SOLOMON ISLANDS

LAW REFORM COMMISSION

REVIEW OF THE PENAL CODE AND CRIMINAL PROCEDURE CODE

THIRD INTERIM REPORT

MENTAL IMPAIRMENT, CRIMINAL RESPONSIBILITY AND FITNESS TO PLEAD

OCTOBER 2013

SOLOMON ISLANDS LAW REFORM COMMISSION

26 September 2013

Honourable Commins Mewa
Minister for Justice and Legal Affairs
Kalala House
Honiara

Dear Hon Minister,

Review of the Penal Code and the Criminal Procedure Code

On 1st May 1995 your predecessor gave terms of reference to the Law Reform Commission (LRC) to enquire and report to you on the review of the Penal Code and the Criminal Procedure Code.

In accordance with the Law Reform Commission Act (and the Regulations made under that Act) the LRC is pleased to present to you the third interim Report on this Review. The third interim report contains recommendations for reform of the law and procedure that applies to persons with mental health problems in Solomon Islands who come into contact with the criminal justice system. The Report deals with issues pertaining to mental impairment, criminal responsibility and the capacity of these people to participate in court proceedings.

Yours Sincerely,

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THE SOLOMON ISLANDS LAW REFORM COMMISSION

HONIARA, SOLOMON ISLANDS

MENTAL IMPAIRMENT, CRIMINAL RESPONSIBILTY AND FITNESS TO PLEAD

Report

2013

Solomon Islands Law Reform Commission

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

Chairperson	post vacant
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	Mrs Emmanuella Kauhue
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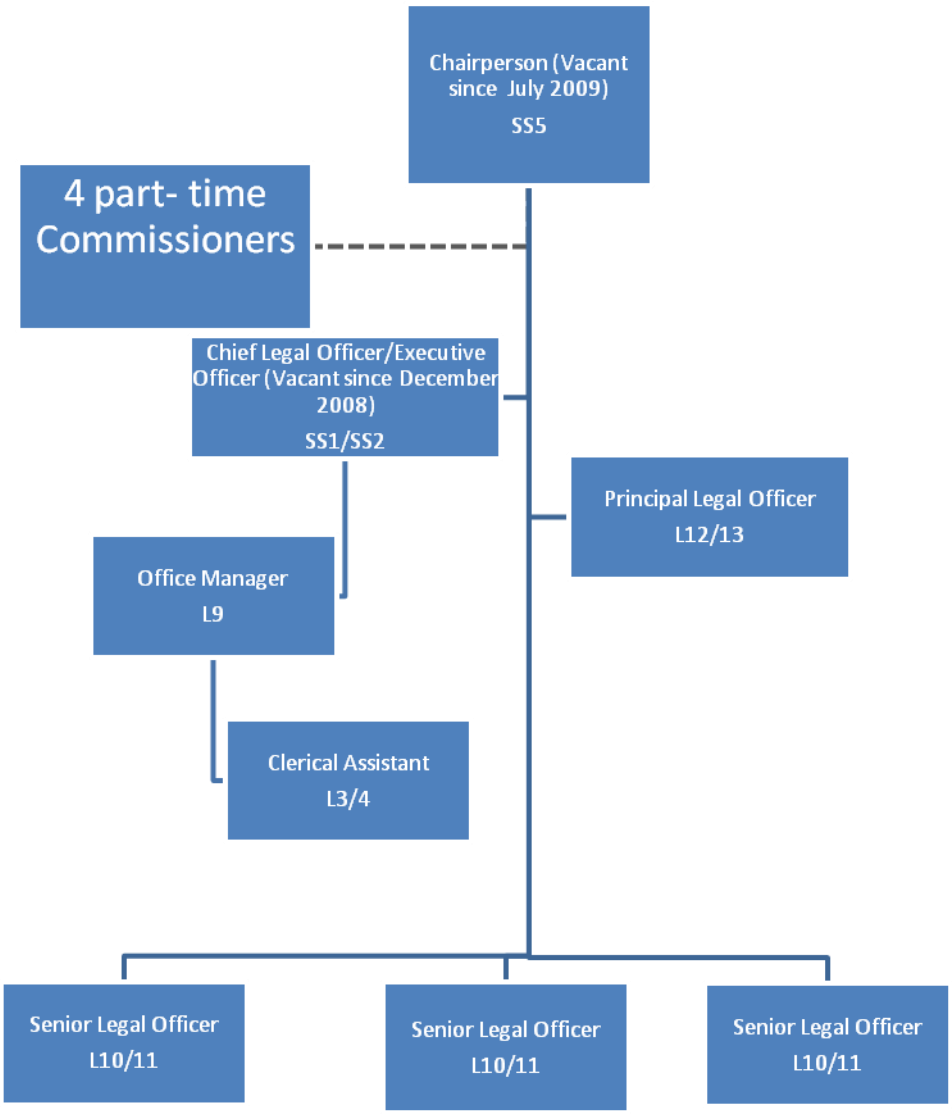
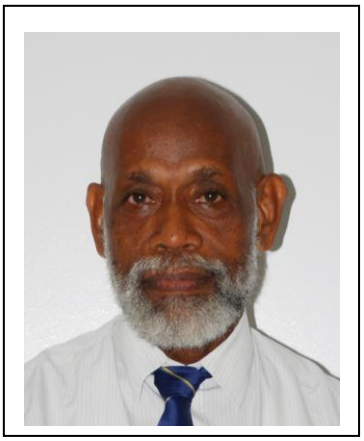
Solomon Islands Law Reform Commission (SILRC) Organisational Structure



Commissioners

Commissioner Gabriel Suri



Commissioner Waeta Ben Tabusasi

Commissioner Rt Rev. Philemon Riti

Commissioner Emmanuella Kauhue

Acknowledgments

The SILRC would like to thank the Commissioner and staff of the Correctional Services, the Public Solicitor's Office and Dr Paul Orotaloa, psychiatrist, for responding positively to our initial invitation for the submission of helpful information that contributes much towards the write up and compilation of this Report.

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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.

Abbreviations and Terminology

CRC: Convention on the Rights of the Child

ECHR: European Court of Human Rights

LRC: Solomon Islands Law Reform Commission

UNCRPD: United Nations Convention on the Rights of Persons with Disabilities

NT: Northern Territory

NSW: New South Wales

NZ: New Zealand

Vic: Victoria

UK: United Kingdom

Mental impairment: In this paper we use the term mental impairment to refer to a wide range of conditions that can affect the capacity of a person to reason, understand, communicate and control his or her actions. It includes mental illness, disease of the mind as well as intellectual disability, dementia and brain damage.

Fitness to plead: Refers to the capacity of a person charged with a criminal offence to participate in the court proceedings.

Qualified person: means a psychiatrist or a psychologist.

Special hearing: An inquiry conducted by a court to determine whether a person charged with a criminal offence, who is not fit to plead, committed the physical elements (actus reus) of the offence. In Solomon Islands it is an inquiry to determine whether there is enough evidence to support a finding of guilt for the offence.

List of recommendations

Recommendation 1

Special hearing

A special hearing should be conducted for a person who is not fit to plead because of a mental impairment. The purpose of the special hearing is to determine whether, on the balance of probabilities, there is sufficient evidence to prove that the person with the mental impairment committed the physical elements (actus reas) of the offence for which he or she was charged.

Recommendation 2

The special hearing should be conducted before conducting an enquiry to determine whether a person with a mental impairment is not fit to plead or fit to stand trial. The Law Reform Commission recommends that Solomon Islands should adopt the NZ model on special hearing for two reasons. First, the NZ model promotes the certainty that a mentally impaired defendant would not be detained for indefinite or for lengthy periods for an offence he or she might not have committed. Second, the NZ model will save the courts and legal services time from holding a fitness inquiry which demands time and add more constraints on limited resources.

Recommendation 3

Diversion

Diversion should be introduced for a person with a mental impairment - (a) who is charged with a minor offence (misdemeanor); and (b) whose mental condition is curable and can be treated in the community or home, and (c) who will not pose a security risk or harm to the public or to themselves if released into the community.

Recommendation 4

The responsibility to initiate the diversion of a person with a mental impairment lies with a family member or a guardian of the impaired person. The family member of guardian shall instigate the review by submitting an application to the police requesting diversion for the mentally impaired person. The police, with the assistance of a

qualified person (a psychiatrist or a psychologist) will conduct medical assessments on the impaired person's mental condition and determine whether or not the impaired person is eligible for diversion from the criminal justice system.

Recommendation 5

Supervision Orders and detention

The revised Penal Code or Criminal Procedure Code should empower the relevant courts in Solomon Islands to make supervision orders for a person with a mental impairment. There will be two types of supervision orders – custodial supervision order – where a mentally impaired person must be detained, and non-custodial supervision order – where the person can be released under strict conditions and supervision.

Recommendation 6

The court shall make a supervision order for a person with a mental impairment who is not fit to plead or who is acquitted of a charge because of insanity. The court will decide whether to make a custodial or non-custodial supervision order.

Recommendation 7

A custodial supervision order shall be made by the courts where it is necessary that the mentally impaired person should be detained. This can only happen if the court is satisfied that the release of the mentally impaired person into the community would pose a serious risk to the safety of the mentally impaired person or the safety of any other person.

Recommendation 8

A person with a mental impairment who is the subject of a custodial supervision order can only be detained in a correctional center, or in a prison, if there are no practicable alternative places for detention.

Recommendation 9

The revised Criminal Procedure Code should specify the circumstances and the length of time when a person with a mental impairment should be detained.

Recommendation 10

The revised Criminal Procedure Code should specify that a person with a mental impairment should be detained if – (a) the person's mental condition has been assessed by a qualified person (a psychiatrist or a psychologist) and it is found that the mentally impaired person might pose risks of harm to themselves or to another person; and (b) the court finds that proper mental health facilities or services are available in the appropriate place of detention, or the court is satisfied that there is no practicable alternative available other than a correctional center or prison – in a correctional center or prison - given the circumstances of the person.

Recommendation 11

Periodic Reviews

Periodic reviews should be conducted for people with a mental impairment who are detained. The responsibility to initiate the periodic review lies with any person or institution having interest in the welfare of the mentally impaired person. To instigate the review, the person or institution having interest in the welfare of the mentally impaired person (or through the lawyer representing the mentally impaired person) shall, within three (3) months of the person's detention, submit an application to the Registrar of the High Court seeking court direction for the periodic review. Upon notification of the application, the court shall direct a qualified person (medical officer in charge, or any other qualified person) of the mental health facility, prison or another place of safe custody to conduct medical assessment on the condition of the person with mental impairment for the purposes of the review. Subsequent periodic reviews of the mentally impaired person's mental condition shall be conducted at the end of every 12 months of the person's detention, however, where necessary, the court may order that a special or urgent periodic review should be conducted within 6 months of a person's detention.

Recommendation 12

Periodic reviews of a person's mental condition should be conducted by the court based on medical reports adduced by at least one qualified person (the medical officer in charge of the mental health

facility, correction center, prison or another place of safe custody, or a qualified person called for the purposes of the periodic review).

Recommendation 13

Equal rights of appeal

The revised Criminal Procedure Code should contain provisions for appeals from (i) decisions about whether a person with a mental impairment who is not fit to plead or stand trial committed the physical elements (actus reas) of an offence; (ii) decisions about fitness or unfitness to plead or stand trial; and (iii) decisions about supervision orders.

Recommendation 14

Evidence about mental impairment and fitness to plead

The Criminal Procedure Code should specify that only one qualified person (psychiatrist or psychologist) should carry out assessments on the condition of a person with a mental impairment in order to assist the courts in conducting periodic reviews, or determining whether it is necessary to detain a person with a mental impairment. However, to assist the court in determining whether or not a person was affected by mental impairment at the time he or she committed an offence (determining whether or not to acquit the accused as 'not guilty' because of insanity), at least two qualified persons (one of whom must be a psychiatrist) must be required to conduct separate assessments on the condition and the circumstances of the accused person at the time he or she committed the offence.

Recommendation 15

Appropriate training and adequate mental health facilities

The Government should prioritise training opportunities for medical and correctional/prison officers, or any other person who looks after or intends to work with persons with a mental impairment.

