

SOLOMON ISLANDS
LAW REFORM COMMISSION



**Review of the Penal Code and Criminal Procedure
Code**

First Interim Report

**Corruption Offences Parts X and XXXVIII of the Penal
Code**

2011



THE SOLOMON ISLANDS LAW REFORM COMMISSION
HONIARA, SOLOMON ISLANDS

REVIEW OF THE PENAL CODE AND CRIMINAL PROCEDURE CODE
FIRST INTERIM REPORT
CORRUPTION RECOMMENDATIONS
PARTS X AND XXXVIII OF THE PENAL CODE

2011

Solomon Islands Law Reform Commission

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

The Chairman post is currently vacant.

The Commissioners are:

Mr Gabriel Suri

Mr Waeta Ben Tabusasi C.S.I., S.I.M.

Mrs Sarah Dyer

Rt Reverend Philemon Riti O.B.E.

The Research Manager is Kate Halliday

The Legal Officers are:

Philip Kanairara

Kathleen Kohata

Daniel A. Suluia

The Office Manager is Matilda Dani Diake

The Administration Assistant is Solomon Lincoln Saemala

The project team for this paper was Philip Kanairara and Kate Halliday

The LRC is located at Kalala Haus, Honiara, Solomon Islands, behind the High Court.

PO Box 1534 Honiara

Phone: +677 38773

Fax: + 677 38760

Email: lawreform@lrc.gov.sb

Website: www.lawreform.gov.sb.

Terms of reference	9
Abbreviations and Terminology	10
List of recommendations	11
1. Introduction	17
<i>The approach of the LRC</i>	18
<i>The nature and extent of corruption in Solomon Islands</i>	20
<i>Law reform in other countries</i>	23
<i>Case law on corruption</i>	25
2. Bribery offences: official corruption, corrupt practices	27
<i>Who should be subject to the bribery offences?</i>	27
<i>A single offence of bribery?</i>	34
<i>Should corruption offences apply to corporations?</i>	37
<i>Should there be an offence of bribery to cover foreign public officials and officials of public international organizations?</i>	44
<i>What acts should be covered by bribery?</i>	45
<i>Indirect giving or indirect receipt of benefit</i>	47
<i>Should bribery cover the situation where the receiver of the benefit gets another person to do the favour?</i>	48
<i>Should bribery cover conduct that is outside of the scope of the agent's duties?</i>	49
<i>Benefits that tend to corrupt or influence an agent</i>	52
<i>Should there be an offence where a secret benefit is given for advice outside of an agent/principal arrangement?</i>	55
<i>Proving 'corruptly'</i>	56

3. Abuse of office	65
<i>Existing offences</i>	65
<i>Other jurisdictions</i>	67
UNCAC	67
<i>A new offence</i>	67
4. Defence of culture and tradition	69
5. Punishment and deterrence	71
<i>Maximum penalties</i>	71
<i>Disqualification</i>	73
<i>Repayment or forfeiture</i>	75
<i>Relationship between criminal sanctions and disciplinary or civil actions</i>	76
6. Investigation and prosecution of corruption offences	83
<i>Investigation of offences</i>	83
<i>Other jurisdictions</i>	87
<i>Conclusion</i>	88
<i>Prosecution of corruption offences</i>	90
Appendix 1 Prosecutions for corruption	93
Appendix 2 Submissions and Consultations on the Penal Code	97

Terms of reference

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

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

To enquire and report to me on –

The Review of the Penal Code and Criminal Procedure Code;

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

Dated at Honiara this 1st day of May 1995.

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

Abbreviations and Terminology

DPP – Director of Public Prosecutions

LCC – Leadership Code Commission

LRC – Solomon Islands Law Reform Commission

MCOCC Report; Model Criminal Code – Model Criminal Code Officers Committee of the Standing Committee of Attorneys- General, *Theft, Fraud, Bribery and Related Offences*, Final Report December 1995.

RCDF – Rural Constituency Development Fund

UK – United Kingdom

UNCAC – United Nations Convention Against Corruption

List of recommendations

Recommendation 1

The Penal Code should have one offence of bribery that applies to both public sector and private sector bribery. The offence would apply to:

- (a) members of National Parliament, provincial assemblies and the Honiara City Council, government ministers, constitutional post holders, statutory appointments, judges, magistrates, officers appointed by the Public Service Commission or any commission established by the Constitution or an Act of Parliament, consultants and advisers to government bodies, appointments to state owned enterprises; and
- (b) any person acting on behalf of another with actual or implied authority. The provision should be broad enough to cover middlemen, who are not formally appointed as agent or representative of a group, as well as community and church leaders.

Recommendation 2 (alternative to 1 (b))

If the offence of corrupt practices is retained the definition of agent should include any person acting with implied or actual authority of the principal. The offence should also cover members of National Parliament, provincial assemblies and the Honiara City Council, government ministers, constitutional post holders, statutory appointments, judges, magistrates, officers appointed by the Public Service Commission or any other commission established by the Constitution or any Act of Parliament, consultants or advisers to any government body and appointments to state owned enterprises. The definition should be broad enough to cover middlemen, who are not formally appointed as an agent or representative of groups as well as community leaders and church leaders.

Recommendation 3 (alternative to 1 (a))

If the offence of official corruption is retained it should clearly apply to everyone who performs a public function or holds public office. It should specifically cover members of National Parliament, provincial assemblies and the Honiara City

Council, government ministers, constitutional post holders, statutory appointments, judges, magistrates, officers appointed by the Public Service Commission or any other commission established by the Constitution or any Act of Parliament, consultants or advisers to any government body, appointments to state owned enterprises or anyone else who performs a public function.

Recommendation 4

The Penal Code should have separate offence directed at corporations for the prevention of bribery. The offence would apply where a director, employee or agent of the corporation bribes another with the intention to benefit the corporation.

Recommendation 5

The Penal Code should have an offence of bribery of foreign public officials and officials of international organisations.

Recommendation 6

The bribery offences in the Penal Code should be drafted to cover the actions of providing, offering and promising a bribe, and asking for, inducing, receiving or agreeing to receive a bribe, where the intention is to influence the actions of the agent.

Recommendation 7

The Penal Code should prohibit indirect giving or indirect receipt of a bribe.

Recommendation 8

Bribery offences in the Penal Code should cover the situation where the receiver of the benefit gets another person to do the favour.

Recommendation 9

Bribery should cover conduct that is outside the scope of an agent's duties and include conduct that the agent can engage in because of his or her position.

Recommendation 10

Bribery in the Penal Code should cover giving and receiving benefits that would tend to influence an agent.

Recommendation 11

The Penal Code should have an offence to prohibit giving and receiving secret commissions to give advice to another person.

Recommendation 12

The fault element of corruptly should be replaced with a fault element of improperly.

Recommendation 13

The existing offences in sections 94 and 96 should be replaced with a single offence of abuse of office. It would apply where a public officer or employee of a non government organisation improperly exercises his or her functions, with the intention of getting a benefit for himself or herself, or for another, or a detriment to another.

Recommendation 14

The offence should also apply to a former public officer (and employee of non government organisation) who improperly uses information gained while in public office or employment, with the intention to get a benefit for himself or herself, or for another, or a detriment to another. Information is not used improperly if it is used with the consent of the principal.

Recommendation 15

Custom should be prohibited as a defence for any bribery offences in both the public sector and private sector. Custom might be used as a mitigating factor for the purpose of sentencing.

Recommendation 16

Bribery offences should have a maximum penalty of at least 7 years imprisonment. The maximum fine that might be imposed should be unlimited.

Recommendation 17

The maximum penalty for abuse of office should be increased to 5 years.

Recommendation 18

The Penal Code should include a power for courts to disqualify from public office when a person is found guilty of bribery offences or abuse of office.

Recommendation 19

Amend the Penal Code to clarify that when a person is convicted of a corruption offence that the court can order payment of the amount or value of the benefit received or given by the convicted person to any identified person or body.

Recommendation 20

Section 2 of the Penal Code should be amended to clarify that a person cannot be punished under the Code, and under any other criminal law, for the same act.

Recommendation 21

Introduce legislation to authorise public sector bodies including the Office of the Auditor-General, the Office of the Ombudsman, the Leadership Code Commission, the Royal Solomon Islands Police Force, the Office of Inland Revenue, the Financial Intelligence Unit and Customs to share information with each other, for the purpose of that body's powers and functions.

Recommendation 22

Introduce legislation to provide protection for public officers or other informants subject to a duty to maintain confidentiality who give information to public

sector bodies. This should include protection from defamation (civil and criminal) and other civil actions.

Recommendation 23

Introduce legislation to so that information collected by the Leadership Code Commission regarding the financial affairs of leaders is available to the public.

Recommendation 24

Introduce legislation to allow police to apply to a judge of the High Court for a production order for information that may be related to bribery or abuse of office. Information obtained from a person cannot be used in any subsequent criminal prosecution against the person (save for a prosecution for the offence of failing to provide the information, or a prosecution for perjury).

Recommendation 25

Amend the Penal Code and Evidence Act so that a witness can be required to give evidence in a prosecution for corruption offences even though the answer would tend to incriminate the witness. Any answer given by the witness cannot be used in a criminal prosecution against the witness.

1. Introduction

- 1.1 The LRC commenced the review of the Penal Code and Criminal Procedure Code in 2008. An Issues Paper was released in November 2008 on the Penal Code which provided information, asked questions about reform and called for submissions. In 2009 and 2010 the LRC conducted consultation on the Penal Code in the provinces and Honiara (see Appendix 2 for a list of all consultations and submissions).
- 1.2 Due to the size and complexity of the review of the Penal Code the LRC has broken the review into different areas. This approach will also allow the LRC to give interim reports to the Minister for Justice and Legal Affairs on particular areas in the Penal Code. This paper addresses and makes recommendations for reform of the corruption offences in Parts X and XXXVIII of the Penal Code: official corruption, corrupt practices and abuse of office and the related offences in sections 92, 93 and 94 of the Penal Code. Other offences in the Penal Code, such as larceny and embezzlement, can also be used to prosecute corruption and they will be considered in a separate discussion paper. This paper also considers the legal responsibility of corporations for corruption offences, the relationship between corruption offences in the Penal Code and civil or disciplinary action (under the Leadership Code or Public Service Regulations) and some issues in relation to the investigation of corruption offences.
- 1.3 Not all corruption is covered by the criminal law, and other legislation, such as the National Parliament Electoral Provisions Act, create specific corruption offences. Other legislation prohibits corruption in the areas of financial institutions, customs and excise, gaming, immigration, income tax and mining law. In most cases breaches of these prohibitions attract criminal sanctions. Other legislation, such as the Leadership Code (Further Provisions) Act and the Public Service Regulations allow for disciplinary actions to be

taken (such as reprimand, fine, disqualification from public office and dismissal from employment).

The approach of the LRC

- 1.4 The LRC must make recommendations to the Minister for reform of the law. The terms of reference for the review of the Penal Code state that the recommendations need to address developments in new crimes and make the Penal Code more responsive to the modern needs of Solomon Islands.
- 1.5 In addition the Law Reform Commission Act requires the LRC to make recommendations that will ‘modernise and simplify the law, eliminate defects in the law, introduce new and more effective methods for administration of justice.’¹
- 1.6 The review is also an opportunity to consider whether the Penal Code complies with Solomon Islands’ international obligations. The Solomon Islands has signed the United Nations Convention Against Corruption. The CNURA Government in 2009 indicated a commitment to ratifying this convention.
- 1.7 In order to fulfill its mandate the LRC uses a process that starts with an analysis of the current law, and research about how the law is being applied. During this process the LRC identified some issues or questions that may need to be addressed through law reform.
- 1.8 Following this the LRC undertook consultation across Solomon Islands including meetings with provincial government members, church leaders, women’s provincial councils and general (open) community meetings. Some submissions were also received by the LRC. The LRC participated in the Anti-Corruption Task Force set up by the CNURA government in 2009 and participated in workshops conducted by the task force. In the final part of the process the LRC analyses information collected from the consultation and case law, legal developments in other countries as well as local information and

¹ Law Reform Commission Act s 5.

research about the nature and extent of corruption in Solomon Islands to develop recommendations for reform of the Penal Code.

What is corruption?

The LRC consultation gathered information in response to this question to make some assessment about community expectations in this area. Responses included:

Corruption is when people in authority use public assets for private gain, use or to gain favour. Maybe people mix things up as giving is part of society. You should only give what belongs to you. Do not give out what belongs to the public.

Corruption occurs where a public servant has private interests when doing his or her job.

Corruption is misuse of power or discretion for personal gain or to favour wantoks, or improper use of public office. It comes in the form of money, wantok system, education scholarship, bribing to stop people from telling the truth, bribery to queue jump or get service first.

Corruption is failure to comply with procedures (in public service) or dealing with public money or public property (contrary to procedures).

Corruption is when leaders manipulate the system to evade justice.

Corruption in the rural areas includes lying in land cases, making spurious or false claims which are not later upheld by the courts.

In the matrilineal society men take on the role of negotiators and spokespeople particularly in commercial matters. There can be corrupt practices when this happens.

There is corruption with the disposal and use of the RCDF and related funds in particular where politicians make decisions about allocation of funds. Corruption thrives where these funds remain unregulated.

Corruption occurs when ministers exercise discretionary powers.

The electoral system contributes to political corruption.

The nature and extent of corruption in Solomon Islands

- 1.9 A number of reports and inquiries have considered the nature and extent of corruption in Solomon Islands. These provide useful information and context for considering how the offences in the Penal Code might be reformed. This work also points to the need to consider some issues around the investigation and enforcement of corruption offences and sanctions.

Transparency International

- 1.10 Transparency International (TI) is a global civil society organization that fights corruption, and has an active Solomon Islands Chapter (TSI). In 2004 TI released an analysis of the national integrity systems of Solomon Islands.² According to the analysis a small group of repeat ‘offenders’ were responsible much of the corrupt practices in the country. The report identifies that bribery took the form of provision of goods and services (including hospitality), overseas education for leaders’ children and the supply of cars. Corruption also occurred where government Ministers abuse discretion to remit or waive duty or taxes; or politicians give directives to issues licences and award contracts. In some cases this activity does not contravene the criminal law particularly where Ministers have a wide and unfettered discretion.
- 1.11 The report also notes that the power to disqualify a leader from public office for misconduct has not been exercised since 1999 when the Leadership Code (Further Provisions) Act was introduced. The report highlights that there have been few successful criminal prosecutions for corruption, and that prior to 1999 most prosecutions for corruption were under the Leadership Code (for misconduct) by the DPP. The report suggests that the low rate of successful prosecutions is due to weaknesses in investigation and prosecution capacity and will.

² Paul Roughan, Peter Larmour, Manuhua Barcham, *National Integrity Systems Transparency International Country Study Report*, Transparency International 2004.

- 1.12 The TI Global Perception Index for 2010 rates Solomon Islands at 110 of 178 countries, with a score of 2.8 (where 10 is highly clean and 0 is highly corrupt).³

Diagnostic Study on Corruption Legislation 2008

- 1.13 This report considers a wide range of legislation that exists in Solomon Islands to address corruption, including but not limited to criminal law, and was made in response to the CNURA government's anti-corruption policies.⁴ It makes an assessment of the law's effectiveness and gives recommendations for reform of the law. The authors conclude that while the legal framework is basically sound, "it is generally not implemented and is therefore ineffective."⁵
- 1.14 The report recommends that the legislation be redrafted so that it is clearer and not subject to misinterpretation. Specifically it recommends that the Penal Code "could be amended to omit Parts X and XXXVIII and replace them with a single Part that comprehensively provides clearly drafted offences against public corruption and sufficiently weighted penalties." The report also recommends that future legislation should demarcate criminal and disciplinary conduct, and ensure the exercise of disciplinary powers where appropriate.⁶
- 1.15 The report identifies difficulties with detection and investigation of corruption. These difficulties arise because of reluctance to report family members, witnesses are reluctant to cooperate with an investigation and lack of resources. The report recommends changes to legislation so that information collected by integrity bodies such as the Leadership Code Commission can be shared with law

³ www.transparency.org accessed 29 October 2010.

⁴ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008.

⁵ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008, 96.

