intent to cause prejudice' has been adopted as the requisite fault element in the United Kingdom, while 'dishonesty' is the standard used under the Model Criminal Code. Model Criminal Code provisions. For example, the United Kingdom *Forgery and Counterfeiting Act 1981* requires that the defendant acts with 'intent to prejudice', while the Model Criminal Code requires that a person engage in the offending conduct 'dishonestly with a view to obtaining a gain or causing a loss'.

Prejudice is defined by section 10 of the United Kingdom Forgery and Counterfeiting Act as:

...an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs—

(a) will result—

(i) in his temporary or permanent loss of property; or

¹⁹⁸ Policy direction from the LRC on property related offences (covering questions 119-136 of the LRC 2008 Review).

- (ii) in his being deprived of an opportunity to earn remuneration or greater remuneration; or
- (iii) in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or
- (b) will result in somebody being given an opportunity—
 - (i) to earn remuneration or greater remuneration from him; or
 - (ii) to gain a financial advantage from him otherwise than by way of remuneration; or
- (c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty.

In electing to include dishonesty rather than intent to cause a person to act to their prejudice as a fault element for forgery offences, the MCCOC argued that prejudice is a complex concept which is difficult to define adequately.¹⁹⁹ Intent to cause a person to act to their prejudice was also criticised by the MCCOC for the reason that it does not clearly include cases where there is a dishonest intent to gain without consideration of from whom the gain is made, and could extend to include cases where there is no dishonest intention, for example where a person uses a false document to secure property that they believe is theirs.²⁰⁰ Dishonesty was also preferred on the basis that dishonesty as a fault element is used for other offences in English law and under the Model Criminal Code, including fraud, theft and blackmail.

An alternative approach is to exclude the fault elements of ‘prejudice’ and ‘dishonesty’ to create a provision that targets the conduct of the defendant, rather than their intentions. For example, the *Crimes Act 1900* (New South Wales) only requires that the offender knows the document is false and uses it with intent that it be used for one of the prescribed purposes. Excluding the element of dishonesty reduces the number of elements for the prosecution to prove and may further simplify prosecution of forgery and related offences.

Sections 253-255 of the *Crimes Act 1900* (New South Wales) provide:

253 Forgery—making false document

A person who makes a false document with the intention that the person or another will use it:

- (a) to induce some person to accept it as genuine, and
- (b) because of its being accepted as genuine:
 - (i) to obtain any property belonging to another, or

¹⁹⁹ MCCOC (1995), *Final Report—Chapter 3: Theft, fraud, bribery and related offences*, p 237.

²⁰⁰ MCCOC (1995), *Final Report—Chapter 3: Theft, fraud, bribery and related offences*, p 237.

- (ii) to obtain any financial advantage or cause any financial disadvantage, or
- (iii) to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 10 years.

254 Using false document

A person who uses a false document, knowing that it is false, with the intention of:

- (a) inducing some person to accept it as genuine, and
- (b) because of its being accepted as genuine:
 - (i) obtaining any property belonging to another, or
 - (ii) obtaining any financial advantage or causing any financial disadvantage, or
 - (iii) influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

255 Possession of false document

A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will use it:

- (a) to induce some person to accept it as genuine, and
- (b) because of its being accepted as genuine:
 - (i) to obtain any property belonging to another, or
 - (ii) to obtain any financial advantage or cause any financial disadvantage, or
 - (iii) to influence the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

In considering which fault elements to apply to forgery offences, Solomon Islands may wish to consider whether it would like to include common fault elements across a number of offences in the revised legislation. For example, if Solomon Islands wish to apply the fault element of dishonesty to forgery offences, it may wish to consider whether this fault element should also be used in relation to theft, fraud, blackmail and related offences.

Question 6.3.5

Which mental fault element/s should apply to forgery offences in Solomon Islands?

e Inducing a person to accept a false document

Section 251 of the *Crimes Act 1900* (New South Wales) and section 346 of the *Criminal Code 2002* (Australian Capital Territory) also include provisions on the meaning of ‘inducing acceptance of a false document’. These provisions clarify that inducing acceptance of a false document extends to circumstances involving machines, and that it is not necessary that the accused intended to induce a particular person to accept the false document as genuine. Section 345 of the *Criminal Code 2002* (Australian Capital Territory) provides:

For section 346 (Forgery), section 347 (Using false document) and section 348 (Possessing false document)—

- (a) a reference to inducing a person to accept a document as genuine includes a reference to causing a computer, machine or electronic device to respond to the document as if it were genuine; and
- (b) it is not necessary to prove an intention to induce a particular person to accept the false document as genuine.

Including a similar provision in the new Crimes Bill would add clarity to interpretation of forgery-related offences.

Question 6.3.6

Does Solomon Islands wish to include a provision in the new Crimes Bill that clarifies application of the offence of ‘inducing acceptance of false document’?

f Purpose of forgery

Forgeries may be made for a wide variety of purposes, including causing an economic gain or loss, influencing a person in the exercise of a public duty or causing a serious, non-economic loss. Of these purposes for conducting a forgery, only the first two are usually considered to be within the concern of criminal law. This can be seen in the above extracts from the Model Criminal Code, the *Crimes Act 1900* (New South Wales), *Criminal Code 2002* (Australian Capital Territory). For example, paragraph 19.3(b) of the Model Criminal Code states that the purpose of making a forged document must be to:

...obtain a gain or cause a loss or to influence the exercise of a public duty

The MCCOC considered whether to extend this provision to include circumstances where a forgery is carried out for the purpose of causing a serious, non-economic loss. The example used by the MCCOC was the forgery of a letter by one person, to convince a woman to leave her husband.²⁰¹

²⁰¹ MCCOC (1995), *Final Report—Chapter 3: Theft, fraud, bribery and related offences*, p 239.

Another potential example of forgery for a non-economic purpose could be the forgery of a security pass to access a privately owned building. In the similar case of a forgery of a drivers licence, the intent is to influence police officers and other duty holders to allow the person in possession of the forged licence to continue to drive on public roads. It is therefore a forgery to influence the exercise of a public duty. However, the same is not true of a forging a security pass to gain access to a private building. In this case there is no 'public duty' and the conduct would fall outside of the scope of forgery provisions, including those set out in the Model Criminal Code, which apply only to economic gain or loss and influencing a public duty. Nevertheless, the MCCOC cautioned that the inclusion of terms to cover this kind of conduct would 'considerably broaden the ambit' of forgery under the Model Criminal Code.

Question 6.3.7

Does Solomon Islands wish to limit the scope of forgery offences to forgeries for the purpose of causing an economic gain or loss and influencing a person in the exercise of a public duty, or should forgery offences also apply to forgeries for the purpose of causing a serious, non-economic loss?

g Making or possessing devices for making false documents

A number of jurisdictions in Australia²⁰² as well as New Zealand²⁰³ and the United Kingdom make it an offence for a person to make or have in his or her possession equipment used for forging documents. A simple provision which criminalises such conduct is found in section 264 of the *Crimes Act 1961* (New Zealand):

Paper or implements for forgery

Every one is liable to imprisonment for a term not exceeding 10 years who, without lawful authority or excuse, has in his or her possession or under his or her control anything capable of being used to forge any document with intent to use it for such a purpose.

The Model Criminal Code contains a similar offence, which only applies to things which have been 'designed' or 'adapted' for making false documents. This is narrower than the equivalent New Zealand provision, which applies to any thing that can be used to forge a document and which is under the control of a person for the purpose of forgery.

Section 19.6 of the Model Criminal Code provides:

- (1)** A person who makes, or has in his or her possession, any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed

²⁰² Offences include *Criminal Code Compilation Act 1913* (Western Australia), section 474; *Criminal Code Act* (Northern Territory), section 270; *Criminal Law Consolidation Act 1935* (South Australia), section 140(6); *Criminal Code Act 1899* (Queensland), section 510; *Crimes Act 1900* (New South Wales), section 256; *Criminal Code 2002* (Australian Capital Territory), section 349; *Crimes Act 1961* (New Zealand), section 264.

²⁰³ *Crimes Act 1961*, section 264.

or adapted, with the intention that the person or another person will use it to commit forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

(2) A person who, without lawful excuse, makes or has in his or her possession any device, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

Question 6.3.8

Does Solomon Islands wish to make it an offence to criminalise possessing the implements for forging documents in the Crimes Bill?

h False accounting –

Although the common law on forgery, and subsequent codifications of that law, proceed from the general rule that ‘a forgery is a document which not only tells a lie, but tells a lie about itself’,²⁰⁴ Solomon Islands may wish to consider including a specific offence about ‘false accounting’. False accounting refers to the act of making false statements about the financial position of a person or corporate body in financial records. This offence can be considered to be an exception to the general rule that a forged document tells a lie about itself. False accounts tell a lie in an otherwise legitimate document.

The MCCOC recommends the retention of an offence of false accounting because of ‘the central importance of accounts in the world of commerce’.²⁰⁵ Section 83 of the *Crimes Act 1958* (Victoria) provides:

- (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another—
 - (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
 - (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular—he is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

²⁰⁴ This formulation was first stated by Kenny and Turner, *Kenny’s Outlines of Criminal Law* (1902) page 257. It was later adopted into the English and Australian common law on forgery.

²⁰⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), *Report chapter 3—theft, fraud, bribery and related offences*, 1995, p 231.

- (2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

Question 6.3.9

Does Solomon Islands wish to include a provision about false accounting?

6.4 Penalties

In considering the range of maximum penalties that should apply to forgery offences, Solomon Islands may wish to consider the range of penalties that apply to similar offences in other jurisdictions. Although a maximum penalty of 14 years was suggested during consultations conducted by the Solomon Islands Law Reform Commission, this penalty level is higher than those in place in jurisdictions referred to in this Chapter. In considering penalty levels for the Model Criminal Code, the MCCOC recommended that:

The penalty for forgery should be lower than for fraud because the offence is essentially preparatory: it does not require proof that any property or financial advantage was obtained. Where property or a financial advantage is obtained, the defendant can and should be charged with the appropriate fraud offence. The penalty ought to be set one level lower than for theft and fraud at 7.5 years.

Penalty levels for equivalent offences in other jurisdictions tend to be slightly higher than recommended by MCCOC. For example, New Zealand²⁰⁶ and Victoria²⁰⁷ both set the maximum penalty level for forgery and false accounting at 10 years imprisonment. The penalty for forgery offences in the United Kingdom,²⁰⁸ New South Wales,²⁰⁹ and the Australian Capital Territory²¹⁰ is also 10 years imprisonment; however the penalty for false accounting in these jurisdictions is 7 years.²¹¹

The MCCOC also recommended that:

The offence of possessing forgery implements without lawful excuse is less serious because no intent to prejudice another has to be proved. The penalty for this offence is 2 years (s.19.6).

²⁰⁶ *Crimes Act 1961* (New Zealand), sections 256-258, 260.

²⁰⁷ *Crimes Act 1958* (Victoria), sections 83-83A.

²⁰⁸ *Forgery and Counterfeiting Act 1981* (United Kingdom), section 6.

²⁰⁹ *Crimes Act 1900* (New South Wales), sections 253-255.

²¹⁰ *Criminal Code 2002* (Australian Capital Territory), sections 346-348.

²¹¹ *Theft Act 1968* (United Kingdom), section 17; *Crimes Act 1900* (New South Wales), section 192G; *Criminal Code 2002* (Australian Capital Territory), section 350.

Again, other jurisdictions have higher penalties in place, ranging from 2-10 years in the Australian Capital Territory,²¹² 3-10 years in New South Wales,²¹³ 5-10 years in Victoria,²¹⁴ and 10 years in New Zealand²¹⁵ and the United Kingdom.²¹⁶

Question 6.4.1

What penalty levels do Solomon Islands consider to be appropriate for forgery offences under the revised legislation?

6.5 Related provisions

As forgery is a preparatory offence for fraud, which in turn is closely related to theft offences, Solomon Islands may wish to consider the interaction of definitions and concepts that are shared across these crime types. Solomon Islands may therefore wish to consider how preferences about policy options discussed in this chapter relate to policy preferences in relation to both fraud and theft offences. For further discussion of policy options for theft offences, see Chapter 1—*Stealing Offences*. For further discussion of policy options for fraud offences, see Chapter 5—*Fraud*.

²¹² *Criminal Code 2002* (Australian Capital Territory), section 349.

²¹³ *Crimes Act 1900* (New South Wales), section 256.

