SOLOMON ISLANDS

LAW REFORM COMMISSION

HOMICIDE OFFENCES

CONSULTATION PAPER

2015

SOLOMON ISLANDS LAW REFORM COMMISSION, HONIARA, SOLOMON ISLANDS

HOMICIDE OFFENCES CONSULTATION PAPER JANUARY 2015

Call for Submissions

The SILRC invites your comments and submissions on this consultation paper. A submission is your views and opinions about how the law should be changed. A submission can be written, such as a letter or email, or verbal, such as a telephone conversation or a face to face meeting. A submission can be short or long, it can be formal or simply dot points or notes.

How to Make a Submission

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

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This paper is available from our office or our website

The deadline for submissions for this reference is 1st January 2016

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

Terms of Reference

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

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

To enquire and report to me on –

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

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

Dated at Honiara 1st day of May 1995

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

Solomon Islands Law Reform Commission

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

Chairperson	Frank Paulson
Part- time Commissioners	Mr Waeta Ben Tabusasi C.S.I., S.I.M
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Abbreviations and Terminology

SILRC – Solomon Islands Law Reform Commission

MCCOC – Model Criminal Code Officers Committee

CEDAW- Convention on the Elimination of All Forms of Discrimination Against Women

UNIFEM- United Nation Development Fund for Women

UNDP- United Nation Development Programme

ODPP- Office of the Director of Public Prosecution

PSO- Public Solicitor's Office

RSIP- Royal Solomon Islands Police Force

UK- United Kingdom

ALRC- Australian Law Reform Commission

VLRC- Victorian Law Reform Commission

NSW- New South Wales

PNG- Papua New Guinea

SBCA- Solomon Islands Court of Appeal

SBHC- Solomon Islands High Court

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CHAPTER 1: INTRODUCTION

1.1 This is the Solomon Islands Law Reform Commission (**SILRC**) Consultation Paper for Homicide Offences. Homicide offences apply where someone causes the death of a person; the main offences being murder and manslaughter.

1.2 The Solomon Islands *Penal Code* [Cap 26] and *Criminal Procedure Code* [Cap 7] were enacted in the early 1960's and contain the current offences relating to homicide offences. The definitions of these offences were adopted primarily from judicial cases and legislation from the United Kingdom in the early 1960's. Since the introduction of these laws many political, social and legal changes have occurred within and outside of the Solomon Islands in relation to homicide offences. Further, the laws governing homicide in England at the time the Solomon Islands adopted them remained largely unaltered since the seventeenth century.[1]

1.3 In 2008 the SILRC released an Issues Paper on the Penal Code that included a chapter on homicide offences. Following this the SILRC conducted consultation on the Penal Code. The SILRC Issues Paper on the Penal Code identified the following issues that need to be considered in connection with reform of homicide offences:

- the scope of the fault element of murder;
- degrees of responsibility for murder;
- mandatory life sentences for murder;
- system of parole and pardons:
- reform of partial defences;
- lack of definition for culpable negligence in relation to manslaughter; and
- limited scope of special relationships between two people that applies to the duty to provide necessities of life to another in relation to manslaughter.

1.4 The purpose of this consultation paper is to seek responses from interested parties and the public in regards to possible reforms with regards to the current homicide laws as outlined below. The issues raised are morally and legally complicated, and people may have a range of views, which SILRC would like to hear.

[1] The Law Commission (UK), *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide* (28 November 2006), 3.

CHAPTER 2: MURDER

2.1 Murder as an offence carries both a social stigma and a penalty that reflects the seriousness of the offence. The penalty for murder is mandatory life imprisonment; this means that if an accused is found guilty of murder the courts have no discretion to set a lesser sentence and must sentence the accused to life imprisonment.

THE SCOPE OF THE FAULT ELEMENT – MALICE AFORETHOUGHT

2.2 The fault element for murder is *malice aforethought* as set out in s 202 of the Penal Code and the concept is derived from the common law and English statute law (*Homicide Act* 1957).[2] The concept of malice aforethought is somewhat deceptive, and has been described as a "mere arbitrary symbol" as neither the word 'malice' nor 'aforethought' is used in its ordinary sense.[3] The Solomon Islands Penal Code defines the state of mind for murder (malice aforethought), as the following:

- an *intention* to cause death;
- an *intention* to cause grievous bodily harm; or
- *knowledge* that death or grievous bodily harm is a probable consequence of one's conduct.[4]

2.3 Conversely, English case law holds that malice aforethought is restricted to cases where a person intends to kill, or cause grievous bodily harm.[5] *Samani v Regina* is an example of where knowledge that death or grievous bodily harm constituted malice aforethought.[6] In this case the Accused delivered two powerful blows, a clenched-fist punch and a kick, to the left abdomen of the Deceased which caused the Deceased's spleen to rapture and split in two, causing severe internal bleeding which resulted in her death. The Accused was convicted of murder because the force he used was of such considerable magnitude that it caused the enlarged spleen of the Deceased to rupture and split into two halves. As a result, the Court held that the accused could not have failed to realise that such a force would probably cause grievous bodily harm.

2.4 Another example is *Tabukai v Regina*,[7] in which the Accused assaulted the Defendant. The assault involved the Accused beating the Deceased on the head, and by banging her head against the wall of their house. The reverberating impact of the deceased head hitting the wall could be felt by other neighbours who shared the same house.

[2] *Penal Code* [Cap 26] 1963 (SI) s 202. See JC Smith, *Smith & Hogan: Criminal Law* (10th ed, 2002) 359. *Homicide Act* 1957 (UK).
[3] Law Commission (UK), *Partial Defences to Murder – Final Report* (6 August 2004), 18.
[4] *Penal Code* [Cap 26] 1963 (SI) s 202.
[5] *R v Maloney* [1985] AC 905.
[6] *Samani v Reginam* [1996] SBCA 4; CA-CRAC 4 of 1995 (23 February 1996).
[7] *Tabukai v Regina* [2009] SBCA 13; CA-CRAC 8 of 2008 (26 March 2009).

The post mortem report concluded that the Deceased died as a result of acute subdural haematoma consistent with blunt and violent injuries to the head. The issue before the High Court was whether the Accused knew that the act of beating the deceased on the head or face with his first, and banging her head against the wall would probably cause death or grievous bodily harm. The issue was answered in the affirmative, and thus, the Accused was convicted of murdering the Deceased.

2.5 In contrast, in *Regina v Olifei*,[8] the Accused had the specific intention to cause death or grievous bodily harm. In this case the Accused held a knife (30 mm in length) challenged the Deceased (who was unarmed) to a fight. The Accused proceeded to move forward, and tackled the Deceased down a hill. At the bottom of the hill Deceased's stomach was on the ground. The Accused stood at the side of Deceased, lifted his knife with his two hands and forcefully stabbed Deceased's back. The knife punctured the Deceased's lung, and causing severe bleeding and haemopeunmothorx. The force used was considerable; the knife cut through the lower part of the 10th right rib and went through the lower lob of the right lung. The Deceased was taken to the hospital where he died. The Accused was held to have had the intention to cause death or grievous bodily harm, and was therefore convicted for the murder of the deceased.

2.6 The Public Solicitors Office suggested that the Penal Code definition of the fault element for murder is quite broad when compared to other comparable jurisdictions.[9] The following table compares the fault element for murder in Solomon Islands to the fault element for murder in other jurisdictions:

Jurisdiction	**Fault Element for Murder**	**Maximum Penalty**
Solomon Islands Penal Code s 202	• Intention to cause death or grievous bodily harm.[10] • Knowledge that the act which caused death will probably cause the death of, or grievous bodily harm.[11]	• Mandatory Life Imprisonment.

[8] *Regina v Olifei* [2001] SBHC 181; HCSI-CRC 344.2009 (21 March 2011).

[9] Consultation with Public Solicitor's Office (17th July 2009).

[10] In Solomon Islands section 4 of the *Penal Code* [Cap 29] defines grievous bodily harm as "any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense".

[11] According to S Bronitt and B McSherry, 'Unlawful Killing' *Principles of Criminal Law* (2nd ed, 2005) 471, "The exact meaning of 'knowledge that death was a probable consequence' is unclear. The risk of death must be more than a mere possibility (*R v Crabble* (1985) 156 CLR 464 at 469), but the courts have been loath to apply any form of statistical analysis to the notion of probability. In *Boughey v The Queen* (1986) 161 CLR 10 it was argued that the words "likely to cause death" in s 157(1) (c) of the Criminal Code (Tas) meant that the likelihood of death was more likely than not. The High Court rejected this analysis and instead stated that the risk had to be "substantial" or "real and not remote". The court then went on to say that "likely" and "a good chance" were synonyms for "probable". It could be argued that the words "likely" or "a good chance" lower the standard of the test somewhat."

Jurisdiction	Fault Element for Murder	Maximum Penalty
Australian Capital Territory Crimes Act 1900 ss 12(1)(a), (b)	• Intention to cause death or serious harm. • Reckless indifference to the probability of causing death.	• Life Imprisonment.
New South Wales Crimes Act 1900 ss 18(1)(a), 19A and 19B	• Intention to kill or inflict grievous bodily harm.[12] • Reckless indifference to human life.	• Life Imprisonment. • Mandatory Life Imprisonment for the Murder of Police Officers.[13]
Northern Territory Criminal Code ss 156(1)(c) and 157	• Intention to cause death or serious harm.[14]	• Mandatory Life Imprisonment.
Queensland Criminal Code ss 302 and 305	• Intention to cause death or grievous bodily harm.[15]	• Life Imprisonment.
South Australia Criminal Law Consolidation Act 1935 s11	• Intention to cause death or grievous bodily harm.[16] • Foreseeability of death as a probable consequence of action.	• Mandatory Life Imprisonment.

[12] In New South Wales, s 4 of the *Crimes Amendment (Grievous Bodily Harm) Act 2005* states: "Grievous bodily harm includes: (a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and (b) any permanent or serious disfiguring of the person."

[13] *New South Wales Crimes Act* 1900 (NSW) s 19B.

[14] Schedule 1, s 1 of *Criminal Code Act* (Northern Territory) defines grievous bodily harm as "any physical or mental injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health".

[15] Schedule 1, s 1 of Criminal Code (Queensland) defines grievous bodily harm as "any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health."

[16] In South Australia, the common law definition is set out in *DPP v Smith* [1961] AC 290, which defines grievous bodily harm to mean "really serious harm" (See Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2005) 109).

Jurisdiction	Fault Element for Murder	Maximum Penalty
Tasmania Criminal Code ss 156, 157	• Intention to cause death or cause bodily harm which is commonly known to cause death;[17] • Unlawful act or omission which the offender knew or ought to have known to be likely to cause death.	• Life Imprisonment.
Victoria Crimes Act 1958 s 3	• Intention to cause grievous bodily harm;[18] • Foreseeability of death as a probable consequence of action.[19]	• Life Imprisonment.
Western Australia Criminal Code s 279(2)	• Intention to cause death or grievous bodily harm.[20]	• Life Imprisonment.
Papua New Guinea Criminal Code ss 299(2) and, 300	• Wilful Murder: intention to cause death. • Murder: intention to cause grievous bodily harm.[21]	• Capital Punishment.
Vanuatu Penal Code ss 106(1), 106(2)	• Intention to cause the death.	• Life Imprisonment for Premeditated Murder. • 20 years for Non-Premeditated Murder.

[17] Schedule 1, s 1 of *Criminal Code Act 1924* (Tasmania) states: "grievous bodily harm means any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health."

[18] In Victoria, the law relating to grievous bodily harm is governed by the common law position as in *Donovan* [1934] 2 KB 498 which states "...'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent but must, no doubt, be more than merely transient or trifling."