⁶ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008, 97-98.

enforcement agencies. It also identifies some gaps in the legal powers of investigators, such as lack of provision for electronic surveillance.

- 1.16 According to the report the most effective tool for securing cooperation to supply information is the offer to mitigate punishment or grant immunity from prosecution.⁷ This issue, along with some other issues relating to investigation of corruption, is addressed by the LRC's recommendations. Some of the issues identified by the report in relation to prosecutions for corruption (such as the admissibility of financial and bank records) have been addressed by the introduction of the Evidence Act in 2009.

An Auditor-General's Insights into Corruption in Solomon Islands Government (Office of the Auditor-General 2007)

- 1.17 This report analyses 10 special audit reports by the Solomon Islands Auditor-General to identify systemic issues. It identifies common issues arising from:

- widespread non compliance with the Public Finance and Audit Act, Financial Instructions and General Orders;
- officials using positions of influence to assist family and friends to gain from their positions; and
- lack of action by authorities to pursue suspected criminal activity and lack of response by departments to address shortcomings identified through the audits.⁸

- 1.18 It identifies that a number of weaknesses relate to the incentives that encourage corruption, and the lack of disincentives. It states that the long term credibility of institutions (such as courts, police and Leadership Code Commission) is dependent on effective enforcement of the law and disciplinary processes that can address corruption.

⁷ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008, 99 – 101.

⁸ Office of Auditor-General, *An Auditor-General Insights into Corruption in Solomon Islands Government*, 31 October 2007, National Parliament Paper No 48 if 2007, 13.

1.19 It recommends that urgent consideration be given to a suitable amendment to the Penal Code to ensure that all of those with responsibilities of office be covered by the official corruptions provisions, and that the Chair of the LRC be asked to expedite that part of its current reference which relates to corruption offences.⁹

The People's Survey 2009

1.20 This survey asked respondents across Solomon Islands about their perceptions on some aspects of public accountability. One question asked about dishonest behaviour and misuse of power among senior people in the respondent's own community. The responses indicate that a significant proportion of people (over 80%) who were interviewed perceive that there is dishonest behaviour or misuse of power in their own community.¹⁰

Global Integrity Assessment of Solomon Islands 2008

1.21 Global Integrity provides information on governance and corruption trends including country specific assessments of the effectiveness of anti-corruption mechanisms. The first assessment by Global Integrity of Solomon Islands was published in 2009 and it assessed Solomon Islands overall as very weak, with a score of 59 out of 100. It also assessed the effectiveness of the legal framework as 63 out of 100, and actual implementation at 52 out of 100.¹¹ The assessment highlights the problem of bribery in government procurement processes, and identifies lack of protection for public officers who might give information to law enforcement agencies about corruption.¹²

Law reform in other countries

1.22 The offences in Parts X and XXXVIII of the Penal Code are part of the received law of Solomon Islands and are based on 19th and early 20th

⁹ Office of Auditor-General, *An Auditor-General Insights into Corruption in Solomon Islands Government*, 31 October 2007, National Parliament Paper No 48 if 2007, Recommendation 8, 21.

¹⁰ ANU Enterprises, *People's Survey 2009*, 51.

¹¹ <http://report.globalintegrity.org/Solomon%20Islands/2008/> accessed 2/11/10.

¹² Global Integrity, *Global Integrity Scorecard: Solomon Islands 2008*, 83.

century English criminal law. Other jurisdictions that share the same kind of (introduced) criminal law as Solomon Islands such as Queensland, Western Australia, the United Kingdom and Fiji have amended their corruption offences.

- 1.23 While the Queensland Criminal Code and Western Australia Criminal Code retain the same basic offences of official corruption and corrupt practices both have introduced some important changes to those offences.
- 1.24 In 2010 a new Bribery Act was passed in the United Kingdom that was based on many years of work by the England and Wales Law Commission, including two detailed reports with recommendations.
- 1.25 In 2003 the Fiji Law Reform Commission released a report on bribery and corruption that made a broad range of recommendations (not just limited to reform of the criminal law) to address bribery.¹³ In 2009 Fiji promulgated a Crimes Decree that reformed the offences of official corruption and corrupt practices. The offences are now drafted in a plain English style, and a new fault element was introduced to replace the existing element of 'corruptly'. The maximum penalty for official corruption was increased to 10 years imprisonment.¹⁴
- 1.26 Reform of criminal offences on corruption is sometimes complemented by the introduction of an anti-corruption agency that is responsible for investigation, education and prevention. For example, anti-corruption agencies have been established in Fiji, Queensland and New South Wales. In 2009 an anti-corruption task force established by the CNURA government was considering whether and how an anti-corruption agency might function in Solomon Islands. However, the task force did not publicly release any final recommendations in this area. The functions of an anti-corruption body can include:
 - receiving and responding to complaints about corruption;
 - monitoring and investigating corruption;

¹³ Fiji Law Reform Commission, *"Building an Anti-Corruption Culture for Fiji"* 2003.

¹⁴ Fiji Crimes Decree 2009, Part 11, Division 1.

- obtaining administrative orders and prosecuting corruption offences;
- undertaking preventative research, analysis and technical assistance;
- providing ethical policy support, scrutinising asset declaration; and
- providing public education and outreach.

Case law on corruption

1.27 The case law on prosecutions for corruption offences can also provide valuable information about whether the existing law is adequate. Appendix 1 contains a summary of prosecutions in Solomon Islands for corruption offences, the outcomes and any particular issue associated with the prosecution. Despite the apparently high level of concern about corruption prosecutions for corruption offences are not common, and rarely result in a conviction and punishment. This is consistent with the conclusions reached by other research such as the 2004 report by Transparency International and the 2008 Diagnostic Study on Corruption Legislation.

2. Bribery offences: official corruption, corrupt practices

- 2.1 The Penal Code offences of official corruption and corrupt practices are bribery offences (giving or receiving a benefit as a reward or inducement for a favour). At present the Code makes a distinction between public sector bribery and private sector bribery. Official corruption is the offence that applies entirely to public sector bribery.¹⁵ Corrupt practices applies to both public sector bribery and private sector bribery.¹⁶
- 2.2 Features shared by the two offences are that they apply to giving and receiving of benefits, and they both have a requirement to prove that the giving or taking of the benefit was done 'corruptly'.
- 2.3 The differences between the two offences are the maximum penalty, and the availability of a presumption in relation to corruptly for the offence of corrupt practices in connection with government contracts. The presumption is that once it is proved that a person received money or any other benefit from someone who has, or wants to get, a contract from the Government, then it is presumed that the money or benefit was taken for a corrupt reason or purpose. The onus is then on the accused to prove that the benefit was not obtained corruptly.¹⁷ The maximum penalty for official corruption is higher than the one for corrupt practices, except for corrupt practices that involves a contract or proposal for a contract with the Government or Local Council.¹⁸ The consent of the DPP is required for a prosecution for corrupt practices, but not for official corruption.

Who should be subject to the bribery offences?

- 2.4 One of the key issues arising from the existing corruption provisions in the Penal Code is whether they cover all persons and entities who should be subject to criminal punishment. This requires consideration

¹⁵ Penal Code s 91.

¹⁶ Penal Code Part XXXVIII.

¹⁷ Penal Code s 376.

¹⁸ The maximum penalty for corrupt practices that involves contract with the Government is 7 years imprisonment; same as the maximum penalty for official corruption, Penal Code ss 375, 91.

of the following questions: should every person performing public functions be subject to the offences on corruption? Should a person performing non-public functions be subject to the same offences?

The current law

2.5 The offence of official corruption applies where a ‘person employed in the public service’ asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain a bribe; or where a person gives, confers, or procures, or promises, or offers to give or confer, or to procure, or attempts to procure a bribe to a ‘person employed in the public sector.’

2.6 The term ‘person employed in the public service’ is defined in s 4 of the Penal Code:

‘any person holding any of the following offices or performing the duty thereof, whether as deputy or otherwise, namely -

- (i) any office to which a person is appointed or nominated by Act or by election; or
- (ii) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either of the last two preceding paragraphs of this section; or
- (iii) any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act;

and the said term further includes –

- (i) a magistrate
- (ii) a member of a commission of inquiry appointed under or in pursuance of any Act;
- (iii) any person employed to execute any process of a court;
- (iv) all persons in the employment of any Department of the Government;
- (v) a person acting as a minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnization of marriage, or in respect of the making or

keeping of any register or certificate of marriage, birth, baptism, death or burial but not in any other respect;

- (vi) a person in the employ of a Council established under the Local Government Act.’

2.7 The corrupt practices offence applies to agents who take a bribe, as well as people who give a bribe to an agent. Agent includes ‘any person employed by or acting for another’ as well as a person serving under the Crown or under any Town Council or other local government council or other public body and a member of any such council or other public body.’¹⁹

Person employed in the public service

2.8 There have been inconsistent court rulings as to whether elected officials such as Government Ministers come within the definition of person employed in the public service and therefore subject to the offence of official corruption. The court decisions have focused on the interpretation of subparagraph (i) of the definition of person employed in the public service contained in the Penal Code “any office to which a person is appointed or nominated by Act or by election”. The issue is further complicated by a popular perception that elected politicians are not public officers.

2.9 In the case of *Rojumana*²⁰ the High Court of Solomon Islands ruled that a Government Minister was a ‘person employed in the public service’. However in the earlier case of *Zama* the High Court held that a Government Minister, as a Member of Parliament, was ‘by definition... not a person employed in the public service and clearly [fell] outside the ambit of s 91(a) of the Penal Code’.²¹ In the *Zama* case, the prosecution conceded the defence submission that the accused was not a person employed in the public service. The prosecution also submitted that the police did not have the

¹⁹ Penal Code s 373.

²⁰ [2008] SBHC 23 <www.paclii.org>

²¹ *Zama v R* [2007] SBHC 113 <www.paclii.org>

jurisdiction to deal with Mr. Zama and that he should have been dealt with by the Leadership Code Commission.

- 2.10 In *Rojumana* the DPP took the issue to the Court of Appeal which confirmed that a government minister falls within the definition of 'person employed in the public service', on the basis that a government minister is a person holding an office to which the person is appointed. Importantly, the Court of Appeal held that the earlier High Court ruling in *Zama* that a government minister falls outside the scope of s 91(a) was wrong. This decision clarifies the application of Part X of the Penal Code as far as government ministers are concerned.²²
- 2.11 However, in the absence of an express reference to government ministers in the relevant provisions, a degree of ambiguity remains as to the extent to which government ministers are subject to the prohibitions. For example, there might be an argument that the Court of Appeal decision is relevant only to the particular Minister considered in that decision and is not applicable to others appointed under different circumstances.
- 2.12 The definition of 'person employed in the public service' in Section 4 is complex and it is not clear whether it covers certain classes of persons engaged to perform public functions, such as consultants who are not formally appointed to any particular office, and who are not employees of any ministry or council.

Agent

- 2.13 The application of the offence of corrupt practices also poses some problems. Even though the definition of agent appears to be broad enough to cover persons acting for or on behalf of private entities, some situations appear not to be covered. It is not clear who might be covered by the term 'serving under the Crown.' It is not clear whether the offence of corrupt practices covers all situations where a person is

²² *Rojumana & Maetia v Reginam* Court of Appeal, Criminal Appeal No 15 of 2008 (unreported Goldsborough P, Williams JA and Hansen JA 26 March 2009).

responsible for making decisions, or commercial arrangements on behalf of others.

- 2.14 A common situation in Solomon Islands is where more educated members of a tribe advise or encourage other members of the tribe about a commercial arrangement or business dealing in connection with tribal land. In some cases the member of the tribe who gives advice, or acts as the middleman or spokesman for the tribe might take secret commissions from the business interests. Sometimes the representative arrangement might be formalised into a trust, in other cases the arrangements are not formalised. The questions that need to be considered here are whether these kind of arrangements fall within the current definition of agent, and whether the actions of these middlemen should be covered by the offences on corruption.

LRC consultation

- 2.15 Our consultation indicates strong public support for corruption offences to apply to every public officer, including government Ministers and members of Parliament.²³ The consultation also indicates a perception or concern about people in the public sector and private sector engaging in corruption, including the church, village and community leaders. It was suggested that corruption provisions in the Penal Code should cover everyone.²⁴

Other jurisdictions

- 2.16 In jurisdictions like Queensland and Western Australia elected public officials (eg. members of parliament), appointed officials, and public servants, are subject to the prohibitions against corruption.²⁵ The

²³ A Radclyffe, *Submission, Consultation, Lata*, 6 May 2009, Savo Council of Chiefs, *Consultation*, 23 June 2009, Mother's Union Conference, *Consultation, Honiara*, 16 June 2009, *Consultation, Taro*, 14 October 2009, Central Province Government members, *Consultation, Tulagi*, 3 November 2009, *Consultation, Gizo*, 20 April 2009, Gizo Police and a Private Legal Practitioner. *Consultation, Kirakira*, 11 March 2010, Kirakira Police.

²⁴ Taro, Choiseul Province consultation 12 – 15 October 2009, Honiara Mothers Union conference 16 June 2009, Bungana Island, Central Province consultation 10 June 2009, Savo, Central Province consultation 23 June 2009, and Lata, Temotu consultation 6 May 2009.

²⁵ Criminal Code (Queensland) s 87; Criminal Code (Western Australia) ss 60, 61, 82, & 83.

Queensland Criminal Code has a number of bribery offences that apply specifically to members of Parliament.²⁶

- 2.17 For the corrupt practices offence in the Queensland Criminal Code agent is defined to include any person acting or intending to act for or on behalf of any corporation, firm or person, whether as agent or in any other capacity. It enumerates a non-exhaustive list that includes a Minister of Crown, and a person serving under the Crown or a Minister of a Crown.²⁷ The Criminal Code of Western Australia has similar definition of agent but does not specifically mention a Minister of Crown.²⁸
- 2.18 The Australian Model Criminal Code recommends one offence of bribery that covers bribes given to, or received by an 'agent'. For this offence agent is defined to include a person acting with actual or implied authority of the principal and lists categories of people who fall within the meaning of agent including employees, public officials, members of Parliament, ministers, judges, judicial officers, police officers, local councilors, and some statutory office holders.²⁹ This is to ensure that the definition covers a wide pool of relationships of trust.
- 2.19 The England and Wales Law Commission recommended that the bribery offences cover functions and activities both in the public sector and in the private sector.³⁰ This is because it is not easy to identify who will and who will not count as a 'public servant'.³¹ Furthermore, many private individuals and organisations are now contracted to provide public services, or to provide services to the private sector that have a public interest element to them.³²

²⁶ Criminal Code (Qld) ss 59, 60.

²⁷ Criminal Code (Queensland) s 442A(1).

²⁸ Criminal Code (Western Australia) s 546(1).

²⁹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Theft, Fraud, Bribery and Related Offences*, Final Report December 1995, clause 20.1.

³⁰ Law Commission, *Reforming Bribery*, 1998 [4.78] and 2008 [3.29].

³¹ Law Commission, *Reforming Bribery*, 2008 [3.215].

³² Law Commission, *Reforming Bribery*, 2008 [3.216].

2.20 The UK Bribery Act 2010 provides that the bribery offences apply to people who carry out particular functions and activities namely: any function of a public nature; any activity connected with a business; any activity performed in the course of a person's employment and any activity performed by or on behalf of a body of persons (whether corporate or unincorporated). In addition one of the following conditions must also apply:

- the person performing the function or activity is expected to perform it in good faith;
- the person performing the function or activity is expected to perform it impartially; or
- the person performing the function or activity is in a position of trust by virtue of performing it.³³

UNCAC

2.21 The United Nations Convention against Corruption (UNCAC) requires criminalisation of bribery of national public officials; bribery of foreign public officials and officials of public international organisations as well as embezzlement, misappropriation or other diversion of property by a public official.³⁴ The UNCAC obligations on the private sector corruption are less stringent than those for the public sector. It requires states parties to *consider* adopting legislative and other necessary measures to establish bribery and embezzlement of property in the private sector as criminal offences.³⁵ The UNCAC is silent on the issue of whether there should be a distinction between public sector bribery and private sector bribery.

