

# SAMOA

## LAW REFORM COMMISSION

CRIMES ORDINANCE 1961  
Report 01/10

**June 2010**

The Hon Tuila'epa Sailele Malielegaoi  
Prime Minister  
Office of the Prime Minister  
Apia SAMOA

31 May 2010

Dear Prime Minister

**SLRC Report 01/10—*Review of the Crimes Ordinance 1961***

I am pleased to submit to you Samoa Law Reform Commission Report 01/10, *Review of the Crimes Ordinance 1961*, which we submit under section 6 of the *Law Reform Commission Act 2008*. In accordance with this Act, a copy of the Report should be laid before the Legislative Assembly as soon as practicable.

We look forward to receiving your approval to arrange for publication of this Report.

Yours sincerely

Leilani Tuala-Warren  
**Executive Director**

## Preface

The need to reform the criminal law in Samoa was a driving factor in the establishment of the Samoa Law Reform Commission ('the Commission'). Many offences are contained in the *Crimes Ordinance 1961*—a statute that has remained almost unchanged for close to 50 years. Others, such as the *Prevention and Suppression of Terrorism Act 2002*, are the result of ad hoc and reactive law reform.

In November 2008, the Commission was given a major reference into criminal law by Cabinet and the Attorney General. The reference includes the review and reform of the *Crimes Ordinance*, the *Criminal Procedure Act 1972*, the *Evidence Ordinance 1962* and the development of a Sentencing Bill.

This Report sets out the Commission's recommendation for reform of the *Crimes Ordinance*. Reports on the *Criminal Procedure Act*, the *Evidence Ordinance* and the creation of a Sentencing Bill will be released later in 2010.

Recommendations have been based on the need for Samoan criminal law to be relevant for modern times and in line with international trends. However, Samoan custom and traditions have remained paramount considerations. Changes have only been recommended where the Commission considers that they would enhance Samoa's society, culture and economy, and better meet the needs of the Samoan Government and community.

The Commission would like to express that it is mindful that Samoa is a country founded on God: 'E Faavae i le Atua'. The Christian basis of Samoan society is a paramount consideration in the Commission's development of options for reform. Where there has been conflict between reinforcing Christian values and modernisation, the Commission has sought to balance the role of the criminal law with other options for deterring socially reprehensible conduct through families and the villages. None of the Commission's recommendations should be interpreted as endorsing or morally sanctioning unchristian conduct.

The Criminal Law Review Working Group (CLR Working Group)—made up of senior representatives of relevant Government ministries—was established to inform the Commission about issues that are arising in practice with the *Crimes Ordinance* and to give suggestions for reform. The final report of the CLR Working Group is attached as Appendix 5 of this report.

Recommendations also have been shaped by extensive public feedback. In December 2009, the Commission released an Issues Paper on the *Crimes Ordinance*, including 78 questions about potential legislative change. The Commission received six written submissions in response to the Issues Paper, which are referenced throughout the Report. The Commission held public forums about the issues raised in the review on 5 and 17 March 2010 in Upolu and Savaii, respectively.

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## 1. Background

1.1 This Report considers select issues relating to the *Crimes Ordinance 1961*, and explores options for reform. The issues that are discussed in this Report include areas of concern raised by the CLR Working Group and by members of the public. These include sexual offences, crimes against persons, theft and other crimes against property, and crimes that have been recognized internationally after the enactment of the *Crimes Ordinance* that have not yet been considered in Samoa, such as acts of genocide and hate crimes.

### ***The role of criminal law***

1.2 Criminal law protects members of society from harmful and socially unacceptable behavior and is used as a powerful tool by the government to control crime and protect society.<sup>1</sup>

1.3 There are two main purposes for punishing persons through the criminal justice system. Under the utilitarian theory, punishment is justified because of its potential to reduce crime.<sup>2</sup> Perhaps the most well-known aspect of this theory is ‘deterrence’, which assumes that offenders will not enter into criminal activity if the consequences of their actions are sufficiently severe. As set out in the New Zealand (NZ) case of *R v Radich*:

*[O]ne of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so.*<sup>3</sup>

1.4 The other main theory, the retributive theory of punishment, states that punishment is an appropriate response to the voluntary commission of an offence and should be imposed regardless of its effects.<sup>4</sup>

1.5 Codification is thought to advance some of the fundamental values of the criminal law. Many of these values are captured in the maxim *nullum crimen sine lege, nulla poena sine lege*: ‘there must be no crime or punishment except in accordance with fixed, predetermined law’.<sup>5</sup>

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<sup>1</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2007, *Promoting Criminal Justice Reform*, Canada.p.82.

<sup>2</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) (Report 103), Ch 4.

<sup>3</sup> *R v Radich* [1954] NZLR 86.

<sup>4</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) (Report 103), Ch 4.

<sup>5</sup> Roach, K, Healy, P & Trotter, G, 2004, *Criminal Law and Procedure Cases and Materials: 9<sup>th</sup> Edition*, Edmond Montgomery Publications Ltd, Canada, 25.

## **Criminal laws in Samoa**

1.6 On 5 December 1961, the Honourable Anapu Solofa, Minister for Justice, moved a motion for the introduction of the Crimes Bill into Parliament. On the 11 December 1961, the Crimes Bill went to second reading. The date of assent was on 16 December 1961 and the commencement date was 1 January 1962. The resulting *Crimes Ordinance 1961* codifies most Samoan criminal offences.

1.7 Other statutory criminal laws in Samoa include:

- i) *Arms Ordinance 1960*
- ii) *Community Justice Act 2008*
- iii) *Criminal Procedure*
- iv) *Evidence Ordinance 1961*
- v) *Money Laundering Prevention Act 2000*
- vi) *Money Laundering Prevention Act 2007*
- vii) *Mutual Assistance in Criminal Matters Act 2007*
- viii) *Narcotics Act 1967*
- ix) *Police Offences Ordinance 1961*
- x) *Proceeds of Crimes Act 2007*
- xi) *Prevention and Suppression of Terrorism Act 2002*
- xii) *Road Traffic Ordinance 1960*
- xiii) *Young Offenders Act 2007*
- xiv) *Money Laundering Prevention Act 2007*

1.8 Many of these laws have been the result of ad hoc and reactive law reform. For example, amendments to the *Narcotics Act 1967* were introduced after cocaine and methamphetamine was found in Samoa, and to respond to an increasing prevalence of marijuana cases. The *Prevention and Suppression of Terrorism Act 2002* was enacted in reaction to terrorist attacks on the United States of America in September 2001, and amendments to the *Arms Ordinance 1960* were because of the increase in gun smuggling into Samoa.

## **A need for change**

1.9 In the fifty years that have followed enactment of the *Crimes Ordinance*, the Ordinance has remained substantially unchanged. Most parts of the Ordinance were based on the *Samoa Act 1921*. Therefore, many parts of the Ordinance are written in outdated language and do not reflect advances in technology and society. Further, the Ordinance does not cover some crimes which received recognition after the Ordinance's enactment, including crimes involving terrorism; organized crime; money laundering; corruption; trafficking in woman and children; trafficking in drugs, firearms and explosives; and cyber crime.<sup>6</sup> Legislative reform could clarify

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<sup>6</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2007, *Promoting Criminal Justice Reform*, Canada, 81.

some of the ambiguities in the current *Crimes Ordinance* and fill in some of the gaps in order to modernize the Ordinance and make it more relevant to this day and age.

- 1.10 Another reason for making changes to the criminal law is to respond to a rising crime rate (that is, increased deterrence). The Commission has heard extensive anecdotal and public comment that the ‘crime rate’ is a matter of concern. This has some support in statistics available from the Ministry of Police and Prisons (MoPP), the Ministry of Justice and Court Administration (MJCA), and those from the Samoa Bureau of Statistics. For example, statistics from the MoPP show that the number of sexual offences where convictions were recorded in the Supreme Court rose from five in 2004 to 28 in 2007.<sup>7</sup> On the other hand, in relation to drug-related offences, MoPP data advise that 44 people were convicted of possession of narcotics in 2005. This is significantly lower than the 90 people who were convicted of possession of narcotics in 2002 and has continued to decrease, with 28 convictions in 2006 and 19 in 2007.<sup>8</sup>
- 1.11 However, the sets of statistics differ vastly. While statistics from the MoPP indicate that 17 people were convicted of sexual offences in 2005,<sup>9</sup> statistics from MJCA report that 44 people were imprisoned for sexual offences in 2005.<sup>10</sup> As noted above, the MPP data show 44 people having been convicted of possession of narcotics in 2005. In comparison, 2005 statistics from the MJCA show 105 people having been imprisoned for drug offences.<sup>11</sup>
- 1.12 The correlation between a modern crimes legislation and a reduction or otherwise in the crime rate will not be a conclusion of this paper, although it is an issue which warrants attention in legislative review.

### ***Focus of recommendations for reform***

- 1.13 In its review of the *Crimes Ordinance*, the Commission has focused on:
- updating outdated provisions and language;
  - incorporating gender neutrality, in accordance with the new Legislative Handbook for Samoa; and
  - responding to pressures of the international community to deal with emerging issues of transnational scope.

**Recommendation 1:** The *Crimes Ordinance* should be redrafted in gender neutral language.

<sup>7</sup> Ministry of Police, Prisons and Fire Services (*Criminal Convicted Cases Dealt within the Supreme Court Classified by Principal Type of Offences, 2002-2007*).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ministry of Justice and Court Administration (*Supreme Court sentencing Classified by Offence Group, 2005-2007*).

<sup>11</sup> Ibid.

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### **Sexual crimes**

2.1 Sexual crimes are covered in ss 46 to 58H of the *Crimes Ordinance*. These offences raise a number of issues in relation to gender and age discrepancies, outdated terminology, and the relationship between morals and the criminal law.

### **Rape**

2.2 An offence of ‘rape’ is set out in s 47(1) of the *Crimes Ordinance*. Rape is defined as the act of a male person having sexual intercourse with a woman or girl:

- i) *without her consent freely and voluntarily given; or*
- ii) *with consent extorted by fear or bodily harm or by threats; or*
- iii) *with consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of or grievous bodily injury to a third person; or*
- iv) *with consent obtained by personating her husband; or*
- v) *with consent obtained by a false and fraudulent representation as to the nature and quality of the act.*

2.3 Section 47(3) excludes a husband from criminal liability for raping his own wife, unless at the time of the intercourse there was in force in respect of the marriage a decree of judicial separation or a separation order. The section also does not apply to sexual offences committed on men and boys.

2.4 The rape offence is limited to penetration of person’s genitalia by a person’s penis. This does not cover, for example, the introduction into a person’s genitalia of another part of a person’s body or an object held or manipulated by another person. Also outside the offence is connection between a person’s mouth or tongue and a part of another person’s genitalia. The *Crimes Act 1961* (NZ) defines these acts as ‘unlawful sexual connections’ and includes them alongside rape in the offence of ‘sexual violation’.<sup>12</sup>

2.5 In the Issues Paper, the Commission asked whether:

- a husband should be able to be convicted of rape on his wife;
- an offence of sexual violation be added and include not only penetration of the penis but also the use of foreign objects into the vagina, anus, or mouth of another person without consent; and
- the offence should still be called ‘rape’ if it is gender neutral?

### **Submissions**

2.6 Stakeholders raised strong views on whether the *Crimes Ordinance* should include an offence of marital rape. Judges, lawyers, the CLR Working Group and some others expressed the view that a husband should be able to be convicted of rape on his wife.

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<sup>12</sup> *Crimes Act 1961* (NZ) ss 128, 128B.

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The Samoa Victim Support Group (SVSG), for example, submitted that spousal rape is often part of a pattern of violent and abusive behavior. When a wife is a victim of rape, a message is sent that sexual violence is acceptable. On the other hand, many of those who attended the public consultation were strongly against changing the law in this way. Particular concerns were raised about the need to protect the privacy of the married couple and the potential for such an offence to damage a couple's lifelong relationship. The Samoa Nurses Association also submitted that a husband should not be convicted of rape on his wife.

- 2.7 Most stakeholders supported a new offence of sexual violation to include the use of foreign objects into the vagina, anus or mouth of another person without consent. The CLR Working Group advised that rape should be redefined, or a new offence inserted under the rape offence, which included penetration of the genitalia or the anus of a person by a penis or any other object or part of the body.
- 2.8 Most stakeholders agreed that the law should continue to use the term 'rape' for the offence of sexual intercourse without consent. Some went on to suggest that the term should be defined more broadly to include other kinds of penetration of the vagina or anus.

### *Commission's views*

- 2.9 Sexual assault is a priority issue in Samoa and worldwide. Reform of the criminal law can help to address this issue by sending a clear message that sexual violence is intolerable in any context, including where a husband rapes his wife. This is consistent with the position in countries such as Australia, NZ and the Solomon Islands. In the Commission's view, protecting women and children from sexual violence—including any violence in the family home—should take priority over the possible reasons against introducing such an offence that were raised in consultations.
- 2.10 Almost all stakeholders agreed that the *Crimes Ordinance* should continue to use the term 'rape' for the offence of sexual intercourse without consent. Considering its high level of public recognition, the Commission agrees that this term should remain in the Ordinance. However, a definition should be included to clarify that the 'rape' offence covers all forms of sexual penetration including the introduction into a male or female's genitalia of another part of a person's body or an object held or manipulated by another person.
- 2.11 One model on which such a definition could be drafted is set out in the definition of 'sexual assault' in the *Crimes Act 1900* (NSW), stated as including:
- (a) *sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:*
    - (i) *any part of the body of another person, or*
    - (ii) *any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or*

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(b) *sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or*

(c) *cunnilingus, or*

(d) *the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).*

**Recommendation 2:** Section 47(3) of the *Crimes Ordinance*, which excludes a husband from criminal liability for raping his wife other than in limited circumstances, should be repealed.

**Recommendation 3:** A definition of rape should be included in the *Crimes Ordinance*, which specifies that the offence covers all forms of sexual penetration including the introduction into a male or female's genitalia of another part of a person's body or an object held or manipulated by another person.

### Incest

2.12 Section 49 of the *Crimes Ordinance* deals with incest, defined as sexual intercourse between:

i) *parent and child; or*

ii) *brother and sister, whether of the whole blood or of the half blood, and whether the relationship is traced through lawful wedlock or not; or*

iii) *grandparent and grandchild;*

where the person charged knows of the relationship between the parties.

2.13 The definition of a 'child' includes an illegitimate child but not an adopted child, foster child or stepchild. That is, the incest offence operates on the basis of a blood relationship, rather than a cultural understanding of family.

2.14 Incest laws in many other jurisdictions are limited to close blood relatives.<sup>13</sup> However, some incest offences have been drafted more broadly. For example, the *Crimes Act 1958* (Vic) applies to a person who has sexual intercourse with (among other relationships) a person whom he or she knows to be his or her stepchild, or a descendent of his or her stepchild. In 2001, Papua New Guinea amended its *Criminal Code* to extend the existing law against incest to include a broader set of relationships including customarily adopted children. Subsequent amendment of the Code in 2002 removed these categories and, instead, returned to a focus on 'close blood relatives', meaning a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent, grandchild, aunt, uncle, niece, nephew or first cousin.<sup>14</sup>

2.15 In the *Crimes Act* (NZ), the offence of incest only covers blood relationships. However, the Act sets out an additional offence of 'sexual conduct with dependent

<sup>13</sup> See, eg, *Penal Code* (Solomon Islands), *Crimes Act 1900* (NSW), *Criminal Law Consolidation Act 1935* (SA).

<sup>14</sup> *Criminal Code Act 1974* (PNG) ss 229A, 229E. Generally, see Luluaki, 'Incest and Marriage Prohibitions: Implications of Recent Changes to the Law Against Incest Under Papua New Guinea's Criminal Code' (2003).

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family member’, which criminalizes a person from having a ‘sexual connection’ with a ‘dependent family member’ who is under 18 years of age.

- 2.16 In the Issues Paper, the Commission asked whether the definition of a child should be defined more widely to include an adopted child, foster child and stepchild.

### ***Submissions***

- 2.17 All stakeholders who commented on this question expressed the view that protection should apply to the wider definition of ‘child’ to include all those who are ‘aiga’ in the Samoan culture. As stated by the SVSG:

*It is very common that Samoan families extend beyond the nuclear family unit to include adopted children, foster children or stepchildren. Those children still rely on their parents for care and protection, and the relationship is one of dependency and trust. Once in that relationship of dependency, the vulnerability of children increases, whether they are a biological child or a foster child. If a parent abuses that relationship of dependency and trust then their crime is one of utmost seriousness and the fact that the child is not their biological child should not in any way reduce the penalty for the crime.*

### ***Commission’s views***

- 2.18 It is important to protect children from sexual violation from persons with whom they are in a relationship of dependency and trust. However, in the Commission’s view, ss 50 to 53 of the *Crimes Ordinance* (the ‘trust and dependency’ offences discussed below) are a more appropriate way of achieving this goal than expanding the incest offence. In particular, the trust and dependency offences apply to all acts of sexual indecency, whereas the incest offence is limited to acts of sexual intercourse. For adults, the rape offence will apply where a person’s consent to sexual intercourse has not been given freely and voluntarily. Accordingly, the Commission is not recommending expansion of the incest offence.

## **Minors and relationships of trust and dependency**

- 2.19 Sections 50 to 53 of the *Crimes Ordinance* deal with sexual intercourse and indecency by a man with a girl either living within his family, or under a certain age.
- 2.20 Section 50 deals with sexual intercourse or attempted sexual intercourse by a man with a girl who is living with him as a member of his family and under the age of 21. The girl can be a step daughter, foster daughter or ward. Consent is not a defence to this offence. The offence carries a maximum penalty of seven years imprisonment.
- 2.21 Section 51 criminalizes sexual intercourse, and attempted sexual intercourse, with a girl under 12 years of age. Consent is not a defence to this offence, nor is it a defence that the person charged believed that the girl was of or over the age of 12 years. The offence carries a maximum penalty of 10 years imprisonment for sexual intercourse, and seven years imprisonment for attempted sexual intercourse.

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2.22 Section 52 deals with ‘indecenty’ with girl under 12 years of age. The offence carries a maximum penalty of seven years imprisonment.

2.23 Section 53 deals with sexual intercourse or indecenty with a girl between 12 and 16 years of age. It is a defence to a charge under this section if the person charged proves that the girl consented and that he is younger than the girl, provided it is proved that consent was not obtained by a false or fraudulent representation as to the nature and quality of the act. It is a defence if the person charged proves that the girl consented, that he was under the age of 21 years at the time the act was committed, and that he had reasonable cause to believe, and did believe, that the girl was of or over the age of 16 years. The offence carries a maximum penalty of seven years imprisonment. Section 53(7) places a limitation on the prosecuting of this offence if the prosecution is not commenced within 12 months from the date when the offence was committed.

2.24 Male victims are dealt with under section 58D of the *Crimes Ordinance* (indecenty between man and boy). This section does not differentiate between boys of different ages as it is set out for offences against girls of different ages. A person under the age of 16 years may not be charged with this offence unless the other male was under the age of 21 years.

2.25 There is no clear definition of indecent assault in the *Crimes Ordinance*. In the case of *Police v Vaitolu*, Justice Doherty outlined the elements of indecent assault as follows:

- an assault, being the intentional touching of the body of another person or in some cases the threat of such touching, so its an intentional application of force;
- that the touching was indecent according to commonly accepted community standards; and
- that the accused knew the touching was indecent in that sense.<sup>15</sup>

2.26 In the Issues Paper, the Commission asked the following questions about the ‘trust and dependency’ offences:

- Should s 50 (which deals with sexual intercourse or attempted sexual intercourse by a man with a girl living in his family) cover a wider range of relationships, such as teacher-student, doctor-patient?
- Should the requirement that prosecution of a charge of sexual intercourse or indecenty with a girl between 12 and 16 years of age commence within 12 months from the date when the offence was committed be removed?
- Should the maximum penalty for sexual intercourse with a girl under 12 years of age be increased to 14 years, 20 years or life imprisonment?
- Should the maximum penalty for indecenty with a girl under 12 years of age be increased to 10 years?

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<sup>15</sup> *Police v Vaitolu* [2003] WSSC 55.

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### ***Submissions***

2.27 All those who responded to the question considered that a wider range of relationships of trust should fall within the s 50 offence of sexual intercourse and attempted sexual intercourse. As stated by the SVSG:

*It is essential to protect children from any person who, through their position in society, forms a close relationship with the child. This includes teachers, pastors and doctors, all of whom have professional codes and ethics which prohibit such behaviour.*

2.28 The SVSG went on to state that if a person under 18 years of age is assaulted within certain relationships of trust, consent should be no defence and the offender should be held accountable for abuse of their position. The CLR Working Group commented that there was a need to clarify that the offence of having sexual intercourse with a young girl living in a person's family applies where the girl lives with that person in a different family.

2.29 Stakeholders agreed that the 12-month limitation on prosecuting the offence of intercourse or indecency with a girl between 12 and 16 years of age should be removed, for reasons including the suppression of painful experiences for often lengthy periods of time and the time it may take a child to realize that they have a right not to be subjected to sexual conduct. The CLR Working Group advised that there was no clear justification for this limitation.

2.30 There was support for raising maximum penalties for breach of the 'trust and dependency' offences, with suggested penalties ranging from 14 to 20 years imprisonment. Stakeholders agreed that the maximum penalty for sexual indecency with a girl under 12 years of age should be 10 years imprisonment.

2.31 Several stakeholders raised concerns about the gendered nature of the 'trust and dependency' offences, submitting that they should also apply to protect young boys from acts of indecency.

### ***Commission's view***

2.32 Sexual offences against minors and persons in a relationship of trust and dependency should be drafted to apply equally to males and females. This is consistent with the Commission's general recommendation that the *Crimes Ordinance* should be gender neutral. The following views are based on the offences set out in sections 50 to 53 of the *Crimes Ordinance* being redrafted to also apply to male victims of sexual assault.

2.33 There was broad consensus that s 50 of the *Crimes Ordinance* should be redrafted to cover a wider range of people with whom children may be in a relationship of trust and dependency. The section already applies to those who have, or attempt to have, intercourse with their stepdaughters, foster daughters or wards. The offence should also apply to other persons who have a responsibility for, or significant role in, a

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child's care or upbringing, including, but not limited to, teachers, pastors and doctors. As with the current offence, no defence of consent should be available.

2.34 The Commission recommends removal of the 12-month limitation on prosecuting the offence of sexual intercourse with a girl between 12 and 16 years of age. There is no apparent policy rationale for this limitation. Instead, it appears to unduly hinder appropriate prosecutions.

