THE SOLOMON ISLANDS LAW REFORM COMMISSION

HONIARA, SOLOMON ISLANDS

Review of the Penal Code and Criminal Procedure Code

FOURTH INTERIM REPORT

ADMINISTRATION OF JUSTICE OFFENCES

OCTOBER 2017

THE SOLOMON ISLANDS LAW REFORM COMMISSION

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Fourth Interim Report

2017

Solomon Islands Law Reform Commission

The Solomon Islands Law Reform Commission (SILRC) is a statutory body established under the Law Reform Commission Act [Cap 15]. The SILRC is headed by a Chairperson and has four part-time Commissioners who are appointed by the Minister for Justice and Legal Affairs.

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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.

The Law Reform Process

The role of the Solomon Islands Law Reform Commission (SILRC) is to review laws that are referred to it by the Minister responsible for Justice. The SILRC conducts these reviews in order to simplify the law, eliminate problems in the law, identify more effective laws, and to ensure that laws are fair and reflect the needs and desires of the people of Solomon Islands as required by the Law Reform Commission Act [Cap 15].

When it carries out a review of the law, the SILRC consults with provincial governments, government departments, institutions, civil society organisations, churches, communities and any member of the public. Through this consultation process, the SILRC educates the community about the legal issues arising from the laws under review. This allows members of the community to participate in development of government policy and law in an informed manner at their locality on government law reform references.

Law reform is a process of changing the law that requires public participation. This is to ensure that any law reform mirrors societal views and aspirations. Comments and submissions sent to the SILRC will not be confidential unless requested that the information provided be kept confidential.

The SILRC gathers information about reform of the law from a wide range of resources including prevalence of the issues on or related to the law in the Country as gathered from consultations and other resources and developments in other countries on the law under review. Any reform must also consider the Constitution of Solomon Islands and the international obligations of Solomon Islands, where appropriate.

The SILRC produces reports containing recommendations on law reform as the end products of its reform process**.**

Recommendations for changes to the law are made by the Chairperson and the part-time Commissioners, on the basis of research, consultation and submissions received by the SILRC. The recommendations do not affect the law until they are implemented by the Ministry of Justice and Legal Affairs together with other ministries where appropriate, into a Bill, and later passed the Bill in Parliament.

Acknowledgments

The SILRC would like to thank Ms Kate Halliday for undertaking research and for writing up the first draft report for this project.

The SILRC would also like to thank Justice Faukona (High Court) for his written submission on the recommendations contained in the first draft report.

Furthermore, the SILRC would like to thank the Magistrates' Court, the Public Solicitor's office (PSO), the Office of the Director of Public Prosecution (ODPP), the Royal Solomon Islands Police Force (RSIPF), the Attorney General's Chambers, the Leadership Code Commission, the Ombudsman's Office, the MJLA Legal Policy Unit, and all participants who attended the workshop organized by the SILRC on 26 March 2016, and for providing helpful information on the recommendations contained in the first draft report. These have been very useful towards the write-up and the compilation of this final report.

Special thanks also go to Ms Georgie McArthur and Stephanie for immensely assisting the SILRC to finalise this report.

Finally, but not the least, the SILRC thanks anyone who may have contributed towards this report, one way or the other, and for contributing in the law reform process in Solomon Islands.

List of Recommendations

Chapter 2: Part 1: Perjury

Recommendation 1:

The offence of perjury should be redrafted in clear simple language. It should apply to evidence:

- given on oath; and
- made in or for the purpose of legal proceedings, including proceedings that have been or may be instituted; and
- that is material in that proceeding; and
- that the person giving that evidence believes to be false, or does not believe to be true.

Recommendation 2:

The government, through the Legal Policy Unit, Ministry of Justice and Legal Affairs, should work on amending section 31(2)(c) of the Evidence Act 2009 to reflect the fact that convictions for perjury in the Solomon Islands can only occur when evidence is given on oath.

Recommendation 3:
Retain the maximum penalty of seven years imprisonment for the offence of perjury.

Chapter 2: Part 2: Inconsistent or contradictory statements

Recommendation 4:

Abolish the offence of making an inconsistent or contradictory statement in section 111 of the Penal Code.

Chapter 2: Part 2: False Accusations

Recommendation 5:

Introduce a new and standalone offence of 'false accusation of offence' in the Penal Code. The offence should apply when a person falsely accuses another person of a crime, or conspires to do so:

(a) knowing or believing that the other person did not commit the offence, and

(b) intending that the other person will be charged with committing the offence.

The reference to 'conspir[ing] with any other person to accuse any person falsely of any crime' should be removed from section 116(a).

Recommendation 6:

The penalty for the offence of falsely accusing a person of a crime or conspiring to do so should be as follows: life imprisonment if a person is being accused falsely of murder, or any other offence carrying a maximum penalty of life imprisonment; 7 years imprisonment if a person is being accused falsely for any other offence not having a maximum of life imprisonment.

Chapter 2: Part 4: Corroboration

Recommendation 7:
Abolish the legal requirement for corroboration in section 109 of the Penal Code for perjury and other offences relating to the administration of justice; including false statements on oath made otherwise than a judicial proceeding (s 103); false statements etc., with reference to marriage (s104); false statements, etc., as to births or deaths (s 105); false statutory declarations and other false statements without oath (s 106); false declarations, etc., to obtain registration, etc., for carrying on vocation (s 107), and aiders, abettors, suborners, etc. (s 108).

Chapter 3: False statements made outside judicial proceedings

Recommendation 8:

Introduce a new offence of making a false statement or declaration. This offence should apply when a person who is required or authorized by law to make a statement or declaration, whether on oath or otherwise, makes a statement that would amount to perjury if made on oath in a judicial proceeding. This offence should apply when information is provided to any government body, public authority, or person who is performing functions under, or in connection with, the law.

A person is not liable for this offence if the information, or statement, or declaration given is not false or misleading in a material particular.

The maximum penalty for this offence should be seven (7) years if the statement is made on oath, and three (3) years imprisonment for statements not made on oath.

This offence will replace the current offences in sections 103, 104, 105, 106 and 107 of the Penal Code.

Recommendation 9:

That the government consider introducing a Statutory Declarations Act (or similar) for the Solomon Islands. The Act, or regulations made under it, should specify:

- who is authorised to take a sworn written statement;
- the form which such sworn statements should take;
- who is authorised to certify documents;
- what procedures should be followed for taking sworn written statements, including a requirement that the person taking the statement must read the statement back to the person making the statement and confirm that he or she understands the contents;
- whether fees may be charged and if so, how much; and
- the consequences of failing to comply with these requirements.

Recommendation 10:

Introduce a new offence of 'Use of purported statutory declaration or sworn statement' into the Penal Code. The offence should cover three types of behaviour:

a) When a person signs a sworn statement or statutory declaration that he or she did not write or instruct;
b) When a person authorises a sworn statement or statutory declaration and either:
    - knows that the statement was not written or instructed by the person who has sworn it; or
    - knows that he or she has no authority to administer that oath or take that declaration;
c) When a person uses or offers for use any statement or declaration knowing that either:
    - The statement or declaration was not made by the deponent; or
    - The statement or declaration was not made before a person properly authorised to administer that oath or take that declaration.

The maximum penalty for this offence should be seven (7) years imprisonment.

Chapter 4: Fabricating and Destroying Evidence

Recommendation 11:

Retain the offence of fabricating evidence in the Penal Code. The maximum penalty for fabricating evidence remains at seven (7) years imprisonment.

Recommendation 12:

Retain the offence of destroying evidence in the Penal Code. Increase the maximum penalty for the offence to seven (7) years imprisonment.

Recommendation 13:

Group the provisions containing the offences of fabricating and destroying evidence next to each other in the revised penal code.

Chapter 5: Interfering with and Protection of Witnesses and others

Recommendation 14:

Consolidate the particulars of the existing offences in sections 114, 116(b), 121(1*)(i)* and 122 of the Penal Code into one general offence of 'Interfering with witnesses'. The offence carries a maximum penalty of seven (7) years imprisonment**.**

Alternative Recommendation 14a:

Increase the maximum penalty for the offence of deceiving witnesses (contained in section 114 of the Penal Code) to seven (7) years imprisonment.

Alternative Recommendation 14b:

The offence of dissuading, hindering or preventing witnesses contained in section 116(b) of the Penal Code is replaced by a standalone offence of 'preventing witnesses from attending'

The offence is committed when a person, in order to obstruct the course of justice, wilfully dissuades, hinders or prevents, or attempts to dissuade, hinder or prevent, a person who has been duly summoned to attend as a witness, or to be called as a witness, before a court or tribunal, from attending as a witness, or from producing evidence in a court or tribunal.

The existing offence in section 116(b) is repealed.

The new offence of preventing witnesses from attending should be a standalone offence.

For the purpose of clarity, the relevant provision for the offence should be drafted in simple terms.

The maximum penalty for the new offence of preventing witness is seven (7) years imprisonment.

Alternative Recommendation 14c

Introduce a new offence of 'corrupting witnesses' in the Penal Code. This new offence carries a maximum penalty of seven (7) years imprisonment. The offence covers bribery of witnesses (giving and receiving), as well as attempts by other means to threaten, intimidate, induce, interfere with or influence a witness to either give false testimony, or withhold true testimony.

The new offence of corrupting witnesses consolidates the existing offences in sections 121(1)*(i)* and 122 of the Penal Code. The new offence replaces the existing offences contained in sections 121(1)*(i)* and 122 of the Penal Code.

Recommendation 15:

The existing offence in section 123 should be replaced with a new offence of 'Retaliation against or intimidation of judicial officer or witness etc.'

The new offence is committed when a person causes or threatens to cause any injury or detriment to a judicial officer, or witness or a member of their family, or their property, because of something lawfully done as a judicial officer or witness**.**

The new maximum penalty for the offence of 'Retaliation against or intimidation of judicial officer or witness' is seven (7) years imprisonment.

Chapter 6: Perversion of the course of Justice and related offences

Recommendation 16:

Introduce a new and separate offence of 'perverting the course of justice' in the Penal Code. This would include any conduct intended to pervert the course of justice.

'Pervert' includes to defeat, obstruct or prevent.

This offence would replace the remaining provisions in section 116.

See also Recommendation 5 on conspiracy to falsely accuse a person of a crime and Recommendation 14 on interfering with witnesses that make recommendations regarding other parts of section 116.

Recommendation 17:

Increase the maximum penalty for the offence of perverting the course of justice to seven (7) years imprisonment.

Chapter 7: Offences relating to judicial Proceedings

Recommendation 18:

The offence in section 121(1)*(b)* of the Penal Code should be repealed as it is already covered by the offence of contempt of publication contained in section 132(1) of the Criminal Procedure Code.

Recommendation 19:

The offence of non-attendance in section 132(1) of the Criminal Procedure Code is amended by increasing its existing fine of forty dollars ($40) to a new fine of one thousand penalty units.

Recommendation 20:

The offences in section 121(1)*(h)* of the Penal Code and section 182 of the Evidence Act 2009 should be consolidated into one general offence (consolidated into amended offence in section 182 of Evidence Act 2009).

The penalty for this offence is two thousand and five hundred penalty units or, imprisonment of three months or, both.

Chapter 8: Other issues

Part 8.1: Proceedings other than judicial proceedings

Recommendation 21:

That the government consider further how administration of justice offences may apply to proceedings that mediate custom disputes. Although these proceedings are non-judicial in nature, they are nevertheless a lawfully recognised part of the Solomon Islands legal system.

The SILRC commends the government for its initiative in drafting a Tribal Lands Dispute Resolution Panel Act and encourages its enactment as an important step in this direction. We urge the government to carefully consider the types of misconduct that are prohibited in this Act in light of the concerns expressed to us by stakeholders during the course of our consultations on this reference.

Part 8:2 Felonies and misdemeanours

Recommendation 22:

The government consider removing the distinction between felony offences and misdemeanours in the Penal Code and other Solomon Islands laws.

Chapter 1: Background and Introduction

1.1 This report contains information on the review of provisions in the Penal Code concerning offences relating to the administration of justice. These offences are contained in Parts XI and XII of the Penal Code, such as perjury, other false statements given on oath, fabricating and destroying evidence, interfering with witnesses and similar offences.

1.2 The report is divided into eight (8) Chapters. Chapter 1 contains this introduction and general discussion on issues relating to the existing offences relating to the administration of justice.

1.3 Chapter 2 considers the offences of perjury and false statements in judicial proceedings in sections 102 and 103 respectively.

1.4 Chapter 3 looks at the existing offences in the Penal Code relating to other statements and declarations made outside of judicial proceedings in sections 104, 105, 106 and 107 of the Penal Code.

1.5 Chapter 4 concerns evidence, and examines the offences of fabricating and destroying evidence; currently contained in sections 110 and 115 of the Penal Code respectively.

1.6 Chapter 5 examines offences that prohibit conduct that interferes with witnesses and others involved in the administration of justice. The chapter looks at the existing offences in s 114 (deceiving witnesses), s 116(b) (dissuading, hindering and preventing witnesses), 121(1)(i) (interfering and influencing witnesses and others), s 122 (bribe and attempt to bribe witnesses or others), and s123 (injury, damage or threat of witnesses or others).

1.7 Chapter 6 considers offences dealing with other criminal conduct aiming at perverting, obstructing, preventing or defeating the course of justice. The chapter examines the remaining offence contained in s 116(a) (conspiring to do anything to obstruct, prevent, pervert or defeat the course of justice).

1.8 Chapter 7 provides a discussion on the offences contained in section 121 (1) of the Penal Code which applies generally to judicial proceedings. The chapter looks at issues identified in relation to some of the offences and provide recommendations for addressing the issues, as well as providing information to shed light on competing public interests discussed in the chapter.

1.9 Chapter 8 provides a general discussion on other proceedings apart from judicial proceedings, and considers whether the offences dealt with in the report should also apply to other proceedings such as chiefs' hearings. The

chapter also discusses the issue about the categorisation of offences into misdemeanours and felonies, and recommends that this distinction be removed from the Penal Code and other legislation and regulations.

Policy Context

1.10 Courts use contempt to punish those who interfere with the administration of justice.[1] Common law contempt covers five broad areas: improper behaviour in or near courts, other forms of interference in judicial proceedings such as pressure on witnesses, abuse of process, and 'scandalising'. Scandalising covers publication of allegations against judges or courts that contain scurrilous abuse, that allege they are corrupt or lack integrity or impartiality, or that in making decisions they bow to the wishes of outside individuals, pressure groups or institutions.[2]

1.11 The reasons for legislating for criminal offences to cover aspects of contempt are:

- Some areas of the common law of contempt are not clear. Codification clarifies what is prohibited, or might be punished and the severity of the punishment that might be given.
- There are procedural benefits to using criminal law rather than common law contempt proceedings to punish interference with the administration of justice.
- Some aspects of common law contempt proceedings may not comply with the right to a fair hearing contained in section 10 of the Constitution.
- It is not clear whether all courts in the Solomon Islands have the power to use the common law of contempt to punish interference with the administration of justice. The High Court has inherent power to punish contempt however it is unlikely that the Magistrates and Local Courts have any inherent powers (outside of their statutory powers) to punish for contempt. The Magistrates Court has specific powers to punish certain types of contempt such as failure to comply with a summons to give evidence and refusing to be sworn or affirmed to give evidence if present at the proceedings.[3] The Leadership Code Commission has the same power as the Magistrates' Court to punish for contempt.[4]
- While the High Court may be able to punish contempt of inferior courts (the Magistrates Court and the Local Court) pursuing contempt proceedings in the High Court may not be practicable in many cases,

[1]Australian Law Reform Commission, *Contempt Summary of Report*, Report No 35, 1.
[2]Ibid., para 67.
[3]Magistrates' Courts Act, ss 61, 62.
[4]Leadership Code (Further Provisions) Act 1999, s 26.

particularly for more minor forms of contempt that might nevertheless merit some sanction.

- Common law contempt cannot be used to punish those who interfere with tribunals and other judicial proceedings if there is no specific statutory power to punish contempt (such as the Trade Disputes Panel, and the proposed Tribal Lands Dispute Resolution Panel).