²¹⁴ *Crimes Act 1958* (Victoria), subsections 83A(5A)-(5C).

²¹⁵ *Crimes Act 1961* (New Zealand), section 264.

²¹⁶ *Forgery and Counterfeiting Act 1981* (United Kingdom), section 6.

Chapter 7— Extortion

Extortion, also known as blackmail, is the unwarranted demanding of property with menaces.²¹⁷ While extortion is related to robbery, there are two main differences between the offences. Firstly, the offence of extortion is complete upon the demand being made, irrespective of whether any property is transferred.²¹⁸ Secondly, extortion includes a much broader range of threats compared to robbery, which is confined to the use or threat of physical violence.²¹⁹

The need for reform of extortion offences in Solomon Islands was identified by the Solomon Islands Law Reform Commission (LRC) in the 2008 Review of the Penal Code where it was suggested that:²²⁰

The reform of extortion provisions may be particularly relevant in Solomon Islands due to concerns about unwarranted demands for customary compensation.

This Chapter examines current extortion provisions in the Solomon Islands *Penal Code* [Cap 26] and provides suggestions for the possible reform of these offences. These options are examined in the context of the LRC's policy direction of 16 May 2012, which indicated that the Penal Code should include a single broad provision about extortion.

7.1 Current Law

Extortion offences are set out in Part XXX of the Penal Code which deals with robbery and extortion. This Part includes three separate extortion offences, which are based on the now repealed United Kingdom *Larceny Act 1916*.²²¹ The first of these offences captures a number of specific offending behaviours including written demands for property or valuable things, demands pertaining to valuable securities or other documents, threats to accuse a person of committing a serious offence, and demands with intent to force another person to commit buggery or submit to rape. Section 294 provides:

Demanding money etc. with menaces

(1) Any person who -

- (a) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause, any property or valuable thing; or

²¹⁷ MCCOC, Model Criminal Code: Chapter 3: *Theft, Fraud, Bribery and Related Offences Report*, 1995, p 195.

²¹⁸ D Ormerod, *Smith and Hogan's Criminal Law*, 13th edition, 2011, paragraph 25.1.

²¹⁹ MCCOC, Model Criminal Code: Chapter 3: *Theft, Fraud, Bribery and Related Offences Report*, 1995, p 195.

²²⁰ Solomon Islands Law Reform Commission *Review of Penal Code and Criminal Procedure Code; Issues Paper 1*, 2008, paragraph [9.24].

²²¹ This Act has since been repealed and replaced with the *Theft Act 1968* (UK).

(b) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person; or

(c) with intent to extort or gain any property or valuable thing from any person accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime,

is guilty of a felony, and shall be liable to imprisonment for life.

(2) Any person who with intent to defraud or injure any other person-

(a) by any unlawful violence to or restraint of the person of another; or

(b) by accusing or threatening to accuse any person (whether living or dead) of any such crime or of any felony,

compels or induces any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix the name of any person, company, firm or co-partnership, or the seal of any body corporate, company or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of a felony and shall be liable to imprisonment for life.

(3) This section applies to any crime punishable with imprisonment for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal.

(4) For the purposes of this Code it is immaterial whether any menaces or threats be of violence, injury or accusation to be caused or made by the offender or by any other person.

A second extortion offence applies generally to demands for property capable of being stolen.

Section 295 provides:

Demanding with menaces things capable of being stolen

Any person who with menaces or by force demands of any person anything capable of being stolen is guilty of a felony, and shall be liable to imprisonment for five years.

A third extortion offence criminalises the act of threatening to publish or abstain from publishing something about a person in order to gain something of value. Section 296 provides:

Threatening to publish with the intent to extort

Any person who with intent -

- (a) to extort any valuable thing from any person; or
- (b) to induce any person to confer or procure for any person any appointment or office of profit or trust-
 - (i) publishes or threatens to publish any libel upon any other person (whether living or dead); or
 - (ii) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead),

is guilty of a misdemeanour, and shall be liable to imprisonment for two years.

The key terms used to form extortion offences have been well settled by the Solomon Islands courts, which have drawn extensively on English interpretations of the repealed *Larceny Act 1916*. These interpretations make it clear that a person is entitled to make any demand of another person. The behaviour that is targeted by extortion provisions is providing support to these demands through the use of threats or menaces. This principle was affirmed by the Court in *R v Kelly*,²²² which quoted the reasoning of the English Court of Criminal Appeal in *Treacy v Director of Public Prosecutions*:²²³

The offence is committed [...] if a person "makes any unwarranted demand with menaces"... the notion of making an unwarranted demand with menaces involves that the demand is made to or of someone who could comply with it and who could be influenced by the menaces that accompany the demand. The act of making the demand is not, in my view, committed until it is communicated to the person who is being unjustifiably menaced.

Solomon Islands courts have also referred to English decisions to define the term 'menaces':²²⁴

The law says that the menaces employed in the demand do not always have to involve demand by express demand or threat... It does not matter that the menaces are direct or veiled so long as they affect the balance of the ordinary mind to be upset, the offence is committed.

The majority of available cases involve demands made for customary compensation. This pattern aligns with the concerns raised during consultations undertaken by the LRC. The Courts have consistently held that demands for customary compensation that are accompanied by threats or menaces are illegal. For example, the Court in *Regina v Malaketa*²²⁵ held that:

It is not wrong to demand/ask compensation to be paid for an alleged swearing, in custom.
It is wrong to demand compensation to be paid with menaces or by force, threats of harm

²²² [2005] SBMC 9.

²²³ (1971) 55 CrAppR 113 [[1971] 2 WLR 112; [1971] 1 All ER 110; [1971] AC 537], page 130 (Lord Morris).

²²⁴ *R v. Hans Paul Studer* (1916) 11 Cr. App. R. 307 and *R. v. Collister & Warhurst* (1955) 39 Cr. App. R. 100.

²²⁵ [2003] SBHC 81; see also *Regina v Marau* [1993] SBHC 63.

or injury to the life, liberty or property of another person. The law forbids that, section 295 of the Penal Code.

Despite having settled definitions for basic concepts that support extortion offences and having developed a consistent approach to common extortion matters, there remain a number of inherent problems for extortion offences that have been modelled on the United Kingdom *Larceny Act 1916*, including those provided in the Solomon Islands Penal Code. The potential confusion caused by the overlap between these provisions, as identified by the LRC,²²⁶ has provided a ground for at least one appeal to the High Court.²²⁷ English commentators Smith and Hogan have stated that the ‘cardinal problem’ for extortion offences modelled on the United Kingdom *Larceny Act 1916* is:

[where] to draw the line between demands for property which are legitimate and demands which amount to blackmail.²²⁸

This problem manifests itself in regards to the scope of the offence itself and therefore also to the range of defences available to those charged with extortion offences. In Solomon Islands, the problem of defences has been resolved by reference to section 8 of the Penal Code,²²⁹ which provides:

A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

However, this does not resolve the ‘cardinal problem’ identified by Smith and Hogan and elaborated upon in more recent versions of *Smith and Hogan’s Criminal Law*.²³⁰

Not every demand accompanied by a menace will amount to blackmail... [If] there is a menace...but it is in the circumstances a perfectly lawful demand accompanied by a justifiable threat [this should not constitute blackmail]. At the other extreme, a demand by D[efendant] for property to which he is not legally entitled accompanied by a threat to kill V[ictim] would be an obvious instance of blackmail.

²²⁶ Solomon Islands Law Reform Commission *Review of Penal Code and Criminal Procedure Code; Issues Paper 1*, paragraph [9.22].

²²⁷ See *Kemakeza v Regina* [2008] SBHC 44. In this case the appellant Kemakaza claimed that an error on the face of the charge at the Court of first instance denied him the opportunity to enter an early guilty plea, and that he was therefore denied the opportunity to have this taken into account as a circumstance in mitigation at sentencing. The High Court found that although the charge was incorrect on its face, it referred to the correct provision of the Penal Code. As there was no indication that the defect on the face of the charge caused any confusion about what the appellant was to be tried for, the High Court rejected the appeal.

²²⁸ Smith & Hogan (1st ed), 443–444, quoted by The Law Reform Commission of Ireland, “Report on the Law Relating to Dishonesty” (1992), paragraph [11.7].

²²⁹ See for example, *R v Kelly* [2005] SBMC 9.

²³⁰ Ormerod, *Smith and Hogan’s Criminal Law* (13th Edition, 2011), page 945.

Between these two extremes... less clear cut cases emerge: D may threaten to publicize V as a defaulter unless he pays a gaming debt (See *Norreys v Zeffert* [1939] 2 All ER 187, KBD); D may threaten to publish memoirs which expose V's discreditable conduct unless V 'buys' them from him (see Lord Denning's *Report*, Cmnd 2152, paragraphs 31-36); or D may threaten to expose V's immoral relationship with D unless V pays the money which he had promised D (see *Bernhard* [1938] 2 KB 264, [1938] All ER 140, CCA). It is arguable whether the conduct in these cases *ought* to be blackmail (emphasis in original).

On the face of the provisions, all five of the circumstances outlined by Smith and Hogan would fall within the range of conduct covered by extortion offences in the Penal Code. This means that decisions about the kind of behaviour covered by current Penal Code extortion provisions must be made by the Courts in the absence of express limitations provided by Parliament. In the United Kingdom, this problem was cured by the addition of provisions to clarify when a demand with menaces may be considered lawful.²³¹

7.2 Policy Considerations and proposals for reform

a. A single offence about extortion

Extortion could be comprehensively addressed in the new Penal Code by including a single offence that covers general circumstances where a person may use threats to seek a benefit or cause a loss to another. A general extortion offence and definitions of key terms would provide a clear and simple framework to combat this type of conduct in the revised legislation. Several jurisdictions, including the United Kingdom,²³² New Zealand,²³³ Victoria²³⁴ and South Australia²³⁵ have moved towards having a single extortion offence in their criminal laws. The Model Criminal Code Officers Committee (MCCOC) provides the following example of an extortion offence as follows:²³⁶

A person who makes any unwarranted demand with menaces:

- (a) with the intention of obtaining a gain or of causing a loss; or
- (b) with the intention of influencing the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 12 years and 6 months.

²³¹ See *Theft Act 1968* (United Kingdom), paragraphs 21(1)(a), (b).

²³² *Theft Act 1968* (United Kingdom), section 21.

²³³ *Crimes Act 1961* (New Zealand), section 237.

²³⁴ *Crimes Act 1958* (Victoria), section 87.

²³⁵ *Criminal Law Consolidation Act 1935* (South Australia), section 171.

²³⁶ MCCOC, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences Report*, 1995, p 182.

This offence is based on section 21 of the United Kingdom *Theft Act 1968*, and is broad enough to capture the range of conduct currently outlined in sections 294-296 of the Penal Code. Subsection 21(1) of the United Kingdom *Theft Act 1968* provides:

A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces...

Solomon Islands has indicated that it wishes to revise its legislation to include a single broad provision about extortion.²³⁷ This chapter therefore assumes this approach in the following discussion of key issues related to the framing of a single broad extortion offence.

b ‘Unwarranted’ demands

Single broad extortion offences, such as the one outlined above, require that person makes an ‘unwarranted’ demand. The requirement of an ‘unwarranted’ demand could preclude the situation where the threat or menace relates to a ‘warranted’ demand. For example, a warranted demand may exist if a person is lawfully entitled to money owed by the person subject to the demand and therefore entitled to obtain the gain being demanded. If Solomon Islands wish to include the element of an ‘unwarranted demand’ in a new broad single offence of extortion, then consideration could be given to clearly defining this term to ensure clarity.

An example definition of unwarranted demand is provided in the Model Criminal Code:

- (1) A demand is unwarranted unless the person believes that he or she has reasonable grounds for making the demand and reasonably believes that the use of the menaces is a proper means of reinforcing the demand.
- (2) The demand need not be a demand for money or other property.²³⁸

This definition incorporates two tests to determine whether a demand is unwarranted. Firstly, that the defendant did not believe that he or she had reasonable grounds for making the demand, and secondly that the defendant did not reasonably believe that the use of menaces was appropriate in support of the demand.²³⁹

These tests will allow courts to take into account the actual circumstances of a person’s demand or belief as to the demand, measured against its reasonableness. This approach has also been adopted in *Crimes Act 1958* (Victoria), section 87.