2.22 The UNCAC defines public official to mean: i) a person holding a legislative, executive, administrative or judicial office whether temporary or permanent, whether paid or unpaid; ii) any other person who performs a public function including for a public agency or public enterprise, or provides a public service; iii) any other person

³³ Bribery Act 2010 s 3.

³⁴ UNCAC Arts 15, 16, 17.

³⁵ UNCAC Arts 21 & 22.

defined as a public official in the domestic law. The UNCAC further extends public official to mean any person who performs a public function or provides a public service.³⁶

2.23 In the context of Solomon Islands it is suggested that the offence of bribery in the public sphere should apply to:

- members of the National Parliament and ministers;
- members of provincial assemblies including provincial ministers;
- members of Honiara City Council;
- constitutional post holders and appointments;
- statutory appointments;
- judges and magistrates;
- public officers appointed by the Public Service Commission and officers appointed by any other commission established by the Constitution or any Act of Parliament;
- consultants or advisers to any Government agency, department, and ministry; and
- state owned enterprise appointments.

2.24 Outside of the public sphere, it is suggested that bribery should apply to agents including employees and less formal relationships where there is an element of trust. It should be broad enough to include the situation where a person represents or assumes to represent customary land owners in commercial negotiations, and not limited to the strict legal meaning of agent (someone with authority to alter the legal relations with the principal).

A single offence of bribery?

2.25 As discussed above the main differences between the offence of official corruption and the offence of corrupt practices are the maximum penalty, and the availability of a presumption for certain kinds of corrupt practices. Official corruption only covers bribery of

³⁶ UNCAC Art 2.

person employed in the public service, however the offence of corrupt practices can be used for corruption in the public sector as well as private sector. The two offences also share other elements: the bribe must be given as an inducement or reward for the person employed in the public service or the agent to do something or not do something, and the bribe must be given or taken 'corruptly'. We now consider whether the Penal Code should be reformed to replace the two offences with one offence of bribery.

- 2.26 The original policy underlying the distinction between official corruption and corrupt practices appears to be that public sector corruption is more serious. However, one reason for having one common bribery offence is that it is difficult to distinguish between the private sector and the public sector, especially where private individuals (such as consultants) and organisations are contracted to carry out public functions. Another reason for having one offence is to make the offence clear and simple.

LRC consultation

- 2.27 LRC consultation suggests that corruption at the community or village level is a concern, and that the offences of bribery should apply to church leaders, village leaders and other leaders or people who have the trust of people, or influence people in their community. At this level it may often be difficult to make a distinction between public sector and private sector bribery but the harm caused to communities (economic harm, and harm to community harmony and cohesion) by any form of bribery can be significant. The evidence available about corruption and bribery in relation to the exploitation of resources (for example logging and mining) suggests that bribery of both public officers and community leaders takes place. This is also supported by the People's Survey which shows that over 80% of people surveyed thought that there was dishonest behavior or misuse of power in their own community.³⁷

³⁷ ANU Enterprises, People's Survey 2009.

Other jurisdictions

2.28 In Kenya, a single bribery offence applies to both public sector and private sector bribery.³⁸ The prohibition of bribery, along with a number of other corruption offences applies generally in relation to any agent. The Act defines agent as a person who, in any capacity, is employed by or acts for or on behalf of another person.³⁹ The Fiji Law Reform Commission recommended that the distinction between 'public officers' and other non-government employees should be abolished and that the Penal Code adopt a more neutral description such as 'agent' or 'person'.⁴⁰ However, the recent Fiji Crimes Decree retains the distinction between public and private sector bribery.⁴¹ The Model Criminal Code has one offence of bribery that applies to agents. The UK Bribery Act 2010 has general bribery offences that apply to functions or activities, and makes no distinction between public and private sector corruption.⁴²

Recommendations

- 1. The Penal Code should have one offence of bribery that applies to both public sector and private sector bribery. The offence would apply to :**
- (a) members of National Parliament, provincial assemblies and Honiara City Council, government ministers, constitutional post holders, statutory appointments, judges and magistrates, officers appointed by the Public Service Commission or any other commission established by the Constitution or any Act of Parliament, appointments to state owned enterprises, consultants and advisers to government bodies,**
- (b) employees, as well as any person acting on behalf of another with either actual or implied authority.**

³⁸ Anti-corruption and Economic Crime Act s 38(1).

³⁹ Anti-corruption and Economic Crime Act ss 38(1) & 39.

⁴⁰ Fiji LRC Report 35.

⁴¹ Crimes Decree (Fiji) 2009

⁴² Bribery Act 2010 UK ss 1 & 2.

2. **Alternative to 1(b), if the offence of corrupt practices is retained as a separate offence the definition of agent should include any person acting with or implied or actual authority of the principal. The offence should also cover employees, members of National Parliament, provincial assemblies and Honiara City Council, government ministers, constitutional post holders, statutory appointments, judges and magistrates, consultants or advisers to any government body and appointments to state owned bodies. The definition should be broad enough to cover middlemen, who are not formally appointed as agents or representatives of groups as well as other community leaders, including church leaders.**
3. **Alternative to 1(a) if the offence of official corruption is retained the Penal Code should be amended so that it clearly applies to everyone who performs a public function or holds public office. It should specifically cover members of National Parliament, provincial assemblies, Honiara City Council and government ministers, constitutional post holders, statutory appointments, judges, magistrates, public officers appointed by the Public Service Commission or any other commission established by the Constitution or any Act of Parliament, consultants or advisers to any government body, appointments to state owned enterprises or anyone else who performs a public function.**

Should corruption offences apply to corporations?

2.29 Corporate liability for criminal offences is an issue that is relevant to many offences in the Penal Code and other Solomon Islands legislation. This issue will also be considered when the LRC makes recommendations for reform of the rules of criminal responsibility for the Penal Code. However the issue is of significance to this area because of the potential for corporations to be involved in serious bribery. Some examples are where large sums of money are paid by businesses or organisations to politicians and high level officials in return for favours, corruption in extractive industries (forestry,

mining, fishing),⁴³ and lobbying by business interests while newly elected MP's are involved in the election of the Prime Minister and formation of government.⁴⁴

Current law

- 2.30 The corruption offences apply to agents and persons employed in the public service. Under the Interpretation and General Provisions Act (IGP Act) person includes any public body, company, association and any body of persons corporate or unincorporated.⁴⁵
- 2.31 At common law, a corporation cannot be criminally responsible for an offence that can only be punished by imprisonment. The IGP Act provides that, where a body corporate commits an offence against an Act for which the only penalty prescribed is a term of imprisonment, the body corporate is punishable on conviction by a fine, the amount of which is to be determined according to the relevant provisions of the IGP Act.⁴⁶
- 2.32 However, these provisions in the IGP Act only apply in relation to 'an offence against *an Act made after the commencement of this Act* [emphasis added]'.⁴⁷ This excludes the corruption offences under the Penal Code, which predate the IGP Act.⁴⁸ In other words, the IGP Act does

⁴³ Transparency International, *Corruption in the Extractive Industries*, Anti-Corruption Task Force Workshop, Honiara, 8 and 9 October 2009.

⁴⁴ John Keniapisia, *Political Corruption - Presentation*, Anti-Corruption Task Force Workshop, Honiara, 9 and 10 November 2010.

⁴⁵ Interpretation and General Provisions Act s 16.

⁴⁶ Interpretation and General Provisions Act s 51(2).

⁴⁷ Interpretation and General Provisions Act s 51(2).

⁴⁸ After the commencement of the Interpretation Act, the Penal Code was amended to provide that the Code 'shall be interpreted in accordance with the Interpretation and General Provisions Act': Penal Code s 3. However, this does not mean that *all* provisions of the Interpretation Act apply in relation to the offences under the Penal Code. Rather, the provisions of the Interpretation Act apply only according to the terms of those provisions. This would mean that, where a provision of the Interpretation Act is expressed to apply only to offences enacted *after* that Act, s 3 of the Penal Code does not have the effect of applying that provision to all offences under the Penal Code, including those enacted *before* the Interpretation Act.

not operate to convert the offence under s 91(b) of the Penal Code into an offence for which a corporation could be held responsible.

- 2.33 For these reasons, the offence under s 91(b)) that is expressed to be punishable only by imprisonment, and which predates the IGP Act, is probably not capable of being committed by a corporation. However, this does not prevent other offence provisions, such as corrupt practices, applying to a corporation where the Penal Code expressly permits a fine to be imposed on the offender.
- 2.34 The IGP Act also provides for the liability of people holding the post of director, manager or secretary (or some similar post) of a corporation for an offence committed by the corporation. The liability arises if the offence was committed with the consent or connivance of one of these post-holders. It appears that both the body corporate and the individual might be held liable for the same offence.⁴⁹ However in some circumstances it might be unfair to hold an individual director or manager liable for a criminal offence, particularly where decision making in the corporation is diffuse, the corporation did not have any policy or processes in place to prevent the criminal conduct or the corporation had a culture, or adopted work practices, that directly or indirectly permitted or authorised criminal conduct.
- 2.35 Unlike natural persons, a legal person such as a corporation cannot act and think on its own. Instead, it can only do so through individuals (officers of the corporation). To that end, the common law developed rules for how the acts and states of mind of certain individuals within a company are attributed to the corporation.⁵⁰
- 2.36 Traditionally, the attribution of criminal states of mind to a corporation is restricted to those of 'the board of directors, the managing director, and perhaps other superior managers of the company who carry out functions of management, and speak and act as the company'.⁵¹ To determine exactly who falls within this category

⁴⁹ Interpretation and General Provision Act s 51.

⁵⁰ *Tesco Supermarkets Limited v Natrass* [1972] AC 153.

⁵¹ *Tesco Supermarkets Limited v Natrass* [1972] AC 153.

of persons, it is necessary to consider the constitution of the company, its memorandum or articles of association, the actions of directors in general meetings and the extent, if any, of delegation.⁵²

2.37 Generally, the High Court in Solomon Islands takes the view that the directors and the Chief Executive Officer (CEO) have the directing mind of a corporation, and therefore their mind is the mind of the company. If a director or CEO has a guilty mind then that can be attributed to the company.⁵³

2.38 Some corporations might adopt flatter management with more delegation of powers to middle and lower level employees. The approach of attributing the conduct of a director or CEO to a corporation does not take into account the fact that many offences committed on behalf of corporations are facilitated by middle or lower level employees. It is often difficult to identify any particular decision maker within the management chain responsible for the corrupt transaction. Liability on the basis of attributing the conduct (and any necessary mental requirement) of a director or CEO works best with smaller companies, where the directors and managing directors exercise significant control over the activities of the corporation, but does not work as well for larger, more complex corporations.⁵⁴

2.39 Under the common law it is not possible to create a 'corporate intent' by aggregating the states of mind of more than one person within the corporation. That means criminal liability of a corporation depends on proving both the culpable act or omission and the required mental element by a single person within the corporation.⁵⁵ This creates considerable difficulty in making a corporation liable for a criminal offence, given that the making of decisions and the conduct of

⁵² *Commonwealth Guide* 42.

⁵³ See for example, *Regina v Bartlett* [2008] SBHC 103 [27]-[28]; *Regina v Solomon Islands National Provident Fund* [2001] SBHC 155.

⁵⁴ New South Wales Law Reform Commission, *Sentencing: corporate offenders*, Report 102 (June 2003), 20.

⁵⁵ Commonwealth Secretariat, *United Nations Convention Against Corruption Legislative and Technical Guide*, September 2007, 42.

activities of a corporation often involve a large number of people and not just a single person. It can also be difficult to prove liability for offences that have specific intent (such as corruption offences that have the specific fault element of 'corruptly').

Holding corporations liable for criminal offences

2.40 In some jurisdictions legislation specifies when corporations can be liable for criminal offences.

2.41 Broadly these approaches fall into the following categories:

- legislation specifies when the conduct of a officer or agent can be attributed to the corporation;
- legislation makes a corporation responsible for the criminal conduct of employees acting within the scope of their employment (vicarious responsibility);
- legislation that makes a corporation criminally liable on the basis of corporate conduct, culture and practices; and
- discrete offences that apply to corporations.

2.42 Legislation can make a corporation criminally responsible for any contravention of the relevant legislation by employees or agents. This type of responsibility is very broad and usually imposed for offences that can be characterized as regulatory in substance although criminal in form (such as consumer protection and environment offences).⁵⁶

2.43 In the United States, a company is criminally liable for the acts of its directors, officials or employees, whenever they act within the scope of their duties and for the benefit of the company. These elements are interpreted broadly so that an argument cannot be advanced on behalf of a company that the act of giving or authorising a bribe is itself outside the scope of duties when the company is the beneficiary of the unlawful conduct. It is irrelevant whether the conduct has been

⁵⁶ New South Wales Law Reform Commission, *Sentencing Corporate Offenders*, Report 102 (June 2003), 22.

allowed, condoned, or even condemned by the management at a particular level.⁵⁷

- 2.44 Under the Canadian Criminal Code a corporation can be a party to a criminal offence if a senior officer, acting in the scope of their authority, is a party to the offence; or directs the work of other representatives of the corporation so that they do the act or make the omission specified in the offence; or if a senior officer knows that a representative of the corporation is a party or about to be a party to the offence and does not take reasonable measures to stop them from being a party. The senior officer must act with intent at least in part to benefit the corporation. Senior officer means a representative who plays an important role in the establishment of the organisation's policies, or is responsible for managing an important aspect of the organisation's activities. For a body corporate this includes a director, chief executive officer and chief financial officer.⁵⁸
- 2.45 The Australian Criminal Code attributes the conduct of an employee, agent or officer to the corporation and fault (the mental element of an offence: intention, knowledge or recklessness) to the corporation if the corporation expressly, tacitly or impliedly authorizes or permits the commission of the offence. A corporation does this if:
- the board of directors intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or
 - a 'high managerial agent' of the body intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - a corporate culture existed with the body that directed, encouraged, tolerated or led to non-compliance with the relevant law; or

⁵⁷ Commonwealth Secretariat, *United Nations Convention Against Corruption Legislative and Technical Guide*, September 2007, 43.

⁵⁸ Criminal Code (Canada) ss 2, 22.2.

- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant law.⁵⁹

However the effectiveness of this type of liability is not clear because it is relatively new, and has not been tested in the courts.

UK Bribery Act

2.46 The Bribery Act 2010 contains a specific offence that applies to commercial organisations for failure to prevent bribery.⁶⁰ The offence is committed if a person associated with a commercial organisation bribes another with the intention to obtain or retain business for the organisation, or to obtain or retain an advantage in the conduct of business for the organisation. A person associated with a commercial organization is a person who performs services on behalf of the organisation.⁶¹ A commercial organisation is a body that is incorporated under the law of the UK and carries on a business.

2.47 It is a defence if the organisation can prove it had in place adequate procedures designed to prevent persons associated with the corporation from undertaking the conduct. In addition under the Act the Secretary of State must publish guidance about procedures that commercial organisations can put into place to prevent bribery.⁶²

UNCAC

2.48 UNCAC requires each state party to adopt necessary measures, consistent with its legal principles, to establish legal liability, which may include criminal liability, of legal persons for participation in the offences established in accordance with UNCAC.⁶³

⁵⁹ Criminal Code Act 1995 (Aus) ss 12.1, 12.2, 12.3.

⁶⁰ Bribery Act 2010 (UK) s 7.

⁶¹ Bribery Act 2010 (UK) s 8.

⁶² Bribery Act 2010 (UK) s 9.

⁶³ UNCAC Arts 26(1), 26 (2).

Conclusion

2.49 The current law in Solomon Islands for holding corporations liable for criminal offences, including bribery offences, is limited to attributing the conduct and guilty mind of senior office holders such as directors and CEO to the corporation. Corporations might avoid liability for bribery undertaken by officers with operational responsibility (who are not a director or CEO), or where there the corporate culture tolerates bribery. The rules of criminal responsibility will be considered separately by the LRC as part of its review of the Penal Code, including more effective rules for holding corporations responsible for crimes. However, in addition the criminal law can clarify that corporations have a responsibility to prevent bribery through the introduction of an offence specifically directed at corporations.

Recommendation

4. The Penal Code should have separate offence directed at corporations for failing to prevent bribery. The offence would apply where a director, employee or agent of the corporation bribes another with the intention to benefit the corporation.