Recommendation 16

The Government should build proper and adequate mental health facilities in Solomon Islands where persons with mental impairment can be treated, supervised or kept away from the public where they

become a security risk to the public or to themselves or where they might face risk of harm or abuse from any other person.

Recommendation 17

Criteria for determining fitness to plead

Introduce a criteria to guide the courts in determining whether or not a person is fit to plead or stand trial in the revised Criminal Procedure Code or Penal Code.

Recommendation 18

The appropriate criteria to determine whether a person is not fit to plead or stand trial should be based on any of the following – (a) the person is unable to plead to the charge; (b) the person is unable to understand the nature of the trial; (c) the person is unable to follow the course of the proceedings; (d) the person is unable to give instructions to his or her legal counsel; or (e) the person is unable to understand the substantial effect of any adverse evidence; and decide upon a defence, and make his or her version of facts known to the court and his or her counsel that may be given in support of the prosecution.

Recommendation 19

Responsibility and decision-making

The revised Criminal Procedure Code or Penal Code should clarify that courts are the appropriate body to make decisions about when, where and for how long people charged with a criminal offence who have a mental impairment should be detained.

Recommendation 20

The revised Criminal Procedure Code or Penal Code should empower the courts to order for assessments of a person with a suspected mental impairment who is charged with a criminal offence. The purpose of the assessments is to assist the courts determine whether or not the person with a mental impairment is (i) not fit to plead or stand trial; or (ii) the person is insane, or (iii) where and when the court sees it necessary to order such assessments.

Recommendation 21

Defence of Insanity

The revised Criminal Procedure Code should clarify that the defence of insanity will apply to an accused person with a mental impairment who does not know what he or she did was morally wrong according to the standards of reasonable people.

Recommendation 22

The defence of insanity should apply to conditions of mental impairment that have the effect of depriving a person of the capacity to understand the nature of his or her act or omission; or to know that he or she ought not to do the act or make the omission, or to control his or her actions.

Recommendation 23

The revised Penal Code should be amended to provide for a third element for the defence of insanity: that at the time the offence was committed the accused person with a mental impairment was affected by a mental impairment rendering him or her incapable to control his or her actions.

Recommendation 24

A person with a mental impairment who successfully argues the insanity (mental impairment) defence should be found 'not guilty because of insanity' of the offence.

Recommendation 25

The current special verdict of 'guilty but insane' contained in section 146 of the Criminal Procedure Code should be replaced with a new verdict of 'not guilty because of insanity' in the revised Criminal Procedure Code.

Chapter 1 - Introduction

Background

1.1 The Solomon Islands Law Reform Commission (LRC) has a reference to review the Penal Code and Criminal Procedure Code. This Report addresses the provisions in the Penal Code and Criminal Procedure Code on the defence of insanity and the law that governs the processes for people who are not fit to plead or stand trial because of mental impairment.

1.2 The work of the LRC is guided by the following objectives:

- The need to modernise and simplify the law, eliminate defects in the law, introduce new and more effective methods for administration of justice;
- compliance with the Constitution, and
- under the terms of reference for the review of the Penal Code and Criminal Procedure Code the LRC must address developments in new crimes, and make the Penal Code responsive to the modern needs of Solomon Islands.

1.3 Any reform in this area must take account of the resources for people with mental impairment in the Solomon Islands. According to our consultation so far there is a lack of secure mental health facilities in Solomon Islands suitable for people with mental impairment who are charged with a criminal offence, or found guilty but insane, and who need to be detained either for the safety of the person or the community.

1.4 The provisions in the Criminal Procedure Code and Penal Code for detention of people with mental impairment provide for detention in a mental hospital, prison or other 'place of safe custody'. However in reality it appears that Rove Correctional Centre is the only secure place of detention. At the Rove Correctional Centre people who are affected with mental impairment are not kept in separate units from normal inmates. These people are kept with the normal inmates and are treated the same as the other prisoners. People with mental impairment can pose a potential security risk to other prisoners at the Correctional Centre.[1]

[1] Francis Haisoma, Commissioner for Correctional Services, *Submission No. 1,* 1 October 2009.

1.5 The Kilu'ufi mental health facility at Auki is open and is not secure. Patients can escape or leave at any time into the community. This can pose a risk to the public.[2] There is also a need to upgrade the mental health facility at Kilu'ufi, as well as there is need for medical staffing and the need for prescribed medicines.

1.6 Matters were made worse when the Kilu'ufi mental health facility was forced to close down due to its run down condition in late 2012.[3] A number of mental patients admitted at Kilu'ufi died of dysentery due to poor sanitation. The subject of the case study in this report – JH - was one of those patients who died in 2012.[4]

1.7 The policy reasons for having proper rules in place that apply to people who are not fit because of mental impairment and those who cannot plead or stand trial for other reasons are to:

- ensure that the balance between the interests of people with a mental impairment and those who cannot plead or stand trial and the interests and the safety of the public is maintained;
- ensure that the constitutional protections afforded to people with a mental impairment charged with a criminal offence are not violated;
- ensure that all people are treated equally before the law; and
- meet the obligations of Solomon Islands under United Nations conventions such as the UNCRPD and the CRC.

Research Process

1.8 Work on this Report involved reviewing the relevant provisions of the Penal Code and the Criminal Procedure Code that covers the law and processes that concerns people with a mental impairment who are charged with a criminal offence. In doing that the LRC did some preliminary consultation with key stakeholders to get their views on how these people were dealt with in the criminal justice system in practice, and to identify problems associated with the application of the law in this area. The information gathered

[2] Dr. Paul Orotaloa, Psychiatrist, *Consultation*, Law Reform Commission Office, 16 October 2009.

[3] Dr. Paul Orotaloa, Psychiatrist, and Team, *Consultation*, Community Mental Health unit, National Referral Hospital, 5 February 2013.

[4] Dr Paul Orotaloa and Team, *Consultation*, Community Mental Health Unit, National Referral Hospital, 5 February 2013.

has been used to write this Paper. For example, the information in the case study was obtained from the Rove Correctional Services Centre, and other important information was obtained after having preliminary consultation with key professionals from the Ministry of Medical and Health Services and the Ministry of Justice and Legal Affairs in Honiara.

1.9 The LRC also did research on the laws in other jurisdictions, mainly New Zealand, the Northern Territory, New South Wales and United Kingdom in this area. These jurisdictions were considered because at one stage they had similar laws to those in Solomon Islands, however over the years these jurisdictions have reformed the law in this area. The aim of the comparison with other jurisdictions is to identify some options for reform that might assist to overcome the problems identified in Solomon Islands.

Overview of this Paper

1.10 The next part of the Report gives information about the current law that applies to people with mental impairment in the criminal justice system. Chapter 3 considers relevant human rights standards, and analyses the current law from that perspective. Chapter 4 identifies some problems in relation to the existing law and gives information about options for reform of the law, as well as recommendations for reform.

Chapter 2 - Current Law

2.1 This chapter explains the current law concerning people who have a mental impairment at the time they committed an offence, and are relying on the defence of insanity. It also explains the law relating to the fitness of people who have a mental impairment, and who participate in court proceedings.

2.2 The Penal Code and Criminal Procedure Code contain provisions on insanity as a defence and procedures that apply where a person is charged with an offence and is not fit to plead due to unsoundness of mind, and separate procedures for a person charged with a criminal offence who does not understand the proceedings for a reason other than unsoundness of mind.

Insanity as a defence

2.3 Section 12 of the Penal Code[5] states that a person is not criminally responsible for an offence if at the time of doing the act or omission that constitutes the offence he or she is affected by a disease of the mind to the extent where he or she:

- is incapable of understanding what he or she was doing; or
- did not know that he or she should not do the act or omission.[6]

2.4 Section 12 is based on the moral assumption that it is wrong to punish those who, by reason of mental incapacity, are not capable of free and rational action.[7] However the defence does not lead to an acquittal.

2.5 The Criminal Procedure Code says that even if the accused was affected by a mental disease at the time of the offence he or she is not entitled to be acquitted of the offence but is guilty of the offence but insane.[8]

2.6 Following a verdict of guilty but insane the court must report the case for the order of the Governor-General and order that the accused person be kept in custody.[9] The Governor-

[5] Cap 26.
[6] Penal Code s 12
[7] Fairall PA & Johnson PW, 'Antisocial Personality Disorder and the Insanity Defence' (1987) 11 Criminal Law Journal 78, 79.
[8] Criminal Procedure Code s 146(1).
[9] Criminal Procedure Code s 146(1)(b).

General has discretion to order the accused to be confined in a mental hospital, prison or other places suitable for safe custody.[10] This provides a mechanism for protecting the community from people who have mental impairment, who are at risk of harming themselves or others. Protection is provided by incapacitation (detention) and treatment. However, it is based on an assumption that a person who is not guilty of an offence because of insanity is a risk to him or herself or the community.

2.7 At the end of three years, the officer in charge of the mental hospital or prison must make a report in writing to the Director of Public Prosecutions to be considered by the Governor-General about the condition, history and circumstances of the detainee. Subsequent reports of this sort must be made every two years.[11]

2.8 The Governor-General can appoint someone to make a special report to the Director of Public Prosecutions, which is then sent to the Governor-General, about the condition, history and the circumstances of the detained accused.[12]

2.9 After considering the reports, the Governor-General can order the release of the accused person subject to the conditions for supervision or any other conditions to ensure the safety and welfare of the accused and the public. The Governor-General can also order the person to be transferred from a mental hospital to a prison, or from a prison to a mental hospital, or from any place in which the accused is detained or remained under supervision to either a prison or a mental hospital.[13]

Fitness to Plead

2.10 Fitness to plead or stand trial relates to the capacity of the accused to participate in a criminal proceeding. The question of fitness to plead can arise for reasons other than mental illness. In Solomon Islands the Criminal Procedure Code has two processes that address fitness to plead:

[10] Criminal Procedure Code s 146 (1)(c).
[11] Criminal Procedure Code s 146(2).
[12] Criminal Procedure Code s146(4).
[13] Criminal Procedure Code s 146(5).

- one that applies when the accused is incapable of defending the charge due to unsoundness of mind[14]; and
- another that applies when the accused does not understand the proceedings for other reasons other than unsoundness of mind.[15]

Unfit to plead due to unsoundness of mind

2.11 Fitness to plead can be considered before the accused pleads to the charge or it can come up during the course of the case. In both situations the Court must conduct an inquiry to inquire into the unsoundness of the accused mind.[16]

2.12 Where the Court decides that the accused is of unsound mind and incapable of making his or her defence, the Court must postpone the proceedings until the accused is fit to make his or her defence.[17]

2.13 The concept of unsoundness of mind is not defined in either the Criminal Procedure Code or the Penal Code, neither do their relevant provisions lay out any procedure as to how the court inquiry is conducted or what matters the court has to inquire into.[18]

2.14 According to section 256 of the Criminal Procedure Code where a person refuses or fails to plead ('stands mute of malice, or neither will, nor by reason of infirmity can answer directly to the information') the court can consider whether the accused is of unsound mind, and incapable of making his or her defence. If the accused is not fit the court must detain the accused in safe custody and report the case to the Governor-General.

2.15 Under an alternative procedure in section 144 of the Criminal Procedure Code where the issue of 'fitness to plead' arises in the course of a trial or a preliminary investigation, the court can grant or refuse bail to the accused. Bail can be granted to a person who is not fit to plead due to unsoundness of mind if the court is satisfied that arrangements can be made to prevent the accused from injuring himself or herself and to

[14] Criminal Procedure Code ss 144, 256.
[15] Criminal Procedure Code s 149.
[16] Criminal Procedure Code ss 144, 256.
[17] Criminal Procedure Code ss 144(2), 256.
[18] Per Mwanesalua J, in *Regina v Tipasua* [2008] SBHC 27 at para 4.2.

protect the community.[19] If bail is not granted to the accused, the court must detain the person and send the court record to the Director of Public Prosecutions so that the case is considered by the Governor-General.[20]

2.16 After considering the case the Governor-General can make an order for the court to direct the accused person to be detained in a mental hospital or other suitable place of custody up to the time the accused is capable of making his or her defence.[21]

2.17 The person can be detained until a medical officer in charge of the mental hospital or prison finds that the accused person is capable of making his or her defence. The medical officer sends a certificate to the Director of Public Prosecutions[22] who then has to inform the court whether the case against the accused person will continue or not.[23] If the case is not continued the accused person is released from custody. The release does not prevent any future prosecution against the person based on the same facts.[24]

2.18 The court can resume the case when it decides that the accused person is capable of making his or defence and the medical certificate can be used as proof that the accused person is capable. If the court finds that the accused person is still incapable of making the defence, it will act as though the accused is brought before it for the first time.[25]

Accused does not understand proceedings but he or she is not insane

2.19 In some cases an accused may not understand the proceedings but he or she is not insane. An example of such case would be a person who has acquired brain injury or a physical disability combined with intellectual impairment or brain damage, and as a result of such injury cannot follow the proceedings logically.