1.12 In its report on the reform of the law on contempt the Australian Law Reform Commission (ALRC) recommended that common law on contempt be replaced by legislation and in some areas by specific criminal offences. In particular it recommended criminal offences to address improper behaviour in or near a court that causes substantial disruption, interference or pressure on witnesses and the publication of certain allegations against judges and courts.[5]

1.13 There are inconsistencies and limitations in the current offences in the Penal Code that have no apparent policy justification. For example the maximum penalty for fabricating evidence is 7 years imprisonment, while the maximum penalty for destroying evidence is 2 years imprisonment. Bribery of witnesses or judicial officers under section 122 of the Penal Code is limited to bribery in relation to *'any offence'* with intent to obstruct or pervert the course of justice *in the court*, or dissuade any person from doing his duty in connection with the course of justice *in the court.* The offence directed at retaliation only covers people who have attended a judicial proceeding and given evidence and not those who give evidence by affidavit or statutory declaration.[6]

1.14 We also consider the issue of whether and how the offences in the Penal Code that address administration of justice should apply to proceedings other than 'judicial proceedings.' Most of the offences in the Penal Code in this area apply to judicial proceedings, which is defined as proceedings taken in or before any court, tribunal, commission of inquiry or person in which evidence may be taken on oath.[7] However, in Solomon Islands many disputes, particularly rights with respect to customary land, are determined in chief hearings; hearings which do not fall within the definition of 'judicial proceedings' as provided for in section 4 of the Penal Code.

1.15 The report also considers offences in the Penal Code that deal with the criminal conduct of giving false statements in statutory declarations or government documents as required under certain legislation in Solomon

[5] Australian Law Reform Commission, *Contempt, Summary of Report*, Report No 35.
[6] Penal Code, s 123.
[7] Ibid., s 4.

Islands. These are offences contained in sections 103 to 107 of the Penal Code.

Chapter 2: Perjury and False statements on oath in judicial proceedings.

Part 2.1: Perjury

Background and current law

2.1 Perjury is committed when a person lies on oath. Making perjury a criminal offence is intended to deter people from giving false evidence in legal proceedings, which can undermine the integrity of the justice system.

2.2 Section 102 of the Penal Code of the Solomon Islands criminalises behaviour where a person, who is lawfully sworn as a witness or an interpreter, wilfully makes a statement material in a judicial proceeding which he or she knows to be false or does not believe to be true.

2.3 As section 102(1) applies to situations where a person is 'lawfully sworn' as a witness or interpreter, it appears to apply specifically to oral evidence given in judicial proceedings, and not to false evidence given in an affidavit or statutory declaration. Section 102(2), however, creates an offence where a person makes a false statement on oath for the purposes of a judicial proceeding before a person authorised by law to administer an oath, such as a commissioner for oaths.[8]

2.4 Perjury is categorized as a misdemeanour[9] and carries a maximum penalty of 7 years imprisonment.

2.5 The elements of the offence as contained in section 102(1), were set out in *R v Bolami*:

- there is a judicial proceeding; and
- a person is lawfully sworn as a witness; and
- wilfully makes a statement in that proceeding; and
- which he knows to be false; and
- did not believe to be true.[10]

2.6 The statement, viewed objectively, must also be material to the proceeding.[11]

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[8] Penal Code, s102.

[9] The use of the terms misdemeanour and felony in the Penal Code is misleading. For instance, some misdemeanours carry the same maximum penalties as felonies, while some felonies may carry lesser penalties than some misdemeanours. The SILRC is of the view that all distinctions between misdemeanours and felonies in the Penal Code should be abolished. This was done in the United Kingdom with the passing of the Criminal Law Act 1967. Section 1(1) of this Act abolished all distinctions between felony and misdemeanour in the United Kingdom. See the discussion on abolishing the distinction between felonies and misdemeanours in Part 8.2.

[10] *R v Bolami* [2011] SBHC 28, [202].

[11] *Bolami v Regina* [2011] SBCA 26, [32].

2.7 While the offence and the elements of perjury are set out, they are not clearly defined or formulated and the drafting style is old-fashioned. The SILRC is of the view that the accessibility and effectiveness of the law would be improved if the elements, defences and other relevant qualifications that apply to perjury or related offences are set out in clear language.

2.8 The Model Criminal Code Officers Committee (MCCOC) recommended an offence of perjury where a person makes a sworn statement in or for the purpose of legal proceedings that the person believes to be false, or that is false and the person is reckless that it is false.

2.9 This proposal has the advantage of simplicity and clarity; however, there are factors unique to Solomon Islands criminal law that will need to be taken into account when formulating a new definition of perjury. In this chapter, the SILRC considers the following elements of perjury in more detail before making a final recommendation on changes to section 102:

- made on oath;
- material to the proceeding;
- made in (or for the purposes of) a judicial proceeding.

2.10 The SILRC also considers the question of whether the current penalty for the offence is appropriate.

'Statements on oath'

2.11 The current offence of perjury requires a person to be lawfully sworn in as a witness or interpreter, meaning that a person will only be guilty of a criminal offence if he or she gives evidence on oath. The definition of 'oath' in the Penal Code includes an affirmation or a declaration.[12]

2.12 This provision appears to be inconsistent with section 31 of the Evidence Act 2009, which permits the use of unsworn evidence. Section 31 states that the probative value of evidence is not decreased only because a person giving unsworn evidence if false is liable to be convicted of perjury to the same extent as if the person had given the evidence on oath.[13]

2.13 This allowance of unsworn evidence is one of the significant developments in the Evidence Act 2009. Part 4 of the Evidence Act deals with competence and compellability of witnesses. Section 29 in Part 4 concerns lack of capacity in witnesses, and specifies that a person who is incapable of understanding that

[12] Penal Code, s 4.
[13] Evidence Act 2009, s 31(2)(c).

they are under an obligation to give truthful evidence may nevertheless be competent to give unsworn evidence.[14]

2.14 Section 31(1) provides that unsworn evidence is admissible for all purposes. Section 31(2) says that the probative value of the evidence is not decreased only because:

> (a) the evidence is unsworn; and
>
> (b) a person charged with an offence may be convicted on the evidence; and
>
> (c) the person giving the evidence is liable to be convicted of perjury to the same extent as if the person had given the evidence on oath.[15]

2.15 It is unclear how a person giving unsworn evidence will be liable to be convicted of perjury when the offence of perjury in the Penal Code applies only to statements made on oath, or by a person who is lawfully sworn as a witness or interpreter. Likewise, perjury at common law also requires that a statement be made on oath.

2.16 Section 31(2)(c) merely states that the probative value of the evidence given is not affected simply because a person giving unsworn evidence is liable to perjury charges in the same way as a person giving sworn evidence. It does not create an offence in itself, nor does it affect the operation of the Penal Code. Nevertheless, it appears to be anomalous with the requirement in the Penal Code that a statement must be made on oath for it to constitute the offence of perjury.

2.17 Amending the definition of perjury to include unsworn evidence would remove this inconsistency between the two Acts. Nevertheless, the SILRC does not recommend this step. Most relevantly, if admitting unsworn evidence occurs in circumstances where person is incapable of understanding that he or she is under an obligation to give truthful evidence, then it seems inappropriate to expose people in such circumstances to criminal charges for perjury, which requires that a person deliberately makes a false statement. The MCCOC also took the view that "incompetence because of lack of capacity to give sworn evidence by reason of age or mental impairment should debar prosecution for perjury."[16] Consequently, the requirement that the offence of perjury contained

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[14] Evidence Act 2009, s 29. Lack of capacity (1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence but the person may be competent to give unsworn evidence

[15] Penal Code, s 31(2).

[16] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), Model Criminal Code, Chapter 7, *Administration of Justice Offences*, Discussion Paper, July 1997, p. 41.

in section 102 of the Penal Code apply only to evidence given on oath should be maintained.

2.18 Maintaining the requirement that evidence be given on oath for perjury to be committed, however, means that the possible inconsistency with section 31(2)(c) of the Evidence Act 2009 remains. The SILRC recommends that the government, Legal Policy Unit, Ministry of Justice and Legal Affairs, take note of this anomaly and amend section 31(2)(c) of the Evidence Act 2009 to be consistent with the perjury offence in the Penal Code.

'Material to the proceeding'

2.19 For a statement to amount to perjury, it must relate to an issue that is material to the proceeding. This means that it must be directly relevant to the issue being tried.

2.20 The MCCOC recommended that for the purpose of perjury it should be immaterial whether or not the sworn statement concerned a matter material to the legal proceedings, whether or not the sworn statement was in fact admitted in evidence in the legal proceedings, whether or not the court was properly constituted and whether or not the person who made the statement was competent to give evidence (except that a person who is not competent because of age or mental impairment is not guilty of perjury).[17]

2.21 The objective of the offence of perjury is to deter people from giving false evidence in legal proceedings and undermining the integrity of the justice system. The reason to retain a requirement for the statement to be material is to exclude false statements that have no influence over the outcome of proceedings, and are trivial.[18]

2.22 The arguments for and against retaining the requirement of materiality were put succinctly by the MCCOC in the discussion paper:

> […] On [the] one hand, the view was put that a witness must tell the truth without any reservation even as to matters which he or she regards as immaterial. Often, it is not apparent until late in proceedings what matters are really material and there should be an incentive to witnesses to tell the truth at all times. The rule as to materiality involves technicalities that add needlessly to the Court's task. Immateriality can be taken into account on sentencing. The contrary view was that the requirement as to materiality was 'a safety valve' ameliorating what

[17] Ibid.
[18] Above n 16, 35.

would otherwise be the harsh operation of the law of perjury; it enables the jury to acquit in cases where it had concluded that a falsehood told by the defendant had not been as to something that really mattered in the proceedings.[19]

2.23 In consultations, the SILRC asked stakeholders for their views on whether the requirement should be changed, so that perjury is committed regardless of whether the statement is material, or whether the court is properly constituted, or whether the witness has the capacity to give evidence (except where capacity is related to mental impairment or immaturity).

2.24 There was no support for this recommendation.[20] The stakeholders were of the view that false statements given in a judicial proceeding, or for the purpose of instituting a judicial proceeding, must be material to the judicial proceeding for which they were intended. They argued that it would be impracticable to charge and convict every witness who gives a false statement regardless of whether the statement is material or immaterial to the issues in consideration in a judicial proceeding. This is because Solomon Islands criminal justice system does not have the resources to prosecute every person who makes a false statement in court in a judicial proceeding, or for the purpose of a judicial proceeding.[21]

2.25 In light of these stakeholders' view, the requirement that a statement must be 'material to the proceeding' for it to amount to perjury should be retained.

'Made in, or for the purposes of a judicial proceeding'

2.26 For perjury to occur, it must happen in a judicial proceeding. Section 4 of the Penal Code defines a 'judicial proceeding' as including "any proceeding had or taken in or before any court tribunal, commission of inquiry or person, in which evidence may be taken on oath". There is no separate definition of judicial proceeding in section 102.

2.27 Other jurisdictions provide a definition of a judicial proceeding specifically for the purposes of the particular section on perjury and related offences.[22] Incorporating the definition of 'judicial proceedings' in the section on perjury

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[19] Above n16, p. 35.

[20] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016 ('Targeted stakeholders' consulted during the workshop include: Principal Magistrate Jim Seuika, Central Magistrate Courts, lawyers of the Public Solicitor's office (PSO), Director of Public Prosecutions and lawyers of the Office of the Director of Public Prosecution (ODPP), Prosecutors of the Royal Solomon Islands Police (RSIP), lawyers of the Attorney General's Chambers, the Chairman of the Leadership Code Commission, the Ombudsman and staff of the Ombudsman Office, Ms Pamela Wilde of the Legal Policy Unit, Ministry of Justice and Legal Affairs).

[21] Ibid.

[22] See Crimes Act 1969 (Cook Islands) s119; Criminal Code Act 1974 (Papua New Guinea) s 118; Crimes Act 2013 (Samoa) s139; Criminal Offences (Tonga) s 63; Penal Code (Vanuatu) s 74.

rather than keeping it in the definitions in section 4 of the Penal Code would have the benefit of clearly identifying what proceedings the offence of perjury would apply to. However, the definition of 'judicial proceedings' in the Penal Code applies to more offences than just perjury. It applies to other administration of justice offences such as sections 102, 103 and 110, which are located in Part XI – Perjury and false statements; as well as sections 114, 115, 121 and 123, which are found in Part XII – Other administration of justice offences. There is a further reference to 'judicial proceedings' in section 195 – Cases in which publication of defamatory matter is absolutely privileged (in Part XIX – Defamation).

2.28 In light of the multiple references to judicial proceedings in the Penal Code, the SILRC does not see any benefit in moving the provision from its current position in the definitions section.

2.29 Further, the definition of "judicial proceedings" in section 4 is appropriately wide to allow it to capture a variety of proceedings where evidence is taken on oath. The SILRC does not recommend any changes to this definition.

Other issues

2.30 A further consideration is whether the current definition of perjury would apply to statements made on oath that later become part of legal proceedings, but when the legal proceedings have not yet commenced. The current definition may run the risk of excluding statements that were made at a time when judicial proceedings had not yet been instituted.

2.31 In the Issues Paper, one question asked was:

Should the offence of perjury include giving a false statement on oath in connection with, or to start, judicial proceedings?[23]

2.32 The MCCOC also suggested including a provision to clarify that the offence would apply to a false sworn statement or affidavit made for the purpose of legal proceedings, even if it is not actually used in legal proceedings. It suggested a provision that states: "A reference to judicial proceedings includes a reference to any such proceedings that have been or may be instituted."[24]

Conclusion

[23] Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code, Issues Paper 1*, (2008), Question 139.
[24] Above, n16, s 7.1.1.

2.33 The offence of perjury is currently divided into statements made orally in a proceeding (s102(1)) and statements made on oath for the purposes of a judicial proceeding but not before the tribunal itself (s102(2)).

2.34 For clarity and accessibility, the SILRC recommends that the offence of perjury be simplified into one provision that captures all statements made in, or for the purposes of judicial proceedings. As discussed above, the new offence should apply only to statements made on oath, in judicial proceedings as defined in section 4, and should maintain the requirement that a statement must be material to the proceeding for it to constitute perjury.

Recommendation 1: The offence of perjury should be redrafted in clear simple language. It should apply to evidence:

- given on oath; and
- that is material in that proceeding; and
- made in or for the purpose of legal proceedings, including proceedings that have been or may be instituted; and
- that the person giving that evidence believes to be false, or does not believe to be true.

2.35 In light of the fact that the SILRC is recommending that only evidence given on oath should be liable to a charge of perjury, it recommends that the government consider its consistency with the Evidence Act.

Recommendation 2: The government, MJLA Policy Unit, should work on amending section 31(2)(c) of the Evidence Act 2009 to reflect the fact that convictions for perjury in the Solomon Islands can only occur when evidence is given on oath.

Penalties

2.36 The offence of perjury carries a maximum penalty of 7 years imprisonment. The MCCOC recommended a maximum penalty of 10 years imprisonment for perjury.[25]

2.37 The penalty for committing perjury in other jurisdictions ranges from five years[26] to 14 years[27], but is most commonly set at seven years.[28] Some jurisdictions also have a higher penalty for committing perjury in order to procure the conviction

[25] MCCOC Above n16, 4.
[26] Crimes Act 2013 (Samoa) s 139.
[27] Criminal Code 1974 (Papua New Guinea) s 121(1)(2); Criminal Code 1899 (Queensland) s123A.
[28] Penal Code (Vanuatu) s 75; Crimes Decree 2009 (Fiji Islands) s 176; Crimes Act 1969(Cook Islands) s 120; Crimes Act 1961 (New Zealand) s 109; Perjury Act 1911 as amended (United Kingdom) s 2.

of another person for a crime they did not commit. This is discussed further in the section on 'false accusations' in Part 2.3 below.

2.38 During consultations, the SILRC asked the question whether the maximum penalty for perjury should be increased from seven years to ten, in line with the recommendations of the MCCOC. The stakeholders consulted did not support the increase. Further, Justice Faukona of the High Court was of the view that there is no need for an increase from the current penalty of seven to ten years imprisonment because the offence is not prevalent.[29] Other stakeholders also held the view that it is not necessary to increase the maximum penalty for perjury. Some were unsure why it was necessary and sought to know what the courts in the Solomon Islands and in other regional jurisdictions say about the issue.[30] Others pointed to the categorisation of perjury as a misdemeanour and questioned whether the Magistrates' Court has the jurisdiction to award higher penalties.[31]

2.39 The Commission concludes that it is unnecessary to increase the maximum penalty for perjury and recommends that it remain at seven (7) years imprisonment.