2.35 The maximum penalties for some of the offences set out in ss 50 to 53 of the *Crimes Ordinance* carry relatively low penalties. In the Commission's view, more appropriate maximum penalties would be as follows:

- sexual intercourse with a person under 12 years of age—14 years
- attempted sexual intercourse with a person under 12 years of age—10 years
- sexual indecency with a person under 12 years of age—10 years
- sexual intercourse or indecency with a person between 12 and 16 years of age—12 years

2.36 Raising the maximum penalties in this way was supported by stakeholders and is consistent with comparative international offences. It is not expected that these higher penalties would be ordered for all successful prosecutions. However, they provide scope for judicial discretion to take into account possible aggravating features—for example, the infliction of actual bodily harm or infliction of the offence in the company of another person or persons.

2.37 One issue that was not raised in the Issues Paper was the maximum penalty for the s 50 offence of sexual intercourse with a member of a person's family. In light of the increased penalties that have been recommended for the offences in ss 51 to 53 of the Ordinance, this penalty also should be reviewed.

**Recommendation 4:** Section 50 of the *Crimes Ordinance* should cover a wider range of people who have a responsibility for, or significant role in, a child's care or upbringing, including teachers, pastors and doctors.

**Recommendation 5:** The requirement that offences of sexual intercourse or indecency with a girl between 12 and 16 years of age must be prosecuted within 12 months of commission of the offence in s 53(7) of the *Crimes Ordinance* should be repealed.

**Recommendation 6:** The offences in ss 51 to 53 of the *Crimes Ordinance* should carry the following maximum penalties:

- sexual intercourse with a person under 12 years of age—14 years
- attempted sexual intercourse with a person under 12 years of age—10 years
- sexual indecency with a person under 12 years of age—10 years
- sexual intercourse or indecency with a person between 12 and 16 years of age—12 years.

### **False or fraudulently obtained consent**

- 2.38 Indecent assault on women and girls over the age of 16 years is dealt with in s 54 of the *Crimes Ordinance*. Section 54(a) criminalizes any indecent assault on a woman or girl of or over the age of 16 years. Section 54(b) criminalizes the doing of anything to a woman or girl of or over the age of 16 years, with her consent, which but for such consent would have been an indecent assault, where consent was obtained by a ‘false and fraudulent representation as to the nature and quality of the act’.
- 2.39 In the Issues Paper, the Commission asked whether a new offence should be created to cover unlawful sexual intimidation of a person. Examples of similar offences can be found in some Australian states and territories. For example, s 327 of the *Criminal Code* (WA) sets out an offence of ‘sexual coercion’, which applies where a person who compels another person to engage in sexual behavior. The offence carries a maximum penalty of 14 years imprisonment. The *Criminal Code 1899* (Qld) takes the approach of expanding the definition of sexual assault to apply to a person who procures another person, without that person’s consent to ‘commit an act of gross indecency’ or ‘witness an act of gross indecency by the person or any other person’.<sup>16</sup>
- 2.40 The Commission also sought views on whether consent obtained by threat to another—for example, a child—should be covered under this section.
- 2.41 Another issue that has arisen in the context of s 54 is whether an element of the offence is proof that the victim was over 16 years of age. In the case of *Police v Avia*, Sapolu CJ of the Supreme Court dismissed charges of indecent assault on the basis that there was no proof that the victim was over 16 years of age at the material time.<sup>17</sup>

### **Submissions**

- 2.42 Most stakeholders agreed that a new offence should be created to cover unlawful sexual intimidation of a person noting, for example, that:
- Women and children in many parts of Samoa are extremely vulnerable due to their poverty and dependency on others for essential needs such as shelter and food. This vulnerability exposes them to abuse and intimidation.*
- 2.43 The CLR Working Group supported introducing a sexual intimidation offence, advising that there have been cases where female victims have been threatened and intimidated by an accused to take of her clothes with a view to carry out a sexual assault.
- 2.44 Stakeholders unanimously supported the extending the offence of unlawful sexual intimidation to include consent obtained by threatening another person.

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<sup>16</sup> *Criminal Code 1899* (Qld) s 352.

<sup>17</sup> *Police v Avia* [2009] WSSC 36.

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### *Commission's views*

2.45 The *Crimes Ordinance* should be extended to cover unlawful sexual intimidation. In the Commission's view, the best model on which such an offence could be based is s 327 of the *WA Criminal Code*—that is, where a person compels another person to engage in sexual behavior.

2.46 In the Commission's view, s 54(a) should be redrafted to apply in a gender- and age-neutral manner. This ensures that the offence operates as a catch-all provision for all circumstances where consent to sexual intercourse has been obtained through false and fraudulent representations. The Commission also considers that s 54(b) should criminalize situations where a perpetrator obtains consent by making threats directed at another person. Such actions are clearly unacceptable and warrant criminal sanction.

**Recommendation 7:** A new offence should be included in the *Crimes Ordinance* to deal with situations where a person compels another person to engage in sexual behavior.

**Recommendation 8:** Section 54(a) of the *Crimes Ordinance* should apply to male and female victims of any age.

**Recommendation 9:** Section 54(b) of the *Crimes Ordinance* should apply to situations where a person obtains consent by making threats directed at another person.

### **Persons with impaired mental capacity**

2.47 Section 57 of the *Crimes Ordinance* criminalizes sexual intercourse with an 'idiot' or 'imbecile' woman or girl, provided the alleged offender knew or had good reason to believe, that she was an idiot or imbecile. The words 'idiot' and 'imbecile' are not defined. There is no exception to the offence to cover situations where the accused person is married to the victim or consents to intercourse.

2.48 Article 16(1) of the United Nations (UN) *Declaration of Human Rights* and article 23 of the *International Covenant on Civil and Political Rights* recognize the right of every person to be free to marry and found a family.

2.49 This right is recognized in the offence in the *Criminal Code* (WA) of sexual offence against an 'incapable person'. In this context, an incapable person is defined as 'a person who is so mentally impaired as to be incapable (a) of understanding the nature of the act the subject of the charge against the accused person; or (b) of guarding himself or herself against sexual exploitation. It is a defence to a charge under the section to prove the accused person was lawfully married to the 'incapable person'.<sup>18</sup>

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<sup>18</sup> *Criminal Code Act Compilation Act 1913* (WA) s 330.

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2.50 Instead of carving out an exception for lawful marriages, the *Crimes Act* (NZ) criminalises ‘exploitative sexual connections’ with persons with a ‘significant impairment’. A sexual connection is ‘exploitative’ if a person has knowledge about the other person’s impairment and has taken advantage of it in order to obtain his or her acquiescence in, submission to, participation in, or undertaking of the connection.<sup>19</sup> The Act defines ‘significant impairment’ as

*an intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs the person’s capacity—*

- (a) to understand the nature of sexual conduct; or*
- (b) to understand the nature of decisions about sexual conduct; or*
- (c) to foresee the consequences of decisions about sexual conduct; or*
- (d) to communicate decisions about sexual conduct.*

2.51 In the Issues Paper, the Commission asked whether the offence should include an exception for legal marriages, de facto relationships and consensual sexual relations. The Commission also noted that the words ‘idiot’ or ‘imbecile’ may be considered derogatory and questioned whether they should be replaced by ‘mental disorder’ or ‘mental incapacity’. Under the *Mental Health Act 2007*, ‘mental incapacity’ is defined as an

*intellectual impairment, mental disorder, medical disorder, brain injury, physical disability or dementia such that, by reason of the impairment, illness, disorder, injury, disability or dementia, the person is unable to make or communicate reasonable judgments in respect of all or any of the matters relating to the person or the person’s circumstances or estate.*<sup>20</sup>

2.52 ‘Mental disorder’ includes a ‘mental illness and means a medical condition that is characterized by a significant disturbance of thought, mood, perception or memory’.<sup>21</sup>

### **Submissions**

2.53 All stakeholders who commented on this issue supported changing the words ‘idiot’ or ‘imbecile’ to more neutral terminology such as ‘mental incapacity’ or ‘mental disorder’. The SVSG further submitted that this section should be gender neutral, stating that ‘boys and young men with intellectual disorders also deserve protection from sexual predators’.

2.54 Stakeholders expressed mixed views on whether allowances should be made for legal marriages, de facto relationships and consensual sexual relations with persons who are the subject of s 57 of the *Crimes Ordinance*. The CLR Working Group recommended that the section ‘should continue to protect those who are mentally disadvantaged from accused persons but at the same time their rights to consensual relationships should be maintained and protected’. One stakeholder was concerned

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<sup>19</sup> *Crimes Act* 1961 (NZ) s 138.

<sup>20</sup> *Mental Health Act 2007* s 2 (interpretation).

<sup>21</sup> *Mental Health Act 2007* s 2 (interpretation).

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that such an amendment could lead to misunderstanding about the law and unfairness in the system.

- 2.55 Some who submitted on this issue distinguished between levels of mental disorder, with Papalii Viopapa, for example, commenting that persons with a ‘mental incapacity’ are ‘incapable of making sensible decisions so should be protected from that’, which is not true of all persons with a ‘mental disorder’.

### *Commission’s views*

2.56 The meaning of the words ‘idiot’ and ‘imbecile’ is not clear in s 57 of the *Crimes Ordinance*. Under modern standards, these words are also derogatory. In the Commission’s view, these words should be replaced with a value-neutral term which reflects the mischief against which the offence is directed—that is, the sexual exploitation of persons who are unable to understand the nature of sexual conduct or of guarding themselves against sexual connections. This does not fall neatly within the definitions in the *Mental Health Act* of ‘mental incapacity’ or ‘mental disorder’. Some persons who have a ‘significant disturbance of thought, mood, perception or memory’—the definition of mental disorder—will be perfectly capable of understanding and making decisions about sexual matters. Others will not. This indicates the need for a more nuanced and targeted definition.

2.57 The other issue to which the Commission was directed was whether there should be an exception to the offence for lawfully married persons. There is no prohibition on persons with a mental incapacity getting married under the *Marriage Ordinance 1961*. Persons also may become mentally incapacitated after entering into marriage (for example, where mental incapacity results from dementia). In either scenario, this would result in an offence having been committed should the married couple have sexual intercourse. However, the Commission has concerns about including a defence for all marital relations. This may be interpreted as condoning exploitative sexual connections within a marriage—the very issue which has prompted the Commission to recommend repealing the exception to the rape offence for married persons. A defence for lawful marriages also ignores the position of de-facto relationships, which may be equally deserving of an exception from the offence.

2.58 The Commission’s preferred approach to resolving these issues is to replace s 57 of the *Crimes Ordinance* with a provision modeled on s 138 of the *Crimes Act* (NZ) (‘Sexual exploitation of person with significant impairment’). This new offence would require:

- that there was a sexual connection with a person with a ‘significant impairment’—an intellectual, mental, or physical condition or impairment that significantly impairs the person’s capacity: to understand the nature of sexual conduct; to understand the nature of decisions about sexual conduct; to foresee the consequences of decisions about sexual conduct; or to communicate decisions about sexual conduct; and
- that the sexual connection was ‘exploitative’—the person had knowledge about the other person’s impairment and took advantage of it in order to obtain his or

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her acquiescence in, submission to, participation in, or undertaking of the connection.

**Recommendation 10:** Section 57 of the *Crimes Ordinance* should be repealed and replaced with a provision modeled on s 138 of the *Crimes Act 1961* (NZ) ('Sexual exploitation of person with significant impairment'), including the definitions of 'significant impairment' and 'exploitative sexual connection'.

### Adultery

2.59 Sections 58 and 58A of the *Crimes Ordinance* relate to adultery by married persons and adultery with a married woman, and carry fines not exceeding \$100. Given the moral nature of adultery, questions arise whether it should remain a criminal offence. This involves consideration of the proper function of the criminal law:

- i) *on the one hand, is the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour?; and*
- ii) *secondly, is a common morality not an integral part of holding a society together therefore making it important for the State to legislate against immorality?*<sup>22</sup>

2.60 Most European countries have repealed their adultery offences. In the United States, adultery remains criminal in some states. However, the constitutionality of these laws was brought into question in the Supreme Court case of *Lawrence v Texas*.<sup>23</sup> In this case, the majority of the Supreme Court found unconstitutional a Texas statute which criminalised persons of the same sex engaging in certain sexual conduct. As stated in the majority opinion by Justice Kennedy,

*Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.*<sup>24</sup>

2.61 In 1955, the American Law Institute promulgated the Model Penal Code and warned against criminal penalties for consensual sexual relations conducted in private on the basis that:

- the prohibitions undermine respect for the law by penalizing conduct in which many people engage;
- the statutes regulate private conduct not harmful to others; and

<sup>22</sup> Roach, K, Healy, P & Trotter, G, 2004, *Criminal Law and Procedure Cases and Materials: 9<sup>th</sup> Edition*, Edmond Montgomery Publications Ltd, Canada, 50-53.

<sup>23</sup> *Lawrence v Texas* (2003) 539 U.S. 558.

<sup>24</sup> *Ibid*, Majority Opinion, [1].

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- laws are arbitrarily enforced and thus invited the danger of blackmail.<sup>25</sup>

2.62 There is no offence of adultery in the criminal laws of the Solomon Islands, Tonga, Fiji, or Papua New Guinea.

2.63 In the Issues Paper, the Commission asked whether the offence of adultery and related sections remain in the *Crimes Ordinance*.

### *Submissions*

2.64 Papalii Viopapa and Judge Vaepule Vaai expressed the view that adultery was an issue of morality and should remain in the private domain. In comparison, the Samoa Nurses Association thought it should ‘definitely’ stay in the *Crimes Ordinance*. The Tamati Law Firm thought that adultery should remain a crime but should be placed in another act such as the *Marriage Ordinance 1961*.

2.65 Most of those who attended public consultations said that adultery should remain a crime because it a biblical offence. However, some people commented that it need not be a criminal law as penalties could be administered by Alii and Faipule.

### *Commission’s views*

2.66 Ultimately, adultery is an issue of morality. Problems with criminalizing moral concerns were identified upwards of 50 years ago by the American Law Institute, including arbitrary enforcement and the private nature of the regulated conduct. These same concerns apply in the context of the Samoan adultery offences. More recently, criminalizing intimate relations between consensual adults has been struck as a breach of the right to privacy by the United States Supreme Court. Although Samoa does not have a similar constitutional right to privacy, this is a persuasive policy consideration. Adultery has been taken off the criminal statute books in most other countries, including Australia, NZ and elsewhere in the Pacific. In the Commission’s view, the adultery offences in ss 58 and 58A of the *Crimes Ordinance* should be repealed.

2.67 If the Commission’s recommendation to repeal the adultery offences is not accepted by the Samoan Government, the offences should be made gender neutral to ensure that they apply to adultery with a married man. This is in accordance with the gender neutral policy expressed throughout this report and the non-discrimination obligations under the Samoan Constitution.

**Recommendation 11:** The adultery offences in ss 58 and 58A of the *Crimes Ordinance* should be repealed.

<sup>25</sup> ALI, Model Penal Code §213.2, Comment 2, p. 372 (1980), cited in *Lawrence v Texas* (2003) 539 U.S. 558, majority opinion.

### Sodomy and related offences

2.68 Section 58E of the *Crimes Ordinance* makes sodomy an offence. Sodomy was defined in the case of *Police v Poi* as meaning penetration of the male or female victim's anus by the offender's penis.<sup>26</sup> The extent of penetration is irrelevant but there must be some degree of penetration. Ejaculation by the accused is also not necessary. Consent is not a defence.<sup>27</sup>

2.69 The penalty for sodomy differs on the basis of the age of the offender and, where the victim is a male, the age of the victim. Where sodomy is committed on a female, the maximum penalty is seven years imprisonment. Where sodomy is committed on a male and, at the time of the act that male is under the age of 16 years and the offender is of or over the age of 21 years, the maximum penalty is imprisonment for seven years. In all other cases, the maximum penalty is imprisonment for five years.

2.70 A related offence is set out in s 58D, which criminalizes 'indecent between males'. The offence covers a male who:

- indecently assaults any other male; or
- does any indecent act with or upon any other male; or
- induces or permits any other male to do any indecent act with or upon him.

2.71 Section 58G of the *Crimes Ordinance* criminalizes attempts to commit sodomy.<sup>28</sup>

2.72 In the *2009 Country Report on Human Rights Practices in Samoa*, the US Department of State noted that sodomy offences were not actively enforced with regard to consensual homosexual acts between adults.<sup>29</sup>

2.73 Sodomy offences have been struck down on the basis of international and national human rights instruments, to the extent that they criminalize the private practices of consenting adults. In 1981, the European Court of Human Rights considered a case in which an adult male living in Northern Ireland sought to engage in consensual homosexual conduct—at that time, an offence under Northern Ireland laws. The Court held that criminal offences relating to homosexual conduct in private between consenting males over the age of 21 constituted an interference with a person's right to respect for his private life in contravention of art 8 of the *European Convention on Human Rights*:

*Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.*<sup>30</sup>

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<sup>26</sup> *Police v Poi* [2007] WSSC 49.

<sup>27</sup> *Crimes Ordinance 1961* s 58E(4).

<sup>28</sup> The offence also covers attempts commit bestiality.

<sup>29</sup> United States Department of State, *2009 Country Reports on Human Rights Practices - Samoa*, 11 March 2010, available at: <http://www.unhcr.org/refworld/docid/4b9e52c4c.html> [accessed 28 May 2010]

<sup>30</sup> *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981), [60]. See also *Lawrence v Texas* (2003) 539 U.S. 558.

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2.74 In 2007 the UN Joint Programme on HIV/AIDS and the UN Development Programme commissioned a review to examine the current scale of the HIV epidemic in the Pacific region and how the Pacific's response can be strengthened, including by changes to discrimination, privacy and confidentiality laws. The review noted that many Pacific island countries have a legacy of legislation from their colonial pasts that criminalizes behaviour such as anal sex. The existence of these laws can deter people from accessing HIV education and prevention services.<sup>31</sup> The review recommended that:

*Countries must undertake progressive legislative reform to repeal legislation that criminalizes high-risk behaviour and promotes HIV-related discrimination. Changing the laws need not imply approval of the behaviour but would signal a greater concern for people.*<sup>32</sup>

2.75 On 1 February 2010, Fiji passed a law decriminalizing consensual homosexuality, becoming the first Pacific Island nation with colonial-era sodomy laws to formally decriminalize sex between men.<sup>33</sup>

2.76 In the Issues Paper, the Commission asked whether an exception should be made to the sodomy offence consenting adults in private and, if so, what should be the age of consent. The Commission also asked whether the sodomy offence should differentiate between different age groups (under 12 years of age, between 12 and 16 years of age and over 16 years), as applies under the sexual assault offences in ss 50-53 of the *Crimes Ordinance*.

### **Submissions**

2.77 A number of stakeholders, including the CLR Working Group, supported an exception to the sodomy offence where the act is conducted in private between adults, with some persons suggesting 18 and 21 as appropriate ages. The Samoa Fa'afafine Society strongly supported removing the sodomy offence in the context of consenting adults, commenting that 'it is not the role of the criminal law, nor should it be the intention of Parliament, to support and reinforce homophobia and intolerance within our community'. Judge Vaepule Vaai did not support an exception, but did suggest that there should be a defence where the defendant is younger than the victim.

2.78 The majority of stakeholders were against differentiating the sodomy offence based on different age groups. The SVSG submitted that a child or young man under the age of 16 cannot give informed consent to sodomy; however, that in these instances, the act of sodomy should fall within the definition of rape.

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<sup>31</sup> *Turning the tide: an open strategy for a response to AIDS in the Pacific: report of the Commission on AIDS in the Pacific – Suva, Fiji : UNAIDS Pacific Region* (2009), [4.3]

<sup>32</sup> *Ibid*, Rec 4.

<sup>33</sup> UNAIDS, *Fiji first Pacific Island nation with colonial-era sodomy laws to formally to decriminalize homosexuality* (April 2010) [http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2010/20100303\\_Fiji.asp](http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2010/20100303_Fiji.asp), accessed 29 April 2010.

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### *Commission's views*

2.79 The Commission strongly supports repealing all criminal penalties attaching to sodomy and related acts conducted in private between consenting adult males. Such legalization is essential to meet a number of international human rights, including non-discrimination on the basis of gender and sexual preference, and respect for personal privacy. Legalization also received support in the majority of public submissions.

2.80 Above, the Commission recommends that the sexual assault offences should operate in a gender neutral manner. To support this objective, the Commission recommends that the definition of sexual intercourse for the purpose of the *Crimes Ordinance* should be expanded to include all forms of penetration, including anal intercourse. Accordingly, acts of sodomy—other than those between consenting adults—would fall within the offences of rape and sexual intercourse with minors.

2.81 On this basis, ss 58D and E of the *Crimes Ordinance* should be repealed. Section 58G of the *Crimes Ordinance* should be repealed to the extent it applies to sodomy.

**Recommendation 12:** The sodomy and related offences in ss 58D and E of the *Crimes Ordinance* should be repealed. Section 58G of the *Crimes Ordinance* should be repealed to the extent it applies to sodomy.

### **Bestiality**

2.82 Sections 58F to 58H of the *Crimes Ordinance* deal with bestiality—having sexual intercourse with, and committing acts of indecency with, animals. Considering the animal-protection focus of these offences, the Commission asked whether the offences should be moved to animal protection legislation. Stakeholders were divided as to whether the offences should be moved to animal protection legislation, remain in the *Crimes Ordinance*, or be set out both in the *Crimes Ordinance* and animal protection legislation.

### *Commission's views*

2.83 The bestiality offences apply to offensive and harmful sexual acts that warrant criminal sanction. Retaining these provisions in the *Crimes Ordinance* sends a strong message of societal disapproval, which may be lessened should the offences be moved to animal protection legislation. This is particularly true given that Samoa does not presently have a central animal welfare act. Should such legislation be enacted in the future, a cross-reference could be included to the bestiality offences in the *Crimes Ordinance*.

## ***Other crimes against religion, morality and public welfare***

### **Personating a female**

- 2.84 Section 58N of the *Crimes Ordinance* applies to a male who, in a public place and with intent to deceive any other person as to his true sex, represents that he is a female.
- 2.85 In its submission on the Issues Paper, the Samoa Fa’afafine Association expressed strong concerns about the offence. In particular, the Association commented that the offence breached s 15 of the *Samoan Constitution*—freedom from discriminatory legislation. The Association suggested replacing s 58N with an ‘impersonation’ offence, which would apply to males or females who represented themselves as a member of the opposite sex for the purpose of soliciting prostitution.
- 2.86 Members of the public who attended public consultations were divided on the personating a female offence. Some put forward similar views to the Fa’afafine Association, commenting that, without more, impersonating a female should not an offence. On this view, penalties should be reserved for those persons who impersonate females for the purpose of misleading youth and children into sexual activities. In comparison, some persons thought that the offence should remain and the penalty increased.