[19] Fault element extends to recklessness causing grievous bodily harm (See Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws Critical Perspectives* (2005) 114).

[20] Schedule 1, s 1 of *Criminal Code* (Western Australia) states "grievous bodily harm means any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health." The problem with this definition is that "the second limb of the definition substantially weakens the meaning of the term" (See Model Criminal Code Officers Committee of the Stand Committee of Attorneys-General, *Discussion Paper Model Criminal Code Chapter 5 Fatal Offences Against the Person* (1998) 51.

[21] S 1 of the PNG Criminal Code Act 1974 states "grievous bodily harm means any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health."

Jurisdiction	Fault Element for Murder	Maximum Penalty
United Kingdom (Homicide Act 1957)	• Intention to kill or cause grievous harm.[22]	• Mandatory Life Imprisonment.
New Zealand Crimes Act 1961 s 167	• Intention to cause death. • Intention to cause any bodily injury that is known to the offender to be likely to cause death and is reckless whether death ensues or not.	• Life Imprisonment.

2.7 In England, and in some of the jurisdictions in Australia, the fault element for murder is restricted to intention to kill or to cause grievous bodily harm. In the Solomon Islands the fault element includes not only intention to kill or cause grievous harm, but also where the person knew that the act or omission causing death would probably cause grievous bodily harm. As a result, in Solomon Islands the fault element for murder is wider than any of the other jurisdiction listed in the table above.

2.8 In a report on a workshop held by SILRC with the police on reform of the Penal Code it was suggested that the fault element for murder should include:

- where accused foresees that his or her action will probably cause death; and
- where violence causing death is used in the course of committing another serious offence.[23]

2.9 In that report there is support for murder not to include the situation where the accused foresees that his or her action would probably cause serious (or grievous) harm. There was some support for an additional offence sitting between murder and manslaughter to cover this, rather than it being covered by the offence of manslaughter.[24]

[22] See John Smith, *Smith & Hogan Criminal Law* (10th ed, 2002) 439 – 440.
[23] Report on a Workshop held by SILRC with the Royal Solomon Islands Police, Honiara, 18-19 May 2009.
[24] *Ibid.*

KILLING IN THE COURSE OF ANOTHER OFFENCE

2.10 Violence causing death which occurs in the course of another offence is an offence in the Solomon Islands under s 201 of the Penal Code.[25] The section is worded as follows:

> (1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.
>
> (2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence.

Question 1.1.1

Should ss 200 **Murder** and 202 **Malice aforethought** be simplified by removing the concept of Malice Aforethought from the Penal Code and replacing it with its current definition?

Question 1.1.2

When should the offence of murder apply?

1. Where the act or omission (causing death) is accompanied by an intention to cause death, or intention to cause grievous bodily harm?

2. Where the act or omission causing death is accompanied by an intention to cause death, or intention to cause grievous bodily harm, where the offender knew his actions would be likely to cause death?

3. Where the accused foresees that his or her action will probably cause death?

4. Where the accused foresees that his or her action will probably cause grievous bodily harm?

Question 1.1.6

Should the offence of murder include cases where a person kills another in the furtherance of committing another serious offence, even if the person did not intend to kill the victim?

[25] *Penal Code* [Cap 26] 1963 (SI) s 201.

Question 1.1.7

Should recklessness (i.e. the fault element currently in section 202(b) of the Penal Code) include killing where there is an intention to cause fear of injury and the offender was aware of a serious risk of death?

LEVELS/DEGREE OF CULPABILITY – CATEGORIES OF MURDER

2.10 Currently, the Penal Code entails a two-tier structure of 'murder' and 'manslaughter'. It has been suggested at the Tulagi consultation in 2009 that murder should be given different categories.[26] Certain stakeholders proposed that it is essential to consider the introduction of two levels of murder namely wilful murder and murder as is stated in the *Criminal Code Act* of Papua New Guinea.[27]

2.11 Further, at a SILRC consultation with the legal staff of the Public Solicitor's Office it was suggested that if the scope of offence of murder is restricted and penalty changed, then there may be more guilty pleas.[28] Currently very few accused plead guilty, as there is little reason to do so as the penalty for murder is a mandatory life sentence, irrespective of whether the accused pleads guilty or not guilty.

2.12 The United Kingdom Law Commission has recommended that murder should be categorised into different degrees; first degree murder, second degree murder, and manslaughter.[29] The rationale put forward by the Law Commission is that 'individual offences of homicide should exist within a graduated system or hierarchy of offences'. Further, such a system allows the law to reflect the offence's degree of seriousness.[30] It allows mandatory life sentences to be confined to the most serious kind of killing, whilst also allowing discretionary life sentences for other less serious killings.

2.13 Such a system would allow partial defences to murder to be retained. Partial defences to murder if established would reduce first-degree murder to second-degree murder. The penalty for first-degree murder would remain as life imprisonment and for second-degree murder it could be a discretionary life maximum penalty and a minimum sentence would be set. Second-degree murder would also be the result when a partial defence of provocation, diminished responsibility or killing pursuant to a suicide pact is successfully pleaded to first-degree murder. However, unless eligibility for parole periods are available for judges for first degree murder, such a

[26] Tulagi Consultation (November 2, 2009), Gizo Consultation (21, May 2009).
[27] Consultation with ODPP and Staff on 6 June 2008.
[28] Consultation Legal Staff – Public Solicitor's Office 17th July 2009.
[29] The Law Commission (UK), *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide* (28 November 2006), 9.
[30] *Ibid*, 16.

system would not reduce the number of not guilty pleas for those charged with first degree murder.

2.14 The Law Commission recommended the following 3-tier structure for homicide offences in England and Wales:

1. First degree murder (mandatory life penalty):[31]

    a) Killing intentionally.

    b) Killing where there was an intention to do serious injury coupled with an awareness of a serious risk of causing death.

2. Second degree murder (discretionary life maximum penalty):

    a) Killing where the offender intended to do serious injury.

    b) Killing where the offender intended to cause some injury or a fear or risk of injury, and was aware of a serious risk of causing death.

3. Manslaughter (discretionary life maximum penalty)

    a) Killing through gross negligence as to a risk of causing death.

    b) Killing through a criminal act:

        i. intended to cause injury; or

        ii. where there was an awareness that the act involved a serious risk of causing injury

    c) Participating in a joint criminal venture in the course of which another participant commits first or second degree murder, in circumstances where it should have been obvious that first or second degree murder might be committed by another participant.

Question 1.2.1

Should the Penal Code categorize murder into different categories such as first degree murder, second degree murder and manslaughter or should the Solomon Islands maintain its current 2-tier structure?

[31] In the United Kingdom all accused convicted of murder must be provided with a date they are eligible for parole, except in limited circumstances.

ATTEMPTED MURDER

2.15 It is an offence under the Penal Code to attempt to unlawfully kill someone; or intending to kill do something, or fail to fulfill a duty to preserve life and health, that is likely to endanger human life.[32] According to the SILRC Issues Paper 1 (2008):

> To be found guilty of attempt a person must take some action towards committing the offence, or the person fails to take all of the action required to commit the offence due to circumstances beyond their control, or because they decide to not go ahead with the commission of the offence.[33]

2.16 In terms of the fault element of attempted murder, the prosecution has to prove an intention to kill. For example, if the accused had the intention to cause serious harm, without desiring death, they will not be guilty of murder.[34]

2.17 The following table compares the maximum penalty for attempted murder in the Solomon Islands and comparable jurisdictions.

Jurisdiction	Maximum Penalty
Solomon Islands *Penal Code* *s 215*	• Life Imprisonment
Australian Capital Territory *Crimes Code 2002* *s 44*	• Life Imprisonment
New South Wales *Crimes Act 1900* *ss 27-30*	• 25 Years Imprisonment
Northern Territory *Criminal Code* *ss 4 and 156*	• Mandatory Life Imprisonment
Queensland *Criminal Code s 305*	• Life Imprisonment
South Australia *Criminal Law Consolidation Act 1935* *s 12*	• Life Imprisonment

[32] *Penal Code* [Cap 26] 1963 (SI) s 215.
[33] Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code: Issue Paper 1* (Nov 2008) 47.
[34] *R v Walker & Hayles* (1990) CrAppR 226 per Lloyd LJ.

Tasmania *Criminal Code* *ss 158 and 342*	• Life Imprisonment
Victoria *Crimes Act 1958* *ss 3, 321M and 321P*	• 25 Years Imprisonment
Western Australia *Criminal Code* *s 283*	• Life Imprisonment
Papua New Guinea *Criminal Code* *s 304*	• Life Imprisonment
Vanuatu *Penal Code* *ss 28 and 106*	• Life Imprisonment if Premeditated • 20 Years Imprisonment if Not Premeditated
United Kingdom *Criminal Attempts Act 1981* *ss 1 and 4*	• Life Imprisonment
New Zealand *Crimes Act 1961* *s 173*	• 14 Years Imprisonment
Cook Islands *Crimes Act 1969* *s 193*	• 14 Years Imprisonment

CHAPTER 3: MANSLAUGHTER

3.1 The current law on manslaughter can be divided into three categories:

1. unlawful act manslaughter;
2. negligence manslaughter; and
3. manslaughter which results from a successful partial defence case.

3.2 Some of the issues associated with manslaughter include:

- culpable negligence is not defined under our current law;
- negligent manslaughter is limited to duties in relation to health and safety that are specified in the Penal Code;
- whether unlawful act manslaughter in the Penal Code is limited to unlawful act which carries a risk of causing some injury;
- the extent of gross negligence as it applies to culpable negligence; and
- the offence of manslaughter is quite broad.

3.3 The Penal Code states that a person can be convicted of manslaughter for causing the death of another by an unlawful act, or omission.[35] An unlawful act or omission is where a person's act or omission amounts to culpable negligence in discharging a duty relating to the preservation of life and health.[36] The offence of manslaughter also applies to intentional death which was mitigated by provocation, diminished responsibility or excessive self-defence, and to unintentional death where a person killed without having malice aforethought, but who has a state of mind that is culpable accordingly to the law.

3.4 Surgical operation done in good faith and with reasonable care and skill for the benefit of another person is lawful. In other words '[a] surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable.'[37] This means that a doctor who knows that a person will probably die, but does a surgical operation in good faith and with reasonable care will not amount to any unlawful act. The law respects the fact that not all acts done in which a person knows that death or grievous bodily harm is a probable consequence are unlawful. Thus, there are acts which cause death that are justified by law or excused by law.

3.5 Consent by a victim to their own death or maiming however does not affect the criminal responsibility of another person. This means that a person cannot give consent to another person to cause their own death, or consent to the causing of

[35] *Penal Code* [Cap 26] 1963 (SI) s199.
[36] *Ibid.*
[37] *Regina v Crabbe* (1985) 156 CLR 464 [8]–[10].

his/her own death or maiming by another person.[38] To maim means the destruction or permanent disabling of any external or internal organ, member or sense.[39]

3.6 The offence of manslaughter applies where a killing does not amount to murder but where the death is caused by some unlawful act, or omission such as an assault, or a negligent failure to fulfill a legal duty to preserve life and health.[40] The Penal Code also specifies the duties to preserve life and health.[41] The maximum penalty for manslaughter is life imprisonment and the court can impose a lesser sentence on someone convicted of manslaughter.

THE DIFFERENCE IN CULPABILITY BETWEEN MURDER AND MANSLAUGHTER

3.7 Our analysis of murder and manslaughter convictions indicates that in some cases there may be little difference between the culpability of a person convicted of manslaughter, and another person convicted of murder. This means that sometimes the line between murder and manslaughter is not clear. However, there is a significant difference between the punishment for murder – mandatory life imprisonment – and the punishment for manslaughter which varies from life imprisonment to absolute discharge.[42]

3.8 Two cases which illustrate this are *Regina v Manioru*,[43] and *Regina v Oma*.[44] In *Manioru*, the Accused was charged and convicted for murder while in the *Oma* case at first instance the Accused was charged with murder which was later withdrawn and was replaced with manslaughter. The Accused in *Oma* case was convicted for manslaughter and sentenced to four and half years imprisonment. In these two cases the Accused used a knife to kill the deceased while under the influence of alcohol. The killing in both cases happened in the context of an argument that escalated into the accused killing the deceased.