In comparison, the New Zealand *Crimes Act 1961* states that a demand will be considered unwarranted if it is supported by a threat to do or not do something that is not ‘reasonable and proper’ in the circumstances. Whether the defendant holds a reasonable belief about their

²³⁷ Policy direction from the LRC on property related offences (covering questions 119-136 of the LRC 2008 Issues Paper).

²³⁸ MCCOC, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences Report* (1995), p 182.

²³⁹ MCCOC, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences Report* (1995), p 183.

rights to the property sought by the demand is not relevant in determining whether they have committed an offence. Subsection 237(2) provides:

Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.

This provision has the effect that a person with a genuine claim will be guilty unless he or she believes that it is reasonable and proper to use menaces to enforce their claim.

Consultations in Solomon Islands undertaken by the Law Reform Commission highlighted concerns that customary dispute settlement practices could fall within extortion provisions in the Penal Code. Although decisions by the Courts indicate that using violence to enforce customary demands is not permitted under Solomon Islands law, Solomon Islands may wish to explicitly address this issue in legislation. One possible avenue for doing so would be through a definition of unwarranted demands which explicitly outlines how the law of extortion should apply to customary law in Solomon Islands. This may assist to ensure that customary practice is not improperly used as a defence to extortion charges.

Alternatively, a provision similar subsection 237(2) of the New Zealand *Crimes Act 1961* would place the focus on the conduct of the defendant in making a threat, and would not require the court to consider the validity of any claims about customary rights.

Question 7.1.1

Does Solomon Islands wish to include the element of ‘unwarranted demand’ in a new broad general offence of extortion?

Question 7.1.2

If so, should this term be defined, and should customary practices be included in such a definition?

c Menaces

Another key element for extortion offences is that the unwarranted demand must be accompanied by ‘menaces’. Solomon Islands may wish to consider whether it prefers to rely on the common law definition of menaces or whether it would prefer that menaces is defined by legislation. Continuing to rely on the common law to define menaces has the advantage of retaining a well settled definition and understanding of this important term, while also allowing its meaning to be reviewed and updated gradually in recognition of changes to the understanding of offending behaviour in Solomon Islands. This approach has been favoured in the United Kingdom, which retained the broad common law definition given to extortion

offences under the repealed *Larceny Act 1916* for the new single extortion offence under the *Theft Act 1968*.

In comparison, a legislated definition of ‘menaces’ may give greater certainty to the scope of this term and allow Solomon Islands Parliament to have greater control over the scope of any extortion offence in the revised legislation. Although it would be possible to define menaces narrowly, a preferred approach would be to favour a broad definition. This would reflect the current common law approach in Solomon Islands and ensure that extortion offences capture a wide range of conduct. An example of a definition of ‘menaces’ can be found in section 18.3 of the Model Criminal Code, which provides:

- (1) ...‘menaces’ includes:
 - (a) an express or implied threat of any action detrimental or unpleasant to another person; and
 - (b) a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office.
- (2) A threat against an individual does not constitute a menace unless:
 - (a) the threat would cause an individual of normal stability and courage to act unwillingly in response to the threat; or
 - (b) the threat would cause the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.
- ...
- (4) It is immaterial whether the menaces relate to action to be taken by the person making the demand.

Importantly, subsection 18.4(4) of the Model Criminal Code clarifies that a defendant commits extortion if he or she makes a demand which is supported by threats made by another person. A similar position exists at common law in the United Kingdom.²⁴⁰

Question 7.1.3

Does Solomon Islands wish to define the term ‘menaces’?

Question 7.1.4

If so, what would be an appropriate definition of ‘menaces’?

²⁴⁰ See *Lambert* [2009] EWCA Crim 2860.

d Making a gain or causing a loss

The requirement that extortion relies on an intention to make a gain or cause a loss operates to limit extortion offences to circumstances where the defendant menaces a victim with a view to secure an economic or proprietary interest. This limitation was recommended by MCCOC on the basis that threats in relation to non-economic matters or things are best captured under other offence types.²⁴¹ Menaces for the purpose of gaining approval to construct a building or demands for sexual relations would not be caught by extortion provisions that are limited to circumstances where the defendant intends to make an economic gain or cause an economic loss.²⁴² This position is in contrast to the current extortion provisions in Solomon Islands which cover both of these circumstances.²⁴³

Definitions for the terms ‘gain’ and ‘loss’ are discussed in Chapter 1-Stealing Offences. Solomon Islands may wish to consider whether this definition should also apply to extortion offences. This would mirror the approach taken in most jurisdictions including the United Kingdom *Theft Act 1968*,²⁴⁴ the Model Criminal Code,²⁴⁵ the Victoria *Crimes Act 1958*²⁴⁶ and the New South Wales *Crimes Act 1900*.²⁴⁷ For example, the definition of gain or loss that applies to extortion offences under the Model Criminal Code provides:²⁴⁸

“**gain**” or “**loss**” means gain or loss in money or other property, whether temporary or permanent, and:

- (a) “**gain**” includes keeping what one has; and
- (b) “**loss**” includes not getting what one might get.

Solomon Islands may wish to consider what types of gain or loss would be appropriately captured under a general extortion offence.

Question 7.1.5

Does Solomon Islands prefer that extortion provisions rely on the same definitions for gain and loss as other offences under the revised legislation?

Question 7.1.6

If not, what types of gain or loss should be captured by the offence of extortion?

²⁴¹ MCCOC, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences Report* (1995), pages 189-191.

²⁴² MCCOC, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences Report* (1995), pages 189-191.

²⁴³ See Penal Code, subsections 294(3) and 296(b).

²⁴⁴ Subsection 34(2)

²⁴⁵ Section 14.3

²⁴⁶ Section 71

²⁴⁷ Section 249N

²⁴⁸ Section 14.3

7.3 Penalties

The LRC has noted that the United Kingdom has adopted a maximum penalty of 14 years imprisonment for extortion offences, and that the MCCOC recommended a maximum term of 12 years and six months imprisonment.²⁴⁹ During consultations held by LRC, 14 years imprisonment was suggested as an appropriate maximum penalty. This view accords with the approach taken in New Zealand²⁵⁰ and in the majority of Australian jurisdictions, including New South Wales,²⁵¹ Queensland,²⁵² the Northern Territory²⁵³ and the Australian Capital Territory.²⁵⁴ Higher penalties levels apply in Victoria (15 years imprisonment),²⁵⁵ South Australia (15 years imprisonment),²⁵⁶ Western Australia (20 years imprisonment)²⁵⁷ and Tasmania (21 years imprisonment).²⁵⁸

Question 7.1.7

What level of penalty does Solomon Islands consider to be appropriate for extortion under the revised legislation?

7.4 Related provisions

Extortion is closely related to robbery and other theft related offences. Extortion therefore shares a number of definitions and concepts. Solomon Islands may wish to consider how preferences about policy options discussed in this chapter relate to policy preferences in relation to theft offences. For further discussion of policy options for theft offences, see Chapter 1-Stealing offences.

As Solomon Islands has indicated that it wishes to enact a single provision about extortion, it may also wish to consider repealing the current suite of extortion offences contained in sections 294-296 of the Penal Code. It is also noted that as part of the broader review of the penal Code, Solomon Islands may wish to consider whether conduct where a defendant menaces a victim to induce him or her to appoint the defendant to a particular office or position of trust²⁵⁹ or to engage in sexual activity with the defendant²⁶⁰ will be appropriately covered by other provisions in the revised legislation.

²⁴⁹ Solomon Islands Law Reform Commission *Review of Penal Code and Criminal Procedure Code; Issues Paper 1*, paragraph [9.23]. See *Theft Act 1968* (United Kingdom), subsection 21(3); *Model Criminal Code*, section 18.1.

²⁵⁰ *Crimes Act 1961* (New Zealand), section 238.

²⁵¹ *Crimes Act 1900* (New South Wales), section 249K.

²⁵² *Criminal Code Act 1899* (Queensland), section 415.

²⁵³ *Criminal Code Act* (Northern Territory), section 228.

²⁵⁴ *Criminal Code 2002* (Australian Capital Territory), section 342.

²⁵⁵ *Crimes Act 1958* (Victoria), section 87.

²⁵⁶ *Criminal Law Consolidation Act 1935* (South Australia), section 172.

²⁵⁷ *Criminal Code Compilation Act 1913* (Western Australia), section 398.

²⁵⁸ *Criminal Code Act 1924* (Tasmania), section 241.

²⁵⁹ See *Penal Code*, subsection 296(b).

Chapter 8 — Currency offences

Currency offences cover a variety of criminal behaviour such as counterfeiting, possessing materials and equipment for counterfeiting, and offences against the currency itself, such as damaging and ‘clipping’ coins.²⁶¹

Currency offences are rare in Solomon Islands. Nevertheless, it is important to have strong provisions in place as these activities can damage countries by reducing business and consumer confidence in the value of the country’s money.

Solomon Islands succeeded to the *International Convention for the Suppression of Counterfeiting Currency*²⁶² (the Convention) on 3 September 1981. Article 3 of the Convention requires States to criminalise:

- (1) Any fraudulent making or altering of currency, whatever means are employed;
- (2) The fraudulent uttering of counterfeit currency;
- (3) The introduction into a country of or the receiving or obtaining counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit;
- (4) Attempts to commit, and any intentional participation in, the foregoing acts;
- (5) The fraudulent making, receiving or obtaining of instruments or other articles peculiarly adapted for the counterfeiting or altering of currency.

The Convention deems currency offences as extradition offences between parties to the Convention (Article 10) and requires parties to enable counterfeited currency and instruments to be seized and returned to the Government or bank of issue (Article 11).

Solomon Islands implements Article 3 of the Convention under Part XXXVI of the *Penal Code* [Cap 26], and recognises counterfeiting and forgery offences as extraditable offences under the *Extradition Act* [Cap 59].

8.1 Current law

a Legislation

The Solomon Islands *Penal Code* [Cap 26] (Penal Code) currently contains a range of offences relating to the alteration, destruction and counterfeiting of currency. Banknotes are dealt with under the forgery provisions, and coins are dealt with under the counterfeiting provisions.

²⁶⁰ See *Penal Code*, subsection 294(3).

²⁶¹ ‘Clipping’ refers to the process of removing metal from the edge of a coin, particularly of a coin made of gold, silver or another precious metal. The material taken by clipping can be sold or used to make more coins without diminishing the face value of clipped coins.

²⁶² Done at Geneva, 20 April 1929, League of Nations, *Treaty Series*, vol.112, No 2623. The Convention also contains a Protocol which came into force at the same time. Available at <<http://treaties.un.org>>.

Many of the coin offences focus on removing precious metals from the coins (by 'clipping') or using gold, silver and bronze to change the appearance of the money. However, these metals are no longer used in Solomon Islands currency.

The separation of banknote and coin offences reflects the approach previously taken in the United Kingdom. The separation was partly because coins previously contained precious metals and so held both the value of the metal as well as a face value and because, initially, only coins were issued by the State whereas notes were privately issued.²⁶³ Many jurisdictions, including the United Kingdom, Australia and New Zealand, now recognise that the 'true characteristic' of currency is that it is 'lawfully issued and is used as money', regardless of its physical form.²⁶⁴

Section 352 of the Penal Code deals with the counterfeiting of coins. It states:

- (1) Any person who falsely makes or counterfeits any coin resembling any current coin is guilty of a felony, and shall be liable-
 - (a) in a case where the coin resembles a current gold or silver coin, to imprisonment for life; and
 - (b) in a case where the coin resembles a current copper coin, to imprisonment for seven years.
- (2) The offence of falsely making or counterfeiting a coin is deemed to be complete although the coin made or counterfeited is not in a fit state to be uttered or the making or counterfeiting thereof has not been finished or perfected.

Sections 353 and 354 of the Penal Code deal with the alteration and impairment of coins, for example by gilding, silvering or filing; section 355 deals with the possession of counterfeit coins and 'uttering', which is the passing of counterfeit coins from one person to another with intent to defraud the second person; sections 356 and 357 deal with the purchase, importation and exportation of counterfeit coins and section 359 deals with the manufacture and possession of coining implements.

The forgery of banknotes is dealt with in section 336 of the Penal Code. Offences also exist under sections 346, 347 and 348 of the Penal Code for making or possessing forged banknotes, and for possessing paper, materials and other things involved in making banknotes, for

²⁶³ The United Kingdom previously dealt with the forgery of banknotes under the *Forgery Act 1913* (United Kingdom) and the counterfeiting and alteration of coins under the *Coinage Offences Act 1936* (United Kingdom). Banknotes and coins are now dealt with together under the *Forgery and Counterfeiting Act 1981* (United Kingdom).