Recommendation 3: Retain the maximum penalty of seven years imprisonment for the offence of perjury

Part 2.2 Inconsistent or contradictory statements

Background and current law

2.40 The Penal Code contains a separate and lesser offence of giving inconsistent or contradictory statements, which carries a maximum penalty of six months imprisonment.[32] It is available where a witness makes two or more inconsistent or contradictory statements in judicial proceedings that are material to the issue in question. It is not necessary to prove that any of the statements are false, but it must be proved that the witness intended to deceive the court.[33]

2.41 Other jurisdictions which have a similar offence often require the statements to be *irreconcilably* contradictory, rather than merely contradictory or inconsistent.[34] Fiji Islands is the only Pacific nation that has a provision essentially similar to

[29] Justice Faukona, *submission*, High Court of Solomon Islands, Honiara, 9 March 2016.
[30] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.
[31] Ibid.
[32] Penal Code, s 111.
[33] Penal Code, s 111(2).
[34] See Criminal Code 1899 (Queensland) s 123A; Crimes Act 1900 (New South Wales) s 331.

section 111. In all cases, it is unnecessary to prove the statement was objectively false, but it is necessary to prove either that the accused knew or believed the statement to be untrue,[35] or intended to deceive the court.[36]

2.42 The Cook Islands, Papua New Guinea, Samoa, Vanuatu, and New Zealand do not have an offence of making contradictory statements.

2.43 The MCCOC recommended including a provision that would permit a conviction for perjury if it appears that the accused has made two inconsistent sworn statements, and the court is of the opinion that one of the statements was deliberately false, similar to the current section 111 of the Penal Code.[37]

Discussion

2.44 The Commission's view is that this offence should be abolished. There are many reasons why a person may give false evidence, such as through mistake, misunderstanding, inadvertence or fear. Stakeholders raised the concern that a witness might give inconsistent statements under pressure, fear or duress from another person, or under certain circumstances.[38] They supported abolishing the offence.

2.45 Maintaining this offence could prevent a witness from correcting his or her evidence, and stakeholders felt that opportunity should be given to correct inconsistent statements. It does not promote the interests of justice to discourage a person from correcting a previous false statement. [39]

2.46 Making a statement that is contradictory to a previous statement does not necessarily demonstrate criminal intent, which is generally a requirement of criminal offences.

2.47 The Commission acknowledges that there are cogent arguments in favour of maintaining a separate offence. Firstly, maintaining the offence can be seen as a deterrent to witnesses giving false evidence in the first place.

2.48 Secondly, if two statements are irreconcilably in conflict, the unavoidable conclusion is that one of them is false, even if it is not possible to ascertain which one is a lie. In this case, there is an advantage to having a specific provision against giving inconsistent statements as it is not necessary to prove that the statement is objectively false, as is the case in order to prove the offence of perjury. Appropriate exercise of prosecutorial discretion could avoid the danger

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[35] Ibid.
[36] Crimes Decree 2009 (Fiji Islands) s 185(2).
[37] Model Criminal Code Officers Committee, *Administration of Justices*, Discussion Paper (July 1997) 44 - 45.
[38] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.
[39] Above n 37.

of having a person prosecuted for a genuine mistake. This argument has greater strength in jurisdictions where this offence requires an 'irreconcilable' conflict rather than just an inconsistency, such as is the case with the current provision in the Penal Code.

2.49 On balance, the Commission is of the view that there is no need to maintain this as a separate offence and supports removing section 111. A person who makes an inconsistent or contradictory statement can still be charged with perjury if one of the statements is known or believed to be false by the person making it, and would otherwise meet the elements of perjury. The interests of justice are better served if people are not discouraged from correcting erroneous statements that may have been made for a variety of reasons that do not have the requisite criminal intent.

Recommendation 4: Abolish the offence of making an inconsistent or contradictory statement in section 111 of the Penal Code.

Part 2.3 False Accusations

Background and Current law

2.93 The Penal Code creates an offence where a person conspires with another to accuse a person falsely of a crime. It is buried within section 116, which is a catch-all provision that concerns 'conspiracy to defeat justice and interfere with witnesses'. Section 116(a) applies where a person 'conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice' (emphasis added).

2.94 The offence is regarded as a misdemeanour and no penalty is specified in the Penal Code for this offence. In such cases, the offence is punishable with two (2) years imprisonment, or with a fine, or with both.[40]

2.95 The current offence is limited to *conspiracy* to accuse a person falsely of a crime and there is no specific provision to cover situations where a person makes a false accusation against another person in the absence of a conspiracy to do so with others.

2.96 The SILRC holds the view that the criminal conduct of accusing a person falsely of a crime should be criminalized. This should apply in cases of both conspiracy to accuse a person falsely, and making a false accusation.

[40] See Penal Code, s 41.

Should there be a standalone offence of procuring the conviction of another?

2.97 Section 116(a) applies where a person 'conspires with any other person to accuse any person falsely of any crime' but there is currently no offence of falsely accusing another person of a crime in the absence of a conspiracy with others to do so.

2.98 There appears to be no policy reason why the offence should be confined to *conspiracy* to make a false accusation, rather than actually making a false accusation. Thus, the element of conspiracy or agreement between two or more persons would not be required for this offence, but the prosecution or police still need to prove that the accused person has the intention to make a false accusation against another person. There is need to introduce an offence that is wider than the current offence of conspiracy in s 116(a) of the Penal Code to deal with circumstances where conspiracy is lacking.

2.99 The MCOCC noted the seriousness of the conduct and supported the need for this change by stating that 'there appears to be no sufficient reason why the offence should be confined, as in the existing Codes, to conspiracies to bring false accusation.'[41]

2.100 The key case on conspiracy to falsely accuse a person of a crime in the Solomon Islands is *Bolami*[42] (see case study below).

Bolami: A case study

Mr. Bolami and three others were charged with perjury and conspiracy to accuse a person falsely of murder, in contravention of sections 102 and 116(a) of the Penal Code respectively.

The case arose from a long history of hostility between the members of two families on Lord Howe Island in Temotu Province. In October 2001, this hostility flared up and fighting broke out between the parties. Guns, bows and arrows, and knives were used. Tragic consequences followed, one of which was the death of a man who was fatally shot.

Mr. Tana was arrested for the murder, was convicted and sentenced to life imprisonment in August 2003. This conviction was secured on the evidence of Mr Bolami and others, attesting to the fact that Mr Tana committed the deed. Murder is one of the most serious crimes in the Penal Code of Solomon Islands, and it carries a mandatory penalty of life imprisonment.

[41] Model Criminal Officers Committee, *Administration of Justice Offences*, Discussion Paper, (July 1997) 105.
[42] *Regina v Bolami* [2011] SBHC 28; HCSI-CRC No.331 of 2005, 454 and 455 of 2007 (4 May 2011); [2011] SBCA 26; CA-CRAC 9 of 2011 (25 November 2011).

More than a year later, following the discovery of fresh evidence by Police that Mr. Tana was wrongly convicted, his conviction was overturned by the Court of Appeal and he was released from prison.

Mr. Bolami was subsequently charged with the murder and with perjury and conspiracy to defeat justice. Three others were charged with perjury and conspiracy.

The prosecution alleged that the accused persons told lies in a High Court proceedings held in Lata, Temotu Province, and that they conspired together to accuse Mr Tana falsely of the murder. It was alleged that they lied in court by giving material evidence which they knew to be false or did not believe to be true, namely that Mr. Tana was responsible for the murder.

Bolami was convicted of murder and was sentenced to life imprisonment. Bolami and one of his co-accused, Leinga, were convicted of perjury and conspiracy, and were sentenced to 3½ years imprisonment for perjury and 1 year imprisonment for conspiracy, to run consecutively. The two other co-accuseds were acquitted of the charges. Perjury currently has a maximum penalty of seven years imprisonment, while conspiracy to accuse a person falsely of a crime carries a penalty of 2 years imprisonment, or a fine or both.[43]

Bolami appealed to the Court of Appeal against his conviction and sentence for murder, and Leinga appealed against his conviction and sentence for perjury and conspiracy.[44] The Court of Appeal dismissed Bolami's appeal against his conviction for murder. Leinga's appeal against his conviction and sentence for perjury was successful, and the conviction and sentence were quashed by the Court of Appeal. His appeal against his conviction for conspiracy was dismissed, but his appeal against the sentence of 1 year imprisonment was successful, and the Court of Appeal reduced his sentence to 9 months imprisonment for his involvement to conspire with others to falsely accuse Mr. Tana of murder.

2.101 In the case of *Bolami*, the four accused were charged with conspiracy to falsely accuse and with perjury. Since no stand-alone offence of falsely accusing a person of a crime exists, two of the accused were acquitted as there was no evidence of a conspiracy. Bolami and Leinga were the only two accused who were found to have conspired to accuse an innocent man of murder, and were initially sentenced to 1 year imprisonment for this offence. They were also

[43] See Penal Code, ss 116(a) and 41.

[44] Bolami did not appeal his conviction or sentence for perjury and conspiracy.

initially convicted of perjury and were given a significantly higher sentence for this – three and a half years.

2.102 On appeal, Leinga's sentence for conspiracy to falsely accuse was reduced and he ended up with a very low sentence since the perjury charges were dismissed (9 months). This was for an act that could have seen an innocent man spend his life in prison.

2.103 A number of other Pacific Island countries and other similar jurisdictions have an offence of perjuring oneself 'in order to procure the conviction of another person for a crime'.[45] These offences are found where the penalty for perjury is specified, and generally create one penalty for perjury and a higher penalty for this offence, which is seen as an aggravated form of perjury.

2.104 Stakeholders were supportive of creating an offence to deal with the conduct in circumstances where conspiracy cannot be established.

2.105 The SILRC is of the view that an offence should be introduced that will also cover cases that do not involve conspiracy. This new offence should apply to situations when a person knowingly accuses an innocent person of a crime, with the intent that the person becomes the subject of a police investigation or prosecution. It should also be clear that the offence can cover situations where a police officer falsely brings a charge against a person.

Recommendation 5: Introduce a new and standalone offence of 'false accusation of offence' in the Penal Code. The offence should apply when a person falsely accuses another person of a crime, or conspires to do so:

(a) knowing or believing that the other person did not commit the offence, and

(b) intending that the other person will be charged with committing the offence.

The reference to 'conspir[ing] with any other person to accuse any person falsely of any crime' should be removed from section 116(a).

Is the penalty appropriate?

2.106 The conduct criminalized by the current offence is very serious, and a person who is being accused falsely of an offence is facing the possibility of having his or her constitutional right to liberty and freedom of movement deprived if he or

[45] Criminal Code Act 1974 (Papua New Guinea) s 121(2); Crimes Act 1969 (Cook Islands) s 120(2); Crimes Act 1961 (New Zealand) ss 109(2), Criminal Code 1899 (Queensland) s 124(2). The relevant provisions in the criminal laws of Fiji and Vanuatu are almost identical to section 116 of the Solomon Islands Penal Code and only provide for conspiring to accuse a person of a crime. Neither procuring the conviction of another person, nor conspiring to do so, is a crime in Samoa.

she is convicted of the offence alleged.[46] As the MCOCC noted, 'there should not be the slightest doubt that this conduct represents a serious offence.'[47]

2.107 The existing offence in the Penal Code is classified as a misdemeanour, which means that the maximum penalty that can be imposed is two years imprisonment and/or a fine. This low maximum penalty does not necessarily reflect the seriousness of the conduct criminalized by the offence, particularly when compared to penalties set in other jurisdictions.[48]

2.108 As discussed above, this was clearly reflected in the sentences imposed by the High Court in the *Bolami* case. A person was falsely accused of murder, but the sentence imposed for doing so was 1 year imprisonment; which was further reduced by the Court of Appeal to 9 months imprisonment.[49] In neighbouring countries like Papua New Guinea or the Cook Islands, the maximum penalty that the accused would have faced for the same offence is between 14 years and life imprisonment.

2.109 Participants at SILRC consultations agreed that the current penalty for the offence is insufficient, and supported increasing the maximum penalty to 7 years imprisonment.

2.110 The SILRC agrees that the maximum penalty of two years is too low for this offence and that it should be increased to at least seven years imprisonment for any instance where a person falsely accuses another of a crime. In the case where a person falsely accuses another person of a crime that carries a maximum penalty of life imprisonment, the penalty should be a maximum of life imprisonment also. While it is possible that the falsely accused person will avoid jail or only serve a short time before the truth is discovered, it is equally possible that a person may spend 20 years in prison before new evidence comes to light. In either case, there is a significant threat to an innocent person's liberty which should carry a strong penalty as a deterrent, and allow judges to impose a high sentence as punishment in appropriate cases.

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[46] Constitution, ss 5 and 14.

[47] Model Criminal Officers Committee, *Administration of Justice Offences*, Discussion Paper, (July 1997) 105.

[48] For instance, section 127 of the Criminal Code Act 1974 of Papua New Guinea says if the offence the person is falsely accused of carries the penalty of death or life imprisonment, then the penalty for committing the offence is life imprisonment. If the person is falsely accused of any offence carrying a term less than life imprisonment; 14 years imprisonment. Queensland also has the same penalty regime for the offence (Criminal Code Act 1899 s 131). In other jurisdictions, the maximum penalty for this offence ranges from 5 years to 14 years imprisonment.

[49] [2011] SBHC 28; HCSI-CRC No.331 of 2005, 454 and 455 of 2007 (4 May 2011); [2011] SBCA 26; CA-CRAC 9 of 2011 (25 November 2011).

Recommendation 6: The penalty for the offence of falsely accusing a person of a crime or conspiring to do so should be as follows: life imprisonment if a person is being accused falsely of murder, or any other offence carrying a maximum penalty of life imprisonment; 7 years imprisonment if a person is being accused falsely for any other offence not having a maximum of life imprisonment..

Part 2.4 Corroboration

Background and current law

2.50 A person cannot be convicted for perjury, or for making other false statements and declarations, upon the evidence of one witness alone.

2.51 Section 109 of the Penal Code states that a person will not be liable to be convicted of certain offences in the Penal Code or of any offence declared by any other Act to be perjury, solely on the evidence of one witness as to the falsity of any statement alleged to be false. Such evidence must be corroborated or supported with additional evidence.

2.52 The offences in the Penal Code that require corroboration under section 109 include:

- perjury (s 102);
- false statements on oath made otherwise than a judicial proceeding (s 103);
- false statements etc., with reference to marriage (s104);
- false statements, etc., as to births or deaths (s105);
- false statutory declarations and other false statements without oath (s.106);
- false declarations, etc., to obtain registration, etc., for carrying on vocation (s 107, and
- aiders, abettors, suborners, etc. (s 108).

2.53 When the new Evidence Act was introduced in 2009, it abolished the requirement for corroboration for all offences. Section 18 of the Evidence Act says, however, that 'subject to any other written law, it is not necessary that the evidence on which a party relies be corroborated' (emphasis added). As the Penal Code is a written law currently in force, s 18 of the Evidence Act is subject to the Penal Code, and therefore the corroboration requirement for these offences remains.

2.54 The legal requirement for corroboration for perjury remains in the criminal laws of most neighbouring countries, with the exception of Vanuatu and Samoa.[50] Nevertheless, many Australian jurisdictions including Queensland, New South Wales, South Australia, Western Australia and the ACT have removed the legal requirement for corroboration from their relevant criminal laws.[51] Others, such as Queensland and the Northern Territory still require corroboration.

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[50] Criminal Code Act 1974 (Papua New Guinea), s 121 (8).

[51] Criminal Code (Queensland) s 204, Crimes Act (New South Wales) s 327, Criminal Law Consolidation Act (South Australia) s 242. Western Australia repealed a requirement for corroboration in 1988.

2.55 The MCCOC recommended that "there should be no requirement of law for corroboration of a single witness on a charge of perjury but there should be a requirement for consent of the Director of Public Prosecutions."[52] The report took the view that there was insufficient justification to retain this requirement for perjury when it was no longer required for other serious offences.

2.56 The SILRC is of the view that the legal corroboration requirement in section 109 of the Penal Code for perjury, and other offences relating to the administration of justice, should be abolished.

Discussion

2.57 The primary reason for having a corroboration rule is that it may be dangerous to convict an accused on the evidence of one witness alone. Conviction on a charge of perjury at common law required supporting and independent evidence to confirm the witness's testimony. This requirement was carried over into the statutory framework since laws on perjury were passed. Corroboration at common law only applied to the offence of perjury and not to the range of offences covered by section 109 of the Penal Code.

