

Solomon Islands Law Reform Commission

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

The current Chairman is Mr. Frank Bollen Paulsen.

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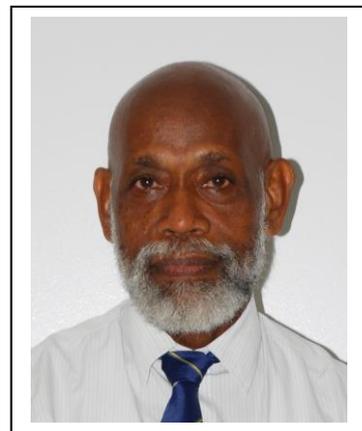


Chairperson Frank Bollen Paulsen

Part-time Commissioners



Commissioner Gabriel Suri



Commissioner Waeta Ben Tabusasi



Commissioner Rt Rev. Philemon Riti



Commissioner Emmanuella Kauhue

Call for Submissions

The Solomon Islands Law Reform Commission (SILRC) invites your views and comments as submissions to this Personal Harm Offences Consultation Paper. A submission is your views and opinions about how the law should be changed. A submission can be written, such as a letter or email, or verbal, such as a telephone conversation or a face to face meeting. A submission can be short or long, it can be formal or simply dot points or notes.

How to Make a Submission

You can write a submission, send an email or fax, or ring up the SILRC or come to our office and speak with one of our staff. You can also come to consultation meetings held by the SILRC.

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This paper is available from our office.

The deadline for submissions for this project is 30th June 2018.

Law reform is a process of changing the law that requires public participation. Comments and submissions sent to the SILRC will not be confidential unless you clearly request that the information provided be kept confidential.

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Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
HIV	Human Immunodeficiency Virus
MCCOC	Model Criminal Code Officers Committee of the Standing Committee of the Attorney-Generals (Australia)
NSW	New South Wales
NT	Northern Territory
PNG	Papua New Guinea
Qld	Queensland
SILRC	Solomon Islands Law Reform Commission
UK	United Kingdom
WA	Western Australia

INTRODUCTION

1.2 Personal harm or injuries offences are offences that cause damage to the physical person rather than property.¹ These offences are also known as non-fatal offences against the person. Such offences take the form of an attack directed at another person, which do not result in the death of any person.² These offences cause physical, psychological or emotional harm to a person.

1.3 The purposes of Personal Harm Offences Consultation Paper are to:

- engage Solomon Islanders in the renewal of the law, educate them as to the current law and the issues that may exist with the current law; and
- gather information on people's view of the law on personal harm offences and changes they think should be made to those offences.

1.4 This paper has 7 chapters focusing on the Personal Harm Offences in the Solomon Islands Penal Code [Cap 26] (Penal Code). These chapters will consider how the criminal law protects the right to bodily integrity except for sexual offences.³ These are the Personal Harm/Non-Fatal offences against person which will be considered in this consultation paper in the chapters:

1) Assaults

- Common assaults
- Assaults causing actual bodily harm
- Unlawful wounding
- Acts intended to cause grievous bodily harm or prevent arrest
- Grievous harm

2) Poisoning

- Maliciously administering poison with intent to harm; and unlawful poisoning

3) Kidnapping and abduction

- Child stealing and abduction of unmarried girls under 15 years
- Unlawful or wrongful confinement or detention

4) Criminal Reckless and Negligence

- Reckless and negligent acts

5) Failure to supply necessities and cruelty to children under 15 years

6) Intimidation, molestation and stalking

- Making a written threat to kill

¹ Mick Woodley (ed), *Osborn's Concise Law Dictionary* (12th ed, 2013), 316.

² Ibid.

³ Sexual Offences were considered in the Second Interim Report, June 2013, of the SILRC, which the Government has implemented into the Penal Code (Amendment) (Sexual Offences) Act 2016.

7) Negligent act likely to spread infection of disease dangerous to human life.

1.5 This paper discusses the current law on Personal Harm Offences in the Solomon Islands. It also considers laws on personal harm offences from other jurisdictions in some instances. In addition, the paper raises issues and questions to seek feedback or comments from the public. Finally, it suggests possible reform options for discussions.

CHAPTER 1: ASSAULTS

Common Assaults

- 1.6 The Penal Code section 244 provides for common assaults. The section states that any person who unlawfully assaults another is guilty of a misdemeanour, and, if the assault is not committed in circumstances for which a greater punishment is provided in the Code, the penalty shall be one year imprisonment.
- 1.7 The elements of the offence are that the defendant at a particular place and time unlawfully assaults the complainant.
- 1.8 The Penal Code does not define the term assault. The High Court in the case of *Regina v Fataga*,⁴ adopted the English definition of assault as where a person intentionally or recklessly causes another person to fear immediate and unlawful personal violence.⁵ There is no requirement for any injury, although the offence can apply where injury is caused to the victim. However, there is uncertainty whether words alone could amount to assault or whether the victim must be aware of the threatening behaviour (for example where the victim is asleep) or whether conditional threats result to assault. In the case of *Rauhoura v Reginam*,⁶ the Accused was charged with common assault. The issue was whether a strike or blow which did not hit the victim should amount to assault. The court followed the English meaning of assault and held that with regards to common assault it did not matter whether or not the blow or strike on the victim, what mattered was whether apprehension of immediate danger was caused to the victim by the accused's actions.
- 1.9 There are arguably uncertainties of the kinds of actions which may constitute assault. Some jurisdictions have introduced definitions for assault. For example, in Queensland,⁷ PNG,⁸ and Western Australia:⁹ their Criminal Codes define assault as where someone strikes, touches or applies force to another person without his or her consent. It also includes attempts, or threats made by action or gesture to apply force when the person making the threat appears to be able to carry out the threat. Force includes applying heat, light, electrical force, gas, odour or any other substance or thing to cause injury or personal discomfort.

⁴ [2003] SBHC 108 <www.paclii.org>.

⁵ *Regina v Fataga* [2003] SBHC 108 citing with approval *Fagan v Metropolitan Police Commissioner* (1968) 3 All E.R. at 445, 97.

⁶ *Rauhoura v Reginam* [1995] SBCH 72 <www.paclii.org>.

⁷ Criminal Code s 245 (Qld).

⁸ Criminal Code s 243 (PNG).

⁹ Criminal Code s 222 (WA).

1.10 The English case of *Fagan v Metropolitan Police Commissioner*,¹⁰ stated that for an assault to be committed, both elements of actus reus and mens rea must be present at the same time. The 'actus reus' is the action causing effect on the victim's mind and the 'mens rea' is the intention to cause that effect.

1.11 Herring stated the elements of assault as:

- a) 'actus reus', the defendant caused victim to apprehend imminent unlawful force.
- b) 'mens rea', the defendant intended or was reckless that the victim would apprehend imminent unlawful force.'¹¹

Assault causing actual bodily harm

1.12 Assault causing actual bodily harm is when a person commits assault and it results in actual bodily harm or injury. The maximum penalty for assault causing actual bodily harm is five years imprisonment.¹²

1.13 The elements of assault causing bodily harm are that the defendant at a particular place and time unlawfully assaults the complainant causing bodily harm.