3.9 In the *Manioru* case the incident which gave rise to the fight was that the Accused who had consumed alcohol, punched the front of a truck. The Deceased then questioned the Accused as to his action. The Accused got angry and swore at the Deceased. The Accused then moved towards the Deceased and swung a knife six times at the Deceased. Though the Deceased missed these swings, the Accused remained standing on his feet. The Accused's brother intervened to stop the Accused from attacking the Deceased but his brother was unsuccessful and the Accused managed to step around his brother and stabbed the Deceased which resulted in his death.

[38] *Penal Code* [Cap 26] 1963 (SI) s 236.
[39] *Ibid*, s 4.
[40] *Ibid*, s 199.
[41] *Ibid*, ss 210-214.
[42] Mark Findlay, 'Criminal Laws of the South Pacific', Institution of Justice and Applied Legal Science, Fiji, 104.
[43] *Regina v Manioru* [2011] SBHC 122.
[44] *Regina v Oma* [2011] SBHC 72.

3.10 In *Oma,* the Accused who was the brother of the Deceased was also under the influence of alcohol. The Accused asked the Deceased why the Deceased had not attended a proposed family meeting, this lead to an argument in which the Accused swore at the Deceased. The Accused who had a knife then challenged the deceased to a fight. The accused also kicked a piece of iron sheet which was lying close to where the Deceased's wife sat. These made the Deceased angry so he threw a torch at the Accused's head. The Deceased moved towards the Accused in the dark and a brief fight took place. During that fight the Accused stabbed the Deceased with the knife at the Deceased's upper quadrant of his abdomen, which caused the Deceased death.

3.11 The two cases illustrate how the court weighs the culpability of murder and manslaughter. Though the line between murder and manslaughter is sometimes not clear, murder is the most serious offence that applies where someone causes the death of another and is committed where someone kills with malice aforethought.[45]

3.12 Manslaughter is a lesser offence that applies where a killing does not amount to murder but the death is caused by some unlawful act, such as assault, or negligent failure to fulfill a legal duty to preserve life and health.[46] Therefore, the primary differences between the two offences are the fault, or moral blameworthiness of the accused, and as a result the penalty for murder is more severe.

UNLAWFUL ACT MANSLAUGHTER

3.13 Unlawful act manslaughter applies where a killing does not amount to murder but death is caused by an unlawful act that is likely to do harm to the person, and death results which was not a foreseen, nor intended consequence of the act.

3.14 For instance, in *Regina v Taganepari,*[47] the Accused slapped the Deceased, then grabbed the Deceased's shirt and pushed the Deceased to the ground. The Accused subsequently kicked the Deceased's abdomen but did not intend to kill. However, as a result of the kick, the Deceased died the next day. The post mortem revealed that the Deceased's spleen had ruptured which caused a blood collection in the abdominal area. The Accused was convicted for manslaughter and was sentenced to three years imprisonment.

[45] *Penal Code* [Cap 26] 1963 (SI) s200.
[46] *Ibid,* s 199.
[47] *Regina v Taganepari* [2011] SBHC 80; HCSI-CRC 33 of 2010 (23 August 2011).

3.15 It is unclear whether the unlawful act manslaughter is limited to an unlawful act which carries a risk of causing some injury as is the case under English Law. Under English law a death caused by a relatively minor assault where there was no risk of causing some injury would not be manslaughter. It is arguable that the English position applies here because of the rules of interpretation in the Penal Code.[48]

NEGLIGENT MANSLAUGHTER

3.16 Negligent manslaughter applies where a killing does not amount to murder but death is caused by negligent failure to fulfill a legal duty to preserve life and health. In this situation the accused does not intend to cause death or bodily harm to the victim. The level of negligence required is culpable negligence.[49] The Penal Code does not define culpable negligence in relation to manslaughter, but does set out where someone has a duty in relation to life and health.[50] The following classes of people have this duty:

1. A person who has responsibility for caring for another person who is old, sick, mentally ill, or in detention (for example prison) who cannot provide for him or herself, must provide the other person with the necessities of life;

2. The head of a family has a duty to provide the necessities of life for children under the age of 15 years;

3. Employers who are required to provide food, clothing or lodging for servants or apprentices under the age of 15 years;

4. A person who does something that is or may be dangerous to human life or health must use reasonable skill and care; and

5. A person who is in charge of a dangerous thing (eg. a pot of boiling water) that may endanger the life, health or safety of someone, must use reasonable care and take reasonable precautions to avoid danger.

3.17 The above duties can be categorised into two types. The first category (1, 2, 3) imposes a duty where there is a special relationship between two people so that one person owes a duty to provide the necessities of life to the other. The second category (4, 5) provides for particular duties in relation to dangerous conduct. Therefore, negligence manslaughter is limited by the narrow categories where a duty is imposed by the Penal Code.

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[48] See *Penal Code* [Cap 26] 1963 (SI) s 3. This Code shall be interpreted in accordance with the Interpretation and General Provisions Act [Cap 85] and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

[49] *Penal Code* [Cap 26] 1963 (SI) s199.

[50] *Ibid*, ss210-2014.

3.18 In *Regina v Maeni*[51], the Accused was charged with the offence of manslaughter under section 199 of the Penal Code, the accused pleaded guilty to unlawful killing, manslaughter. The Court held that the unlawfulness in the offence of manslaughter is negligence in the act that causes death and the doing an act or omission that involves a high risk of causing death or grievous bodily harm.[52] The Accused in this case had no intention to kill the deceased, but he was culpable negligent to the degree of criminal responsibility. During an operation to arrest Ishmael Panda (Deceased), Joseph Sangu, Harold Keke, Henry Rokomane and Victor Tadukusu, the accused fired his 303 rifle, which resulted in the death of the deceased.[53] The Court held that with or without authorisation from the Provincial Police commander, Constable Meani, like those others on the search party, had a duty of care to preserve life in as far as possible while carrying out the duty to arrest the escapees. They were not to shoot at the escapees if it was possible to arrest the escapees without shooting. The Accused was sentenced to 1 year imprisonment.[54]

3.19 Consultation by the SILRC in Honiara has suggested that the duty to preserve life should be broadened to cover people who have immediate responsibility for care of children (to include for example house girl, or baby sitter who is caring for child). This is important because it sends a message to the community about the responsibility involved in taking care of children.[55]

QUESTION 3.0.1

Should unlawful and negligent manslaughter be limited to unlawful/criminal acts intended to cause injury?

QUESTION 3.0.2

Should unlawful and negligent manslaughter extend to unlawful/criminal acts committed in the awareness that it involves a serious risk of causing some injury?

QUESTION 3.0.3

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

QUESTION 3.0.4

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

[51] In *Regina v Maeni* [1991] SBHC 115;HC-CRC 117 OF 1999(2 December 1991).

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid*.

[55] Consultation with Legal Staff – Public Solicitor's Office (17th July 2009).

QUESTION 3.0.5

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

REFORMS OF MANSLAUGHTER

3.20 Under the Common Law manslaughter consists of various categories and is quite broad because it does not require proof that the accused was aware of risk or serious harm, or should have been aware of a risk of death or serious harm.[56] It is sufficient to prove that the accused was aware of a risk of causing some injury.

3.21 The United Kingdom Law Commission considered to what extent a person should be criminally responsible for unintentional death, including whether a person should be criminally liable for a death that he or she did not avert or foresee.

3.22 They concluded that liability for unintentional death should apply where a person:

1. Unreasonably and advertently takes a risk of causing death or serious injury; or

2. Unreasonably and inadvertently takes a risk of causing death or serious injury where the failure to advert is culpable because the risk is obviously foreseeable and the person has the capacity to advert to the risk.

3.23 Advertently equates to foreseeing the consequences of conduct. In the first situation, there is criminal liability because the person foresees the risk of death or serious injury, but takes the risk anyway. In the second situation the person does not foresee the risk of death or serious injury, but is criminally liable because the risk was obvious and a reasonable person had the capacity to foresee the risk. A person does not have the capacity to foresee risk (depending on the nature of the risk) if he or she is immature (a child), or has an intellectual disability.

[56] Model Criminal Code Officers Committee of the Standing Committee of Attorneys- General, 'Fatal Offence Against the Person', Discussion Paper (June 1998), 67.

3.24 The United Kingdom Law Commission recommended two offences to replace the existing law on manslaughter – namely, reckless manslaughter and gross manslaughter. The MCCOC also recommended two following offences – manslaughter and dangerous conduct causing death:

> Manslaughter
>
> A person
>
> (a) whose conduct causes death of another person and
>
> (b) intents to cause or is reckless about causing serious harm is guilty of an offence.
>
> Dangerous conduct causing death
>
> A person
>
> (a) whose conduct cause death of another person and
>
> (b) who is negligent about causing the death of that or any other person is guilty of an offence. [57]

3.25 Both carry maximum penalty of 25 years imprisonment. MCCOC also recommended a definition of negligence (modeled on Australian common law definition of gross negligence) in *Nydam v The Queen*:

> that there must have been; such great falling short of the standard of care which a reasonable person would have exercised and which involves such a high risk that death or grievous harm might follow that the doing of the act merited criminal punishment.[58]

[57]Model Criminal Code Officers Committee of the Standing Committee of Attorneys- General, 'Fatal Offence Against the Person', Discussion Paper (June 1998),[5.1.10-5.1.11] 156.
[58]*Nydam v The Queen* [1977] VR 430 at 445, approved in *The Queen v Lavender* (2005) 222 CLR 67 at [136].

CHAPTER 4: OTHER HOMICIDE OFFENCES

SUICIDE

4.1 Suicide is the act of taking one's own life on purpose. According to the World Health Organization, suicide is defined as 'an act deliberately initiated and performed by a person in the full knowledge or expectation of its fatal outcome'.[59] In Solomon Islands, it is not an offence to commit suicide, or to attempt to commit suicide, but it is an offence to assist someone to commit suicide or attempt to commit suicide, and this is provided in the *Penal Code*[Cap 26] section 219 which states;

> Any person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, is guilty of a felony, and shall he liable to imprisonment for fourteen years.
>
> If on the trial of an information for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, he may be found guilty of that offence.[60]

4.2 Under this provision, it becomes an offence when someone is assisting another person to either commit suicide or attempt to commit suicide. Currently there is no reported case on assisting or attempting to commit suicide in Solomon Islands.

4.3 In all Australian jurisdictions, the law on suicide is the same as in Solomon Islands where it is not an offence to commit suicide and also, with exception of the Northern Territory, it is not an offence to attempt suicide in Australia.[61] However the penalty is different. In Solomon Islands the penalty for assisting and abating someone to either commit or attempt to commit suicide is 14 years, whilst in all Australian jurisdictions expect New South Wales no differentiation is made between the sentencing for assisting and encouraging suicide.[62]

4.4 In New South Wales a person aiding or abetting suicide is liable to 10 years imprisonment,[63] whereas one who incites or counsels suicide is punishable by a maximum of 5 years imprisonment.[64]

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[59] Organization for Economic Co-Operation and Development (OECD), 'Health at a glance 2009: OECD indicators', Suicide, http://www.oecd.org/els/health-systems/health-at-a-glance.htm, (Accessed 20/06/2014).

[60] *Penal Code* [Cap 26] 1963 (SI) s 219

[61] *Criminal Code,* Northern Territory s 169.