Should there be an offence of bribery to cover foreign public officials and officials of public international organizations?

2.50 The Penal Code does not have any offence of bribery that applies to foreign public officials and officials of public international organisations. The offence of official corruption covers persons working in or for the Solomon Islands Government, and it is not clear whether the corrupt practices offence could apply to foreign public officials or officials of public international organizations.

2.51 The UNCAC requires states to criminalise bribery of foreign public officials and officials of public international organisations. A foreign public official is any person holding a legislative, executive, administrative or judicial office of any foreign country, whether appointed or elected; and any person exercising a public function for a

foreign country. An official of a public international organisation is an international civil servant or any person authorised by an international organisation to act on its behalf.⁶⁴

Recommendation

5. The Penal Code should have an offence of bribery of foreign public officials and officials of international organisations.

What acts should be covered by bribery?

Current law

2.52 For official corruption the offence is committed if a person employed in the public service:

‘corruptly asks for, solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done, or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office.’⁶⁵

2.53 The offence is also committed if any person:

“corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed.”⁶⁶

2.54 The offence of corrupt practices is committed where:

“any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal’s affairs or business or for showing or forbearing to show

⁶⁴ UNCAC, Art 2.

⁶⁵ Penal Code s 91(a).

⁶⁶ Penal Code s 91(b).

favour or disfavor to any person in relation to his principal's affairs or business."⁶⁷

2.55 Corrupt practices can also be committed where:

"any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show any favour or disfavour to any person in relation to his principal's affairs or business."⁶⁸

2.56 Corrupt practices also can be committed where:

"any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and to which his knowledge is intended to mislead the principal."⁶⁹

2.57 As highlighted by the 2008 Diagnostic Study on Corruption Legislation the wording of the offences is complex, and is not plain English. This is likely to have an impact on investigations and prosecutions for the offences.

2.58 The approach taken in the High Court case of *Regina v Maetia and Rojumana* suggests that the offence of official corruption is not established unless the prosecution can prove that the public officer obtained a benefit, and that a favour was provided in return.⁷⁰ The Court referred to the case of *State v Aisake* where the High Court of Fiji decided that before the accused can be called on to make a defence to a charge of official corruption, the prosecution must produce credible evidence to show that the accused (a public officer) received some

⁶⁷ Penal Code s 374(a).

⁶⁸ Penal Code s 374(b).

⁶⁹ Penal Code s 374(c).

⁷⁰ *Regina v John Maetia Kaliuae and Clement Rojumana*, High Court of Solomon Islands.(unreported Naqiolevu J).

property or benefit, which was received on account of or in consideration for something that was done by the accused in the discharge of his duties.⁷¹

Other jurisdictions

2.59 By contrast in jurisdictions where bribery has been recently reformed such as Fiji and the UK, the physical aspects of the offence are clearly stated as:

- providing, offering or promising, a benefit to an agent; or
- an agent asking for, receiving or agreeing to receive, a benefit

with the *intention* that the action will affect or influence the performance of the functions of the agent. There is no requirement for the corrupt bargain to be actually implemented.

6. The bribery offences in the Penal Code should be drafted to cover the actions of providing, offering and promising a bribe, and asking for, receiving, inducing or agreeing to receive a benefit, where the intention is to influence the actions of the agent . The offence should apply even where the promise or bargain is not fulfilled.

Indirect giving or indirect receipt of benefit

2.60 Indirect giving or receipt of a benefit is not an offence under the Penal Code. Indirect bribery occurs where a person seeking a favour from a public officer or agent uses a middleman to negotiate with the public officer or agent. If indirect giving or receiving a benefit is not addressed in the Penal Code it may provide a loop hole to enable people to avoid criminal conviction. For example, where a businessperson who wants to bribe a public officer for a licence or tax exemption uses his or her lawyer or accountant to negotiate the bribe.

2.61 The Queensland Criminal Code states that any act or thing prohibited by the secret commission offence is prohibited whether the act or

⁷¹ State v Aisake [1993] FJHC 135 <pacli.org.au>.

thing is done directly or indirectly or through any other person.⁷² This provision extends the secret commission offence to include actions or omissions that can be indirectly done whether by an agent or another. A similar provision appears in the Western Australian Criminal Code.⁷³

- 2.62 UNCAC requires state parties to consider adopting legislation to make it an offence for an agent or another to promise, offer or give, directly or indirectly an undue advantage that results in breaching or refraining from his or her duties.⁷⁴

Recommendation

7. The Penal Code should prohibit indirect giving or indirect receipt of a bribe.

Should bribery cover the situation where the receiver of the benefit gets another person to do the favour?

- 2.63 The offences of official corruption, public officers receiving property to show favour and extortion by public officers do not clearly prohibit a benefit being offered to, and/or accepted by a public officer on account of another person doing or not doing something.⁷⁵ The existing prohibitions seem to apply only in relation to things done or not done by the public official to whom a bribe has been given (whether for his/her own benefit or for the benefit of another person). The corrupt practices offence seems to be a little broader as it arguably covers offer and acceptance of consideration as an inducement or reward for something done or not being done by any person.

- 2.64 The Model Criminal Code recommended an offence of bribery that involves giving or receiving a benefit for the purpose of a favour. The definition of favour includes the agent causing or influencing his or

⁷² Criminal Code (Qld) s 442A.

⁷³ Criminal Code (WA) s 546(8).

⁷⁴ UNCAC art 21.

⁷⁵ Penal Code ss 91, 92, 93.

her principal or other agents of the principal to do or not to do something.

- 2.65 The UK Bribery Act 2010 provides that the function or activity being sought by the party giving the bribe does not have to be carried out by the receiver of the bribe.⁷⁶
- 2.66 UNCAC requires states to consider making an offence that will apply where a bribe is given to a public official so that he or she will use his or her real or supposed influence to obtain an undue advantage from an administration or public authority of the State for the giver (or any other person)⁷⁷.
- 2.67 If the offences in the Penal Code do not cover the situation where the receiver of the benefit gets another person to do the favour it would leave a loop hole to escape criminal conviction.

Recommendation

8. Bribery offences in the Penal Code should cover the situation where the receiver of the benefit gets another person to do the favour.

Should bribery cover conduct that is outside of the scope of the agent's duties?

- 2.68 The Penal Code offences of official corruption and corrupt practices do not clearly cover corrupt conduct that is outside the scope of the public officer or agent's duties, but which the public officer or agent can engage in because of his or her position. The offence of official corruption applies to the discharge of the duties of the office by the public officer. The offence of corrupt practices applies to acts in relation to the principal's affairs or business.
- 2.69 The Transparency International Report 2004 for Solomon Islands raises concerns about instances of corruption where government Ministers give improper directives to public officials to issue a licence or award a government contract. Participants at an Anti-Corruption

⁷⁶ Bribery Act 2010 (UK) ss 1(4) & 2(8).

⁷⁷ UNCAC art 18.

Taskforce Workshop⁷⁸ raised similar concerns. In such cases it might be argued that the Minister's conduct did not amount to a discharge his or her duties, and therefore is not caught by the offence of official corruption.

2.70 The case of *R v Musuota* illustrates the problem. The accused, a member of Parliament and government minister, was charged with a corrupt practices under the Penal Code as well as of misconduct under the Leadership Code (Further Provisions) Act, including acceptance of bribery under section 13 of that Act.⁷⁹ The Court found that the accused had accepted a benefit, the use of a hire car, in return for resigning his position as Minister. Shortly after his resignation a new prime minister, Solomon Mamaloni, was elected by Parliament and Mr Musuota was appointed a Minister in the new government. The Court decided that Mr Musuota was not guilty of corrupt practices, and made no finding of misconduct, because Mr Musuota's resignation was not part of his duties as a minister. While the conduct of resigning because of the influence of a gift was 'deplorable' the court decided that the law does not make this conduct an offence.⁸⁰

2.71 An Australian case also illustrates how the issue might arise. The official corruption provision in the Queensland Criminal Code is in the same terms as the official corruption provision in the Solomon Islands Penal Code.⁸¹ In *Herscu v R*, the High Court ruled that the improper conduct of the Minister for Local Government and Main Roads was covered by the offence of official corruption in the Criminal Code of Queensland. The conduct of the Minister involved influencing the Council to make changes to planning requirements for

⁷⁸ Honiara, 8 and 9 October 2009.

⁷⁹ Section 13 of the Leadership Code (Further Provisions) Act provides 'Any leader who asks for, receives or obtains, or agrees or attempts to receive or obtain any property or benefit or favour of any kind for himself or any other person in consider on his actions in carrying out his duties as a leader being influenced in any manner, or on account of having acted as a leader in any manner (whether generally or in a particular case) is guilty of misconduct in office.

⁸⁰ *R v Musuota* [1997] SBHC 9 www.paclii.org.

⁸¹ Criminal Code (Qld) s 87 and Penal Code (SI) s 91.

a shopping centre. The Court decided that official corruption is not limited to discharge of the duties of the office, but can include improper conduct that the officer can engage in because of his or her position.

- 2.72 If the courts of Solomon Islands took a similar approach to the High Court of Australia then it is possible that the way in which the existing offences are expressed would cover this situation. It is worth noting that in an earlier Queensland case the court decided that improper conduct that is outside an officer's duties was not be covered by official corruption.⁸²
- 2.73 The Model Criminal Code provides that it is an offence to give or receive, dishonestly, a benefit for himself or herself or for another person with the intention of providing a favour. The favour may be to do or not to do something because of his or her position, or causing or influencing the principal or another agent of the principal to do something or not do something.⁸³
- 2.74 UNCAC requires States to consider making a criminal offence for where a public official or other person abuses his or her influence, with the intention to get from the administration or public authority an undue advantage for the giver of the bribe.⁸⁴
- 2.75 For clarity and certainty, the bribery offences should cover improper conduct that the agent can engage in because of his or her position, or because of the authority of his or her position, even though the conduct does not fall within the scope of the agent's official duties.

Recommendation

9. Bribery should cover conduct that is outside the scope of the agent's duties and include conduct that the agent can engage in because of his or her position.

⁸² *R v David* [1931] QWN. The Herscu case stated that *R v David* was wrongly decided.

⁸³ Mode Criminal Code clause 20.2.

⁸⁴ UNCAC art 18.

Benefits that tend to corrupt or influence an agent

- 2.76 For the offences of official corruption and corrupt practices there must be some agreement or understanding between the giver and taker of the bribe that the bribe is an inducement or reward for doing something (or not doing something). The offence does not cover situations where an improper benefit is given but there is no such agreement or understanding between the giver and receiver.
- 2.77 A common example of this type of situation is where a facilitation (speed fee) or gratitude payment is made to a public officer. There are two types of speed fee. The obvious one is where someone gives the speed fee, or promise to give the speed fee, upon the public officer delivering the required service to the giver. This situation is covered by the existing offences of:
- Extortion by a public officer, carrying a maximum penalty of three years imprisonment,⁸⁵ or
 - Public officer receiving payment to show favour, carrying a maximum penalty of 6 months imprisonment.⁸⁶
- 2.78 For the first of these offences it is necessary to prove that the benefit was taken or accepted in exchange for the performance of the officer's duty; for the second it is necessary to prove that the benefit was taken on the understanding (express or implied) that the officer would do a favour.
- 2.79 The other situation is where the speed fee is given without a clear intention or arrangement to reward or induce the receiver. The payer or giver may make the payment to be assured in his or her own mind that the official will carry out his or her public function. Payment might be made even where there is no particular basis for the payer to believe that the recipient would not carry out his or her function if

⁸⁵ Penal Code s 92.

⁸⁶ Penal Code s 93.

payment is not made. Some may term this as a good will or token of appreciation payment. Some see this conduct as acceptable customary practice.

- 2.80 Another situation that causes some concern in Solomon Islands is the payment of sitting fees by logging interests for provincial government representatives to make an agreement about timber rights.⁸⁷
- 2.81 A further issue is whether the giver of a facilitation or gratitude payment should be liable to criminal punishment as well as the receiver. A giver cannot be prosecuted under sections 92 and 93 of the Penal Code. A giver of a payment might be prosecuted under section 91 (official corruption).
- 2.82 There is an argument that the giver or payer should not be prosecuted for giving a benefit because giving a benefit does not necessarily guarantee preferential treatment or favour. It may also be just the practice in that jurisdiction. It is also argued that the act of making a facilitation payment is far less reprehensible than paying a bribe because the payer will usually be the victim of extortion or under considerable commercial or personal pressure to make the payment.
- 2.83 On the other hand the lack of sanctions against payers of benefits in these circumstances contributes to the culture of tolerance for these types of payments. Facilitation payments, 'speed fees' and gratitude payments can have a corrosive and corrupting effect on the public sector. The expectation or belief that a 'speed fee' or gratitude payment is required disadvantages people who either cannot, or will not, make such payments, because only those people able to, and prepared to make such payments obtain public services. Under the Solomon Islands Public Service Code of Conduct a public officer, their business associates, their family and/or wantoks must not accept or seek any gifts or other personal benefits in exchange for official duties or work related favours.⁸⁸

⁸⁷ Forest Resources and Timber Utilisation Act s 8.

⁸⁸ Paragraph 3.6.

Other jurisdictions

2.84 The Model Criminal Code has a separate offence that prohibits giving and receiving of corrupt benefits to an agent that with the expectation that receipt would tend to influence the agent to provide favour. The maximum penalty for this offence is 5 years. This offence applies to both the giver of the benefit and the receiver i.e the agent.⁸⁹ The Model Criminal Code recommended a separate offence, with a lesser penalty than for bribery, because the culpability involved with this type of offence is less than for bribery where there must be some agreement between the giver and receiver about the favour being performed in return for the bribe. Similarly, the Fiji Crimes Decree 2009 has a separate offence that prohibits benefits that would tend to influence a public official.⁹⁰

2.85 In Queensland, the corrupt practices offence that applies to bribery of agents has been extended to include bribery that would tend to influence an agent.⁹¹ The offence applies to both giving and receiving a benefit that would tend to influence. The Western Australia Criminal Code contains similar provision.⁹² In Kenya, the offence of bribing agents (both giving and receiving bribes) includes where the benefit would tend to influence the agent to show favour or disfavour.⁹³

Recommendation

10. The offences of bribery in the Penal Code should cover giving and receiving benefits that would tend to influence an agent.

⁸⁹ The Model Criminal Code clause 20.3.

⁹⁰ Crimes Decree 2009 (Fiji) s 136.

⁹¹ Criminal Code Act 1899(Qld) ss 442B(b), 442BA(b).

⁹² Criminal Code (WA) s 530.

⁹³ Anti-corruption and Economic Crimes Act (Kenya) s 39(2).

Should there be an offence where a secret benefit is given for advice outside of an agent/principal arrangement?

- 2.86 The current offence of corrupt practices only applies where the prosecution can prove that the person being bribed is an agent of a principal, and the bribe is given with the intention that the agent will do something or not do something in relation to the principal's affairs or business.
- 2.87 The LRC consultation and research highlights situations, and relationships, that would fall outside of the agent/principal relationship where bribery might occur. One example is where a member of Parliament, who is also a customary land owner, takes a secret benefit (such as the use of hire car for a period of time) so that he will assist the person who pays for the car with negotiations with customary land holders in his constituency for a logging licence.
- 2.88 The proposed new offence would cover a secret benefit given by P (the payer) to R (the receiver of the secret benefit), with the intention that R will give advice to X to induce X to do something for the benefit of P. The intention of the offence is to cover secret commissions for advice where there is no legal relationship of agent and principal between R and X, but where X relies on advice from R, or is likely to be influenced by the advice given by R to the advantage of P.
- 2.89 The aim of this offence is to cover situations where it is difficult to prove that R was an agent for X. It is suggested that in the Solomon Islands context it is important to have offences that cover secret commissions where R is not an agent for X, but for other reasons X relies on the advice given by R. Punishment of R is justified on the basis that he or she took a *secret* benefit in return for giving advice to X that is intended by R to induce X to do something in favour of P (such as enter into a contract).