2.20 There are two processes specified in the Criminal Procedure Code that deal with accused persons who cannot understand the proceedings but are not insane. They govern:

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[19] Criminal Procedure Code s 144(3).
[20] Criminal Procedure Code s 144(4).
[21] Criminal Procedure Code s 144(5).
[22] Criminal Procedure Code s 147(1).
[23] Criminal Procedure Code s 147(2).
[24] Criminal Procedure Code s 147(3).
[25] Criminal Procedure Code s 148(2).

- cases decided by the Magistrates' Court[26]; and
- cases which are subject to a preliminary investigation by the Magistrates' Court and of trial in the High Court.[27]

2.21 The Magistrates' Court can decide cases that carry a punishment of 14 year's imprisonment, or a fine, or both.[28] However when dealing with these cases the court can only impose a term of imprisonment up to five years[29] or a fine up to $50,000.[30]

2.22 The High Court must decide all other criminal cases. These include cases of rape, murder and manslaughter. In addition, other cases that carry a maximum penalty of less than 14 years can be decided by the High Court, if the Magistrates' Court considers that the case should be tried in the High Court, or if the prosecutor has made an application for the case to be tried in the High Court. Before a case can be tried by the High Court there must be a preliminary investigation in the Magistrates' Court.[31]

Cases tried by a Magistrates' Court

2.23 In cases tried in a Magistrates' Court, the Court can proceed with the case, hear evidence and decide whether the evidence would justify a conviction.

2.24 To justify a conviction the prosecution must prove each element of the offence beyond reasonable doubt. The defence can be called upon to give evidence at the close of the evidence for the prosecution.[32]

2.25 If the evidence is not sufficient to justify a conviction the Court must acquit and discharge the accused. If the evidence is sufficient to justify a conviction, the court must order the accused to be detained during the Governor-General's pleasure. This court order is subject to the confirmation of the High Court.[33]

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[26] Criminal Procedure Code s 149(1)(a).
[27] Criminal Procedure Code s 149(1)(b).
[28] Criminal Procedure Code s 4(b), Magistrates' Court Act (Cap 20) s 27(1)(a).
[29] Criminal Procedure Code s 7(1)(a), Magistrates' Court Act (Cap 20) s 27(1)(b)(i).
[30] Criminal Procedure Code (Amendment) Act 2009 s 3(a).
[31] Criminal Procedure Code s 210.
[32] Criminal Procedure Code s 149(1).
[33] Criminal Procedure Code s 149(1)(a).

Cases which are subject to a preliminary investigation by a Magistrates' Court and trial by the High Court

2.26 In a preliminary investigation the Magistrates' Court hears evidence from the prosecution. If the Court is satisfied that a strong case (a prima facie case) has been proved, it must commit the accused to the High Court for trial. The Magistrates' Court can then admit the accused person to bail or commit him or her to prison for safe custody.[34]

2.27 At the trial at the High Court if the Court is not satisfied that the evidence given by the prosecution will justify a conviction, the Court must acquit and discharge the accused. But if the Court is satisfied that the evidence will justify a conviction, the Court must order the accused person to be detained during the Governor General's pleasure.[35]

2.28 After the preliminary investigation, but before the trial the Director of Public Prosecutions can decide not to proceed with the case against the accused. In this situation the person is released from prison, or discharged from bail. But this discharge does not prevent any subsequent prosecution for the same facts.[36]

2.29 A person detained under the Governor General's pleasure can be kept in places and under conditions where the Governor General from time to time orders.[37]

2.30 When the High Court makes or confirms an order detaining an accused person at the Governor-General's pleasure the Court must also send to the Director of Public Prosecutions a copy of the notes of evidence taken at the trial, together with any recommendations or observations about the case.[38]

2.31 The Criminal Procedure Code has no provisions for review of detention of a person following a finding under section 149 that the evidence would justify a conviction, or that allow the Governor-General to make any specific orders about medical treatment for the person.

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[34] Criminal Procedure Code s 149(1)(b)(i)
[35] Criminal Procedure Code s 149(1)(b)(ii).
[36] Criminal Procedure Code s 149(1)(b)(iii).
[37] Criminal Procedure Code s 149(2).
[38] Criminal Procedure Code s 149(4).

Chapter 3 - Human Rights Standards

3.1 This chapter explains human rights standards recognised in the Constitution and in relevant international laws, such as the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child, that are relevant to this area of law.

3.2 The Constitution contains some important rights that need to be considered. Everyone is entitled to fundamental rights and freedoms including the right to life, liberty, security of the person and the protection of law. These rights are subject to respect for the rights and freedoms of others and for the public interest.[39] The Constitution also has a guarantee for a fair trial in a reasonable time for people charged with a criminal offence[40].

3.3 The human rights standards in the Constitution correspond closely (with some changes) to those in the European Convention on Human Rights. Therefore, we can look at decisions by the ECHR in relation to these standards when considering the standards in the Constitution.

3.4 Solomon Islands has also signed the UNCRPD and the CRC. To date Solomon Islands has not ratified the former convention but has acceded to the CRC. The rights or standards contained in the Constitution and the Conventions will be used as a reference for reform of the law in this area.

The Constitution

Fair trial within a reasonable time

3.5 The Constitution says that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court. If the trial is not held within a reasonable time the person should be released on bail.[41]

3.6 A trial includes the whole of the proceedings including appeals and decisions about sentence. This means that the requirement for a fair hearing by an independent and impartial court applies to the decision about sentence, as well

[39] Constitution s 3.
[40] Constitution s 10.
[41] Constitution ss 5(3), 10(1).

as decision about guilt or innocence. The ECHR has decided that a procedure under UK law that allowed the Home Secretary (a politician) to decide how long a person should actually be detained for after being sentenced to an indeterminate sentence ('at Her Majesty's pleasure') was a violation of the right to a fair trial under the article 6 of the European Convention on Human Rights.[42] However article 6 does not apply to bail applications, or to proceedings following a finding that an applicant is unfit to plead to a criminal charge.[43]

3.7 Other requirements for a fair trial include:

- the presumption that an accused is innocent until he or she is proven or pleaded guilty;
- the accused's right to be informed of the nature of the offence charged in a language he or she understands;
- the award of adequate time and facilities to the accused to prepare his or her defence;
- the accused's right to defend himself or herself before the court in person, at his own expense, by a legal representative of his or her choice;
- the accused's right to be afforded facilities to examine witnesses called by the prosecution; and
- the accused's right to the assistance of an interpreter if he or she cannot understand the language used at the trial.[44]

3.8 'What a fair trial is and what is reasonable time' are issues that require consideration in the context of trials of people with a mental impairment because these persons experience the criminal justice system differently to other accused at all stages of the criminal justice process.[45]

3.9 It is highly likely in the Solomon Islands criminal justice system that cases involving persons who have a mental impairment will experience delays due to the lack of medical

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[42] *T v United Kingdom, V v United Kingdom* 16 December 1999 (2000) 30 EHRR 121.

[43] C Ovey and Robin White, *Jacobs and White The European Convention on Human Rights*, (4th edition) 162-163.

[44] Constitution s 10.

[45] Western Australia Law Reform Commission, *Review of the Law of Homicide*, Final Report (2007).

expertise and resources.[46] This problem is illustrated by the case study in the box on pages 29 and 30. In this case the accused was detained at Rove Correctional Centre for 16 months, and his case adjourned 17 times, before his condition was assessed by a doctor and a report about his condition was made so that the court could make a decision about whether he was fit to plead.

Right to liberty

3.10 The Constitution says that a person cannot be deprived of his or her personal liberty unless it is authorized by law in the following circumstances:

- if he or she is not fit to plead to a criminal charge;
- as part of a sentence given by a court for a criminal offence; if he or she is reasonably suspected of having committed an offence; or
- in the case of a person of unsound mind for the purpose of care or treatment or the protection of the community.[47]

3.11 The Constitution also says that a person's right to liberty is subject to the interest of the public and the rights and freedoms of others.[48] This means that a person's right to liberty can be breached by the State in certain circumstances, particularly, if the release of the person into the community might pose a risk to public safety and prevents others from exercising their rights and freedoms guaranteed in the Constitution.

3.12 Laws that provide for detention of people of unsound mind that cannot be justified on the grounds of providing care or treatment, or protection of the community may be unlawful, and detention of people who are not fit to plead for other reasons other than unsoundness of mind that is not justified on these grounds, might also be unlawful.

3.13 The Constitution also says that any person who is arrested or detained for an offence who is not tried within a reasonable

[46] At the moment Solomon Islands only has one qualified psychiatrist. The Public Solicitor's Office also raised concerns around the difficulty of obtaining reports on time.

[47] Constitution s 5(1)(a)(b)(f)(i).

[48] Constitution s 3.

time should be released either with conditions or unconditionally pending the trial.[49]

Analysis

3.14 The provisions that allow the Governor-General to make decisions about the release and the care of a person found guilty but insane, and a person detained under section 149 of the Criminal Procedure Code (when the court finds that there is evidence to justify a conviction) may be inconsistent with a person's right to a fair trial.

3.15 The Criminal Procedure Code specifies that the Governor-General can determine the release or care of a person, but it does not specify whether the person has the opportunity to be heard, or whether such hearing is to be held in public. The detainee cannot make any application to the Governor-General; for detention under section 149 the application must be made by the DPP.

3.16 A person detained because of a guilty but insane verdict cannot make an application to the Governor-General for review. Under the law the Governor-General must review the detention after three years, no matter what condition the person was in at the time of the verdict, or the nature of the conduct that lead to the finding (for example, no distinction is made between a person detained because they killed a person, or because they assaulted a person).

3.17 The Governor-General is not a court, and decisions regarding detention of people under sections 146 and 149 of the Criminal Procedure Code are similar to the function that was held to be invalid in cases decided by the ECHR in relation to the right to a fair trial in the European Convention on Human Rights.

3.18 In the cases of *T v United Kingdom* and *V v United Kingdom*, the ECHR decided that a procedure under UK law that allowed the Home Secretary to decide how long a person should be detained, after being sentenced to an indeterminate sentence, violated the person's right to a fair trial under article 6 of the European Convention on Human Rights.[50]

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[49] Constitution 5(3).

[50] *T v United Kingdom*, *V v United Kingdom* 16 December 1999 (2000) 30 EHRR 121.

3.19 The proceeding under section 149 of the Criminal Procedure Code, to determine whether there is enough evidence to support a conviction of a person who is not fit to plead, may also violate the person's right to a fair trial. The person cannot understand the proceedings and may not be able to communicate with his or her lawyer, or participate in the proceedings.

3.20 In cases where a person is not fit to plead due to unsoundness of mind, he or she can be detained, and the trial postponed, until he or she is fit or unless the Governor-General orders his or her discharge and release.[51] In cases where bail is not granted by the court the accused is detained. In this case the person is not going to get his or her trial within a reasonable time because the Criminal Procedure Code does not specify any timeframe for the detention.

3.21 The Criminal Procedure Code does not grant any entitlement to treatment for an accused who is detained because he or she is not fit to plead. By contrast, the Constitution provides that person of unsound mind can only be detained for the purpose of care or treatment, or the protection of the community. The Criminal Procedure Code does not require the detention of a person who is not fit to plead, or found guilty but insane, or a subject to a finding under section 149 to be justified on the need for the person's care or treatment or for the protection of the community as required under section 5 of the Constitution.