[62] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5- Fatal offences against a person, Discussion paper* (1998) 181.

[63] New South Wales *Crimes Act 1900* (NSW) s 31C(1).

4.5 The MCCOC has taken the view that the offence of assisting suicide ought to attract a greater maximum penalty than encouraging suicide.[65] The Committee suggests 7 years and 5 years respective.[66]

QUESTION 4.1.1

Does the penalty adequate for the offence of assisting suicide or attempt suicide?

QUESTION 4.1.2

Should we retain the penalty for attempt suicide or have separate penalties for assisting and encouraging respectively?

INFANTICIDE

4.6 Infanticide describes a particular kind of child killing and is set out in section 206 of the *Penal Code* [Cap 26] that:

> Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of felony, to wit, infanticide, and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child.[67]

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[64] New South Wales *Crimes Act 1900* (NSW) s31C (2). The Australian Capital Territory legislation also contains separate provisions for aiding and abetting (s17(1)) and inciting or counselling (s17(2)) suicide, although both are punishable by 10 years imprisonment.

[65] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5- Fatal offences against a person, Discussion paper*, June 1998.p181, http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/mcloc_mcc_chapter_5_fatal_offences_discussion_paper.pdf.(Accessed on 26th June 2014)

[66] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5- Fatal offences against a person, Discussion paper*, June 1998.p181

[67] *Penal Code* [Cap 26] 1963 (SI) s 206.

4.7 Unlike other homicide offences, infanticide is both an offence, and an alternative verdict to murder. In practice it has been treated as a partial defence which means that the prosecution can charge a woman with infanticide, and a woman who has been charged with murder can raise infanticide in her defence at trial.[68] The penalty for the offence of infanticide is the same as for manslaughter, life imprisonment.[69]

4.8 Infanticide as it is defined in the Penal Code has a biological basis. The provision operates so that a woman who would otherwise be guilty of murder of a child up to the age of 12 months can be found guilty of another offence called infanticide. A woman can be found guilty of killing infanticide if her mind was disturbed at the time of killing as a result of giving birth or breastfeeding.[70] An analysis of the Penal Code for compliance with CEDAW recommended that infanticide should be an alternative to murder where a woman is affected by environmental, social and biological stresses.[71]

4.9 The basis for infanticide is very limited given that in the Penal Code it is restricted to the biological basis. However, case law in Solomon Islands in relation to infanticide has determined that socio-economic grounds maybe taken into account to determine whether the mind of the accused was disturbed.[72] In *Regina v Emmanuel*,[73] a Form 6 student was convicted for infanticide. The Accused suffocated her newly born child because she feared that she would be expelled from school, that she would have an illegitimate child and that when her parents noticed her pregnancy there would have severe consequences.[74]

4.10 Consultation by the SILRC indicates that the offence of infanticide in the Penal Code allows the law to recognise the reduced culpability or moral blameworthiness of a mother who kills a child as a result of extreme poverty, social pressures or mental health problems following the birth of a child.[75]

[68] See Victorian Law Reform Commission, *Defences to Homicide Final Report* (2004) [6.4] 253.
[69] *Penal Code* [Cap 26] 1963(SI) s 206.
[70] *Ibid.*
[71] UNIFEM, UNDP, Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries (2007).
[72] *Ibid.*
[73] *Regina v Emmanuel* [2010] SBHC 21; HCSI-CRC 339 of 2007 (14 May 2010)
[74] *Ibid.*
[75] Solomon Islands Law Reform Commission, '*Review of Penal Code and Criminal Procedure Code*', Issue paper1, (2008), 56.

4.11 There are criticisms against infanticide provisions in other jurisdictions.[76] Certain law reform commissions have made recommendations to abolish infanticide on the grounds of uncertain medical foundation, the fact that it is discriminatory in nature and it erroneously links women's biology to criminal responsibility.[77] However, an argument in support of the need to retain infanticide being its purpose in that 'it enables special and sympathetic treatment for women unable to cope with onerous and unalleviated nature of the responsibility of caring for infants.'[78]

QUESTION 4.2.1

Should infanticide be retained or abolished?

QUESTION 4.2.2

If infanticide were retained, whether it should be reformed.

QUESTION 4.2.3

Should the connection between childbirth, lactation and disturbance of mind be removed?

QUESTION 4.2.4

Should the age limit for infanticide be extended to 2 years?

QUESTION 4.2.5

Should we allow killing of deformed child to avoid child suffering?

QUESTION 4.2.6

Is the penalty for Infanticide adequate for the offence?

[76] See Simon Bronitt and Bernadette McSherry 'The abolition of infanticide' *Principles of Criminal Law* (2nd ed, 2005) 296.
[77] *Ibid.*
[78] *Ibid.*

CAUSING DEATH BY RECKLESS AND DANGEROUS DRIVING

4.12 The elements of the offence of causing death by reckless or dangerous driving, which must be proved by the prosecution, are:

> (a) that the accused was driving a motor vehicle;
>
> (b) that the accused was driving in a dangerous or reckless manner; and
>
> (b) that the motor vehicle was involved in an accident which caused the death of another.
>
> The maximum penalty for a person convicted of causing death by reckless or dangerous driving is five years imprisonment.[79]

4.13 In *Regina v Kaukui*,[80] among other charges, the Accused was charged and convicted of causing death by recklessly or dangerous driving contrary to section 38 of the *Traffic Act*.[81] In this case the Accused was drunk when he drove a car which hit a concrete flowerbed then continued along a footpath and hit the Deceased and another girl. The Crown's case was that the manner in which the Accused drove the car was dangerous because he had been drinking, he had not slept that night and had continued to drive while tired, and that he was driving at an unsafe speed. He was sentenced to 18 months suspended for two years. The sentence was appealed and the Accused was sentenced to three years imprisonment in lieu of the sentence imposed on that count on 10 July 2009.[82]

4.14 In *Regina v Matamu,*[83] the Accused was charged with causing death by reckless or dangerous driving contrary to section 38 of the Traffic Act.[84] In this case the Accused consumed alcohol and then drove at an excessive speed that was higher than the speed that vehicles usually travel when driving on the roads. He did not travel in the proper lane and was zigzagging across the lanes. The car then rolled three times and struck the Deceased. The Accused pleaded guilty and was sentenced to three years imprisonment for dangerous driving.

4.15 The two cases illustrate similar features involving alcohol and driving at an excessive speed resulting in the death of the diseased. Also both cases attract similar sentences of 3 years imprisonment. In M*atamu,* the Court held that the tariff sentence imposed have taken into account the principle of deterrence which is important in cases of dangerous driving because it is directed to all people that drive motor vehicles. This can be differentiated from other offences where deterrence is only directed to minority

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[79] *Solomon Islands Traffic Act* [Cap 131] s 38.
[80] *Regina v Kaukui* [2010] SBCA 2; CA-CRAC 11 of 2009 (26 March 2010).
[81] *Solomon Islands Traffic Act* [Cap 131] s 38.
[82] *Regina v Kaukui* [2010] SBCA 2; CA-CRAC 11 of 2009 (26 March 2010).
[83] *Regina v Matamu* [2010] SBHC 33; HCSI-CRC 78 of 2010 (21 May 2010).
[84] *Solomon Islands Traffic Act* [131] s 38.

of like minded persons who might contemplate committing the offences such as robbery or sexual offences.[85] In Solomon Islands the maximum penalty for dangerous driving causing death is 5 years imprisonment.[86] However, most decided cases so far attract a range of sentence between 3-4 year imprisonments.[87]

4.16 By comparison to Australian jurisdictions, New South Wales the maximum penalty for dangerous driving is 10 years imprisonment and a maximum of 14 years for aggravated dangerous driving causing death.[88] In the Australian Capital Territory the maximum penalty for causing death by culpable driving is 7 years and 9 years imprisonment maximum for circumstances of aggravation.[89] Northern Territory the maximum penalty for dangerous driving causing death is 10 years imprisonment.[90]In South Australia the maximum penalty for dangerous driving causing death or serious harm by culpable driving is 15 years imprisonment and in stances where the offence is aggravated or is a subsequent offence the maximum is life imprisonment.[91] In Victoria the maximum penalty is 20 years imprisonment for culpable driving causing death.

QUESTION 4.3.1

Is the sentence for causing death by reckless or dangerous driving adequate to the offence?

QUESTION 4.3.2

Should we have separate offences for causing death by reckless driving, and causing death by dangerous driving?

[85] *Regina v Matamu* [2010] SBHC 33; HCSI-CRC 78 of 2010 (21 May 2010).
[86] *Solomon Islands Traffic Act* [Cap 131] s 38.
[87] *Regina v Matamu* [2010] SBHC 33; HCSI-CRC 78 of 2010 (21 May 2010). Counsel for Crown submits that the appropriate Sentence range for offence of this type is in *R -v- Kaukui,* in which the Court of Appeal held that a sentence of 3-4 years imprisonment was appropriate.
[88] *Crimes Act 1900* (NSW) s 52A(1)–(2). The Commission notes that in New South Wales the maximum penalty for dangerous driving causing grievous bodily harm is less than for dangerous driving causing death. For dangerous driving causing grievous bodily harm the maximum penalty is seven years' imprisonment and for aggravated dangerous driving causing grievous bodily harm the maximum penalty is 11 years' imprisonment: see Crimes Act 1900 (NSW) s 52A(3)–(4).
[89] *Crimes Act 1900* (ACT) s 29. The maximum penalty for culpable driving causing grievous bodily harm is four years' imprisonment and five years' imprisonment if committed in circumstances of aggravation.
[90] *Criminal Code* (NT) s 174F (1). This provision was introduced in December 2006.
[91] *Criminal Law Consolidation Act 1935* (SA) s 19A. In Queensland the offence of 'dangerous operation of a vehicle' where death or grievous bodily harm is caused has a maximum penalty of seven years' imprisonment. If the accused is significantly over the legal limit of blood alcohol the maximum penalty is increased to 14 years' imprisonment: see Criminal Code (Qld) s 328A. I n Tasmania the maximum penalty f or causing death or grievous bodily harm by dangerous driving is 21 y ears' imprisonment: see Criminal Code (Tas) ss 167A–B. Section 389(3) of the Tasmanian Code provides that the maximum penalty f or any crime is 21 y ears' imprisonment or a fine unless the section creating the offence specifies a different penalty. For the offences of causing death or grievous bodily harm by dangerous driving there is no penalty set out in the section.

QUESTION 4.3.3

Should the penalty for causing death by reckless driving be higher than the penalty for causing death by dangerous driving?

QUESTION 4.3.4

Should we have a separate penalty for causing death by dangerous driving for instances where there are aggravating circumstances?

CHAPTER 5: PARTIAL DEFENCES

5.1 Partial defences are only available for homicide offences and, if proven reduce the culpability of the accused from being guilty of murder to manslaughter. The basis for this is that:

> [h]istorically, the rationale... was to avoid the mandatory sentence for murder (formerly capital punishment, and subsequently life imprisonment) in cases with mitigating circumstances.[92]

5.2 The Penal Code has the following partial defences:

- provocation;[93]
- excessive self defence;[94]
- diminished responsibility;[95] and
- legal duty to cause the death or do the act which causes the death.[96]

[92]Law Commission (New Zealand), *The Partial Defence of Provocation Report 98* (2007) 14.
[93] *Penal Code* [Cap 26] 1963 (SI) s205.
[94] *Ibid,* s 204 (b).
[95] *Ibid,* s 205.
[96]*Ibid,* s 204(c).