²⁶⁴ See *Crimes (Currency) Act 1981* (Australia), section 6; *Reserve Bank Act 1989* (New Zealand), sections 29 and 30; *Forgery and Counterfeiting Act 1981* (United Kingdom), section 14. For a general discussion, see United Kingdom Law Commission, *Criminal Law: Report on Forgery and Counterfeit Currency* (Report) [1973] EWLC 55 (1 January 1973), page 35, available at <<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/other/EWLC/1973/55.html&query=report+on+forgery&method=all>>. (UKLC 1973 Report).

example, dies or designs. Other offences about banknotes include passing forged banknotes (section 343), importing forged banknotes (section 346) and selling imitation currency (section 365).

b Case Law

There is only one reported case relating to counterfeiting currency available on the Pacific Islands Legal Information Institute database. In *Regina v Idris*²⁶⁵ a South African couple arrived in Solomon Islands carrying a large quantity of undeclared foreign currency and stolen traveller's cheques. The couple used the traveller's cheques to obtain Solomon Islands \$108,059.68, a portion of which was then converted into New Zealand dollars, British pounds and United States dollars.

According to the Court, police also seized 'some counterfeit dollars' which the Court ordered to be destroyed. The amount and origin of the currency that was counterfeited was not stated in the decision and the defendants were not charged under the Penal Code for counterfeiting offences. Instead, the defendants were found guilty of fraud offences under the Penal Code and for offences under the *Money Laundering and Proceeds of Crime Act 2002*.

8.2 Policy considerations

Solomon Islands may consider simplifying the current currency offence provisions by modernising the language and combining the offences for coins and banknotes where appropriate, taking into account the requirements of the Convention. Issues for consideration are set out below.

a Territorial application

The Convention aims to ensure that sovereign states cooperate to address currency offences. One of the major problems that the Convention sought to address was the difficulty in prosecuting currency offences where a person counterfeits the currency of one country from beyond the jurisdiction of that country. The territorial application of offences under the Penal Code is limited to circumstances where the offensive conduct occurs wholly within Solomon Islands (Penal Code, section 5) and to conduct where part of an offence is committed within, and the offender is within, Solomon Islands (Penal Code, section 6).

Solomon Islands may wish to consider revising the territorial application of its currency offences. The Australian approach is to allow all currency offences which occur within Australia to be prosecuted, regardless of which country's currency is involved, and to allow the prosecution of offences which occur outside Australia if they relate to Australian money.²⁶⁶ The

²⁶⁵ [2009] SBHC 61; HCSI-CC 334 of 2008 (25 November 2009). See also *Idris v Regina* [2008] SBHC 29; HCSI-CRC 108 of 2008 (3 July 2008).

²⁶⁶ See *Crimes (Currency) Act 1981* (Commonwealth of Australia), sections 5 and 23.

United Kingdom and New Zealand only allow the prosecution of offences if a relevant part of the offence took place in their jurisdiction.²⁶⁷ The United Kingdom and New Zealand approach is most similar to the current Solomon Islands approach.

If, as part of redrafting the Penal Code, generally applicable territorial provisions were to be included, Solomon Islands may wish to consider how those provisions would be affected by any specific territorial currency offence provisions.

Question 8.2.1

Does Solomon Islands wish to prosecute only those offences which occur within, or partly within, Solomon Islands, or should territorial application be extended to allow Solomon Islands to prosecute currency offences which relate to Solomon Islands currency even where the offensive conduct takes place entirely overseas?

b Definition – ‘Currency’

A definition of ‘currency’ that applies to both domestic and foreign currency enables the prosecution of a broad range of currency offences and facilitates international cooperation.

Article 2 of the Convention provides that:

In the present Convention, the word “currency” is understood to mean paper money (including banknotes) and metallic money, the circulation of which is legally authorised.

Solomon Islands may consider drawing on the definition of ‘currency’ used in the Solomon Islands *Money Laundering and Proceeds of Crime Act 2002*.²⁶⁸ This definition adopts an approach which is similar to that used in the Convention and it would avoid introducing another definition for currency into Solomon Islands law.

Section 2 of the Money Laundering and Proceeds of Crime Act 2002 provides:

"currency" means the coin and paper money of Solomon Islands or of a foreign country that is designated as legal tender which is customarily used and accepted as a medium of exchange in the country of issue[.]

This definition does not distinguish between domestic and foreign currency offences and would therefore assist Solomon Islands to meet its obligations under Articles 3 and 5 of the Convention.

²⁶⁷ See *Criminal Justice Act 1993* (United Kingdom), section 1(1)(a); *Crimes Act 1961* (New Zealand), sections 6 and 7.

²⁶⁸ *Money Laundering and Proceeds of Crime Act 2002* (Solomon Islands), section 2; *The Currency Declaration Act 2009* (Solomon Islands), section 2(a), also defines as currency other monetary instruments, money in electronic form and precious stones and metals. This is to ensure that Solomon Islands authorities have broad powers to require that things that can readily be exchanged for money are declared to border control authorities when entering or exiting Solomon Islands.

Question 8.2.2

Does Solomon Islands wish to use a definition for 'currency' based on the existing definition of this term under the Solomon Islands *Money Laundering and Proceeds of Crime Act 2002*?

c Definition – 'Counterfeit'

The Penal Code does not define what is meant by 'counterfeit currency'. Instead it relies on the ordinary meaning of counterfeit and the common law to guide the interpretation of this important concept. A definition in respect of forged currency notes can be found in sections 333 and 334 of the Penal Code, however this does not apply to coins.

Solomon Islands may wish to consider including a provision to define 'counterfeit currency'. This would complement a definition of 'currency' by creating a clear distinction between legal 'currency' and illegal 'counterfeit currency'. It may also be of assistance in prosecuting currency crimes by removing doubt as to whether an incomplete or poor quality counterfeit is able to satisfy the physical elements of a currency offence. Examples of incomplete counterfeits include counterfeit banknotes that have only been printed on one side and sheets of paper that have been printed on but not separated into individual banknotes.

The United Kingdom *Forgery and Counterfeiting Act 1981* and the Australian Commonwealth *Crimes (Currency) Act 1981* both define counterfeit currency. Both definitions cover things which have been made to resemble currency, things that have been altered to resemble currency and incomplete counterfeits, and both apply regardless of whether the counterfeit currency could pass as legal tender.

Section 3 of the Australian Commonwealth *Crimes (Currency) Act 1981* provides:

counterfeit money means:

- (a) any article, not being a genuine coin or genuine paper money, that resembles, or is apparently intended to resemble, or pass for, a genuine coin or genuine paper money; or
- (b) any article, being a genuine coin or genuine paper money, that has been altered in a material respect and in such a manner as to conceal, or to be apparently intended to conceal, the alteration;

and includes any such article whether it is or is not in a fit state to be uttered and whether the process of manufacture or alteration is or is not complete.

Section 28 of the United Kingdom *Forgery and Counterfeiting Act 1981* provides:

- (1) For the purposes of this Part of this Act a thing is a counterfeit of a currency note or of a protected coin—

- (a) if it is not a currency note or a protected coin but resembles a currency note or protected coin (whether on one side only or on both) to such an extent that it is reasonably capable of passing for a currency note or protected coin of that description; or
- (b) if it is a currency note or protected coin which has been so altered that it is reasonably capable of passing for a currency note or protected coin of some other description.

(2) For the purpose of this Part of this Act—

- (a) a thing consisting of one side only of a currency note, with or without the addition of other material is a counterfeit of such a note;
- (b) a thing consisting—
 - (i) of parts of two or more currency notes; or
 - (ii) of parts of a currency note, or of parts of two or more currency notes, with the addition of other material,

is capable of being a counterfeit of a currency note.

(3) References in this Part of this Act to passing or tendering a counterfeit of a currency note or a protected coin are not to be construed as confined to passing or tendering it as legal tender.

Both the Australian and United Kingdom definitions follow the recommendation of the United Kingdom Law Commission, which suggested that:²⁶⁹

A counterfeit of a note or coin should be defined as one which sufficiently resembles a genuine note or coin to be reasonably capable of passing for it, and that a thing consisting of one side only of a currency note is a counterfeit of that note, and that a thing consisting of parts of two or more currency notes is capable of being a counterfeit of a currency note.

Question 8.2.3

Does Solomon Islands wish to include a definition of counterfeit currency in the revised legislation?

d Producing counterfeit currency

Article 3(1) of the Convention requires the production of counterfeit currency to be criminalised.

Solomon Islands currently treats the production of counterfeit coins and banknotes as serious offences. The penalty for forging banknotes and counterfeiting gold and silver coins is life

²⁶⁹ UKLC 1973 Report, page 36.

imprisonment (section 336 and paragraph 352(1)(a) of the Penal Code). The penalty for forging copper coins is seven years imprisonment (paragraph 352(1)(b)).

Many of the offences involving coins predominantly apply where the coin is made of precious metals. For example, an offence against taking part of a coin is to prevent a person being able to take a small portion of a coin and sell it at the commodity value of the metal used to mint the coin. Offences about adding something to a coin target conduct where something is added to give it the appearance of having higher value. For example, gilding or silvering a coin under section 353 of the Penal Code.

Solomon Islands could consider consolidating the offences contained in sections 352, 353, 354, 358, 362 and 364 into a single offence concerning the production of counterfeit currency. An example of a single counterfeiting offence can be found in the United Kingdom

Forgery and Counterfeiting Act 1981. This provision applies to both domestic and foreign currency and relies on a separate definition of counterfeit to supply the physical elements of the offence. Section 14 of the United Kingdom *Forgery and Counterfeiting Act 1981* provides:

- (1) It is an offence for a person to make a counterfeit of a currency note or of a protected coin, intending that he or another shall pass or tender it as genuine.
- (2) It is an offence for a person to make a counterfeit of a currency note or of a protected coin without lawful authority or excuse.

While it retains a separate offence of possessing filings and clippings (section 15), the Australian Commonwealth *Crimes (Currency) Act 1981* also contains a similar broad prohibition against producing counterfeit currency (section 6). The interpretation of this provision relies on fault elements under Chapter 2 of the Australian Commonwealth *Criminal Code Act 1995*. As with the United Kingdom offence, the fault element for counterfeiting under the *Crimes (Currency) Act 1981* is intention.²⁷⁰ This avoids the criminalisation of producing counterfeit currency in certain circumstances, for example a person drawing a banknote as 'play' money.²⁷¹

Section 6 of the *Crimes (Currency) Act 1981* provides:

A person shall not make, or begin to make, counterfeit money or a counterfeit prescribed security.

²⁷⁰ *Criminal Code Act 1995* (Australian Commonwealth), Division 5.

²⁷¹ See UKLC 1973 Report, page 37.

Penalty:

- (a) in the case of a person, not being a body corporate—imprisonment for 14 years; or
- (b) in the case of a person, being a body corporate—\$75,000.

Question 8.2.4

Does Solomon Islands wish to replace the current range of offences dealing with the production of counterfeit currency with a single broad offence?

e Related offence - Damaging currency

Solomon Islands may also wish to consider whether there would be a benefit to including a provision to criminalise conduct that damages currency. Sections 362 and 364 of the Penal Code currently make it an offence to deface coins and banknotes. Current offences under the Penal Code for damaging currency range from \$40 for mutilating or defacing currency notes, to six months imprisonment for melting down coins and imprisonment for one year for defacing a coin.²⁷² Solomon Islands may wish to consider whether it would be beneficial to include a single offence dealing with conduct that damages currency in the revised legislation.

An example of this kind of provision is included under section 16 of the Australian Commonwealth *Crimes (Currency) Act 1981*:

A person shall not, without the consent, in writing, of an authorized person, intentionally deface, disfigure, mutilate or destroy any coin or paper money that is lawfully current in Australia.

Penalty:

- (a) in the case of a person, not being a body corporate—\$5,000 or imprisonment for 2 years, or both; or
- (b) in the case of a person, being a body corporate—\$10,000.

Question 8.2.5

Does Solomon Islands wish to include a specific offence about damaging currency?

f Using counterfeit currency

Article 3 of the Convention requires that signatories criminalise conduct where a person attempts to utter counterfeit currency, obtain it, or introduce it into any country. The Convention uses the term ‘uttering’, which is the use of counterfeit currency by passing it from one person to another with intent to defraud the second person.