### ***Commission’s views***

- 2.87 The central role that has been put forward for the personating a female offence is to protect children and youth from being coerced or deceived into sexual activities. Such practices fall within the offences set out in ss 51 to 53 of the *Crimes Ordinance*. In the context of adults, the doing of any sexual act for which consent has been obtained by a ‘false and fraudulent representation as to the nature and quality of the act’ is criminalized under s 54(b) of the *Crimes Ordinance*.
- 2.88 As such, the Commission does not consider there to be a legitimate role for the offence of impersonating a female. Its operation is clearly discriminatory on the basis of sexuality and, therefore, in breach of in breach of s 15 of the *Samoan Constitution*. Section 58N of the *Crimes Ordinance* should be repealed.

<p><b>Recommendation 13:</b> The personating a female offence in s 58N of the <i>Crimes Ordinance</i> should be repealed.</p>
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### **Prostitution**

- 2.89 An issue that has been raised in the course of this Inquiry is whether Samoa should criminalize the act of prostitution, or soliciting persons for this purpose.
- 2.90 As noted by one commentator:

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*In most Pacific communities, where Christian principles and values are deeply etched into its cultures and traditions, prostitution not only is illegal but regarded as an act of 'evil'. It is not a topic that is openly discussed within these communities because it is often seen as a matter lying outside the realms of decency and morality. ... But that approach by Pacific people can be interpreted as a denial to accept the fact that prostitution does exist in most if not all Pacific communities and it is continuing to grow.*<sup>34</sup>

2.91 Currently, it is an offence under the *Crimes Ordinance* to keep or manage a brothel or a 'place of resort for homosexual acts', or be the tenant or lessor of such a place and knowingly permit the premises to be so used.<sup>35</sup> Additional offences are set out for living on the earnings of prostitution<sup>36</sup> and procuring a woman or girl to have sexual intercourse with a male who is not her husband.<sup>37</sup>

2.92 There is no offence in the *Crimes Ordinance* for the act of prostitution. This is consistent with many other common law jurisdictions, which have directed crimes at certain aspects of the business of prostitution—such as the ownership of brothels, or causing or inducing prostitution. In recent decades, Australia and NZ have moved towards decriminalization of prostitution. Although models vary widely between jurisdictions, they are all based on the licensing of various aspects of the sex industry, including workers, operators and/or venues. Prostitution laws also place obligations on prostitutes and clients to, for example, take steps to avoid transmission of sexually transmitted diseases (STDs). In comparison, almost every state in the United States criminalizes the act of prostitution.

2.93 The *Crimes Ordinance* does not criminalise soliciting and/or loitering for the purpose of prostitution. This differs from most other jurisdictions in Australia and the Pacific. For example, s 19(1) of the *Prostitution Act 1992* (ACT) provides that 'a person shall not, for the purpose of offering or procuring commercial sexual services, accost any person, or solicit or loiter, in a public place'. A higher maximum penalty applies if a person accosts a child for such a purpose.<sup>38</sup> The purpose of soliciting and loitering offences has been explained as preventing public offence by ensuring that sex workers do not congregate in streets or other public areas.<sup>39</sup>

### **Submissions**

2.94 The Issues Paper did not ask a question about the prostitution offences in the *Crimes Ordinance*. However, this issue was raised in public consultations. Persons who attended these consultations commented on the importance of penalizing males

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<sup>34</sup> Lemisio M, 'Should Prostitution be Decriminalised in the Pacific? The Pros and Cons' (2008) 12(1) *Journal of South Pacific Law* (2008) 101.

<sup>35</sup> *Crimes Ordinance 1961* ss 58J, K.

<sup>36</sup> *Ibid* s 58L.

<sup>37</sup> *Ibid* s 58M.

<sup>38</sup> See also *Summary Offences Act 1988* (NSW) s 19; *Prostitution Regulation Act 1992* (NT) s 10(1); *Prostitution Act 1999* (Qld) s 73; *Summary Offences Act 1953* (SA) s 25; *Sex Industry Offences Act 2005* (Tas) s 8; *Prostitution Control Act 1994* (Vic) ss 12, 13.

<sup>39</sup> *The Laws of Australia* [10.3.1300], current as at 1 May 2009.

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and females who work as prostitutes. One cause of concern was the potential for prostitution to allow diseases such as HIV/AIDS to enter the country. Prostitution was also thought to lead to other problems such as family breakdown and offences involving violence. Papalii Viopapa suggested that ‘prostitution’ should be defined and the criminalization should extend to persons who seek the service.

### *Commission’s views*

2.95 Criminalising aspects of the sex industry, rather than the act of prostitution itself, is a common way of regulating prostitution. Crimes directed at owning brothels, procuring prostitution and living on the earnings of prostitution target the foundations of the industry, including the persons with the greatest money and power. In the Commission’s view, this should remain the approach in the *Crimes Ordinance*. (However, as set out below the Commission does recommend an additional offence for soliciting and loitering in a public place for the purpose of offering or procuring commercial sexual services.) An offence of prostitution itself would appear to have limited benefit as deterrence, often affecting those who—for reasons of youth, poverty or migration status—are effectively trapped in the industry. Making the act of prostitution illegal also precludes the institution of certain public health measures, such as strategies to promote testing for STDs.

2.96 However, the Commission considers that the prostitution offences in the *Crimes Ordinance* could be improved in two key respects. First—consistently with the rest of the Ordinance—the offences should be gender neutral. In particular, ss 58J and 58K should be merged into one offence of brothel keeping. Section 58M should be amended to apply to the procuring for gain of sexual intercourse with both males and females without regard to their marital status. Secondly, a new offence of soliciting or loitering in a public place should be enacted to prevent sex workers, and those seeking their services, from congregating in streets or other public areas. Consistently with international trends, this offence should carry a maximum penalty in the order of three months imprisonment.

**Recommendation 14:** The prostitution offences in ss 58J to 58M of the *Crimes Ordinance* should be made gender neutral, including by merging ss 58J and 58K into one offence of brothel keeping; and amending s 58M to apply to procuring sexual intercourse with both males and females without regard to their marital status.

**Recommendation 15:** A new offence should be inserted in the *Crimes Ordinance* of soliciting or loitering in a public place for the purpose of offering or procuring commercial sexual services. The offence should carry a maximum penalty of three months imprisonment.

### **Distribution or exhibition of indecent matter**

2.97 Section 43 of the *Crimes Ordinance* prohibits the distribution and exhibition of an ‘indecent model or object’ without lawful justification. The Ordinance does not define what matter is ‘indecent’, nor has the issue received judicial consideration in Samoa.

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2.98 Defining terms such as ‘indecent’, ‘obscenity’ and ‘pornography’ is notoriously difficult—most famously through the statement of Justice Stewart of the US Supreme Court in *Jacobellis v Ohio*—‘I can't define pornography, but I know it when I see it’. A definition that may suffice for the purpose of this Report is the portrayal of sexual acts solely for the purpose of sexual arousal. This can be distinguished from ‘indecent’ and ‘obscenity’, the definitions of which focus on accepted community standards. For example, indecent has been described as ‘non-conformance with accepted standards of morality’.<sup>40</sup>

2.99 In the Issues Paper, the Commission asked whether the words ‘indecent matter’ should be replaced by ‘pornography and other similar paraphernalia’ in order to modernize and clarify the offence.

2.100 A related issue is whether there is a need for a separate offence to criminalize the use, distribution and exhibition of child pornography. Child pornography raises some issues that do not apply to pornography dealing exclusively with adults—in particular, the participation of children in the production of such material. Criminal offences relating to child pornography are often much broader than offences relating to the distribution or exhibition of adult pornography, covering conduct such as access to, and possession of, such material.

### ***Submissions***

2.101 A couple of stakeholders supported changing the words ‘indecent matter’ with ‘pornography and other similar paraphernalia’. Judge Vaepule Vaai suggested that indecent matter should be defined as including pornography, which would make it a question of law not of fact. The Tamati Law Firm preferred to keep the status quo.

### ***Commission's views***

2.102 Replacing ‘indecent matter’ with ‘pornography and other similar paraphernalia’ could raise several problems. The term ‘pornography’ may include an overly broad range of material associated with the depiction of sexual acts. Depending on the judicial standard adopted in a given case, this could include, for example, depictions of scantily-clad women or men in magazines. On the other hand, the term may be too narrow in that it omits any non-sexually explicit material—for example, the highly controversial ‘Piss Christ’ artwork, which displays a plastic crucifix in urine. In the Commission’s view, it is preferable to retain the term ‘indecent matter’.

2.103 The Commission sees merit in including an additional limb into the s 43 offence to explicitly deal with child pornography. In particular, this could criminalize access to, and the possession of, child pornography. Such an offence is in keeping with Canada and Australian states and territories. An instructive model in this regard is ss 68 to 70 of the *Crimes Act 1958* (Vic), which covers the procurement and possession of child pornography.

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<sup>40</sup> *Federal Communications Commission v. Pacifica Foundation* (1978) 438 U.S. 726.

## 2. Crimes Against Religion, Morality and Public Welfare

**Recommendation 16:** A new s 43A should be inserted in the *Crimes Ordinance*, which criminalizes access to, and possession, distribution and exhibition of, child pornography. Child pornography for these purposes should be defined as ‘a model or object or indecent show or performance that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context’.

### 3. Crimes against Rights of Property

3.1 Crimes against rights of property are covered under ss 85 to 115 of the *Crimes Ordinance*. The need for review of this part of the *Crimes Ordinance* stems from an increase in the prevalence of fraud-like crimes in Samoa and the need to modernize some of the drafting.

#### **Theft**

3.2 Section 85 of the *Crimes Ordinance* defines the offence of theft as the act of fraudulently or dishonestly taking, or converting to the use of any person, anything capable of being stolen, with intent:

- i) *to deprive the owner or any person having any property or interest therein permanently of such thing or of such property or interest; or*
- ii) *to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking or converting.*

3.3 Section 85(2) specifies that ‘every animate or inanimate thing whatever that is the property of any person, and is movable, is capable of being stolen’. The definition does not include the theft of intangible items, such as electricity and credit.

3.4 Section 86 sets out the punishment for theft. Currently, maximum penalties differ on the basis of the type of property that has been stolen, who has stolen it, and its value.

3.5 Section 87 makes unavailable certain defences that otherwise could be brought against a charge of theft—namely that the person charged with theft:

- was in lawful possession of the property stolen; or
- had a lawful interest in the property stolen.

3.6 On the basis of the issues raised by the CLR Working Group, the Commission has considered three specific issues related the theft offence, set out below. First, how the theft of intangible items should be dealt with under Samoan criminal law, including meter tampering; secondly, the need, if any, to raise the penalties associated with a finding of theft; and, finally, theft committed by spouses and de-facto partners.

#### **Intangible property**

3.7 Section 85 of the *Crimes Ordinance* reflects the common law offence of larceny in only covering the unlawful taking of tangible property.

3.8 In some common law jurisdictions, theft offences have been extended to cover intangible property. Under s 1(1) of the *Theft Act 1968* (UK), a person is guilty of theft if he or she ‘dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it’. ‘Property’ is defined to include ‘money and all other property, real or personal, including things in action and other

intangible property'.<sup>41</sup> Substantially similar offences have been adopted in a number of Australian jurisdictions, including the definition of theft in the Australian Model Criminal Code.<sup>42</sup> The Model Code also includes within its definition of property electricity and wild creatures that are tamed or ordinarily kept in captivity.

3.9 Some issues have arisen with applying the elements of theft to intangible property—in particular, the concept of ‘taking’. In *R v Preddy*, the UK House of Lords held that choses in action represented by credit in bank accounts do not pass from one person to another.<sup>43</sup> Instead, the chose in action held by the transferor is destroyed and an identical but a separate chose in action is created in favor of the transferee.

3.10 The wrongful acquisition of intangible property also may be covered under offences relating to fraud or deception. As discussed further below, s 89 of the *Crimes Ordinance* criminalizes the obtaining of ‘anything capable of being stolen’ by false pretence. The offence also applies to the causing or inducing of a person to ‘execute, make, accept, endorse or destroy’ any valuable security.

3.11 In the Issues Paper, the Commission asked whether the theft offence should cover the theft of intangibles. The stakeholders who expressed views about this question agreed that the theft offence be extended in this way.

#### *Commission’s view*

3.12 Extending theft offences to cover intangible property is well supported in international jurisdictions and received the support of stakeholders. The Commission agrees that intangible property should be covered by the definition of ‘thing capable of being stolen’ in the theft offence in the *Crimes Ordinance*.

**Recommendation 17:** The definition of ‘thing capable of being stolen’ for the purpose of the offence of theft in the *Crimes Ordinance* should cover intangible property.

#### **Abstracting electricity**

3.13 At common law there is no property in electricity. Some theft offences extend to the theft of electricity.<sup>44</sup> An alternative approach is excluding electricity from the definition of property and, instead, making special provision for the abstraction of, or interference with, electricity. For example, the *Theft Act* (UK) includes an offence of ‘abstracting of electricity’, which covers ‘a person who dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity’. A specific theft of electricity offence is also set out in the Solomon Islands.<sup>45</sup>

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<sup>41</sup> Section 4(1).

<sup>42</sup> *Crimes Act 1958* (Vic) s 72; *Criminal Code Act 1995* (Cth) sch 1 s 131.1; *Criminal Code 2002* (ACT) s 308.

<sup>43</sup> *R v Preddy* [1996] UKHL 13.

<sup>44</sup> See, eg, *Criminal Code* (Cth) s 130.1.

<sup>45</sup> *Penal Code* (Solomon Islands) s 264.

### 3. Crimes Against Rights of Property

- 3.14 In Samoa, the *Electric Power Corporation Act 1980* includes an offence of ‘unlawful use of electricity’, which applies where a person ‘unlawfully directs electricity or causes electricity to be unlawfully directed, or uses electricity that is unlawfully directed’.<sup>46</sup> The offence gives rise to a maximum penalty of three years imprisonment.
- 3.15 In submissions on this issue, Judge Vaepule Vaai and the CLR Working Group supported extending the theft offences in the *Crimes Ordinance* to cover tampering with water and electricity meters. On the other hand, the Tamati Law Firm suggested that this should be regulated under another Act, given the specificity of the subject matter.

#### *Commission’s views*

- 3.16 The *Electric Power Corporation Act* criminalizes the unlawful directing or use of electricity. This offence, including the maximum penalty of three years imprisonment, will be adequate for the vast majority of situations in which a person dishonestly appropriates electricity. In a very few circumstances, the amount of electricity unlawfully appropriated may warrant a higher penalty. Under the current penalty structure of the theft offence, this may include the appropriation of an amount of electricity with a value of greater than \$400. To ensure that this option is available, the definition of ‘thing capable of being stolen’ in the theft offence of the *Crimes Ordinance* should cover electricity.

<p><b>Recommendation 18:</b> The definition of ‘thing capable of being stolen’ for the purpose of the offence of theft in the <i>Crimes Ordinance</i> should cover electricity.</p>
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#### **Intent to permanently deprive**

- 3.17 As noted above, the definition of theft requires that a person who has taken or otherwise stolen property intend to permanently deprive the owner or another person with a proprietary interest of that property.
- 3.18 The *Theft Act* (UK) specifies that an intention to permanently deprive can be established where a person, having possession or control (lawfully or not) of property belonging to another, parts with it under a condition as to its return which he may not be able to perform, where this is done for purposes of his own and without the other’s authority.<sup>47</sup>
- 3.19 The CLR Working Group has suggested that the *Crimes Ordinance* should extend the definition of theft to cover a person who intends to pledge the thing capable of being stolen; deposit it as security; or part with it under a condition as to its return which the person parting with it may be unable to perform. Such an extension was supported in submissions.

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<sup>46</sup> *Electric Power Corporation Act 1980* s 45.

<sup>47</sup> *Ibid* s 6.

*Commission's views*

3.20 There was considerable support for ensuring that a person that parts with another person's property under circumstances where he or she may not be able to ensure its return is culpable under the theft offence. There are strong policy reasons why such an extension should be adopted. In particular, it ensures that a person who takes the property of another can not use it recklessly without regard to the property's future return to its lawful owner. In the Commission's view, s 6 of the *Theft Act* (UK) provides a good model upon which to base such an extension of the theft offence.

**Recommendation 19:** The definition of 'theft' in the *Crimes Ordinance* should specify that an intention to deprive an owner can be established where a person, having possession or control (lawfully or not) of property belonging to another, parts with it under a condition as to its return which he may not be able to perform, where this is done for purposes of his own and without the other's authority.

**Penalties**

3.21 The penalties for theft vary according to a complex set of criteria. As set out in s 86, the maximum penalty is:

- i) *3 months if the value of the property stolen does not exceed \$4;*
- ii) *1 year if the value of the property stolen exceeds \$4 but does not exceed \$100;*
- iii) *3 years if the value of the property stolen exceeds \$100 but does not exceed \$400;*
- iv) *5 years if the value of the property stolen exceeds \$400;*
- v) *7 years if the property stolen is testamentary instrument;*
- vi) *10 years if the property stolen is a ship or aircraft;*
- vii) *7 years if the property stolen is anything stolen by a clerk or servant which belongs to or is the possession of his employer;*
- viii) *7 years if the property stolen is anything in the possession of the offender as a clerk or servant, or as an officer of the Government of Samoa or of any local authority or public body, or as a constable; or*
- ix) *7 years if the theft is one within the extended definition contained in section 88 of the Crimes Ordinance.*

3.22 The penalty structure for theft in some other jurisdictions is considerably simpler. In Victoria, for example, a person guilty of theft is subject to a maximum penalty of 10 years imprisonment regardless of the value of the property stolen. A separate offence, subject to a higher maximum penalty, is set out for unlawfully taking control of an aircraft. In NZ, the maximum penalties for theft depend on the value of the property stolen varying from three months for property valued under \$500 to seven years for property of a value greater than \$1,000. A maximum of seven years imprisonment also applies where the theft was by a person in a 'special relationship' with the victim.

*Submissions*

### 3. Crimes Against Rights of Property

3.23 In the Issues Paper, the Commission asked whether the maximum penalties for theft should be increased. Most stakeholders who commented on this issue agreed that the penalties should be increased on the basis of the need for deterrence. Judge Vaepule Vaai questioned whether an increase in penalty would move jurisdiction to the Supreme Court.

3.24 The CLR Working Group expressed the view that the penalties for theft should be increased as follows:

- three years if the value of the property stolen is greater than \$100 but less than \$1,000;
- five years if the value of the property stolen is greater than \$1,000 but less than \$5,000;
- seven years if the value of the property stolen is greater than \$5,000;
- 10 years if the property stolen is anything stolen by a clerk or servant which is in the possession of or belongs to his or her employer, or if his or her employer has any interest in the property; and
- seven years if the theft is one to which the extended definition of theft set out in s 88 of the *Crimes Ordinance* applies.

#### *Commission's views*

3.25 The penalties for the offence of theft are in need of revision, both to simplify the penalty structure and to raise some of the maximum penalties. In particular, the Commission considers there to be merit in raising the maximum penalty where the value of the property stolen exceeds \$400.

3.26 Raising the penalty for theft offences may move jurisdiction to the Supreme Court. Under s 36 of the *District Courts Act 1969*, district courts have jurisdiction to hear criminal charges relating to any offence which is punishable by a term of imprisonment not exceeding five years. In the Commission's view, this is only appropriate for the highest categories of theft—that is, where the value of the property is greater than \$400 or where the relationship of the offender to the victim is such as to warrant a more severe penalty.

<p><b>Recommendation 20:</b> The penalties for the theft offence should be reviewed with a view to simplifying the penalty structure and raising the maximum penalties for the most serious types of offending.</p>
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#### **Spousal theft**

3.27 At common law, certain offences could not be committed by one spouse against the other, on the principle of the unity of husband and wife. That is, that in most circumstances, both spouses have an equal right to use, or dispose of marital property. Some jurisdictions have changed this position through legislation. For example, s 22 of the *Crimes Act (NZ)* states that a person may be convicted of theft of another person's property even though he or she was married to, or in a civil union or a de facto relationship with, that person at the time of the theft.

### 3. Crimes Against Rights of Property

- 3.28 A more nuanced position applies under the s 260 of the *Penal Code* (Solomon Islands). This section permits a wife to protect and secure her separate property ‘as if such property belonged to her as a femme sole’, in certain situations. Namely,  
*no proceedings ... shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife or for the purpose of giving it to a paramour.*
- 3.29 In the Issues Paper, the Commission asked whether spouses and/or de-facto partners should be included in the list of persons who can be guilty of theft.

#### ***Submissions***

- 3.30 Although several stakeholders supported extending the theft offence to provide for marital theft, the Tamati Law Firm did not agree with such an amendment.

#### ***Commission’s views***

- 3.31 The Commission recommends amending the theft offence to ensure that it applies to marital theft. In most countries that have included such an amendment, the offence applies without discrimination on the basis of whether the couple was separated or divorced at the time of the alleged taking. This is the Commission’s preferred approach. However, if considered necessary to accommodate cultural concerns about marital unity, the offence could be limited in accordance with the theft offence in the Solomon Islands—namely, contingent on separation or desertion.

<p><b>Recommendation 21:</b> The theft offences in pt VIII of the <i>Crimes Ordinance</i> should be extended to apply to marital theft.</p>
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#### **Persons under a special obligation**

- 3.32 Section 88 of the *Crimes Ordinance* deals with persons who are under a special obligation to deal with money or other items capable of being stolen. The section deems any person guilty of theft if he or she holds, receives, or obtains any money, valuable security, or another thing capable of being stolen, subject to an obligation to deal with it in a particular manner, and who fraudulently or dishonestly deals with it in any other manner, or fails to deal with it in accordance with such obligation.
- 3.33 The CLR Working Group identified several scenarios that are not covered under the current drafting: theft by misappropriating proceeds held under direction; theft by persons required to account; and theft by persons holding a power of attorney.
- 3.34 Section 220 of the *Crimes Act* (NZ) is an example of a substantively similar provision to s 88 of the *Crimes Ordinance* which would cover the possible gaps identified by the CLR Working Group:

**220 Theft by person in special relationship**

(1) *This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person—*

*(a) to account to any other person for the property, or for any proceeds arising from the property; or*

*(b) to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.*

(2) *Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.*

(3) *This section applies whether or not the person was required to deliver over the identical property received or in the person's possession or control.*

(4) *For the purposes of subsection (1), it is a question of law whether the circumstances required any person to account or to act in accordance with any requirements.*

**Submissions**

3.35 In the Issues Paper, the Commission asked whether s 88 of the *Crimes Ordinance* should include theft by misappropriating proceeds held under direction, theft by persons requiring to account, and theft by persons holding a power of attorney. Stakeholders agreed that these should be covered.