1.14 Herring outline the elements of assault causing actual bodily harm as:

- a) 'actus reus', the defendant must commit an assault or battery which causes the victim to suffer actual bodily harm.
- b) 'mens rea', the defendant must intend or be reckless as to the assault or battery.¹³

1.15 The Penal Code has more serious penalties for assaults that are committed on certain classes of people, or in certain or particular circumstances. A maximum punishment of two years applies if:

- the assault is done while the accused is committing a serious offence or resisting arrest;
- the assault occurs during unlawful industrial action;
- the assault is on someone seizing property under a court order;
- the assault is committed on a police officer; or
- the assault is on someone carrying out a duty under the law.¹⁴

¹⁰ [1968] 3 ALL ER 442, Queen's Bench Division.

¹¹ Jonathan Herring, *Criminal Law* (5th ed, 2012), 326.

¹² Penal Code [Cap 26] s 245.

¹³ Jonathan Herring, above n 11, 336.

¹⁴ Penal Code [Cap 26] s 247.

- 1.16 There is a further category of serious assaults on particular classes of people. This category of serious assaults involves striking or wounding magistrates, police officers and persons protecting wrecks. The maximum penalty for committing assaults on those classes of people is seven years imprisonment.¹⁵
- 1.17 The penalties for assaults do not recognize or take into account assaults that are carried out on the weak or vulnerable people like children, women, persons living with disabilities, or where a weapon is used.
- 1.18 In the case of *Regina v Kake*,¹⁶ one of the issues considered was whether a steam pot was a weapon in terms of section 44(2) of the Penal Code. The prosecution did not provide to the Magistrate the descriptions of the steam pot which the Respondent had used to assault the victim. However, the steam pot did cause actual bodily harm to the victim. The Court agreed that the steam pot was an article which was capable of causing injury to a person and hence a weapon within subsection 2 of section 44 of the Penal Code.
- 1.19 The MCCOC has recommended for more serious penalties for personal harm offences in the following circumstances:
- the offence was committed by threatened use of an offensive weapon;
 - the offence was committed during torture;
 - the offence was committed against public officials;
 - the offence was committed against a person who was involved in judicial proceedings;
 - the offence was committed against a child under the age of 10 years; and
 - the offence was committed against a person to whom the accused was in a position of trust or authority.¹⁷
- 1.20 The Vanuatu Penal Code [Cap 135] provides a specific section for intentional assault, and the category of damages and penalties. Intentional assault is when a person has the intention to assault another person. One has to satisfy the mens rea (intention to assault) and the actus reus (the act of assault) before he or she could be charged with the offence of intentional assault. Listed below are the penalties for each category of damages caused by intentional assault:
- a) if no physical damage, penalty of three months' imprisonment;
 - b) if damage of a temporary nature is caused, penalty one year imprisonment;

¹⁵ Penal Code [Cap 26] s 246.

¹⁶ *Regina v Kake* [2006] SBHC 119 <www.paclii.org>.

¹⁷ MCCOC, *Model Criminal Code Chapter 5 Non-Fatal Offences Against the Person Report* (1998), 110.

- c) if damage of permanent nature is caused, penalty imprisonment for five years; and
- d) if the damage caused results in death, although the offender did not intend to cause such death, the penalty is 10 years imprisonment.¹⁸

QUESTIONS

1. Should the Penal Code include a definition for 'assault'? If so, how should assault be defined?
2. Should all penalties for assault in the Penal Code be different with serious consideration of assaults that are carried out on weak and vulnerable people (children/woman/persons with disabilities) or where weapon is used? If so how?
3. Should there be increase in penalties for assaults committed on officers carrying out or involving in judicial duties and other statutory duties?
4. Should the penalties for assault increase according to the nature of injury on the victim?
5. Should there be an intentional harm assault offence?

1.21 Possible options for reform are:

1. The Penal Code should have a definition for assault.
2. Reform the penalties for assault in the Penal Code taking into account the many circumstances/situations where an assault can occur.
3. The penalties should be determined by the nature of damage endured by the victim as the result of the assault.
4. Assaults committed against the weak and the vulnerable persons of the society should attract higher penalties.
5. Assault committed against a person carrying out or involving in judicial duties and other statutory duties should be high.
6. The Penal Code should have the offence of intentional harm assault.

SILRC previous consultations

1.22 There were a number of submissions made with regard to Personal Harm Offences when the SILRC conducted some consultations on the review of the Penal Code. For instance, some submitted that there is a need to distinguish between different types of assault.¹⁹ Others submitted that there should be a classification of the different forms of assault depending on the seriousness of the offence; and the need to separate

¹⁸ Penal Code [Cap135] s 107 (Vanuatu).

¹⁹ *Consultation*, Kirakira, 11th March 2010.

victims with bruises from those with no bruises.²⁰ There were also some views on the punishment for the offence, for example, the punishment for common assault needed to fit the motive behind the assault.²¹ The maximum penalty for assault causing bodily harm was inadequate and should be set at 20 years, that is imposed according to the types of injury or harm; and that the punishment for common assault should be increased.²²

Unlawful wounding

- 1.23 Unlawful wounding and causing bodily or grievous bodily harm are personal harm offences in the Penal Code which results in a person (victim) sustaining minor or major injuries. In Australian States of Queensland, Northern Territory and Western Australia, grievous bodily harm is defined in their criminal codes as “any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health.”²³ However, these offences do not cover harm such as pain, loss of consciousness, disfigurement, mental harm or injury to mental health. Other jurisdictions such as Queensland,²⁴ Western Australia,²⁵ and Papua New Guinea,²⁶ now define bodily harm in their Criminal Codes as any bodily injury which interferes with health and comfort of a person. The Northern Territory Criminal Code defines harm as physical harm or harm to person’s mental health both temporary and permanent.²⁷
- 1.24 Unlawful wounding is when a person wounds another person without any lawful justification. Herring defines unlawfully to mean the defendant acted without lawful justification. An example of lawful justification is where the defendant is acting in self-defence.²⁸ Herring adopted the meaning of wound in the case of *C v Eisenhower* [1984] QB 331 (DC) to mean a break in the continuity of the whole of the skin.²⁹ Unlawful wounding is a misdemeanor offence and carries a maximum penalty of five years imprisonment.³⁰

²⁰ *Consultation*, Tulagi, 3rd November 2009.

²¹ *Consultation*, Auki, 29th April 2009.

²² *Consultation*, Gizo, 20th April 2009.

²³ MCCOC, above n 17, 21.

²⁴ Criminal Code s 1 (Qld).

²⁵ Criminal Code s 1 (WA).

²⁶ Criminal Code s 1 (PNG).

²⁷ Criminal Code s 1 (NT).

²⁸ Jonathan Herring, above n 11, 338.

²⁹ Jonathan Herring, above n 11, 333, The breaking of just the outer skin is insufficient: *M’Loughlin* (1838) 173 ER 651. The Skin comprises two layers: dermis and epidermis. Both must be broken for there to be a wound.