2.58 The corroboration requirement first came about because the crime of perjury was originally and exclusively dealt with in the Court of Star Chamber.[53] The procedure in the Court of Star Chamber followed the ecclesiastical or civil law approach which was based on a numerical system of proof. Accordingly, in this system, a single witness would not be sufficient to establish a fact, and the weight of a particular person's testimony, depending on the dispute, was assigned a numerical value, sometimes in fractions. This became the sole reason why the Court of Star Chamber had to demand two witnesses for the crime of perjury.[54]

2.59 When the Court of Star Chamber was abolished in 1641 and its jurisdiction transferred to the Court of Kings Bench, the long established practice of requiring two witnesses in perjury prosecutions was accepted in the common

[52] MCCOC Discussion Paper, p. 51.

[53] The Court of Star Chamber comprised of judges and privy councillors that grew out of the medieval king's council as a supplement to the regular justice of the common-law courts. It achieved great popularity under Henry VIII for its ability to enforce the law when other courts were unable to do so because of corruption and influence, and to provide remedies when others were inadequate. When, however, it was used by Charles I to enforce unpopular political and ecclesiastical policies, it became a symbol of oppression to the parliamentary and Puritan opponents of Charles and Archbishop William Laud. It was, therefore, abolished by the Long Parliament in 1641, https://www.britannica.com/topic/Court-of-Star-Chamber (Accessed 25/10/2016).

[54] Ibid.

law courts despite those courts' clear general rejection in the 17th century of the ecclesiastical numerical system.[55]

2.60 The historical policy reason for the requirement of corroboration is no longer relevant. It is difficult to justify a requirement for corroboration for a successful prosecution for perjury where there is no requirement for corroboration for other serious offences such as murder, robbery or burglary.

2.61 The corroboration requirement has already been abolished for sexual offences. The Penal Code previously required corroboration before a person could be convicted of procuring a woman or girl for sexual intercourse or prostitution; and for procuring defilement of a woman by threats or fraud. The section containing these offences was repealed by the Penal Code (Amendment) (Sexual Offences) Act 2016. An offence of procurement still exists, but no longer requires corroboration for a conviction. It should be acknowledged, however, that the corroboration requirement for sexual offences was based on a different rationale to that of perjury. As noted by the Australian Law Reform Commission:

> Historically, sexual assault complainants and children were considered by the common law, as classes of witness, to be inherently unreliable. Their unreliability was considered a matter capable of affecting the evaluation of the evidence and about which judges had special knowledge or experience beyond the jury's appreciation.[56] [*footnotes omitted*.]

2.62 Aside from perjury, the only offences remaining in the Penal Code that require corroboration are treason and related offences.[57] The offence of treason will be reviewed in a forthcoming SILRC report on Public Order Offences.

2.63 The proposal to remove the legal requirement for corroboration for perjury received mixed views from stakeholders. Some stakeholders were unaware of whether there are problems associated with the current law that warrants reform. Others were concerned that the abolishment of the corroboration requirement might pose adverse consequences to the case of an accused person charged with perjury.[58]

2.64 Some stakeholders consulted felt that there was no strong policy reason for removing corroboration for perjury, and that it was different to removing the rule from sexual offences. In the latter case, the prohibited conduct generally happens in private between the victim and the perpetrator.

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[55] Above n 53.

[56] Australian Law Reform Commission, *Family Violence – A National Legal Response (ALRC Report 114)*, 28.11.

[57] Penal Code, s 53.

[58] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.

2.65 The SILRC is of the view that a court should be able to convict a person of perjury if it is satisfied on the evidence provided that the offence has been committed. This would be consistent with the Evidence Act which has otherwise abolished the requirement for corroboration.

2.66 Further, judges are well-trained and can assess and determine whether it is safe to convict a person of perjury upon the strength of the evidence produced. Issues such as the motivation of a witness who has a strong interest in securing a conviction in a trial for perjury can be assessed along with other factors when the court decides what weight to give to the evidence of the witness. Justice Faukona of the High Court was in favour of removing the legal requirement for corroboration. He suggested that the court should be allowed to adjudge the credibility of a sole evidence as presented.[59] Moreover, even if section 109 of the Penal Code is abolished the courts can still follow the practice of calling for additional evidence in cases when and where they see fit.

2.67 In addition, courts could follow the practice of warning themselves whether it is safe to convict a person for perjury (or other criminal offences) on the evidence of one witness alone. Hence, they can convict a person for perjury if the evidence given by a single witness is credible and trustworthy and they are satisfied beyond reasonable doubt that the elements of perjury have been established by the evidence of that one witness.[60] Some participants at the SILRC consultations noted that the criminal standard of proof still stands, and the prosecution would still have the task of establishing its case by adducing sufficient evidence to prove the elements of perjury beyond reasonable doubt before a person can be convicted for perjury, or any other offence.[61] Alternatively, the courts can always acquit an accused of perjury if the prosecution cannot produce sufficient evidence to establish the elements of perjury beyond the criminal standard of proof.

2.68 One of the strongest policy reasons put forward for retaining the corroboration requirement is that if it is abolished for perjury cases it would discourage people from giving evidence in court.[62] Hence, a potential witness might fear that he or she might be unduly harassed with a charge of perjury for what he or she says in court on oath.[63] This fear is premised on the belief that he or she might be

[59] Justice Faukona, *submission*, High Court of Solomon Islands, Honiara, 9 March 2016.
[60] The general rule at common law has been developed on the basis that the testimony of a single competent witness is sufficient in law to support a verdict.
[61] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.
[62] This reason was also discussed by the MCOCC, *Administration of Justice Offences*, Discussion Paper (July 1997) 49.
[63] Department of Justice of Canada, *Corroboration, A study Paper prepared by the Law of Evidence Project*, (1975)14, http://www.lareau-legal.ca/Evidence11.pdf (Accessed 19 September 2017).

charged with perjury brought by the successful party in a subsequent prosecution for perjury. By then, it would be simply his or her testimony against his prosecutor.[64]

2.69 In contrast, some participants were of the view that removing the corroboration requirement for perjury will eliminate the additional and technical burden required of the courts and the prosecution. They suggested that such abolition will save court's time, resources and the effort of having to deal with this technical requirement in the prosecution of perjury cases.

2.70 The SILRC is of the view that there are strong policy reasons for a shift from this corroboration requirement for perjury and other perjury related offences.

> **Recommendation 7:** Abolish the legal requirement for corroboration in section 109 of the Penal Code for perjury and other offences relating to the administration of justice; including false statements on oath made otherwise than a judicial proceeding (s 103); false statements etc., with reference to marriage (s 104); false statements, etc., as to births or deaths (s 105); false statutory declarations and other false statements without oath (s 106); false declarations, etc., to obtain registration, etc., for carrying on vocation (s 107), and aiders, abettors, suborners, etc. (s 108).

[64] Ibid., 14 – 15.

Chapter 3: False statements made outside judicial proceedings

3.1 The Penal Code contains a variety of provisions that create offences for making false statements outside of judicial proceedings. These include false statements on oath outside of judicial proceedings (section 103), false statutory declarations and other false statements without oath (section 106), as well as a number of offences for making false declarations or statements in particular circumstances, such as with reference to marriage (section 104), as to births or deaths (section 105) or to obtain registration for carrying out a vocation (section 107).

3.2 The Issues Paper contemplated whether any or all of these offences should be consolidated to simplify and modernise this aspect of the law.[65] It asked the question:

> **Should the offences of making false statutory declarations, and false statements in specific circumstances, be replaced with one general offence of making a false statement or declaration when information is required under the law, or given in compliance with the law?**

3.3 Other Pacific Island jurisdictions vary in how they prevent false statements being made:

- The Fiji Islands Crimes Decree 2009 contains similar offences to the current offences in the Solomon Islands Penal Code on giving false and misleading information. There is one offence of making a false statement on oath,[66] another offence of making a false statement without oath,[67] and several separate offences dealing with making false statements in particular circumstances.[68] These offences apply to the giving of false statements etc., with reference to marriage, births and deaths, false statutory declarations and other false statements without oath, and false declarations, etc. to obtain registration for employment, etc.[69] These offences contain similar elements and maximum penalties to the current offences in the Solomon Islands Penal Code.
- The Cook Islands, New Zealand and Queensland have two separate provisions – one for making a false statement on oath, and another for making a false

[65] Solomon Islands Law Reform Commission, Issues Paper 2008.
[66] Crimes Decree 2009 (Fiji Islands) s 177.
[67] Ibid., s 180.
[68] Ibid., s 178 - False statements, etc. with reference to marriage, s 179 - False statements, etc. as to births or deaths, s 181 - False declarations, etc. to obtain registration for employment, etc.
[69] Crimes Decree 2009 (Fiji Islands) ss 178, 179, 180, and 181.

statement or declaration.[70] Making a false statement on oath carries a higher penalty than making a false declaration.

- Vanuatu has one provision that creates a single offence for statements or declarations made on oath or otherwise. It has a maximum penalty of three (3) years imprisonment, and is committed when a person who, for any purpose required or authorised by law, makes any statement or declaration, whether on oath or affirmation or not, which would amount to perjury if made within a judicial proceeding.[71]
- Papua New Guinea and Samoa have no equivalent offence of making a false statement, either on oath or otherwise.

General prohibition on making a false statement

3.4 The Penal Code contains offences that apply to the making of false statements outside of judicial proceedings, both on oath and not on oath.

3.5 It is an offence to make a false statement on oath for any purpose.[72] This offence is contained in section 103 of the Penal Code, and applies to a person who is required or authorised by law to make any statement on oath for any purpose, and being duly sworn (other than in a judicial proceeding) wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true. The offence also applies to the use of false affidavits for the Bill of Sale Act, and carries a maximum penalty of 7 years imprisonment, similar to perjury.

3.6 Section 106 of the Penal Code applies to false statutory declarations and other false statements made *without* oath. The statement must be made 'knowingly and wilfully', and be false in a material particular.[73] The offence applies to written as well as oral statements that are required to be made under or in pursuance of any Act.

3.7 The offence is classified as a misdemeanour and no penalty is specified. In such cases, the offence is punishable with two (2) years imprisonment, or with a fine, or with both.[74]

3.8 The Penal Code also contains offences that apply where false or misleading information is given in specific circumstances: false statements in relation to

[70] Crimes Act 1969 (Cook Islands) ss 121 and 122; Crimes Act 1961 (New Zealand) ss 110 and 111; Criminal Code Act (Queensland) ss 193 and 194.
[71] Penal Code (Vanuatu), s 76
[72] Penal Code, s 103.
[73] Penal Code, s 106(1)
[74] See Penal Code, s41.

marriage, birth or deaths, false declarations for registration in a vocation or for a certificate of registration.[75] These offences do not apply to statements or information given on oath. The maximum penalties vary from 7 years imprisonment (for false statements in relation to marriage, birth or death) to 12 months imprisonment.

3.9 Some other jurisdictions have a single offence for making a false statement or declaration.[76] For example, in the Cook Islands, the offence is committed when a person who, on any occasion on which he is required or permitted by law to make any statement or declaration before any officer or person authorised by law to take or receive it, or before any notary public to be certified by him as such notary, makes a statement or declaration that would amount to perjury if made on oath in a judicial proceeding.[77]

3.10 The SILRC is of the view that rather than having separate offences that apply to false or misleading information given in specific contexts, or where required or permitted by law, the Penal Code should have a general offence that applies to giving or making false statements or misleading information to government, or where required or permitted by any law of Solomon Islands.

3.11 SILRC consultations revealed support for a new and general offence of knowingly giving a false statement or misleading information to a government or a body performing functions under or in connection with the law, or where the information is required or permitted by law. This new offence should apply generally to all contexts where a false statement or information is given as required by law.[78]

3.12 The SILRC recommends the introduction of a single offence that would cover the circumstances and particulars of the existing offences in sections 103, 104, 105, 106 and 107 of the Penal Code. This new offence should be termed 'false statement or declaration'.

Recommendation 8: Introduce a new offence of making a false statement or declaration. This offence should apply when a person who is required or authorized by law to make a statement or declaration, whether on oath or otherwise, makes a

[75] Penal Code, ss 104, 105, 106 & 107.
[76] Crimes Act 1969 (Cook Islands), ss 121 and 122; Crimes Act 1961 (New Zealand), ss 110 and 111; Criminal Code Act (Queensland), ss 193 and 194.
[77] Crimes Act 1969 (Cook Islands), s 122. Section 111 of the New Zealand Crimes Act 1961 is essentially the same.
[78] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016; Justice Faukona, *submission*, High Court, Honiara, 9 March 2016.

statement that would amount to perjury if made on oath in a judicial proceeding. This offence should apply when information is provided to any government body, public authority, or person who is performing functions under, or in connection with, the law.

A person is not liable for this offence if the information, or statement, or declaration given is not false or misleading in a material particular.

The maximum penalty for this offence should be seven (7) years if the statement is made on oath, and three (3) years imprisonment for statements not made on oath.

This offence will replace the current offences in sections 103, 104, 105, 106 and 107 of the Penal Code.

3.13 The SILRC acknowledges that a number of other laws contain offences of making a false declaration. These include the Births Marriages and Deaths Act, which contains an offence of wilfully making a false statement about something that is required to be registered;[79] and the Islanders Marriage Act, which contains an offence for celebrating a marriage knowing that a party to the marriage is under 15 years, and for a false declaration for the purposes of the Act.[80] Section 212 (b) of the Customs and Excise Act creates a penalty for making a false declaration in any matter relating to customs laws.

3.14 It is beyond the scope of this paper to examine the content of other Acts in detail. The SILRC believes that despite the presence of specific offences in other Acts, there remains a need for a general provision in the Penal Code to criminalise false declarations in all circumstances.

Procedural issues: requirements and forms.

3.15 Statutory declarations are used for a wide range of purposes by government agencies to ensure that accurate information is provided. Unfortunately, the law covering the making and verifying of statutory declarations (written statements on oath) is fragmented and difficult to understand. It is contained in the Oaths Act (Cap 23), section 5 of the Commissioners for Oaths Act 1889 (52 & 53 Vict c. 10) and the Statutory Declarations Act 1835 (5 &6 Will IV c. 62). These are old English laws that remain part of the law in the Solomon Islands following independence, as they have not been replaced by a specific Solomon Islands law.

[79] The Births, Marriages and Deaths Act, s 16.
[80] Islands Marriage Act, ss 10, 22.

3.16 A Commissioner for Oaths may take any affidavit, and any commissioner for oaths, judge, magistrates or justice of the peace, can take any declaration made in accordance with the Statutory Declarations Act 1835.[81] The Magistrates Court Act also provides that every magistrate is a commissioner for oaths.[82] But the issue remains that the requirements of the Statutory Declarations Act are obscure and difficult to understand.

3.17 Most stakeholders suggested that the requirements for making and administering sworn written statements and statutory declarations should be clarified.[83] It was thought that having all requirements specified in one piece of legislation would be helpful for the purpose of clarity and consistency.

3.18 It was also recommended that the forms used should not matter because different institutions, such as commercial banks, the National Provident Fund, and different government institutions, are using different forms (templates) that suit their own purposes.

3.19 Most stakeholders suggested that it is best to clarify legislative requirements that apply to cover persons who are authorized by law to administer oaths, or to certify documents. Some raised concern that in practice, any officer at their offices can certify a document as long as the official stamp of the office is affixed to the document.[84]

3.20 It was also suggested that public servants who act as Commissioners for Oaths should not ask for fees for administering oaths, or for the certification of documents.[85]

3.21 The stakeholders[86] suggested that a new offence should be introduced to apply to a person authorized by law to administer a statement on oath, or a statutory declaration, who fails to comply with the requirements for administering oaths for such statement, and for use of a purported statutory declaration or sworn statement.

3.22 The SILRC agrees that the requirements around who can administer oaths or certify documents, and in what circumstances, would benefit from clarification. The current law is archaic and confusing, and would benefit from a clear, modern expression of the requirements for making statutory declarations and certification of documents.

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[81] Oaths Act, s 4.
[82] Magistrates Court Act, s 33.
[83] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.
[84] Ibid
[85] Ibid.
[86] Above n 83.

Recommendation 9: That the government consider introducing a Statutory Declarations Act (or similar) for the Solomon Islands. The Act, or regulations made under it, should specify:

- who is authorised to take a sworn written statement;
- the form which such sworn statements should take;
- who is authorised to certify documents;
- what procedures should be followed for taking sworn written statements, including a requirement that the person taking the statement must read the statement back to the person making the statement and confirm that he or she understands the contents;
- whether fees may be charged and if so, how much; and
- the consequences of failing to comply with these requirements.