PROVOCATION

5.3 Provocation is conduct by way of words or acts by a deceased, which causes an accused to lose self-control and form an intention to kill or cause grievous bodily harm.[97] The *Penal Code* [Cap 26] in section 205 provides:

> Where on a charge of murder there is evidence on which the court can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be determined by the court; and in determining that question there shall be taken into account everything both done and said according to the effect which it would have on a reasonable man.[98]

5.4 The test for provocation is whether the accused was provoked so as to lose his self-control, and whether a reasonable person in the position of the accused would react in the manner in which the Accused did.[99] Once the defence of provocation is raised, it is for the prosecution to exclude that defence beyond reasonable doubt.[100] In *Regina v Orinasikwa,*[101] the Accused was charged with murder. The Accused admitted that he killed the Deceased but raised the defence of provocation. The Accused argued that he was provoked because he was with other relatives at the burial of his uncle whom the Deceased had killed earlier; when the Deceased threatened and made provocative shouts he formed the intention to kill the Deceased. His intention was formed in a sudden passion involving loss of self-control by reason of provocation. The judge stated that:

> [T]he position ... in Solomon Islands [is that the] defence of provocation is still available to an accused person where he intends to kill or cause grievous bodily harm but his intention to do so is the result of sudden-passion causing him to lose his self-control by reason of provocation.[102]

The defence of provocation was successful and consequently, the Court convicted the Accused of manslaughter.

5.5 The loss of self-control must be of a sudden nature. This means that provocation is unavailable where an accused acted in considered desire for revenge. For example in

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[97] *Penal Code* [Cap 26] 1963 (SI) s205.
[98] *Ibid,* s 205.
[99] *Ibid,* s205.
[100] *Regina v Orinasikwa* [1999] SBHC 28; HC-CRC 018 of 1998 (24 March 1999).
[101] *Ibid.*
[102] *Ibid.*

Regina v Maelonga,[103] there were three Accused, the 2nd and 3rd Accused, and the Deceased were blood bothers. The 3rd Accused was the first born, then the Deceased and then the 2nd Accused. The 1st Accused is the son of 3rd Accused and nephew of the Deceased. In this case, the Deceased had sexual intercourse with the 3rd Accused's daughter. After three years the issue of the Deceased conduct was unsolved despite insistence by the Accused that the Deceased needed to compensate them. The Deceased's reluctance led to the Accused to kill the Deceased. This is an example where considered desire for revenge takes place in a society in which some of its members continues to practice traditional belief systems. The requirement under common law that provocation be of a sudden nature, meant that the defence did not advance provocation in this case as there was no element of suddenness, rather the Accused waited 3 years to carry out the killing.

5.6 Consultation by the SILRC with the legal staff of the Public Solicitor's Office (PSO) revealed that provocation is very difficult to prove and should be retained in Solomon Islands.[104] In certain comparable jurisdictions the partial defence of provocation has been abolished. In Tasmania, Australia, the Minister of Justice stated that provocation is abolished on the following grounds:

- People who rely on provocation intend to kill. An intention to kill is murder.
- Provocation can be adequately considered as a factor during sentencing.
- Provocation can be subject to abuse.
- Provocation is gender biased and unjust.[105]

5.7 The Victorian Attorney-General in the Second Reading Speech of the Crimes (Homicide) Bill 2005 also stated that the partial defence of provocation is outdated and can be taken into account in the sentencing process.[106] In New Zealand, its Law Commission recommended that provocation be repealed.[107] It recommended that provocation 'should be weighted with other aggregating and mitigating factors as part of the sentencing exercise.'[108] It also recommended that a sentencing guideline be developed in the event that the partial defences of provocation were repealed, to cover the relevance of provocation and other mitigating circumstances that might justify rebuttal of the presumptive life sentence for murder.[109]

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[103] *Regina v Maelonga* [2012] SBHC 35; HCSI-CRC 247 of 2010, 462 of 2010, 171 of 2010 (24 April 2012).
[104] SILRC consultation with the Public Solicitor's Office, Honiara (2009).
[105] Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas).
[106] See Australian Law Reform Commission, *Family Violence – A National Legal Response*, Final Report Volume 1 (October 2010) [14.43] http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf.
[107] See Queensland Law Reform Commission, '*Provocation in other jurisdiction' A review of the excuse of accident and the defence of provocation Report No. 64* (2008) 283 – 288, 290.
[108] Law Reform Commission (New Zealand) *The Partial Defence of Provocation*, Report No 98 (2007) [7] – [8].
[109] *Ibid.*

5.8 The recommendations were implemented as part of the law in New Zealand under clause 5 of the *Crimes (Provocation Repeal) Amendment Act 2009* of New Zealand and it states that, 'the partial defence of provocation in cases of culpable homicide in so far as it has any effect as a rule or principle of Common Law in New Zealand is abolished.'[110] In Victoria provocation has been abolished. The Victorian Law Reform recommended that it be abolished and highlighted the following issues with the provocation laws that justified its abolishment:

- a loss of self control is an inappropriate basis for partial defence-people should be able to control their impulses even when angry;
- provocation is gender biased in that it is a defence used by men to excuse anger and violence directed towards women;
- provocation promotes a culture of blaming the victim;
- provocation privileges a loss of self-control as a basis for a defence;
- provocation is an anomaly – it is not a defence to any crime other than murder; and
- provocation is an anachronism - as we no longer have mandatory sentence for murder, provocation should be taken into account at sentencing as it is for all other offences.[111]

5.9 Despite criticisms on the partial defence of provocation, below are some reasons for retaining provocation. The Victorian Law Reform Commission highlighted the following potential reasons that supported the retention of provocation:

- Important half way house;
- Safety net for women killing violent partners;
- Abolishing provocation would result in increased sentences and uncertainty;
- Abolishing provocation would increase community dissatisfaction with sentencing.[112]

5.10 In the Australian Capital Territory, New South Wales and the Northern Territory, the partial defence of provocation is maintained.[113] In New South Wales, although it maintained the defence of provocation; the defence was changed in 1982 to remove the requirement of suddenness, making it accessible to battered women.[114]The New South

[110] *Crimes (Provocation Repeal) Amendment Act 2009*, clause 5 (New Zealand).
[111] See Victorian Law Reform Commission, *Defences to Homicide Final Report* (2004) [2.14], 26.
[112] *Ibid* [2.39] – [2.52], 36.
[113] See Queensland Law Reform Commission, 'Provocation in other jurisdiction' A review of the excuse of accident and the defence of provocation Report No. 64 (2008) 280.
[114] Mitch Riley, 'Provocation: Getting Away With Murder?' (2008)(1)(1) *Queensland Law Student Review* 55, 61. Battered women describes women who suffered repeated episodes of physical assault by the person with whom she lives or with whom she has a relationship, often resulting in serious physical and psychological damage to the woman and resulted to the woman killing her husband after long periods of domestic violence. Women have

Wales Law Reform Commission in its conclusion strongly viewed that retaining the partial defence of provocation will ensure public confidence in the administration of criminal justice, including confidence in sentences imposed, and maintains the proper role of both the judge and the jury.[115]

EXCESSIVE SELF-DEFENCE

5.11 This partial defence is called excessive self-defence because self-defence or defence to another person's act is a complete defence to murder. The *Penal Code* [Cap 26] in section 204 (b) provides:

> Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if …
>
> (*b*) ...he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control.[116]

5.12 Under this provision the accused must be justified in causing some harm to the victim, and have lost self-control because of a fear of being immediately killed or seriously injured.[117] In *Regina v Ome*,[118] the proceedings came before the Court of Appeal by way of a purported appeal by the Crown against the acquittal of Peter Ome (the Appellant) on a charge of murder; he was acquitted by the High Court of the Solomon Islands and convicted of manslaughter. The Appellant counter appealed against his conviction of manslaughter claiming that the learned judge erred in not acquitting him of all charges on the ground of self defence.[119] The Applicant after a prolonged drinking session, carrying a tobacco knife began to chase a girl whose fiancé and fiancé's brother, the Deceased, sought revenge for this insult. A fight ensued, in the course of which the Deceased chased the Appellant who stopped and seeing his pursuer began to run

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two issues when trying to establish provocation: firstly, proving suddenness, and secondly, proving loss of self-control, as in over one third of husband killings, the husband was asleep at the time. Women typically kill husbands after years of abuse. Often, they have tried to leave the relationship, but have been unable to for fear of further violence, financial and emotional dependence, lack of emergency services and concern for their children. Furthermore, at the time of killing, many women appear calm and in control – their act is a rational, calculated one.

[115] See New South Wales Law Reform Commission, *Partial Defence to murder: Provocation and Infanticide*. Report No.83, (1997) [2.38] 27.

[116] *Penal Code* [Cap 26] 1963 (SI) s 204(b).

[117] *Ibid,* s 204(b).

[118] *Regina v Ome* [1980] SBFJCA 3; [1980-1981] SILR 27 (27 June 1980).

[119] *Ibid.*

away again but in so doing swung his arm back and holding the knife in the hand of that arm inflicted the wound from which the deceased died.[120]

5.13 The Applicant then relied on section 197(b) of the *Penal Code* (now s204 (b) of Revised *Penal Code* [Cap26]) and claimed self- defence despite the fact that the force was excessive. The Court of Appeal held that the test of whether the act done in self-defence was excessive was a mixture of subjective and objective assessment.[121] It considered whether the trial judge, in his interpretation of ss197 and 198 of the *Penal Code* (now ss 204 & 205 of *Penal Code* [Cap 26]) was correct not to find a complete defence of self-defence where excessive force was apparent or in question but where self-defense was accepted by him to reduce the charge of murder to manslaughter.[122] The trial judge was of the opinion that in these facts the use of the knife was an unreasonable use of force and while recognising the test as an objective one 'was trying to arrive at whether the subjective state of mind of the appellant could be taken as sufficient evidence of the objective reasonableness of his actions.'[123]

5.14 In consideration of "matters of extenuation" expressed in section 197(a) of the *Penal Code* (now s204 of *Penal Code*[Cap 26]) upon which the learned judge ultimately relied and which appears to offer the partial defence in subsection (b).[124] The Court of Appeal held that the judge complied with the law by taking the subjective element into consideration and therefore, dismissed the appeal.[125]

5.15 By comparison, the reintroduction of excessive self-defence has been recommended by a number of law reform bodies and has occurred in both New South Wales[126] and South Australia.[127] One of the reasons for the reintroduction of the excessive self-defence is that it can play an important role in providing a 'halfway house' for cases where self-defence is not successful, but where manslaughter is the more appropriate

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[120] *Regina v Ome* [1980] SBFJCA 3; [1980-1981] SILR 27 (27 June 1980).
[121] *Ibid.*
[122] *Regina v Ome* [1980] SBFJCA 3; [1980-1981] SILR 27 (27 June 1980).
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] See for example, House of Lords, Report of the Select Committee on Murder and Life Imprisonment (1989), para 89; Criminal Law Revision Committee, Offences Against the Person Report No 14 (1980). Compare with the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, Model Criminal Code, Chapter 5, Fatal Offences Against the Person Discussion Paper (1998), 107–113; and Gibbs Committee, Review of the Commonwealth Criminal Law (Third) Interim Report on Principles of Criminal Responsibility and Other Matters (1990).
[127] *Criminal Law Consolidation Act 1935* (SA) s 15(2), which provides:
It is a partial defence to a charge of murder (reducing the offence to manslaughter) if:
(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but
(b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

outcome than murder.[128] No matter how remote the possibility, there may be circumstances in which a person may honestly believe his or her actions are necessary to protect himself or herself against serious injury, but where his or her response is grossly unreasonable in the circumstances.[129] A person who has an honest belief in the need to defend himself or herself, but is mistaken about the level of force required to counter the threat, should be considered morally less culpable than others who kill intentionally.[130] In some Australian states and United Kingdom, this concept that a person can be excused of murder but convicted of manslaughter due to excessive force used in defence no longer exists. One of the reasons against the reintroduction of excessive self-defence is that it may prevent women from being acquitted on the basis of self-defence, due to the existence of an 'easy' middle option.[131]