²⁷² Penal Code, sections 362-364.

The Penal Code currently contains a number of provisions about using counterfeit currency (under sections 355, 356 and 362). Solomon Islands also uses the term ‘uttering’ and could consider simplifying this language by removing references to the legal term ‘uttering’ and replacing this term with more modern language.

A revised offence concerning use could be framed broadly using an approach like that taken in the United Kingdom. Section 15 of the United Kingdom *Forgery and Counterfeiting Act 1981* provides:

- (1) It is an offence for a person—
 - (a) to pass or tender as genuine any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin; or
 - (b) to deliver to another any thing which is, and which he knows or believes to be, such a counterfeit, intending that the person to whom it is delivered or another shall pass or tender it as genuine.
- (2) It is an offence for a person to deliver to another, without lawful authority or excuse, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin.

Australia takes a similar approach in sections 7 and 8 of the Australian Commonwealth *Crimes (Currency) Act 1981* while retaining the concept of ‘uttering’:

7 Uttering counterfeit money or counterfeit securities

A person shall not:

- (a) utter counterfeit money, knowing it to be counterfeit money; ...

Penalty:

- (a) in the case of a person, not being a body corporate—imprisonment for 12 years; or
- (b) in the case of a person, being a body corporate—\$60,000.

8 Buying or selling non-excepted counterfeit money or counterfeit securities

- (1) A person shall not buy, sell, receive or dispose of, or offer to buy, sell, procure or dispose of, non-excepted counterfeit money or a counterfeit prescribed security.

(1A) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A) (see subsection 13.3(3) of the *Criminal Code*).

- (2) A person shall not, with intent to defraud:

- (a) buy, sell, receive or dispose of; or
- (b) offer to buy, sell, procure or dispose of;

an excepted counterfeit coin.

Penalty:

- (a) in the case of a person, not being a body corporate—imprisonment for 12 years; or
- (b) in the case of a person, being a body corporate—\$60,000.

The approach of the United Kingdom and the Australian Commonwealth both meet the requirements of the Convention.²⁷³

Question 8.2.6

Does Solomon Islands want to update the language for currency offences, for example by replacing references to ‘uttering’ with more modern language?

Question 8.2.7

Does Solomon Islands wish to include a broadly framed offence provision which criminalises a range of conduct involving using counterfeit currency?

Question 8.2.8

If so, should this offence include conduct where a person gives or delivers counterfeit currency to another person to enable them, or another person, to commit a currency offence?

g Possessing counterfeit currency

Article 3(3) of the Convention requires parties to criminalise the act of receiving and obtaining counterfeit currency.

The Penal Code currently criminalises possession of counterfeit currency under section 358 and subsections 355(3) and (4). These offences only apply to coins and do not deal with possession of counterfeit banknotes. The offences in section 355 apply when it can be shown that a person intends to deal with the coins.

Solomon Islands may wish to consider modernising these offences so that they apply to the possession of counterfeit currency in general, and whether it wishes to distinguish between mere possession, and possession with intention to deal further with the currency. In its examination of offences related to the possession of counterfeit currency, the United Kingdom Law Commission took the view that:²⁷⁴

The creation of two offences will provide on the one hand for an offence with an adequate penalty for the case where circumstances establish that the accused had knowledge and

²⁷³ The provisions also align with the recommendations of the United Kingdom Law Commission in UKLC 1973 Report, page 38.

²⁷⁴ UKLC 1973 Report, page 40. New Zealand takes a similar approach in sections 263 and 266(3) of the *Crimes Act 1961* (New Zealand).

the requisite intention [to use the counterfeited currency]; on the other hand a person who does not have this intention will not be put in jeopardy of conviction for a serious offence even where he cannot give any acceptable explanation of how he comes to have one or two notes or coins.

Section 16 of the United Kingdom *Forgery and Counterfeiting Act 1981* implements the recommendation of the United Kingdom Law Commission. It provides:

- (1) It is an offence for a person to have in his custody or under his control any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, intending either to pass or tender it as genuine or to deliver it to another with the intention that he or another shall pass or tender it as genuine.
- (2) It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin.
- (3) It is immaterial for the purposes of subsections (1) and (2) above that a coin or note is not in a fit state to be passed or tendered or that the making or counterfeiting of a coin or note has not been finished or perfected.

Solomon Islands may also wish to consider including in the provisions a defence of 'reasonable excuse' so that a person who innocently comes into possession of the currency cannot be prosecuted (for example, the person had not had a chance to surrender it to the police).

Section 9(2) of the Australian Commonwealth *Crimes (Currency) Act 1981* outlines in greater detail the circumstances where possession of counterfeit currency will not be considered an offence:

- (2) It is a defence to a prosecution of a person for an offence against subsection (1) in relation to the possession of counterfeit money or a counterfeit prescribed security if the person charged establishes to the satisfaction of the court:
 - (a) that he or she did not make the counterfeit money or counterfeit prescribed security; and
 - (b) that he or she did not, after the time when he or she first learned that the counterfeit money or counterfeit prescribed security was counterfeit money or a counterfeit prescribed security or the time when he or she acquired the counterfeit money or counterfeit prescribed security, whichever was the later time, have a reasonable opportunity to surrender it to a member of the Australian Federal Police or of the police force of a State or Territory or to any other person prescribed for the purposes of this section.

Question 8.2.9

Does Solomon Islands wish to include a provision to criminalise both the possession of counterfeit currency as well as possession with intention to use the counterfeit currency?

Question 8.2.10

Does Solomon Islands wish to include a defence to identify the circumstances where possession will not be considered an offence?

h Importing and exporting counterfeit currency

Article 3(3) of the Convention requires that parties criminalise introducing counterfeit currency into a country. Solomon Islands may therefore wish to consider whether the current Penal Code provisions dealing with the import and export of counterfeit currency are sufficient to ensure that Solomon Islands is able to meet its obligations under the Convention.

Subsection 357(1) of the Penal Code provides:

- (1) Any person who, without lawful authority or excuse, the proof whereof lies on the accused -
 - (a) imports or receives into Solomon Islands from beyond the seas any false or counterfeit coin resembling any current gold or silver coin, knowing it to be false or counterfeit; or
 - (b) exports from Solomon Islands, or puts on board any ship, vessel or boat for the purpose of being so exported, any false or counterfeit coin resembling any current coin, knowing it to be false or counterfeit,
- is guilty, in the case of importing or receiving, of a felony, and, in the case of exporting or putting on board, of a misdemeanour, and shall be liable to imprisonment for fourteen years.

This provision contains two significant limitations. Firstly, it only applies to the import and export of coins. Solomon Islands may wish to revise this provision to ensure that both coins and banknotes are covered by the scope of the offence. This could be achieved by referring to 'currency' rather 'coin'. Secondly, the provision focusses on the transport of counterfeit currency by sea. Solomon Islands may wish to revise this provision to ensure that other methods of importing and exporting counterfeit currency are included within the scope of this offence.

Section 10 of the Australian Commonwealth *Crimes (Currency) Act 1981* provides an example of a simple provision that applies to all forms of counterfeit currency and covers any method of importing or exporting counterfeit currency:

A person shall not:

- (a) import into Australia or export from Australia counterfeit money, knowing it to be counterfeit money; ...

Penalty:

- (a) in the case of a person, not being a body corporate—imprisonment for 12 years; or
(b) in the case of a person, being a body corporate—\$60,000.

Question 8.2.11

Does Solomon Islands wish to include a revised provision to criminalise the importation and exportation of counterfeit currency that applies to all forms of counterfeit currency?

Question 8.2.12

If so, should this provision criminalise importing and exporting counterfeit currency by any means?

i Attempts

Article 3(4) of the Convention requires parties to criminalise attempts to commit the conduct covered by Article 3 of the Convention. Attempts are currently dealt with under Part XXXIX of the Penal Code. Solomon Islands may wish to consider whether these provisions will apply adequately to any currency offences that are revised as a consequence of this review.

The law of attempts is a principle of criminal responsibility that applies generally to a wide variety of criminal conduct. A detailed discussion of the law of attempts in Solomon Islands and its potential application to revised currency offences therefore lies beyond the scope of this issues paper.

j Possession of equipment and materials for producing counterfeiting currency

Article 3(5) of the Convention requires parties to criminalise:

The fraudulent making, receiving or obtaining of instruments or other articles peculiarly adapted for the counterfeiting or altering of currency.

This requirement is partially addressed under section 348, which applies to banknotes, and section 359 of the Penal Code, which applies to coins. These provisions target a specific list of items and equipment that apply to the counterfeiting of coins and banknotes. However, there are some significant gaps in these provisions. For example, section 348 does not include inks or printers, both of which are essential components in the process of counterfeiting banknotes. Section 359 prohibits the possession of different tools depending on the kind of metal that they are designed to work. These provisions list the technologies and methods in use at the time that the provision was drafted and may therefore not reflect the current methods and technologies used to produce currency whether genuine or counterfeit.

Solomon Islands may wish to consider including a revised provision about the possession of equipment and materials for producing counterfeiting currency that is technology neutral and includes a requirement to show they were intended to be used to commit a currency offence. The kinds of equipment and materials that may be used to produce counterfeit currency could include a range of things that would otherwise be legal to possess, for example, high-quality printers and sophisticated metal working tools. A technology neutral provision would ensure that the offence can continue to operate effectively regardless of changes in the way that currency is made and counterfeited.²⁷⁵

Section 17 of the United Kingdom *Forgery and Counterfeiting Act 1981* provides an example of a technology neutral provision that targets the possession of equipment and materials for producing counterfeit currency:

- (1) It is an offence for a person to make, or to have in his custody or under his control, any thing which he intends to use, or to permit any other person to use, for the purpose of making a counterfeit of a currency note or of a protected coin with the intention that it be passed or tendered as genuine.
- (2) It is an offence for a person without lawful authority or excuse—
 - (a) to make; or
 - (b) to have in his custody or under his control,any thing which, to his knowledge, is or has been specially designed or adapted for the making of a counterfeit of a currency note
- (3) Subject to subsection (4) below, it is an offence for a person to make, or to have in his custody or under his control, any implement which, to his knowledge, is capable of imparting to any thing a resemblance—
 - (a) to the whole or part of either side of a protected coin; or
 - (b) to the whole or part of the reverse of the image on either side of a protected coin.
- (4) It shall be a defence for a person charged with an offence under subsection (3) above to show—
 - (a) that he made the implement or, as the case may be, had it in his custody or under his control, with the written consent of the Treasury; or
 - (b) that he had lawful authority otherwise than by virtue of paragraph (a) above, or a lawful excuse, for making it or having it in his custody or under his control.

Section 264 of the New Zealand *Crimes Act 1961* also contains a simple, technology neutral provision which could be adapted to all forms of counterfeit currency:

²⁷⁵ This is consistent with the recommendations of the United Kingdom Law Commission, UKLC 1973 Report, page 41-42.

264 Paper or implements for forgery

Every one is liable to imprisonment for a term not exceeding 10 years who, without lawful authority or excuse, has in his or her possession or under his or her control anything capable of being used to forge any document with intent to use it for such a purpose.

Question 8.2.13

Does Solomon Islands wish to include a technology neutral offence that targets the possession of equipment and materials for producing counterfeit currency without reasonable excuse?

k Forfeiture of counterfeit currency

Once counterfeit currency has been identified, an important power for governments in protecting the integrity of currency is the power to seize it and permanently remove it from circulation. Article 11 of the Convention requires parties to have in place powers that allow for the seizure of counterfeit currency and equipment and materials to make such currency, as well as to return the currency and instruments to a requesting bank or jurisdiction.

An effective counterfeit currency forfeiture regime requires an effective set of powers to enable law enforcement and customs agencies to seize counterfeit currency (seizure powers) as well as provisions that set out how counterfeit currency can be dealt with once it has been seized. These provisions typically include rules about the destruction of counterfeit currency and other procedures to make it unfit for use in criminal activity, for example by marking it so that it cannot be confused with legitimate currency.

There are two ways of dealing with this;

- 1) search and seizure provisions contained in the same Act, for example in the Criminal Code, or
- 2) General search and seizure policing powers, for example powers under the Solomon Islands Police Act or Criminal Code, are relied on, and specific counterfeit currency forfeiture provisions are included in the Penal Code.

In both cases, Solomon Islands will need to consider whether a warrant should be required.