**Commission's views**

3.36 There is merit in extending s 88 of the *Crimes Ordinance* to cover all persons who acquire money or other valuable items because they are in a special position of trust. This includes situations where proceeds are held under direction; there is a requirement to account; and items are appropriated under a power of attorney. In the Commission's view, the section should be redrafted in accordance with s 220 of the *Crimes Act* (NZ). This provides less potential for gaps to be identified in the future than following a model of adding specific situations considered as falling within the general policy intent of the section. The name of the section should also be changed to 'theft by person in special relationship' to better reflect the nature of the offence.

<p><b>Recommendation 22:</b> Section 88 of the <i>Crimes Ordinance</i> should be redrafted in accordance with s 220 of the <i>Crimes Act 1961</i> (NZ) to cover all persons who acquire money or other valuable items through a special relationship of trust, including proceeds held under direction; requirements to account; and powers of attorney. The section should be renamed 'theft by person in special relationship'.</p>
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## ***Fraudulent practices***

### **Obtaining by false pretence**

3.37 Section 89 of the *Crimes Ordinance* criminalizes the obtaining of ‘anything capable of being stolen’ by false pretence and the causing or inducing of a person to ‘execute, make, accept, endorse or destroy’ any valuable security. ‘False pretence’ is defined in s 89(2) as:

*a representation either by words or otherwise of a matter of fact either present or past, which representation is known to the person making it to be false and is made with the fraudulent intent to induce the person to whom it is made to act upon it.*

3.38 Concerns have been raised that the offence of obtaining by false pretence may not cover those acting in the capacity of an officer, clerk or servant, who, with intent to defraud or cause loss to any person by any false pretence, obtain valuable credit.

3.39 The CLR Working Group has also suggested a number of fraud-like practices that, in its view, should be covered by the *Crimes Ordinance*, being:

- taking or dealing with certain documents with intent to defraud;
- fraudulently destroying documents;
- fraudulently concealing documents; and
- impersonating another person for the purpose of obtaining a benefit.

3.40 One example of such an offence is found in s 228 of the *Crimes Act* (NZ) (‘Dishonestly taking or using document’), which provides that:

*Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—*

*(a) dishonestly and without claim of right, takes or obtains any document; or*

*(b) dishonestly and without claim of right, uses or attempts to use any document.*

3.41 Other jurisdictions have dealt with this issue through general deception offences, which apply to fraudulently obtaining property or any financial advantage. A model of this type of offence is ss 81 and 82 of the *Crimes Act* (Vic), which apply to a person who, by any deception, dishonestly obtains:

- property belonging to another, where the person intends to permanently deprive the other of it; or
- any financial advantage.

### ***Submissions***

3.42 In the Issues Paper, the Commission asked whether false pretence should extend to officers, clerks and servants who obtain credit by false pretence with intent to defraud or cause loss to any person, and whether the penalty for false pretence should be increased from three to seven years. A number of people supported extending the offence for obtaining through false pretence to cover officers etc who obtain credit by false pretence with intent to defraud or cause loss to a person. However, Judge

### 3. Crimes Against Rights of Property

Vaepule Vaai advised that there was no need to extend the offence in this way as such conduct would be caught by the offence of obtaining credit by fraud. All stakeholders that commented on this issue supported raising the maximum penalty for obtaining through false pretence to seven years.

- 3.43 Most stakeholders also supported making it an offence under the *Crimes Ordinance* to take or deal with property with an intent to defraud, fraudulently destroy or conceal documents, or impersonate another person for the purpose of obtaining a benefit. The Tamati Law Firm suggested that there should be a ‘catch-all’ provision in case specific legislation has not covered everything relating to fraudulent conduct.

#### *Commission’s views*

- 3.44 The CLR Working Group and others have raised a number of scenarios in which a person who profits from deceptive conduct would not be culpable under the *Crimes Ordinance*. This highlights a broader deficiency in the current scope of the s 89 offence of ‘Obtaining by false pretence’. In the Commission’s view, the offence should be redrafted to encompass the wide range of situations in which a person dishonestly obtains by any deceptive practice property belonging to another or a financial advantage. Sections 81 and 82 of the *Crimes Act* (Vic) could be used as a model in this regard.

- 3.45 There was broad-reaching support for raising the maximum penalty for breach of s 89 to seven years imprisonment. This is consistent with the penalty for theft by persons in a special relationship and, in the Commission’s view, remains appropriate in light of the recommended redrafting of the offence. The Commission supports raising the penalty in this way.

**Recommendation 23:** Section 89 of the *Crimes Ordinance* should apply to all situations in which a person dishonestly obtains by any deceptive practice property belonging to another or a financial advantage. Sections 81 and 82 of the *Crimes Act 1958* (Vic) could be used as a model in this regard.

**Recommendation 24:** The maximum penalty for breach of s 89 of the *Crimes Ordinance* should be increased to seven years imprisonment.

#### **Witchcraft**

- 3.46 Section 95 of the *Crimes Ordinance* makes everyone who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration or undertakes to tell fortunes, liable to imprisonment for a term not exceeding six months.

- 3.47 The witchcraft offence raises a number of issues. First, challenges in proving the offence in a court—how can a court be asked to determine whether spiritual practice is ‘pretend’? Further, it is unclear whether local practices of ‘taulasea’, ‘fofo’ and

### 3. Crimes Against Rights of Property

‘faipele’ are caught under this offence. The offence has been removed from the criminal statute books of most common law jurisdictions.

3.48 In the Issues Paper, the Commission raised several options for reform of the witchcraft offence, including repealing the offence altogether. In the alternative, the offence could be limited to practices that cause actual harm (physical or mental) to a person. If this option is pursued, a further question arises as to whether the practices should be defined.

#### *Submissions*

3.49 Although there was some support for repealing the witchcraft offence on the basis of voluntary assumption of risk, other stakeholders preferred retaining an offence and defining the practices that are encompassed within it.

3.50 Several persons who attended public consultations opposed the witchcraft offence because of the capacity of natural healers to cure illness. One suggestion was for the Ministry of Health to issue licences to such healers. Other persons, however, thought that the law should remain to ensure that persons could be charged if something happened to the ill person.

#### *Commission’s views*

3.51 The arguments that stakeholders raised for and against retaining a witchcraft offence focused on the impact of such practices on persons’ life and health. This is quite different to the object of the present offence, which is about protecting persons from ‘pretending’ to exercise witchcraft, located in the part of the *Crimes Ordinance* dealing with fraud. The maximum penalty of six months imprisonment would be manifestly low for practices that are harmful to a person’s life or health. Since the offence in s 89 (obtaining by false pretence) protects people from any fraudulent practices, including those relating to witchcraft, the witchcraft offence should be repealed from this part of the *Crimes Ordinance*.

3.52 A separate question is whether a different witchcraft offence should be included into Part VII of the *Crimes Ordinance*, which deals with crimes against person and reputation. Harmful conduct is already covered by offences such as murder, manslaughter and the causing of actual bodily harm. For each of these offences there is a defence of ‘lawful justification’. In the Commission’s view, these offences are adequate to deal with harm caused by witchcraft. Whether the conduct amounts to ‘lawful justification’ is an issue to be determined on a case-by-case basis.

3.53 In light of the concerns expressed by members of the public, the Commission recommends that the Ministry of Health consider traditional healers in Samoa, including the need to introduce a licensing system or some other regulatory model.

<p><b>Recommendation 25:</b> The witchcraft offence in s 95 of the <i>Crimes Ordinance</i> should be repealed.</p>
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**Recommendation 26:** The Ministry of Health should consider traditional healers, including the need to introduce a licensing system or some other regulatory model.

### **False accounting**

3.54 Section 98 of the *Crimes Ordinance* deals with falsifying accounts relating to public funds. Public money is not defined in the Ordinance. However, a definition is included in s 2(1) of the *Public Finance Management Act 2001*, being:

*all money other than trust money received by the government, including all revenues, grants, loans and other moneys, and all bonds, debentures, and any other securities received by, or on account of, or payable to, or belonging to, or deposited with the Government or any department by:*

- i) any Officer of Government in his capacity as such; or*
- ii) any person on behalf of Government.*

3.55 False accounting by any person in relation to public funds carries a maximum penalty of five years imprisonment. A substantially similar offence is set out in s 99 with respect to false accounting by any employee.

3.56 In the Issues Paper, the Commission asked whether the penalty for false accounting should be increased to seven years imprisonment. All stakeholders that commented on this issue agreed that the penalty should be raised. The Samoa Nurses Association suggested that the maximum penalty should be raised to 10 years imprisonment.

#### ***Commission's views***

3.57 A maximum penalty of seven years imprisonment for false accounting would be appropriate. In particular, it is equivalent to the recommended penalty for the offence of obtaining by false pretence. The increased penalty for false accounting was also supported by stakeholders.

**Recommendation 27:** The maximum penalty for the false accounting offences in ss 98 and 99 of the *Crimes Ordinance* should be increased to seven years imprisonment.

### **Accusation of criminal offence**

3.58 Section 101 of the *Crimes Ordinance* deals with extorting anything from a person by way of accusations or threats of accusations of criminal offences.

3.59 This offence is much narrower than 'blackmail' offences included in other jurisdictions. For example, the blackmail offence set out in s 237 of the *Crimes Act (NZ)* provides that:

*(1) Every one commits blackmail who threatens, expressly or by implication, to make any accusation against any person (whether living or dead), to disclose something about any person (whether living or dead), or to cause serious damage to property or endanger the safety of any person with intent—*

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(a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and

(b) to obtain any benefit or to cause loss to any other person.

(2) Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.

(3) In this section and in section 239, benefit means any benefit, pecuniary advantage, privilege, property, service, or valuable consideration.

3.60 In the Issues Paper, the Commission noted that there is no offence to deal with compelling someone to make, destroy, etc any valuable security or to take action to permit any paper or parchment to be made or dealt with as a valuable security. The Commission asked whether such an offence should be included in s 101. All persons that commented on this issue agreed that the offence should be extended.

#### ***Commission's views***

3.61 Section 101 of the *Crimes Ordinance* does not cover many situations in which a person may be compelled to undertake action that is detrimental to themselves or another person. In the Issues Paper, the Commission raised a number of situations that fall outside the s 101 offence—namely, compelling a person to make or destroy any valuable security, or to enable a document to be made or dealt with as a valuable security. Stakeholders agreed that these situations should be covered in the *Crimes Ordinance*.

3.62 In the Commission's view, these changes would still leave significant gaps. Instead of attempting to identify each situation where a person could be coerced or threatened into taking detrimental action, the *Crimes Ordinance* should be amended to include a general blackmail offence.

<b>Recommendation 28:</b> Section 101 of the <i>Crimes Ordinance</i> should be repealed and replaced with a general blackmail offence.
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#### ***Burglary***

3.63 Section 102 of the *Crimes Ordinance* deals with breaking and entering a building with intent to commit a criminal offence ('Burglary'). Section 102(2) defines 'to break' as breaking any part of a building or to open by any means whatever any door, window or other thing intended to cover any opening to the building. This does not cover open styled homes in Samoa where parts of the building are open and someone enters the building through those openings.

3.64 Sections 103 and 104 criminalize 'unlawful entry of building by night' and 'intimidation by breaking house or discharge of firearms', respectively. These offences distinguish between committing offences by day or by night.

### 3. Crimes Against Rights of Property

- 3.65 In the Issues Paper, the Commission raised several questions about the burglary offences:
- Should the definition of ‘to break’ be extended to cover situations where someone enters into a part of a building left permanently open, such as a Samoan fale?
  - Should burglary by breaking and entering a vehicle also be included in the burglary offence?
  - Should the distinction between by day and night be removed so that the penalty is the same for all offending, regardless of the time of the offence?

#### ***Submissions***

- 3.66 Most stakeholders agreed that the definition of ‘to break’ should cover situations where someone enters into a part of a building left permanently open. On this reasoning, ‘even if it’s a Samoan fale it’s a building and people’s property so the offence should be extended’. Papalii Viopapa instead suggested having a separate offence to cover invasion of a fale. Stakeholders were also supportive of extending the burglary offence to apply to the breaking and entering of vehicles.
- 3.67 All stakeholders who commented on this issue expressed the view that the maximum penalty for breaking and entering should be the same regardless of whether the offence took place at day or night.

#### ***Commission’s view***

- 3.68 The burglary offence in s 102 should be amended to cover unauthorized entry into buildings left permanently open, such as Samoan fales. In the Commission’s view, this should be achieved by replacing the elements of the offence from ‘breaking and entering a building with intent to commit a criminal offence’ to ‘entering a building without authorization with intent to commit a criminal offence’. ‘Building’ should be defined to expressly include dwelling houses left permanently open.
- 3.69 The Commission supports criminalizing unauthorised entry into a vehicle. In the Commission’s view, this should be established as a separate offence to burglary, which is primarily directed at domestic premises. An exception to this is where a vehicle is itself a person’s dwelling, in which case it should fall within the definition of ‘building’ for the purpose of s 102 of the *Crimes Ordinance*. One model that could be adopted in this regard is s 427 of the *Criminal Code 1899* (Qld), which provides that ‘a person who unlawfully enters another person's vehicle with intent to commit an indictable offence commits a crime’.
- 3.70 There is no clear justification for continuing to distinguish between forcible entries that occur at nighttime and during the day. In the Commission’s view, this distinction should be removed from the burglary offences in the *Crimes Ordinance*.
- 3.71 A result of the above recommendations is that s 103 of the *Crimes Ordinance* becomes redundant—that is, it becomes indistinguishable from the revised s 102 burglary offence. Accordingly, s 103 should be repealed.

**Recommendation 29:** Section 102 of the *Crimes Ordinance* should cover unauthorized entry into buildings left permanently open by replacing ‘breaking and entering a building with intent to commit a criminal offence’ with ‘entering a building without authorization with intent to commit a criminal offence’. ‘Building’ should be defined to expressly include dwelling houses left permanently open.

**Recommendation 30:** A new offence should be included in the *Crimes Ordinance* of unlawfully entering another person's vehicle with intent to commit a criminal offence.

**Recommendation 31:** The offence of unlawful entry of building by night in s 103 of the *Crimes Ordinance* should be repealed.

**Recommendation 32:** The maximum penalty for the offence of intimidation by breaking house or discharge of firearms in s 104 of the *Crimes Ordinance* should be the same regardless of whether the offence took place during the day or night.

## ***Forgery and related offences***

### **Forgery**

3.72 Forgery is defined in s 107 of the *Crimes Ordinance* as making a false document, knowing it to be false, with the intent that it shall be used or acted upon as genuine. Forgery carries a maximum penalty of five years imprisonment. The terms ‘document’ and ‘false document’ are not defined in the Ordinance or another piece of Samoan legislation such as the *Acts Interpretation Act 1974*.

3.73 In *Moors v Police*, the Samoa Court of Appeal applied the common law definition of ‘false document’ to determine whether a Treasury Department account voucher signed without authority amounted to a false document under s 107 of the *Crimes Ordinance*.<sup>48</sup> In dismissing the charge, the Court cited with approval the statement of Blackburn J in *Ex parte Charles Windsor*:

*Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing.*<sup>49</sup>

3.74 Forgery offences in some other jurisdictions include definitions of ‘false document’, which appear to be more expansive than its meaning at common law. For example, the *Forgery and Counterfeiting Act 1981* (UK) explains the meaning of making a false document for the purpose of the Act. Under s 9 of the Act, an instrument is false if it purports to have been:

- made in the form in which it is made by a person who did not in fact make it in that form;

<sup>48</sup> *Moors v Police* [1964] WSCA 1.

<sup>49</sup> *Ex parte Charles Windsor* (1865) Cox C.C. Cas. 118 - 123, 124

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- made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form;
- made in the terms in which it is made by a person who did not in fact make it in those terms;
- made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms;
- altered in any respect by a person who did not in fact alter it in that respect;
- altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect;
- made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
- made or altered by an existing person but he did not in fact exist.

3.75 The Act further specifies that a person is to be treated as making a false instrument if he or she alters an instrument so as to make it false in any respect, whether or not it is false in some other respect apart from that alteration.

3.76 A substantially equivalent definition is included in Australia in the *Criminal Code* (Cth).<sup>50</sup> The Code also includes a non-exhaustive definition of ‘document’, being:

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

3.77 Penalties for forgery in other jurisdictions tend to be considerably higher than the five years imprisonment currently set out in the *Crimes Ordinance*. In the UK, the *Forgery and Counterfeiting Act* provides a maximum penalty for forgery of 10 years imprisonment. New Zealand also sets out a maximum of 10 years imprisonment for making a false document where the offender has intended to use it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration. Where there is no such intention, a maximum of three years imprisonment applies.

3.78 In the Issues Paper, the Commission asked several questions about the forgery offence, being whether:

- the maximum penalty for forgery should be increased to 10 years imprisonment?
- the term ‘document’ should be defined in order to cover expressly photograph, photographic negative, plate, slide, film, microfilm, photo static negative, disc,

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<sup>50</sup> *Criminal Code* (Cth) s 143.2. See also *Crimes Act 1961* (NZ) s 255.

tape, wire, sound track, card, email, websites, other electronic document or other data storage device?

- the term ‘false document’ should be defined?

#### ***Submissions***

3.79 Most stakeholders supported raising the penalty for forgery to 10 years. There was also agreement for defining the term ‘document’ and ‘false document’ in the legislation. However, Judge Vaepule Vaai expressed the view that whether a document is ‘false’ should be left to the common law. The CLR Working Group supported adding a definition to clarify what amounts to a document or a false document.

#### ***Commission’s views***

3.80 The Commission recommends raising the maximum penalty for forgery to 10 years imprisonment. This is in accordance with penalties in other jurisdictions and adequately recognizes the severity of the crime. The Commission is not recommending that a different maximum penalty should apply where, for example, the offender forged a document for the purpose of obtaining a benefit. However, this would be appropriate to take into account in judicial sentencing.

3.81 There are several benefits for including a statutory definition for the terms ‘document’ and ‘false document’ for the purpose of the forgery offences. In particular, this will provide clarity and certainty as to the scope of the offences. Statutory definitions also ensure that the offences cover the many variations in which forgery may manifest. The definitions of ‘document’ and ‘false document’ in the *Criminal Code* (Cth) provide a good model on which these definitions could be based.

**Recommendation 33:** The maximum penalty for forgery in s 107 of the *Crimes Ordinance* should be increased to 10 years imprisonment.

**Recommendation 34:** The *Crimes Ordinance* should define the term ‘document’ and ‘false document’ for the purpose of the forgery offences in ss 107 and 108 of the Ordinance. The *Criminal Code* (Cth) could be used as a model in this regard.

#### **Intent to defraud**

3.82 Section 108 of the *Crimes Ordinance* deals with knowingly using, dealing with or acting upon any forged document knowing it is a forged document, or causing any person to use or deal with forged documents. Breach of s 108 gives rise to a maximum penalty of five years imprisonment.

3.83 In the Issues Paper, the Commission asked whether s 108 should extend to altering or reproducing documents with intent to defraud, and using or reproducing

documents with intent to defraud. These additional offences used to be included in the *Crimes Act* (NZ); however, both were repealed in 2003.

- 3.84 One question that must be considered before recommending the inclusion of these new offences is their relationship with the general forgery offence in s 107 of the *Crimes Ordinance*. As noted above, this offence covers any person who makes a false document with the intent that it shall be acted on as genuine. A person is held to have ‘made’ a forgery if he or she has made any material alteration or addition to a genuine document.
- 3.85 The Commission cannot envisage circumstances in which a person could be in breach of the suggested new offences but not ss 107 or 108 of the *Crimes Ordinance*. A person who alters or reproduces a document with intent to defraud will be caught by the s 107 forgery offence. A person who uses or reproduces document with the intent to defraud will be caught by the s 108 offence of ‘uttering forged documents’ (provided he or she knew the document to be forged). The sufficiency of the current forgery offences in covering this type of conduct was noted in the submission of Judge Vaepule Vaai.
- 3.86 Accordingly, the Commission is not convinced of any need to enact the suggested offences of altering or reproducing documents with intent to defraud, and using or reproducing documents with intent to defraud. This is supported by the repeal of these provisions from the *Crimes Act* (NZ).

### **Counterfeit coin**

- 3.87 Sections 109 to 111 of the *Crimes Ordinance* criminalize the making, impairing and uttering of ‘counterfeit coin’. These sections do not expressly refer to counterfeit paper money.
- 3.88 In comparison, in Australia the *Crimes (Currency) Act 1981* (Cth) refers to ‘counterfeit money’, which is defined to mean:
- (a) any article, not being a genuine coin or genuine paper money, that resembles, or is apparently intended to resemble, or pass for, a genuine coin or genuine paper money; or
  - (b) any article, being a genuine coin or genuine paper money, that has been altered in a material respect and in such a manner as to conceal, or to be apparently intended to conceal, the alteration;
- and includes any such article whether it is or is not in a fit state to be uttered and whether the process of manufacture or alteration is or is not complete.<sup>51</sup>
- 3.89 The *Central Bank of Samoa Act 1984* refers to ‘counterfeit currency’. Currency is defined to mean any ‘bank note or currency note or coin other than commemorative coin’.<sup>52</sup>

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<sup>51</sup> *Crimes (Currency) Act 1981* (Cth) s 3.

<sup>52</sup> *Central Bank of Samoa Act 1984* s 2.

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3.90 In the Issues Paper, the Commission sought views on whether the term ‘counterfeit coin’ should be changed include paper money as well as coins. Stakeholders were supportive of this proposal. Judge Vaepule Vaai, for example, commented that the offence ‘should catch everything that is not legal tender’.

#### *Commission’s views*

3.91 Sections 109 to 111 of the *Crimes Ordinance* should be amended to refer to ‘counterfeit currency’ to clarify that the offences apply to counterfeit paper money as well as counterfeit coin. This should be defined consistently with the *Central Bank of Samoa Act*.

**Recommendation 35:** Sections 109 to 111 of the *Crimes Ordinance* should be amended to refer to ‘counterfeit currency’ to clarify that the offences apply to counterfeit paper money as well as counterfeit coin.