3.22 The right to a fair trial within a reasonable time might also be violated because of delays in obtaining medical assessments so that a decision can be made about whether the person is not fit to plead due to mental illness, or is not fit to plead for some other reason.

3.23 Under the European Convention on Human Rights any pre-trial detention of a person charged with an offence has to be justified on the ground of public interest, and detention should not exceed a reasonable time. In the case of prisoners with a mental disorder detention can be justified by the need to ensure that the accused appears at the trial, risk of

[51] Criminal Procedure Code s 147(3).

reoffending and risk of harm to the community or harm to the person.[52]

3.24 The ECHR has also held that where a person is detained because of mental disorder there must be

- a close correspondence between expert medical opinion and the definition of mental disorder,
- objective medical evidence regarding the mental disorder and the court must decide that the mental disorder is of a kind or degree warranting compulsory confinement.[53]

International law

3.25 The rights of people who are guilty of the offence but insane and those who are not fit for other reasons are recognized in international law. Two of the international laws relevant to this project are the UNPRPD and the CRC. Solomon Islands has various obligations to satisfy when it signed or acceded to these international laws.

Convention on the Rights of People with Disabilities.

3.26 Solomon Islands signed this Convention on 23 September 2008. A year later the country signed the Optional Protocol to the Convention on 24 September 2009. Signing the Convention is subject to ratification by signatory States. This means that Solomon Islands has to ratify the Convention to be bound by it. Signing the Convention is the first step in becoming a party to the Convention. By signing the Convention or Optional Protocol, Solomon Islands has indicated its intention to take steps to be bound by the treaty at a later date. Being a signatory to the Convention also creates an obligation, in the period between signing and ratification, to refrain from acts that would defeat the object and purpose of the treaty.[54]

3.27 The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and

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[52] See C Ovey and Robin C.A. White, *Jacobs & White The European Convention on the Human Rights* (4)(2006)134 – 135.

[53] *Winterwerp v Netherlands* (Application no. 6301/73) http://www.bailii.org/eu/cases/ECHR/1979/4.html.

[54] United Nations, *Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities* http://www.un.org/disabilities/default.asp?navid=23&pid=151#bp1 (Accessed 29/11/10).

fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.[55] Under the Convention persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[56]

3.28 The Convention provides that state parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.[57]

3.29 States Parties must ensure that people with disabilities have:

- access to justice on an equal basis with others;[58]
- equal recognition before the law;[59] and
- the right to liberty and security of person on an equal basis with others.[60]

3.30 Persons with disabilities must not be deprived of their liberty unlawfully or arbitrarily, and any deprivation of liberty must be in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.[61]

3.31 States Parties must ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law (such as the right to liberty and right to a fair trial) and shall be treated in compliance with the objectives and principles of the present Convention.[62]

3.32 In terms of the right to health and health services, the Convention says that persons with disabilities have the right to the highest attainable standard of health without discrimination on the basis of disability. This means that they are to receive the same range, quality and standard of free or

[55] *Convention on the Rights of Persons with Disabilities* UNTS art 1.
[56] *Convention on the Rights of Persons with Disabilities* UNTS art 1.
[57] *Convention on the Rights of Persons with Disabilities* UNTS art 5(1)
[58] *Convention on the Rights of the Persons with Disabilities* UNTS art 13.
[59] *Convention on the Rights of the Persons with Disabilities* UNTS art 12.
[60] *Convention on the Rights of Persons with Disabilities* UNTS art 14(1)(a).
[61] *Convention on the Rights of Persons with Disabilities* UNTS art 14(1)(b).
[62] *Convention on the Rights of Persons with Disabilities* UNTS art 14(2).

affordable health services provided for other persons and receive those health services needed because of their disabilities.[63]

The Convention also states that parties to the convention must provide comprehensive habilitation and rehabilitation services in the areas of health, employment and education.[64]*Convention on the Rights of the Child*

3.33 Solomon Islands acceded to the CRC on 6 May 2002. Relevant provisions from this convention cover the rights of children to personal liberty and the right to health services.

3.34 The CRC recognises and seeks to promote the rights of persons under 18 years of age. In terms of health services the Convention requires that state parties recognise the right of the child to the highest attainable standard of health and to facilities for treatment of illnesses and rehabilitation of health. The CRC also obliged state parties to ensure that no child is deprived of his right to access to such health care services.[65]

3.35 The Convention also says that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or age'.[66]

[63] *Convention on the Rights of Persons with Disabilities* UNTS art 25.
[64] *Convention on the Rights of Persons with Disabilities* UNTS art 26.
[65] *Convention on the Rights of the Child* UNTS art 24.
[66] *Convention on the Rights of the Child* UNTS art 37.

Chapter 4 - Issues and Options For Reform

4.1 This chapter considers a number of the problems or issues identified in relation to the law concerning people with mental impairment in Solomon Islands. The chapter also looks at how other jurisdictions developed their laws in this area to address the issues that are identified. This comparative analysis of the law becomes the basis upon which reform options can be identified to overcome the problems in Solomon Islands.

4.2 The LRC has identified problems and issues in relation to this area of law after conducting:

- a comparative analysis of the law in other jurisdictions;
- stakeholder consultations with key stakeholders from the Correctional Services; the Public Solicitor's Office and Ministry of Health and Medical Services;
- an analysis of applicable international laws; and
- some consideration of applicable constitutional provisions.

4.3 The issues identified include:

- indefinite, lengthy, inappropriate or unlawful detention;
- lack of criteria for determining unfitness to plead;
- lack of clarity around decision making;
- courts have no power to order assessments and make orders about where a person should be detained;
- lack of review of decisions to detain;
- limited appeal rights; and
- limitation with the insanity defence, and conflict between the Penal Code and Criminal Procedure Code in relation to people who are insane at the time of the offence.

Indefinite, lengthy, inappropriate or unlawful detention

4.4 The issues in relation to the detention of people with a mental impairment charged with a criminal offence are significant. The objective of the Constitutional protections (right to liberty, right to a fair trial within a reasonable time) discussed in the earlier section is to prevent lengthy, indefinite or arbitrary detention. Under the Constitution detention can be lawful only when is if part of a sentence imposed by a court following a finding of guilt, when a person is not fit to plead

and for a person with a mental impairment it must also be for the purpose of care or treatment or the protection of the community.

4.5 However, under the Criminal Procedure Code an accused can be detained for indefinite or lengthy periods where:

- the accused is found guilty of the offence but insane;
- the accused is found not fit to plead due to unsoundness of mind; or
- the accused is not fit to plead because he or she cannot understand the proceedings and the court has found that there is sufficient evidence to support a conviction.

4.6 There is a significant risk that a person with a possible mental impairment might be detained for significant periods of time even before there is any assessment to determine whether he or she is fit to plead. This risk is particularly high if the person is charged with a serious offence such as murder because he or she is less likely to gain release on bail.

4.7 Following a finding under section 146 or 149 of the Criminal Procedure Code there might also be a delay before the Governor-General makes a decision about the detention of the person.

4.8 There might be further delay when proceedings are postponed under section 146 because where the accused is not released on bail there is a risk that he or she might be detained for a lengthy time, particularly, where the person does not receive treatment, or if the condition is not treatable.

4.9 The Criminal Procedure Code does not specify any timeframe for the detention. There is an assumption that eventually the person will be fit to plead. The postponement might benefit those with curable conditions, but could lead to lifelong incarceration of the incurable mentally ill who are incapable of regaining capacity to plead. The postponement only promotes a fair trial for persons with a curable condition but it operates as a punitive device for those who have an incurable condition. Similar treatment of the incurables and the curable violates the equality provision in the Constitution, and under the applicable international law.

4.10 Under the Criminal Procedure Code the detention of the person does not have to be justified on any ground of public

interest, or the need to provide care and treatment and protection for the detained person.

4.11 Lack of secure mental health facilities outside of Rove Correctional Centre for people with mental impairment who are charged with a criminal offence also means that people who are detained under these provisions are detained in prison.

4.12 LRC consultations with the staff of the Correctional Services revealed that Rove is not the right place to detain people with mental impairment who are charged with crimes. The CSSI staff stated that while it is necessary to ensure the safety of the public and mental patients (prisoners), there is no guarantee to ensure the safety of the officers who are actually looking after prisoners with mental impairment at Rove. The CSSI staff said that their officers found it difficult to deal with aggressive prisoners with mental impairment because the officers were not trained to handle mental patients (prisoners).

4.13 The CSSI staff also said that it is not their job to maintain the hygiene or to take care of waste matter being left around in the premises by prisoners affected with a mental impairment. CSSI officers said that they are not being paid allowances for doing that kind of dirty job. They said that their officers may be liable for mishandling patients with mental impairment.

4.14 The CSSI staff recommends that proper mental health facilities should be built in the country to accommodate and supervise people with mental impairment. They said that Rove is not the best place for accommodating prisoners with mental problems because the prison was not designed for such people. They also raised the concern that there is no doctor or properly trained staff to provide the required medical service and to look after these people properly at Rove.

4.15 The following case study illustrates how different factors can contribute to lengthy and indefinite detention. It shows that there can be significant problems with the transfer of people with mental impairment from the prison system to a mental health facility even though the Criminal Procedure Code provides that the accused can be detained in prison or a mental health facility until he or she is fit to plead.

Case study: JH's case[67]

The accused JH was charged with murder. He was received into Rove Correctional Centre on 17 October 2005.

His counsel approached the commandment at Rove Central Prison to produce a report on the accused's behavior as counsel believed that the accused was not fit to plead or stand trial. By then the accused had been in custody for nine (9) months.

Rove Central Prison Management had difficulties communicating with the accused as he was not responding to questions. Officers speaking his native tongue tried but also to no avail.

The accused continued to appear at the court on a fortnight basis and detained in prison. In February 2007 a psychiatric report was submitted which recommended that the accused attended Kilu'ufi Mental Hospital for further assessment.

The Correctional Service made inquiries with Kilu'ufi Hospital and in March 2007 the Hospital agreed to receive the accused. However, the Hospital management said it would not guarantee the personal security of the accused and that Correctional Services must make arrangements for his transfer, meals and security. It was unclear whether Correctional Services had the power to remove him to Kilu'ufi. The Magistrates' Court in Honiara was notified about this. Advice was issued by the Court that a written request with an attached copy of the psychiatrist report including an affidavit would need to be tendered to the court to make the order. It was unclear who was responsible for making the request to the court.

The accused continued to appear in court on a fortnight basis until 10th October 2007 when an application was made by the Director of Public Prosecutions under s144 of the Criminal Procedure Code.

The Magistrate then made an order referring the accused to Kilu'ufi Mental Hospital for safe custody and the further evaluation of his mental health. Under the order the accused was to return to court on 8th November 2007.

The accused returned to court on 8th November without attending Kilu'ufi Hospital. He continued his fortnightly appearance at the Court.

[67] Details of this case study were provided in a letter from the Commissioner for Correctional Services submitted to the Law Reform Commission on 22/9/09.

On 6th December 2007 upon an application made by the Public Solicitors Office the Court made an order for the reception of the accused at Kilu'ufi for treatment. He was held at Rove Prison for safe custody until his transfer, which never happened.

On 19th August 2008 the Director of Public Prosecutor advised the Governor-General that the case was pending under s144 of the Criminal Procedure Code for consideration.

On 16th September 2008 the Director of Public Prosecutions and the Governor-General met to consider the case. The Governor-General issued a detention order detaining the accused at Rove correctional centre to be jointly taken care of by the mental health services and the correctional service. The case has to be reviewed annually.

The existing Medical facilities at both Kilu'ufi and the National Referral Hospital are 'totally inappropriate to accommodate JH, as required under the law.'[68]

Options for reform

Lengthy, indefinite or unlawful detention

4.16 Options to consider to address problems relating to lengthy or indefinite detention of persons with mental impairment in Solomon Islands include:

- the holding of a special hearing within a specified time to determine the criminal proceedings when a person is not fit to plead for any reason; or
- the adoption of the New Zealand approach, where the court must hold a special hearing to determine whether the accused committed the physical elements of the offence before it considers the issue of fitness to plead.