3.23 Chapter 14 of the *Solomon Islands Courts (Civil Procedure) Rules 2007* (the Rules) deals with sworn statements in the context of civil proceedings in the High Court and Magistrates Court.[87] These Rules address many of the issues suggested above, including specifying who is authorised to take a sworn statement, the form the statement must take, the fees that may be charged, and provisions for ensuring that the statement is read back to a person who is illiterate or blind to check for understanding. Chapter 14 of the Rules may provide a useful starting point for the development of a Statutory Declarations Act or similar that would apply more broadly than the Rules.

Use of purported statutory declaration

3.24 In some other jurisdictions it is an offence to sign a writing purporting to be an affidavit (sworn statement) or statutory declaration when the person has no authority to do so; or to use such an affidavit or statutory declaration knowing that it was not properly authorized.

3.25 The Cook Islands and New Zealand both have such an offence. Section 125 of the Cook Islands Crimes Act provides:

> **125. Use of purported affidavit or declaration –**
> Everyone is liable to imprisonment for a term not exceeding three years who-

[87] *Solomon Islands Courts (Civil Procedure) Rules 2007*, Rule 1.9.

(a) Signs a writing that purports to be an affidavit sworn before him or a statutory declaration taken by him, when the writing was not so sworn or taken, or when he knows that he has no authority to administer that oath or take that declaration; or
(b) Uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or made, as the case may be, by the deponent or before a person authorised to administer that oath or take that declaration.[88]

The offence aims to address the conduct where people deliberately attempt to sign or make use of affidavits or declarations that are not properly authorised, in full knowledge that this is so. Stakeholders[89] supported the inclusion of such a provision, and the SILRC agrees that such a provision would help to reduce the unauthorised signing and use of affidavits or statutory declarations. **Recommendation 10:** Introduce a new offence of 'Use of purported statutory declaration or sworn statement' into the Penal Code. The offence should cover three types of behaviour:

a) When a person signs a sworn statement or statutory declaration that he or she did not write or instruct;
b) When a person authorises a sworn statement or statutory declaration and either:
- knows that the statement was not written or instructed by the person who has sworn it; or
- knows that he or she has no authority to administer that oath or take that declaration;

c) When a person uses or offers for use any statement or declaration knowing that either:
- the statement or declaration was not made by the deponent; or
- the statement or declaration was not made before a person properly authorised to administer that oath or take that declaration.

The maximum penalty for this offence should be seven (7) years imprisonment.

3.26 The Penal Code already contains a provision dealing with unauthorised administration of oaths in Part X: Corruption and the abuse of office.[90] This provision creates an offence where a person administers an oath when he has no lawful authority. It is narrower than the proposed offence of 'use of purported

[88] Crimes Act 1969 (Cook Islands), s125. Section 114 of the Crimes Act 1961 (New Zealand) is in identical terms with the same penalty.
[89] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.
[90] Penal Code, s 98

statutory declaration or sworn statement', and is classified as a misdemeanour. The SILRC believes that a more comprehensive offence as recommended above is justified, and that it should carry a penalty in line with other offences that attempt to pervert the course of justice. Further, while this offence may be committed by a person holding public office, it may also be committed by others and is therefore more appropriately found together with other offences of making false statements.

Chapter 4: Fabricating and Destroying Evidence

Background and current law

4.1 The existing offences in the Penal Code to consider under this chapter include -

- fabricating evidence (Penal Code s 110); and
- destroying evidence (Penal Code s 115)

4.2 These are standalone offences and should be placed together in the revised Penal Code. This is because the existing provisions (s.110 and s.115) deal with criminal conduct relating to evidence. At the moment these offences are located in different parts of the Penal Code.

4.3 Fabricating evidence is committed when a person intends to mislead any tribunal in any judicial proceeding, by fabricating evidence by any means other than perjury; or knowingly makes use of such fabricated evidence. The maximum penalty is seven (7) years imprisonment.

4.4 Destroying evidence is committed when a person who, knowing that any book, document, or thing of any kind whatsoever is or may be required in evidence in a judicial proceeding, wilfully removes or destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence. This offence is categorized as a misdemeanour, and no penalty is specified for it in section 115 of the Penal Code.

4.5 Section 4 of the Penal Code defines a misdemeanour to mean 'any offence which is not a felony'. Further, section 41 says that the general punishment for misdemeanours for which the Penal Code does not provide a specific punishment, is a maximum penalty of two (2) years imprisonment, or a fine, or both. This means that the offence of destroying evidence has a maximum penalty of 2 years imprisonment, or a fine, or both such imprisonment and fine.

Policy Considerations: Issues and problems

4.6 The SILRC identifies two issues in relation to the maximum penalties for the offences of fabricating and destroying evidence. First, there is a disparity in the maximum penalties. Fabricating evidence carries a maximum penalty of seven (7) years imprisonment, while destroying evidence has a maximum penalty of two (2) years imprisonment, or a fine, or both imprisonment and fine. Both of these offences prohibit serious conduct which aim at achieving the same outcome, and that is to deprive the courts from having access to truthful and reliable evidence in judicial proceedings. In that respect, there is no clear justification to justify why fabricating of evidence should be treated more seriously than the destroying of evidence. The SILRC is of the view that while the criminal conduct covered by these two offences might potentially differ in

seriousness, the penalty for destroying evidence should be increased rather than treating the offence as a misdemeanour.

4.7 In addition, the current penalty for destroying evidence is much lower compared to the penalty for the same offence in comparable jurisdictions.

Comparative penalties

4.8 In its research the SILRC undertook a comparative analysis of the maximum penalties for the offences of fabricating and destroying evidence. These are contained in Table 1 below.

Table 1: Comparative maximum penalties

Jurisdiction	**Fabricating evidence**	**Destroying evidence**
Solomon Islands	7 years imprisonment	2 years imprisonment, or a fine, or both
Papua New Guinea	7 years imprisonment	3 year imprisonment
Vanuatu	7 years imprisonment	5 years imprisonment
Fiji Islands	7 years imprisonment	1 year imprisonment
Samoa	3 years imprisonment	Does not have offence
Cook Islands	7 years imprisonment	Does not have offence
New Zealand	7 years imprisonment	Does not have offence
New South Wales	10 years Imprisonment	10 years imprisonment
Queensland	7 years imprisonment	7 years imprisonment

Policy discussion

4.9 Table 1 shows the comparative maximum penalties of fabricating and destroying evidence in Solomon Islands, Papuan New Guinea (PNG), Vanuatu, Fiji, Samoa, Cook Islands, New Zealand (NZ), New South Wales (NSW), and Queensland (QLD). The disparity in the maximum penalties for the offences in Fiji Islands[91] is greater than in Solomon Islands. Papua New Guinea narrows the disparity in maximum penalties for the offences to 7 years imprisonment for fabricating evidence and 3 years imprisonment for destroying evidence.[92] The Penal Code of Vanuatu further narrows the gap to 7 years imprisonment for fabricating evidence and 5 years imprisonment for destroying evidence.[93] The

[91] See Crimes Decree 2009 (Fiji Islands) ss 184 and 189.
[92] See Criminal Code Act 1974 (Papua New Guinea) ss 122 and 125.
[93] Penal Code (Vanuatu) ss 77, 78.

relevant laws of Samoa, Cook Islands and New Zealand contain the offence of fabricating evidence, but they do not have the offence of destroying evidence. Samoa has a lesser maximum penalty of 3 years imprisonment for fabricating evidence[94], while Cook Islands and New Zealand each have a maximum penalty of 7 years imprisonment for fabricating evidence.[95] New South Wales treats both offences as equally serious and consolidates them into one general offence. It is termed 'tampering etc. with evidence', and carries a maximum penalty of 10 years imprisonment.[96] Queensland also treats both offences as equally serious and provides a maximum penalty of 7 years imprisonment for both.[97]

4.10 The SILRC consultations revealed that the offences of fabricating and destroying evidence should be retained in the Penal Code. However, stakeholders consulted further suggested that fabricating evidence is more serious than destroying evidence, and that these offences should carry different maximum penalties.[98] However, the stakeholders did not provide any justification for this argument.

4.11 The SILRC prefers the approach taken by New South Wales and Queensland, in treating the offences as equally serious and providing the same penalty for both. This approach should be adopted by Solomon Islands because both offences address similar criminal conduct which aims at achieving the same outcome, and that is to prevent the courts from having access to truthful and reliable evidence.

4.12 The Australian States of NSW and Queensland treat offences against the administration of justice very seriously, and this is reflected in the maximum penalties set by the States for these offences at 10 years imprisonment (NSW) and 7 years imprisonment (QLD) respectively. In New South Wales, the seriousness with which the community regards offences against justice can be seen in the Second Reading Speech by the then Attorney General of NSW for the Crimes (Public Justice) Amendment Bill (1990). The then Attorney-General stated that -

> ''…Offences that damage the administration of justice strike at the very heart of our judicial system. It is fundamentally important that confidence is maintained in our system of justice, and to this end must be protected from attack. Those who interfere with the course of justice must be subject to severe penalties. Not only do offences concerning the administration of justice affect

[94] Crimes Act 2013 (Samoa), s 140.
[95] See Crimes Act 1969 (Cook Islands), s 124; Crimes Act 1961 (New Zealand), s 113.
[96] Crimes Act 1900 (New South Wales), s 317.
[97] See Criminal Code 1899 (Queensland), ss 126, 129.
[98] Targeted stakeholders, *consultations,* Heritage Park Hotel, Honiara, 26 March 2016; Justice Faukona *submission*, High Court, Honiara, 9 March 2016.

> individuals, but the community as a whole has an interest in ensuring that justice is properly done."[99]

Conclusion

4.13 The SILRC concurs with the approach taken in New South Wales and Queensland in treating the offences equally, and recommends that both offences should be given the same maximum penalty of seven (7) years imprisonment.

Recommendation 11: Retain the offence of fabricating evidence in the Penal Code. The maximum penalty for fabricating evidence remains at seven (7) years imprisonment.

Recommendation 12: Retain the offence of destroying evidence in the Penal Code. Increase the maximum penalty for the offence to seven (7) years imprisonment.

Recommendation 13: Group the provisions containing the offences of fabricating and destroying evidence next to each other in the revised penal code.

[99] NSW Attorney General, Second Reading Speech for the Crimes (Public Justice) Amendment Bill (1990).

Chapter 5: Interfering with and Protection of Witnesses and others

Background and current law

5.1 The existing offences in the Penal Code that prohibit conduct relating to interference with, and the protection of witnesses, include -

- deceiving witnesses (s 114);
- dissuading, hindering or preventing witnesses (s116(b));
- wrongful interference or influencing witnesses (s121(1)(i));
- bribe or attempt to bribe witnesses or others (s122); and
- injury, damage or threat of witnesses or others (s123)

5.2 The SILRC holds the view that the issues identified in relation to the offences identified in this chapter may be addressed in two ways. The first approach is to consolidate the offences in sections 114, 116(b), 121(1)*(i)* and 122 of the Penal Code into one general offence of 'Interfering with witnesses'. This is because the conduct covered in those offences, even if they differ in nature, shares the element of interfering with witnesses with the aim of preventing the courts from receiving truthful and reliable evidence from witnesses, or those to be called as witnesses in judicial proceedings. This new consolidated offence should be formulated to cover the particulars of the existing offences. The offence in section 123 will be dealt with separately as a specific offence.

5.3 The second approach is to deal with some of the offences and the issues identified in relation to them, separately and as specific offences. Some offences will have to be dealt with together. That is, deceiving witnesses (s 114) and dissuading, hindering or preventing witnesses (s 116(b)) are dealt with as separate offences. The offences in section 121(1)(i) and bribery in section 122 will be dealt with together, whilst the offence in section 123 is a specific offence that is dealt with separately.

Approach 1: One general offence of interfering with witnesses etc.

5.4 The first option is to consolidate the particulars of the offences in sections 114, 116(b) and 121(1)*(i)* and 122 of the Penal Code into one general offence. This is one way of simplifying and clarifying the law in this area by grouping similar criminal conduct into one provision other than creating multiple and specific offences that address similar criminal behaviours. The offence in section 123 will be dealt with separately as it deals with a broader class of people than only witnesses.

5.5 SILRC research indicated that prosecutions on the basis of these offences are rare – even non-existent. Further, most of the offences are currently categorised as 'misdemeanours' in the Penal Code, and therefore, carry low maximum penalties (2 years imprisonment, or a fine, or both) in comparison to penalties set by other common law jurisdictions for the same offences. Simplifying and strengthening the law in this area might encourage prosecution for the offences in the future.

5.6 The SILRC recommends the consolidation of the offences in sections 114, 116, 121(1)(i) and 122 of the Penal Code. The new maximum penalty for this consolidated offence should be seven (7) years imprisonment. Increasing the penalties for the offences reflects the trend undertaken in other pacific island and common law jurisdictions to strengthen their laws in this area.

5.7 The offence in section 123 will be dealt with as in Approach 2.

Recommendation 14: Consolidate the particulars of the existing offences in sections 114, 116(b), 121(1*)(i)* and 122 of the Penal Code into one general offence of 'Interfering with witnesses'.

The offence carries a maximum penalty of seven (7) years imprisonment**.**

Approach 2: Separate offences of interfering with witnesses etc:

5.8 An alternate to the approach undertaken above is to maintain separate offences for each type of interference with witnesses. The SILRC proposes this recommendation as an alternate approach to approach 1 for the offences in sections 114, 116(b), 121(1)*(i)* and 122 of the Penal Code.

Deceiving witnesses

5.9 The offence of deceiving witnesses is currently contained in section 114 of the Penal Code. It is committed when a person who, practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness. The offence is categorised as a misdemeanour with no penalty being specified for it. In such case, it carries a penalty of 2 years imprisonment, or a fine, or both.[100]

5.10 The offence of deceiving witnesses has a very low maximum penalty in comparison to prescribed penalties set by comparable jurisdictions for the offence.

Comparative penalties

[100]Penal Code, s 41.

5.11 Table 2 below shows the current maximum penalties prescribed for the offence of deceiving witnesses in comparable jurisdictions.

Table 2: Comparative maximum penalties

Jurisdiction	**Law**	**Name of Offence**	**Maximum Penalty**
Solomon Islands	Penal Code, s 114	Deceiving witnesses	2 years imprisonment, or a fine, or both imprisonment and fine
Papua New Guinea	Criminal Code Act 1974, s	Deceiving witnesses	1 year imprisonment
Vanuatu	Penal Code, s 81	Deceiving witnesses	7 years imprisonment
Fiji Islands	Crimes Decree 2009, s	Deceiving witnesses	1 year imprisonment
Samoa	Crimes Act 2013	Does not have offence	Not available
Cook Islands	Crimes Act 1969, s 128.	Does not have offence	Not available
New Zealand	Crimes Act 1961, s 117.	Does not have offence	Not available
Australian Capital Territory	Criminal Code 2002, s 708	'deceiving witness, interpreter or juror	5 years imprisonment
Queensland	Criminal Code 1899, s 128	'Deceiving witnesses'	3 years imprisonment

5.12 Table 2 shows that in the South Pacific region, Papua New Guinea and Fiji Islands have a lesser maximum penalty for the offence compared to Solomon Islands. Samoa, Cook Islands and New Zealand do not have an offence of deceiving witnesses while the Penal Code of Vanuatu sets a maximum penalty of seven (7) years imprisonment for the offence. In the Australian Capital Territory and Queensland, the penalties for the offence are 5 years and 3 years imprisonment respectively.

5.13 The SILRC did not receive any specific feedback from stakeholders consulted on the offence of deceiving witnesses.

Analysis and Conclusions

5.14 Considering the comparable maximum penalties set by other jurisdictions (as shown in Table 2) for the offence, the SILRC recommends that the offence should be reformed by increasing its maximum penalty to five years imprisonment. The increased penalty for deceiving witnesses should send out the message that engaging in deceitful practices that would influence or affect a witness from giving evidence in judicial proceedings is unacceptable, and undermines the administration of justice in Solomon Islands.

Alternative Recommendation 14a: Increase the maximum penalty for the offence of deceiving witnesses (contained in section 114 of the Penal Code) to seven (7) years imprisonment.