### ***Damage to property***

#### **Arson**

3.92 Arson is defined in the *Crimes Ordinance* as wilfully setting fire to, or damaging by means of any explosive:

- i) *any building, erection, or structure, or any ship or aircraft or any well of any combustible substance, or any mine, or any bush, forest, or plantation; or*
- ii) *any property, whether [the person] has an interest in it or not, if he or she knows or ought to know that danger to life is likely to ensue.*<sup>53</sup>

3.93 Arson carries a maximum penalty of five years imprisonment. Some other jurisdictions impose a higher maximum penalty for arson in certain circumstances. In its 2009 review of bushfire arson laws, the NSW Attorney-General’s Department noted that NSW offences of damaging property by fire are aggravated by the intention of the person who commits them and whether the offence was committed during a public disorder. The lowest penalties are reserved for those offenders who intend merely to damage property. Where there is intention to injure a person, or to dishonestly destroy intending to profit, the penalties are increased.<sup>54</sup>

Circumstances of the offence	Damage only		
	Intent to injure		Dishonest intent
Primary offence	195(1)(b) - <b>10(yrs)</b>	196(1)(b) - <b>14</b>	197(1)(b) - <b>14</b>
During a public disorder	195(2)(b) - <b>12</b>	196(2)(b) - <b>16</b>	197(2)(b) - <b>16</b>

<sup>53</sup> *Crimes Ordinance 1961* s 112.

<sup>54</sup> NSW Attorney General’s Department, *Review of Bushfire Arson Laws* (2009).

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3.94 The review went on to note that:

*The highest penalty for a property damage offence, under section 198 of the Crimes Act 1900, is 25 years imprisonment. This penalty is available if a person lights a fire and damages property with the intention of endangering the life of a person. Twenty-five years imprisonment is available regardless of whether or not somebody actually dies as a result of the damage caused by the fire.*<sup>55</sup>

3.95 In NZ, arson carries a maximum penalty of 14 years imprisonment if a person:

*(a) intentionally or recklessly damages by fire or by means of any explosive any property if he or she knows or ought to know that danger to life is likely to ensue; (b) intentionally or recklessly, and without claim of right, damages by fire or by means of any explosive any immovable property, or any vehicle, ship, or aircraft, in which that person has no interest; or (c) intentionally damages by fire or by means of any explosive any immovable property, or any vehicle, ship or aircraft, with intent to obtain any benefit, or to cause loss to any other person.*<sup>56</sup>

3.96 Lower maximum penalties apply to other arson offences, including:

- seven years imprisonment if a person intentionally or recklessly damages any other property in which that person has no interest; and
- five years imprisonment if a person intentionally or recklessly damages any property with reckless disregard for the safety of any other property.<sup>57</sup>

3.97 In the Issues Paper, the Commission asked whether the maximum penalty should be increased to seven years imprisonment for intentionally or recklessly damaging any property by fire or by any explosive. The Commission also sought views on raising the maximum penalty to 14 years imprisonment where an offender knows that that danger to life is likely to ensue.

#### ***Submissions***

3.98 All stakeholders who commented on the question supported raising the maximum penalty to seven years imprisonment where a person intentionally or recklessly damages any property by fire or any explosive. Most also agreed that the penalty for arson should be increased to 14 years imprisonment where an offender knows that danger to life is likely to ensue. Judge Vaepule Vaai, however, suggested that the maximum penalty should remain seven years but that endangerment to property or life should be reflected in the sentence.

#### ***Commission's views***

3.99 Acts of arson pose a grave threat to persons and property and the seriousness of this crime should be reflected in the maximum penalties. In the Commission's view, a maximum penalty of five years imprisonment is too low to achieve the necessary

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<sup>55</sup> Ibid, 3.

<sup>56</sup> *Crimes Act 1961* (NZ) s 267.

<sup>57</sup> Ibid.

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deterrent function. The Commission recommends that, where a person wilfully damages any property by acts of arson pursuant to s 112 of the *Crimes Ordinance*, a maximum of seven years imprisonment should apply. Provision also should be made for a higher maximum penalty where arson is accompanied by aggravating factors. In particular, a new offence should be inserted for arson where a person knows or ought to know that danger to life is likely to ensue. Consistent with other jurisdictions, the aggravated offence should also extend to arson where a person intends to gain a benefit or to cause a loss to another person. A maximum penalty of 14 years imprisonment should apply where one of these aggravating factors is made out. This also is consistent with the maximum penalty in the ‘wilful damage’ offence set out in s 113 of the *Crimes Ordinance*.

**Recommendation 36:** The maximum penalty for breach of s 112 of the *Crimes Ordinance* should be increased to seven years imprisonment.

**Recommendation 37:** A new offence should be inserted in the *Crimes Ordinance* for arson in aggravating circumstances, including where a person:

- (a) knows or ought to know that danger to life is likely to ensue; or
- (b) intends to gain a benefit or to cause a loss to another person.

The maximum penalty for the offence should be 14 years imprisonment.

#### **Wilful damage**

3.100 Section 113(a) of the *Crimes Ordinance* imposes a maximum penalty of 14 years imprisonment on a person who wilfully destroys or damages:

- i) *any property, whether he or she has an interest in it or not, if he or she knows or ought to know that danger to life is likely to ensue; or*
- ii) *any road, railway, bridge, tunnel or similar means of communication, or any aerodrome, wharf, quay or jetty, if he knows or ought to know that it is thereby likely to be rendered dangerous, impassable or unusable; or*
- iii) *any power station, or any building, erection or structure, or any equipment, line, cable or pipe, used for or in connection with the production, transmission or distribution of electricity, if he or she knows or ought to know that the supply of electricity is thereby likely to be affected.*

3.101 Lower maximum penalties apply where a person wilfully damages other kinds of property.<sup>58</sup>

3.102 Section 113 does not define ‘wilful’, nor has its meaning in this context been considered by a Samoan court. However, there is precedent from other common law jurisdictions which is likely to be influential should the issue arise in the context of the Samoan *Crimes Ordinance*.

3.103 In *R v Webb; Ex parte Attorney-General (Qld)*, ‘wilfully’ was interpreted in the context of the Queensland arson offence as:

<sup>58</sup> *Crimes Ordinance 1961* s 113(b), (c).

*meaning to refer to either an intended consequence or a consequence which is in mind as likely but is recklessly ignored. ... The meaning given to 'wilfully' is more extensive than would be conveyed by the word 'intentionally' which might be thought in some contexts to mean 'of one's own free will'. This meaning to be given to 'wilfully' should also embrace 'a result not positively desired but foreseen as a likely consequence of the relevant act'.<sup>59</sup>*

3.104 In the Issues Paper, the Commission asked whether the term 'wilful' should be defined for the purpose of s 113 of the *Crimes Ordinance*. The Tamati Law Firm and Papalii Viopapa supported including a statutory definition of wilful. On the other hand, Judge Vaepule Vaai expressed the view that this should be left to the common law.

#### ***Commission's views***

3.105 'Wilful' is a term that is commonly used to establish the necessary *mens rea* for criminal offences and its meaning is well established in common law. To define 'wilful' for the purpose of s 113 of the *Crimes Ordinance* could create confusion about the term's meaning in other offences without achieving a clear benefit. The Commission does not recommend that 'wilful' should be defined in s 113—instead, this should be interpreted in accordance with the common law.

#### ***Computer crime***

3.106 In the previous decades, the international community has increasingly pursued the development and implementation of legislation to protect against 'cybercrime'. A common benchmark for such legislation is the Council of Europe *Convention on Cybercrime*, which requires signatories to criminalize conduct including:

- unauthorized access to the whole or any part of a computer system;
- unauthorized interception of non-public transmissions of computer data;
- unauthorized damaging, deletion, deterioration, alteration or suppression of computer data;
- serious hindering of the functioning of a computer system;
- the production, sale, procurement for use, import, distribution or otherwise making available devices or codes with the intent that it be used to commit the above offences, or possession of such an item with intent.<sup>60</sup>

3.107 The Convention also requires signatories to adopt legislation to criminalize computer-related forgery and computer-related fraud.<sup>61</sup>

3.108 Part VIII of the *Crimes Ordinance* does not deal specifically with computer-related offences. In the Issues Paper, the Commission asked whether there should be a new part of the *Crimes Ordinance* to deal with this type of crime. The stakeholders that commented on the issue supported including a new section in the *Crimes*

<sup>59</sup> *R v Webb; Ex parte Attorney-General (Qld)* (1989) 47 ACrimR 97,100 (citations omitted).

<sup>60</sup> Council of Europe, *Convention on Cybercrime*, 23 November 2001, available at: <http://www.unhcr.org/refworld/docid/47fdfb202.html> [accessed 13 May 2010], Title 1.

<sup>61</sup> *Ibid*, Title 2.

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*Ordinance* to deal with computer-related offences. Judge Vaepule Vaai further advised that there is a need for an offence to deal with cell phone crimes, such as the sending of harassing texts.

#### ***Commission's views***

3.109 Failure to deal with computer crimes is a reflection of the age of the *Crimes Ordinance*, and the infrequency with which amendments have been made. There is a clear need for unauthorized access to a computer system, unauthorized interception of computer data, and other conduct set out in Titles 1 and 2 of the Council of Europe *Convention on Cybercrime* to be criminalized in Samoa. These offences have also been included in the criminal laws of Australia and NZ.

3.110 There is no culpability under the *Crimes Ordinance* for harassing conduct, including the sending of harassing texts by cellphone. This issue was not raised in the Issues Paper and, accordingly, the Commission is not in a position to make a recommendation. However, the gap warrants further consideration by the Samoan Government. In the Commission's view, the Government should commission a review of harassment and related laws in Samoa, including the need for additional offences and a civil protection order scheme. Should the Government accept this recommendation, the Samoa Law Reform Commission would be well placed to undertake such a review.

**Recommendation 38:** Offences in relation to the misuse of computers should be developed and enacted as a new part of the *Crimes Ordinance*. Titles 1 and 2 of the Council of Europe *Convention on Cybercrime* could be used as a model in this regard.

**Recommendation 39:** The Samoa Government should commission a review of harassment and related laws in Samoa, including the need for additional offences and a civil protection order scheme.

## 4. Crimes against Person and Reputation

4.1 Sections 59 to 84 of the *Crimes Ordinance* deal with crimes against person and reputation.

4.2 In November 2009, the NZ Law Commission (NZLC) published a report, *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*. Considering the close similarities between the *Crimes Ordinance* and the *Crimes Act* (NZ), on which the Ordinance was based, the recommendations of the NZLC are discussed, where relevant. At the time of writing, the NZ Government had not issued a response to the Report.

### ***Culpable homicide***

4.3 Under s 59 of the *Crimes Ordinance*, homicide is ‘the killing of a human being by another, directly or indirectly, by any means whatsoever’. However, not all killings are ‘culpable’ under the criminal law. Section 61(2) limits the instances of culpable homicide to the killing of a person:

- i) *by an unlawful act; or*
- ii) *by an omission without lawful excuse to perform or observe any legal duty; or*
- iii) *by both combined; or*
- iv) *by causing that person by threats or fear of violence, or by deception, to do an act which causes that person’s death; or*
- v) *by wilfully frightening a child under the age of 14 years or a sick person.*

4.4 Culpable homicide will fall within the categories of murder, manslaughter or infanticide. Homicide that is not culpable is not an offence.

4.5 An issue that arises is whether to expand the types of conduct that amount to culpable homicide. The CLR Working Group has suggested that s 61(2) of the *Crimes Ordinance* should also apply to:

- a person who drives a motor vehicle in a dangerous, reckless, or negligent manner, or under the influence of alcohol or any illicit drug; and
- an expert or professional in a field of work who performs his or her duties in a negligent manner, causing the death of another.

### **Culpable driving causing death**

4.6 The gap in the Samoan criminal law for killings resulting from culpable driving came to public attention after a bus crash that resulted in the death of eight people.<sup>62</sup> In light of the necessary elements of culpable homicide, the driver was charged with negligent driving causing death under s 39A of the *Road Traffic Ordinance 1960*. The maximum penalty for this offence is five years imprisonment or a fine not exceeding 20 penalty units (\$2000).

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<sup>62</sup> For legal authority for the lack of recognition of a crime of negligent driving amounting to manslaughter, see *Police v Uolo* [2003] WSSC 11.

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4.7 Under the common law, dangerous driving will normally be excluded from the scope of culpable homicide by an unlawful act. In the case of *Andrews v Director of Public Prosecutions (UK)*, the UK House of Lords held that offences of negligent or careless driving were not unlawful acts for the purpose of manslaughter, observing that ‘there is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal’.<sup>63</sup> This line of reasoning was followed in *R v Pullman*, in which Hunt CJ held that, to constitute an unlawful act sufficient to found a charge of manslaughter, the conduct must be unlawful in itself—that is, unlawful otherwise than by reason of the fact that it amounts to such a breach.<sup>64</sup>

4.8 Manslaughter on the basis of criminal negligence is a more common way of prosecuting dangerous driving causing death. Killing by criminal negligence amounts to manslaughter either under the common law or through statutory codification. An example of statutory codification is s 156 of the *Crimes Act (NZ)*, which provides that:

*Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.*

4.9 No equivalent duty to preserve human life is set out in the *Crimes Ordinance*. Samoan criminal law also does not recognise common law manslaughter by reason of s 7 of the *Crimes Ordinance*, which precludes a person from being convicted of any offence at common law.

4.10 Another approach that some jurisdictions have used in their criminal laws is a separate ‘unlawful killing’ offence, often introduced to overcome a perceived reluctance of juries to convict dangerous driving offenders under manslaughter charges. For example, under s 318 of the *Crimes Act 1958 (Vic)* (‘culpable driving causing death’), a person is liable to a maximum penalty of 20 years imprisonment if he or she drives a motor vehicle:

*(a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or*

*(b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or*

*(c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or*

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<sup>63</sup> *Andrews v Director of Public Prosecutions (UK)* (1937) 2 All ER 552.

<sup>64</sup> *R v Pullman* (1991) 25 NSWLR 89.

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*(d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.*

4.11 Negligence also can be established by proving that a person was ‘fatigued to such an extent that he or she knew, or ought to have known, that there was an appreciable risk of him or her falling asleep while driving or of losing control of the vehicle’ or, by driving the motor vehicle, ‘failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case’.

4.12 A separate offence is set out for ‘dangerous driving causing death or serious injury’.<sup>65</sup> A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public, causes the death of another person or serious injury to another person is subject to maximum penalties of 10 and five years imprisonment, respectively.

### ***Submissions***

4.13 In the Issues Paper, the Commission asked whether death resulting from a person driving a motor vehicle in a dangerous, reckless, or negligent manner, or under the influence of alcohol or any illicit drug, should fall under culpable homicide. Stakeholders were supportive of such an amendment. Judge Vaepule Vaai also noted that there is still the alternative option of negligent driving. Members of the public who attended consultations raised the need for other measures to be introduced to ensure the safety of people traveling in public buses, such as the availability of seat belts.

### ***Commission’s views***

4.14 It is unsatisfactory not to have available a manslaughter, or equivalent, offence in the situation where a person drove a motor vehicle in a manner that grossly departed from the expected standard of care and, by doing so, caused death. This gap extends to other circumstances where a person’s criminal negligence endangers human life. A 2009 Australian example is the case of *R v Watson*, in which a person who was an experienced diver and the deceased’s dive buddy failed to assist the deceased to surface from an open water dive when she was in distress, instead allowing her to sink to the sea bed.<sup>66</sup> In the Commission’s view, a provision should be inserted in the *Crimes Ordinance* that places a clear legal obligation on persons to use reasonable care and take reasonable precautions to avoid danger when he or she is in charge, or has under his or her control, something that may endanger a person’s life, health or safety. Section 156 of the NZ *Crimes Act* could be used as a model in this regard.

4.15 The Commission also sees merit in enacting an additional offence also to deal with culpable driving causing death that does not amount to manslaughter. This provides an alternative verdict where the conduct is more serious than the five-year maximum penalty of the ‘negligent driving’ offence in the *Road Traffic Ordinance*

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<sup>65</sup> *Crimes Act 1958* (Vic) s 319.

<sup>66</sup> *R v Watson* [2009] QCA 279.

## 4. Crimes Against Person and Reputation

but falls short of the criminal negligence standard required under manslaughter (or—as has been the experience in some other jurisdictions—to accommodate an unwillingness of juries to make findings of manslaughter in dangerous driving cases). Section 318 of the *Crimes Act* (Vic) could be used as a model in this regard.

**Recommendation 40:** The *Crimes Ordinance* should impose an obligation on persons to use reasonable care and take reasonable precautions to avoid danger when he or she is in charge, or has under his or her control, something that may endanger a person’s life, health or safety. Section 156 of the *Crimes Act 1961* (NZ) could be used as a model in this regard.

**Recommendation 41:** An offence of ‘culpable driving causing death’ should be enacted to deal with conduct that does not amount to negligent manslaughter but is of greater severity than the ‘negligent driving’ offence in s 39A of the *Road Traffic Ordinance 1960*. Section 318 of the *Crimes Act 1958* (Vic) could be used as a model in this regard.

### Unprofessional conduct causing death

4.16 As noted above, the CLR Working Group has suggested that an expert or professional in a field of work who performs his or her duties in a negligent manner, causing the death of another should fall within the definition of culpable homicide.

4.17 An example of a specific provision in this regard is s 155 of the *Crimes Act* (NZ) (‘Duty of persons doing dangerous acts’):

*Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.*

4.18 In the Issues Paper, the Commission asked whether death resulting from a professional performing his or her duties in a negligent manner should fall under culpable homicide. All stakeholders that commented on the question agreed that the *Crimes Ordinance* should be amended to reflect this change.

#### *Commission’s views*

4.19 Professionals who hold themselves out as being able to perform a role that carries inherent danger should be held to account if they carry out this role in a grossly negligent manner. Section 155 of the *Crimes Act* (NZ) provides a useful addition to the obligation recommended above for persons to use reasonable care and take reasonable precautions to avoid danger when they are in charge, or have under their control, something that may endanger a person’s life, health or safety.

4.20 An important limitation on the recommended offence is the requirement that a professional is *criminally* negligent in his or her performance of duties. This will ensure that the offence doesn’t capture honest mistakes or mere carelessness.

**Recommendation 42:** The *Crimes Ordinance* should impose an obligation on professionals doing dangerous acts to use reasonable knowledge, skill, and care in the doing of any such act. Section 155 of the NZ *Crimes Act* could be used as a model in this regard.

### Infanticide

- 4.21 Section 72 of the *Crimes Ordinance* sets out the offence of infanticide, which applies where a woman causes the death of any child of hers within 12 months from the date of its birth in a manner that amounts to culpable homicide and  
*at the time of the offence the balance of her mind was disturbed by reason of her not having fully recovered from the effect of childbirth or by reason of lactation or of any disorder consequent upon childbirth, to such an extent that she should not be held fully responsible [for its death].*
- 4.22 A person found guilty of infanticide is liable to a maximum penalty of three years imprisonment. This can be compared with the penalty of life imprisonment that applies to murder and manslaughter. In practice, infanticide commonly operates as a defence to a charge of murder.
- 4.23 The availability of an offence/defence of infanticide is controversial. In particular, concerns have been raised about the potential for the offence to ‘pathologise’ women and motherhood and the lack of any clear psychiatric foundation for the elements of the offence/defence.<sup>67</sup> In November 2006, the UK Law Commission (UKLC) considered the infanticide offence/defence and concluded that, although it has been subject to criticism, it is a ‘practicable legal solution to a particular set of circumstances’ and should be retained without significant amendment.<sup>68</sup>
- 4.24 The UKLC commissioned research on the sentences in infanticide cases, using a sample of 41 cases between 1990 and 2003. In the vast majority of cases a non-custodial sentence was given, including five defendants who received hospital orders. Three defendants were given sentences of imprisonment. There was a close connection between the sentence and the defendant’s medical diagnosis. For example, in all cases in which the primary diagnosis was depression a probation order was issued without a condition of mental treatment. By way of contrast, in four of the five cases in which the primary diagnosis was dissociative disorder, a probation order with a condition of treatment was made.
- 4.25 Many of the issues raised by infanticide relate to the treatment of mentally ill persons. In Samoa, this is governed by the *Mental Health Act 2007*. Under s 5(1) of this Act, a preference is set out for treatment and protection for persons with a mental disorder to be provided:

<sup>67</sup> United Kingdom Law Commission, *Murder, manslaughter and Infanticide* (2006).

<sup>68</sup> *Ibid*, [8.3]. The UK infanticide provisions are substantively equivalent to those in Samoa, with the exception that the UK offence gives rise to the same penalty as that for manslaughter (life sentence).

## 4. Crimes Against Person and Reputation

- (a) on a voluntary basis; and
- (b) within the family and community in which the person lives.

4.26 Parts 4 and 5 of the *Mental Health Act* set out the requirements for issuing a community treatment order and an inpatient treatment order. The criteria for a community treatment order are that:

- (a) the person has a mental disorder; and
- (b) the person is unwilling or unable to receive care, support, treatment or protection for the mental disorder on a voluntary basis; and
- (c) as a result of the mental disorder the person requires care, support, treatment or protection:
  - (i) in the interests of the person; or
  - (ii) to protect another person or persons; and
- (d) the care, support, treatment or protection required for the person under (c):
  - (i) is available; and
  - (ii) cannot be provided in a less restrictive manner than under a Community Treatment Order.<sup>69</sup>

4.27 In more severe situations, an ‘inpatient treatment order’ may be made. A patient against whom such an order has been made must reside as an inpatient at a Treatment Centre, meaning ‘a premise, place or service designated by the Minister ... to provide secure care, support, treatment or protection’.<sup>70</sup>

### **Submissions**

4.28 In the Issues Paper, the Commission raised the following issues relating to the infanticide offence:

- whether a woman, upon being charged with infanticide, should be examined by the Chief Mental Health Officer and an adviser to the court, as defined under the *Mental Health Act 2007*;
- whether, on the basis of this examination, the woman should be detained at a treatment centre;
- the relevant period for determining insanity; and
- the appropriate time to amend a charge to murder or manslaughter.

4.29 Most stakeholders were supportive of a requirement that a woman charged with infanticide be examined by the Chief Mental Health Officer and an adviser to the court.<sup>71</sup> The CLR Working Group advised that the mental capacity of a mother is a crucial element in the infanticide offence and its assessment required ‘proper medical assessment’ by medical practitioners and registered psychiatrists as well as legal directions from the Court.

4.30 The Samoa Nurses Association supported detaining a woman at a treatment centre on the basis of the examination by the Chief Mental Health Officer, noting that the

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<sup>69</sup> *Mental Health Act 2007* s 10.

<sup>70</sup> *Ibid* s 2. The criteria for issuing an inpatient treatment order are set out in s 13.

<sup>71</sup> However, Vaepule expressed the view that the current system was fine.

#### 4. Crimes Against Person and Reputation

woman may be capable of doing more harm and should be detained for her benefit and for the security of the community. The Tamati Law Firm only thought that detention was warranted where the woman's family was not able to assist with her treatment at home.