Other jurisdictions

- 2.90 The Kenyan Anti-corruption and Economic Crimes Act makes this conduct an offence. Section 40 of the Act prohibits benefits given for the purpose of inducing the person to give advice to another, where

the benefit is a secret from the person receiving the advice. Giving advice includes giving information. The Queensland Criminal Code prohibits giving or receiving secret payments to induce a person to give advice to someone, that is intended or likely to induce that person to enter into a contract with any third person, or give advice that is intended or likely to induce the person to appoint a third person or vote for a third person. The offence only applies if the payment is secret and the benefit is 'valuable consideration.'⁹⁴

Recommendation

11. The Penal Code should have an offence to prohibit giving and receiving secret commissions to give advice to another person, to induce the person to do something for the benefit of the giver of the commission.

Proving 'corruptly'

- 2.91 Proving bribery offences (official corruption and corrupt practices) can be problematic because of the need to prove that the accused acted 'corruptly'.
- 2.92 The term 'corruptly' is used in other common law jurisdictions, and other jurisdictions that use the Griffith criminal code (such as Queensland, Western Australia and Fiji). However reform projects in Fiji, United Kingdom and Australia have recommended changes with respect to the term 'corruptly', and some jurisdictions such as Western Australia and Queensland have specific corruption offences that do not include the element of 'corruptly'. For example, the offences of bribery of a member of Parliament in Queensland and Western Australia is committed if a bribe is given in order to influence the politician, or if the politician asks for or takes a bribe on the understanding that his or her action will be influenced.⁹⁵ It is not necessary to prove that the bribe was given or taken 'corruptly'. The Fiji Crimes Decree 2009 reformed the offence of official corruption to

⁹⁴ Criminal Code (Qld) ss 442E, 442EA.

⁹⁵ Criminal Code (Qld) ss 59, 60, Criminal Code (WA) ss 60,61.

remove the fault element of ‘corruptly’ to replace it with the condition that a bribery is committed if a person ‘without lawful authority or excuse’ gives or takes a benefit to influence a public official in the exercise of his or her duties.⁹⁶

- 2.93 The term corruptly is not defined in the Penal Code. The Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes identified the requirement to prove that the accused acted ‘corruptly’ as an impediment.⁹⁷

Meaning of ‘corruptly’

- 2.94 According to the one of the leading (and early) decisions by English courts corruptly means to ‘purposively do an act which the law forbids as tending to corrupt’, and that it does not mean dishonest.⁹⁸ More recent decisions by English courts suggest that corruptly means dishonestly intending to weaken the loyalty of an agent.⁹⁹
- 2.95 In Solomon Islands the High Court discussed corruptly in the election petition case of *Alisae v Salaka*.¹⁰⁰ The Court said “the word corruptly does not mean wickedly, immorally or dishonestly, but rather means with the object or intention of doing what the legislature forbids”.
- 2.96 In the Pacific region court decisions have diverged. In Fiji the court has followed the *Cooper v Slade* approach that corruptly means purposively doing something which the law tends to forbid as tending to corrupt.¹⁰¹ In Australia the High Court, when considering the scope of the offence of official corruption in the Queensland Criminal Code, held that a Minister was under an obligation to act honestly, and that the official corruption offence was directed at ensuring that public

⁹⁶ Crimes Decree 2009 (Fiji) ss 134, 135.

⁹⁷ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008, 99.

⁹⁸ *Cooper v Slade* [1857] HL Cas 746; 10 ER 1488.

⁹⁹ *Lindley* [1957] Crim LR 321, *Calland* [1967] Crim LR 236.

¹⁰⁰ [1985] SBHC 6; www.pacii.org.

¹⁰¹ *State v Aisake* FJHC 35.

officials did act honestly and not sacrifice duty for personal gain.¹⁰² In PNG the National Court has held that corruptly means dishonestly.¹⁰³

- 2.97 The *Cooper v Slade* approach has been criticised because of its circularity and lack of meaning. There is a risk that taking this approach might narrow the scope of the offence. For example, would doing something that is forbidden by the Public Service Code of Conduct, or the Leadership Code, amount to ‘something that the law tends to forbid as tending to corrupt’?
- 2.98 The ambiguity of the term corruptly does not assist to clarify whether certain kinds of conduct that might be permitted or even required according to custom or customary law infringes the criminal law. It might be argued that a person engaged in conduct that falls within one of the corruption offences, but with the state of mind that the conduct is acceptable in custom, is not acting corruptly, and therefore not committing a corruption offence.
- 2.99 The difficulty with the term corruptly is highlighted by the availability of a reverse onus regarding corrupt behavior for the offence of corrupt practices. The reverse onus only applies where:
- the receiver of the benefit is in the employment of the Crown, a government department, town council or other local government council or other public body; and
 - the giver of the benefit is holding or seeking to obtain a contract with the Crown, government department, town council, local government council or other public body.
- 2.100 The reverse onus is not available for other cases, such as where a bribe is given to a person employed by the Crown or any other public body to obtain a licence, a visa or a tax exemption. It is also not clear whether the reverse onus applies to other types of agents, such as elected officials, provincial government officials and employees. In principle, there is no reason why the reverse onus should apply to

¹⁰² *Herscu v R* (1991) 103 ALR 1 at 6.

¹⁰³ *The State v Toamara* (1998-99) PNGLR 253.

contracts, but not to other common situations where public officials are bribed, and only to some categories of agent.

2.101 By way of contrast, the reverse onus in relation to misconduct under the Leadership Code (Further Provisions) Act is not so limited, and it applies to any leader irrespective of the circumstances of the giving of the benefit. Once it is established that the leader has acquired property that cannot be part of his or her known income or receipts, he or she is guilty of misconduct in office unless he or she proves otherwise.¹⁰⁴

2.102 The new UK Bribery Act takes a different approach. It does not use the term *corruptly* or any reverse onus. Instead the offence is concerned with *improper performance* of a function or activity. The function or activity is improperly performed when:

- the performance is in breach of a relevant expectation; or
- there is a failure to perform the function or activity, and the failure is a breach of the relevant expectation.

The test for relevant expectation is what a reasonable person in United Kingdom would expect in relation to the performance of the function or activity.¹⁰⁵

Consultation

2.103 In the LRC Penal Code Issues Paper we asked whether the Penal Code should adopt a different approach. One written submission supported the adoption of the term *improperly* to replace *corruptly*.¹⁰⁶ Recent consultation with the Office of the Director of Public Prosecutions indicates support for the replacement of the fault element of *corruptly* with a fault element of *improperly* that is defined in legislation.¹⁰⁷

Options for reform

¹⁰⁴ Leadership Code (Further Provisions) Act s 18.

¹⁰⁵ Bribery Act 2010 (UK) ss 4 & 5.

¹⁰⁶ A Radclyffe, *Submission*.

¹⁰⁷ Office of Director of Public Prosecutions, *Consultation*, 5 November 2010.

2.104 It is crucial that the fault element of corruptly in the Penal Code is clarified. Here are some options for reform:

- a) retain the fault element of corruptly and change the reverse onus provision that applies so it applies to a wider range of transactions;
- b) replace the fault element of 'corruptly' with another fault element, such as dishonesty or improperly, and define the fault element.

Option a)

2.105 Under this option the reverse onus that currently only applies to government contracts for the offence of secret commissions would be extended to all prosecutions for bribery.

2.106 The Queensland Criminal Code provides for a reverse onus for its offences on secret commissions if it is proved that any valuable consideration has been received or solicited by an agent from any person having business relations with the principal, without the consent of the principal. The burden of proving that valuable consideration was not received, solicited, given, or offered in contravention of any of the provisions on secret commission offences is on the accused.¹⁰⁸ The ordinary onus of proof applies to other corruption offences like official corruption, however the Queensland Code also has a bribery offence that applies to members of Parliament that does not use the element 'corruptly'.

2.107 The Western Australia Criminal Code takes the same approach as Queensland.¹⁰⁹

2.108 In Kenya, if a person is accused of a corruption offence, where the element of the offence is that the act was done corruptly, and it is proved that the person did the act, such as the payment or receipt of a benefit, then the accused is presumed to have done that act corruptly, unless the contrary is proved.¹¹⁰

¹⁰⁸ Criminal Code (Qld) s 442M(2).

¹⁰⁹ Criminal Code (WA) s 543.

¹¹⁰ Anti-corruption and Economic Crimes Act (Kenya) s 58.

- 2.109 The Fiji Law Reform Commission recommended this option to be adopted in Fiji.¹¹¹
- 2.110 However a reverse onus may not be reasonable or fair when the giver or receiver of the benefit (not being charged with a criminal offence) is not willing or available to testify for the accused that the benefit was not corruptly given. There is a further problem that a witness cannot be compelled to give evidence that might incriminate him or herself. The Queensland Criminal Code provides that a witness giving evidence in a secret commission prosecution cannot refuse to answer on the ground that the answer would incriminate the witness, but evidence given by the witness cannot be used against that witness except for a prosecution for perjury.¹¹² The court can give a certificate to a witness where it believes that the witness has given true testimony which will allow the witness to get a stay of proceedings if he or she is subsequently prosecuted.¹¹³
- 2.111 One question is whether this reverse onus infringes the presumption of innocence as guaranteed under the Constitution.¹¹⁴ The 1998 Law Commission Report on reforming corruption offences recommended abolishing the reverse onus on the basis that it could potentially be considered to contravene Article 6(2) of the European Convention on Human Rights (ECHR) regarding the presumption of innocence.¹¹⁵
- 2.112 However, in the case of *X v United Kingdom*, the European Commission on Human Rights held that a reverse onus will not violate the right to innocence if it only creates a rebuttable presumption of fact, which the defence may disprove, and is not unreasonable.
- 2.113 The Model Criminal Code Committee rejected a reverse onus for secret commissions' offences because it is not consistent with general

¹¹¹ Fiji Law Reform Commission, Report on Bribery and Corruption (2003) 29-34.

¹¹² Criminal Code (Qld) s 442K.

¹¹³ Criminal Code (Qld) s 442L.

¹¹⁴ Constitution s 10(2)(a).

¹¹⁵ Law Commission, *Reforming Corruption*, 1998 Report [4.77]- [4.78].

criminal law principles, and the presumption of innocence, particularly where the offence carries a heavy penalty.¹¹⁶

Option b)

- 2.114 For this option the fault element of corruptly is replaced with a fault element such as dishonestly or improperly which is defined in legislation. In jurisdictions where the fault element of dishonestly or improperly has been used it has been defined in both subjective and objective terms. Whether the conduct of the accused is dishonest or improper is assessed by reference to the ordinary standards of reasonable and honest people.
- 2.115 The Model Criminal Code defines “dishonesty” to mean dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.¹¹⁷
- 2.116 Improperly is used in South Australia for the offence of bribery of a public officer. The offence is committed if a benefit is improperly given or offered to a public officer, or improperly sought or accepted by a public officer. Improperly is defined as knowingly or recklessly act contrary to the standards of propriety as generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.¹¹⁸ The conduct must merit criminal sanction, and in assessing whether the conduct was improper the court must take into account whether the benefit was publicly disclosed.
- 2.117 Dishonesty or improperly is a more accessible concept than corruptly as it accurately identifies the prohibited evil. It also has the necessary flexibility to deal with the wide variety of circumstances in which offences can occur. This includes the difficult cases where elected officials are offered, or receive benefits from a variety of sources.

¹¹⁶ MCCOC Report 307.

¹¹⁷ MCCOC Report 140.

¹¹⁸ Criminal Law Consolidation Act 1935 (South Australia) ss 238, 249.

Dishonesty and honesty in political life, commercial life and elsewhere must be measured against a general community standard.¹¹⁹

Recommendation

12. The fault element of corruptly should be replaced with a fault element of improperly. The Penal Code should define acting improperly as acting contrary to standards of behavior reasonably expected of a person in the role of the accused by ordinary and decent members of the community.

¹¹⁹ MCCOC Report 291.

3. Abuse of office

Existing offences

3.1 Abuse or improper use of office, where there is no bribery, is currently covered by the separate offences of:

- public officers having private interests (carrying a maximum penalty of one year imprisonment),¹²⁰ and
- abuse of public office (carrying a maximum penalty of two years, three years if the abuse of office was done for the purpose of gain).¹²¹

3.2 The offence of public officer having private interest is confined to public officers:

- with judicial or administrative duties in relation to property of a special character, or
- responsible for the carrying on of any manufacture, trade or business of a special character,

‘where they acquire or hold directly or indirectly a private interest in any such property, manufacture, trade or business, and where the public officer ‘discharges any such duties’ with respect to the property, manufacture, trade or business.’

3.3 For abuse of office the elements of the offence are:

- that the accused is a person employed in the public service;
- the accused abused the authority of his or her office; and
- the accused’s act was arbitrary and prejudicial to the rights of another.

3.4 The abuse of office offence is limited in its scope because abuse of office might involve an omission rather than an action or direction to another, and it does not apply where the abuse leads to a benefit for either the accused or another. In many cases a public officer is

¹²⁰ Penal Code s 94.

¹²¹ Penal Code s 96.

motivated to engage in behavior that would amount to abuse of office because of a benefit, either for himself or herself or another. The prejudice that flows from abuse of public office may be to an individual, but it might also simply be prejudice to the general public interest. Some further difficulties might arise with defining the scope of the words 'abuse the authority of his office.'

- 3.5 Some of the difficulties with the current offence are illustrated by the case of *Regina v Fasi*.¹²² In this case the prosecution had proved beyond reasonable doubt that the accused was a person employed in the public service and that he had abused the authority of his office as a Magistrate when he signed applications for citizenship when none of the applicants took and subscribed to the Oath of Allegiance before him. However, the accused was acquitted because the prosecution failed to prove that the accused's action was arbitrary and prejudicial to the rights of another.
- 3.6 The 2007 Solomon Islands Auditor-General's report identified the problem of officials using positions of influence to assist family and friends as a systemic weakness.¹²³ The offence of abuse of office does not recognise that in cases where a public officer abuses his or her office that it is usually the collective interests of the people (the public), or the integrity of a system, that is prejudiced rather than the interests of another individual. The current offence does not recognise that public officers are often motivated or driven to abuse office because of the prospect of getting a benefit either for themselves or for a friend or family member. The offence of abuse of office is also an offence that might be used where a statutory discretion (for example those held by Ministers, senior public officers) is abused in order to get a benefit for the decision maker, or another.

¹²² [2006] SBHC 73; <www.paclii.org>.

¹²³ Office of the Auditor-General, *An Auditor General's Insights into Corruption in Solomon Islands Government*.

Other jurisdictions

- 3.7 The Kenyan Anti-corruption and Economic Crimes Act describes abuse of office as when a person uses his or her office to improperly confer a benefit on himself or herself or anyone else.¹²⁴
- 3.8 The Model Criminal Code describes abuse of office as when a public official dishonestly exercises any function or influence, refuses or fails to exercise any function, or uses information gained, because of his or her public office with the intention to obtain a benefit for himself or herself or for another person, or cause a detriment to another person. It carries a maximum penalty of 5 years imprisonment.¹²⁵
- 3.9 In the Australian state of South Australia the offence of abuse of office extends to former public officers who improperly use information obtained while in public office, with the intent to benefit himself or herself or another, or to cause injury or detriment to another. The maximum penalty for the offence is 7 years.¹²⁶

UNCAC

- 3.10 The UNCAC requires each state party to consider adopting laws that would criminalise abuse of functions or position by a public official for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.¹²⁷

A new offence

- 3.11 The LRC considers that the existing offences should be replaced by a new offence that focuses on improper conduct carried out with the intention to benefit the person or another, or with the intention to cause some detriment to another. The scope of the offence would be defined by the fault element of improperly to delineate the prohibited

¹²⁴ Kenyan Act s 46.

¹²⁵ Model Criminal Code clause 20.5

¹²⁶ Criminal Law Consolidation Act 1935 (SA) s 251(3).

¹²⁷ ICAC Art 19.

conduct from legitimate conduct. That is, it would be necessary to prove that the accused was acting contrary to the standards of behaviour reasonably expected of a person in the role of the accused by ordinary and decent members of the community. This would replace the requirement to prove that the action of the accused was an arbitrary abuse of office.