4.17 In addition legislation can provide protection from lengthy or indefinite detention by:

- Introducing and allowing the diversion of offenders charged with a relatively minor criminal offence out of the criminal justice system;
- providing options other than detention – court to impose supervision orders by detaining people with a mental impairment where it is really necessary, taking into account the

[68] Reference to copy of Order of Governor-General delivered by Commissioner of Correctional Services.

safety of the public or the accused or any other person likely to be affected by the court order;

- providing more options for review for people with a mental impairment who are detained;
- ensuring that people with a mental impairment who are charged with a criminal offence have the same rights of appeal as others.

Special Hearing within a specified time to determine the criminal proceedings when a person with a mental impairment is not fit to plead.

*Special hearing **after** a fitness hearing*

4.18 A special hearing is a hearing to determine, on the evidence available, whether an accused person who is found not fit to stand trial is:

- not guilty of the offence;
- not guilty on the basis of mental impairment; or

that the accused committed the offence or another alternative offence to the one charged.[69]

4.19 Currently the option of a special hearing (to determine whether there is evidence to support a conviction) is only available for people who are not fit to plead for a reason other than unsoundness of mind.

4.20 The policy reason for a special hearing is to ensure that there is some justification for detention of a person who is accused of a serious offence, who is not fit to plead.

4.21 In jurisdictions like the Northern Territory and New South Wales a special hearing is used for all accused who are not fit to plead. A special hearing must also be held within a specified time.

4.22 In the Northern Territory, a special hearing must be conducted 3 months after the judge's determination that the person is unlikely to become fit to stand trial within 12 months.[70]

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[69] See for example Criminal Code Act (NT) s 43V(1), Mental Health (Forensic Provisions) Act 1990 (NSW) s 19(2).

[70] Criminal Code Act (NT) s 43R(3).

4.23 In New South Wales, the court has to conduct a special hearing 'as soon as practicable' unless the DPP decides otherwise that no further proceedings will be taken in respect of the offence.[71]

4.24 In New South Wales, prior to the introduction of the special hearing, defendants who were found unfit to plead were detained indefinitely at the Governor - General's pleasure without the consideration as to whether or not they had in fact committed the offence charged against them.[72]

4.25 The special hearing can offer potential solutions to indefinite or lengthy detention. First, the special hearing ensures that people who are unfit to plead or stand trial do not have to be detained for indefinite or lengthy periods before their cases can be dealt with. It addresses the problem of waiting for a person to be 'cured' before the criminal prosecution can be determined. Second, the accused has the assurance that he or she can only wait for a specified period (not more than 12 months) before his or her case is dealt with. Third, the special hearing provides the accused with the opportunity to be acquitted of the offence charged against him or her.[73]

*Special hearing **before** a fitness hearing*

4.26 In New Zealand, a court may not conduct a finding of a defendant's unfitness to be tried unless the court holds a special hearing to determine whether, on the balance of probabilities, there is sufficient evidence to prove that the accused committed the physical elements (actus reus) of the offence.[74]

4.27 If the court is not satisfied that the defendant was involved in the offence, it must discharge the defendant.[75] Although the discharge does not mean that the person is acquitted of the offence[76], it at least saves the person from being detained unnecessarily.

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[71] Mental Health (Forensic Provisions) Act 1990 (NSW) s 19.

[72]NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: an overview* Consultation paper 5 (2010).

[73] See Mental Health (Forensic Provisions) Act 1990 (NSW) ss 22(1)(a), 22(2), 26, 39.

[74] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 9.

[75] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 13(2).

[76] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 13(3).

4.28 This process offers two advantages. It promotes certainty that a defendant would not be detained for indefinite or lengthy periods for an offence he or she might not have committed. It also saves the time of the court and legal services from holding a fitness inquiry which may demand time and add more constraints on limited resources available.

4.29 The LRC opted to adopt a special hearing mechanism based on the New Zealand model. Thus, the special hearing to determine whether there is sufficient evidence to prove that the accused committed the physical elements (actus reus) of the offence has to be conducted first before a court inquiry to determine the issue of the person's fitness to plead.

1. **A special hearing should be conducted for a person who is not fit to plead because of a mental impairment. The purpose of the special hearing is to determine whether, on the balance of probabilities, there is sufficient evidence to prove that the person with the mental impairment committed the physical elements (actus reas) of the offence for which he or she was charged.**

2. **The special hearing should be conducted *before* conducting an enquiry to determine whether a person with a mental impairment is not fit to plead or fit to stand trial. The Law Reform Commission recommends that Solomon Islands should adopt the NZ model on special hearing for two reasons. First, the NZ model promotes the certainty that a mentally impaired defendant would not be detained for indefinite or for lengthy periods for an offence he or she might not have committed. Second, the NZ model will save the courts and legal services time from holding a fitness inquiry which demands time and add more constraints on limited resources.**

Introducing and allowing for the diversion of offenders charged with a relatively minor criminal offence out of the criminal justice system

4.30 Diversion refers to any measure that removes an offender from the criminal justice system at any stage in the criminal process. Diversion may divert offenders away from the system with or without directing them into an alternative system, a system that focuses on treatment rather than punishment.

4.31 In NSW, the Local Court is empowered to deal with offenders with mental illness and those with a cognitive disability who are charged with less serious offences.[77] The reasons for this are threefold. First, it is not fair to require those whose culpability has been reduced to face the full force of the criminal law and its sanctions. Second, the culpability of these offenders should be measured against the wide social problems they typically face which may offer an explanation for their criminal behaviour. Third, because of the offender's condition, it is less likely that the conventional criminal process will provide a means of rehabilitation and deterrence from future re-offending. An alternative process, one that tries to address the underlying causes of criminal conduct, may have a greater chance at reducing recidivism.[78]

4.32 Diversion can be initiated by the police or a family member or guardian of the person with a mental impairment prior to entering the court system.

3. **Diversion should be introduced for a person with a mental impairment - (a) who is charged with a minor offence (misdemeanor); and (b) whose mental condition is curable and can be treated in the community or home, and (c) who will not pose a security risk or harm to the public or to themselves if released into the community.**

4. **The responsibility to initiate the diversion of a person with a mental impairment lies with a family member or a guardian of the impaired person. The family member of guardian shall instigate the review by submitting an application to the police requesting diversion for the mentally impaired person. The police, with the assistance of a qualified person (a psychiatrist or a psychologist) will conduct medical assessments on the impaired person's mental condition and determine whether or not the impaired person is eligible for diversion from the criminal justice system.**

Options other than detention – court imposition of supervision orders - detention where it is really necessary considering the safety of the public

[77] See Mental Health (Forensic Provisions) Act 1990 (NSW) ss 32 & 33.

[78] New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: an overview* Consultation paper 7 (2010).

or the accused person or any other person likely to be affected by the imposition of the supervision order

4.33 The Criminal Procedure Code does not provide any guidelines to assist the Governor General to determine when to release a person who has been found guilty but insane, who is not fit to plead or where the person is subject to a finding under section 149 of the Criminal Procedure Code. In addition the existing provisions for indefinite detention and release on the order of the Governor-General are not consistent with the right to a fair trial and the right to liberty contained in the Constitution.

4.34 In other jurisdictions legislation provides that detention can only be ordered by a court when it is necessary, and allows a court to impose non-custodial supervision orders or community treatment orders.

4.35 In the Northern Territory the court has to abide by a principle to keep restrictions on the person's freedom and personal autonomy to a minimum that are consistent with maintaining and protecting the safety of the community.[79] In the Northern Territory a supervision order can be made when the court finds that:

- the person is not found guilty of the offence because of mental impairment following a normal trial or a special hearing; or
- following a special hearing the court finds that the person committed the offence charged.[80]

4.36 A supervision order can be a custodial supervision order or a non-custodial order.[81] In the Northern Territory, a person who is not fit to plead, or acquitted because of mental impairment, can only be detained in prison if the court is satisfied that there is no practicable alternative given the circumstances of the person.[82] Further, the court must not make a custodial supervision order unless it receives a certificate from the responsible person[83] stating that facilities

[79] Criminal Code Act (NT) s 43ZM.
[80] See Criminal Code Act (NT) ss 43I(2)(a), 43X(2)(a) and 412A(3).
[81] Criminal Code Act (NT) s 43A.
[82] Criminal Code Act (NT) s 43ZA(2).
[83] The responsible person is the chief executive officer of the Department of Health and Community Services.

or services are available in the place for the custody, care or treatment of the person.[84]

4.37 When making the order declaring that an accused person is liable to supervision the court must have regard to the following factors:

- whether the supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
- the need to protect people from danger;
- the nature of the mental impairment, condition or disability;
- the relationship between the mental impairment, condition or disability and the offending conduct;
- whether there are adequate resources available for the treatment and support of the supervised person in the community;
- whether the supervised person is complying or is likely to comply with the conditions of the supervision order; and
- any other matters the court considers relevant.[85]

4.38 In New Zealand a report by a health assessor must be made so the court can determine whether it is *necessary* to detain a defendant who was found unfit to stand trial or acquitted on account of his or her insanity.[86] Health assessors include a practicing psychiatrist who is a registered medical practitioner, a psychologist or a specialist assessor.[87] A person who is not fit to stand trial, or acquitted due to insanity, can only be detained by the court if it is necessary. For instance, the court must be satisfied on the evidence of more than one health assessor (one must be a psychiatrist) that the accused is mentally disordered[88] or that the making of the order is in the best interests of the public or any person or class of person who may be affected by the court's decision.[89] The court must order the release of the person if detention is not necessary.[90]

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[84] Criminal Code Act (NT) s 43ZA(3).
[85] Criminal Code Act (NT) s 43ZN(1)
[86] Criminal Procedure (Mentally Impaired Persons) Act 2003 s 24(1)(b).
[87] Criminal Procedure (Mentally Impaired Persons) Act 2003 s 4(1).
[88] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 25(2).
[89] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 24(1)(c).
[90] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 25(1)(d).

4.39 In Victoria, after making a decision that an accused is not fit to plead the judge must not order that the accused be remanded in an appropriate place[91] unless he or she is satisfied that facilities or services necessary for that order are available.[92] The judge must not remand the accused in custody in a prison unless he or she is satisfied that there is no practicable alternative in the circumstances.[93] If a court declares that a person is liable to a supervision order, the court must not make a custodial supervision order unless the court is satisfied that the facilities or services necessary for the order are available.[94] Moreover, the court must not make a custodial supervision order committing a person to custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances.[95]

4.40 The courts in Solomon Islands should be empowered to impose supervision orders for the supervision, treatment and the safety of persons with mental impairment, and for the safety of the public. Imposition of supervision orders shall apply on an equal basis to all persons who are affected with a mental impairment and who are charged with a criminal offence. Thus, supervision orders shall apply to –

- a person who is found 'not guilty' of an offence because of mental impairment; or
- a person who is not fit to plead or stand trial (following a special hearing).

4.41 Supervision orders should come in two forms - custodial and non- custodial supervision orders. A custodial supervision order is an order imposed by the courts where it is necessary that the person must be detained. This order may only be imposed if the release of the person into the community would pose a serious risk to the safety of the person or the

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[91] An appropriate place means an approved mental service or a residential service, see Crimes ((Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 3(1).

[92] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 12(3); the judge can make the same order after a special hearing pending the making of a supervision order, see s 19(2)

[93] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 12(4). This same order can also be made after a special hearing pending the making of a supervision order, see s 19(3).

[94] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 26(3).

[95] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 26(4).

safety of any other person. The subject of a custodial supervision order can only be detained in a correctional centre if there are no practicable alternative places for detention. A custodial supervision order must be reviewed every 12 months.

