

Penal Code Review Committee

Report

August 2018

Submitted to:

Minister for Home Affairs and Minister for Law

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¹ Designations reflect the positions the members last held while sitting on the Committee.

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² Designations reflect the positions the members of the Secretariat last held while serving on the Secretariat.

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ABBREVIATIONS

Domestic legislation	Abbreviation
Building Maintenance and Strata Management Act (Chapter 30C, 2008 Rev Ed)	BMSMA
Children and Young Persons Act (Cap 38, 2001 Rev Ed)	CYPA
Civil Defence Act (Cap 42, 2001 Rev Ed)	CDA
Computer Misuse and Cybersecurity Act (Cap 50A, 2007 Rev Ed)	CMCA
Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed)	CDSA
Criminal Procedure Code (Cap 68, 2012 Rev Ed)	CPC
Electronic Transactions Act (Cap 88, 2011 Rev Ed)	ETA
Evidence Act (Cap 97, 1997 Rev Ed)	EA
Films Act (Cap 107, 1998 Rev Ed)	FA
Financial Advisers Act (Cap 110, 2007 Rev Ed)	FAA
Health Products Act (Cap 122D, 2008 Rev Ed)	HPA
Interpretation Act (Cap 1, 2002 Rev Ed)	IA
Internal Security Act (Cap 143, 1985 Rev Ed)	ISA
Mental Health (Care and Treatment) Act (Cap 178A, 2008 Rev Ed)	MHCTA
Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed)	MOA
Misuse of Drugs Act (Cap 185, 2008 Rev Ed)	MDA
Organised Crime Act 2015 (No 26 of 2015)	OCA
Penal Code (Cap 224, 2008 Rev Ed)	PC, or Code
Personal Data Protection Act (No 26 or 2012)	PDPA
Police Force Act (Cap 235, 2006 Rev Ed)	PFA
Prevention of Corruption Act (Cap 241, 1993 Rev Ed)	PCA
Prisons Act (Cap 247, 2000 Rev Ed)	PA
Protection from Harassment Act (Cap 256A, 2015 Rev Ed)	POHA
Road Traffic Act (Cap 276, 2004 Rev Ed)	RTA
Security and Futures Act (Cap 289, 2006 Rev Ed)	SFA
Telecommunications Act (Cap 323, 2000 Rev Ed)	TA
Terrorism (Suppression of Bombings) Act (Cap 324A, 2008 Rev Ed)	TSOBA
Terrorism (Suppression of Financing) Act (Cap 325, 2003 Rev Ed)	TSOFA
Weights and Measures Act (Cap 349, 1985 Rev Ed)	WMA
Women's Charter (Cap 353, 2009 Rev Ed)	WC
Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed)	WSHA

Foreign legislation	Abbreviation
Criminal Justice Act 1993 (c 36) (UK)	CJA 1993
Criminal Justice and Courts Act 2015 (c 2) (UK)	CJCA 2015
Fraud Act 2006 (c 35) (UK)	Fraud Act 2006
Sexual Offences Act 2003 (c 42) (UK)	SOA 2003

Other terms	Abbreviation
Auxiliary Police Officer	APO
Central Narcotics Bureau	CNB

Immigration and Checkpoints Authority	ICA
Land Transport Authority	LTA
London Interbank Offered Rate	LIBOR
Penal Code Review Committee	PCRC, or Committee
Singapore Civil Defence Force	SCDF
Singapore Interbank Offered Rate	SIBOR
Singapore Prison Service	SPS
Terms of Reference of the PCRC	TOR

Books	Abbreviation
Chan Wing Cheong, Stanley Yeo and Michael Hor, <i>Criminal Law for the 21st Century: A Model Code for Singapore</i> (Academy Publishing, 2013)	Model Code for Singapore
Stanley Yeo, Neil Morgan, & Chan Wing Cheong, <i>Criminal Law in Malaysia and Singapore</i> (LexisNexis, 2007)	YMC 1 st Ed
Stanley Yeo, Neil Morgan and Chan Wing Cheong, <i>Criminal Law in Malaysia and Singapore</i> (LexisNexis, 2012, 2 nd Ed)	YMC 2 nd Ed
Stanley Yeo, Neil Morgan and Chan Wing Cheong, <i>Criminal Law in Malaysia and Singapore</i> (LexisNexis, Rev 2 nd Ed, 2015)	YMC
<i>Ratanlal and Dhirajlal's Law of Crimes: A Commentary on The Indian Penal Code, 1860</i> (CK Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007)	Ratanlal 26 th Ed
<i>Ratanlal and Dhirajlal's Law of Crimes: A Commentary on The Indian Penal Code, 1860</i> (Shriniwas Gupta and Dr Preeti Mishra gen ed) (Bharat Law House, 27th Ed, 2013)	Ratanlal vol [1/2]
<i>Sentencing Practice in the Subordinate Courts</i> (LexisNexis, 2013, 3rd Ed)	Sentencing Practice