In developing forfeiture provisions, Solomon Islands may wish to consider including provisions for dealing with counterfeit currency following seizure, with actual powers for seizing counterfeit currency being provided under other legislation, such as the *Police Act 1972* and the Criminal Procedure Code [Cap 7]. Alternatively, Solomon Islands may wish to include, with other currency provisions in the revised Penal Code, a broader provision which includes both seizure powers and provisions for dealing with counterfeit currency following seizure.

At present, the Penal Code only addresses the procedure for dealing with counterfeit currency once it has been seized. Section 366 allows a court to order seized currency and instruments to

be delivered to the Governor-General or a person authorised by him. This would include a requesting bank or jurisdiction. Seizure of counterfeit currency therefore relies on powers under other laws.

Police powers to stop and search persons, vehicles and vessels without a warrant are provided under section 15(1) of the *Criminal Procedure Code*. This provision states that a police officer has a power to search for:

...any article stolen or unlawfully obtained, or any article in respect of which a criminal offence or an offence against the customs laws has been, is being, or is about to be, committed... and may take possession of and detain any such article which he may ... reasonably suspect that a criminal offence ... has been, is being, or is about to be committed.

It is understood that Solomon Islands is currently reviewing police powers to search for and seize items. Under section 15(1) of the *Criminal Procedure Code*, a police officer has the power to seize items related to currency offences without the need to seek further authority from the Court. The power to grant search warrants is separately provided for under Part IV of the Solomon Islands *Criminal Procedure Code* [Cap 7]. It is recommended that Solomon Islands consider the impact any changes to these laws may have on their ability to implement forfeiture provisions for currency offences.

In contrast, the Commonwealth of Australia and the United Kingdom both favour an approach which covers all aspects of the forfeiture of counterfeit currency, and allow for both police officers and customs officials to seize goods. Although both of these jurisdictions have other laws also dealing with police and warrant powers, these particular provisions clarify the way the powers used to seize currency interact with powers to deal with counterfeit currency once it has been seized. The Australian provision is more complex, relying on detailed lists under the *Crimes (Currency) Act 1981* and the operation of general forfeiture powers under the Australian Commonwealth *Crimes Act 1914*.

The Australian and United Kingdom provisions both state what may be required to be forfeited, outline who may seize counterfeit currency, what authorisation is required to exercise this power and the process for disposing permanently of counterfeit currency.²⁷⁶ The two most notable differences between these provisions are in the description of things that may be forfeited under each provision, and the different requirements regarding authorisation to seize counterfeit currency.

²⁷⁶ *Crimes (Currency) Act 1981* (Commonwealth), section 29; *Forgery and Counterfeiting Act 1981* (United Kingdom), section 24.

Regarding what may be seized, the Australian Commonwealth provision contains an extensive list of specific things that may be seized then forfeited.²⁷⁷ In comparison, the United Kingdom provision broadly allows the seizure of ‘any thing which is a counterfeit’ or ‘any thing [that a person has or] intends to use, for the making of any such counterfeit’.²⁷⁸ The United Kingdom approach may be preferred as it applies generally to counterfeit currency as well as any equipment or material linked to currency offences. The use of detailed lists can increase the complexity of legislation and can require amendments to keep pace with changes in the technology used to commit currency offences.

Regarding authorisation to exercise powers, a United Kingdom constable or customs officer must seek authority from a justice of the peace before seizing items related to currency offences,²⁷⁹ while an Australian constable may seize these things without a warrant.²⁸⁰ Australian customs officers may also seize items related to currency offences without a warrant, but must deliver these goods to the Australian Federal Police.²⁸¹ This allows Australian constables and customs officials to act more quickly to intercept counterfeit currency.

Section 24 of the United Kingdom *Forgery and Counterfeiting Act 1981* provides:

- (1) If it appears to a justice of the peace, from information given him on oath, that there is reasonable cause to believe that a person has in his custody or under his control—
 - (a) any thing which is a counterfeit of a currency note or of a protected coin, or which is a reproduction made in contravention of section 18 or 19 above; or
 - (b) any thing which he or another has used, whether before or after the coming into force of this Act, or intends to use, for the making of any such counterfeit, or the making of any reproduction in contravention of section 18 or 19 above,the justice may issue a warrant authorising a constable to search for and seize the object in question, and for that purpose to enter any premises specified in the warrant.
- (2) A constable may at any time after the seizure of any object suspected of falling within paragraph (a) or (b) of subsection (1) above (whether the seizure was effected by virtue of a warrant under that subsection or otherwise) apply to a magistrates’ court for an order under this subsection with respect to the object; and the court, if it is satisfied

²⁷⁷ Section 29, Australian Commonwealth *Crimes (Currency) Act 1981*.

²⁷⁸ *Forgery and Counterfeiting Act 1981* (United Kingdom), section 24(1).

²⁷⁹ *Police and Criminal Evidence Act 1984* (United Kingdom), section 1. Subsection 5(1) of the *Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007* provides customs officials the same powers of seizure as are granted to police constables under section 1 of the *Police and Criminal Evidence Act 1984*.

²⁸⁰ *Crimes (Currency) Act 1981* (Commonwealth), subsection 29(2); Australian Commonwealth *Crimes Act 1914*, section 9.

²⁸¹ *Crimes (Currency) Act 1981* (Commonwealth), subsection 29(3).

both that the object in fact falls within one or other of those paragraphs and that it is conducive to the public interest to do so, may make such order as it thinks fit for the forfeiture of the object and its subsequent destruction or disposal.

- (3) Subject to subsection (4) below, the court by or before which a person is convicted of an offence under this Part of this Act may order any thing shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order.
- (4) The court shall not order any thing to be forfeited under subsection (2) or (3) above where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made.
- (5) Without prejudice to the generality of subsections (2) and (3) above, the powers conferred on the court by those subsections include power to direct that any object shall be passed to an authority with power to issue notes or coins or to any person authorised by such an authority to receive the object.

Although this example demonstrates an approach which covers all aspects of the forfeiture of counterfeit currency, it can also be used to demonstrate provisions that focus more narrowly on the time following seizure of counterfeit currency. For example, subsections 24(3)-(5) of the United Kingdom *Forgery and Counterfeiting Act 1981* deal exclusively with the period of time after items related to currency offences have been seized.

Question 8.2.14

Should forfeiture provisions for currency offences cover aspects of the forfeiture of items related to currency offences both before and after seizure or only from seizure?

Question 8.2.15

Does Solomon Islands wish to use a principled approach to defining the things that may be seized in relation to currency offences, as in the United Kingdom, or does it prefer to use a more detailed list of counterfeit currency, equipment and materials, as in current Solomon Islands law and in Australia?

Question 8.2.16

If Solomon Islands chooses to include forfeiture provisions that cover aspects of the forfeiture of items related to currency offences both before and after seizure, should police require a warrant or other authorisation before seizing items related to currency offences?

Question 8.2.17

Should a magistrate have a broad power to make orders for dealing with counterfeit currency, including powers to order the destruction or disposal of counterfeit currency?

Question 8.2.18

Does Solomon Islands wish to empower custom officials to seize at the border items related to currency offences?

8.3 Penalties

Penalties for currency offences under the Penal Code range from four dollars to life imprisonment depending on the severity of the offence. For example, a fine of \$4 applies to uttering a defaced coin (subsection 363(3)) and a fine of \$40 applies to a person who mutilates or defaces a currency note (section 364). Sentences of imprisonment range from six months for melting down silver coins to imprisonment for life for counterfeiting a gold or silver coin (paragraph 352(1)(a)). Lower maximum penalties apply to convictions for uttering a counterfeit coin (one year imprisonment, subsection 355(1)), possessing three or more counterfeit coins (five years imprisonment, subsection 355(3)), counterfeiting a copper coin (seven years imprisonment, paragraph 352(1)(b)) and ‘impairing’ a gold or silver coin (fourteen years imprisonment, subsection 354(1));

If Solomon Islands wishes to revise the range of currency offences under the Penal Code, it may also wish to consider revising the penalties that apply to these offences. As required by Article 6 of the Convention, Solomon Islands courts may consider convictions which have occurred in foreign jurisdictions when assessing the seriousness of the offence (see section 106 of the Solomon Islands *Evidence Act 2009*).

Penalties in the United Kingdom vary according to whether the defendant commits an act involving counterfeit currency with the intention that the counterfeit be accepted as genuine or whether the defendant merely performs an act involving counterfeit currency without lawful authority or excuse. Subsections 22(1) and (2) of the United Kingdom *Forgery and Counterfeiting Act 1981* state that the maximum penalty where the defendant intends that counterfeit currency is accepted as genuine is 10 years imprisonment or a fine. Acts involving counterfeit currency without lawful authority or excuse are punishable by two years imprisonment and a fine under subsections 22(3) and (4) of the same Act. These penalty levels match the recommendations of the United Kingdom Law Commission.²⁸²

The Australian Commonwealth *Crimes (Currency) Act 1981* provides penalties ranging from two years for damaging currency (section 16) to 14 years for producing counterfeit currency (section 6). Using counterfeit currency may be penalised by a maximum of seven years imprisonment (section 7), possession of equipment or materials for counterfeiting with 10 years imprisonment and importing or exporting counterfeit currency with 12 years imprisonment (section 10).

²⁸² UKLC 1973 Report, page 39.

The New Zealand *Crimes Act 1961* provides penalties ranging from one year for possession of counterfeit coins intending to pass them as genuine (section 266(6)), seven years for possession of counterfeit notes (section 263) to ten years for producing counterfeit currency or having the materials to do so (see section 256 for notes, section 266 for coins, and sections 264 and 266 for equipment to counterfeit). The maximum penalty for using counterfeit notes is seven years imprisonment (section 228) and for coins is three years imprisonment (section 266(5)).

Penalties in the Australian Commonwealth, the New Zealand and United Kingdom Acts do not distinguish between domestic and foreign currency. This is a requirement under Article 5 of the Convention.

Question 8.3.1

What penalty levels does Solomon Islands consider to be appropriate for currency offences in Solomon Islands?

8.4 Related offences

Currency offences are a particular form of forgery. As with forgery, currency offences can facilitate fraud. Solomon Islands may wish to consider the interaction of policy decisions across these crime types and the way that any proposed revisions to currency offences may interact with provisions about forgery and fraud, as discussed in chapter 5 and chapter 6 of this paper.

There are also a number of general policy considerations which will impact on the scope of new currency provisions. Solomon Islands should consider how the application of general principles of criminal responsibility such as, extraterritorial jurisdiction, corporate criminal liability and attempt provisions, will apply in the currency context.

Chapter 9 — Property damage and arson

Criminal damage to property has traditionally involved physical interference with tangible property belonging to another person, including land. Modern technological advances, particularly those related to computers and computer systems, mean that ‘property’ may also be intangible. This can complicate determinations regarding whether property has been ‘damaged’. While there may be some overlap with offences related to theft and fraud, damage to property offences are broader in that they do not require that the offender possess a motive to acquire the property of another, or to cause a loss to another.

Arson is typically defined as criminal damage to property by fire, and may also include damage by explosives. Penalties for arson usually exceed those for other types of property damage. This is because of the unpredictable and uncontrollable nature of fire, the high likelihood of damage to property, the cost incurred in fire-fighting, and the possibility of injury or endangerment to life of a person.

9.1 Current legislation and case law

Part XXXV of the Solomon Islands *Penal Code* (Penal Code) contains ‘offences involving injury to property’, including arson offences, a general offence of damaging property, and a range of offences focussing on damage to particular types of property.

a Property damage offences

The basic property damage offence is punishable by a maximum of two years imprisonment. Subsection 326(1) of the Penal Code provides:

Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and he shall be liable, if no other punishment is provided, to imprisonment for two years.

Section 326 of the Penal Code also sets out a range of special circumstances where higher penalties, ranging from seven years to life imprisonment, apply. The conduct covered by these more serious offences is very specific.

The most serious category of property damage offences, carrying the maximum penalty of life imprisonment, comprise:

- the use of explosives to damage a house or vessel in circumstances where any person is in the dwelling or vessel of where the destruction endangers the life of a person (subsection 326(2));
- damage to the bank or wall of a river or reservoir that causes danger of inundation or damage to any land or building (paragraph 326(3)(a)); and

- destruction of a bridge, viaduct or aqueduct that passes over a highway or canal, or damage to such a structure with intent to render the bridge, viaduct, aqueduct, or associated highway or canal dangerous or impassable (paragraphs 326(3)(b) and (c)).