³⁰ Penal Code [Cap 26] s 229.

- 1.25 The elements of unlawful wounding are that the defendant at a particular place and time unlawfully wounds the complainant.
- 1.26 An example of a case involving the offence of unlawful wounding is *Regina v Manu*.³¹ In this case the second Accused was charged for unlawful wounding, in addition to the charge of murder. The unlawful wounding conduct was that the second Accused unlawfully stabbed the palm of the victim's left hand with a knife which resulted in injury. The Accused was found guilty of unlawful wounding.

Acts intended to cause grievous harm or prevent arrest

1.27 The offence of intentionally causing grievous harm to a person is one of the most serious personal harm offences in the Penal Code of Solomon Islands, which carries a maximum penalty of life imprisonment.³²

1.28 The Section 224 of the Penal Code states as follows:

“Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person:

- (a) unlawfully wounds or does any grievous harm to any person by any means whatever; or
 - (b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or
 - (c) unlawfully causes any explosive substance to explode; or
 - (d) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
 - (e) causes any such substance or thing to be taken or received by any person; or
 - (f) puts any corrosive fluid or any destructive or explosive substance in any place; or
 - (g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person,
- is guilty of a felony, and shall be liable to imprisonment for life.”³³

1.29 In the case of *Regina v Paewa*,³⁴ the defendant who stabbed the victim at his home with a kitchen knife of about 30 cm long that inflicted the grievous wound on the head of the victim was convicted for acts intended to cause grievous harm contrary to section 224(a).

³¹ [2015] SBHC 81 <www.paclii.org>.

³² Penal Code [Cap 26] s 224.

³³ Penal Code [Cap 26] s 224.

³⁴ [2016] SBHC 86 <www.paclii.org>.

Grievous harm

- 1.30 The Penal Code in section 226 provides that [a]ny person who unlawfully does grievous harm to another is guilty of a felony, and shall be liable to imprisonment for 14 years. The elements of the offence are that the defendant at a particular place and time unlawfully cause grievous harm to the complainant.
- 1.31 Section 4 of the Penal Code defines grievous harm to mean harm which amounts to maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense. Maim is defined in this same section to mean the destruction or permanent disabling of any external or internal organ, member or sense.
- 1.32 A case example of this offence is *Regina v Wesley*.³⁵ In that case, the Respondents (a group of men) were drinking when Armstrong Kitu approached the Deceased and punched him. A fight started between the Respondents and the Deceased, and the Deceased ran into a house but the Respondents' presence prevented the Deceased from escaping. A tussle then ensued between the Deceased and Armstrong Kitu which resulted in Armstrong suffering lacerations. The Deceased then fell into the sea where the Respondents threw bottles at him. There were no attempts made to rescue the Deceased. The Deceased was found dead when he was removed from the sea. The Respondents were initially charged with murder. They pleaded not guilty to the charge of murder. A fresh indictment for the offence under s226 'grievous harm' was later presented and the Respondents pleaded guilty to the charge.³⁶ The Respondents were sentenced, Wesley and Katalaena Kitu served a sentence of about 1 year 9 months and 2 weeks, and the others' sentences were 2 years 6 months and some days.
- 1.33 The MCCOC and the UK Law Commission recommended for personal harm offences to specify that harm should include all forms of physical harm including pain, unconsciousness, disfigurement, infection with disease as well as impairment of mental health.³⁷
- 1.34 A possible option for reform is to include in the Penal Code a broad definition for harm to include harm such as pain, loss of consciousness, disfigurement, mental harm or injury to mental health experienced by the victim as a result of the commission of the offence.

³⁵ *Regina v Wesley* [2005] SBCA 12 <www.paclii.org>.

³⁶ *Regina v Kilibijili* [2005] SBHC 159 12 <www.paclii.org>.

³⁷ MCCOC, above n 17. s 5.1.1, UK Law Commission, *The Law Commission Criminal Law Legislating the Criminal Code, Offences Against the Person and General Principles* (1993) Draft Bill clause 18.

QUESTION

Should the offences of unlawful wounding and acts intended to cause grievous harm cover harm such as pain, loss of consciousness, disfigurement, mental harm or injury to mental health?

CHAPTER 2: POISONING

Maliciously administering poison with intent to harm and unlawful poisoning

- 1.35 A poison is a substance that when introduced into or absorbed by a living organism will cause illness or death.³⁸ Poisoning is the act of applying the poisonous substance on to someone which may result in another person becoming ill or die (dying).
- 1.36 Jonathan Herring stated that it is necessary to distinguish between substances which are in their nature poisonous or noxious and those which are not in their nature harmful.³⁹ Examples of substances which are in their nature poisonous or noxious are cyanide, Sulphuric acid or heroin. These substances are poisonous or noxious regardless of whatever quantity is used.⁴⁰ "To put arsenic in someone's tea is to administer poison to them, even if it is harmless in the amount administered."⁴¹
- 1.37 Substances which are not in their nature harmful⁴² are such substances that must be shown that the quantity is sufficient to be harmful."⁴³ For example, placing a large amount of cod liver oil in someone's coffee could poison them, even though a very small amount would not.⁴⁴
- 1.38 Section 228 of the Penal Code prohibits maliciously administering poison with intent to harm. Any person who unlawfully, and with intent to injure or annoy another, causes any poison or noxious thing to be administered to, or taken by, any person, and thereby endangers his or her life, or does grievous harm, is guilty of a felony liable to a maximum penalty of 14 years imprisonment.⁴⁵
- 1.39 Section 230 of the Penal Code is on unlawful poisoning. This offence prohibits any person who unlawfully and with intent to injure or annoy person causes any poison or other noxious thing to be administered or taken by any person is guilty of a misdemeanour and shall be liable to a maximum penalty of five years imprisonment.⁴⁶

³⁸ *Oxford Dictionary of English*, Angus Stevenson (ed), (3rd edition,2010), 1372.

³⁹ Jonathan Herring, above n 11, 347.

⁴⁰ *Ibid*, 347.

⁴¹ *Ibid*, 347.

⁴² *Ibid*, 347

⁴³ *Ibid*, 347. .

⁴⁴ *Ibid*, 341

⁴⁵ Penal Code [Cap 26] s 228.

⁴⁶ Penal Code [Cap 26] s 230.

QUESTION

Should the offence of poisoning with intention to injure or annoy be covered under personal harm offences such as acts intended to cause grievous harm or intentionally or recklessly cause grievous harm?

- 1.40 Possible option for reform would be, poisoning with intention to injure or annoy should not be a separate offence but covered under the personal harm offences such as acts that are intended to cause harm or intentionally or recklessly cause grievous harm.