Dissuading, hindering or preventing witness

5.15 The offence of dissuading, hindering or preventing witness is committed when a person, in order to obstruct the course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence or endeavours to do so.[101]

Policy considerations: Problems and issues

5.16 The offence of dissuading, hindering or preventing a witness from giving evidence in section 116(b) appears to only apply to a witness who is summoned to give oral evidence, and does not seem to apply to a witness who gives evidence through affidavits or statutory declarations. Also, the offence is currently regarded as a misdemeanour and no penalty is specifically provided for it in the Penal Code. In addition, being categorised as a misdemeanour[102], this offence carries a penalty that is lower compared to the penalties set by comparable jurisdictions for the offence.

SILRC Research and Analysis

5.17 The Criminal Code Act 1974 of Papua New Guinea and the Criminal Code 1889 of Queensland contain identical offences termed as 'preventing witnesses from attending'.[103] These offences do not just apply to witnesses who are summoned to give oral evidence in court but also apply to witness who are summoned to produce anything in evidence in court. The offence is committed when a person wilfully prevents or attempts to prevent any person who is summoned to attend as a witness before any court or tribunal from attending as a witness, or from

[101] Penal Code, s 116(b).
[102] Section 41 of the Penal Code sets a maximum penalty for offences categorized as misdemeanours to 2 years imprisonment, or a fine, or both such term of imprisonment and fine.
[103] Criminal Code Act 1974 (Papua New Guinea) s 126; Criminal Code 1899 (Queensland) s 130.

producing anything in evidence…[104] The maximum penalty for the offence in Papua New Guinea is 1 year imprisonment, while the penalty is 3 years imprisonment in Queensland.[105]

5.18 The Crimes Act 1900 of New South Wales contains a similar offence termed as 'preventing, obstructing or dissuading witness or juror from attending etc.'[106] The offence has a maximum penalty of five (5) years imprisonment[107], and is committed where a person who, without lawful excuse, wilfully prevents, obstructs or dissuades –

- a person called as a witness in any judicial proceeding from attending as a witness or from producing anything in evidence pursuant to a summons or subpoena…[108];
- another person who the person believes may be called as a witness in any judicial proceeding from attending the proceeding…'[109]; or
- a person summoned as a juror in any judicial proceeding from attending as a juror…'[110]

5.19 Cook Islands and New Zealand have identical offences termed as 'corrupting juries and witnesses'.[111] The only difference is that New Zealand extends the application of the offence to an overseas jurisdiction. The offence carries a maximum penalty of seven (7) years imprisonment in both jurisdictions, and is committed when a person -

- dissuades or attempts to dissuade any person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter, civil or criminal; or
- influences or attempts to influence, by threats or bribes or other corrupt means, any juryman or assessor in his conduct as such, juryman or assessor whether the juryman has been sworn as a juryman or assessor as the case may be, or not; or
- accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman or assessor; or
- willfully attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice.

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[104] Criminal Code Act 1974 (Papua New Guinea), s 126; Criminal Code 1899 (Queensland), s 130.
[105] Ibid.
[106] Crimes Act 1900 (New South Wales), s 325.
[107] Ibid.
[108] Above n 105, s 325(1).
[109] Ibid., s 325 (1A).
[110] Ibid., s 325 (2).
[111] See Crimes Act 1969 (Cook Islands), s 128; Crimes Act 1961 (New Zealand), s 117.

5.20 It is also common in other jurisdictions to have an offence that applies generally to preventing a witness from attending judicial proceedings, or preventing a witness from producing anything in evidence.[112]

5.21 SILRC received strong support from stakeholders that the current offence in section 116(b) of the Penal Code should be amended to cover the conduct of intentionally preventing another person from attending as a witness, or from producing evidence through other means, in a court or tribunal.[113]

Conclusions and Recommendations for reform

The SILRC recommends the following in relation to the offence in section 116(b) of the Penal Code: dissuading, hindering or preventing witnesses.

Alternative Recommendation 14b: The offence of dissuading, hindering or preventing witnesses contained in section 116(b) of the Penal Code is replaced by a standalone offence of 'preventing witnesses from attending'.

The offence is committed when a person, in order to obstruct the course of justice, wilfully dissuades, hinders or prevents, or attempts to dissuade, hinder or prevent, a person who has been duly summoned to attend as a witness, or to be called as a witness, before a court or tribunal, from attending as a witness, or from producing evidence in a court or tribunal.

The existing offence in section 116(b) is repealed.

For the purpose of clarity, the relevant provision for the offence should be drafted in simple terms.

The maximum penalty for the new offence of preventing witness is seven (7) years imprisonment.

Wrongful interference or influencing witnesses (s 121(1)(i) and bribe or attempt to bribe (s 122)

5.22 The existing offences in the Penal Code that contain elements of interference with witnesses, obstructing, defeating or perverting the course of justice and dissuading others from carrying out their duties in connection with the course of justice (that will be dealt with in this section) include -

- attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence, s 121(1)*(i)*

[112] Criminal Code (Queensland) s 130 provides a maximum penalty of three years imprisonment. The MCCOC recommended an offence for the Model Criminal Code carrying a maximum penalty of five years.

[113] Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.

- bribe or attempt to bribe, s 122;

5.23 The existing offence of wrongful interference or influencing witnesses contained in s 121(1*)(i)* of the Penal Code is committed when a person attempts to interfere with or influence a witness in a judicial proceeding in giving their evidence. It carries a maximum penalty of three (3) months imprisonment.

5.24 The bribery offence in section 122 is a misdemeanour with no penalty being specified for it. The Penal Code provides a maximum penalty of two (2) years imprisonment, or a fine, or both imprisonment and fine, for offences categorised as misdemeanours.[114] This offence is committed when a person who, in relation to any offence, bribes or attempts to bribe or makes any promise to any other person with the intent to -

- obstruct, defeat or pervert the course of justice in the court; or
- to dissuade any person from doing his duty in connection with the course of justice in the court.

Policy Considerations: Problems and Issues

5.25 Interference with witnesses is done by various means including bribery, other forms of economic pressure, social and family obligations. These means can be used to prevent a witness from giving evidence, or inducing a witness to give false evidence. Interference with witnesses is also a form of common law contempt. Like other areas covered by the common law of contempt some aspects of it have been legislated into criminal law.

5.26 The following issues are identified in relation to the offences under discussion:

- the scope of the offence in section 121(1)*(i)* of attempting wrongfully to interfere with a witness is not clear because the offence does not specify what constitutes 'wrongful' interference with a witness; and

- the maximum penalty for the offence in section 121(1)*(i)* is relatively low in comparison with penalties set by relevant laws in other jurisdictions, as well as comparable penalties set for similar offences in the Penal Code; and

- the bribery offence in section 122 applies where it is done to dissuade any person from doing his duty in connection with the course of justice in the court and has a comparatively low penalty, and

[114] Penal Code, s 41.

- the bribery offence in section 122 applies to a person who bribes or attempts to bribe or makes an offer to another person but it does not apply to the other person who receives the bribe or accepts the offer.

Policy discussion

5.27 The offences of 'corruption of witnesses' in Papua New Guinea and Queensland, and that of 'corrupting juries and witnesses' in Cook Islands and New Zealand, cover the circumstances currently covered by the existing offences contained in section 121(1)(i) and 122 of the Penal Code. These offences both carry a maximum penalty of 7 years imprisonment.

5.28 The offences in Papua New Guinea and Queensland contain similar elements to the offences in section 121(1)(i) and 122 (bribery). They apply where a person 'gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for, any person, upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false testimony or withhold true testimony.' They also apply to a person who 'asks, receives or obtains, or agrees or attempts to receive or obtain any property or benefit for himself or herself…or to the attempts by any other means to induce a person called or to be called as a witness in any judicial proceedings to give false testimony or withhold true testimony…'

5.29 The offences of corrupting witnesses and jurors in Cook Islands and New Zealand apply to situations where a person interferes with witnesses by dissuading or attempt to dissuade another person by threats and bribes or other corrupt means from giving evidence in any cause or matter (whether civil or criminal. They also apply to situations where a person wilfully attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice. These offences cover elements and circumstances of the existing offences in section 121(1)*(i)* and 122 (bribery) in the Penal Code.

5.30 Section 25 of the United Nations Convention against Corruption (UNCAC) is relevant to the discussion under this part. Solomon Islands acceded to UNCAC on 6 January 2012,[115] and is obliged as a state party to the Convention, to 'adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally –

[115] United Nations Office on Drugs and Crimes (UNODC), *United Nations Convention against Corruption Signature and Ratification Status as of 12 December 2016:* https://www.unodc.org/unodc/en/treaties/CAC/signatories.html(Accessed 06/02/17).

- the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

- the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.'[116]

5.31 SILRC consultations revealed that the offence in 122 should not be confined to bribery, but should extend to cover attempts by other means to influence a witness from giving true evidence, or to give false evidence. Stakeholder submissions agree with the SILRC proposal that the offence should not only apply to those who give or offer a bribe, but also extend to those who accept or take a bribe. They are of the view that the law in this area should be updated and made clearer so that true evidence is adduced in judicial proceedings for the purposes of the offence in section 122.

5.32 The SILRC is of the view that the offence in section 121(1)*(i)* and section 122 should be consolidated into one general offence of 'corrupting witnesses'. This new offence captures the particulars of both offences and has one maximum penalty. This is consistent with the offences of corrupting witnesses in Papua New Guinea and Queensland and the offence of corrupting witnesses and jurors in Cook Islands and New Zealand, and goes in line with submissions given by stakeholders consulted in Honiara in March 2016.[117] The SILRC also holds the view that the bribery offence in section 122 should extend to a person who receives the bribe or accepts the offer.

Conclusions and Recommendations

5.33 Taking into account the recommendations proposed by stakeholders, research undertaken by the SILRC on comparative laws in other jurisdiction in relation to

[116] United Nations Office on Drugs and Crimes (UNODC), *United Nations Convention against Corruption (UNCAC):* https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (Accessed 06/02/17).
[117] Targeted stakeholders, *consultations,* Heritage Park Hotel, Honiara, 26 March 2016; Justice Faukona, *submission*, High Court, Honiara, 9 March 2016.

the offences in sections 121(1)*(i)* and 122, and section 25 of the UNCAC, the SILRC recommends the following -

Alternative Recommendation 14c: Introduce a new offence of 'corrupting witnesses' in the Penal Code. This new offence carries a maximum penalty of seven (7) years imprisonment. The offence covers bribery of witnesses (giving and receiving), as well as attempts by other means to threaten, intimidate, induce, interfere with or influence a witness to either give false testimony, or withhold true testimony.

The new offence of corrupting witnesses consolidates the existing offences in sections 121(1)*(i)* and 122 of the Penal Code. The new offence replaces the existing offences contained in sections 121(1)*(i)* and 122 of the Penal Code.

Injury, damage or threat (s 123).

5.34 The offence of 'injury, damage or threat' in section 123 of the Penal Code is categorised as a misdemeanour with no penalty specified for it. It is committed when a person who (whether in the court or elsewhere) injures, damages or threatens or attempts to injure or damage any person, a member of that person's family or property with the intent –

- to obstruct, defeat or pervert the course of justice in the court, or
- to dissuade any person from doing his duty in connection with the course of justice in the court; or
- for having attended a judicial proceeding and given evidence in connection with the course of justice.[118]

Policy considerations: Issues and problems

5.35 The following issue is identified in relation to the offence in section 123 of the Penal Code –

- the offence has a comparatively low penalty of two years compared to other jurisdictions, and
- it is too general and may not apply to retaliation against judicial officers (or people carrying out judicial functions) or to witnesses who give evidence by sworn statement, and
- The offence may not cover other forms of detriment, for example dismissal from employment, against a witness or a judicial officer. There is need to ensure that the safety concerns of persons, particularly

[118]Penal Code, s 123.

witnesses and judicial officers, who must participate in the criminal justice system, are adequately addressed.

SILRC Research: Comparable laws in other jurisdictions

5.36 The Criminal Code 1889 of Queensland, Australia, contains an offence of 'Retaliation against or intimidation of judicial officer, juror, witness etc. It is committed when a person causes or threatens to cause any injury or detriment to a judicial officer, juror or witness or a member of their family, because of something lawfully done as a judicial officer, juror or witness. The offence has a maximum penalty of seven (7) years imprisonment.[119]

Policy Analysis

5.37 The offence of 'Retaliation against or intimidation of judicial officer, juror, witness etc. in Queensland contains elements that could be considered for the reform of the offence contained in section 123 of the Penal Code. The offence was created to protect judicial officers and witnesses and members of their families from threats of injury, detriment or actual injury. It is a serious offence that carries a maximum penalty of seven (7) years imprisonment.

5.38 A written submission received from a judge of the National Judiciary recommended that section 123 be amended. It was suggested that the existing provision is more or less confined to unlawful activities directed at other persons, their families or their properties, and that it does not include retaliation against judicial officers or other persons performing judicial functions. The judge proposed that the new penalty for the amended offence should be seven years imprisonment.[120]

5.39 SILRC consultation also revealed that the offence contained in section 123 of the Penal Code should be amended so that it covers threats of injury or detriment, or causing injury or detriment, to a judicial officer or a witness, or a member of their family. It was recommended that the act of retaliating against judicial officers or witnesses is very serious, and should carry a more severe maximum penalty than the existing penalty. The stakeholders recommended a maximum penalty of 10 years imprisonment for the offence.[121]

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[119]Criminal Code Act 1899 (Queensland), s 119B.
[120] Justice Faukona, *submission*, High Court of Solomon Islands, Honiara, 9 March 2016.
[121]Targeted stakeholders, *consultations*, Heritage Park Hotel, Honiara, 26 March 2016.

5.40 Some stakeholders raised a concern that in Solomon Islands witnesses do not want to give evidence for fear of their safety and risk to their lives and properties.[122]

5.41 Solomon Islands is obligated to take legislative measures and create criminal offences that protect witnesses, judicial officials, law enforcement officers and other categories of public officials. As noted earlier, Solomon Islands acceded to the United Nations Convention against Corruption (UNCAC) on 6 January 2012,[123] and is obliged as a state party to the Convention, to 'adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally –

- the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

- the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.'[124]

Conclusions and Recommendations

5.42 Taking into account the recommendations proposed by stakeholders, research undertaken by the SILRC on comparative laws in other jurisdiction in relation to the offence in sections 123 of the Penal Code, and section 25 of the UNCAC, the SILRC recommends the following -

Recommendation 15: The existing offence of injury, damage or threat in section 123 of the Penal Code is repealed and replaced with a new offence of 'Retaliation against or intimidation of judicial officer or witness etc.'

[122] Ibid.
[123] United Nations Office on Drugs and Crimes (UNODC), *United Nations Convention against Corruption Signature and Ratification Status as of 12 December 2016:* https://www.unodc.org/unodc/en/treaties/CAC/signatories.html(Accessed 06/02/17).
[124] United Nations Office on Drugs and Crimes (UNODC), *United Nations Convention against Corruption (UNCAC):* https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (Accessed 06/02/17).

The new offence is committed when a person causes or threatens to cause any injury or detriment to a judicial officer, or witness or a member of their family, or their property, because of something lawfully done as a judicial officer, or a witness**.**

The maximum penalty for the offence of 'Retaliation against or intimidation of judicial officer or witness etc. is seven (7) years imprisonment.

Chapter 6: Perversion of the course of Justice

Background and current law

6.1 Part XI (Perjury and False Statements and Declarations) and Part XII (Other offences relating to the Administration of Justice) of the Penal Code contain a number of offences that apply to specific kinds of conduct that amount to obstructing justice or interfering with the course of justice. Discussions on some of these offences were made in the previous chapters on perjury, other false statements, provisions relating to evidence and provisions relating to witnesses. It is nevertheless important to retain a general offence of perverting the course of justice to cover conduct that interferes with the proper administration of justice, but would fall outside of these specific offences.

Conspiracy to pervert or obstruct the course of justice

6.2 Section 116 of the Penal Code contains several provisions dealing with conspiracy to defeat justice and interference with witnesses. Interference with witnesses is considered in Chapter 5.

6.3 The offence contained in section 116(a) of the Penal Code is committed when a person:

- conspires with any other person to accuse any person falsely of any crime; or
- conspires with any other person to do anything to obstruct, prevent, pervert or defeat the course of justice.