5.16 Also many women who kill in response to family violence often use weapons against their unarmed partners and a jury, presented with the option of returning a verdict of manslaughter on the basis of excessive self-defence, may therefore simply accept that such a killing was unreasonable and disproportionate, instead of properly considering the reasonableness of her actions in the circumstances.[132] Hence, there is fear that excessive self-defence will effectively become a defence for women who kill in response to family violence (resulting in manslaughter verdict) while men will continue to be able to successfully bring themselves within the scope of self-defence and acquitted of murder.[133]

5.17 Another argument against the reintroduction of excessive self-defence is that the defence has been seen as providing some accused, such as people who are excessively fearful, with a defence in circumstance where they should arguably be convicted for murder. Further, as a concept, excessive self-defence is inherently vague and has resulted in no satisfactory test being promulgated.[134]

5.18 In contrast, South Australia and New South Wales reintroduced excessive self-defence in 1991 and 2002 respectively, and it appears that it is most frequently used as a basis for a plea of manslaughter.[135] In Victoria, a new offence was introduced in 2005 in recognition of the excessive self-defence. The new offence is called the defensive homicide which is an alternative verdict to murder in circumstances where the

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[128] See Victorian Law Reform Commission, *Defences to Homicide Final Report* (2004) [3.90], 93-94.
[129] *Ibid.*
[130] *Ibid.*
[131] See Canadian Association of Elizabeth Fry Associations, Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property (1998), 31–2.
[132] See Victorian Law Reform Commission, *Defences to Homicide Final Report* (2004) [3.92] – [3.94], 94-95.
[133] *Ibid*.
[134] *Ibid.*
[135] *Ibid* [2.39] – [2.52], 36..65-96.

defendant kills a person in self-defence but does not have reasonable grounds to believe that the force used was necessary for self defence.[136]

DIMINISHED RESPONSIBILITY

5.19 Diminished responsibility is provided for under section 203 of the *Penal Code* [Cap 26] which states:

> (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.[137]

5.20 The partial defence of diminished responsibility reduces murder to manslaughter. Diminished responsibility can apply where a person has a mental impairment, disease or injury that substantially affects his or her mental responsibility.[138] Unlike the other partial defences and complete defences, the accused must prove that he or she should not be convicted of murder because of diminished responsibility and that he/she was suffering from an abnormality of the mind. The abnormality of the mind must have arisen from a specified cause and the abnormality of the mind must have substantially impaired the accused's mental responsibility for the killing.[139] As a result, this partial

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[136] Legislative council select committee on the partial defence of provocation, inquiry into the partial defence of provocation, *Defence and partial defences to Homicide*, June 2012.7.Defensive homicide was designed, in part, to protect women who kill abusive partners. It has been noted that there are concerns as to its operations. Hemming refers to recent experience indicating that it is commonly used by men, and majority were the result of guilty pleas. He suggests there is a danger that defensive homicide is provocation in a new guise.' See Hemming Andrew (2011) Reasserting the place of *objective test in criminal responsibility*: University of Notre Dame Australia Law Review, 13(1).pp.69-112.

[137] *Penal Code* [Cap 26] 1963 (SI) s 203.

[138] *Ibid*, s 203(1).

[139] See Victorian Law Reform Commission, *Defences to Homicide Final Report* (2004).Executive Summary.xxxix

defence acts as a halfway measure where a person has a mental impairment, disease or injury that affects his or her capacity to be responsible for his or her actions, but does not meet the criteria for the complete defence of insanity.

5.21 In *Regina v Haro*,[140] the Accused and the Deceased both came from Rano Village, Rendova Island, Western Province and were related to each other. The Deceased was an uncle of the Accused. On 8th August 2000 in the evening, between 8:00 pm and 11:00 pm, Solomon Abel (prosecution witness 1(PW1)), Donald Bero (prosecution witness 2 (PW2)), Jimmy Bakuru (prosecution witness 3(PW3)), Mesa Bero (Deceased) and the Accused were all at the Accused's house drinking tea and telling stories. The Accused made a cup of tea for the Deceased, and after handing him his cup of tea, the Accused grabbed the Deceased's neck and squeezed it, and then threw him down to the floor of the house. Upon seeing this PW1 and PW3 struggled with the Accused, trying to free his hands from the Deceased. They succeeded in removing the Accused's hands from the Deceased but unfortunately the Deceased died immediately as a result of the Accused's action.[141]

5.22 The Accused was then charged with murder contrary to section 200 of the *Penal Code*. He pleaded not guilty to the charge. The defence raised in this case was not that of insanity, but rather that the Accused was suffering from a mental disturbance or mental abnormality at the time he killed the Deceased.

5.23 The Court after hearing all the evidence from the witnesses and the expert evidence from Dr. Divi Ogaoga held that the law places the onus on the Defence to show on the balance of probabilities that the Accused was suffering from abnormality of the mind such that he ought not to be convicted of murder. In considering this defence the Court is entitled and indeed bound to take into account the whole of the facts and circumstances of the case, including medical evidence, the nature of the killing, and the conduct of the Accused before, during and after the incident. [142]

5.24 The burden of excluding the defence rests with the prosecution and must do so beyond reasonable doubt. The Court held that on the whole of the evidence, the prosecution was not able to completely negated the case of diminished responsibility in this case.[143] This left the Court with a doubt as to the guilt of the Accused and the Accused must be given the benefit of that doubt. The charge of murder has not been made out and the defence successfully raised the defence of diminished responsibility

[140] *Regina v Haro* [2003] SBHC 107; HC-CRC 099 of 2002 (11 June 2003.
[141] *Ibid.*
[142] *Ibid*.
[143] *Ibid*.

in this case.[144] As a result the Court found the Accused not guilty of murder, but guilty of manslaughter.

[144] *Ibid*.

LEGAL DUTY TO CAUSE DEATH OR TO DO THE ACT WHICH CAUSES DEATH

5.25 The legal duty to cause the death or do the act which causes the death is also a partial defence that can reduce intentional homicide to manslaughter.[145] This defence is provided for under section 204 (c) of the *Penal Code* [Cap 26] which states;

> Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely…
>
> (*c*) that, in causing the death he acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or to do the act which he did.[146]

5.26 This defence requires that the accused justify that in the causing of death, the accused acted in the belief in good faith, and on reasonable grounds that he was under a legal duty to cause the death, or to do an act which he did provided that the legal duty is consistent with the Constitution and any Act of Parliament.

5.27 The application of a legal duty to kill has resulted in a conflict between customary laws and the introduced laws, which has been historically limited in the realm of criminal law.[147] Introduced laws take precedence over customary law in criminal cases, though the Constitution recognises customary law as part of the laws in Solomon Islands.[148] The *Customs Recognition Act 2000*,[149] section 7 also makes reference to the application of customary laws in criminal cases only for the purpose of:

a) ascertaining the existence or otherwise of a state of mind of a person;
b) deciding the reasonableness or otherwise of an act, default or omission by a person;
c) deciding the reasonableness or otherwise of an excuse;
d) deciding, in accordance with any other law whether to proceed to the conviction of a guilty party;
e) determining the penalty (if any) to be imposed on a guilty party; or
f) taking the custom into account in order to avoid any injustice that may be done to a person.[150]

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[145] *Penal Code* [Cap 26] 1963 (SI) s 204(c).
[146] *Ibid*.
[147] Dr. Tes Newton, *The Incorporation of Customary law and principles into sentencing decisions in the south pacific*, University of the South Pacific, Vanuatu.2.
[148] Constitution (Solomon Islands) schedule 3(3).
[149] *Customs Recognition Act 2000*- The Parliament passed this Act in 2000 but is yet to come into force and use as law in Solomon Islands.
[150] *Customs Recognition Act 2000* (Solomon Islands) s 7.

5.28 The case of *Loumia v DPP,*[151] illustrated the non-recognition of customary law or customary practice that allows for payback killing. This is because such customary law is inconsistent with the Constitution (right to life) and the Penal Code (law on murder). Any law which is inconsistent with a statute law cannot be allowed to be recognised by the courts. In this case the court refused to accept the argument that according to custom the Accused had a legal duty to cause death to those who caused death to a close relative of the accused.

QUESTIONS 5.0.1

Should we retain the partial defences if the penalty for murder is reformed to life imprisonment?

QUESTIONS 5.0.2

Should we add the word "sudden" or "instance" in front of provocation?

QUESTIONS 5.0.3

If murder is reformed into categories, should the partial defences only apply to the most serious category of murder (i.e. the one that has mandatory life as the punishment)?

QUESTIONS 5.0.4

Are partial defences operating fairly in the context of Solomon Islands to excuse intentional killing in cases with mitigating circumstances that do not merit the punishment of mandatory life imprisonment?

QUESTION 5.0.5

If the mandatory life imprisonment for the offence of murder is not change. Should considerations be given to the partial defence to murder, and the extent to which local customs and values should justify a conviction for manslaughter rather than murder?

QUESTION 5.0.6

If mandatory life imprisonment did not apply to murder should the partial defences of provocation, diminished responsibility and excessive self-defence be abolished?

QUESTION 5.0.7

Is the application of partial defences to intentional killing consistent with the right to life in the constitution?

QUESTION 5.0.8

[151] *Loumia v Director of Public Prosecutions* [1986] SBCA 1; [1985-1986] SILR 158 (24 February 1986).

If mandatory life imprisonment continues to apply to murder should the partial defences for murder be changed? If so, How?

REFORMS FOR PARTIAL DEFENCES

5.29 SILRC Issues Paper 1 (2008) identified that in Australia, New Zealand and UK, partial defences have been criticised. It stated:

> the relevance of the partial defences has been questioned where mandatory life imprisonment is no longer the punishment for murder. If the offence of murder does not carry a mandatory sentence of life imprisonment a court sentencing a person to murder can impose a sentence which recognises the particular facts of a case, the characteristics of an accused, as well as the need to protect human life.[152]

5.30 The Issues Paper also highlighted that 'the partial defences have also been criticised because they are complex, excuse intentional killing and can result in unfairness.' Further, '[p]eople who have the culpability for murder might escape conviction for murder because of a partial defence, and people whose culpability falls short of murder may fall into one of the partial defences categories.'[153]

5.31 An important question the Issues Paper highlighted is 'whether the scope of partial defences operates fairly for people from diverse cultural backgrounds and for different genders.'[154]In addition, it stated:

> issues that might arise in Solomon Islands in relation to murder and partial defences are illustrated by the case of *Loumia*. The decision in the case of *Loumia* suggests consideration should be given to whether the other partial defences of provocation and diminished responsibility can apply to intentional killing because of the right to life contained in the Constitution.[155]

5.32 The Model Criminal Code Officers Committee (MCCOC)[156] has recommended that partial defences should be abolished and that the offence of murder should only apply where a person intentionally or recklessly kills, and that there should not be a mandatory penalty of life imprisonment for murder.[157]

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[152] Solomon Islands Law Reform Commission, '*Review of Penal Code and Criminal Procedure Code*', Issue Paper 1, (2008), 57.
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] A committee established by the standing committee of the Attorneys- General in 1991 to develop a national model criminal code for Australian Jurisdictions.
[157] *Ibid, 58.*

5.33 In Australian jurisdictions, Queensland Law Reform Commission is currently reviewing provocation, while Tasmania, Victoria and Western Australia have already abolished the partial defence of provocation.[158] In Western Australia provocation was recently abolished, alongside mandatory life imprisonment for the offence of murder. One of the main reasons for abolishing provocation in these jurisdictions is that a court can take provocation into account during sentencing of a person convicted of murder. Further intentional killing should only be justified in circumstances where a person honestly believes that his or her actions were necessary to protect him or herself for another from injury.[159]

[158] Queensland Law Reform Commission, *A review of the partial defence of provocation*, Discussion Paper (2008) 86-89.
[159] *Ibid*.