CHAPTER 3: KIDNAPPING AND ABDUCTION

Kidnapping and abduction

- 1.41 The Penal Code [Cap 26] of Solomon Islands contains offences that address kidnapping and abduction. Kidnapping occurs where a person is taken outside Solomon Islands without his or her consent, or without consent of the person who is legally authorized to consent on behalf of that person.⁴⁷ Abduction is where a person is forced or by any deceitful means is induced to go from any place to another.⁴⁸
- 1.42 Any person who kidnaps another person is guilty of a felony and shall be liable to imprisonment for seven years.⁴⁹
- 1.43 A case example of the offence of kidnapping is *Regina v Mosese*.⁵⁰ This case is about an Indian woman who lived with her parents in the Solomon Islands. She had a relationship with a Solomon Islander, whom she moved in with against her parent's wishes. The parents disapproved of her relationship and had tried to keep them apart. In February 2008, the parents sought some policemen to assist them to get their daughter to accompany them to Fiji. The three policemen who were the accused were Nathaniel (Nela) Mosese, Samuel Kalita and Redley Gilbert. These policemen went to the daughter and asked her to accompany them to her parent's house and they assured her that they would bring her back to her de facto spouse. She insisted that her de facto husband followed her as well. They all went to her parent's house. On arrival she was escorted to her parent's house where she was not allowed to leave the house. She was locked-up in the house and on the next morning transported to the airport by the Accused. She was not given her passport until she had checked in to fly to Fiji with her parents against her will. The court in this case did not convict the accused because the knowledge of lack of consent was not proved.
- 1.44 It is also an offence to kidnap or abduct a person with the intention of secretly and wrongfully confining that person. This offence has a maximum penalty of seven years imprisonment.⁵¹

⁴⁷ Penal Code [Cap 26] s 248.

⁴⁸ Penal Code [Cap 26] s 248 (b).

⁴⁹ Penal Code [Cap 26] s 249.

⁵⁰ *Regina v Mosese* [2007] SBCH 2 <www.pacii.org>.

⁵¹ Penal Code [Cap 26] s 250.

Furthermore, it is an offence to kidnap or abduct a person in order to subject that person to grievous harm, slavery or to the unnatural lust of any person. This carries a maximum penalty of 10 years imprisonment.⁵² An example of this kind of abduction offence is the case of *Regina v Roni*.⁵³ In the case, Walter Roni ("the accused") was charged with one count of murder⁵⁴ and one count of abduction contrary to sections 200 and 251 of the Penal Code respectively. The accused and two other men approached the victim at a cocoa shed and accused him of being a spear (spy). They tied the victim up with his hands behind his back with bush rope and took him to Calvary village. They then took him down to Uraghai River where the men accompanying the Accused severely beat him up with fists and gun butts. The autopsy report on the body of the Victim revealed that he died from gunshot trauma to the upper right back in tandem with blunt force trauma to the chest and jaw. The offence was very serious. He was, however, given credit for pleading guilty to the offence. He was sentenced to 8 years imprisonment.

Other jurisdictions

1.45 The Vanuatu Penal Code [Cap 135] section 105 states that no person shall:

- (a) convey any person beyond the limits of the Republic without the consent of that person, or of some person legally authorised to consent on behalf of that person; or
- (b) by force compel, or by any fraudulent means induce, any person to go from any place to another place.

The penalty for this offence is 10 years imprisonment.⁵⁵

1.46 The MCCOC of Australia recommended that the offence of kidnapping should apply where someone is taken or detained without the person's consent in order to hold the person for ransom or as a hostage, or to send the person out of the country, or to commit a serious offence on the person. The maximum penalty for this offence would be 15 years imprisonment.⁵⁶

⁵² Penal Code [Cap 26] s 251.

⁵³ *Regina v Roni* [2007] SBHC 77;

⁵⁴ He was acquitted of murder for no evidence.

⁵⁵ Penal Code s 105 (Vanuatu).

⁵⁶ MCCOC, above n 17, 88.

QUESTIONS:

1. Should the offences of kidnapping and abduction in the Penal Code be replaced with one offence of kidnapping or abduction with a high penalty?
2. Should the offence of kidnapping in the Penal Code also apply where someone is taken or detained without the person's consent in order to hold the person for ransom or as hostage or to send the person out of the country, or commit a serious offence on the person?

1.47 The possible options for reform are:

- The offences of kidnapping and abduction in the Penal Code should remain as separate offences.
- The offence of kidnapping should apply where someone is taken or detained without the person's consent in order to hold the person for ransom or as a hostage, or to send the person out of the country, or to commit a serious offence on the person.

Child stealing and abduction of unmarried girls under 15 years

1.48 The Penal Code of Solomon Islands makes it an offence to steal a child under 14 years old.⁵⁷ The offence carries a maximum of seven years imprisonment while abduction of unmarried girl less than 15 years is a misdemeanour. The offence of stealing a child under 14 years does not apply to a person who claims in good faith to have the right of possession of a child or the mother, or the father of an illegitimate child.

1.49 It is not clear why there should be two separate offences, with different ages, and different penalties for situations where a girl child is taken away from her parents without consent.

1.50 Furthermore, the Penal Code provides that any person who wrongfully conceals or keeps in confinement a kidnapped or an abducted person is guilty of a felony, and shall be punished in the same manner as if he or she had kidnapped or abducted that person.⁵⁸

1.51 Two cases from Papua New Guinea and Fiji are described as examples of such prohibited acts. *State v Buka*,⁵⁹ is a child stealing case of Papua New Guinea. In that case the Accused was charged with the offence of child stealing. The victim who was a 3 years old child was attending the Seventh Day Adventist 2 week's crusade in Mt

⁵⁷ Penal Code [Cap 26] s 253.

⁵⁸ Penal Code [Cap 26] s 252.

⁵⁹*State v Buka* [2007] PGNC 53 <www.paclii.org>.

Hagen with her mother. After they had returned from Waghi River, the mother left the child outside their tent while she went in to get changed. It was at the time when the Accused took the child away to her residence with the intention to claim a reward. When the child's mother realized that her child was missing, she raised the alarm and a search was mounted. The matter was reported to the police and a radio broadcast was made with reward of K, 1,000.00 for the safe return of the child. The husband of the Accused turned up at Mt Hagen police station to report that the child was in his custody. The parents of the child then arranged with the Accused's husband to meet on the next day at the campsite when he would bring the child and get the reward. The Accused and her husband brought the child to the campsite and did the exchange. They were then arrested and detained in custody for the offence of child stealing contrary to s.361 (i) (a) of the Criminal Code. The Accused's husband was acquitted while the court convicted the Accused for the offence of child stealing.