6.4 The offence of conspiring to accuse a person falsely of a crime has been discussed earlier in Chapter 2, Part 2.3.

6.5 The offence of conspiring with another person to obstruct, prevent, pervert or defeat the course of justice is limited to conspiracy, and the Penal Code does not criminalize conduct where a person attempts to pervert the course of justice in the absence of a conspiracy.

6.6 The SILRC believes that it should be an offence to attempt to pervert the course of justice, as well as conspiring to do so.

6.7 Participants at consultations supported having both offences, rather than limiting the offence to conspiracy to mislead justice.

6.8 Most comparable jurisdictions, like the Solomon Islands, have offences of conspiring to pervert the course of justice but not attempting to pervert the

course of justice. The exceptions are the Queensland Criminal Code, which contains one offence of conspiracy to obstruct, prevent, pervert or defeat the course of justice,[125] and a second offence of attempting to obstruct, prevent, pervert or defeat the course of justice.[126] By contrast, the Crimes Act 2013 of Samoa has one single offence that applies when a person "conspires or attempts to obstruct, prevent, pervert, or defeat the course of justice in any cause or matter, civil or criminal".[127]

6.9 The Model Criminal Code Committee (MCCOC) recommended a general offence of perverting the course of justice. It argued that while the practice has been to express the charge as either attempt or conspiracy, the common law now recognises it as a substantive offence independent of conspiracy or attempt.[128] The offence recommended by MCCOC is intentional conduct to pervert the course of justice, with 'pervert' defined as including obstruct, prevent or defeat.

6.10 The SILRC is of the view that it is appropriate to enact a provision that would cover all attempts to pervert the course of justice, whether or not they involved conspiracy to do so or a specific attempt.

Recommendation 16: Introduce a new and separate offence of 'perverting the course of justice' in the Penal Code. This would include any conduct intended to pervert the course of justice.

'Pervert' includes to defeat, obstruct or prevent.

This offence would replace the remaining provisions in section 116.

See also Recommendation 5 on conspiracy to falsely accuse a person of a crime and Recommendation 14 on interfering with witnesses that make recommendations regarding other parts of section 116.

Penalty

[125] Criminal Code 1899 (Queensland), s 132.
[126] Ibid., s 140.
[127] Crimes Act 2013 (Samoa), s 141 (emphasis added).
[128] Model Criminal Code Officers Committee, *Administration of Justice Offences*, Discussion Paper (July 1997) 89.

6.11 The offence of conspiring to pervert the course of justice is categorized as a misdemeanour in the Penal Code, and no maximum penalty is specified for it in s 116. The Penal Code sets a maximum penalty for misdemeanours with no specified penalties at two (2) years imprisonment, or a fine, or both. This maximum penalty is low compared to that given for the same offences in other jurisdictions.

6.12 In most other Pacific Island jurisdictions, the penalty for similar offences of conspiracy to defeat justice is set at seven years.[129]

6.13 Participants in the SILRC consultations argued that the current penalty set for the offence is insufficient and suggested that the maximum penalty for the offence in s 116(a) of the Penal Code should be increased to seven (7) years imprisonment. The SILRC agrees that the penalty for this offence should be increased in line with other jurisdictions and community expectations.

Recommendation 17: Increase the maximum penalty for the offence of perverting the course of justice to seven (7) years imprisonment.

[129] See Criminal Code Act 1974 (Papua New Guinea) s 128; Penal Code (Vanuatu) s 79; Crimes Act 1969 (Cook Islands) s 128; Crimes Act 1961 (New Zealand) s 116; Criminal Code 1899 (Queensland) s 132. Fiji Islands has a maximum penalty of 5 years (Crimes Decree 2009 (Fiji Islands) s 190 (b)(d)(e)) and the offence in Samoa carries a penalty of three years: Crimes Act 2013 (Samoa) s 141.

Chapter 7: Offences relating to judicial Proceedings

Background and current law

7.1 Section 121(1) of the Penal Code contains a number of specific contempt offences that apply specifically to judicial proceedings. These offences each carry a maximum penalty of three (3) months imprisonment, and where they are committed in view of the court, or within the premises in which a judicial proceeding is being held, the court can punish a person by immediate detention in custody and then imposing a fine of up to one thousand penalty units on the release of the person on the same day or, in default of payment of such fine, sentence the person to one (1) month imprisonment.[130] These provisions are in addition to the power of the High Court to punish for contempt.[131]

7.2 The following are brief descriptions of the offences contained in section 121(1). The offence in section 121(1)(*a*) is committed when a person who, within the premises in which a judicial proceeding is being had or taken, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken.

7.3 Section 121 (1)(*b*) contains an offence that applies to a person who fails to attend a judicial proceeding and give evidence after he or she has been summoned to do so.

7.4 The offence in section 121(1)(*c*) is committed where a person who is present at a judicial proceeding to give evidence, refuses to be sworn or to make an affirmation.

7.5 Section 121(1)*(d)* contains an offence that is committed when a person who is being sworn or affirmed in a judicial proceeding, refuses without lawful excuse, to answer a question or to produce a document which is within his or her power to do so.

7.6 The offence in section 121(1)(*e*) applies to a witness who attends a judicial proceeding to give evidence, remains in the room where the proceeding is being held, after being ordered to leave the room.

7.7 Section 121(1)(*f*) contains an offence that is committed when a person causes an obstruction or disturbance in the course of a judicial proceeding.

7.8 The offence in section 121(1)(*g*) is committed by a person who, while a judicial proceeding is pending, makes use of any speech or writing misrepresenting the proceedings, or capable of prejudicing any person in favour or against the

[130] Penal Code, s 121(2).
[131] Penal Code, s 121(3).

parties to the proceeding, or calculated to lower the authority of the person before whom the proceeding is taken.

7.9 Section 121(1)(*h*) contains an offence that is committed when a person publishes a report of a judicial proceedings which has been directed to be held in private. This offence contains features that overlap with the offence of contempt of publication in section 182 of the Evidence Act 2009.

7.10 The offence is section 121(1)(*i*) is dealt with under Chapter 5 of this report. The offence is committed when a person attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence, in connection with such evidence.

7.11 Section 121(1)(*j*) contains an offence which is committed when a person dismisses his or her servant who has given evidence on behalf of a party to a judicial proceeding.

7.12 The offence in section 121(1)(*k*) applies to a person who wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court.

7.13 Section 121(1)(*l*) contains an offence which is committed when a person commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such judicial proceeding is had or taken.

Policy considerations: Problems and issues

7.14 The following issues are identified in relation to some of the offences in section 121(1) of the Penal Code –

- duplication of the offence in section 121(1)*(b)* of the Penal Code by the offence of non-attendance of witness in section 132(1) of the Criminal Procedure Code;
- overlap between the offence in section 121(1)(*h*) of the Penal Code and the offence of contempt by publication in section 182 of the Evidence Act 2009, and a related matter relating to penalty;
- Clarifying issues relating to competing public interests contained in sections 10 and 12 of the Constitution and the offence in section 121(1)(*g)* of the Penal Code.

Duplication of offences

7.15 The offence in section 121(1)(*b)* of the Penal Code seems to duplicate the offence of non-attendance of witness contained in section 132(1) of the Criminal Procedure Code.

7.16 Section 121 (1)*(b)* of the Penal Code provides -

Any person who –

(b) having been summoned to give evidence in a judicial proceeding, fails to attend… shall be guilty of an offence, and shall be liable to imprisonment for three months.

7.17 Section 121 (2) further provides that when an offence against paragraph (b) (including paragraphs (a), (c), (d), (e), (f), (g) or (l)) of subsection (1) is committed in view of the court, the court may detained the offender in custody, and at any time before the rising of the court on the same day make cognisance of the offence and sentence the offender to a fine of one hundred dollars, or in default of payment to imprisonment for one month.[132]

7.18 In comparison, section 132(1) (in part) of the Criminal Procedure Code says that a person summoned to attend as a witness who, without lawful excuse, fails to attend as required by the summons...shall be liable by order of the court to a fine of forty dollars.

Policy considerations and discussion

7.19 It is clear from the reading of section 121(1)(*b)* of the Penal Code and section 132(1) (in part) of the Criminal Procedure Code that an issue of duplication exists between these provisions, and that it should be addressed. The SILRC holds the view that the offence in section 121(1)(b) in the Penal Code should be repealed as it is already covered by the offence of contempt of publication contained in section 132(1) of the Criminal Procedure Code. This is necessary because these two statutory provisions deal with the same conduct. Further, the SILRC also recommends that the existing penalty of forty dollars for the offence in section 132(1) of the Criminal Code should be increased to a new penalty of one thousand penalty units. This is because the fine of forty dollars for the offence in section 132(1) of the Criminal Procedure Code may now be considered inadequate given the current circumstances in Solomon Islands.

Recommendation 18: The offence in section 121(1)*(b)* of the Penal Code should be repealed as it is already covered by the offence of contempt of publication contained in section 132(1) of the Criminal Procedure Code.

Recommendation 19: The offence of non-attendance in section 132(1) of the Criminal Procedure Code is amended by increasing its existing fine of forty dollars ($40) to a new fine of one thousand penalty units.

Overlap between the offence in section 121(1) (h) of the Penal Code and the offence of contempt by publication in section 182 of the Evidence Act 2009

7.20 Section 121 (1)(h) of the Penal Code states –

[132] Penal Code, s 121(2).

Any person who –

(h) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private… shall be guilty of an offence, and shall be liable to imprisonment for three months.

7.21 A proceeding held in private refers to a proceeding that is conducted in private (sometimes referred to as a proceeding held in camera), and the public galleries are cleared and the doors locked, leaving only the judge, the court clerk, the parties and lawyers and witnesses in attendance. This type of proceeding is rare, or is infrequently used as public access and transparency are both paramount to justice. However, from time to time, there are overriding concerns where the violation of personal privacy combined with the vulnerability of the witness or parties justifies an in camera hearing. Examples are marriage annulments where evidence of sexual dysfunction is required. So few people are affected by the Order sought that there is little harm done in ordering that the evidence be received in camera.[133]

7.22 Section 121(1)*(h)* of the Penal Code potentially overlaps with section 182 of the Evidence Act 2009, with regards to the publication of evidence that is prohibited from being published. Section 182 provides -

Contempt by publication

182. A person commits a contempt of court who prints or publishes –

(a) without the express permission of the court, any question that is disallowed by the court, or any evidence given in response to such a question; or

(b) any question, or any evidence given in response to a question, that the court has informed a witness he or she is not obliged to answer and has ordered must not be published.

Policy considerations: Problems and Issues

7.23 The offence in section 121(1)*(h)* of the Penal Code prohibits the publication of a report of evidence taken in a judicial proceeding which is held in private or in camera. Proceedings held pursuant to section 182 of the Evidence Act 2009 are open proceedings, and members of the public can attend.

7.24 The ambit of the offence in section 182 of the Evidence Act is broader than that of the offence in section 121(1)*(h)* of the Penal Code. This is so in the sense that section 182 is not restricted to *publication* of evidence alone, but extends to

[133] See Duhaime's Law Dictionary, in camera definition, http://www.duhaime.org/LegalDictionary/I/InCamera.aspx (Accessed 25 March 2017). An example of this proceeding (in camera hearing) is provided for in section 15 of the Islanders Divorce Act [Cap 70] of Solomon Islands.

include the '*printing*' of evidence as well. Section 121(1) *(h*) is restricted to the conduct of '*publishing*' evidence alone. In addition, section 182, not only covers the publication or printing of evidence, but extends to include the *publication* or *printing* of '*any question that is disallowed by the court, or 'any question that the court has informed the witness that he or she is not obliged to answer', and which the court has ordered not to be published'.*

7.25 Despite the differences identified, both provisions, and the offences contained therein, seek to achieve the same outcome, and that is, to prohibit the publication (or printing) of evidence or question which the court has disallowed to be published, or evidence or a question published without the express permission of the court.

Policy discussion

Consolidated offence

7.26 The SILRC is of the view that both provisions, and the offences they contain, should be consolidated into one general provision that captures all the particulars of the existing offences in section 121(1*)(h)* of the Penal Code and 182 of the Evidence Act 2009. This requires that the offence in section 121(1)*(h)* of the Penal Code be repealed, and section 182 of the Evidence Act 2009 amended, to include the existing particulars of both offences in the amended offence in section 182 of the Evidence Act 2009. One rationale for considering this option is premised on the idea that it is much speedier and expedient to deal with the offence in section 182 of the Evidence Act 2009 by way of contempt of court, rather than having to charge a person with the offence in section 121(1)*(h)* of the Penal Code and go through the court process which is normally time consuming and susceptible to delays.

Maximum penalty

7.27 A related issue is to consider the appropriate penalty to set for the amended offence in section 182 of the Evidence Act 2009. The offence in section 121(1)*(b)* of the Penal Code carries a penalty of three months' imprisonment or, if the court deems fit, impose a fine of up to one thousand penalty units on the offender on the same day, or in default of paying the fine, ordered the offender to imprisonment for one month.[134] In contrast, any violation of the offence of contempt by publication in section 182 of the Evidence Act is dealt with by contempt of court, and currently, no penalty is specified for it. This means that

[134] See Penal Code, ss 121(1)(2). Note that the penalty of $100 in section 121(2) of the Penal Code has been increased to $1000 by s 8 of the Penalties Miscellaneous Amendments Act 2009 (see the Schedule to the Act).

the court will determine the appropriate penalty to impose in any given case when the offence is committed.

Recommendation 20: The offences in section 121(1) *(h)* of the Penal Code and section 182 of the Evidence Act 2009 should be consolidated into one general offence (consolidated into amended offence in section 182 of Evidence Act 2009).

The penalty for this offence should be two thousand and five hundred penalty units or, imprisonment for three months, or both. [135]

Clarifying issues relating to competing public interests contained in sections 10 and 12 of the Constitution and the offence in section 121(1)(g) of the Penal Code.

7.28 Section 121(1)*(g)* states that a person commits an offence if:

> while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken.

7.29 The offence in section 121(1)*(g)* covers and applies in three situations -

- making use of any speech or writing misrepresenting the proceedings;
- making use of speech or writing capable of prejudicing someone in favour or against the parties to the proceeding, and
- making use of speech or writing to lower the authority of the person before whom the proceeding is taken.

7.30 The ambit of section 121(1)(*g*) is potentially wide and the provision codified two main areas of misconduct under the common law of contempt by publication: sub judice contempt and scandalising the court. At common law these classes of contempt were described by Lord Russel in the case of *R v Gray*[136] -

> "Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing

[135] The fine of two thousand and five hundred penalty units or, three months imprisonment or, both, that is set for this offence, is reflective of the formula used to calculate penalties for offences introduced in recent Acts or bills, such as the Ombudsman Act 2017, the Whistle Blowers Protection Bill 2016, and the Family Protection Act 2014.

[136] [1900] 2 QB 36, 40. In this case, an editor, who was the defendant, wrote an article commenting on a trial that had taken place before Darling J, and including some scurrilous personal abuse of the judge and his fitness for that office. Accepting the defendant's apology and fining him $100 for contempt of court, Lord Russell CJ said anything calculated to bring a judge into contempt, or to lower his authority, is a contempt of court. But judges are open to criticism, and reasonable argument or expostulation would not be treated as a contempt of court.

published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court."

Sub judice contempt

7.31 Sub judice contempt is typically committed where there is a publication or comment through media organisations relating to proceedings currently before the court that has the potential to interfere with the proper running of the proceedings.[137] The first and second situations codified in section 121(1)*(h)* of the Penal Code fall under this class of contempt. This offence may be committed where a person or a media organisation makes a public comment, or publishes the evidence of a proceeding that misrepresents the proceedings or prejudices someone in favour or against a party to the proceedings. The rational for the offence is to avoid a 'trial by media' by prohibiting the publication of material which might prejudge issues at stake in particular proceedings, or which might influence or place pressure on persons involved in the proceedings, including jurors, witnesses or potential witnesses, and parties to the proceedings.[138]

7.32 The NSW case of *Attorney General for NSW v Radio 2UE Sydney Pty Ltd* illustrates this point. This case involved a murder trial. On the third day of the trial, the defendant, John Laws, who is a well-known media personality, made a number of comments on radio about the criminal trial involving a man accused of murdering a young child. In his comments, Mr Laws described the accused as "absolute scum" and a murderer. Mr Laws discussed the evidence and insisted that the accused was guilty of the murder, as well as criticising the way in which the prosecution had run the case. The jury was discharged and John Laws and Radio 2UE were charged with, and were found guilty of, contempt. They were ordered to pay costs and substantial fines.