There is also an offence, punishable by a maximum penalty of fourteen years, for putting any explosive substance in any place with intent to destroy or damage any property (section 327).

There are a range of offences punishable by up to seven years imprisonment that apply to particular types of property damage, including damage to vessels in distress and wrecked or stranded vessels (subsection 326(5)) as well as damage to a vessel or a navigation aid, agricultural machinery, a well or a mine shaft (subsection 326(6)).

In addition, specific offences dealing with casting away vessels, ensure that a person who wilfully and unlawfully ‘casts away’ a vessel (section 323), or attempts to do so (section 324), for instance, by untying it from its mooring, is guilty of an offence. The basic property damage offence in subsection 326(1) may not cover this conduct as the act of untying a vessel would not necessarily damage or destroy it, and it may not be possible to prove that the vessel had been damaged if the final fate of the vessel is not known. The offences of casting away vessels, or attempting to cast them away, also carry higher maximum penalties (14 and seven years respectively) than the basic property damage offence which is punishable by two years imprisonment.

The Penal Code includes offences of wilful and unlawful destruction or damage to official documents or records. Destruction of wills, registers for recording title to property, official registers of births, baptisms, marriages, deaths or burials, carries a maximum penalty of fourteen years imprisonment (subsection 326(4)). Destruction of documents kept in a public office, or which is evidence of title or an estate in land, carries a penalty of seven years imprisonment (subsection 326(7)). There is overlap between these offences, and other offences in the Penal Code, such as fraudulently destroying legal documents in sections 283-286. There are also inconsistencies in the penalties applicable to these document destruction offences. For example, section 284 provides a punishment of three years imprisonment for the fraudulent destruction of documents of title, compared to seven years imprisonment for wilful and unlawful destruction of evidence of title to land or estate under subsection 326(7).

In order to reduce the overlap, complexity and apparent inconsistency in penalties for offences relating to the destruction of legal documents it may be useful to consider whether it is necessary to have the offences in subsections 326(4) and (7) in addition to offences about the fraudulent destruction of documents under sections 283-286. Solomon Islands may wish to consider including official documents of the kinds listed in subsections 326(4) and (7) in the definition of ‘property’ that applies to property damage offences. The definition of property for property damage offences is discussed below. Arson offences

Solomon Islands arson offences cover damage by fire to certain types of property. Damage by fire to other types of property not covered in this Part, including damage by explosive, are covered by the more generic damage to property offences in the rest of Part XXXV.

The arson offences are set out in sections 319 – 322 of the Penal Code. Penalties are tiered depending on the type of property involved.

The maximum penalty of life imprisonment applies to those who ‘wilfully and unlawfully’ set fire to buildings or other structures, aircraft, vehicles or vessels, vegetable produce or mineral or vegetable fuel, or a mine (section 319).

The lesser penalty of 14 years imprisonment applies where the property involved is a crop of cultivated produce, hay, grass, trees, saplings or shrubs (section 321).

Section 320 provides that attempting to set fire to the former category of property (in section 319) carries a maximum penalty of 14 years imprisonment, whereas attempting to set fire to the latter category of property (in section 322) carries a maximum penalty of seven years.

b Case-law

Solomon Islands case-law on ‘injury to property’ largely relates to arson offences. A common element of the current arson and damage to property offences is that the conduct (the damaging or burning) was done ‘wilfully and unlawfully’. Neither of these terms are defined in legislation, so it has been left to the courts to apply the common law to determine what the prosecution must establish in order to prove these elements.

In general, to prove that the conduct was done ‘wilfully’ the prosecution needs to establish that it was done intentionally or recklessly but not accidentally or negligently. In other words, property must be damaged with the intention of destroying or damaging the property, or recklessly as to whether it would be damaged or destroyed. In order to prove the conduct was unlawful, it is necessary to prove that the property in question was owned by another and that the owner did not consent to its damage or destruction.²⁸³

In the case of *Regina v Bartlett* it was alleged that the defendant procured a group of men to burn houses built on land that was owned by his company. The High Court of Solomon Islands found that the prosecution was unable to discharge its burden of proof:²⁸⁴

The land clearly is owned by the accused by virtue of his directorship of Hatanga Ltd, the registered owner of the land, the land is not that of "another" which is critical to the crown’s case. The crown has not satisfied the test that the arson was unlawful within the provision of the law.

²⁸³ *Regina v Bartlett* [2008] SBHC 103; HCSI-CRC 327 of 2005 (14 November 2008).

²⁸⁴ Naqiolevu J, at paragraph 44.

The prosecution had urged the court ‘to exercise great caution in applying principle arising from case law developed in other jurisdictions, given it is common for a person to occupy and build on land that is legally owned by another’.²⁸⁵ Justice Naqiolevu explained that he had no alternative but to apply the law:²⁸⁶

The court while conscious of the serious practical consequences the decision may have, given the common practice for persons to illegally occupy and build on land that is legally owned by another in this country. The courts must not shy away from its responsibility to apply the law to its full extent.

9.2 Policy considerations

The Solomon Islands Law Reform Commission (LRC) indicated in their policy direction of 16 May 2012, that:

[t]he Penal Code should have a general offence for damage to property with a range of maximum penalties applying to specific types of properties, such as wills, court records, land titles etc.

The following discussion will examine policy considerations for including general property damage offences in the revised legislation before discussing offences relating to damage to particular kinds of property. A general arson offence and policy considerations that apply broadly to property damage offences are also discussed below.

a Definition of property

Narrow or broad definition

There are two general approaches to defining ‘property’ for the purposes of property damage and arson offences. The MCCOC recommends using a definition limited to ‘tangible’ property for damage offences as opposed to the definition for theft offences which may be broader, for example by including intangible property. This approach accords with that of the United Kingdom Law Commission, which recommended that ‘the property which can be the subject of an offence of criminal damage should be all property of a tangible nature, whether real or personal’ as physical damage lies at the heart of property damage offences.²⁸⁷ The Model Criminal Code and the United Kingdom *Criminal Damage Act 1971* both exclude intangible property from the concept of ‘property’ as it applies to property damage offences.²⁸⁸

²⁸⁵ Naqiolevu J, paragraph 45.

²⁸⁶ At paragraph 47.

²⁸⁷ United Kingdom Law Commission, *Criminal Law: Report on Offences of Damage to Property* (1970) L.Com. No29, pages 13-14

²⁸⁸ Australian Model Criminal Code, section 4.1.1; *Criminal Damage Act 1971* (United Kingdom), section 10.

In comparison, the New Zealand definition includes both tangible and intangible property, and applies broadly to all crimes containing the term:²⁸⁹

Property includes real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest.

The Cook Islands and Queensland definitions of property also apply broadly to tangible and intangible property.²⁹⁰

The Solomon Islands *Penal Code* applies the same definition of ‘property’ to all property offences. The definition in section 4 of the *Penal Code* is a relatively broad definition including land and personal property, tangible property and some intangible property (such as ‘debts and legacies’ and ‘a right to recover or receive any money or goods’).

Solomon Islands may wish to consider whether to maintain the current broad approach to defining property, or whether a narrower definition for the purposes of property damage offences should be applied (as recommended by MCCOC and the United Kingdom Law Commission). In practice, prosecutions will generally only result from damage to tangible property as it will otherwise be difficult to prove damage or destruction to intangible property. One potential exception is damage to computer data or programs; however it is recommended that computer offences are covered in a separate and specifically tailored suite of offences.

Question 9.2.1

Should property offences only apply to circumstances where tangible property is damaged, or should property damage offences apply to both tangible and intangible property?

Coral and marine life

The essence of ‘property’, including as it is defined in the Solomon Islands Penal Code, is that it is capable of being owned by a person, or at least, something in which a person can have a proprietary interest. For this reason coral and marine life in the ocean at large does not traditionally fall within the definition of property, with the result that damage to coral, marine life and resources, for instance by the use of explosives, is not covered by property damage offences. The LRC advised that they were asked during consultation with the Gela Council of Chiefs—‘Does damage to property cover natural resources such as reefs, marine life, especially when damage [is] caused by using dynamite? Does that also cover the harvesting of coral for sale?’²⁹¹ Generally, this type of behaviour is not covered by property damage offences, but tends to be covered by a separate range of environmental or fishing offences. For instance,

²⁸⁹ Subsection 2(1) of the *Crimes Act 1967*.

²⁹⁰ Section 2 of the Cook Islands *Crimes Act 1969*; Section 1 of the Queensland *Criminal Code Act 1899*.

²⁹¹ These questions were included in the consultation notes on property related offences provided by Solomon Islands Law Reform Commission on 10 June 2009.

section 8 of Solomon Islands *Fisheries Act [Cap 38]* creates an offence of fishing with explosives, poison and other noxious substances which is punishable by a fine of two hundred dollars or imprisonment for six months, or both.

b General property offences

The United Kingdom *Criminal Damage Act 1971* and the Australian Model Criminal Code both feature a small number of broad offences that have relatively high maximum penalties. The United Kingdom Law Commission explained the rationale for this approach by stating:²⁹²

[W]e think that the essence of offences of criminal damage should be the destruction of or damage to the property of another. Distinctions based upon the nature of the property or its situation, or upon the means used to destroy or damage it, or upon the circumstances in which it is destroyed or damaged should not affect the basic nature of the offence...Such features as the means used or their consequences are subsidiary matters relevant, if at all, in regard to sentence. We have had overwhelming support for our proposal to adopt a simple basis for the definition of the offence... [T]he conduct to be penalised should be stated as broadly as possible...

The United Kingdom *Criminal Damage Act 1971* therefore only contains three offence provisions. Section 1 provides the main property damage offence:

- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another-
 - (a) Intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
 - (b) Intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;Shall be guilty of an offence.
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

Section 2 further provides for an offence of threatening to destroy or damage property, and section 3 creates an offence of possessing anything with intent to destroy or damage property. The Model Criminal Code contains the same three basic property damage offences.²⁹³

²⁹² United Kingdom Law Commission, *Criminal Law: Report on Offences of Damage to Property* (1970) L.Com. No29, at p. 7.

²⁹³ Australian Model Criminal Code, sections 4.1.6, 4.1.9 and 4.1.10.

This approach does not distinguish between different types of property. The advantage of the United Kingdom approach is that it is simple, which can improve its application by police, prosecutors and the courts. Assuming that Solomon Islands relies on a broad definition of property, as discussed above and in Chapter 1, an approach similar to that used in Australia or the United Kingdom will ensure that all kinds of property damage is made illegal, including in circumstances where the method of causing damage is not anticipated by the legislature. This consolidated approach also preserves a broad judicial discretion to apply a penalty that is appropriate to the circumstances of each case. The disadvantage of this approach is that it comes at the cost of the legislature specifically tailoring penalties for specific types of property damage that reflect particular areas of community concern.

Question 9.2.2

Does Solomon Islands wish to include a small number of general offences for damage to property?

c Additional provisions targeting specific kinds of property damage

Given the LRC has indicated that a range of penalty levels should apply to property damage offences in certain circumstances, it may wish to consider whether a small number of general property offences should be supplemented with a number of specific provisions. These provisions generally apply to two separate categories of considerations.

The first category of considerations relates to whether warrant further protection should be given to specific kinds of property through the addition of specific provisions about damage to that kind of property. For example, the New Zealand *Crimes Act 1961* contains a broad property damage offence as well as additional offences for damage to specific kinds of property, including ‘contaminating food, crops, water and other products’ under section 298B.²⁹⁴ These additional offences carry higher penalties.

The second category of consideration relates to the circumstances surrounding the offence, for example, New South Wales provides for more severe penalties where property damage is caused ‘during a public disorder’,²⁹⁵ where there is intent to seriously endanger another person or cause serious bodily injury to another person,²⁹⁶ and where the person damages property in the company of others committing serious offences.²⁹⁷

The disadvantage of including additional specific provisions is that this may result in lengthy and more complex legislation to deal with property offences. This approach may also necessitate more frequent amendments than if Solomon Islands chooses to rely only on a small number of

²⁹⁴ See also *Crimes Act 1961* (New Zealand), sections 248-252, 270-272, 298A.

²⁹⁵ Subsections 195(2) and 196(2) NSW *Crimes Act 1900*.

²⁹⁶ Section 198 NSW *Crimes Act 1900*.