4.42 The courts may also impose non-custodial orders. A non-custodial supervision orders should be imposed on persons whose mental conditions are less serious, and who, if treated outside of prison or a mental hospital will not threaten the security and safety of the person and the public. The courts can be empowered to impose non-custodial supervision orders if they decide that the detention of the persons concerned in a prison or mental hospital is not necessary in the circumstances.[96]

4.43 A non-custodial supervision order does not require the person to be detained in prison or in a mental hospital in order to be treated. Such a person can be released on conditions decided by the court and specified in the order. For example, in Northern Territory and Victoria, Australia, the court can release the person into the community on conditions decided by the court and specified in non-custodial supervision order.[97] In New Zealand, a person can stay at his or her place of residence or other places specified in a community treatment order and still receive medical treatment from an authorized clinician. [98] The person does not have to be detained in a prison or mental hospital to be treated.

5. The revised Penal Code or Criminal Procedure Code should empower the relevant courts in Solomon Islands to make supervision orders for a person with a mental impairment. There will be two types of supervision orders – custodial supervision order – where a mentally impaired person must be detained, and non-custodial supervision order – where the person can be released under strict conditions and supervision.

[96] Apply only after the consideration that the release of the person into the community will not threaten the security and safety of the person concerned and or the public.

[97] See Criminal Code Act (NT) s 43ZA(1)(b); Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC) s 26(2)(b).

[98] Mental Health (Compulsory Assessment and Treatment) Act 1992 (NZ) s 29.

6. **The court shall make a supervision order for a person with a mental impairment who is not fit to plead or who is acquitted of a charge because of insanity. The court will decide whether to make a custodial or non-custodial supervision order.**

7. **A custodial supervision order shall be made by the courts where it is necessary that the mentally impaired person should be detained. This can only happen if the court is satisfied that the release of the mentally impaired person into the community would pose a serious risk to the safety of the mentally impaired person or the safety of any other person.**

8. **A person with a mental impairment who is the subject of a custodial supervision order can only be detained in a correctional center, or in a prison, if there are no practicable alternative places for detention.**

9. **The revised Criminal Procedure Code should specify the circumstances and the length of time when a person with a mental impairment should be detained.**

10. **The revised Criminal Procedure Code should specify that a person with a mental impairment should be detained if – (a) the person's mental condition has been assessed by a qualified person (a psychiatrist or a psychologist) and it is found that the mentally impaired person might pose risks of harm to themselves or to another person; and (b) the court finds that proper mental health facilities or services are available in the appropriate place of detention, or the court is satisfied that there is no practicable alternative available other than a correctional center or prison – in a correctional center or prison - given the circumstances of the person.**

Options for review for people with a mental impairment

4.44 The Criminal Procedure Code does not contain any provision for review of people who are detained indefinitely except for those who are found guilty but insane. The review of people who are guilty but insane is conducted by the Governor-General after the first three years of detention, and then every two years thereafter.

4.45 The Public Solicitor's Office suggests that periodic reviews of an accused found not fit to plead, or detained due to insanity

should be conducted by the High Court within specified timeframes.[99]

4.46 In the Northern Territory legislation provides that the court must conduct periodic reviews of supervision orders[100] every 12 months. When the court makes a supervision order, the appropriate person must, at intervals of not more than 12 months prepare and submit a report to the court on the treatment and management of the supervised person's mental impairment, condition or disability.[101]

4.47 After considering the report, the court can conduct a review to determine whether the supervised person may be released from the supervision order.[102]

4.48 In New South Wales, the Mental Health Tribunal must hold an initial review of the case of a person found not guilty of an offence due to mental illness. This must be done *as soon as practicable* after a person has been detained in a mental facility after a special hearing, a trial or on appeal.[103] After reviewing the case, the Tribunal must make an order for the care, detention or treatment of the person or the release of the person whether unconditionally or subject to conditions.[104]

4.49 Similarly, the Tribunal must hold an initial review of a person's case *as soon as practicable* after he or she has been found unfit to be tried and has been detained by the Court in a mental health facility or in another place for a period not exceeding 12 months.[105] Reviews of a forensic patient must be conducted by the Tribunal every 6 months, though the case of a forensic patient can be reviewed at any time.[106]

11. Periodic reviews should be conducted for people with a mental impairment who are detained. The responsibility to initiate the periodic review lies with any person or institution having interest in the welfare of the mentally impaired person. To instigate the review, the person or institution having interest in the welfare of the mentally

[99] Public Solicitors Office, *Submission No. 1*, 1 February 2010.
[100] See Criminal Code Act (NT) s 43ZH.
[101] Criminal Code Act (NT) s 43ZK.
[102] Criminal Code Act (NT) s 43ZH(1).
[103] Mental Health (Forensic Provisions) Act 1990 (NSW) s 44(1).
[104] Mental Health (Forensic Provisions) Act 1990 (NSW) s 44(2).
[105] Mental Health (Forensic Provisions) Act 1990 (NSW) s 45.
[106] Mental Health (Forensic Provisions) Act 1990 (NSW) s 46.

impaired person (or through the lawyer representing the mentally impaired person) shall, within three (3) months of the person's detention, submit an application to the Registrar of the High Court seeking court direction for the periodic review. Upon notification of the application, the court shall direct a qualified person (medical officer in charge, or any other qualified person) of the mental health facility, prison or another place of safe custody to conduct medical assessment on the condition of the person with mental impairment for the purposes of the review. Subsequent periodic reviews of the mentally impaired person's mental condition shall be conducted at the end of every 12 months of the person's detention, however, where necessary, the court may order that a special or urgent periodic review should be conducted within 6 months of a person's detention.

12. Periodic reviews of a person's mental condition should be conducted by the court based on medical reports adduced by at least one qualified person (the medical officer in charge of the mental health facility, correction center, prison or another place of safe custody, or a qualified person called for the purposes of the periodic review).

Equal rights of appeal for people with a mental impairment

4.50 A party to a proceeding in a Magistrate's Court can appeal to the High Court against a judgment, sentence or an order given by the Magistrate's Court.[107]

4.51 A person who cannot understand the proceedings but is not insane can appeal against an order given by a Magistrate's Court for detention under the Governor-General's pleasure.[108] However, the Court of Appeal Act does not allow a person to appeal decisions made by the High Court under sections 144, 149 and 256 of the Criminal Procedure Code.

4.52 The Court of Appeal Act[109] says that a person convicted on a trial in the High Court can appeal to the Court of Appeal:

- against his or her conviction on any ground on a question of law alone;

[107] Criminal Procedure Code s 283(1).
[108] Criminal Procedure Code s 283(1).
[109] Cap 6.

- against his or her conviction on a question of fact, or question of fact and law (with leave of the Court of Appeal or the trial judge); and
- against the sentence (with leave of the Court of Appeal) unless the sentence is one fixed by law.[110]

4.53 Unless there is a conviction then it appears that no appeal is available. Therefore, it appears that there is no appeal from a decision of the High Court under sections 144, 256 or 147 and a decision that a person is guilty but insane because in these cases the court makes no order for conviction.

4.54 The Court of Appeal Act further states that [a]ny party to an appeal from a Magistrate's Court to the High Court may appeal against the decision of the High Court to the Court of Appeal on any ground of appeal which involves a point of law only.[111] Likewise this appears to limit appeals from decisions in the Magistrates Court that are made under sections 144, 145, 147 and 256 unless the appeal involved a point of law only.

4.55 The Court of Appeal can quash a sentence passed against a person found guilty of an offence if the Court believes the person was insane at the time the offence was committed. The Court can then order the custody of the person at the Governor-General's pleasure.[112]

4.56 The current law does not give the same right to people with a mental impairment (a disability) to appeal against detention orders and other orders made against them. The UNCRPD stipulates that state parties must recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.[113]

Other jurisdictions

4.57 In the Northern Territory, a supervision order is subject to the same rights of appeal as a sentence, meaning that the accused has the same rights of appeal as in a normal criminal case to appeal against a custodial supervision order.[114] A

[110] Court of Appeal Act s 20.
[111] Court of Appeal Act s 22(1).
[112] Court of Appeal Act s 24(3).
[113] *Convention on the Rights of Persons with Disabilities* UNTS art 5(1).
[114] Criminal Code Act (NT) s 43ZB(1).

person can also appeal against the finding at a special hearing that he or she committed the offence charged or an alternative offence, as if he or she is appealing against a finding of guilt at a criminal trial.[115]

4.58 The Chief Executive Officer of the Department of Health and Community Services may appeal to the Court of Criminal Appeal if he or she considers that a different supervision order should have been made concerning the accused and that an appeal should have been brought in the public interest.[116] The Court of Criminal Appeal may confirm or quash the supervision order and make a new supervision order in substitution for it.[117]

4.59 In New Zealand the defendant or the prosecution can appeal against detention orders as if they are appealing against a sentence.[118] The accused is also entitled to appeal against any finding:

- that the evidence against him or her is sufficient to prove that the he or she committed the physical elements of the offence;[119]
- that the accused is fit to stand trial;[120] or
- in relation to an acquittal on account of insanity.[121]

4.60 Both the prosecution and the defence can appeal against:

- an order that the accused be detained as a special patient or special care recipient;
- an alternative order, for example, that the accused be treated as a patient or cared for as a care recipient, or
- an order that the proceedings against an accused found unfit to stand trial be stayed.[122]

4.61 In New South Wales, a person can appeal against a decision in a special hearing that on limited evidence available the accused had committed the offence charged or an alternative offence to the one charged.[123] Hence this decision is subject to

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[115] Criminal Code Act (NT) s 43X(3)(c).
[116] Criminal Code Act (NT) s 43ZB(2).
[117] Criminal Code Act (NT) s 43ZB(3).
[118] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 26.
[119] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 16.
[120] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 16.
[121] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 21.
[122] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 29.
[123] Mental Health (Forensic Provisions) Act 1990 (NSW) s 221(c)(d).

appeal in the same manner as a decision in an ordinary trial of criminal proceedings.[124]

13. The revised Criminal Procedure Code should contain provisions for appeals from (i) decisions about whether a person with a mental impairment who is not fit to plead or stand trial committed the physical elements (actus reas) of an offence; (ii) decisions about fitness or unfitness to plead or stand trial; and (iii) decisions about supervision orders.

Evidence about mental impairment and fitness to plead

4.62 A lack of medical expertise in Solomon Islands adds more problems to cases where people with mental impairment are brought into the criminal justice system. Under the provisions of the Criminal Procedure Code there is a need to distinguish between those who are not fit due to unsoundness of mind, and others who are not fit to plead for other reasons. This means that evidence is required from a mental health expert to establish whether the accused is unfit due to unsoundness of mind, or unfit for some other reason. It appears that the practice in Solomon Islands is that this evidence might be given by psychiatrist or psychologist. Generally expert evidence about the existence of a mental illness is needed from a psychiatrist.

4.63 At the moment, there is only one qualified psychiatrist in Solomon Islands. This contributes to the delays in the assessment of psychiatric reports or the unavailability of such reports when they are required. The delays are possible because it takes time and resources for a psychiatrist to make a final report on the accused patient. This involves follow up observations and linking them together to come to a final conclusion on the patient's mental condition.[125] The lack of medical expertise means that there are problems in obtaining other alternative views from psychiatrists or other medical experts.

4.64 Reform of the processes in relation to a special hearing and eliminating the distinction between people who are not fit to plead because of mental illness and people who are not fit to

[124] Mental Health (Forensic Provisions) Act 1990 (NSW) s 22 (3)(c).

[125] Dr. Paul Orotaloa, Psychiatrist, *Consultation*, Law Reform Commission Office, 16 October 2009.

plead for any other reason may help address the difficulty in this area.

14. The Criminal Procedure Code should specify that only one qualified person (psychiatrist or psychologist) should carry out assessments on the condition of a person with a mental impairment in order to assist the courts in conducting periodic reviews, or determining whether it is necessary to detain a person with a mental impairment. However, to assist the court in determining whether or not a person was affected by mental impairment at the time he or she committed an offence (determining whether or not to acquit the accused as 'not guilty' because of insanity), at least two qualified persons (one of whom must be a psychiatrist) must be required to conduct separate assessments on the condition and the circumstances of the accused person at the time he or she committed the offence.

15. The Government should prioritise training opportunities for medical and correctional/prison officers, or any other person who looks after or intends to work with persons with a mental impairment.