- 3.12 The LRC considers that the offence might also be extended to employees of non government organisations because of their role in providing services for the public and communities, and their use of funds from governments and donors.
- 3.13 The LRC considers the offence should also apply to former public servants and employees of non government organisations who improperly use information obtained while in service or employment with the intention to benefit him or herself, or another, or with the intention to cause a detriment to another. It would be appropriate to limit the offence, so that using information with the consent of the principal is not improper.

Recommendation

- 13. The existing offences in sections 94 and 96 should be replaced with a single offence of abuse of office. It would apply where a public officer or employee of a non government organisation improperly exercises his or her functions with the intention of getting a benefit for himself or herself, or for another, or a detriment to another.**
- 14. The offence should also apply to a former public officer or employee of a non government organisation who improperly uses information gained while in public office or employment, with the intention to get a benefit for himself or herself, or for another, or a detriment to another. Use of information with the consent of the principal is not improper.**

4. Defence of culture and tradition

- 4.1 The Penal Code is not clear about whether giving or taking benefits that are acceptable in custom is an offence. As discussed earlier it might be argued that the fault element of ‘corruptly’ that applies to official corruption and corrupt practices means that conduct (which would otherwise be an offence) that is permitted or required under custom is excluded from the offences. The Queensland Criminal Code, the Western Australia Criminal Code, and the Kenyan Anti-corruption and Economics Crime Act state that custom is not a defence in prosecution of bribery offences.¹²⁸ The UNCAC does not say anything on custom as a form of defence.
- 4.2 The Leadership Code (Further Provisions) Act 1999 requires every leader to disclose to the Leadership Code Commission his or her financial affairs within three months of becoming a leader.¹²⁹ However, it is not necessary for the leader, his or her spouse and children to disclose details of gifts received from spouse and children; gifts offered in connection with custom ceremony; and gifts with a value less than hundred dollars.¹³⁰
- 4.3 During LRC consultation it was suggested traditional culture or custom should be recognised in laws.¹³¹ Another submission suggested that customary practices that may be seen as corruption, but which are acceptable in a cultural way, should not be regarded as corruption in the Penal Code.¹³² On the other hand another submission stated that the Penal Code should not incorporate an exception regarding gifts into corruption offences.¹³³ Another argument is that this issue is quite complex because in some cases

¹²⁸ Anti-corruption and Economics Crime Act (Kenya) s 49; Queensland Criminal Code section 442M; Western Australia Criminal Code section 542; and the MOCCOC Report 305.

¹²⁹ Leadership Code (Further Provisions) Act 1999 s 8.

¹³⁰ Leadership Code (Further Provisions) Act 1999 s 8(4).

¹³¹ Taro, Choiseul Province, *Consultation*, 12 – 15 October 2009.

¹³² Savo Council of Chiefs, *consultation*, 23 June 2009.

¹³³ Andrew Radcliff, *submission*.

culture might contribute or provide opportunities for corruption, and in other cases it can be a strength when dealing with corruption.¹³⁴

- 4.4 Corruption in Solomon Islands now occurs in situations that did not exist prior to the development of modern democratic government and the introduction of a market economy into Solomon Islands. The creation of national and provincial governments, and the commercial exploitation of resources, has created opportunities for corruption that did not previously exist. Customary practices such as people giving gifts to chiefs and leaders, and chiefs and leaders distributing goods, developed in a different context.
- 4.5 There is a risk that reform of criminal law dealing with corruption will be undermined if acts claimed to be done according to custom are categorically regarded as constituting no offence. A contextual approach needs to be considered. Custom is not relevant to corruption offences that occur in the public sector because the public sector context is not a customary context. In the case of bribery in the private sector, custom is not relevant to situations where the giving or receiving of the benefit is kept secret, and not shared with other members of the community.

Recommendation

15. Custom should be prohibited as a defence for any bribery offences in both the public sector and private sector. Custom might be used as a mitigating factor for the purpose of sentencing.

¹³⁴Anti-corruption Task Force meeting 9 – 10 October 2009, Honiara.

5. Punishment and deterrence

Maximum penalties

- 5.1 The maximum penalties that can be imposed for a conviction for corruption offences in Solomon Islands are low compared to some other jurisdictions. The maximum penalty for official corruption is seven years imprisonment, and the maximum penalty for corrupt offences is two years, or a fine of \$2000. In the case of corrupt practices where it involves a government contract the maximum penalty is seven years, or a fine of \$2000. The offences that address abuse of public office (sections 93 and 94) carry maximum penalties of six months imprisonment, and 12 months imprisonment. The offence of extortion by a public officer (section 93) carries a maximum penalty of three years imprisonment. In addition, disqualification from public office is limited to Leadership Code proceedings and is not available under the Penal Code on conviction for a corruption offence.
- 5.2 In those jurisdictions where corruption offences have been recently reformed the maximum penalty for bribery is 10 years imprisonment. The Model Criminal Code recommended a maximum penalty of 10 years for bribery, and five years for abuse of office. In Queensland and Western Australia the maximum penalty is seven years for both official corruption and corrupt practices. In Fiji, the maximum penalty for official corruption is 10 years.
- 5.3 Inadequacy of penalties, compared to international standards, was identified as a problem with the current offences by the Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes. The report recommends increasing the penalties and sanctions that may be imposed for corruption and related unlawful activities.¹³⁵
- 5.4 The LRC consultation shows a strong perception that the current penalties and punishments for corruption do not effectively deter

¹³⁵ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008, 100.

people from engaging in corrupt activities. This perception might also arise due to the narrowness of some of the corruption offences, as well as policing and prosecution practices and capacity. Suggestions for penalties to improve deterrence include: higher penalties for officers with status such as judges and members of Parliament, mandatory minimum penalties for chiefs found guilty of corruption, a requirement to pay back money or benefits gained through corruption and disqualification from public office. The need for punishment that takes into account the status of the person convicted of a corruption offence, particularly elected officials, was also raised during consultation.¹³⁶

- 5.5 During consultation it was strongly submitted that deterrence should be the guiding principle for penalties. It is the view of people consulted that due to very low penalties, people do not care about committing the offences. They submitted that penalties should be high in order to deter people from committing offences. Some submitted that corruption involving government officials and public authorities should attract severe penalties. During one consultation it was suggested that chiefs found guilty of corruption must be imprisoned for two years.¹³⁷ It was also suggested that an accused found guilty of corruption must pay back the money he or she had got out of corruption.¹³⁸

Recommendation

16. Bribery offences should have the a maximum penalty of at least 7 years imprisonment. The maximum fine that might be imposed should be unlimited.

¹³⁶ *Consultation*, Gizo 20 April 2009; *Consultation*, Lata 6 May 2009; Mother's Union Conference, *Consultation*, Honiara, 16 June 2009.

¹³⁷ *Consultation*, Taro 14 October 2009.

¹³⁸ *Consultation*, Lengalau Village, Guadalcanal 12 May 2009; *Submission*, Frank Wetara, LRC Office 16 April 2010.

17. The maximum penalty for abuse of office should be increased to 5 years.

Disqualification

5.6 In terms of deterrence and protection of the community, disqualification from public office may well be a more effective sanction for corruption offences than imprisonment and fines. The Leadership Code (Chapter VIII of the Constitution and the Leadership Code (Further Provisions) Act) has disqualification available as a sanction for misconduct. Public officers might also be dismissed from public office under the Public Service Commission Regulations. The Penal Code does not provide the courts the power to order disqualification from office if a person is found guilty of a corruption offence.

5.7 Certain public servants and public office holders, including Government Ministers and other Members of Parliament, are subject to the Leadership Code. A finding of misconduct by the High Court may be punished by a fine of up to \$10,000¹³⁹ and disqualification from holding public office for three years (or permanent disqualification if found guilty of misconduct a second time).¹⁴⁰ However the High Court can only deal with misconduct if a case is referred to it by the Commission, or an appeal is lodged by a leader from a finding of the Commission.¹⁴¹ Misconduct includes bribery as well as conduct that may amount to abuse of office.¹⁴² Under the Constitution a person who is convicted of an offence in respect of his office or position or in relation to the performance of his functions or duties is guilty of misconduct.¹⁴³

5.8 A public officer is also subject to the Public Service Commission Regulations (the PSC Regulations). Sanctions under the PSC

¹³⁹ Leadership Code (Further Provisions) Act ss 17, 35(a).

¹⁴⁰ Leadership Code (Further Provisions) Act s 36.

¹⁴¹ Leadership Code (Further Provisions) Act s 33.

¹⁴² Leadership Code (Further Provisions) Act Part III.

¹⁴³ Constitution s 94(4).

Regulations can be in the form of reprimand, severe reprimand, reduction in salary or wages, demotion, or dismissal.¹⁴⁴ The PSC Regulations appear to suggest that these sanctions can be imposed on an officer in addition to any criminal penalty as a result of criminal proceedings against the officer regarding the same conduct.¹⁴⁵

5.9 The power in the Leadership Code (Further Provisions) Act to disqualify for misconduct has never been used even though there are cases where leaders have been found guilty of a criminal offence that was committed in the course of his or her public duties. There appear to be a number of reasons for this:

- a perception, or practice, that where corruption results in a criminal investigation and prosecution the LCC has no further role in relation to the case;
- the process for making an application under the Leadership Code (Further Provisions) Act for disqualification is not specified;
- the LCC has not seen fit to refer any cases the High Court; and
- a view that section 2 of the Penal Code precludes any subsequent action under the LCC where a leader has been convicted of a criminal offence.

5.10 Disqualification and banning orders are common in the area of the regulation of corporations and professions (such as lawyers and doctors). Under the Solomon Islands Companies Act 2009 the court can disqualify a person from being a director of a company, or being involved in the management of a company, for up to five years if he or she has been found guilty of a number of offences, or disqualified from acting as a director in another country.¹⁴⁶ The Kenya Anti-corruption and Economic Crime Act provides for automatic

¹⁴⁴ PSC Regulation 58.

¹⁴⁵ PSC Regulations 52–55.

¹⁴⁶ Companies Act 2009 s 77.

disqualification from being elected or appointed as a public officer for 10 years on being convicted on a corruption or economic crime.¹⁴⁷

LRC consultation

5.11 Some people consulted by the LRC submitted that the criminal law should apply notwithstanding the Leadership Code and its processes, and that the current system with a separate system for leaders protected politicians from being held accountable for corruption.¹⁴⁸ As discussed above a strong theme from consultation was that the penalties for corruption need to deter. Disqualification from public office following conviction for a corruption offence was supported during consultation by the LRC.¹⁴⁹ Some people consulted supported disqualification for a specified period for up to 10 years¹⁵⁰ while other supported disqualification for life.¹⁵¹ One written submission supported disqualification for 5 years for members of Parliament who are convicted of a corruption offence.¹⁵²

18. The Penal Code should include a power for courts to disqualify from public office when a person is found guilty of bribery offences or abuse of office.

Repayment or forfeiture

5.12 Under the Penal Code when a person is convicted of a corruption offence (sections 91, 92, 92 and 374 of the Code) the court can in addition to any other penalty make an order that the property which passed in connection with the offence should be forfeited to the Crown. Where the property can't be forfeited or found the court can direct payment of a sum of money that is equivalent in value to the

¹⁴⁷ Anti-Corruption and Economic Crime Act (Kenya) s 64.

¹⁴⁸ Church leaders, *Consultation*, Tingoa, 19 October 2009.

¹⁴⁹ *Consultation*, Lata, 6 May 2009, *Consultation*, Lengalau, Guadalcanal, 12 May 2009, church leaders, *Consultation*, Tingoa 19 October 2009, *Consultation*, Taro 14 October 2009, *Consultation*, Tulagi, 4 November 2009.

¹⁵⁰ *Consultation*, Lengalau, Guadalcanal, 12 May 2009, *Consultation*, Tulagi, 4 November 2009.

¹⁵¹ *Consultation*, Lata, 6 May 2009, *Consultation*, Taro 14 October 2009.

¹⁵² A Radclyffe, *Submission*.

property.¹⁵³ This does not address repayment to bodies or people other than the Crown.

- 5.13 Under the Money Laundering and Proceeds of Crime Act, within six months after conviction, the Director of Public Prosecutions may apply to the court for a confiscation order against the property which is considered tainted property in respect of the offence or apply for a pecuniary penalty order against the person in respect to the benefits derived from the commission of the offence.¹⁵⁴ In the circumstance that the defendant has died or absconded, the Director of Public Prosecutions may apply to the court for a confiscation order in respect of any tainted property.¹⁵⁵
- 5.14 The Queensland Criminal Code provides that any person found guilty of a crime of secret commission is liable to an additional order to pay the amount or value of the benefit received or given by the person.¹⁵⁶

Recommendation

19. Amend the Penal Code to clarify that when a person is convicted of a corruption offence that the court can order payment of the amount or value of the benefit received or given by the convicted person to any identified person or body.

Relationship between criminal sanctions and disciplinary or civil actions

- 5.15 Corruption can be addressed by criminal prosecution as well as other actions available under the law. This section considers the relationship between criminal offences and misconduct under the Leadership Code and disciplinary proceedings under the PSC Regulations.
- 5.16 A single act can have a number of aspects, and can result in different legal consequences. For example a person who assaults a person can

¹⁵³ Penal Code s43.

¹⁵⁴ Money Laundering and Proceeds of Crime Act s 28.

¹⁵⁵ Money Laundering and Proceeds of Crime Act s 32.

¹⁵⁶ Criminal Code (Qld) s 442I.

be liable to pay compensation, and can be liable to a criminal conviction. If the assault occurs in the workplace then there might also be disciplinary action. The question whether more than one sanction or consequence can be imposed on a person for a single act depends on how the different legal actions are characterised.

- 5.17 Both the Constitution and general legal principles prohibit double punishment under the criminal law. The Constitution says that a person cannot be tried for a criminal offence once acquitted or convicted of a *criminal offence* in connection with the same act or omission.¹⁵⁷ However there is no objection in principle to punishment under the criminal law, as well as sanctions or legal consequences under other laws that cannot be characterised as criminal, for the same conduct.
- 5.18 Criminal, civil and disciplinary proceedings have different purposes and processes. Criminal proceedings are taken by the state to punish. Criminal offences require mental elements such as intent (for corruption offences presently that intent is the fault element of 'corruptly'). Criminal offences must be decided by a court with a high standard of proof of beyond reasonable doubt. A person accused of a criminal offence has a right to remain silent during investigation, and the right to not self-incriminate. The ethical obligations on a prosecutor regarding fairness and disclosure are different to the obligations of a plaintiff or complainant in civil or disciplinary proceedings. A person can only be deprived of his or her liberty (ie imprisoned) as part of a sentence for a criminal conviction, and a criminal charge must be determined by a court.¹⁵⁸
- 5.19 For civil proceedings the purpose is to pay damages or compensation to the person who has suffered an injury or loss; there is a lower standard of proof (ie the balance of probability), there is no risk of imprisonment and the accused has no right to not self incriminate.

¹⁵⁷ Constitution s 10(5).

¹⁵⁸ Constitution ss 5, 10.

- 5.20 For disciplinary proceedings the purpose is to protect the public and protect the reputation of a profession. Disciplinary proceedings are often heard by bodies or tribunals that are not courts. An example of this is a disciplinary committee convened to hear complaints against lawyers under the Legal Practitioners' Act. Such bodies also commonly have an investigative function. There is a low standard of proof (ie balance of probability); there is no risk of imprisonment; the accused has no right to silence and the outcome usually involves a reprimand, suspension, termination or disqualification.
- 5.21 The Penal Code prohibits punishment for an act or omission under the Penal Code, as well as punishment under any other Act, Statute or other law, for the same act or omission.¹⁵⁹ It is not clear whether this prohibition only extends to criminal offences, or to any proceeding where the sanction that might be imposed could be characterised as a punishment. The protection from 'double punishment' that might be offered by section 2 of the Penal Code is potentially far wider than the protection from double jeopardy contained in the Constitution.
- 5.22 In relation to the PSC Regulations, there is a further issue. The terms of the PSC Regulations seem to suggest that an officer could not be punished under those regulations in respect of particular misconduct where the officer had been charged with a criminal offence for such misconduct and had subsequently been acquitted.¹⁶⁰ Punishment seems to be precluded even where the conduct clearly contravened relevant legal requirements (eg. the Financial Instructions) whether or not it was also a 'crime'. This would seem to mean that an acquittal operates as immunity for an officer from punishment under the PSC Regulations even though an acquittal for a criminal offence is not a finding of innocence, it is finding that the person did not commit the offence.
- 5.23 The 2008 Report on Diagnostic Study of the Law of Solomon Islands for Anti-corruption Purposes recommended that provision should be

¹⁵⁹ Penal Code s 2.