CHAPTER 1: INTRODUCTION

SECTION 2: EXECUTIVE SUMMARY

TERMS OF REFERENCE

(1) *The objectives of the Committee are:*

- a. *To conduct a thorough and comprehensive review of the Penal Code, and make recommendations on reforming the Penal Code; and*
- b. *To study and make recommendations on any other specific reform areas or proposals referred to it by the Minister for Home Affairs and the Minister for Law.*

(2) *The Committee shall consider the following key areas of reform in relation to the Penal Code:*

- a. *Rationalising, recalibrating and modernising General Principles, Exceptions and Explanations in the Penal Code. This will include a review of the defences at law so that they properly reflect the level of moral culpability that give rise to criminal liability; and*
- b. *Rationalising, recalibrating and modernising the substantive offences in the Penal Code, including proposals with respect to:*
 - i. *Updating or removing outmoded offences;*
 - ii. *Responding to a changing crime environment (eg, new and more sophisticated forms of offences);*
 - iii. *Removing offences already or better dealt with under other dedicated legislation;*
 - iv. *Simplifying minute and overly-granular distinctions between offences; and*
 - v. *Reviewing punishment provisions to ensure proportionality to seriousness of the offence, and bail and arrest powers.*

Chapter 1: Introduction

1 The PCRC has structured its Report into seven chapters that reflect its Terms of Reference:

- (a) Introduction;
- (b) Keeping up with technological change;
- (c) Tackling emerging crime trends;
- (d) Enhancing protection for vulnerable victims;
- (e) Updating the Penal Code;
- (f) Harmonising criminal laws;
- (g) Updating the sentencing framework.

Chapter 2: Keeping up with technological change

2 This chapter deals with changes made in response to crimes facilitated by new technology.

Section 3 – Crimes committed in the virtual arena

Section 3.1 – Definition of “property”

3 These recommendations deal with the definition of “property” in the Penal Code. Currently, the narrow definition of “property” introduces a gap in the criminal law with respect to intangible (eg, air miles and virtual currency) or incorporeal property (eg, drawing rights from the bank). The Committee makes recommendations to address this gap. Consequently, insofar as incorporeal property cannot be moved, the Committee makes recommendations to amend the theft provision in the Penal Code to deal with the alteration of such property.

Recommendations

- (1) Amend s 22 of the Penal Code, to set out a comprehensive definition of “property” which will cover intangible and incorporeal property*
- (2) Amend s 378 of the Penal Code to account for the possibility of theft of incorporeal property*

Section 3.2 – Valuable security in electronic form

4 This recommendation updates the Penal Code’s definition of “valuable security” in s 30 to include those in electronic forms.

Recommendation

- (3) Amend s 30 of the Penal Code, to extend the definition of “valuable security” to include electronic records*

Section 3.3 – Cheating of corporate entities

5 This recommendation clarifies that corporate entities can be deceived for the purposes of the offence of cheating, although they receive and take action upon information entirely through automated systems and no natural person is deceived.

Recommendation

- (4) Insert an Explanation to s 415 of the Penal Code, to make clear that corporate entities are capable of being deceived and induced for the purposes of the offence of cheating*

Section 3.4 – New offences relating to computer programs

6 This recommendation acknowledges the increasing prevalence of autonomous computer programs, and the potential for harm such systems bring. However, it also recognises that regulation should not unduly discourage or smother industry development, and that no countries have introduced specific rules on criminal liability for artificial intelligence systems.

Recommendation

- (5) While no legislative amendments are immediately necessary, the Government should actively explore and develop a suitable framework to address the issue of criminal liability for harm caused by computer programs*

Section 4 – New identity theft offence

7 This recommendation addresses a current gap in the law insofar as identity theft is concerned. The recent amendments to the CMCA created a new offence of obtaining, retaining, supplying, offering to supply, transmitting or making available personal information that was obtained in contravention of certain sections of the CMCA which related to computer misuse offences. However, the new offence required that the information was obtained in contravention of the CMCA. It does not cover information obtained through non-technological means such as traditional theft of identity documents. The Committee makes a recommendation to address this.

Recommendation

(6) Create a new offence of illegal possession of another person's identity information

Section 5 – Transnational offences

Section 5.1 – Territorial jurisdiction for white collar crimes

8 These recommendations clarify which fact elements must occur in Singapore for our criminal justice system to have jurisdiction over white collar and property offences. This ensures a consistent approach to territorial jurisdiction for white collar offences under various statutes, such as the CMCA and the SFA.