- 1.52 *State v Prasad*,⁶⁰ is a Fiji case of abduction of an unmarried girl. In the case, the Accused was charged with two counts of abducting a girl under the age of 18 years with intent to have carnal knowledge and defilement of girl between 13 years and 16 years.
- 1.53 The Accused abducted the 14 years old student and took her to Sun seeker Hotel in Nadi where he had sexual intercourse with her. The Accused also took the victim to Wailoaloa Beach at 10am in a seven seater van, where both sat together until 3pm when the Accused received a phone call from the police alleging that he had abducted a girl, and thereafter the Accused went to Nadi police. Both the accused and the victim were juveniles at that time. The Birth Certificate of the victim was not tendered by the prosecution. However, the Birth Certificate of the Accused was annexed to the Pre-sentence report which confirmed that he was 17 years old when he committed this offence. A Medical Certificate was tendered by the prosecution as Exhibit 2 which confirmed that there was no forced sexual intercourse. It appeared from the facts that the victim was a willing partner and this had happened in a boyfriend-girlfriend situation. The accused in this case pleaded guilty and was sentenced to 18 months imprisonment suspended for four years.
- 1.54 Recommendations from Australia and United Kingdom (UK) Law reform project on child abduction (removing child under 16 or 18 years from control of parent) carries a maximum penalty of seven years or with aggravated factors carries a maximum penalty of nine years imprisonment.⁶¹

⁶⁰ [2011] FJMC 135 <www.paclii.org>.

⁶¹ MCCOC, above n 17, 88.

- 1.55 The Fiji Crimes Decree of 2009 provides for abduction of young person in section 285. It states that a person commits a summary offence if he or she unlawfully takes or causes to be taken any young person, being under the age of 18 years, out of the possession and against will of his or her father or mother, or of any other person having the lawful care or charge of the young person. The maximum penalty for this offence is five years imprisonment.⁶²

QUESTIONS

1. Should there be one offence that applies to child stealing and abduction of an unmarried girl under 15 years, and have the offence applies to both gender?
2. Should the offence of child stealing apply to children under the age of 18 years?
3. Who should be excused from the offence? For example should all parents, including a child born outside of marriage be excused from the offence?

Unlawful/wrongful confinement or detention

- 1.56 The offence of unlawful confinement in the Penal Code applies where a person is confined against his or her will, is relatively minor and carries a maximum penalty of imprisonment for one year, or a fine of \$10,000.⁶³ By comparison, the MCCOC recommended that the offence of unlawful detention should have a maximum penalty of imprisonment for six years.⁶⁴ The Fiji Crimes Decree 2009 provides for wrongful confinement as an offence which carries a maximum penalty of 5 years imprisonment or a fine of 10 penalty units, or both.⁶⁵
- 1.57 In a Fiji case of *State v Reddy*,⁶⁶ the Accused was charged for Wrongful Confinement. The parties lived in a de-facto relationship. The Accused did not like the complainant going out of the house while he was away. In July 2006 the Accused went out to work at 7 am. He locked the front door with a padlock. The complainant was confined in

⁶² Crimes Decree 2009 s 285 (Fiji).

⁶³ Penal Code (Cap 26) s 255. The fine of \$10,000.00 is provided for by the Penalties Miscellaneous Amendment Act 2009.

⁶⁴ MCCOC, above n 17, 90.

⁶⁵ Crimes Decree 2009 (Fiji).

⁶⁶ *State v Reddy* [2007] FJMC 12 <www.paclii.org>.

the house. The house had no back door but the bathroom had an outlet which led to the landlady's house. The outlet could be opened from the house of the landlady only. At around 10 am, the Complainant managed to get the attention of the neighbors who called the police. Through the help of the land lady, the police entered the house of the Accused and got the complainant out. The matter was reported and the Accused was charged. In defense the accused said he had locked the front door at the request of the complainant. The complainant in court turned hostile and agreed to "asking the accused to lock the door". However, she later informed the court that her husband was unhappy about her ex-husband coming to the house and this was not appreciated by the Accused. Court accepted her evidence and stated that it was not uncommon for a witness to protect her de-facto with whom she presently lived. She was also expecting her baby soon. Despite the minor discrepancies in her statement and evidence the court accepted that the Accused had locked the house without her consent. Court found as a fact that the Accused had deliberately and wrongfully tried to keep her inside the house so she would not be able to see anyone while he was at work. It was not an act where the complainant had been there by her consent. If it had been so, she would not cry and try to attract attention of police officers and neighbors from the windows of the house. The Court was satisfied beyond reasonable doubt and convicted the accused as charged.

- 1.58 In a Kiribati case *Republic v Uaai*,⁶⁷ Tebuai Uaai was charged with two offences in relation to an 18-year old school student. The offences were wrongful confinement and common assault. The respective particulars were, on the 5th April 2004, on South Tarawa, Tebuai Uaai wrongfully confined Nei Taoniman Takaeang in his saloon car without her consent. On the 5th April 2004, at Teauraereke, Tebuai Uaai unlawfully assaulted Nei Taoniman Takaeang in his saloon car. The Accused was driving from Bairiki towards Bikenibeu Tebuai and saw Taoniman (victim) waiting for bus. He stopped and asked the victim to get into the car. The victim resisted but he told the victim that he knew her parents and would drop her off. The victim then got into the car. The Accused did not drop off the victim in spite of the fact that the victim had asked the Accused to drop her off several times. The victim then tried to escape when she saw one of her school mates along the road. She waved at him and signaled to him for help but the Accused drove faster. The victim then tried to jump out of the car but was unable to do so because the Accused struck her on the right thigh and that he was driving very fast. The Accused stopped at a shop to get beer when the victim managed to escape, however, the Accused got hold of her bag. She (victim) asked the shopkeeper who was one of her friends to get the bag. The Accused took

⁶⁷ Republic v Uaai [2004] KIHIC 183 <www.pacii.org>.

the bag into his car as the victim's friend approached the Accused and took the bag. The Accused insisted that the victim should get into the car with him but the victim refused. The court found the Accused guilty of both counts, and the Accused was sentenced to 4 months imprisonment for the offence of wrongful detention.

QUESTION

Should the maximum penalty for the offence of wrongful confinement/detention in the Penal Code be increased?

CHAPTER 4: CRIMINAL RECKLESS AND NEGLIGENCE

Reckless and negligent acts

- 1.59 The offence of criminal reckless and negligent acts, addresses behavior that puts human life at risk. There is no requirement that the accused must actually cause harm to the victim. The offence of criminal reckless and negligent acts only applies to specific situations, example, where the accused drives a car or navigates a boat, or is doing something with fire and does not take proper precautions and creates a risk.⁶⁸ The maximum penalty for this offence is relatively low (it is a misdemeanor).
- 1.60 The term recklessness and negligence are not defined in the Penal Code; however, recklessness was defined in a common law case, *Cunningham*.⁶⁹ In this case, there were two elements that needed to be shown for Cunningham recklessness; 1) the defendant was aware that there was a risk that his or her conduct would cause a particular result; and 2) the risk was an unreasonable one for the defendant to take.⁷⁰
- 1.61 The term negligence according to common law is defined as “if the defendant has behaved in the way in which a reasonable person would not, then he or she is negligent.”⁷¹
- 1.62 The offence of other negligent acts causing harm applies where someone fails to fulfil a duty in relation to life and health. Section 238 of the Penal Code provides that “any person who unlawfully does any act, or omits to do any act which it is his duty do, not being an act or omission specified in the preceding section, by which act or omission harm is caused to any person, is guilty of a misdemeanour, and shall be liable to imprisonment for six months.⁷² Other offences relating to negligently causing harm are:
- dealing in poisonous substance in negligent manner, it has maximum penalty of six month imprisonment or fine of five thousand dollars;⁷³
 - endangering safety of persons travelling by aircraft, vehicle or vessel, and it is a misdemeanor;⁷⁴
 - exhibition of false light, mark or buoy, it has a maximum penalty of seven years;⁷⁵

⁶⁸ Penal Code [Cap 26] s 237.