16. The Government should build proper and adequate mental health facilities in Solomon Islands where persons with mental impairment can be treated, supervised or kept away from the public where they become a security risk to the public or to themselves or where they might face risk of harm or abuse from any other person.

Criteria for determining fitness to plead

4.65 The Criminal Procedure Code does not specify any criteria that will assist courts in determining whether or not a person is fit to plead. Neither does the Criminal Procedure Code specify the matters that must be considered in an inquiry to determine whether an accused is fit to plead.

4.66 The High Court of Solomon Islands expressed this in 2008 when it says 'while there is provision that empowers courts to investigate the condition of the accused's mind, the Criminal Procedure Code is silent or does not specify the matters to be inquired into.'[126] This poses difficulties in terms of court deliberation on the issue of fitness.

[126] *Regina v Tipasua* [2008] SBHC 27<www.paclii.org>, emphasis added.

4.67 There is a further difficulty identified in the Criminal Procedure Code because there are different processes governing people not fit to plead due to insanity, and people not fit to plead for other reasons. These different processes complicate matters because the issue is whether an accused person can understand and participate in a trial, and have a fair trial, rather than whether he or she is suffering from mental illness or some other form of mental impairment.

Other jurisdictions

4.68 In other jurisdictions legislation outlines the criteria for determining fitness. This criteria is focused on the person's capacity to participate in criminal proceedings, and not just on mental illness or unsoundness of the person's mind.

4.69 The capacity in question is not limited to the mental health of the accused, it is a much broader concept. In an Australian case determined in 2000 it was held that '…the question whether a person is fit to plead may arise for reasons other mental illness. It may arise, for example, because a person is deaf and dumb or, more generally, because language difficulties make it impossible for him or her to make a defence.'[127]

4.70 In the Northern Territory the criteria for determining whether a person is not fit to plead or stand trial is based on any of the following:

- the person is unable to understand the nature of the charge;
- the person is unable to plead to the charge and to exercise the right of challenge;
- the person is unable to understand the nature of the trial
- the person is unable to follow the course of the proceedings;
- the person is unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- the person is unable to give instructions to his or her legal counsel.[128]

4.71 In New South Wales 'fitness to plead' is determined using this criteria:

- the accused must be able to understand and plead to the charge;

[127] See *Eastman v The Queen* (2000) 74 ALJR 915.

[128] Criminal Code Act (NT) s 43J(1).

- the accused person must be able to exercise his or her right to challenge jurors;
- the accused must be able to generally understand the nature of the proceedings;
- the accused must be able to follow the proceedings in a general sense; and
- the accused must be able to understand the substantial effect of any adverse evidence; and decide upon a defence, and make this and his or her version of facts known to the court and his or her counsel.[129]

4.72 In New Zealand a person who is unfit to stand trial includes a defendant who cannot conduct a defence or instruct counsel to do so.[130] It also includes a defendant, who due to mental impairment, is not able to:

- plead;
- adequately understand the nature, purpose or possible consequences of the proceedings or
- communicate adequately with counsel for the purposes of conducting a defence.[131]

4.73 Similarly, in Victoria, a person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be:

- unable to understand the nature of the charge;
- unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury;
- unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence);
- unable to follow the course of the trial;
- unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- unable to give instructions to his or her legal practitioner.[132]

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[129] *R v Presser* [1958] VR 45, per Smith J. In *R v Kesavarajah* (1994) 181 CLR 230, the High Court held that both the Presser factors and the length of the trial are relevant in determining fitness to be tried, cited in NSW Law Reform Commission, Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedure) Act 1990, Consultation Paper (2006).

[130] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 4(1)(a).

[131] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 4(1)(b).

17. Introduce a criteria to guide the courts in determining whether or not a person is fit to plead or stand trial in the revised Criminal Procedure Code or Penal Code.

18. The appropriate criteria to determine whether a person is not fit to plead or stand trial should be based on any of the following – (a) the person is unable to plead to the charge; (b) the person is unable to understand the nature of the trial; (c) the person is unable to follow the course of the proceedings; (d) the person is unable to give instructions to his or her legal counsel; or (e) the person is unable to understand the substantial effect of any adverse evidence; and decide upon a defence, and make his or her version of facts known to the court and his or her counsel that may be given in support of the prosecution.

Lack of clarity around decision making and responsibility

4.74 In Solomon Islands, the Governor-General has unlimited powers to detain, transfer or determine the place of detention for people found guilty but insane, people in detention who are not fit to plead and those detained under section 149 of the Criminal Procedure Code.[133] The courts have no power in these areas, other than the ability to release a person who is not fit on bail. The case study illustrates difficulties with obtaining a transfer from prison to a mental health facility so that the accused could be assessed and treated.

4.75 The Criminal Procedure Code or other legislation does not specify the roles and duties of main bodies or individuals involved in the decision-making process about these people. In addition it appears that some of those responsible are not aware of, and are not informed about the rights and the circumstances of the persons affected by their decisions, or the delays they might have contributed in dealing with such cases.

Other jurisdictions

4.76 The trend in other jurisdiction is for courts to have a greater role in making decisions about the treatment and detention of people who are not fit to plead, or not guilty of an offence due to mental impairment. The reasons for this are that:

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[132] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 6.

[133] For example see Criminal Procedure Code ss 146(1)(c) and 146(5) regarding transfer and place of custody.

- one of the inherent roles of a court is to make decisions balancing the interests of the public and individuals; and
- courts hearing these types of cases become familiar with the facts of each case, and the circumstances of the individual. They have first hand information on the situation and condition of the accused.

4.77 In addition in Solomon Islands section 10 of the Constitution provides for a fair hearing by an independent and impartial court. This has implications for people who are detained following a finding of guilty but insane, and accused people who are unfit where there is evidence to support a conviction, or a finding that he or she committed the physical elements (actus reas) of the offence. The processes to determine whether a person detained at the Governor-General's pleasure should continue to be detained, do not meet the requirements of section 10.

4.78 In other jurisdictions, the relevant legislation specifies the roles of the courts and responsible bodies and individuals who are involved in the decision making concerning persons who are found unfit to stand trial and those who have been found not guilty of the offence because of mental impairment. Most of the decisions are made by the court in the form of court orders.

4.79 For example, in New Zealand, when a person is convicted of an imprisonable offence (any offence punishable by imprisonment), the court has the power to commit the offender to a hospital or facility where the court is satisfied that the person's mental impairment requires compulsory treatment or compulsory care. This is done in the best interest of the offender or for the safety of the public, a person or class of person.[134]

4.80 The court also has the power to order assessments concerning people affected with a mental impairment who are in custody to assist the court to decide:

- whether the person is unfit to stand trial;
- whether the person is insane;
- the type and length of sentence that might be imposed on the person; and

[134] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 34.

- the nature of a requirement that the court may impose on the person as part of, or as a condition of, a sentence or order.[135]

4.81 In the Northern Territory, supervision orders are made by the courts in respect of persons who are found not guilty because of mental impairment.[136] In these orders the court determines the place of custody[137] or indicates that the person be released unconditionally.[138]

4.82 In NSW, the Mental Health Review Tribunal makes decisions about detention, the place of detention, and whether or not to release a person found not guilty because of mental illness.[139] In Victoria, the court has power to make decisions about a person who is found not guilty of an offence because of mental impairment. The court can either declare the person liable for supervision, or order that the person be released unconditionally.[140]

19. The revised Criminal Procedure Code or Penal Code should clarify that courts are the appropriate body to make decisions about when, where and for how long people charged with a criminal offence who have a mental impairment should be detained.

Court power to order assessments

4.83 The courts in Solomon Islands have no power to make orders for medical assessments or reports on the condition of a person who is detained because of his or her mental impairment. As illustrated in the case study, the court attempted to make orders for the assessment, care and treatment of JH but none of the orders were implemented.

4.84 In other jurisdictions the court has power to order medical assessments or reports on the condition of the person aforementioned, including other important matters about those persons.

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[135] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 38.

[136] See Criminal Code Act (NT) ss 43I(2)(a); 43X(2)(a); 43X (2)(a) & 412A(2)(a).

[137] Where the court makes a custodial supervision order, see Criminal Code Act (NT) s 43ZA (1)(a).

[138] Where the court makes a non-custodial supervision order, see Criminal Code Act (NT) s 43ZA (1)(b).

[139] Mental Health (Forensic Provisions) Act 1990 (NSW) ss 17(3), 23, 39.

[140] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC) s 23.

4.85 In the Northern Territory the court has power to order that assessment be made on the person's mental condition in the following situations:

- if the defence of mental impairment is raised during a trial;[141]
- if the person is found not guilty of the offence because of mental impairment and the court declared him or her liable to supervision;[142]
- if the court is to conduct an investigation into the fitness of the accused person to stand trial;[143]
- during the conduct of an investigation into the person's fitness if the court requires that it is in the interest of justice to do so;[144]and
- after the court declares that a person is subject to a supervision order after a special hearing but pending the supervision order.[145]

4.86 In New Zealand the court has power to order assessment reports on the condition of persons affected with a mental impairment who are in custody to assist the court in determining:

- whether the person is unfit to stand trial;
- whether the person is insane;
- the type and length of sentence that might be imposed on the person; and
- the nature of a requirement that the court may impose on the person as part of, or as a condition of, a sentence or order.[146]

4.87 Similarly, in Victoria, the court has the power to order an assessment of a person's condition at different stages of the court proceedings:

- prior to an investigation into the person's fitness;[147]
- during an investigation into a person's fitness if it is in the interests of justice to do so;[148]and

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[141] Criminal Code Act (NT) s 43G(1)(b).
[142] Criminal Code Act (NT) s 43I(3)(c).
[143] Criminal Code Act (NT) s 43O(d).
[144] Criminal Code Act (NT) s 43P(3)(b).
[145] Criminal Code Act (NT) s 43Y(c).
[146] Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 38.
[147] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC) s 10(1)(d)(i).

- prior to the making of a supervision order.[149]

20. The revised Criminal Procedure Code or Penal Code should empower the courts to order for assessments of a person with a suspected mental impairment who is charged with a criminal offence. The purpose of the assessments is to assist the courts determine whether or not the person with a mental impairment is (i) not fit to plead or stand trial; or (ii) the person is insane, or (iii) where and when the court sees it necessary to order such assessments.

Scope and application of the insanity defence

4.88 Some issues relating to the nature and application of the insanity defence need to be addressed. The defence is very narrow as it only applies to mental impairment that comes within the common law definition of 'disease of the mind'. There are inconsistencies between the Criminal Procedure Code and the Penal Code and court decisions regarding the ambit of the defence. The outcome of successfully raising the defence of insanity is 'guilty but insane' which is inconsistent with general criminal principals. Finally the terminology used to describe the defence is old fashioned, and does not reflect contemporary understanding of mental impairment.

Disease of the mind

4.89 In Solomon Islands the term 'disease of the mind' used in the Penal Code is not defined. The courts have adopted the common law interpretation of this term. Under the common law, conditions that have been held to fall within the insanity defence include psychotic disorders,[150] cerebral arteriosclerosis,[151] epilepsy,[152] and hyperglycemia.[153] The common thread amongst these conditions is that they are seen as arising from an *internal* rather than an external

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[148] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC) s 11(1)(b)(ii).

[149] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC) s 24(1)(d)(i).

[150] See *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386 at 412 per Lord Denning.

[151] See *R v Kemp* [1957] 1 QB 399.

[152] See *R v Cottle* [1958] NZLR 999; *R v Sullivan* [1984] AC 156; *R v Foy* [1960] Qd R 225; *R v Mursic* [1980] Qd R 482; *R v Meddings* [1966] VR 306; *Youssef* (1990) 50 A Crim R 1.

[153] See *R v Hennessy* [1989] 1 WLR 287.

cause.[154] This means that the mere fact that an accused suffers from impaired reasoning powers is not sufficient. A causal link between this and an underlying 'disease' is called for.[155]

4.90 The current defence does not reflect medical understanding of mental illness and the way it can affect people. Medical understanding of mental illness and mental disorder covers a broader range of conditions that are not included in the traditional legal test for insanity.[156] This means that people who have a mental condition, which has no internal cause such as delusions, dementia, brain damage, intellectual disability or personality disorder, which has no internal cause, when they committed the offence are excluded from the defence.