Scandalising the court

7.33 Scandalising the court refers to conduct which denigrates judges or the court so as to undermine public confidence in the administration of justice.[139] The offence in section 121(1)(g) is committed when a person, while a judicial proceeding is pending, makes use of any speech or writing…*calculated to lower the authority of any person before whom such proceeding is being had or taken*.

7.34 Scandalising judges or the judiciary involves the publishing of material or doing other acts (e.g. speech and writing) likely to undermine the administration of justice or public confidence therein, and usually takes the form of scurrilous

[137] Judicial Law Commission of New South Wales, Criminal Trial Courts Bench Book, Contempt, etc., https://www.judcom.nsw.gov.au/ (Accessed 6 July 2017).
[138] Ibid.
[139] Above n 137.

abuse of the judiciary or imputing to them corruption or improper motives.[140] The rationale for an offence of scandalising the court derives from the need to uphold public confidence in the administration of justice, and in many ways, this need is particularly acute in a democracy, where the power and legitimacy of the judicial branch of government derives from the willingness of the people to be subject to the rule of law. In consequence, the public must have faith in the judicial system.[141] It is the balancing of the right to freedom of expression with the importance of upholding public confidence in the administration of justice that lies at the heart of the debate about the offence of scandalising the court.[142]

7.35 At common law, the content of the publication must be of such nature as to risk undermining the administration of justice or public confidence, and the expression "calculated to bring a court or a judge of the court into contempt or to lower his authority" means exactly that. Lord Atkin, in *Ambard v Attorney General of Trinidad and Tobago*[143] succinctly described the common law offence of scandalising the court -

> "No wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

7.36 This common law position was applied by the High Court of Solomon Islands in *Director of Public Prosecutions v Solomon Islands Broadcasting Corporation.*[144] In this case the respondent (SIBC) published the following words: "the Minister's sentence and term in prison was hypocritical ... the judgment must have been pre-arranged..... The MP called on the judiciary to abide by its principles of maintaining neutrality at all times." The Director of Public Prosecution brought the action before the High Court arguing that the words published by the respondent amounted to criminal contempt, and that he had locus standi to

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[140] Law Commission of England and Wales, *Scandalising the Court,* Consultation Paper No 207.
[141] Ibid
[142] Ibid.
[143] [1936] AC 322.
[144] *Director of Public Prosecutions v Solomon Islands Broadcasting Corporation* [1985] SBHC 26; [1985-1986] SILR 101 (25 October 1985).

bring the matter to court. The High Court, in applying the common law test, in its judgment, elaborated -

> '… criticism however vigorous, of a judgment or a decision of a court will not constitute contempt of court, if it is made in good faith and is reasonable, even though it contains errors. It is the ordinary right of members of the public or the press to criticise in good faith in private or in public the public administration of justice. However in exercising that right the members of the public must abstain from imputing improper motives to those taking part in the administration of justice and must genuinely exercise that right of criticism and not act out of malice or an attempt to impair the administration of justice.'[145]

Policy consideration: Striking the balance between competing public interests in section 10 (right to a fair trial) and section 12 (freedom of expression) in the Constitution and the offence in section 121(1) (g) of the Penal Code.

7.37 Section 12 (1) of the Constitution protects a person's freedom of expression. The provision says that a person, without his or her consent, shall not be hindered in the enjoyment of his freedom of expression, including the -

- freedom to hold opinions without interference,
- freedom to receive ideas and information without interference,
- freedom to communicate ideas and information without interference, and
- freedom from interference with his correspondence.

7.38 However, the Constitution also makes provision that allows laws to restrict freedom of expression in the interests of defence, public order, public morality or public health or to *protect the private lives of person concerned in court proceedings or maintain the authority and independence of the courts*.[146] Such restrictions must also be reasonably justifiable in a democratic society.[147]

7.39 The right to a fair trial is another public interest to be considered against freedom of expression. Section 10 (1) of the Constitution says that a person who is charged with a criminal offence, unless the charge is withdrawn, shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

7.40 It is this right to a fair trial, and the need to maintain public confidence in the authority and the independence of the courts that the offence in section 121(1)*(g)* (or similar offences) seek to protect. Hence, the offence was formulated along the lines of section 12(2) *(b)* and section 10 (1) of the Constitution. This entails that

[145] Ibid.
[146] Constitution, s 12(2).
[147] Ibid.

whilst section 12(1) of the Constitution protects and allows a person to exercise his or her freedom of expression, he or she has to be mindful that their exercise of that freedom does not undermine or infringes on another person's right to a fair trial, and the need to maintain public confidence in the authority and independence of the courts.

7.41 The courts in other jurisdictions have established that if there is a conflict between freedom of expression and the right of a person to a fair trial, the latter would prevail. In New Zealand, for instance, in the case of *Solicitor General v Radio New Zealand*[148], the court affirmed this point by saying -

> "… In this country, as in Australia, it is clear that in the event of a conflict between the concept of freedom of speech and the requirements of a fair trial, other things being equal the latter should prevail."

Law Reform Approach in other jurisdictions and defences

7.42 The Australian Law Reform Commission (ALRC) recommended that the common law offence of 'scandalising' be replaced with an offence to publish an allegation which imputes misconduct to a judge if in the circumstances the publication is likely to cause serious harm to the reputation of the judge in his or her official capacity. The ALRC also recommended that truth, or that the defendant honestly believed on reasonable grounds that the allegation was true, should be a defence, as well as fair, accurate and contemporaneous reporting of legal or parliamentary proceedings.[149]

Conclusion

7.43 The SILRC acknowledges that the law of contempt is a very broad area that requires thorough consideration, and that it is not within the scope of this Report to cover all aspects of this area of law. The discussion in relation to the offence in section 121(1)*(g)* of the Penal Code and sections 10 and 12 of the Constitution is an attempt purporting to shed some light and awareness on areas of conflict that may arise when the competing public interests in the Constitution (such as the right to a fair trial or freedom of expression) come into play. In that respect, and at this time, the SILRC makes no recommendations to the issues identified in the discussion, and holds the view that it is best left to the courts to deal with issues of conflict amongst competing public interests and matters that may invoke the contempt of court.

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[148] [1993] NZHC 423, [1994] 1 NZLR 48.

[149] Australian Law Reform Commission, *Contempt, Summary of Report*, Report No 35, 24.

Chapter 8: Other issues

Part 8.1: Proceedings other than judicial proceedings

Should administration of justice offences apply to proceedings other than judicial proceedings?

8.1 The issue of whether and how offences that apply to administration of justice should apply to proceedings that fall outside of the definition of judicial proceedings needs to be considered. The current definition of judicial proceedings does not cover traditional or chiefs' hearings, or proceedings in or before a court, tribunal, or commission of inquiry unless evidence in it can be taken on oath.[150] For example the definition would not cover the proposed Tribal Lands Dispute Resolution Panels because evidence cannot be taken on oath even though a Panel would have the power to make a binding decision about tribal land. This was raised frequently during consultations as a problem that needs to be addressed to protect the integrity of traditional hearings.

8.2 Local Courts, and bodies where evidence can be given on oath and witnesses compelled to give evidence, do not have any power to use the common law of contempt to address witness misbehaviour.

8.3 There is a strong link between traditional justice and the formal system with respect to land disputes. Disputes about customary land must be considered by chiefs, and all traditional means of resolving the dispute must be exhausted, before a case can be considered by the Local Court.[151] This link is also recognized by the proposed Tribal Lands Dispute Resolution Panels Bill that would use chiefs and community leaders as the decision makers on customary land disputes. It removes the Local Court and the Customary Land Appeal Court from dealing with customary or tribal lands.

8.4 The Evidence Act now permits unsworn evidence to be used in court proceedings, and the proposed Tribal Lands Dispute Resolution Panels Bill involves witnesses giving unsworn evidence to a panel of three chiefs or community leaders.

8.5 Consultation by the SILRC indicates concern about false evidence and lies given in chiefs' hearings, particularly in connection with land disputes and land dealings. For example at one consultation the SILRC was told that genealogies can assist with land disputes but there is also the wrong use of genealogies, and

[150] Penal Code, s 4.
[151] Local Courts Act, s 12.

that genealogies are used to steal land rights.[152] At another consultation concerns were also raised about lying in court, and lying about land.[153]

8.6 There is also concern that traditional systems of authority are breaking down, and that there is lack of formal recognition of chiefs and their role.[154]

8.7 The decisions of chiefs can be written and later verified on oath for the purpose of court proceedings. The Local Court Act also has a process for registration of determinations made by chiefs, however, there is no legal requirement that the document is verified on oath.[155]

8.8 Further problems can arise where there is improper interference, including intimidation of chiefs who have responsibility for making a decision (usually about customary land), or interference with the written records of decisions made by chiefs particularly where those written records are used in subsequent court proceedings, or for the purpose of land registration. The offences that protect judicial proceedings, and judicial officers, from improper interference do not apply to chiefs, chief committees, people who give information to chiefs or who participate in meetings with chiefs or people who have responsibilities with respect to the written records of chief hearings. Contempt proceedings are not available to protect proceedings undertaken by chiefs.[156]

Conclusion and recommendations

8.9 The majority of issues that come before chiefs' hearings are land disputes. The Ministry of Justice and Legal Affairs is currently working on a Tribal Lands Dispute Resolution Panels Bill that would regulate customary land disputes. When the Bill becomes law, it would provide for a panel of appointed Members that must have a good knowledge of customary rule in the area or are custodians of land, have lived on their land for more than three continuous years, and have not been convicted of a crime of dishonesty or other criminal offences carrying a sentence of more than six months. The Bill also deals with misconduct during proceedings that covers some (but not all) of the types of conduct prohibited by the Penal Code in judicial proceedings. Such misconduct is punishable by imprisonment for one year or a fine of $400.

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[152] Choiseul Provincial Government representatives and other community members, *Consultation*, Taro, 13 October 2010.

[153] Temotu Province Government members, *Consultation*, Lata, 4 June 2010.

[154] Foreign Relations Committee, Report on the Inquiry into the Facilitation of International Assistance Notice 2003 and RAMSI Intervention, NP Paper No 37/2009, National Parliament of Solomon Islands 196,197.

[155] Local Court Act s 14, Form 2 of the Schedule.

[156] Constitution s 84(1). The High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate court...

8.10 If this proposal is enacted, it would go a significant way towards allaying the concerns of people regarding traditional dispute resolution in relation to land disputes. The government should consider, in its final drafting of the Bill, whether the scope of prohibited conduct is wide enough to capture all types of behaviour that should be discouraged during tribunal hearings. In particular, the SILRC recommends considering whether deliberately lying to a tribunal, producing evidence that they know to be false, or improperly influencing witnesses should be included in the misconduct.

8.11 Some disputes that come before chiefs' hearings are not land disputes. These would remain unregulated, even if the proposed Tribal Lands Dispute Resolution Panels Bill becomes a reality (law). It is currently beyond the scope of this reference to examine ways to make chiefs' hearings more accountable, but the SILRC recommends that the government consider properly regulating chiefs' hearings, (in a similar way to the proposal on tribal lands) if they are to be part of the Solomon Islands legal system. This is important since customary law is a form of law recognised by the Constitution of the Solomon Islands.

8.12 An alternative may be to re-examine the Local Courts Act to make it a more effective tool for settling custom disputes. The Local Courts Act says that a person who appears before the local courts to give evidence may give evidence on oath.[157] This means that proceedings held in the local courts are regarded as 'judicial proceedings' within the definition of judicial proceedings provided for in section 4 of the Penal Code, and therefore, the offences discussed in this paper would apply. Local Courts are already constituted in accordance with the law or customs of Islanders of the area in which the court has jurisdiction. Changes may include amending the Act to align with the proposed Tribal Lands Dispute Resolution Panels Bill for disputes that do not concern land, or extending its reach to make justice more accessible with regards to both area and language.[158]

Recommendation 21: That the government consider further how administration of justice offences may apply to proceedings that mediate custom disputes. Although these proceedings are non-judicial in nature, they are nevertheless a lawfully recognised part of the Solomon Islands legal system.

The SILRC commends the government for its initiative in drafting the Tribal Lands Dispute Resolution Panels Bill and encourages its enactment as an important step in this direction. The SILRC urges the government to carefully consider the types of misconducts that are prohibited in this Bill in light of the concerns expressed by

[157] Local Courts Act [Cap 19] s 15.
[158] Ibid., s 3.

stakeholders during the course of the consultations on this project (Administration of Justice).

Part 8:2 Felonies and misdemeanours

8.13 The Penal Code currently categorises offences as either a felony or a misdemeanour.

8.14 Section 4 of the Penal Code defines a felony to mean 'an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with imprisonment for three years or more'. A misdemeanour is defined as 'any offence which is not a felony'.

8.15 Some offences in the Penal Code that are identified as a misdemeanour specify a particular penalty, others do not. Section 42 says that the general punishment for misdemeanours for which the Penal Code does not provide a specific punishment is a maximum of two years imprisonment, or a fine, or both.

8.16 However, the use of the terms 'misdemeanour' and 'felony' in the Penal Code is confusing as some misdemeanours carry the same maximum penalties as felonies, while some felonies may carry lesser penalties than some misdemeanours.

8.17 The maximum penalty for a felony in the Criminal Code varies from imprisonment for two years (larceny by a tenant or lodger where the value of the chattel or fixture does not exceed 10 dollars: s 272, and miners removing materials: s 287) to imprisonment for life (such as for murder: s 200, manslaughter: s 199, attempting to procure an abortion: s 157, burglary: s299 and arson: s319).

8.18 While misdemeanours carry a default penalty of a maximum of two years imprisonment, in many cases a much higher penalty is specified. The table below lists offences that are identified as misdemeanours that have a specified penalty of three years or higher.

Maximum Penalty	**Offence**
3 years	Extortion by public officers (s 92) Personating public officers (s100),
5 years	Unlawful wounding (s 229) unlawful poisoning (s230) cruelty to children (s233) assaults causing actual bodily harm (s 245)

	Being found by night armed or in possession of housebreaking implements (s 302) False pretences (s308) Uttering and possession with intent to utter (s 355(3))
7 years	Perjury (s102) False statements on oath made otherwise than in a judicial proceeding (s103) False statements etc., with reference to marriage (s 104) False statements, etc., as to births or deaths (s 105) Fabricating evidence (s 110) Assaults on Magistrates and other persons protecting wreck (s 246) Conversion (s 278) Factors obtaining advances on the property of their principals (s 291) Conversion by trustee (s304) Director, etc., of any body corporate or public company wilfully destroying books, etc. (s305) Fraudulent falsification of accounts (s306) Receiving (s 313) Receiving goods stolen outside Solomon Islands (s 314)
10 years	Being found by night armed or in possession of housebreaking implements, if the person has previously been convicted of any such misdemeanour or of any felony (s 302)
14 years	Importing and exporting counterfeit coin (in the case of exporting or putting on board) (s357)

8.19 Beyond the term of imprisonment as stated in the section 4 definitions, there does not appear to be any substantial difference in categorizing an offence as a felony or as a misdemeanour. Other jurisdictions have different procedures for hearing different types of offences,[159] but there does not appear to be any procedural distinction in the Solomon Islands in how the different offences are dealt with by the courts.

8.20 The SILRC is of the view that it is misleading to categorise some offences as misdemeanours and provide them with higher maximum penalties while some felonies carry lower or the same maximum penalties as misdemeanours. This was done in the United Kingdom with the passing of the Criminal Law Act 1967. Section 1(1) of this Act abolished all distinctions between felony and misdemeanour in the United Kingdom. There is no apparent benefit in

[159] For instance, in most jurisdictions in Australia, offences are categorised as either summary or indictable offences. This has procedural implications, such as whether the matter will have a jury trial or judge alone, which court can hear the matter, and the maximum penalties that the courts can impose.

maintaining this distinction and the SILRC suggests that the government consider abolishing the use of misdemeanour and felony.

8.21 The SILRC acknowledges that this issue is broader than the current Administration of Justice offences project. It will impact on the whole Penal Code, as well as other laws and subordinate legislation that make reference to misdemeanour or felony offences. Any change will need to include consequential amendments to a number of existing Solomon Island laws to ensure consistency. Nevertheless, the SILRC recommends that the government consider this recommendation in order to eliminate confusion and improve clarity of Solomon Islands' laws.

Recommendation 22: The government consider removing the distinction between felony offences and misdemeanour in the Penal Code and other Solomon Islands laws.