⁶⁹Herring J, above n 11, 144.

⁷⁰ Ibid.

⁷¹ Ibid, 153.

⁷² Penal Code [Cap 26] s 238.

⁷³ Penal Code [Cap 26] s 239 and Penalties Miscellaneous Amendment Act 2009, Schedule.

⁷⁴ Penal Code [Cap 26] s 240.

⁷⁵ Penal code [Cap 26] s 241.

- conveying person by water for hire in unsafe or overloaded vessel, it is a misdemeanor;⁷⁶ and
- danger or obstruction in public way or line of navigation. The penalty for this offence is a fine of one hundred dollars.⁷⁷

1.63 A case example from Fiji for the offence of criminal reckless and negligent act is the *State v Rokosuka*.⁷⁸ In the case, the Accused drove a motor vehicle in a reckless and negligent manner and endangered the life of Rupeni Ravonu. The Accused was charged with 'Reckless and Negligent Act which carries a maximum of three years imprisonment. He pleaded not guilty to the charge. He was convicted for the said offence. The accused was sentenced to one year imprisonment, suspended for three years.

QUESTIONS

1. Should the Penal Code include a duty to avoid or prevent danger where a person undertakes or agrees to do something?
2. Should the penalties under this offence be increased?
3. Should the Penal Code also cover situations where a person volunteers or undertakes to do something, and failure to do that thing would be dangerous to human life or health?
4. Should the term criminal recklessness or negligence be defined in the Penal Code?

⁷⁶ Penal Code [Cap 26] s 242.

⁷⁷ Penal code [Cap 26] s 243.

⁷⁸ *State v Rokosuka* [2013] FJMC 334 <www.paclii.org>.

CHAPTER 5: FAILURE TO SUPPLY NECESSARIES AND CRUELTY TO CHILDREN

Failure to supply necessities

- 1.64 Failure to supply necessities applies where a person has the duty to provide for another person the necessities of life, and without lawful excuse fails to do so, whereby the life of that other person is or is likely to be endangered, or his health is or is likely to be permanently injured, is guilty of a felony, and shall be liable to imprisonment for three years.⁷⁹
- 1.65 The Fijian case of *State v Smith*⁸⁰, illustrates this offence of failing to provide necessities to someone (must be duty). On the night of 22nd July 2010, the Accused, a single mother went with a “Fijian” man to an apartment and they started drinking alcohol. At around 10: 00pm the accused left with the Fijian man to a club and left her 6 months old baby alone unattended in the apartment room. On the next day 23rd of July 2010, at 7 am, Ranadi Setaita, a Kitchen assistant at the apartment heard the baby crying for a very long period of time. Ranadi opened the door of the room and she discovered the baby alone on the bed crying and dirty with urine and faeces. She washed and fed the baby. She reported the case to the police. The police took the abandoned baby to the police station, then to the hospital and social welfare. The Accused was then charged with Failure to Supply Necessaries” Contrary to Section 264 of the “Crimes Decree No.44 of 2009”.⁸¹The Accused was charged, prosecuted and sentenced for nine months imprisonment suspended for two years.
- 1.66 Another case from Vanuatu is *Public Prosecutor v Kalon*.⁸² In this case, Livan was handicapped from a young age since her birth. She suffered from a neurological disorder. Her physical condition at the time was normal. However, she was unable to feed herself, dress herself, toilet herself and even not capable of playing with other children. She was a child who required constant care. She was sometimes left alone and was locked up at home without food when her parent (both Accused) went to the garden or to Vila. As a result she died at the age of 12 years. The Defendants Leinearu and Philip Kalon were charged jointly for “abandonment of incapable person” contrary to s103 of the Penal Code Act and “failure to provide necessities⁸³ of life” contrary to s104 of the Penal Code Act. They abandoned the incapable person and

⁷⁹ Penal Code [Cap 26] s 232

⁸⁰ *State v Smith* [2011] FJMC 168.

⁸¹ Crimes Decree 2009, s 264 (Fiji).

⁸² *Public Prosecutor v Kalon* [2008] VUSC 44 <www.paclii.org>.

⁸³ Necessaries was the term used in section 104 of the Penal Code (Vanuatu).

failed to provide the necessities to the deceased. Sometimes the child ate the window frame because she was without food for the whole day.

With regards to Count 2 which is 'failure to provide necessities of life,' the elements are clearly outlined below in s104 of the Penal Code.

- i) That the Accused were each under the duty imposed by section 104 (1) in respect of Livan;
- ii) That they negligently failed to observe that duty;
- iii) That they thereby caused damage to the body of Livan which resulted in her death.

1.67 Both Accused were in charge of Livan when she was unable to provide necessities of life for herself. They had failed to provide necessities of life to supply nourishment that is food, water and medical care. Failure to provide necessities led to the death of Livan even though there was no intention to cause death. Although there was a difference to third element, it was raised that the failure to provide the necessities had resulted in a life being endangered. Therefore, both Accused were convicted on count 2 of lesser offence of without lawful excuse neglecting to supply the necessities of life for Livan Kalon so that her life was endangered. Both the Accused were sentenced to carry out 300 hours community work each.

1.68 The offence of failure to provide necessities of life carries a maximum penalty of seven years imprisonment in Vanuatu⁸⁴ and three years' imprisonment in Fiji.⁸⁵

QUESTION

1. Should the penalty for failure to provide necessities increase?

2. This offence is a felony in the Penal Code but only attracts a maximum penalty of three years. Should the use of misdemeanour and felony be removed from the entire Penal Code for ambiguity?

Cruelty to children under 15 years

1.69 Cruelty to children is treating children in a cruel manner, "cruelty encompasses abusive, outrageous, and inhumane treatment that results in the malicious and unnecessary infliction of suffering upon the body or mind."⁸⁶ Behaviour such as assault, neglect, abandoning or exposing the child to be assaulted, neglected or

⁸⁴ Penal Code, s 104 (Vanuatu).

⁸⁵ Crimes Decree 2009, s 264 (Fiji).

⁸⁶ Falex 2003, The Free Dictionary; Legal Dictionary <http://legal-dictionary.thefreedictionary.com/cruelty>.

abandoned, which may result in risk of unnecessary suffering or injury to health of the child, constitute cruelty to children.