4.91 The meaning of the term 'disease of the mind' is a legal rather than a psychiatric question.[157] This is where psychiatrists have a problem because the 'issue is whether the accused's mental faculties were impaired by illness, not whether he or she was suffering from a recognized mental illness.'[158]

4.92 In other jurisdictions, legislation has modified the common law defence that is limited to disease of the mind so that it includes other conditions other than those arising from a disease of the mind. This means that other persons apart from those suffering by a defect of reason arising from a 'disease of the mind' can also rely on the defence. The legislative definition clarifies what mental conditions should fall within the ambit of the defence.

4.93 In the Northern Territory the defence is termed mental impairment and it is defined to include 'senility, intellectual disability, mental illness, brain damage and involuntary intoxication.[159]

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[154] Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2) (2005) 214.

[155] S.T. Yannoulidis 'Mental Illness, Rationality, and Criminal Responsibility' (2003) 25(2) Sydney Law Review 189.

[156] Victorian Law Reform Commission *Defences to Homicide*, Final Report (2004).

[157] *R v Kemp* [1957] QB 399 at 405.

[158] *R v Sullivan* [1984] AC 156.

[159] Criminal Code Act (NT) s 43A.

4.94 The current framework for the defence of insanity includes a number of components. First, the person has to have an underlying mental condition. Secondly, at the time the offence was committed, the person was affected by the mental condition to the extent where he or she cannot (a) understand what he or she is doing; or (b) understand that he or she should not do the act or omission.

4.95 The issue at hand is to determine what kind of mental conditions are capable of affecting a person to the extent which would satisfy the elements of the insanity defence as provided in 4.88 above.

4.96 LRC consultations with the country's only psychiatrist and his team reveal that mental conditions such as intellectual disability, dementia and senility, for example, cannot fulfill the elements of the insanity defence. These conditions can affect a person but they cannot deprive a person's capacity to understand what he or she did or understand that he or she should not do the act or omission. The psychiatrist said that people with mental conditions know, at all times, what they are doing or can distinct between right and wrong. At all times they cannot lose their intelligence and their minds function normally.

4.97 The psychiatrist suggests that only some subtypes of psychosis can affect a person to the extent where the person cannot understand what they are doing or know that they should not do the act or omission. He said that these conditions can only affect the person to this extent occasionally, otherwise, at all other times, the person thinks and acts normally. Some examples of psychosis given by the psychiatrist include command hallucinations and persecutory delusions. He said that these are the common mental conditions that affect persons to commit crimes in Solomon Islands. He also suggested that epilepsy should also be retained or included as a mental condition falling under the ambit of the insanity defence.

4.98 In summary, the psychiatrist is suggesting that only sub-type conditions of psychosis and epilepsy can affect a person to the extent where a person is deprived of understanding what he or she is doing or to know that he should not do the act or omission, or will render the person incapable of controlling his actions.

Knowledge of wrong

4.99 The Penal Code says that a person is not criminally responsible for an offence if at the time of doing the act or omission that constitutes the offence he or she is affected by a disease of the mind to the extent where he or she:

- is incapable of understanding what he or she was doing; or
- did not know that he or she should not do the act or omission.[160]

4.100 In the case of *Regina v Suraihou*[161] the High Court decided that the second part of the defence refers to situations where the accused did not know that his or her act or omission was wrong according to standards of reasonable people, or morally wrong. The test was adopted from Australian case precedents such as *R v Porter*[162] and *Sodeman v R*.[163]

4.101 In contrast the Criminal Procedure Code provides for a test of legally wrong; that at the time of the offence the person was suffering from a defect of reason arising from a disease of the mind to the extent where he or she was incapable of knowing the nature or quality of the act or omission, or did not know it was contrary to or wrong in law.[164] The approach of the court in *Suraihou* is not consistent with section 146 of the Criminal Procedure Code.

4.102 In other jurisdictions the relevant legislation provides that the test is that the person is prevented by mental impairment, illness or insanity from knowing that the conduct or omission was wrong having regard to the commonly accepted standards of right and wrong.[165]

4.103 In New South Wales, the accused must be acquitted of the offence charged if he or she can establish that because of the mental illness at the time of the offence he or she:

- did not know the nature and quality of the act he or she was doing; or

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[160] Penal Code s 12

[161] *Regina v Suraihou* [1993] SBHC 8<www.paclii.org>.

[162] (1933) 55 CLR 182.

[163] (1936) 55 CLR 192.

[164] Criminal Procedure Code 146.

[165] See Crimes Act 1961 (NZ) s 23; Criminal Code Act (NT) s 43C(1)(b); Mental Health (Criminal Procedure) Act 1990 (NSW) s 28(1)(b); Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (VIC) s 16(1)(b).

- did not know that what he or she was doing was wrong.[166]

4.104 In New Zealand, a person must not be convicted of an offence by reason of an act done or omitted when he or she was laboring under natural imbecility or disease of the mind to such extent as to render him or her incapable

- of understanding the nature and quality of the act or omission; or
- of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.[167]

Inability to control actions

4.105 The defence of insanity in Solomon Islands is not available where the accused is unable to control his or her actions due to the effect of a disease of the mind.

4.106 In some other jurisdictions a third element to the defence has been included – that at the time of carrying out the conduct constituting the offence the person was suffering from a mental impairment and as a consequence of that impairment was not able to control his or her actions.[168] For example a person may be severely ill and yet be able to understand and reason about what they are doing. It is arguable that in certain cases even persons suffering from psychosis may understand what they are doing and that it is wrong. A case would be that of an individual suffering from command hallucinations who may be able to understand what he or she is doing and that it is wrong, and yet driven by a particular delusion that he or she is unable to stop him/herself from committing murder or an offence.[169]

4.107 In neigbouring Papua New Guinea the Criminal Code Act 1974 provides that a person is not criminally responsible if at the time of doing the act or making the omission he or she is in such a state of mental disease or natural mental infirmity as to deprive the person of the capacity –

- to understand what he is doing; or
- to control his actions; or

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[166] Mental Health (Forensic Provisions) Act 1990 (NSW) s 28(1)(b).

[167] Crimes Act 1961 (NZ) s 23(2).

[168] Victorian Law Reform Commission *Defences to Homicide*, Final Report (2004).

[169] Victorian Law Reform Commission *Defences to Homicide,* Final Report (2004).

- to know that he ought not to do the act or make the omission.

4.108 In some jurisdictions the inclusion of this element raised criticisms. Consultation by the Victorian Law Reform Commission in 2003 showed that:

- it is difficult to distinguish between an accused who could not, and an accused who would not, control his or her actions;
- those people whose delusions have taken away their capacity to control their actions would be very likely to succeed in a mental impairment defence in any case;
- forensic psychiatrists claim that it would be very difficult to give any kind of expert opinion about volition; and
- the introduction of volition to the mental impairment defence would mean introducing it for both homicide and non-homicide offence, and this may broaden the defence far more than was appropriate.[170]

4.109 LRC consultation with the only psychiatrist in the county and his team reveals that this third element of the defence should be included because some mental conditions falling under psychosis or epilepsy can render a person incapable of controlling his actions, although at the time of the offence, he or she might still be capable of understanding what he or she was doing or knew that he or she should not do the act or omission.

21. The revised Criminal Procedure Code should clarify that the defence of insanity will apply to an accused person with a mental impairment who does not know what he or she did was morally wrong according to the standards of reasonable people.

22. The defence of insanity should apply to conditions of mental impairment that have the effect of depriving a person of the capacity to understand the nature of his or her act or omission; or to know that he or she ought not to do the act or make the omission, or to control his or her actions.

23. The revised Penal Code should be amended to provide for a third element for the defence of insanity: that at the time the offence was committed the accused person with a mental impairment was affected by a mental impairment rendering him or her incapable to control his or her actions.

[170] Victorian Law Reform Commission *Defences to Homicide*, Final Report (2004).

Outcome of successful defence of insanity

4.110 In Solomon Islands section 12 of the Penal Code says that an accused is not criminally responsible for an offence if at the time of committing the offence he or she had a disease of the mind which deprived him or her of the capacity:

- to understand the nature of his or her act or omission that constitutes the offence; or
- to know that he or she ought not to do the act or make the omission.[171]

4.111 In other words, an accused person cannot be found guilty of the offence charged if it is established that he or she was insane at the time he or she committed the offence.

4.112 However, while section 12 of the Penal Code says that a person cannot be held criminally responsible for an offence if at the time of offence he or she was insane, it also says that the effect of the section is subject to other provisions of the Penal Code or other laws in force.

4.113 The Criminal Procedure Code says that even if the accused was affected by a disease of the mind at the time of the offence he or she is not entitled to be acquitted of the offence. The court must hold him or her guilty of the offence but insane.[172] One argument in support of this approach is that the finding of 'guilt' provides a mechanism for detaining the person in order to protect the community particularly where the actions of the accused has lead to death or serious harm of a person.[173] However this approach is not consistent with the rationale or policy behind the defence of mental impairment: that a person should not be held responsible under the law if they are not morally culpable.

4.114 The Penal Code and Criminal Procedure had their origins from the United Kingdom. The law on the insanity defence in United Kingdom was changed in 1883 to change the form of verdict where insanity was successful, and to give the Crown the power to hold the accused in custody at the pleasure of the Crown (at this stage the Queen was Queen Victoria, and there had been an attempt to kill her by a person who was

[171] Penal Code s 12.

[172] Criminal Procedure Code s 146.

[173] A person can also be detained under the Mental Health Act if they are a danger to the community.

found insane). But in 1964 the law was changed so the verdict was "not guilty by reason of insanity."

Other jurisdictions

4.115 In other jurisdictions a person cannot be found guilty of an offence if at the time of the offence he or she committed the offence because of mental impairment or illness.[174]

4.116 In New Zealand if the defence of insanity is successful the person is found not guilty of the offence.[175]

4.117 In the Northern Territory, if the defence of mental impairment is established the person must be found not guilty of the offence because of mental impairment.[176] Similarly, in New South Wales the court must give a special verdict of not guilty by reason of mental illness if at the time the accused person did the act of made the omission that constitutes the offence, he or she is mentally ill.[177] In Victoria, if the defence of mental impairment is established, the person must be found not guilty because of mental impairment.[178]

4.118 In the United Kingdom, a special verdict entitles the accused to be acquitted of the offence on the ground of insanity.[179] However, in those jurisdictions where the accused is found not guilty, or acquitted, due to mental impairment, the court can still detain the person for treatment, or for the protection of the community.

24. A person with a mental impairment who successfully argues the insanity (mental impairment) defence should be found 'not guilty because of insanity' of the offence.

25. The current special verdict of 'guilty but insane' contained in section 146 of the Criminal Procedure Code should be replaced with a new verdict of 'not guilty because of insanity' in the revised Criminal Procedure Code.

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[174] For example, see Criminal Code Act (NT) s 43C(2), Mental Health (Forensic Provisions) Act 1990 (NSW) s 38; Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) s 20(1), Trial of Lunatics Act (UK) s 2.

[175] Crimes Act 1962 (NZ) s 23(2).

[176] Criminal Code Act (NT) s 43C(2).

[177] Mental Health (Forensic Provisions) Act 1990 (NSW) s 38.

[178] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 20(2).

[179] Trial of Lunatics Act (UK) s 2.

APPENDIX

Stakeholder Consultations

Stakeholder	Date/s Consulted	Position	Organisation
Public Solicitor Staff	1 February 2010		Ministry of Justice and Legal Affairs
Mr. Francis Haisoma	1 October 2009, 5 October 2009,	Commissioner Correction Services	Ministry of Police and Correctional Services
Dr Paul Orotaloa	7 October 2009, 16 October 2009 5 February 2013	Psychiatrist, Department of Mental Health	Ministry of Health and Medical Services.
Mr. William Same	October 2009.	Director, Department of Mental Health	Ministry of Health and Medical Services.
Correctional Services Staff	31 October 2011		Ministry of Police and Correctional Services
Sir Albert Palmer	14 August 2013	Chief Justice, Solomon Islands.	Solomon Islands National Judiciary