CHAPTER 6: SENTENCING – MANDATORY LIFE SENTENCES & PAROLE

MANDATORY LIFE SENTENCES

5.34 The issue of whether to retain or abolish mandatory life imprisonment has a substantial impact on the scope of reform for murder, as options need to be developed both for reform of murder with mandatory life imprisonment, and reform of murder without a mandatory life imprisonment.

5.35 Initial consultation by the SILRC indicated the following wide range of opinions and views in regards to mandatory life sentences:

- Mandatory life imprisonment is a hindrance to guilty pleas.[160]
- Mandatory life sentences are arbitrary and don't take into account mitigating circumstances.[161]
- People convicted for the offence of murder must be punished with no mercy which means they should not be no pardoned or given parole.[162]
- The court should be able to set minimum sentences.[163]
- Convicted murders should serve a minimum of 25 years before being considered for release.[164]
- The penalty for murder should remain at mandatory sentence of life imprisonment in order to scare and deter people from committing murder.[165]
- Exceptionally brutal murders should be executed.[166]
- Where a person intentionally kills then there should receive the capital punishment.[167]

[160] Email from Lawrence Stephen to Kate Halliday, 26 May 2008.
[161] *Ibid*.
[162] Savo Consultation (23 June 2009).
[163] SILRC Isabel Consultation – Provincial Council of Women (27 May 2009);
SILRC Rennel Consultation (22 October 2009).
[164] Mothers Union Conference 16 June 2009, Honiara.
[165] SILRC Choiseul Consultation visit (October 14, 2009);
SILRC Tulagi Consultation (November 2, 2009);
SILRC Rennel Consultation (20 October 2009);
SILRC Isabel Consultation – Provincial Council of Women (27 May 2009);
SILRC Honiara Consultation Mothers Union Conference (16 June 2009);
SILRC Savo Consultation (23 June 2009).
[166] SILRC Tulagi Consultation (November 2, 2009), Rennel Consultation (20 October 2009).
[167] SILRC Rennel Consultation (22 October 2009).

- Mandatory sentence encourages people to commit suicide die during their trial. It also discourages people from taking responsibility for their actions as accused often construct lies for the purpose of the trial, and they start to believe their own lies.[168]
- The early release of prisoners is unacceptable because people do not believe that offenders have been fully rehabilitated and this can lead to retaliation against persons pardoned.[169]
- Before the Governor General or Minister responsible for Correctional Services can release a prisoner it is important to consult with the family of the victim and ensure a customary conciliation.[170]

"MINIMUM" RECOMMENDED TERMS/SENTENCING GUIDELINES

6.1 Currently, there are no provisions for a Court that convicts a person of murder to set a minimum time that must be served before releasing a prisoner on parole. However, in *Regina v Ludawane,*[171] the Chief Justice outlined a system that allows judges to provide a recommendation as to the minimum sentences a person convicted of murder should serve. The Chief Justice sanctioned the system in response to the enactment of the *Correctional Services Act* 2007, stating as follows:

> By establishing a Parole Board, the Court is given the discretion to consider whether it may wish to make any comments regarding any minimum period of time that should be served because if it does so elect to do so those comments will be taken into account by the Parole Board.

6.2 Since *Regina v Ludawane,*[172] there have been only two other cases in which judges has provided a recommendation as to an appropriate minimum sentence, these being the cases of *Regina v Manioru*[173] and *Regina v Pati*.[174] An indication by the trial judge of a minimum term is not binding. Further, the minimum term does not change the penalty for murder. It is merely a suggestion by the judge as to what they believe would be an appropriate minimum term that a prisoner should serve before can be eligible for consideration for early release on licence.

6.3 There has been disagreement within the judiciary though as to whether such recommendations should be provided. The dissent has focused on the basis that there are no regulations authorising judges to provide a recommendation, and there is no guidance as to how to formulate these recommendations. Contrary to the Chief

[168] SILRC Consultation with Legal Staff – Public Solicitor's Office 17th July 2009.
[169] SILRC Isabel Consultation – Provincial Council of Women (27 May 2009).
[170] SILRC Temotu Consultation (5 May 2009).
[171] *Regina v Ludawane* [2010] HCSI-CRC 15/07 (Unreported).
[172] *Ibid.*
[173] *Regina v Manioru [2011]* SBHC 122; HCSI-CRC 309 of 2009 (16 September 2011).
[174] *Regina v Pati [2013]* SBHC 34; HCSI-CRC 288 of 2011 (4 April 2013).

Justice's statement in *Regina v Ludawane*, in *Regina v Sutafanabo*[175], Faukona J stated as follows:

> Whilst I respect the decision of Solomon Islands Court of Appeal on a case law [*Manioru v Regina*[176]], there is no provision in the Correctional Services Act 2009, neither any provision in the Regulations attached to it that empowers the trial Judge who convicted an accused for murder to make any such remarks or any recommendation at the judgment.

6.4 Faukona J also provided as follows in *Regina v Nguyen Van Thang*:

> Whilst interest of justice is of paramount importance and served by going through the door opened by the Court of appeal in Manioru case. Since that case there is no practice direction issued so far. Whether those directions may involve legislative amendment or inclusion is a matter that has yet to be finalised. Meantime the Court has discretionary power to pronounce before passing sentence the minimum serving sentence before a prisoner can apply for parole. However my personal view is that discretionary power of the Court cannot be exercised in a vacuum. There ought to be some legal basis for it. Having said that, I noted the door has opened, however, the discretionary power ought to be exercise practically premise on legal basis. If there should be any practice direction in place that ought to be legally based as well. [177]

6.5 Another practice through which judges have make recommendations for when a prisoner should be released, is through sealed envelopes.[178] These envelopes are provided by the judge at the time of sentencing but are sealed so that neither the prosecution nor the defence know the contents.[179] They are provided to the Parole Board or the Committee on the Prerogative of Mercy when these bodies are considering the release of a prisoner.[180] This process does not promote an open and transparent judicial system. And such a system is susceptible to corruption and misinformation. It is susceptible to corruption as it allows the judge unfettered discretion, which is subject to no oversight, accountability mechanisms and lacks any transparency. Further, the deficiency of publically available information may result in misinformation being spread as to why a certain prisoner was released but not another who had committed a similar offence under similar circumstances. Ultimately, these issues could result in public dissatisfaction with the judicial system and would undermine the judicial system.

6.6 There are no sentencing guidelines for members of the judiciary when recommending minimum sentence convicted murderers should serve prior to being eligible for parole. As no sentencing guidelines exist, judges currently have a very broad discretion and

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[175] *Regina v Sutafanabo [2012]* SBHC 48; HCSI-CRC 247of 2010, 467of 2010 & 171 of 2011 (23 May 2012).
[176] *Manioru v Regina* [2012] SBCA 1; CA-CRAC 09 &39 of 2011 (23 March 2012);
[177] *Regina v Nguyen Van Thang* [2013] SBHC 26; HCSI-CRC 150 of 2011 (27 March 2013).
[178] Meeting with Director of Public Prosecutions, 6 May 2014.
[179] *Ibid*.
[180] *Ibid*.

rely on precedent when recommending minimum periods before a prisoner is eligible for parole. Such a broad discretion could lead to the accused in similar cases being given significantly different recommendations as to when they may be eligible for parole. This contradicts the essential elements to the judicial system namely consistency, fairness and justice. Since *Regina v Ludawane* there have only been two other cases in which a judge has recommended a minimum term.[181] The minimum terms have varied significantly. The following is an excerpt as to the killing in *Regina v Ludawane*:

> [punching] him on the face with a closed fist, hitting him on his back with a sago palm branch, holding him upside down by his ankles and hitting his head against a stone… [and, pushing] him down the ladder of your house causing him to fall heavily and hit his head on the cement floor at the bottom… [you] then tied his hands together across a beam support, had him suspended from the ground and beat him again on the backside and below his neck with a solid mangrove stick.

6.7 The following mitigating circumstances were provided by the judge, the accused during the trial (after having plead not guilty) changed his plea to guilty demonstrating remorse; he had no previous convictions; a supportive family with prospect of reform; an intention to commit grievous bodily harm; lack of preplanning; there was an element of provocation in that the child had stolen a watermelon; and the offender was 30 years of age. Aggravating factors included, the age of the victim; the element of mental and physical suffering the child would have endured before death; and the position of trust of the offender. The judge recommended a minimum sentence of "8 years or even earlier".[182]

6.8 In *Regina v Manioru,*[183] the offender was given a recommended minimum term of 10 years. The offender, who was intoxicated, had taken a knife from a store owner and proceeded to punch a truck. The victim asked the offender what he was doing and the offender proceeded to stab the victim killing him. The mitigating factors included by the judge were that the offender was aged 27, he was poorly educated and was a product of his traditional environment and culture, murder was not pre-planned, and compensation was paid to the victim's family. The aggravating factors were the offender went looking for trouble and the victim was an innocent person.

6.9 Finally in *Regina v Pati,*[184] the offender was given a 25 year recommended minimum term. The circumstances of the case were that the Accused deliberately threw a large rock at the head of the Deceased, at very close range. The mitigating circumstances of the cases were that the Accused was 20 years old, previously of good character and the main protagonist was the Accused brother, whilst the Accused played a somewhat

[181] *Regina v Ludawane* [2010] SBHC 128; HCSI-CRC 233 of 2008 (5 October 2010).
Regina v Manioru [2011] SBHC 124; HCSI-CRC 309 of 2009 (19 October 2011).
Regina v Pati [2013] SBHC 34; HCSI-CRC 288 of 2011 (4 April 2013).
[182] *Regina v Ludawane* [2010] SBHC 128; HCSI-CRC 233 of 2008 (5 October 2010).
[183] *Regina v Manioru* [2011] SBHC 124; HCSI-CRC 309 of 2009 (19 October 2011).
[184] *Regina v Pati* [2013] SBHC 34; HCSI-CRC 288 of 2011 (4 April 2013).

lessor role. The aggravating circumstances included, the murder had an element of preplanning; actions of the offender were deliberate; the Accused could have retreated without committing further violence and his brother was never in any real danger of suffering death or grievous bodily harm; there was no offer to plead guilty; and the prisoner showed no remorse.

6.10 The recommended minimum terms of the first two cases (8 and 10 years respectively) seem to be disproportionately low to the severity of the circumstances and the crime committed. Further, these three cases indicate the significant difference that can exist where no sentencing guidelines exist for judges to rely on for providing recommended minimum sentences. Two of the minimum terms handed down are comparatively light in comparison to cases in comparable jurisdictions. For example, if you compare *Regina v Ludawane,* with the Australian and United Kingdom cases, it is evident that the recommended minimum sentence provided was very light. Examples of Australian cases involving filicide include the killing committed by Arthur Freeman, and Kely Lane. Freeman murdered his daughter by throwing her off a bridge, and was sentenced to life imprisonment with a non-parole period of 32 years.[185] Lane murdered her infant daughter she was sentenced to 18 years, with a non-parole period of 13 years and 5 months.[186] In the UK Rebecca Shuttle beat her child to death, she was sentenced to life imprisonment with a minimum tariff of 18 years.[187] Whilst these three cases facts are not synonymous and do differ from *R v Ludawane,* the sentences imposed are substantially more significant than the recommendation provided in *R v Ludawane*. Further, the average minimum parole term for murders committed in Victoria between 1990 and 2005 was 15 years and 4 months.[188] In NSW the average minimum term was 20 years in prison during the years 2009 and 2010.[189] As a result, sentencing guidelines may be beneficial for judges to ensure consistency when providing recommended minimum sentences.