²⁹⁷ Subsection 195(1A) NSW *Crimes Act 1900*.

broad provisions. For instance, technological advances have created new types of property damage, such as damage to computer data. It may also restrict judges in handing down sentences that match the seriousness of offending in any particular case. For example, Solomon Islands may prefer that judges retain the flexibility to impose high penalties for particularly serious offences regardless of whether the defendant's conduct is covered by an additional provision to target damage to a specific kind of property or in particularly serious circumstances.

Question 9.2.3

Does Solomon Islands wish to include additional provisions to apply different penalty levels to property damage offences in certain circumstances?

Question 9.2.4

If Solomon Islands chooses to include additional provisions to cover property damage offences in certain circumstances, what circumstances should these provisions cover?

d Arson

Arson is a form of damage to property involving fire or explosives. Arson is usually dealt with as a specific offence because:²⁹⁸

...there are significant benefits in retaining public understanding and acceptance of the law, when the crimes...coincide with well known and well accepted names of crimes in common usage.

MCCOC opted to retain a separate offence of arson, rather than consolidating this offence into a generic offence of damage to property. Section 4.1.7 of the Model Criminal Code provides the following offence for arson:

(1) A person who:

- (a) causes damage to a building or conveyance by means of fire or explosive, and
- (b) intends to cause, or is reckless as to causing, damage to that or any other building or conveyance,

is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

(2) A person who:

- (a) makes to another person a threat to damage any building or conveyance belonging to that other person or a third person by means of fire or explosives, and

²⁹⁸ MCCOC, Chapter 4: Damage and Computer Offences, Final Report (January 2001), page 5.

(b) intends that other person to fear that the threat will be carried out or is reckless as to causing that other person to fear that the threat will be carried out,
is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(3) In the prosecution of an offence against subsection (2) it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

(4) In this section:

building includes:

(a) a part of a building, or

(b) a structure (whether or not moveable) that is used, designed or adapted for residential purposes.

conveyance means a motor vehicle, motor vessel or aircraft.

New Zealand also maintains a separate category of arson offences which cover damage by fire or explosive and carry more severe penalties than basic property damage offences.²⁹⁹

In contrast, under the United Kingdom *Criminal Damage Act 1971*, the only distinction between causing property damage by fire (arson) and property damage through other means is that subsection 1(3) of the United Kingdom Act requires that property damage by fire is charged as 'arson'. The same penalty applies regardless of whether the defendant damaged property by fire or by any other means.³⁰⁰

Question 9.2.5

Does Solomon Islands wish to include a separate offence of arson?

Question 9.2.6

If a separate arson offence is included, should this use the same basic definitions, principles and fault elements as for other property damage offences?

Question 9.2.7

Does Solomon Islands wish to include an additional offence in the Penal Code for damaging coral, marine life and other oceanic resources?

e Damage to property that is jointly or communally owned

Solomon Islands may wish to include a provision to ensure that a joint or communal owner of property cannot escape criminal liability for damage to that property by virtue of that fact.

²⁹⁹ *Crimes Act 1961* (New Zealand), section 267.

³⁰⁰ *Criminal Damage Act 1971* (United Kingdom), section 4.

Such a provision may be of interest to Solomon Islands given that ‘communal ownership of property is common’ and that ‘approximately 90 per cent of the land in Solomon Islands is held under customary land tenure’.³⁰¹ Communal and joint ownership of property has been examined in detail in Chapter 4—Unlawful use and other offences related to theft.

A provision about jointly or communally owned property could be used to ensure that, if a person shares rights in property with another person, the first person could be held criminally liable for damaging that property without the consent of the other person. A provision of this type may also mean that a communal owner of property, who damages that property without the consent of all other communal owners, could be held criminally liable. It may be decided that certain types of property disputes between communal owners are best resolved under customary law.

The Queensland Criminal Code clarifies the situation with respect to joint ownership by providing:³⁰²

It is immaterial that the person who does the injury is in possession of the property injured, or has a partial interest in it, or an interest in it as joint or part owner or owner in common.

Question 9.2.8

Does Solomon Islands wish to include a provision to ensure that the scope of criminal responsibility for arson or property damage offences includes circumstances where the property in question is jointly or communally owned?

f Mental elements

It is currently a common element of Solomon Islands arson and property damage offences that the damage is done ‘wilfully’. This term is not defined in either the Solomon Islands *Penal Code* or the *Interpretation & General Provisions Act* [Cap 85]. According to *Smith and Hogan’s Criminal Law*:³⁰³

the definition of the *mens rea* element ‘wilful’ or ‘wilfully’ is not as clear as it might be... historically, the term generated a great deal of inconsistent case law... The primary meaning of ‘wilful’ is ‘deliberate’ but it may also include recklessness...

Smith and Hogan’s Criminal Law suggests that replacing the mental element of wilfulness with ‘recklessness’ would be a ‘great simplification’ and ‘improvement’ of English law.³⁰⁴

³⁰¹ *Review of Penal Code and Criminal Procedure Code: Issues Paper 1*, Solomon Islands Law Reform Commission, p. 121 (November 2008)

³⁰² Subsection 458(3).

³⁰³ David Omerod (ed), *Smith and Hogan’s Criminal Law* (13th ed, 2011), page 127.

³⁰⁴ David Omerod (ed), *Smith and Hogan’s Criminal Law* (13th ed, 2011), page 127.

In New Zealand,³⁰⁵ the United Kingdom³⁰⁶ and the Model Criminal Code,³⁰⁷ the defendant must damage property with the intention of destroying or damaging it, or with reckless disregard as to whether it would be damaged or destroyed. The following definition is used in the Model Criminal Code to describe 'recklessness':³⁰⁸

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist, and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur, and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Solomon Islands may wish to consider whether a similar mental element should apply to property damage offences.

Question 9.2.9

Does Solomon Islands wish to use modern mental elements (e.g.; intention or recklessness) for the revised property damage offences or does it wish to continue to use 'wilfully'?

Question 9.2.10

If so, should the mental element for property damage be intention or recklessness or both?

g Threatening to damage property or to cause harm

In its policy direction of 16 May 2012, Solomon Islands indicated that it should be an offence to threaten to carry out the offence of arson. Solomon Islands may wish to consider whether it would be appropriate to include a broader provision to make it an offence to threaten to cause damage to property by any means. This broader provision would criminalise threats to damage property by fire or explosives (arson) as well as threats to damage property by other or unspecified means. Section 2 of the United Kingdom *Criminal Damage Act 1976* makes it illegal

³⁰⁵ NZ *Crimes Act 1961*, section 269.

³⁰⁶ United Kingdom *Criminal Damage Act 1971*, sections 1 and 2.

³⁰⁷ Australian Model Criminal Code, paragraph 4.1.6 (1)(b).

³⁰⁸ Australian Model Criminal Code, section 2.2.9

to threaten to destroy or damage property if that property belongs to another person or in a way that is likely to endanger the life of another person:

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out,—

(a) to destroy or damage any property belonging to that other or a third person; or .

(b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or third person; .

shall be guilty of an offence.

The Model Criminal Code contains a similar offence for circumstances where a defendant threatens to damage property and is reckless as to whether this could cause another person to fear injury to themselves or another. Sections 4.1.9 of the Model Criminal Code provides:

(1) A person who:

(a) makes to another person a threat to damage property, and

(b) is reckless as to causing that other person to fear that the carrying out of the threat will kill or cause serious harm to that other person or a third person, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) In the prosecution of an offence against this section it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

(3) In this section, *serious harm* has the same meaning as it has in Part 5.1.

This approach has been followed in the Australian Capital Territory, under section 406 of the *Criminal Code 2002*.

Question 9.2.11

Does Solomon Islands wish to include a broad offence for threatening to damage property that does not differentiate between different ways of damaging property?

Question 9.2.12

Does Solomon Islands wish to include a provision to make it an offence to threaten to damage property in circumstances where this could result in either serious harm to a person or cause a person to fear injury to themselves or another?

9.3 Penalties

a Penalties for property damage

The generic offence in Solomon Islands is currently a misdemeanour carrying a maximum penalty of two years imprisonment.³⁰⁹ This penalty is significantly lower than other jurisdictions that have updated their property damage offences. The corresponding offence in Queensland carries a maximum penalty of five years imprisonment.³¹⁰ The corresponding offence in New Zealand carries a maximum penalty of seven years imprisonment,³¹¹ while generic offences in the United Kingdom³¹² and the Australian Model Criminal Code³¹³ carry a maximum penalty of ten years imprisonment.

There are competing considerations relevant to setting an appropriate penalty for the general property damage offences. Property damage covers very serious instances of property damage, for example the destruction of a building, as well as comparatively minor property damage. The maximum penalty for property damage must therefore be sufficiently high to provide an appropriate penalty for offenders who cause serious damage to large or expensive items of property, without being more severe than penalties that apply to objectively more serious crime types such as murder, sexual offences and serious harm offences.

Solomon Islands may wish to consider balancing a sufficiently high maximum penalty to cover serious cases not be covered by specific aggravated offences against the risk of creating a relatively serious offence that will undoubtedly extend to cover conduct that is too trivial to merit criminal prosecution. A high maximum penalty for a single broad offence can also create a potential for inconsistent penalties to be imposed for similar conduct.

Question 9.3.1

What is the appropriate maximum penalty for property damage offences in Solomon Islands?

b Penalties for arson

There are currently two tiers of penalty for the offences of arson in Solomon Islands Penal Code depending on the type of property involved. A maximum penalty of life imprisonment applies to offences involving setting fire to buildings, structures, aircraft, vessels, vehicles, stacks of cultivated vegetable produce, stacks of mineral or vegetable fuel, mines or the workings, fittings, and appliances of a mine.³¹⁴ A maximum penalty of 14 years imprisonment applies to

³⁰⁹ Subsection 326(1) of the Solomon Islands *Penal Code*.

³¹⁰ Subsection 469(1) Queensland *Criminal Code Act 1899*.

³¹¹ Subsection 269(2) New Zealand *Crimes Act 1961*.

³¹² Subsection 4(2) United Kingdom *Criminal Damage Act 1971*.

³¹³ Section 4.1.6 Australian Model Criminal Code.

³¹⁴ Section 319.

offences involving setting fire to crops and growing plants.³¹⁵ Queensland has an identical, two-tiered penalty structure while other jurisdictions have preferred a single maximum penalty for arson offences.³¹⁶ For example, the United Kingdom has a maximum penalty of life imprisonment for arson offences regardless of the type of property involved.³¹⁷ Lower maximum penalties have been applied to arson offences in the Australian Model Criminal Code (15 years imprisonment)³¹⁸ and in New Zealand (14 years imprisonment).³¹⁹

Question 9.3.2

If the Solomon Islands decide to include a separate offence of arson, what is the appropriate penalty level?

9.4 Related provisions

Offences involving damage to property are typically carried out for a different purpose compared to other property offences. For example, a person who commits theft generally means to obtain possession of another's property for their own purposes, while a person who damages property may mean to prevent any person from having full enjoyment of that property.

Despite this central point of difference, property damage is closely related to a number of property offences. For example, the use of force to enter private property is an element of burglary and may also result in damage to property. This means that property damage may be used as an alternative charge against a person accused of committing burglary. This could occur, for example, where the evidence proves that a person broke a window to enter property but where the prosecution is uncertain as to whether it can successfully prove the mental element for burglary (that having used force to enter property, the defendant intended to commit another offence). Burglary is discussed in more detail in Chapter 2 – Burglary.

Property damage may also occur in other property crime scenarios, for example in the context of fraud where property is defaced to support a fraudulent premise (a luggage tag is cut from a suitcase to support the premise that the owner of the property cannot be found). In circumstances where a defendant damages property with the intention of committing another offence but is interrupted before the second offence can be completed, they may be charged with both the property damage and the attempt to commit the second offence.

³¹⁵ Section 321.

³¹⁶ Queensland *Criminal Code Act 1899*, sections 461, 463

³¹⁷ United Kingdom *Criminal Damage Act 1971*, subsection 4(1).

³¹⁸ Subsection 4.1.7(1) of the Australian Model Criminal Code.

³¹⁹ Section 267 of the NZ *Crimes Act 1961*.

There may also be a link to computer and cybercrime if intangible property, such as software and computer data, is included in the definition of property that applies to property damage offences.

Defences of claim of right and consent are also closely related to property damage offences, as was demonstrated in *Regina v Bartlett*, where the owner of property was able to consent to the destruction of that property by others.³²⁰

³²⁰ *Regina v Bartlett* [2008] SBHC 103; HCSI-CRC 327 of 2005 (14 November 2008).