4.31 The Tamati Law Firm and Judge Vaepule Vaai considered the relevant period of time for the report to be the time of the commission of the offence. The Tamati Law Firm noted, however, that the woman's mental state at the time the report is produced is also relevant 'because if at the time of the reporting of the crime the person is considered insane, what then'. Papalii Viopapa suggested that both should be taken into account.

4.32 Stakeholders were undecided on when a charge should be amended to murder or manslaughter. In Judge Vaepule Vaai's view, this is a matter for the police. The Tamati Law Firm suggested that the charge should be amended when it is determined that the woman was not mentally ill at the time she murdered the infant.

##### *Commission's views*

4.33 Central to the infanticide offence is that, at the time of the commission of the offence, a woman was suffering from an abnormality of the mind because she had not fully recovered from childbirth or some other disorder consequent upon childbirth, and, consequently, should not be held fully responsible for the child's death. These abnormalities will often—but not always—equal a 'mental disorder' or 'mental incapacity' under the *Mental Health Act*.

4.34 There should be a process in place for ensuring that women who have been charged with infanticide or seek to rely on infanticide as a partial defence to a charge of murder or manslaughter are assessed by qualified medical practitioners. This assessment serves two roles. First, it provides a basis for assessing whether an infanticide charge is suitable. If there is no basis for infanticide, the charge may be amended to murder or manslaughter. Secondly, the assessment can be used for the purpose of issuing a community treatment order or inpatient treatment order in accordance with the criteria set out in the *Mental Health Act*.

4.35 However, infanticide may be successfully made out in the absence of a community treatment order or inpatient treatment order. The abnormality of the mind may not require an order under the *Mental Health Act*—for example, because adequate care can be provided by the woman's family or community, or the abnormality may have resolved between the time of the commission of the offence and the time of the assessment.

<p><b>Recommendation 43:</b> The <i>Crimes Ordinance</i> should provide that a woman who has been charged with infanticide or seeks to rely on infanticide as a defence to a charge of murder or manslaughter should be assessed by a qualified medical professional to determine whether:</p>
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- (a) a community treatment order or an inpatient treatment order should be made under the *Mental Health Act 2007*; and
- (b) there is sufficient medical basis for the charge and, if not, whether the charge should be changed to murder or manslaughter.

### Other issues relating to homicide

4.36 The *Crimes Ordinance* was modeled on, and closely resembles, the NZ criminal law. In November 2009, the NZLC published a review of pt 8 of the *Crimes Act* (NZ), which deals with crimes against the person. Among other issues, the NZLC recommended repeal of the following from the definition of culpable homicide:

- a person who causes death by both an unlawful act and an omission combined, on the basis that this is unnecessary given that a person is liable where there is either an act or an omission and it is open to the prosecution to lay two charges; and
- willfully frightening a child under 16 years of age or a sick person, on the basis that the provision is arbitrary and death from such an act is not sufficiently foreseeable to give rise to manslaughter liability.<sup>72</sup>

4.37 In the Commission's view, the same changes should be made to the definition of culpable homicide in the Samoa *Crimes Ordinance*.

**Recommendation 44:** Subsections 61(2)(c) and (e) of the *Crimes Ordinance* should be repealed.

### Abortion

4.38 Sections 73 to 73D of the *Crimes Ordinance* deal with the death of an unborn child. Under s 73 ('Killing unborn child'), a maximum penalty of 14 years imprisonment is set out for any person 'who causes the death of any child that has not become a human being in such a manner that the person would have been guilty of murder if the child had become a human being'. A maximum penalty of five years imprisonment applies to a person who causes death in such a manner that he or she would have been guilty of manslaughter. The only exception to the offence is if death is caused 'by means employed in good faith for the preservation of the life of the mother'.

4.39 Offences are also set out for any person who unlawfully supplies or procures an abortion;<sup>73</sup> a female who procures her own miscarriage;<sup>74</sup> and a person who supplies the means to procure an abortion.<sup>75</sup>

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<sup>72</sup> New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (Report 111) (2009), ch 4.

<sup>73</sup> *Crimes Ordinance 1961* s 73A.

<sup>74</sup> *Ibid* s 73B.

<sup>75</sup> *Ibid* s 73C.

## 4. Crimes Against Person and Reputation

4.40 The Samoan abortion offences were interpreted in the case of *Police v Apelu*, which involved the offence of unlawfully procuring an abortion.<sup>76</sup> In this case, Sapolu CJ considered precedent from the UK and NZ, which has extended the exception for the abortion offences of preservation of the life of the mother to include a real risk of serious danger to the life of the mother or of serious harm to her physical or mental health.<sup>77</sup> Sapolu CJ noted the similarities between the NZ abortion offence and the Samoan *Crimes Ordinance* and accepted the NZ precedent as ‘directly applicable’ to interpreting the Samoan provision.

4.41 Sapolu CJ went on to consider whether the test for determining whether or not the use of an instrument to procure the miscarriage of a woman was ‘unlawful’ applies only to members of the medical profession and not to ‘back-street’ abortionists. He concluded that the formula for determining whether an abortion was procured ‘unlawfully’ extended beyond members of the medical profession to others who are charged with the offence of procuring an abortion. However, in this case, the defendant’s lack of medical experience was used as a factor against a finding that an abortion was procured for the preservation of a woman’s life or health.

4.42 Sapolu CJ suggested that the *Crimes Ordinance* be amended along the lines of s187A of the *Crimes Act* (NZ), which defines the lawfulness of conduct under the procuring of abortion offences. For pregnancies of not more than 20 weeks’ gestation an act will not be ‘unlawful’ if the person doing the act believes that:

- the continuance of the pregnancy would result in serious danger to the life, or to the physical or mental health, of the woman or girl;
- there is a substantial risk that the child, if born, would be seriously handicapped;
- the pregnancy is the result of incest; or
- the woman or girl is ‘severely subnormal’.

4.43 New Zealand sets out a comprehensive scheme for the authorization of abortions. All abortions must be performed in an institution licensed for that purpose of the *Contraception, Sterilisation, and Abortion Act 1977* (NZ).<sup>78</sup> For such a licence to be granted an institution must demonstrate the availability of adequate facilities to safely perform abortions (including any complications); that the licence-holder is a ‘fit and proper person’; and the availability of adequate counselling services to women considering having an abortion. Except in very limited circumstances, an abortion must be authorised by two certifying consultants.

4.44 A more permissive approach has been taken in Victoria, Australia. Under the *Abortion Law Reform Act 2008* (Vic), a registered medical practitioner may perform an abortion on any woman who is not more than 24 weeks pregnant. A registered medical practitioner may perform an abortion on a woman who is more than 24 weeks pregnant if the practitioner: reasonably believes that the abortion is appropriate in all the circumstances; and has consulted at least one other registered medical

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<sup>76</sup> *Police v Apelu* [2004] WSSC 8.

<sup>77</sup> *R v Bourne* [1939] 1 KB 687; *R v Woolnough* [1977] 2 NZLR 508.

<sup>78</sup> *Contraception, Sterilisation, and Abortion Act 1977* (NZ) s 18.

practitioner who also reasonably believes that the abortion is appropriate in all the circumstances.<sup>79</sup>

- 4.45 In the Issues Paper, the Commission sought views on whether abortion should continue to be illegal. If so, the Commission asked whether:
- there should be an exception where means are employed in good faith to prevent the development or aggravation of serious mental or physical health consequences for the mother; and/or
  - the procedure should be approved and/or performed by a senior medical practitioner?

### *Submissions*

- 4.46 There was a general consensus among stakeholders that abortions should continue to be illegal in Samoa. However, many of these submissions recognized a need for broader exceptions to the offence, including where the pregnancy is the result of sexual assault or incest, or where the woman is facing extreme social pressures. The SVSG, for example, commented that where a pregnancy places the physical health of a woman at risk (including her mental health), the woman should be entitled to make an informed decision about whether to terminate the pregnancy. The Samoa Nurses Association would only limit the exception to situations with the potential for death due to complications of pregnancy.
- 4.47 Judge Vaepule Vaai was of the view that abortions should be approved and performed by two senior medical practitioners. The SVSG was more concerned about the qualifications of the medical practitioner, rather than his or her seniority, commenting that a requirement for approval by a senior medical practitioner could lead to undue delays. Papalii Viopapa suggested that approval should also be sought from two independent Members of Parliament.
- 4.48 The CLR Working Group recommended that the Ordinance require an opinion from two registered medical practitioners that it would seriously harm the health or endanger the life of the mother to have the child.

### *Commission's views*

- 4.49 Abortion should continue to be illegal in Samoa. This was the consensus of those consulted by the Commission and remains appropriate for modern Samoan society. However, the exceptions to the abortion offence should be clarified. Namely, there should be an express exception from the offence (and the related offences of procuring abortions) where abortion is necessary for the life of, or would seriously harm the physical or mental health of, the mother. As an additional safeguard, approval from two qualified medical practitioners should be sought for all abortions other than those where the delay could threaten the life of the mother. Finally, any abortion should be performed by a qualified medical practitioner.

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<sup>79</sup> *Abortion Law Reform Act 2008* (Vic) ss 4, 5.

## 4. Crimes Against Person and Reputation

4.50 The Commission has some concerns that the requirements of the recommended abortion law may result in an undue burden on women seeking an abortion. Consequently, the Commission is of the view that—if this recommendation is implemented—the Government should review the operation of the law in three years time to assess how it is operating in practice. If it is proving overly difficult to meet the legal requirements—in particular, certification by two medical practitioners—the Government should consider legal or other strategies to alleviate this burden.

**Recommendation 45:** The abortion offence in s 73 of the *Crimes Ordinance* should include an express exception where two qualified medical practitioners have certified that an abortion is necessary for the life of, or would seriously harm the physical or mental health of, the mother. Certification should not be necessary where it would threaten the life of the mother.

**Recommendation 46:** Sections 73A and 73 of the *Crimes Ordinance* should be amended to limit the persons who may procure an abortion, or supply the means for procuring an abortion, to qualified medical practitioners.

**Recommendation 47:** The Samoan Government should review the operation of the recommended abortion law within three years from the date of enactment to assess how it is operating in practice.

### ***Other crimes against person and reputation***

#### **Duty to provide necessities of life**

4.51 Where the criminal law imposes a positive duty to act, failure to comply with that duty (that is, an omission to act) may constitute an offence. Under s 76 of the *Crimes Ordinance*, persons are under a duty to provide the ‘necessaries of life’ for any person under their charge who is unable because to provide for himself or herself. ‘Necessaries of life’ are defined non-exhaustively to include the provision of proper and adequate care and attention, food, drink, clothing, shelter and medical treatment. The CLR Working Group questioned whether ‘necessaries of life’ should expressly include respirators, intravenous drips and injections.

4.52 The only Samoan cases in which failure to provide ‘necessaries of life’ have been considered relate to the abandonment of newborn babies. As such, they have not considered whether respirators, intravenous drips and injections fall within the definition of ‘medical treatment’. However, the definition of this term in some Australian legislation suggests that it includes any treatments or procedures carried out by a medical practitioner or other health professional in the course of professional practice.<sup>80</sup>

4.53 In the Issues Paper, the Commission asked whether respirators and intravenous drips and injections be included in the definition of ‘necessaries of life’. Such an

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<sup>80</sup> See, eg, *Guardianship and Administration Act 1993* (SA).

amendment was not supported by stakeholders, principally on the basis that expressly including these items in the definition was unnecessary.

***Commission's views***

4.54 The Commission is not recommending a change to s 76 of the *Crimes Ordinance*. What is included in the requirement to provide adequate medical treatment, as a component of the offence of failure to provide necessities of life, should be determined on a case-by-case basis.

**Grievous bodily harm**

4.55 Grievous bodily harm is covered by s 79 of the *Crimes Ordinance*. In the case of *Police v Tulaga*, Sapolu CJ defined the elements of grievous bodily harm as a wilful assault that led to 'serious bodily harm', without lawful justification.<sup>81</sup>

4.56 In the Issues Paper, the Commission asked whether the infliction of injury as a result of dangerous, reckless or negligent driving, or under the influence of alcohol or other illicit drug, should fall within grievous bodily harm. Although several stakeholders supported expanding the definition of grievous bodily harm in this way, Judge Vaepule Vaai commented that it was difficult to reconcile 'wilful' with 'reckless, careless and negligent'.

***Commission's views***

4.57 Above, the Commission recommends that a new offence be created for 'culpable driving causing death'. Section 39A of the *Road Traffic Ordinance* sets out an offence of negligent driving, under which a person who recklessly or negligently drives or rides any vehicle and thereby causes bodily injury to or the death of any person is liable to a maximum penalty of five years imprisonment. In the Commission's view, these offences provide an adequate framework for penalizing reckless, careless and negligent driving. There is no need to expand the offence of grievous bodily harm to expressly deal with culpable driving.

**Abduction**

4.58 In the Issues Paper, the Commission raised several abduction provisions in the *Crimes Ordinance* that operate in a gender-specific manner, being:

- s 83—abduction of a woman or girl; and
- s 83B—abduction of a child under 16 years of age for the purposes of intending to have sexual intercourse.

4.59 The Commission asked whether these offences should be gender neutral. Gender neutrality received unanimous support from stakeholders.

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<sup>81</sup> *Police v Tulaga* [1997] WSSC 5.

## 4. Crimes Against Person and Reputation

4.60 Above, the Commission recommends that—unless otherwise indicated—the *Crimes Ordinance* should be redrafted in gender neutral language. In accordance with this recommendation, the abduction offences should be gender neutral.

### **Defamatory libel**

4.61 Section 84 of the *Crimes Ordinance* sets out an offence of defamatory libel, defined as ‘any act which confers upon the person defamed a right of action for damages for libel’. The burden of proof in any prosecution is to be determined by the same rules as in an action for damages for libel. It is no defence that the libel is true unless the publication was for the public benefit. The publishing of defamatory libel gives rise to a maximum penalty of six months imprisonment.

4.62 In previous decades, many legal bodies and law reform commissions have recommended abolishing or radically reducing the scope of defamatory libel offences.<sup>82</sup> Criminal libel was removed from the statute books of England and Wales in November 2009. In February 2010, a parliamentary committee of the UK stated that ‘the offence of criminal libel is untenable in a modern, democratic society’. The committee commented that ‘criminal libel stemmed from a time when Government was anxious to defend both itself and the rich and powerful from criticism by the media and the public’.<sup>83</sup>

4.63 Stakeholders who responded to the Issues Paper question of whether the offence of defamatory libel should be retained expressed divergent views, with Judge Vaepule Vaai preferring that such conduct remain in the realm of civil law and the Tamati Law Firm supporting the retention of a criminal offence.

### ***Commission’s views***

4.64 Defamatory libel should be repealed as a criminal offence. Instead, reliance should be placed on civil laws of defamation. This is consistent with the increasing recognition in modern democracies of freedom of speech, including speech that may be politically unpopular.

**Recommendation 48:** The offence of defamatory libel in s 84 of the *Crimes Ordinance* should be repealed.

### ***New provisions***

4.65 The following section of this report considers some additional provisions which could be enacted in the section of the *Crimes Ordinance* dealing with crimes against persons and reputation, identified by the CLR Working Group.

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<sup>82</sup> See, eg, Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (1979) (ALRC 11); NSW Law Reform Commission, *Report on Defamation* (1971); Law Reform Commission (Eng), *Report on Criminal Libel* (1985).

<sup>83</sup> United Kingdom House of Commons—Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* (2010), ch 3.

### **Withholding medical treatment**

- 4.66 A controversial situation arises where a person withholds medical care, takes a terminally ill person home to die, or a health care professional administers pain relief that has the effect of hastening death.
- 4.67 Under the common law, it constitutes a tort and the crime of battery to administer medical treatment to an adult, who is conscious and of sound mind, without his or her consent. Where a person is not capable of giving or withholding consent to medical treatment, a medical practitioner is obliged to provide such treatment as in his or her informed opinion is in the patient's best interests. In some circumstances, this may be a decision not to provide further treatment.<sup>84</sup>
- 4.68 In the Issues Paper, the Commission sought views on whether a new offence should be included in the *Crimes Ordinance*, which would apply where a person withholds medical care, takes a terminally ill person home to die, or a health care professional administers pain relief that has the effect of hastening death. This received limited support from stakeholders. The Samoa Nurses Association opposed the introduction of any such offence, noting that this conduct is already well defined in professional standards and competencies.

#### ***Commission's views***

- 4.69 Judicial interpretations of the offence of homicide, and the tort and offence of battery, adequately balance the competing public interests in situations where a person withholds medical care, takes a terminally ill person home to die, or a health care professional administers pain relief that has the effect of hastening death. The Commission is not persuaded that there is a clear benefit in changing this balance by adding a new offence to specifically cover these situations.

### **Effect of treatment applied in good faith**

- 4.70 Another provision which could potentially be introduced is to clarify that a person who inflicts bodily injury on a person is responsible for that person's death even if the immediate cause of death is treatment applied in good faith. This could cover situations where a bystander administers cardiopulmonary resuscitation in good faith but fails. This provision could replace or supplement s 71 of the *Crimes Ordinance*, which provides that:

*Everyone whose act or omission results in the death of any person shall be deemed to have caused the death of that person, although the immediate cause of death is the act or omission of some other person or some other independent intervening event.*

- 4.71 One example of such a provision is s 166 of the *Crimes Act (NZ)* ('Causing injury the treatment of which causes death'):

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<sup>84</sup> See *Airedale NHS Trust v Bland* [1993] AC 789.

## 4. Crimes Against Person and Reputation

*Every one who causes to another person any bodily injury, in itself of a dangerous nature, from which death results, kills that person, although the immediate cause of death be treatment, proper or improper, applied in good faith.*

- 4.72 A related provision is s 165 of the *Crimes Act* (NZ), which provides that a person who causes the death of another person kills that person, although death might have been prevented by resorting to proper means.
- 4.73 There was no clear consensus in submissions as to whether a provision ensuring responsibility for a person's death where the immediate cause of death is treatment applied in good faith.

### ***Commission's views***

- 4.74 There is merit in amending s 71 of the *Crimes Ordinance* to more closely target ongoing liability where treatment is provided in good faith. This would provide a clear statement that a person whose dangerous act causes another person bodily injury should not be excused from liability for that person's death just because the immediate cause of death was treatment made necessary by the injury inflicted. Such a change also may provide certainty to a person seeking to act as a 'good Samaritan' but concerned about his or her potential liability if treatment is unsuccessful.
- 4.75 The Commission did not consult on the provision in s 165 of the *Crimes Act* (NZ) that a person who causes the death of another person kills that person, although death might have been prevented by resorting to proper means. However, this appears to provide a valuable supplement—that is, that a person who inflicts an injury is liable for that person's death even if it may have been prevented by proper treatment.

<p><b>Recommendation 49:</b> Section 71 of the <i>Crimes Ordinance</i> should be repealed and replaced with provisions that reflect ss 165 and 166 of the <i>Crimes Act 1961</i> (NZ).</p>
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### **Setting traps**

- 4.76 The *Crimes Ordinance* does not criminalize setting traps. The CLR Working Group has suggested a new offence of setting traps, which would balance, on the one hand, the interests of someone putting up traps to protect their person and property, and the danger of those traps leading to death or bodily injury.
- 4.77 An offence of setting traps exists in NZ and all Australian jurisdictions except South Australia. (However, setting traps in South Australia could possibly fall under offences for acts endangering life or creating risk of grievous bodily harm.)<sup>85</sup> An offence of trap setting is also included in the Australian Model Criminal Code. Maximum penalties for these offences range from three to five years imprisonment.
- 4.78 Common elements of trap-setting offences are as follows:

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<sup>85</sup> See *Criminal Law Consolidation Act 1935* (SA) s 29.

## 4. Crimes Against Person and Reputation

- all apply to dangerous traps that have been set with the intent of killing or inflicting grievous bodily harm on a person;
- some apply to dangerous traps set with a lesser mental element—for example, with ‘reckless disregard for the safety of others’;
- the same or a lesser penalty applies to an owner or occupier who permits a dangerous trap to be set or to remain in such a condition that a person is likely to be injured; and
- most specify that they do not apply to traps set for the purpose or intention of destroying vermin.

### *Submissions*

4.79 In the Issues Paper, the Commission asked whether there should be a new offence in the *Crimes Ordinance* for setting traps. All stakeholders who commented on this issue, with the exception of Judge Vaepule Vaai, agreed that such an offence should be added. The CLR Working Group commented that such an offence would protect people who get injured by the reckless activity of the owner of the trap. The Working Group suggested that the offence should be drafted in such a way that it balances a person’s right to protect his or her property, and the need to protect persons from injury or death from ‘extremely dangerous traps’.

### *Commission’s views*

4.80 Setting dangerous traps with the intent of injuring a person, or a reckless disregard as to whether a person gets injured, warrants criminal sanction. This is in accordance with international trends and the views of stakeholders. The offence should also extend to owners or occupiers who knowingly permit such a trap to be set or to remain. In the Commission’s view, this scenario is equivalent in culpability as an owner or occupier setting such a trap him or herself. To balance the interest of property owners in protecting themselves and their property, there should be a clear statement in the provision that it does not apply to traps that have been set with the purpose or intention of destroying vermin.

**Recommendation 50:** A new offence should be included in the *Crimes Ordinance* for setting traps, which should apply to a person who sets, or causes to be set, a dangerous trap with the intent of injuring a person, or with a reckless disregard as to whether a person gets injured. The provision should specify that it does not apply to traps that have been set with the purpose or intention of destroying vermin.

### **Poisoning with intent**

4.81 The *Crimes Ordinance* does not specifically criminalize poisoning with intent. This can be compared, for example, with s 200 of the *Crimes Act* (NZ), which provides that:

*(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to any one, administers to or causes to be taken by any person any poison or other noxious substance.*

## 4. Crimes Against Person and Reputation

*(2) Every one is liable to imprisonment for a term not exceeding 3 years who, with intent to cause inconvenience or annoyance to any one, or for any unlawful purpose, administers to, or causes to be taken by, any person any poison or other noxious substance.*

4.82 Most Australian jurisdictions include offences dealing with the administration of poisons. These vary on the seriousness of harm that must be demonstrated for the offence to be made out. Under s 39 of the *Crimes Act 1900* (NSW) it is an offence to administer to a person any ‘poison, intoxicating substance or other destructive or noxious thing’, so as to endanger the life of that person, or so as to inflict grievous bodily harm upon him or her. In Queensland, the offence of ‘administering poison with intent to harm’ applies to a person who ‘unlawfully, and with intent to injure or annoy another person, causes a poison or another noxious thing to be administered to, or taken by, any person’. A higher maximum penalty applies where the poison endangers the life of, or does grievous bodily harm to, the person to whom it is administered.<sup>86</sup>

4.83 In the Issues Paper, the Commission asked whether a poisoning with intent provision should be included in the *Crimes Ordinance*. Submissions on this question generally supported the inclusion of such an offence, although one stakeholder questioned whether the additional offence was necessary given the availability of homicide offences. The CLR Working Group recommended that a new offence should be enacted in the following terms:

*Every person is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to anyone, administers to or causes to be taken by any person any poison or noxious substance.*

### ***Commission’s views***

4.84 Unlike offences such as murder and the causing of bodily harm, poisoning with intent offences do not require proof that the victim sustained actual damage. It is sufficient to demonstrate that the poison was administered, and that administration was intended to achieve a particular outcome, such as injury or annoyance. This can be especially valuable where a poisoning attempt was unsuccessful or at the lower end of the spectrum and actual harm is difficult to prove.