- 1.70 The Penal Code contains an offence of cruelty to children which carries a maximum penalty of five years imprisonment. The offence applies where harm or neglect is intentionally caused by someone who is over the age of 15 years. The offence is not committed if a parent,⁸⁷ teacher, or other person having the lawful control of a child, is giving reasonable punishment to the child.⁸⁸
- 1.71 Use of corporal punishment on children might also be excused from the offence of assault and assault causing bodily harm because the excuse of punishment of children is recognized under the common law where the punishment is reasonable.
- 1.72 In the case of *Regina v Rose*,⁸⁹ corporal punishment was applied to two 10 years old boys which resulted in mark on the buttock of one of the boys but did not result in any serious medical problem as produced by the medical report. The court considered that the punishment was reasonable and not excessive corporal punishment. On the other hand, in the case of *Regina v Ludawane*,⁹⁰ where a father had beaten his son to death was taken as a very serious and unreasonable and excessive conduct of corporal punishment. The father was convicted for the offence of murder and sentenced to life imprisonment.
- 1.73 The excuse of reasonable punishment was considered by the High Court of Solomon Islands prior to ratification of the Convention of the Rights of the Child (CRC) by the Solomon Islands. The Court had to decide whether corporal punishment was inconsistent with the Constitutional right not to be subjected to torture or inhuman treatment.⁹¹ The Court decided that corporal punishment itself was not a violation of this right; it was a matter of degree, but that degrading forms of corporal punishment (in this case corporal punishment in front of other people) would be inconsistent with the Constitution.⁹²
- 1.74 The United Nations CRC Committee has considered the issue of corporal punishment of children in some detail.⁹³ The Committee argues that corporal punishment in any setting (school, institution, home) is inconsistent with the human rights of children, in particular right to dignity, physical integrity and equality, and cannot be justified on

⁸⁷ Parent applying reasonable corporal punishment on their children may be an issue for legal clarification in light of the Family Protection Act 2014.

⁸⁸ Penal Code [Cap 26] s 233 (4).

⁸⁹ [1987] SBHC 6 <www.paclii.org>.

⁹⁰ [2012] SBHC 128 <www.paclii.org>.

⁹¹ Constitution s. 7 (Solomon Islands).

⁹² *Regina v Rose* [1987] SBHC 6 <www.paclii.org>.

⁹³ Committee on the Rights of the Child, General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.

the basis of the 'best interests of the child' or religious beliefs. It recommends that states should prohibit corporal punishment, and reform legislation and common law that permit the use of force as a way of punishing children.

- 1.75 Corporal punishment has not been prohibited in Australian jurisdictions or the United Kingdom (UK). Some jurisdictions have changed their law to provide some clearer guidance about who can use corporal punishment on children, what types of punishment are acceptable, and whether it is an excuse for all personal harm offences. In the UK a defence of reasonable punishment of a child is no longer available for personal violence offences that involve some sort of harm or injury to the child, or the offence of cruelty to children.⁹⁴
- 1.76 Tuvalu⁹⁵ and PNG⁹⁶ have included corporal punishment in their laws, how it should be administered, on which age group or child and in what circumstances.
- 1.77 The MCCOC has recommended that reasonable punishment of a child should be clarified by legislation so that harm or pain to a child that lasts for more than a short period, or discipline that involves the use of stick or object is not permissible.⁹⁷

QUESTIONS

1. What should the penal code say about corporal punishment or discipline of children?
2. Is corporal punishment still practiced in your area? If so, what are the reasons for practicing corporal punishment?
3. Should a defence to personal harm offence based on corporal punishment be available for parents, as well as people who are in the position of parents? Should it be available for teachers?
4. Should the Penal code include a specific definition for reasonable punishment of children?

- 1.78 The Following views on the balance between punishment of children and cruelty to children gathered from previous consultations are outlined below:
- There should be a balance between children's rights and the right of the parents to discipline their children.⁹⁸
 - Parental discipline is important in the Solomon Islands; children should be disciplined in the home. Lack of discipline in the home breeds a lawless society that does not abide by the law. Also, discipline is okay but not to the

⁹⁴ Children Act 2004 (UK) s 58.

⁹⁵ Education Act s 29 (Tuvalu).

⁹⁶ Child Welfare Regulation 1962, s 23 (PNG).

⁹⁷ MCCOC, above n 17, 130.

⁹⁸ *Consultation*, Choiseul, 13th October 2012.

extent where bodily harm is involved, parents have the right to discipline children in the home, it is a private issue and not a public matter.⁹⁹

- Corporal punishment: (Melanesian way of thinking) need to whip children in order to make them listen, but things are changing, there are now 'child friendly schools; program where teachers do not use corporal punishment, spanking and counselling might be reasonable.¹⁰⁰
- Corporal punishment should be prohibited. Must consider the physical and emotional aspects of the children because there may be a close relationship between child abuse, domestic violence and corporal punishment. Parents see corporal punishment as an effective way to discipline children but children do not.¹⁰¹
- Corporal punishment should be stopped except when used as reasonable punishment as a form of discipline by parents on their children. Corporal punishment is part of traditional practices to instil discipline in children, where the discipline is proportionate to the need to educate the children and the lawful age bracket within which children could be disciplined using corporal should be set by the Penal Code.¹⁰²
- Cruel forms of corporal punishment should not be allowed, only certain types or level of physical discipline by parents should be allowed such as smacking, but hitting should be prohibited and certain part of the body should not be hit for instance, the face.¹⁰³

⁹⁹ *Consultation*, Kirakira, 10th March 2010.

¹⁰⁰ Mothers Union, *Consultation*, 29th May 2009.

¹⁰¹ National Association of Council of Children (NACC), *Consultation*, 9th July 2009.

¹⁰² *Ibid.*

¹⁰³ *Consultation*, Auki, 29th April 2009.

CHAPTER 6: INTIMIDATION, MOLESTATION AND STALKING

Intimidation, molestation and stalking

- 1.79 Intimidation is where a person engages in intimidating or threatening behaviour that is intended to threaten, intimidate or frighten another person or to cause him or her to do something that he or she is or not obliged to do under law, and threatens to cause fear of injury or harm. The maximum penalty for the offence is three years imprisonment.¹⁰⁴
- 1.80 Molestation is a persistent action that is intended to disturb, annoy, harass or interfere with another person. It carries the same maximum penalty as intimidation, three years in imprisonment.¹⁰⁵
- 1.81 There are some restrictions in relation to the offences in the Penal Code that deal with threats and threatening behavior. The intimidation and molestation offence can also apply in circumstances where threats are made. However, the threats must be to cause an unlawful injury to the person, property or reputation of the person and must be intended by the accused to cause alarm.¹⁰⁶ Threats to subject a woman to sexual assault or to confine her against her will would not fall within the category of unlawful injury and are therefore not covered by the intimidation and molestation offences. At the moment, section 231 of the Penal Code on intimidation/molestation is difficult to use to get convictions because it does not cover the threats and intimidating behavior.
- 1.82 The MCCOC of Australia recommended that there should be a definition or interpretation of threat and two different threat offences¹⁰⁷ (threat-interpretation¹⁰⁸, threat to kill¹⁰⁹, and threat to cause serious harm). The MCCOC of Australia recommended that the third threat offence is threat to cause harm where a person threatens another to cause harm to that other person and intend that the other person to fear that the threat will be carried out or is reckless. The maximum penalty for this offence is three years imprisonment. For a person to be guilty of this offence, the other person must actually fear that the threat would be carried out.¹¹⁰

¹⁰⁴ Penal Code [Cap 26] s 231.