¹⁶⁰ PSC Regulation s 55. Note that this does not prevent the officer from being punished under the PSC Regulations in respect of other misconduct.

made to demarcate criminal and disciplinary conduct and ensure the exercise of disciplinary powers where appropriate.¹⁶¹

Misconduct under the Leadership Code: civil remedy or criminal offence?

5.24 The distinction between criminal proceedings and actions under the Leadership Code for misconduct is not clear. Misconduct covers the same ground as a number of criminal offences in the Penal Code, including official corruption and secret commissions, but it also covers a much broader range of conduct than the offences in the Penal Code. For example, misconduct under the Leadership Code includes:

- directly or indirectly asking for or accepting a benefit in relation to any action in the course of his official duties;
- holding shares or other investment in a company that could reasonably be expected to place him in a position of conflict of interest;
- neglect or failure to give priority to official business due to furthering personal business;
- having a controlling interest in a company that seeks, accepts or holds a beneficial interest in a contract with the Government of Solomon Islands; and
- engaging in paid employment (other than official employment) without written approval of the Leadership Commission¹⁶²

5.25 The Constitution or the Leadership Code (Further Provisions) Act 1999 do not provide any clear guidance about whether misconduct is a disciplinary or civil remedy, or a criminal offence.

5.26 A finding of misconduct can be made by either the Leadership Code Commission or the High Court (following a referral by the Leadership Code Commission). Misconduct cannot be punished by imprisonment, but can be punished by fine or disqualification.

¹⁶¹ Primo Afeau, Victoria Aitken, *Report on Diagnostic Study of Law of Solomon Islands for Anti-Corruption Purposes*, July 2008, 97.

¹⁶² Leadership Code (Further Provisions) Act 1999 ss 11, 12, 13, 14, 15.

- 5.27 High Court decisions about the nature of Leadership Code proceedings have not been consistent. Most of these decisions were made under the previous Act (Leadership Code (Further Provisions) Act 1979). The situation was not clarified with the 1999 Act.
- 5.28 In the case of *Regina v Siapu* the High Court had to decide on the standard of proof to be used for charges of misconduct brought against the accused by the Director of Public Prosecutions. The legislation in force at the time (Leadership Code (Further Provisions) Act 1979) required that proceedings for misconduct should be commenced in the High Court by the Director of Public Prosecutions. The court held that the 'offence of misconduct' is not a criminal offence, and the court did not use the criminal standard of proof of beyond reasonable doubt. It applied a standard of proof that the court must be reasonably satisfied of the truth of the allegations bearing in mind the nature and gravity of the charge. The court also said that the purpose of the Leadership Code was to promote the integrity of the country's leaders and to penalise for misconduct.¹⁶³
- 5.29 By contrast, in *Regina and Zapo* some three years later the High Court took a different approach to charges brought under the Leadership Code (Further Provisions) Act 1979 and the Constitution. Three counts of misconduct were brought against the accused under sections 8 and 14 of the Act, and section 94 of the Constitution and section 24(1) of the Act. The court applied a standard of proof of beyond reasonable doubt.¹⁶⁴
- 5.30 In another case the High Court held that charges under the Leadership Code (Further Provisions) Act 1979 should be subject to a preliminary inquiry (a legal process that only applies to criminal charges) by a magistrate before a trial in the High Court. At the time the Act said that proceedings for misconduct should be commenced in the High Court. The court's view was that the legislation needed to be clearer to remove the process of preliminary inquiry because the

¹⁶³ *Regina v Siapu* (1993) SBHC 14 www.pacii.org.

¹⁶⁴ *Regina v Zapo* [1997] SBHC 25, <www.pacii.org>

purpose of the inquiry is to disclose the charge and the facts on which the charge is based.¹⁶⁵

- 5.31 In the case of *R v Musuota* the accused was charged with offences under the Leadership Code (Further Provisions) Act 1979, section 94 of the Constitution and the secret commissions offence in the Penal Code with respect to the same transaction of resigning from the government of Prime Minister Billy Hilly in return for taking a benefit (the use of a car) from a businessman. The court treated the offences under the Leadership Code as criminal offences, and applied the standard of proof of beyond reasonable doubt. The accused was found guilty of two counts of misconduct: accepting a gift, and allowing integrity to be called into question.¹⁶⁶
- 5.32 Despite the conflicting court decisions there are strong arguments in support of characterising Leadership Code proceedings under the current legislation as disciplinary proceedings, rather than criminal proceedings. A leader can be required to provide information that can be used against him or her in misconduct proceedings, the sanctions for misconduct do not include imprisonment and misconduct can be determined either by the Leadership Code Commission or the High Court.¹⁶⁷ According to the Constitution criminal charges *must* be determined by a court.¹⁶⁸ The Leadership Code Commission (which is not a court) cannot determine criminal proceedings.

Recommendation

20. Section 2 of the Penal Code should be amended to clarify that a person cannot be punished under the Code, and under any other criminal law, for the same conduct.

¹⁶⁵ *Regina v Kelly* [1996] SBHC 31, <www.paclii.org>

¹⁶⁶ *R v Musuota*, [1997] SBHC 9 www.paclii.org

¹⁶⁷ Leadership Code (Further Provisions) Act 1999, ss 27, 24, 33.

¹⁶⁸ Constitution s 10(1).

6. Investigation and prosecution of corruption offences

- 6.1 Consultation by the LRC, and other investigations such as the 2008 Report on Diagnostic Study of Solomon Islands Law for the Purpose of Anti-Corruption, identify problems with the investigation of corruption. These problems include:
- lack of cooperation and information sharing by different agencies involved in detecting and addressing corruption and maladministration such as the Leadership Code Commission, Office of the Auditor-General, Ombudsman and police;
 - difficulties with access to financial records;
 - lack of protection for witnesses; and
 - lack of surveillance powers.
- 6.2 During one consultation meeting concerns were raised about the difficulty with proving bribery under the existing law where there must be a connection between the offer or payment of a benefit and the corrupt conduct. In some cases it is only possible to demonstrate that a person (in public office, or in a position of trust) has accumulated wealth or property beyond his or her means.¹⁶⁹

Investigation of offences

- 6.3 Investigation of corruption offences requires access to documents and other records (eg. financial records and auditor's reports) that can provide details of the financial affairs of the entities under investigation. According to the Constitution entry and search of property (house, office, business) must be authorised by a law for the purpose of preventing or detecting criminal offences.¹⁷⁰
- 6.4 There is a further problem in relation to information collected and kept by public bodies such as the Leadership Code Commission, Auditor-General, Ombudsman and Inland Revenue. Police investigators currently have difficulties in obtaining information that

¹⁶⁹ Isabel Province Government members, *Consultation*, Buala, 26 May 2009.

¹⁷⁰ Constitution s 9.

is collected by these public authorities due to confidentiality requirements. Generally information from the Auditor-General and Ombudsman is only available after reports are tabled in Parliament.

- 6.5 By contrast, the Leadership Code Commission and the Financial Intelligence Unit (which administers the Money Laundering and Proceeds of Crime Act) have some significant powers to collect financial information relevant to corrupt activity. However, this information is not available for the investigation of corruption offences in the Penal Code.

Police powers under the Criminal Procedure Code

- 6.6 In Solomon Islands at present, the powers of the police to obtain these types of documents and records seem to be limited to:

- the power to search, with a warrant, a building, vehicle or place for something where this is necessary to the conduct of an investigation into an offence, and to seize any such thing found;¹⁷¹ and
- the power to detain and search a person or vehicle with no warrant where a police officer has reason to suspect that an article associated with a criminal offence is being conveyed on the person or vehicle, and to take possession of any such thing found.¹⁷²

- 6.7 There seems to be nothing in legislation that authorises a police officer to enter and search premises without a warrant even in exceptional circumstances, and seize any documents found on the premises that are relevant to the investigation of a corruption offence.

- 6.8 A search warrant may only be obtained from a Magistrate or justice of the peace.¹⁷³ In order to obtain a search warrant it must be proved that there is a reasonable suspicion that anything

‘upon, by or in respect of which an offence has been committed, or anything that is necessary to the conduct of an investigation into any

¹⁷¹ Criminal Procedure Code s 101.

¹⁷² Criminal Procedure Code s 15.

¹⁷³ Criminal Procedure Code s 101.

offence' is in any building, ship, vehicle, box, receptacle or place. An application for a search warrant should give details about the offence that has been committed, the property that is being sought and its location.¹⁷⁴

- 6.9 There are considerable difficulties for investigations in the provinces where a police officer may not be able to find a Magistrate or justice of the peace to issue a warrant. At present, there is no mechanism for a search warrant to be obtained by telephone or other electronic means. By contrast, in other jurisdictions warrants might be issued (usually by a magistrate or judge) to enter and search a place where police can establish that there are reasonable grounds for suspecting that there is evidence of the commission of an offence at the place;¹⁷⁵ or if there are reasonable grounds to believe that a thing connected with a particular indictable offence are or will be at the place within 72 hours.¹⁷⁶ The LRC is considering the issue of search warrants and other police investigation powers as part of the review of the Criminal Procedure Code.
- 6.10 The current arrangements for search warrants are not suitable for obtaining financial information from financial institutions and public bodies that might be relevant to an investigation for a corruption offence.

Leadership Code Commission

- 6.11 Under the Leadership Code (Further Provisions) Act (1999) every leader must disclose to the LCC every two years his or her financial interests as well those of his or her spouse and children. Failure to provide the information without reasonable excuse, or giving false, misleading or incomplete information, amounts to misconduct. The LCC can also require a leader to provide further details about his or her financial affairs.¹⁷⁷

¹⁷⁴ *Zalao v Attorney-General* [1997] SBCA 6 www.paclii.org.

¹⁷⁵ Police Powers and Responsibilities Act 2000 (Qld) s 151.

¹⁷⁶ New South Wales ss 47, 48.

¹⁷⁷ Leadership Code (Further Provisions) Act ss 8,9.

- 6.12 The LCC when undertaking a formal inquiry has power to require, by written notice, any person, bank, department, office, corporation or institution to produce accounts, books, statements and other documents for the LCC's examination.¹⁷⁸ Failure to comply with such a notice is an offence.¹⁷⁹
- 6.13 However information collected by the LCC cannot be shared with any other agency responsible for investigating or detecting corruption, and it can only be used by the Commission, or for the purpose of misconduct proceedings in the High Court, or under an order of a court.¹⁸⁰ Members appointed to the LCC take an oath swearing to maintain secrecy in relation to the affairs of the LCC, and to not divulge any information in performing the functions of a member except as authorized by law.¹⁸¹ Unlike a court it is not a requirement that the proceedings or the decisions of the Commission be open to the public.

Money-Laundering and Proceeds of Crime Act

- 6.14 The Money-Laundering and Proceeds of Crime Act¹⁸² provides police with powers to gain information about tainted property and serious crimes (crimes that carry a maximum penalty of more than 12 months imprisonment). Information can be gained with production orders¹⁸³, search warrants¹⁸⁴ and monitoring orders.¹⁸⁵ A production order can be obtained by a police officer, without notice to the affected person, from a judge if a person has been charged with or convicted of a serious offence. A production order can be sought in relation to documents relevant to identifying property that might be the subject of a money-laundering offence. A person cannot refuse to produce

¹⁷⁸ Leadership Code (Further Provisions) Act s 27.

¹⁷⁹ Leadership Code (Further Provisions) Act s 28.

¹⁸⁰ Leadership Code (Further Provisions) Act ss8, 10.

¹⁸¹ Leadership Code (Further Provisions) Act s 5(5), schedule 1.

¹⁸² Introduced in 2002, amended in 2010.

¹⁸³ Money-Laundering and Proceeds of Crime Act s 70.

¹⁸⁴ Money-Laundering and Proceeds of Crime Act s 75.

¹⁸⁵ Money-Laundering and Proceeds of Crime Act s 77.

documents on the basis that the document might tend to incriminate the person, or make the person liable to penalty, however the document (or information obtained as a result of production of the document) cannot be used against the person for a criminal prosecution.

- 6.15 The Director of the Financial Intelligence Unit, established by the Money Laundering and Proceeds of Crime Act, has a wide range of powers to obtain information from financial institutions and cash dealers. The Director can share information with law enforcement agencies if the Director has reasonable grounds to suspect that the information may involve an offence of money-laundering, a terrorist financing offence, the proceeds of crime or any other offence under the Money Laundering and Proceeds of Crime Act.¹⁸⁶

Other jurisdictions

- 6.16 In Kenya the Anti-Corruption Commission and Advisory Board has responsibility for investigating corruption (as well as other activities such as advice to public bodies and public education). The Director and investigators of the Commission have the same powers, privileges and immunities of a police officer. The Director may require a person who is reasonably suspected of corruption or economic crime to provide written information about his or her property. The Commission may also apply to a court *ex parte* for an order that an associate of a suspected person provide information about any property. The Commission can by written notice require any person to provide information or documents that relate to a person suspected of corruption or economic crime.¹⁸⁷
- 6.17 The Commission might also apply with notice to a court for an order that any person (whether or not suspected of corruption or economic crime) produce records, and provide explanations or information about the records.¹⁸⁸

¹⁸⁶ Money-Laundering and Proceeds of Crime Act s 11H.

¹⁸⁷ Anti-corruption and Economic Crime Act (Kenya) ss 26, 27.

¹⁸⁸ Anti-corruption and Economic Crime Act (Kenya) s 28.

- 6.18 If a person provides information to the Commission or an investigator he or she is protected from any legal or disciplinary action in relation to that assistance or information. The protection does not apply if the person did not believe that the information was true.¹⁸⁹
- 6.19 The Director of the UK Serious Fraud Office has special responsibility for investigating suspected offences that involve serious or complex fraud. Specifically, the Director can request information or documents relevant to an investigation from people under investigation for serious or complex fraud, as well information from others. Failure, without reasonable excuse, to comply with a request, is a criminal offence. A member of the Serious Fraud Office can also apply for a warrant to enter, search and take documents relevant to an investigation.¹⁹⁰
- 6.20 In New South Wales in addition to the ability to seek and obtain a search warrant, the police can obtain a notice to compel a deposit taking institution to produce documents that might be connected with an offence.¹⁹¹

Conclusion

- 6.21 Legislation can enable and protect public sector bodies to share information more effectively and efficiently for the investigation of corruption offences. There is no reason in principle why information that can currently be shared by the Financial Intelligence Unit for certain offences should not be shared for other serious offences, such as bribery and abuse of office. Similarly, there is no reason why police should be able to use a production order for money-laundering offences, but not for other serious offences.
- 6.22 The LRC considers that sharing of information relevant to the commission of corruption offences by public sector bodies might also contribute to the prevention of corruption. The LRC also considers

¹⁸⁹ Anti-corruption and Economic Crime Act (Kenya) s 65.

¹⁹⁰ Criminal Justice Act 1987 (UK) ss 1, 2.

¹⁹¹ Law Enforcement (Powers and Responsibility) Act 2002 s 53.

that making information about the financial interests of leaders available for public scrutiny would improve public confidence in leaders, and enhance the investigation of misconduct and criminal offences.

- 6.23 The provisions in the Leadership Code (Further Provisions) Act and Money-Laundering and Proceeds of Crime Act to facilitate the collection of evidence by investigators relation were introduced to overcome particular difficulties with investigating and addressing misconduct, money laundering and the proceeds of crime. Similarly, there is a need to introduce additional measures in Solomon Islands to overcome difficulties encountered in investigating corruption offences. At the same time, any new arrangements or powers to obtain information would have to comply with the Constitutional requirement that a person cannot be required to incriminate him or herself.