6.11 In Australia, judges are required to either provide parole periods for all murder cases except the most serious, certain states have statutory requirements, in others states judges rely on case law.[190] In England Schedule 21 of the *Criminal Justice Act* 2003 provides guidelines and conditions for judges determining the minimum period before prisoners sentenced to life imprisonment are allowed to be released on

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[185] News.com.au, *Arthur Freeman sentenced to life in prison for throwing daughter Darcey off bridge,* http://www.news.com.au/national/bridge-dad-jailed-for-darcey-murder/story-e6frfkvr-1226037030533.

[186] The Telegraph, *Australian water polo player jailed for 18 years* http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/8452982/Australian-water-polo-player-jailed-for-18-years.html.

[187] The Guardian, *Rebecca Shuttleworth jailed for minimum of 18 years for son's murder*, http://www.theguardian.com/uk/2013/jun/25/rebecca-shuttleworth-jailed-son-murder.

[188]Sentence Advisory Council, *Homicide in Victoria: Offenders, Victims and Sentencing* (2007) 16.

[189]NSW Bureau of Crime Statistics and Research, *Sentencing for homicide and related offences* (4 April 2012) http://www.bocsar.nsw.gov.au/bocsar/bocsar_mr_bb76.html.

[190] Richard Edney and Mirko Bagaric (9 August 2007) *Australian Sentencing: Principles and Practice,* Cambridge University Press, 315 – 321.

license.[191] The sentencing guidelines set out four starting points for judges when determining when a prisoner will be eligible to be released on license, these are:

1. Whole Life Order
   a) If the court considers the seriousness of the offence is exceptionally high, and the offender is aged 21 or over at the time he committed the offence, the appropriate starting point is a whole life order.
   b) Cases that would usually fall into this category are:
      i. murder of two or more persons, where the murder involves substantial premeditation, abduction of the victim or sexual or sadistic conduct;
      ii. the murder of a child if involving the abduction of the child or sexual or sadistic motivation;
      iii. a murder done for the purpose of advancing a political, religious, racial or ideological cause; or
      iv. a murder by an offender previously convicted of murder.

2. 30 Year Minimum
   a) If the case does not fall with the Whole Life Order category, but the court considers the seriousness of the offence is particularly high and the offender is aged above 18.
   b) Cases that would normally fall into this category include:
      i. The murder of a police officer or prisoner officer in the course of his/her duty;
      ii. murder involving the use of a firearm or explosive
      iii. a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death)
      iv. a murder intended to obstruct or interfere with the course of justice;
      v. a murder involving sexual or sadistic conduct;
      vi. the murder of two or more persons;
      vii. a murder that is racially or religiously aggravated or aggravated by sexual orientation; or
      viii. a murder falling within a Whole Life Order category, committed by an offender who was aged under 21 when he committed the offence.

3. 25 Year Minimum
   a) If the offence does not fall within one of the two above categories and the offender was aged 18 years or over.
   b) Cases that would normally fall into this category include:
      i. if the offender took a knife or other weapon to the scene intending to commit any offence; or
      ii. have it available to use as a weapon

      and used that knife or other weapon in committing the murder.

[191] *Criminal Justice Act* (UK) 2003.

4. 12 Year Minimum
    a) If the offender was aged under 18 when he/she committed the offence.

6.12 The judge having chosen a starting point may then make the minimum sentence more or less depending on aggravating and mitigating factors. Under the British system, the license upon which released prisoners are subjected remains in force for the remainder of the prisoners natural life (unless cancelled earlier) and he/she be recalled at any time to continue serving their life sentence if it is considered necessary to protect the public, or if they breach their license.[192]

6.13 If such guidelines were to be introduced they could also include what would be considered to be aggravating and mitigating circumstances. Possible aggravating and mitigating circumstances could include the following:

- relationship between the victim and the offender – domestic killings characterised by murderous intent *(regardless of whether provocation was successfully raised)* can be an aggravating factor;
- vulnerability of the victim - Offences committed against persons regarded as vulnerable are considered as more serious. This may reflect the exploitation of their vulnerability and the need to offer increased protection to these groups through sentencing. Common categories of vulnerable victims include infants, children, older people, pregnant women and domestic violence victims;
- alcohol or drug use;
- use of a weapon;
- criminal history;
- number of victims;
- brutality of the crime;
- length of the crime;
- gang/pack related violence;
- racial attack;
- age of the offender;
- mental health or capacity of the offender – except where the offender demonstrates a propensity and likelihood to reoffend if released;
- provocation;
- prospect of rehabilitation;
- standing in community; and
- whether customary reconciliation has taken place.

[192] *Crime (Sentencing) Act* (UK) 1997, Chapter 2, ss 31 and 32.

6.14 The practice of providing a minimum term in open court is preferable to less transparent advice given by the Committee on the Prerogative of Mercy, or through sealed envelopes. It allows for a judge to openly explain why the prisoner has been provided with the recommendation, which in turn allows for a consistent, fair and transparent method of providing a recommended minimum sentence if appropriate.

EARLY RELEASE MECHANISMS

6.15 There are two mechanisms to release a person serving a prison sentence. Under the new regulations, the Minister of Police and Correctional Services has no discretion to release a prisoner serving a mandatory life sentence, unless acting on the advice of the Parole Board. The Minister does however, have the discretion to refuse to release a prisoner whom the Parole Board has recommended be released.[193] The second mechanism operates whereby the Committee on the Prerogative of Mercy may direct the Governor General to pardon a person serving a mandatory life sentence.[194]

6.16 The Parole Board was established by the *Correctional Services Act* 2007. One of its functions is to make recommendations to the Minister of Police and Correctional Services to release on licence persons serving a life sentence.[195] The new *Correctional Services (Parole) Regulations* 2014 require the Parole Board to take nature and circumstances of the offence and the sentencing remarks made by the trial judge or Court of Appeal; and any comments and recommendations relating to release made by the sentencing judge, when deciding whether to parole a prisoner.[196]

6.17 The Parole Board had not operated after the controversial release of Jimmy Lusibaea. Lusibeae was convicted of causing grievous bodily harm and assaulting a police officer in 2010 and was sentenced to 2 years and 9 months but released by the Parole Board having served less than 2 months of his prison sentence.[197] The Solomon Islands Truth and Reconciliation Commission stated the following in relation to the relation to Lusibaea's release:

> the blatant manner in which the powers of the Parole Board were brought into play coupled with Lusibaea's poisiton as a Minister of the Crown, did

[193] Meeting with Pamela Wilde, Legal Policy Adviser to the Ministry of Justice and Legal Affairs, 1 May 2014.
Correctional Services (Parole) Regulations 2014 (SI), r 21.
[194] *The Constitution of the Solomon Islands* (1978) s 45(5).
[195] *Correctional Services Act* 2007 (SI) s 73(5)(a).
[196] *Correctional Services (Parole) Regulations* 2014 (SI) r 18(b) and r 18(j).
[197]The Australian, *Solomon Islands faces crisis as minister jailed*,
http://www.theaustralian.com.au/news/world/solomon-islands-faces-crisis-as-minister-jailed/story-e6frg6so-1225963594446.
Radio New Zealand International, *Opposition in Solomons wants release of MP Jimmy Lusibaea revoked*,
http://www.radionz.co.nz/international/pacific-news/194847/opposition-in-solomons-wants-release-of-mp-jimmy-lusibaea-revoked.

> neither the Government nor Lusibaea much credit. To outside observers, it appeared to be a serious case of "influence peddling".[198]

6.18 A new Parole Board began operating after the introduction of the *Correctional Services (Parole) Regulations* 2014 in June. These regulations were the product of extensive review and redrafting of the old regulations by the Attorney General's Chambers.[199] As the new Parole Board is only in its infancy at the time of writing this consultation paper will not comment further on the status or effectiveness of the Parole Board, but does acknowledge that this was an area in which reform was necessary.

6.19 A person serving a mandatory life can also be released by the Governor General who must act on the advice of the Committee on the Prerogative of Mercy.[200] A recommended minimum term if provided by a judge, in relation to a prisoner convicted of murder is not binding on the Committee of Prerogative of Mercy or on the Parole Board. Such recommendations should however, be essential considerations when making decisions as to the release of a prisoner.

6.20 Further, as the Governor General must act on the advice of the Committee on the Prerogative of Mercy, decisions by the Committee on the Prerogative of Mercy must be transparent and fair so as to not diminish the authority of the Governor General or subject the Governor General to controversy. The release on license of former militant commander Andrew Te'e in 2011 who was convicted of 7 murders (in 2007 and 2008) by the Governor General acting on the advice of the Committee of Prerogative Mercy underlines risks posed by a lack transparency and politicisation of the existing system.[201] The Committee refused to give reasons for the release asserting they were "confidential".[202] The Solomon Islands Truth and Reconciliation Commission Report stated as follows with regards to the release of Te'e:

> as Andrew Te'e had received seven life sentences for murder, surely the public was entitled to know what factors influenced the Commission to recommend an early pardon to the Governor-General. The justice system is undermined and public confidence in it shaken when persons convicted of heinous crimes are perceived to be treated leniently. The pardon also raises the spectre of discriminatory treatment against those who remain incarcerated at Rove who are not as well-connected as Andrew Te'e.

6.21 It is the understanding of the SILRC that no central records are held documenting which prisoners have been released by the by the Governor General acting on the advice of the Committee on the Prerogative of Mercy or by the Parole Board. As the

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[198] Solomon Islands Truth and Reconciliation Commission, *Confronting the Truth for a better Solomon Islands – Final Report* (February 2012), 329.
Law Commission (UK), *Partial Defences to Murder – Final Report* (6 August 2004), 18.

[199] Meeting with Pamela Wilde, Legal Policy Adviser to the Ministry of Justice and Legal Affairs, 1 May 2014.

[200] *The Constitution of the Solomon Islands* (1978) s 45(5).

[201] Solomon Times Online, *Andrew Te'e Receives Pardon*, http://www.solomontimes.com/news/andrew-tee-receives-pardon/6256.

[202] Solomon Islands Truth and Reconciliation Commission, *Confronting the Truth for a better Solomon Islands – Final Report* (February 2012), 329.

Parole Board has begun to operate again and release prisoners convicted of murder, such a central record system would be beneficial so that future statistics may be analysed and the operation of the Parole Board reviewed against evidence of who was released, how long they had served in prisoner, what grounds were provided by the Parole Board for release, and if a judge provided a recommended minimum sentence, how long the prisoner actually served in comparison to the recommended sentence.

6.22 The two mechanisms to release a person serving a prison sentence have not been operating transparently or in a non-political influenced manner. This has resulted in the judicial system being undermined and public confidence in that system also undermined.

Question 6.1.1

Should the judges have the power, or be required, to make a recommendation to the Parole Board and Committee for the Prerogative of Mercy regarding the minimum term the person convicted of murder must serve before being eligible for release?

Question 6.1.2

Should there be sentencing guidelines that judges must use to determine a minimum term to be served when someone is convicted for the offence of murder? What kind of sentencing guidelines? Who should make them?

Question 6.1.3

Should any recommendations in regards to Parole made by a judge be public knowledge or be provided in a sealed envelope?

Question 6.1.4

Should customary conciliation be a part of the parole process?

Question 6.1.5

Should judges have the discretion not to set minimum terms for particularly heinous homicide offences?

Question 6.1.6

Should prisoners have life time licenses which if broken result in a return to prison to serve out the remainder of their life sentence?

Question 6.1.7

What factors should be considered to be mitigating or aggravating circumstances?

Question 6.1.8

Should the system of Pardons by the Governor General be abolished?

Question 6.1.9

Should the Governor General have the capacity to refuse to accept a recommendation by the Committee on the Prerogative of Mercy?