¹⁰⁵ Penal Code [Cap 26] s 231.

¹⁰⁶ *Penal Code s231. 'cause alarm' means a sudden fear or distressing suspense caused by an awareness of danger; apprehension or fright.*

¹⁰⁷ Ss 5.1.19 – 5.1.21, 5.1.19 MCCOC, above n 17, 49 - 50.

¹⁰⁸ S 5.1.20 MCCOC, *Ibid.*

¹⁰⁹ S 5.1.21 MCCOC, *Ibid.*

¹¹⁰ MCCOC, above n 17, 50.

1.83 Stalking is a repeated behavior that by itself is not necessarily threatening or intimidating but when the surrounding circumstances are taken into account it causes intimidation or harassment. It is not an offence in the Penal Code, however, it is recognized as an offence in other jurisdictions. The Family Protection Act 2014 regarded stalking as a prohibited conduct.

1.84 The MCCOC of Australia¹¹¹ and some American statutes criminalize intentionally and repeatedly following or harassing another person and making a credible threat with intent to place that person in reasonable fear of death or great bodily injury. Some of them also contain “aggravated stalking” for instance, when a weapon is involved; and this does attract higher a penalty.¹¹²

QUESTIONS

1. Whether definition of “intimidation” in subsection 231(2) and of “molests” in subsection 231(3), should be revised?
2. Whether threat to commit sexual assault should be covered?
3. Should Penal Code s.231 be amended to cover threatening behavior?
4. Should the Penal Code include an offence such as stalking to deal with harassing or intimidating behavior?
5. Should the Penal Code have offences that apply to making threats to kill, or cause serious harm? If so, should the offence apply to threats made in any way (words as well as conduct)?

1.85 Possible options for reform would include:

- Written threat to kill/murder should also cover written threat to cause harm to another person and threat to destroy or damage property of another person.
- All forms of written threat to cause harm to another person, and threat to destroy or damage properties of another person, including messages sent by

¹¹¹ MCCOC, above n 17, 50 - 52.

¹¹² Ibid.

electronic means such as text and email messages should also be covered by the provision.

Making a written threat to kill or murder

- 1.86 Making a written threat to kill is where a person has written a threatening message to kill another person, directly or indirectly, causes any person to receive the threatening to kill message. The maximum penalty for this offence is 10 years imprisonment.¹¹³ The offence is based on threatening written statement but it does not specify if it should include other documents or other forms or ways in which any written threat can be sent indirectly or directly to the other person, for instance, text message.
- 1.87 The Tonga Criminal Offence Act provides that every person who with knowledge of its contents sends or causes to be received any document containing any threat to kill or containing do bodily harm to any person or to damage any property shall be liable to imprisonment for any period not exceeding five years.¹¹⁴
- 1.88 Recommendations from Australia, and UK reform project, provide that threat includes threat to kill by words or conduct and the penalty is 10 years imprisonment maximum.

QUESTIONS

1. Should the Penal Code be reformed to cover other documents that may include written threats to kill or other forms or ways in which any written threat can be send directly or indirectly to the other person? For instance using mobile phone texts messages.
2. Should the Penal Code also include written threat to cause harm to another person?
3. Should the Penal Code also include written threat to damage/destroy properties?

- 1.89 Possible option for reform would be to include written threat to kill or murder should also cover written threat to cause harm to another person and threat to destroy or damage property of another person.

¹¹³ Penal code [Cap 26] s 217.

¹¹⁴ Criminal Offence [cap 18] s 111.

CHAPTER 7: NEGLIGENT ACT LIKELY TO SPREAD INFECTION OF DISEASE DANGEROUS TO LIFE

Negligent act likely to spread infection of disease dangerous to life

- 1.90 The Penal Code contains an offence of unlawfully or negligently spreading a disease dangerous to life. It is a misdemeanour.¹¹⁵ This offence is committed when a person knows that his or her actions could spread a disease, and goes ahead and unlawfully or negligently transmits or spreads the disease to another person; by any means. For instance X¹¹⁶ has the knowledge that he is HIV/AIDS infected and unlawfully or negligently harms Y¹¹⁷ by inflicting her with his disease using his used needles; or has sexual intercourse with her.
- 1.91 Following increasing public awareness of HIV/AIDS, some states in Australia and countries in the pacific for example Fiji, introduced specific offences for intentional exposure or transmission of HIV. International guidelines for legislation on HIV/AIDS recommends that any transmission or exposure offences should be general, and apply to all serious diseases (Such as Hepatitis C, Asbestosis which is caused by exposure to asbestos.)¹¹⁸
- 1.92 It is argued that specific legal offences for transmission of HIV/AIDS are not needed where general offences can apply because specific offences distract from measures that are more effective in preventing the spread of HIV, and they stigmatize people who have HIV or people who are perceived as people likely to have HIV. Most cases of HIV transmission occur where the infected person does not know he or she is actually infected.¹¹⁹
- 1.93 The MCCOC recommended that the criminal law should cover a situation where a person intentionally or recklessly exposes another person to the risk of catching a disease that may lead to a danger of death or serious harm. The Committee made this recommendation to overcome problems with proving that a person's conduct caused another to become infected, with a disease such as HIV (but not limited to HIV). The criminal law is directed here at the behaviour of the accused, rather than the actual harm caused to another person.
- 1.94 The Fiji HIV/AIDS Decree 2011, section 40(1-3) provides:

¹¹⁵ Penal Code [Cap 26] s 185.

¹¹⁶ X is a male.

¹¹⁷ Y is a female.

¹¹⁸ UNAIDS, IPU, *Handbook for legislators on HIV/AIDS, Law and Human Rights* (1999).

¹¹⁹ Ibid.

40.-(1) The deliberate or attempted infection of a person by a person who knows he or she carries HIV is an offence under this Decree.
(2) Where a person who knows he or she carries HIV virus acts in a manner which in the opinion of the Permanent Secretary may on the balance of probabilities transmit HIV to another person or persons the Permanent Secretary may seek an ex-parte injunction requiring the person to cease and desist from such behavior.
(3) A failure by the person to cease and desist from such behavior as in subsection (2) the person shall be liable for imprisonment for a term not less than 14 days and not more than 6 months.¹²⁰

QUESTIONS

1. Should the Penal Code cover situations where a person intentionally or recklessly exposes another person to the risk of catching a disease that may lead to a danger of death or serious harm?
2. Should the Penal Code provide for situation where a person knows that he or she has a serious disease but engages in activities that may result in the transmission of the disease to another person? What should be the penalty?

1.95 The possible option for reform is for the Penal Code to cover a situation where a person knows that he or she has a serious disease but engages in activities that results in the transmission of the disease to another person. The penalty for such offence should be severe or high to deter such conducts.

¹²⁰ HIV/AIDS Decree 2011, s 40(1-3).