4.85 The Commission recommends that a poisoning with intent offence be included in the *Crimes Ordinance*. This should apply where a person unlawfully, and with intent to injure or annoy another person, causes a poison or another noxious thing to be administered to, or taken by, any person. To reflect their different severity, separate maximum penalties should apply where the poison endangers the life of, or does grievous bodily harm to, the person to whom it is administered, and otherwise. In the Commission’s view, 14 and seven years imprisonment, respectively, are appropriate maximum penalties.

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<sup>86</sup> *Criminal Code 1899* (Qld) s 322.

#### 4. Crimes Against Person and Reputation

**Recommendation 51:** The *Crimes Ordinance* should include a poisoning with intent offence, which would apply where a person unlawfully, and with intent to injure or annoy another person, causes a poison or another noxious thing to be administered to, or taken by, any person. The maximum penalty should differ depending on whether the poison endangers the life of, or does grievous bodily harm to, the person to whom it is administered, and otherwise.

## 5. Other Issues

### ***Parties to the commission of the offences***

#### **Parties to offences**

5.1 Where conduct is made criminal, the law is concerned to control not only those who directly perform the conduct prohibited but also those who contribute indirectly to the offence. A person who assists in the commission of the offence can be convicted of the same offence as the person who actually commits the offence.

5.2 Section 23 of the *Crimes Ordinance* ('Parties to offences') provides that a person is a party to and guilty of an offence if he or she:

- actually commits the offence;
- does or omits an act for the purpose of aiding any person to commit the offence;
- abets any person in the commission of the offence; or
- incites, counsels, or procures any person to commit the offence.

5.3 The section goes on to provide that where two or more persons form a common intention to commit an unlawful act, each of them is a party to offences committed by the other in pursuit of that common purpose.

5.4 The CLR Working Group has advised that s 23 of the *Crimes Ordinance* is the subject of continual litigation due to confusion about its application. The Working Group suggested that the Ordinance expressly state that the purpose of the section is to specify the various ways in which persons can become liable for participating in the commission of offences.

5.5 An alternative to specifying the purpose of s 23 of the *Crimes Ordinance* is to redraft the provision in clearer legislative language. One example is the Australian Model Criminal Code provision of 'complicity and common purpose':

*(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*

*(2) For the person to be guilty:*

*(a) the person's conduct must have in fact aided, abetted, counseled or procured the commission of the offence by the other person, and*

*(b) the offence must have been committed by the other person.*

*(3) For the person to be guilty, the person must have intended that:*

*(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed, or*

*(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.*

(4) *A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:*

(a) *terminated his or her involvement, and*

(b) *took all reasonable steps to prevent the commission of the offence.*

(5) *A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.*

5.6 The Model Code also includes an offence of incitement, which applies to a person who ‘urges the commission of an offence’ and intends the offence to be committed.

5.7 Stakeholders who commented on this issue supported simplifying and clarifying the purpose of s 23 of the *Crimes Ordinance*. The Samoa Fa’afafine Association suggested that other issues to consider were:

- the need for accessories to know that the offence has been committed;
- the receipt of any sort of benefit from the offence by the accessory;
- the provision of comfort by accessories (eg spouse, sibling, parent);
- tampering with, or suppression of, evidence by an accessory; and
- the motive of an accessory escaping arrest or conviction.

#### ***Commission’s views***

5.8 As it is presently drafted, s 23 of the *Crimes Ordinance* is an ongoing source of confusion and litigation. In the Commission’s view, the best course of action is to redraft the section in a clearer manner. An associated benefit of redrafting s 23 is closer specification of the circumstances in which a person may be found guilty of having aided, abetted, counselled or procured an offence. Clause 2.4.2 of the Australian Model Criminal Code could be used as a model in this regard. An outcome of this recommendation would be the need for a separate provision to deal with incitement of an offence.

**Recommendation 52:** Section 23 of the *Crimes Ordinance* should be redrafted to more clearly state the circumstances in which a person may be found guilty of having aided, abetted, counselled or procured an offence. A separate provision should be enacted to deal with incitement of an offence.

## **Conspiracy**

5.9 A criminal conspiracy at common law involves an agreement to do an unlawful act or to do a lawful act by unlawful means. The *Crimes Ordinance* does not have a general offence of conspiracy. However, specific offences apply to, for example, conspiracy to murder, commit sedition and defraud.

5.10 In NZ, the *Crimes Act* supplements these specific conspiracy offences with a broad offence of ‘Conspiring to commit offence’.<sup>87</sup> Under this offence:

<sup>87</sup> *Crimes Act 1961* (NZ) s 310.

*every one who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he had committed that offence.*

- 5.11 The elements of conspiracy for the purpose of the NZ offence are determined in accordance with the common law criteria. This is consistent with most Australian jurisdictions.

***Commission's views***

- 5.12 Conspiracy to commit an offence is a well-recognised crime under the common law and should be included in the Samoan criminal law. This will supplement the specific conspiracy offences currently set out in the *Crimes Ordinance*. Section 310 of the *Crimes Act* (NZ) is a good model in this regard.

**Recommendation 53:** The *Crimes Ordinance* should include an offence of conspiring to commit an offence. Section 310 of the *Crimes Act 1961* (NZ) could be used as a model in this regard.

**Other issues**

- 5.13 Section 26 of the *Crimes Ordinance* defines accessories after the fact as a person who—knowing a person to have been a party to an offence—receives, comforts, or assists that person or tampers with or suppresses evidence, in order to enable him or her to escape after arrest or to avoid arrest or conviction. Section 27 deals with attempts, specifying that a person may be guilty of attempting a crime even if he or she does not succeed in carrying out the prohibited act. The penalties for both of these offences are located in a different part of the Ordinance (ss 115 and 114, respectively). The CLR Working Group and stakeholders who submitted to this Inquiry have commented on the benefits of co-locating the penalty provisions with the substantive offences.

- 5.14 In light of the recommended changes to Part III of the *Crimes Ordinance*, the heading ‘Parties to the commission of offences’ is somewhat misleading. This does not accurately reflect provisions such as, for example, attempts to commit a crime.

***Commission's views***

- 5.15 It is anomalous to include the penalty provisions in a different part of the Ordinance to those provisions setting out the elements of the offences. This should be rectified. In the Commission's view, Part III of the *Crimes Ordinance* should be renamed ‘Extensions of criminal responsibility’ to more accurately reflect the substance of the provisions included in the Part.

**Recommendation 54:** The offences of ‘accessory after the fact’ and ‘attempts’ should be located in the same section as the penalties for committing these offences.

**Recommendation 55:** Part III of the *Crimes Ordinance* should be renamed ‘Extensions of criminal responsibility’.

### ***Crimes against public order***

5.16 Crimes against public order are covered in pt IV of the *Crimes Ordinance*. Offences include crimes against the state, such as treason and sedition, and threats to public safety, such as unlawful assembly and riots.

### **Forcible entry onto land**

5.17 The purpose of forcible entry statutes has been stated as being to ensure that:  
*not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror.*<sup>88</sup>

5.18 Under s 32 of the *Crimes Ordinance*, a person who, by force or threats of force, enters on land in the actual and peaceful possession of another for the purpose of taking possession is liable to a maximum of six months imprisonment. The offence applies regardless of whether the person who so enters is entitled to possession.

5.19 The CLR Working Group has recommended that this provision should extend to the ‘forcible detainer’ of land. Such an offence would apply where a person in actual possession of land without claim of right, detains it in a manner that causes or is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person who is entitled to possession. This would correlate to the equivalent provision in the *Crimes Act* (NZ).<sup>89</sup> Other jurisdictions that have offences of forcible entry generally have an equivalent offence of forcible detainer, including, for example, Canada<sup>90</sup> and a number of Australian jurisdictions.<sup>91</sup>

5.20 Stakeholders that commented on this issue supported expanding the offence of forcible entry onto land to also apply to forcible detainer.

### ***Commission’s views***

5.21 An offence covering the forcible detainer of land is a sensible addition to the offence of forcible entry set out in s 32 of the *Crimes Ordinance*. This would cover a person who gains possession of land without the use of force—for example, where the owner is absent—but then uses force, or the threat of force against a person who

<sup>88</sup> *Iron Mountain & Helena Railroad v Johnson* (1887) 119 U. S. 608, Miller J.

<sup>89</sup> *Crimes Act 1961* (NZ) s 91.

<sup>90</sup> *Criminal Code* (Canada) s 72.

<sup>91</sup> Summary Offences Act (NT) ss 46A, 46B; *Crimes Act 1958* (Vic); *Criminal Code 1899* (Qld) s 70; *Summary Offences Act 1953* (SA) s 17D.

is entitled to possession, in order to detain the land. This situation poses as great a threat to a person's 'peaceable and quiet' possession as the 'forcible entry' situation.

**Recommendation 56:** Section 32 of the *Crimes Ordinance* should be extended to cover the forcible detainer of land.

### Participation in organized criminal activity

5.22 The CLR Working Group has suggested the addition of an offence in pt IV of the *Crimes Ordinance* for participation in organized criminal groups. This has been prompted by reports from the police that some recent burglaries in Samoa appear to be by an organized group of people and that such an offence could act as a valuable deterrent.

5.23 An offence of participating in organized criminal activity is set out in s 98A of the *Crimes Act* (NZ). Offences also have been included in several Australian jurisdictions.<sup>92</sup> At the time of writing, a Bill was before Parliament in the Australian Capital Territory (ACT) to introduce an offence for participation in serious organized criminal activities.<sup>93</sup>

5.24 Although there are some differences in the elements of these offences, there is a general consensus that the definition of criminal group applies to groups that have either or both of the objectives of materially benefiting from criminal conduct, and committing serious violent offences. The person must know that the group is a 'criminal group' and know or be reckless as to whether his or her participation in the criminal group contributes to criminal activity. A maximum penalty of five years imprisonment applies in NZ and under the ACT Bill.

5.25 In the Issues Paper, the Commission sought views on whether an offence for participation in organized criminal activity should be included in the *Crimes Ordinance*. This received mostly positive responses.

#### *Commission's views*

5.26 The goal of enacting offences for participation in criminal activity is to disrupt serious organized crime by targeting those who willingly participate in criminal groups that take part in criminal activity. However, such offences also raise significant human rights challenges. In particular, any offence must be drafted in such a way that the threshold for criminality is sufficiently connected to the commission of serious organized criminal harm and adequately protects individual liberties.

5.27 The Commission is in favour of enacting an offence of participating in organized criminal groups in the *Crimes Ordinance* provided the offence is narrowly drafted. In

<sup>92</sup> See, eg, *Criminal Code* (Cth) s 390.3; *Crimes Act 1900* (NSW) s 93T.

<sup>93</sup> Crimes (Serious Organised Crime) Amendment Bill 2010 (ACT).

particular, ‘criminal group’ should require the group to have an objective of materially benefiting from criminal conduct and/or committing serious violent offences. For a person to be found guilty of this offence, he or she should know that the group is a ‘criminal group’ and know or be reckless as to whether his or her participation in the group contributes to criminal activity.

**Recommendation 57:** The *Crimes Ordinance* should include an offence of participation in organized criminal groups. For the purpose of this offence, ‘criminal group’ should be defined to include groups that have an objective of materially benefiting from criminal conduct and/or committing serious violent offences. To be found guilty of this offence, a person must know that the group is a ‘criminal group’ and know or be reckless as to whether his or her participation in the group contributes to criminal activity.

## Hate crimes

5.28 There are no provisions in the *Crimes Ordinance* criminalizing the advocating of genocide, issuing hate propaganda and related advocacy. This appears to be out of step with a number of international jurisdictions and art 20 of the *International Covenant on Civil and Political Rights*, which requires countries to prohibit ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.

5.29 In Canada, advocating genocide or inciting hatred against any ‘identifiable group’—defined as ‘any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation’—is an indictable offence.<sup>94</sup> Exceptions apply in the case of statements of truth, and subjects of public debate and religious doctrine. Proceedings may only commence with the consent of the Attorney General.

5.30 New Zealand prohibits hate speech under the *Human Rights Act 1993* (NZ). Under s 131, it is an offence for a person to publish, distribute or say within public hearing matter or words likely to excite—and with the intention of exciting—hostility or illwill against a group of persons on the ground of the colour, race, or ethnic or national origins.

5.31 In Australia, racial vilification laws have been introduced in discrimination statutes in a number of jurisdictions. For example, in NSW, ‘serious vilification’ occurs if an offender incites hatred, serious contempt or severe ridicule towards a specified group by threatening physical harm or inciting others to do so.<sup>95</sup> As with the Canadian offence, prosecution requires the consent of the Attorney General.

5.32 A danger in hate speech crimes is unduly infringing a person’s freedom of expression—a right set out in art 13 of the *Samoan Constitution*. This issue was considered by the Canadian Supreme Court in the case of *R v Keegstra* in the context

<sup>94</sup> Criminal Code (Canada) ss 318, 319.

<sup>95</sup> *Anti-Discrimination Act 1977* (NSW) s 20D.

of the *Canadian Charter of Rights and Freedoms*. In upholding the hate speech offence as a reasonable limit upon freedom of expression, the Court commented that:

*Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred.*<sup>96</sup>

5.33 Important factors in the Court's finding were the following safeguards:

- Definitional limits of the offence which ensure that it only captures expressive activity which is openly hostile to Parliament's objective.
- The requirement that the promotion of hatred be 'wilful', requiring proof of either intent to promote hatred or knowledge of such a consequence's substantial certainty.
- The exclusion of private communications from the scope of the offence.
- The availability of defences including, for example, where the communications were true or relevant to a subject of public interest.

### ***Submissions***

5.34 In the Issues Paper, the Commission asked whether the advocating of genocide, issuing hate propaganda and related advocacy should be made offences under the *Crimes Ordinance*. All stakeholders that commented on this question supported criminalization.

### ***Commission's views***

5.35 The enactment of hate speech crimes would have merit in showing a clear intention by Parliament to reduce racial, ethnic and religious tension in Samoa. However, such provisions must be carefully drafted to limit the resulting freedom of expression implications. In the Commission's view, the Canadian hate speech crimes provide an appropriate model in this regard. In particular, they require the promotion of hatred to be 'wilful', include a range of defences, and exclude from the scope of the offence private communications. These offences have been upheld as a proportionate infringement on freedom of expression by the Canadian Supreme Court.

**Recommendation 58:** The *Crimes Ordinance* should include new offences for the advocating of genocide, issuing hate propaganda and related advocacy. Sections 318 and 319 of the *Criminal Code* (Canada) should be used as a model in drafting these offences.

<sup>96</sup> *R. v. Keegstra* [1990] 3 S.C.R. 697

## **Crimes affecting administration of law and justice**

### **Corruption**

5.36 A provision governing official corruption is set out in pt V of the *Crimes Ordinance*, which deals with crimes affecting the administration of law and justice and public administration. The offence imposes a maximum penalty of five years imprisonment on a person who:

- (a) *Being the holder of any office, whether judicial or otherwise, in the service of the Independent State of Samoa, corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself, herself or any other person any bribe, that is to say, any money or valuable consideration whatever, on account of anything done or to be afterwards done by that person in an official capacity; or*
- (b) *Corruptly gives or offers to any person holding any such office or to any other person any such bribe as aforesaid on account of any such act.*<sup>97</sup>

5.37 The Ordinance does not define who holds an office for the purpose of this section, nor does it include offences for corrupt practices other than bribery. This could include, for example:

- intimidation;
- abuse of public office;
- dishonest use of official information;
- the issuing of false certificates by public office holders; and
- personating public officers.

5.38 A related provision is in s 38 of the Ordinance, which makes an offence of conspiring or attempting ‘to obstruct, prevent, pervert, or defeat the course of justice in any cause or matter, civil or criminal’. This does not expressly address the protection of assessors (juries) from bribery, intimidation, or attempts to exercise influence.

5.39 Additional offences in relation to corrupt conduct are set out in the *Secret Commissions Act 1975*. This Act criminalizes the giving of a gift to an ‘agent’ as an inducement or reward for doing or forbearing to do an act in relation to the principal's affairs or business.<sup>98</sup> It is also an offence for the agent to accept such a gift.<sup>99</sup> Notably, however, there is no offence in the Act for gifts given to, or received by, the principal.

5.40 The issues raised by corruption stretch well beyond the criminal law. In Samoa, corruption issues may be dealt with by the Public Service Commission or a Commission of Inquiry. Another tool that is commonly used in other countries is an independent anti-corruption body, tasked with receiving and investigating complaints about official corruption, and disseminating knowledge about corruption prevention.

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<sup>97</sup> *Crimes Ordinance 1961* s 35.

<sup>98</sup> *Secret Commission Act 1975* s 4.

<sup>99</sup> *Ibid* s 5.

A Pacific example is the Fiji Independent Commission Against Corruption, which was established in April 2007 to investigate acts of corruption by public officers, employees of government and government-related organizations. The establishment of such a Commission was previously recommended by the Fiji Law Reform Commission in its 2003 Report *Building an Anti-Corruption Culture for Fiji*.<sup>100</sup> Independent anti-corruption bodies are also a requirement under the UN *Convention Against Corruption*.<sup>101</sup> At the time of writing, Samoa had not entered into this Convention.

### **Submissions**

5.41 In the Issues Paper, the Commission sought views on whether there was a need for more comprehensive anti-corruption provisions and, if so, whether these should be included in the *Crimes Ordinance* or in separate legislation. Judge Vaepule Vaai and the CLR Working Group expressed the view that comprehensive provisions should be included in the *Crimes Ordinance*. On the other hand, the Samoa Nurses Association suggested that this should be under separate legislation to better define its consequence.

5.42 The Commission also asked whether a new offence should be created in pt V of the *Crimes Ordinance* to deal with the corruption of ‘justice system participants’, including witnesses, assessors and lawyers. Expanding the scope of pt V in this way was supported by stakeholders, with Judge Vaepule Vaai, for example, commenting that offences should stretch beyond justice system participants to catch ‘everyone’.

### **Commission’s views**

5.43 Considering evidence of significant past instances of corrupt practices in Samoa, and the serious repercussions of such practices, law reform in this area is of a high priority.<sup>102</sup> Some progress in this regard can be achieved by updating pt V of the *Crimes Ordinance*. In particular, the part should be expanded to criminalize conduct such as:

- abuse of public office;
- dishonest use of official information; and
- bribery, intimidation, or the exercise of influence over, assessors.

5.44 However, in the Commission’s view, reform of the criminal law is not sufficient, in and of itself, to address issue of corruption. The Commission strongly recommends that the Samoan Government commission a review of official corruption in Samoa, with a view to identifying laws and practices to promote the deterrence, detection and prosecution of corrupt practices and the education of office holders and members of

<sup>100</sup> The Report is available at <http://www.lawreform.gov.fj/common/Default.aspx?page=briberyLaw>, accessed 13 May 2010.

<sup>101</sup> UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, available at: <http://www.unhcr.org/refworld/docid/4374b9524.html> [accessed 13 May 2010].

<sup>102</sup> For extensive examples of past instances of official corruption in Samoa see Nelson C, *Country Report: Samoa*, available at [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no73/19\\_P141-P147.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no73/19_P141-P147.pdf), last accessed 13 May 2010.

the public about corruption prevention. Strategies may include, for example, ratification of the UN *Convention on Corruption*, establishment of an independent anti-corruption body, and strengthening relevant provisions of the civil and criminal law. Should the Government accept this recommendation, the Samoa Law Reform Commission would be well placed to undertake such a review.

**Recommendation 59:** The Samoa Government should commission a review of official corruption in Samoa, with a view to identifying laws and practices to promote the deterrence, detection and prosecution of corrupt practices, and the education of office holders and members of the public about corruption prevention. Part V of the *Crimes Ordinance* should be considered as a part of this review.

**Recommendation 60:** In the event that Recommendation 59 is not accepted, pt V of the *Crimes Ordinance* should be amended to include a more comprehensive range of corrupt conduct including: abuse of public office; dishonest use of official information; and bribery, intimidation, or the exercise of influence over, assessors.

### ***Matters of justification or excuse***

5.45 Matters of justification and excuse are covered by pt II of the *Crimes Ordinance*.

A justification has been described as ‘socially approved conduct’ whereas an excuse is conduct which is not socially approved but ‘forgivable’.<sup>103</sup>

### **Insanity**

5.46 The defence of insanity is set out in s 13 of the *Crimes Ordinance*. As set out in this section, a person must not be convicted of an offence because of an act that he or she did or omitted to do when labouring under ‘natural imbecility or disease of the mind’ so as to render him or her incapable:

- i) of understanding the nature and quality of the act or omission; or
- ii) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

5.47 The *Crimes Ordinance* insanity test closely reflects the terminology and substance of the common law defence of insanity set out in *M’Naghten’s Case*.<sup>104</sup>

5.48 Criminal codes in some other jurisdictions have adopted expressions used in mental health legislation in their insanity defences, such as ‘mental impairment’ and ‘mental disease’. One such example is the test of ‘mental competence’ in the South Australian criminal law, which provides that:

<sup>103</sup> Fairall P & Yeo S, 2005, *Criminal Defences in Australia (LexisNexis Butterworths, 4<sup>th</sup> Edition)*, Sydney.p.1-2

<sup>104</sup> *M’Naghten’s Case* (1843) 8 ER 718

*A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—*

- (a) does not know the nature and quality of the conduct; or*
- (b) does not know that the conduct is wrong; or*
- (c) is unable to control the conduct.*<sup>105</sup>

5.49 ‘Mental impairment’ is defined to include a ‘mental illness’ (the term used in the *Mental Health Act 2009* (SA)), an intellectual disability, or a disability or impairment of the mind resulting from senility. The definition expressly excludes intoxication. A substantially identical framework is set up under the *Criminal Code* (Cth).

### **Submissions**

5.50 In the Issues Paper, the Commission asked whether the term ‘natural imbecility’ in s 13 of the *Crimes Ordinance* should be replaced with ‘mental disorder’. Most stakeholders supported such an amendment; however, Judge Vaepule Vaai recommended retaining ‘natural imbecility’ if it means the same as mental disorder.