Recommendation

- 21. Introduce legislation to authorise public sector bodies including the Office of the Auditor-General, the Office of the Ombudsman, the Leadership Code Commission, the Royal Solomon Islands Police Force, the Office of Inland Revenue, the Financial Investigation Unit and Customs to share information with each other for the purpose of that body's powers and functions.**
- 22. Introduce legislation to so that information collected by the Leadership Code Commission regarding the financial affairs of leaders is available to the public.**
- 23. Introduce legislation to provide protection for public officers or other informants subject to a duty to maintain confidentiality to give information to public sector bodies. This should include protection from defamation (civil and criminal) and other civil actions.**
- 24. Introduce legislation to allow police to apply to a judge of the High Court for a production order for information that may be related to bribery or abuse of office. Information obtained from a person cannot**

be used in any subsequent criminal prosecution against that person (save for a prosecution for the offence of failing to provide the information, or a prosecution for perjury.)

Prosecution of corruption offences

- 6.24 Prosecutions for corruption offences are difficult due to the secrecy surrounding this type of crime, and the reluctance of witnesses to cooperate with an investigation or prosecution because they are also potentially an accomplice to the crime. In many cases the prosecution has to rely on evidence from an accomplice to support the charge. Courts are unwilling to accept the evidence of an accomplice unless he or she has been given immunity by the prosecution, or has been dealt with by the court for their part in the commission of the offence.
- 6.25 The problem is illustrated by the case of *Regina v Yam*.¹⁹² The accused was convicted in the Magistrates' Court of official corruption, forgery and uttering. An appeal to High Court resulted in acquittal because the accused was convicted on basis of evidence from an accomplice, and the Police or DPP did not give any undertaking not to charge or prosecute the witness. The court applied a rule of practice that accomplices (including accomplices who have not been charged) should only be called to give evidence after a clear undertaking has been given by the DPP that he or she will not be prosecuted for the offence in which he or she has been asked to give evidence. The reason for this rule of practice is that unless the undertaking is given the witness has a powerful motive to ingratiate him or herself with the prosecution.
- 6.26 In a more recent prosecution the DPP for the offence of official corruption the prosecution relied on evidence given by a witness who facilitated the payment of money to the accused. In this case the witness was given immunity from prosecution by the DPP.¹⁹³

¹⁹² [1994] SBHC 70.

¹⁹³ *Regina v John Maetia Kaliuae and Clement Rojumana* HC-SI CRC No 413 of 2006 (unreported judgment Naqiolevu J).

- 6.27 According to the Prosecution Policy of the DPP it is preferable that a witness who is a party to a crime plead guilty and receive a discount to the sentence. However, the policy also recognises it might be appropriate to grant immunity on condition that the person gives truthful evidence in accordance with his or her statement to police.
- 6.28 There is also the issue whether the witness, who is potentially a party to an offence, can be compelled to give evidence. The Evidence Act provides protection from self-incrimination for criminal offences. A person cannot be required to give information in a court proceeding or other public officer conducting an investigation into a criminal offence, or possible criminal offence, if the information would tend to incriminate the person for an offence punishable by fine or imprisonment.¹⁹⁴
- 6.29 The Queensland and Western Australia Criminal Codes have provisions so that a witness can be required to give evidence in a prosecution for secret commission offences even though the evidence would incriminate, or tend to incriminate the witness. The evidence cannot be used in a criminal prosecution against the witness, and where the witness gives truthful evidence the court must give the witness a certificate that can be used to support a stay of a prosecution if he or she is later prosecuted for an offence that is the subject of the proceedings in which evidence is given.¹⁹⁵

Recommendation

25. Amend the Penal Code and Evidence Act so that a witness can be required to give evidence in a prosecution for corruption offences even though the answer would tend to incriminate the witness. Any answer given by the witness cannot be used in a criminal prosecution against the witness if the witness gives truthful evidence.

¹⁹⁴ Evidence Act s 146.

¹⁹⁵ Criminal Code Act (Qld) ss 442K, 442L, Criminal Code Act (WA) ss 540, 541.

Appendix 1 Prosecutions for corruption

Regina v Yam 1994 [1994] SBHC 70 <www.paclii.org>

- Forgery
- Uttering
- Official corruption

<i>Allegations</i>	<i>Result</i>
Payment to public servant of \$55 for a forged letter	Convicted of forgery, uttering and official corruption in Magistrates' Court. Acquitted on appeal. Evidence did not support any link between the bribe and the forged letter by the public servant. High Court held that accomplices should not give evidence unless they are prosecuted or DPP gives undertaking not to prosecute.

Regina v Orodani [1996] SBHC 69 <www.paclii.org>

- Corrupt practices
- Allowing integrity to be called into question (section 94 of the Constitution)

<i>Allegations</i>	<i>Result</i>
Leadership Code and Penal Code prosecution for Minister corruptly accepting the use of a hire car in return for his resignation from the government.	Acquitted of all charges. No evidence to support connection between acceptance of hire car and resignation.

Regina v Zapo [1997] SBHC 25 <www.paclii.org>

- Use of office for personal benefit (Leadership Code (Further Provisions) Act)
- Acceptance of benefit (Leadership Code (Further Provisions) Act)
- Allow integrity to be called into question (s 94 Constitution)

<i>Allegations</i>	<i>Result</i>
Leadership Code prosecution for Minister accepting use of hire car in return for resignation as minister from government.	Acquitted of all charges. Prosecution did not prove circumstances of acceptance of hire car. No evidence of dishonesty

Regina v Musuota [1997] SBHC 9 <www.paclii.org>

- Acceptance of benefit s 14(1)
- Use of office for personal benefit s 8(1)
- Acceptance of bribery s 13
- Allow integrity to be called into question s 24(1)

Leadership Code (Further Provisions) Act and s 94(1) Constitution
Corrupt Practices s 367 Penal Code

<i>Allegations</i>	<i>Result</i>
Leadership Code prosecution for Minister accepting use of a hire car following his resignation as a cabinet minister.	Acquitted of corrupt practices; the act of resignation was not within the range of conduct covered by the offence. Acquitted of use of office for personal benefit; the act of resignation not in connection with official duty as minister. Acquitted of acceptance of bribe; the act of resignation not in connection with official duty. Convicted of accept a benefit and allow integrity to be called into question. Fined \$900. Acquitted on appeal.

Regina v Fasi [2006] SBHC 73 <www.paclii.org>

- 13 counts abuse of office s 196 Penal Code

<i>Allegations</i>	<i>Result</i>
Prosecution for abuse of office in Penal Code for magistrate who signed citizenship application forms without applicants appearing before him to swear oath of allegiance as required.	Acquitted. Court found that accused had signed documents which was an abuse of office, but that prosecution did not prove that act of accused was 'arbitrary and prejudicial to the rights of another'.

Yee v Reginam [2007] SBHC 38 <www.paclii.org>

Official corruption

<i>Allegations</i>	<i>Result</i>
Offer of \$500 bribe to tax official.	Convicted and sentenced in Magistrates' Court to six months imprisonment, reduced on appeal to fine of \$5000.

Regina v Kii 2007 [2007] SBHC 137 <www.paclii.org>

- Official corruption
- Obtain money by deception

<i>Allegations</i>	<i>Result</i>
Claims made by accused (Permanent Secretary for Ministry for National Unity, Reconciliation and Peace) for	Acquitted by High Court.

compensation for loss during tension period. Accused received \$680000 .

R v David Dausabea Central Magistrates' Court (Unreported 2008)

- Official corruption

<i>Allegations</i>	<i>Result</i>
As Mayor of Honiara took bribe of \$1000.	Convicted. Sentence of imprisonment 21 months, partly suspended with 7 months to serve

R v Zama 2007 Central Magistrates' Court (Unreported Myers PM, 26 March 2007)

Francis Zama v Regina HC-SI CRAC No 126 of 2007 (Unreported, Naquiolevu J 24 September 2007).

- 2 counts official corruption

<i>Allegations</i>	<i>Result</i>
Minister for Finance granted himself an exemption from payment of goods tax and stamp duty	Convicted in Magistrates' Court. Acquitted by High Court on the ground that Minister was not employed in the public service as required for official corruption. Crown conceded ground of appeal.

Rojumana v Regina [2009] SBCA 9 <www.paclii.org>

R v Maetia and Rojumana HC-SI CRC No 413 of 2005 (Unreported Naquiolevu J)

John Maetia Kaliuae v Regina Criminal Appeal Case No 8 of 2010 (Unreported, Auld P, Adams JA, Hansen JA, 8 October 2010)

- Multiple counts of official corruption

<i>Allegations</i>	<i>Result</i>
Rojumana (government minister for Home Affairs, responsible for Citizenship Commission) and Maetia (chairman of the Citizenship Commission) sought and took money in connection with grant of Solomon Islands passports and citizenship.	<ol style="list-style-type: none"> 1. Court of Appeal decided that governmentt minister was 'employed in the public service' ie the decision in Zama was incorrect. 2. Maetia convicted by High Court, Rojumana acquitted. 3. Meatia acquitted by Court of Appeal

R v John Tebolo [2010] SBHC 27 <www.paclii.org>

- Official corruption

<i>Allegations</i>	<i>Result</i>
Public officer in the Attorney-General's Chambers took a bribe	Convicted in Magistrates' Court and sentenced to two and a half years

	imprisonment. Sentence reduced by High Court to two years fully suspended.
<i>R v Bouro</i> Central Magistrates' Court (Unreported 7 September 2010)	
<ul style="list-style-type: none"> • Two counts official corruption 	
<i>Allegations</i>	<i>Result</i>
Commissioner of Forest sought bribes from logging companies.	Convicted in Magistrates' Court and sentenced to two years imprisonment suspended.

Appendix 2 Submissions and Consultations on the Penal Code

CONSULTATIONS:

<u>Name/ Address</u>	<u>Location</u>	<u>Date</u>
Royal Solomon Islands Police (RSIP)	Honiara	August 2009
Temotu Province Meetings:		
Temotu Premier, Provincial Secretary, Members and Speaker	Temotu	May 2009
Police Meeting	Women Resource Centre	
Public Forum		
Central Province Meetings:		
Savo Council of Chiefs	Savo, Central Province	June 2009
Chiefs from Gela, ICP of Church of Melanesia	Bungana Island, Central Province	June 2009
People of Lengalau Village, Tasiboko Area, East Guadalcanal	East Guadalcanal, Guadalcanal Province	May 2009
Western Province Meetings:		
Police and Lawyer	Gizo, Western Province	April 2009
Western Province Council of Women		
Public Forum		
Deputy Premier and Provincial Secretary		
National Advisory Committee for Children (NACC)	Honiara	July 2009
Mothers Union	Honiara	June 2009
Malaita province Meetings:		
Deputy Premier and Provincial Secretary	Auki, Malaita Province	April 2009
Legal Adviser		
Provincial Ministers		
Police and Public Solicitors' Office		
Stakeholders (NGOs, Women's Rep.)		

Legal Staff Public Solicitor's Office	Honiara, Guadalcanal Province	July 2009
<u>Names/ Address</u>	<u>Location</u>	<u>Date</u>
Isabel Province Meetings:	Buala, Isabel Province Provincial Office	26th May 2009
Isabel Provincial Executive Provincial Council of Women	Provincial Resthouse, Conference Room	27th May 2009
Police	Buala Police Station	27th May 2009
Diocese of Isabel - Vicar General and three others	Diocese of Isabel, Conference Room	29th May 2009
Mothers Union (Isabel)		29th May 2009
Renbel Meetings:		
Robert Pongi, Provincial Secretary	Rennell, Renbel Province	19th October 2009
Church Leaders		19th October 2009
Pastor Sam Thao (SDA)		
Jonathan Puia (SDA)		
Mr. Benjamin Exodus Spinali (SSEC)		
Mr. Craven Taugenga		
Mr. Brian Tuhenua		
Mr. Moses T Sungagellka (SSEC)		
Pastor John Teno (SSEC)		
Arilon Nasiu (SSEC)		
Police		20th October 2009
PC Katea Tuia		
PPF Advisor Tony Delamere		
PC Derrick Nasui		
PPf Advisor Ronifacio Na'ati Malokula		
Community Leaders	Moreno Conference Room	21th October 2009
Matthew Taupongi		
James Tepuke		

<u>Name/ Address</u>	<u>Location</u>	<u>Date</u>
Community Meetings	Tengano Village and Nuipani Village, East Rennell	22th October 2009
Choiseul Province Meetings:	Choiseul Province	12th October 2009
Local Police PPC Tom PC Margareth PC Tauroa PC and Police Prosecutor Berry PC Frederick		
Choiseul Provincial Executives Mr. Luke Pitakoe, Secretary Lauru Land Conference		13th October 2009
Mr. Michael M Zazu, F/Manager Lauru Land Conference Mana A. Kidson, Save the Children Nelson Katovai, Save the Children Maurice Vaqalo, C. Corp Taro S. Vasara, Business House Rep. Graham Qaqara, Forestry Division (MOFR) Roswita Nowak, Lands Division Helen J. Nowak, WDD Officer Andrew Malasa, MPA, Ward 3 Solomon Poloso, Speaker Choiseul Provincial Assembly		
Hon. Peter Tobire MPA, Ward 1 Wagina, South Choiseul Hon. Jackson Kiloe, Premier		
Women Youth and Church Representatives: Susan Tim		

Leticia Pakipora
 Lorraine Ottoga
 Amata Takulsala

<u>Name/ Address</u>	<u>Location</u>	<u>Date</u>
Florence Vuka		
Ben Vare		
Rhobson Doloso		
Raygun Punimaya		
Harris Poloso		
Judy Face		
Linda Vaike		
Elma Tau		
Christina Vaqalo		
Lisa Haruwe		
Vasizi Charlse		
Jimmy Kelly		
Clayford Jurupiru		
Columbus Velovava		
Mary Kereseke		
Pamela Zioto		
Sabina Biloko		
Margaret Zage		
Meridian Kere		
Barnabas T		
Roveto Voyce		
Elai Qale		
Simon Kisini		
Central Islands Meetings:		
Central Islands Provincial Executive	Provincial Headquarter Tulagi, Central Province	3rd November 2009
Police	Police Headquarter, Tulagi	3rd November 2009
Women and Youth	Education Conference Room	4th November 2009

Provincial government Representatives and NGOs	Education Conference Room	4th November 2009
Makira Province Meetings:		
Premier	Provincial Conference Room, Kirakira, Makira Province	10th March 2010
Deputy Provincial Secretary		
<u>Name/ Address</u>	<u>Location</u>	<u>Date</u>
Minister for Education		
Minister for Forestry		
Minister for Works		
Minister for Fisheries		
Kirakira Provincial Council of Women, Women Groups	Women Resource Centre	
Police:	Court Haus	11th March 2010
Jerry Muaki, Sgt		
Peter Siai, PC		
Toswell Tafia, Sgt		
Rex Waiwori, Staff Sgt		
Paul Pirigau, Inspector		
Davenport Masu, PC		
James Lapoe, Sgt		
Derick Tata, Sgt		
Charlse Alisi, PC		
Placidor Haora, PC		
Samuel Tora, Sgt		
Joh Gapigai, DC		
Community Meeting	St. Peter's Leaf Haus, Tawani Village	12th March 2010
Guadalcanal Meetings:		
Tetere Police and Prison Officers	Tetere Police Headquarter, Guadalcanal	May-10
Community Meeting:		
Catherine Kakamo, Ngalimbiu Village	Catholic Parish Hall, Gorou/ Tetere	16th June 2010
Gabriel Lovanitila, Kekene Village		
Father John Taluasi, Saranuli Village		

Festus Neleta, Numbu Village

Erick Miti, Reko Village

Daniel Poru, Sopapera Village

Jacinta Kura, Kuara Village

Mary Poa, Teatupa Village

Stanley Vutiade, Dadave Village

<u>Name/ Address</u>	<u>Location</u>	<u>Date</u>
Margaret Vure, Mendingi Village		
Grenta Tome, GPPOL 2		
Inspector Sade, Tetere Police Station		
Nursing Manager, Good Samaritan Hospital		
Catherine Ernest, Kovelau Village		
Alice Bunia, Komuvatha Village		

WRITTEN SUBMISSIONS:

Names

Andrew Radclyffe

Ashley Wickham

Connelly Sandakabatu

Chief John Harai

Bernice Tebitara, Chairperson Family Support Group, Gizo

Douglas

Hou

Kenneth Wong

James Meplana