### **Commission’s views**

5.51 The phrase ‘natural imbecility or disease of the mind’, used in the defence of insanity in s 13 of the *Crimes Ordinance*, is out of step with modern sensibilities. In the Commission’s view, this phrase should be amended to the more neutral term ‘mental impairment’. Mental impairment should be defined in the Ordinance as including a ‘mental disorder’ (the term used in the *Mental Health Act 2007*), an intellectual disability, or a disability or impairment of the mind resulting from senility.

**Recommendation 61:** The phrase ‘natural imbecility or disease of the mind’ in s 13 of the *Crimes Ordinance* should be replaced with ‘mental impairment’. Mental impairment should be defined as including a mental disorder, an intellectual disability, or a disability or impairment of the mind resulting from senility.

### **Self defence**

5.52 The *Crimes Ordinance* distinguishes between self defence against unprovoked and provoked attacks, and defence of other persons.

5.53 Under s 15, a person who has been unlawfully assaulted and has not provoked the assault is justified in repelling the assault if he or she uses force that is not meant to cause death or grievous bodily harm and ‘is no more than is necessary for the purpose of self defence’. A person is justified in causing grievous bodily harm or death in these circumstances if he or she was under ‘reasonable apprehension of death or grievous bodily harm’ and believed, on reasonable grounds, that there was no other way of preserving himself or herself.

<sup>105</sup> *Criminal Law Consolidation Act 1935* (SA) s 269C.

5.54 Section 16 deals with self defence against a provoked assault. Under this section, force used after the assault is only justifiable if it was necessary to preserve the person from death or grievous bodily harm, the assault was not commenced with the intention to kill or do grievous bodily harm and ‘before the force was used, he or she declined further conflict and quitted or retreated from it as far as was practicable’.

5.55 A separate defence is provided in s 19 for the defence of someone under the protection of the person seeking justification for using force.

***Permissible level of force***

5.56 The two-pronged framework for the permissible level of force for self-defence was based on the earlier drafting of the *Crimes Act* (NZ). In 1981, NZ repealed these provisions and, instead, enacted a single provision governing defence against assault:

*Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.*<sup>106</sup>

5.57 The NZ provision closely resembles the approach to self defence under the common law that has developed in the UK and Australia. The test set out by the High Court of Australia in *Zecevic v Director of Public Prosecutions (Vic)* is:

*whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.*<sup>107</sup>

5.58 The Court went on to consider how this test would apply to the situation of homicide, and concluded that—for a person to believe on reasonable grounds that killing or doing serious bodily harm is necessary for self defence—he or she must perceive a threat which calls for that response. Ordinarily that would only be the case where there was a reasonable apprehension on the part of that person of death or serious bodily harm.

5.59 Finally, in circumstances where the accused was the original aggressor, the majority held that it was a matter for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, upon reasonable grounds, that his or her actions were necessary in self-defence. Relevant considerations will be the extent to which the accused declined further conflict and quit the use of force or retreated from it.

*There is, however, no longer any rule that the accused must have retreated as far as possible before attempting to defend himself. It is a circumstance to be considered with all the others in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defence.*<sup>108</sup>

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<sup>106</sup> *Crimes Act 1961* (NZ) s 48.

<sup>107</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661, per Wilson, Dawson and Toohey JJ.

<sup>108</sup> *Ibid*, 663.

***Defence of other persons***

5.60 As noted above, the justification of self defence extends to defending any one under a person's protection. This is similar to the position under common law, under which force may only be used in defence of another person who falls within the relationships of servant to master, child to parent and wife to husband. The revised NZ provision takes a much broader position by permitting a person to defend *any* person, regardless of whether he or she is under that person's protection. This is consistent with most Australian jurisdictions in which provisions authorising the use of force in defence of a person apply to the defence of any other person.<sup>109</sup>

***Submissions***

5.61 In the Issues Paper, the Commission asked whether s 15 of the *Crimes Ordinance* should be amended by replacing the description of the permissible level of force from 'no more than is necessary for the purpose of self defence' with the common law wording of 'reasonable in the circumstances'. All stakeholders that commented on this question agreed that the common law terminology was preferable.

5.62 The Commission also sought views on whether a person should be permitted to use force to defend any person, regardless of whether he or she is under that person's protection. No clear consensus on this question emerged in submissions.

***Commission's views***

5.63 The self-defence provisions in the *Crimes Ordinance* are out of step with trends in the common law and statutory provisions in other jurisdictions. There is a growing consensus in favour of a test of self-defence based on whether the accused believed on reasonable grounds that his or her use of force was necessary in self-defence. This test is flexible enough to adapt to self-defence in the context of homicide and in situations in which the accused was the perpetrator of the violence. There are also good reasons for extending self-defence to the protection of any person—not just persons with whom the person who used force is in a protective relationship. In particular, this could encourage bystanders to come to the aid of those being subjected to violence in public places.

5.64 The Commission recommends repealing the self-defence provisions in ss 16, 17 and 19 of the *Crimes Ordinance* and replacing them with a provision modeled on s 48 of the *Crimes Act* (NZ)—that is, that 'every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use'.

**Recommendation 62:** The self-defence provisions in ss 16, 17 and 19 of the *Crimes Ordinance* should be repealed and replaced with a provision modeled on s 48 of the *Crimes Act 1961* (NZ).

<sup>109</sup> *Criminal Code* (Cth), s 10.4; *Criminal Code 2002* (ACT), s 42; *Crimes Act 1900* (NSW), s 418; *Criminal Code* (NT), ss 29, 43BD; *Criminal Law Consolidation Act 1935* (SA), s 15; *Criminal Code* (Tas), s 46; *Criminal Code* (WA), s 248.

## Provocation

5.65 Broadly defined, ‘provocation’ is constituted by any conduct which could deprive an ordinary person of self-control and which, in fact, deprives the accused of self-control. These may include, for example, assaults, sexual infidelity and verbal abuse. As explained by the NZLC:

*At the heart of the defence of provocation is the collision between two fundamental public interests. Each is a facet of the basic value of any civilized society: the protection of the humanity of each of its members and the humanity of the community as a whole. One expression of that value is the profound importance given to the preservation of human life. The other expression of that same value is the recognition of the part compassion must be allowed to play in the criminal justice system.*<sup>110</sup>

5.66 The *Crimes Ordinance* does not expressly recognize a defence of provocation. However, under the common law, provocation operates as a partial defence to reduce murder to manslaughter. This applies under Samoan criminal law because of s 9 of the *Crimes Ordinance*, which expressly preserves common law justifications and excuses for acts and omissions.

5.67 The partial defence of provocation was considered in detail by the NZLC in 2007, leading to a recommendation that the partial defence of provocation should be abolished and, instead, that provocation be taken into account in the exercise of discretion in sentencing. The NZLC noted a widespread view that the operation of the defence was unsatisfactory. Mental health professionals advised that provocation benefits very few defendants who are mentally ill or impaired. The same view was expressed by women’s groups considering the defence from the perspective of women generally and battered women in particular.<sup>111</sup>

5.68 In the Issues Paper, the Commission asked whether the *Crimes Ordinance* should provide for provocation as a partial defence to murder. There was some support for including such a defence in the Ordinance. In contrast, Papalii Viopapa recommended following the NZ approach and repealing the partial defence.

### *Commission’s views*

5.69 There are a number of critical problems with the partial defence of provocation, as identified by the NZLC. However, central to the NZLC recommendation to repeal the defence, was the availability of discretion in the sentencing of persons found guilty of murder. Such an option is not currently available in Samoa, which still imposes a mandatory sentence of life imprisonment for murder.

5.70 The Commission has been tasked with reviewing sentencing laws in Samoa. This provides an opportunity to reconsider mandatory sentences, include the sentence of life imprisonment for murder. After the Commission’s recommendations as regards

<sup>110</sup> New Zealand Law Commission, *The Partial Defence of Provocation* (Report 98) (2007).

<sup>111</sup> *Ibid.*

mandatory sentencing have been developed there will be a more informed basis for considering whether any changes to the partial defence of provocation are necessary or desirable. As such, the Commission is not making a recommendation in relation to provocation in this Report.

### ***Transnational criminal activities***

5.71 The UN *Convention against Transnational Organized Crime*, states that an offence is transnational in nature if:

- i) *it is committed in more than one State;*
- ii) *it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;*
- iii) *it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or*
- iv) *it is committed in one State but has substantial effects in another State.*

5.72 These include, for example, hijacking; identity theft or fraud; slavery and sexual servitude; computer offences; and human trafficking.

5.73 The CLR Working Group has raised concerns that many transnational criminal activities are not covered under the *Crimes Ordinance* or any other Samoan legislation. In addition to being a failure to implement Samoa's international obligations, this may leave Samoa vulnerable to commissions of transnational crime.

5.74 In the Issues Paper, the Commission asked whether transnational organized crimes should be dealt with in the *Crimes Ordinance* or in separate legislation. The majority of stakeholders supported criminalizing these activities in a separate Act; however, this was not unanimous.

### ***Commission's views***

5.75 A range of activities that have been identified in the UN *Convention against Transnational Organized Crime* are not currently crimes in Samoa. The Commission supports the enactment of new legislative provisions to ensure that Samoa becomes compliant with the requirements of the Convention. The Commission understands that a draft Bill in this regard has already been drafted by Samoan legislative drafters together with UN Office on Drugs and Crime.

## Appendices

### *List of recommendations*

**Recommendation 1:** The *Crimes Ordinance* should be redrafted in gender neutral language.

**Recommendation 2:** Section 47(3) of the *Crimes Ordinance*, which excludes a husband from criminal liability for raping his wife other than in limited circumstances, should be repealed.

**Recommendation 3:** A definition of rape should be included in the *Crimes Ordinance*, which specifies that the offence covers all forms of sexual penetration including the introduction into a male or female's genitalia of another part of a person's body or an object held or manipulated by another person.

**Recommendation 4:** Section 50 of the *Crimes Ordinance* should cover a wider range of people who have a responsibility for, or significant role in, a child's care or upbringing, including teachers, pastors and doctors.

**Recommendation 5:** The requirement that offences of sexual intercourse or indecency with a girl between 12 and 16 years of age must be prosecuted within 12 months of commission of the offence in s 53(7) of the *Crimes Ordinance* should be repealed.

**Recommendation 6:** The offences in ss 51 to 53 of the *Crimes Ordinance* should carry the following maximum penalties:

- sexual intercourse with a person under 12 years of age—14 years
- attempted sexual intercourse with a person under 12 years of age—10 years
- sexual indecency with a person under 12 years of age—10 years
- sexual intercourse or indecency with a person between 12 and 16 years of age—12 years.

**Recommendation 7:** A new offence should be included in the *Crimes Ordinance* to deal with situations where a person compels another person to engage in sexual behavior.

**Recommendation 8:** Section 54(a) of the *Crimes Ordinance* should apply to male and female victims of any age.

**Recommendation 9:** Section 54(b) of the *Crimes Ordinance* should apply to situations where a person obtains consent by making threats directed at another person.

**Recommendation 10:** Section 57 of the *Crimes Ordinance* should be repealed and replaced with a provision modeled on s 138 of the *Crimes Act 1961* (NZ) ('Sexual exploitation of person with significant impairment'), including the definitions of

‘significant impairment’ and ‘exploitative sexual connection’.

**Recommendation 11:** The adultery offences in ss 58 and 58A of the *Crimes Ordinance* should be repealed.

**Recommendation 12:** The sodomy and related offences in ss 58D and E of the *Crimes Ordinance* should be repealed. Section 58G of the *Crimes Ordinance* should be repealed to the extent it applies to sodomy.

**Recommendation 13:** The personating a female offence in s 58N of the *Crimes Ordinance* should be repealed.

**Recommendation 14:** The prostitution offences in ss 58J to 58M of the *Crimes Ordinance* should be made gender neutral, including by merging ss 58J and 58K into one offence of brothel keeping; and amending s 58M to apply to procuring sexual intercourse with both males and females without regard to their marital status.

**Recommendation 15:** A new offence should be inserted in the *Crimes Ordinance* of soliciting or loitering in a public place for the purpose of offering or procuring commercial sexual services. The offence should carry a maximum penalty of three months imprisonment.

**Recommendation 16:** A new s 43A should be inserted in the *Crimes Ordinance*, which criminalizes access to, and possession, distribution and exhibition of, child pornography. Child pornography for these purposes should be defined as ‘a model or object or indecent show or performance that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context’.

**Recommendation 17:** The definition of ‘thing capable of being stolen’ for the purpose of the offence of theft in the *Crimes Ordinance* should cover intangible property.

**Recommendation 18:** The definition of ‘thing capable of being stolen’ for the purpose of the offence of theft in the *Crimes Ordinance* should cover electricity.

**Recommendation 19:** The definition of ‘theft’ in the *Crimes Ordinance* should specify that an intention to deprive an owner can be established where a person, having possession or control (lawfully or not) of property belonging to another, parts with it under a condition as to its return which he may not be able to perform, where this is done for purposes of his own and without the other’s authority.

**Recommendation 20:** The penalties for the theft offence should be reviewed with a view to simplifying the penalty structure and raising the maximum penalties for the most serious types of offending.

**Recommendation 21:** The theft offences in pt VIII of the *Crimes Ordinance* should be extended to apply to marital theft.

**Recommendation 22:** Section 88 of the *Crimes Ordinance* should be redrafted in

accordance with s 220 of the *Crimes Act 1961* (NZ) to cover all persons who acquire money or other valuable items through a special relationship of trust, including proceeds held under direction; requirements to account; and powers of attorney. The section should be renamed ‘theft by person in special relationship’.

**Recommendation 23:** Section 89 of the *Crimes Ordinance* should apply to all situations in which a person dishonestly obtains by any deceptive practice property belonging to another or a financial advantage. Sections 81 and 82 of the *Crimes Act 1958* (Vic) could be used as a model in this regard.

**Recommendation 24:** The maximum penalty for breach of s 89 of the *Crimes Ordinance* should be increased to seven years imprisonment.

**Recommendation 25:** The witchcraft offence in s 95 of the *Crimes Ordinance* should be repealed.

**Recommendation 26:** The Ministry of Health should consider traditional healers, including the need to introduce a licensing system or some other regulatory model.

**Recommendation 27:** The maximum penalty for the false accounting offences in ss 98 and 99 of the *Crimes Ordinance* should be increased to seven years imprisonment.

**Recommendation 28:** Section 101 of the *Crimes Ordinance* should be repealed and replaced with a general blackmail offence.

**Recommendation 29:** Section 102 of the *Crimes Ordinance* should cover unauthorized entry into buildings left permanently open by replacing ‘breaking and entering a building with intent to commit a criminal offence’ with ‘entering a building without authorization with intent to commit a criminal offence’. ‘Building’ should be defined to expressly include dwelling houses left permanently open.

**Recommendation 30:** A new offence should be included in the *Crimes Ordinance* of unlawfully entering another person's vehicle with intent to commit a criminal offence.

**Recommendation 31:** The offence of unlawful entry of building by night in s 103 of the *Crimes Ordinance* should be repealed.

**Recommendation 32:** The maximum penalty for the offence of intimidation by breaking house or discharge of firearms in s 104 of the *Crimes Ordinance* should be the same regardless of whether the offence took place during the day or night.

**Recommendation 33:** The maximum penalty for forgery in s 107 of the *Crimes Ordinance* should be increased to 10 years imprisonment.

**Recommendation 34:** The *Crimes Ordinance* should define the term ‘document’ and ‘false document’ for the purpose of the forgery offences in ss 107 and 108 of the Ordinance. The *Criminal Code* (Cth) could be used as a model in this regard.

**Recommendation 35:** Sections 109 to 111 of the *Crimes Ordinance* should be amended to refer to ‘counterfeit currency’ to clarify that the offences apply to counterfeit paper money as well as counterfeit coin.

**Recommendation 36:** The maximum penalty for breach of s 112 of the *Crimes Ordinance* should be increased to seven years imprisonment.

**Recommendation 37:** A new offence should be inserted in the *Crimes Ordinance* for arson in aggravating circumstances, including where a person:

- (a) knows or ought to know that danger to life is likely to ensue; or
- (b) intends to gain a benefit or to cause a loss to another person.

The maximum penalty for the offence should be 14 years imprisonment.

**Recommendation 38:** Offences in relation to the misuse of computers should be developed and enacted as a new part of the *Crimes Ordinance*. Titles 1 and 2 of the Council of Europe *Convention on Cybercrime* could be used as a model in this regard.

**Recommendation 39:** The Samoa Government should commission a review of harassment and related laws in Samoa, including the need for additional offences and a civil protection order scheme.

**Recommendation 40:** The *Crimes Ordinance* should impose an obligation on persons to use reasonable care and take reasonable precautions to avoid danger when he or she is in charge, or has under his or her control, something that may endanger a person’s life, health or safety. Section 156 of the *Crimes Act 1961* (NZ) could be used as a model in this regard.

**Recommendation 41:** An offence of ‘culpable driving causing death’ should be enacted to deal with conduct that does not amount to negligent manslaughter but is of greater severity than the ‘negligent driving’ offence in s 39A of the *Road Traffic Ordinance 1960*. Section 318 of the *Crimes Act 1958* (Vic) could be used as a model in this regard.

**Recommendation 42:** The *Crimes Ordinance* should impose an obligation on professionals doing dangerous acts to use reasonable knowledge, skill, and care in the doing of any such act. Section 155 of the NZ *Crimes Act* could be used as a model in this regard.

**Recommendation 43:** The *Crimes Ordinance* should provide that a woman who has been charged with infanticide or seeks to rely on infanticide as a defence to a charge of murder or manslaughter should be assessed by a qualified medical professional to determine whether:

- (a) a community treatment order or an inpatient treatment order should be made under the *Mental Health Act 2007*; and
- (b) there is sufficient medical basis for the charge and, if not, whether the charge should

be changed to murder or manslaughter.

**Recommendation 44:** Subsections 61(2)(c) and (e) of the *Crimes Ordinance* should be repealed.

**Recommendation 45:** The abortion offence in s 73 of the *Crimes Ordinance* should include an express exception where two qualified medical practitioners have certified that an abortion is necessary for the life of, or would seriously harm the physical or mental health of, the mother. Certification should not be necessary where it would threaten the life of the mother.

**Recommendation 46:** Sections 73A and 73 of the *Crimes Ordinance* should be amended to limit the persons who may procure an abortion, or supply the means for procuring an abortion, to qualified medical practitioners.

**Recommendation 47:** The Samoan Government should review the operation of the recommended abortion law within three years from the date of enactment to assess how it is operating in practice.

**Recommendation 48:** The offence of defamatory libel in s 84 of the *Crimes Ordinance* should be repealed.

**Recommendation 49:** Section 71 of the *Crimes Ordinance* should be repealed and replaced with provisions that reflect ss 165 and 166 of the *Crimes Act 1961* (NZ).

**Recommendation 50:** A new offence should be included in the *Crimes Ordinance* for setting traps, which should apply to a person who sets, or causes to be set, a dangerous trap with the intent of injuring a person, or with a reckless disregard as to whether a person gets injured. The provision should specify that it does not apply to traps that have been set with the purpose or intention of destroying vermin.

**Recommendation 51:** The *Crimes Ordinance* should include a poisoning with intent offence, which would apply where a person unlawfully, and with intent to injure or annoy another person, causes a poison or another noxious thing to be administered to, or taken by, any person. The maximum penalty should differ depending on whether the poison endangers the life of, or does grievous bodily harm to, the person to whom it is administered, and otherwise.

**Recommendation 52:** Section 23 of the *Crimes Ordinance* should be redrafted to more clearly state the circumstances in which a person may be found guilty of having aided, abetted, counselled or procured an offence. A separate provision should be enacted to deal with incitement of an offence.

**Recommendation 53:** The *Crimes Ordinance* should include an offence of conspiring to commit an offence. Section 310 of the *Crimes Act 1961* (NZ) could be used as a model in this regard.

**Recommendation 54:** The offences of ‘accessory after the fact’ and ‘attempts’ should be

located in the same section as the penalties for committing these offences.

**Recommendation 55:** Part III of the *Crimes Ordinance* should be renamed ‘Extensions of criminal responsibility’.

**Recommendation 56:** Section 32 of the *Crimes Ordinance* should be extended to cover the forcible detainer of land.

**Recommendation 57:** The *Crimes Ordinance* should include an offence of participation in organized criminal groups. For the purpose of this offence, ‘criminal group’ should be defined to include groups that have an objective of materially benefiting from criminal conduct and/or committing serious violent offences. To be found guilty of this offence, a person must know that the group is a ‘criminal group’ and know or be reckless as to whether his or her participation in the group contributes to criminal activity.

**Recommendation 58:** The *Crimes Ordinance* should include new offences for the advocating of genocide, issuing hate propaganda and related advocacy. Sections 318 and 319 of the *Criminal Code* (Canada) should be used as a model in drafting these offences.

**Recommendation 59:** The Samoa Government should commission a review of official corruption in Samoa, with a view to identifying laws and practices to promote the deterrence, detection and prosecution of corrupt practices, and the education of office holders and members of the public about corruption prevention. Part V of the *Crimes Ordinance* should be considered as a part of this review.

**Recommendation 60:** In the event that Recommendation 59 is not accepted, pt V of the *Crimes Ordinance* should be amended to include a more comprehensive range of corrupt conduct including: abuse of public office; dishonest use of official information; and bribery, intimidation, or the exercise of influence over, assessors.

**Recommendation 61:** The phrase ‘natural imbecility or disease of the mind’ in s 13 of the *Crimes Ordinance* should be replaced with ‘mental impairment’. Mental impairment should be defined as including a mental disorder, an intellectual disability, or a disability or impairment of the mind resulting from senility.

**Recommendation 62:** The self-defence provisions in ss 16, 17 and 19 of the *Crimes Ordinance* should be repealed and replaced with a provision modeled on s 48 of the *Crimes Act 1961* (NZ).

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***Glossary of acronyms and abbreviations***

ACT	Australian Capital Territory
CLR Working Group	Criminal Law Review Working Group
MJCA	Ministry of Justice and Court Administration
MoPP	Ministry of Police and Prisons
NSW	New South Wales, Australia
NT	Northern Territory, Australia
NZ	New Zealand
NZLC	New Zealand Law Commission
SA	South Australia, Australia
STD	sexually transmitted disease
SVSG	Samoa Victim Support Group
The Commission	The Samoa Law Reform Commission
UK	United Kingdom
UKLC	United Kingdom Law Commission
UN	United Nations
WA	Western Australia, Australia
Vic	Victoria, Australia

***Criminal Law Review Working Group Report***