Recommendations

(7) Set out a schedule of offences (consisting of important property and white-collar offences) under which the Singapore courts will have jurisdiction where any fact element of the offence that takes the form of an event occurs in Singapore

(8) Specify that for scheduled offences, the Singapore courts will have jurisdiction where the offence involved an intention to make gain or cause loss or expose another to a risk of loss or cause harm to any person in body, mind, reputation or property, and that gain, loss or harm occurred in Singapore

Section 5.2 – Liability for cross-border criminal conspiracies

9 This recommendation clarifies that criminal conspiracy as defined in s 120A of the Penal Code covers cross-border conspiracies.

Recommendation

(9) Clarify that criminal conspiracies under s 120A of the Penal Code cover conspiracies in Singapore to commit offences outside Singapore and conspiracies outside Singapore to commit offences in Singapore

Section 6 – General extension of territorial scope

10 This recommendation addresses the limitations in the Penal Code in dealing with persons who threaten Singapore's national security, if such persons had planned their activities abroad. It ensures that Singapore citizens and permanent residents who commit offences such as genocide or other offences against the State outside Singapore can be prosecuted in Singapore.

Recommendation

(10) Extend the provisions of Chapters VI (Offences against the State) and VIB (Genocide) of the Penal Code to acts and omissions by Singapore citizens and permanent residents outside Singapore

Chapter 3 – Tackling emerging crime trends

Section 7 – No-outcome fraud

11 This recommendation addresses the limitations in the Penal Code in dealing with persons who have committed fraud in Singapore. The Committee recognises the benefits of the reforms of fraud-related offences in other common law jurisdictions, which focus on the intent of the accused person rather than the effects of a deception on the victim, and have recommended a new offence of “no-outcome fraud”. In doing so, the Committee is aware of the academic criticism that such an offence might criminalise trivial lies, and have made recommendations to avoid such actions being caught under the new offence.

Recommendation

(11) Create a new offence of fraud, which is committed by any person who, fraudulently or dishonestly, (a) makes a representation, (b) fails to disclose information which he is under a legal duty to disclose, or (c) abuses, whether by act or omission, a position he occupies in which he is expected to safeguard, or not to act against, the financial interests of another person

Section 8 – Obtaining services fraudulently

12 This recommendation addresses the limitations in the Penal Code in dealing with persons who obtain services fraudulently (eg, if the fraudulent act does not involve any kind of false representation or where the victim is deceived into providing a service for the accused person at no measurable cost to the victim. The Committee recommends that it shall be an offence to fraudulently or dishonestly obtain a service knowing that it is being made available on a for-payment basis but not intending that any payment be made.

Recommendation

(12) Create a new offence of obtaining services fraudulently

Section 9 – Criminal breach of trust

13 This recommendation updates the language of the criminal breach of trust provisions in the Penal Code, and reviews the categories covered by the provisions. In *PP v Lam Leng Hung*³, the Court of Appeal decided that s 409 did not cover directors of corporations, governing board members or key officers of a charity, and officers of a society. Such persons committing criminal breach of trust would be punished under s 406 instead. One of the recommendations proposed makes clear that the policy of the Government is that such persons in positions of responsibility are more culpable and have an enhanced potential for harm when they commit criminal breach of trust.

³ [2018] 1 SLR 659 (“*Lam Leng Hung (CA)*”)

Recommendations

- (13) Amend s 407 to update archaic language and rationalise categories of relationships covered by provision
- (14) Amend s 408 to update archaic language and rationalise categories of relationships covered by provision
- (15) Amend s 409 to rationalise categories of relationships covered by provision

Section 10 – Emerging crime tactics

Section 10.1 – Definitions of “wrongful gain”, “wrongful loss”, “dishonestly”, and “fraudulently”

14 These recommendations seek to (a) increase protections against the wrongful avoidance of loss or exposure of another to the risk of loss; (b) deal with limitations in the current definition of “dishonestly” to include considerations of “objective standards of reasonable and honest people”; (c) codify the definition of “fraudulently” with reference to how the term has been defined in case law; and (d) clarify that the definitions of “dishonestly” and “fraudulently” only apply to provisions in the Penal Code.

Recommendations

- (16) Amend s 24 to include the wrongful avoidance of a loss or exposure of another to the risk of loss, and explicitly cover both temporary and permanent gain and loss
- (17) Amend s 23 to include situations where a gain, loss, avoidance of a loss or exposure to the risk of loss of property is wrong by the ordinary standards of reasonable and honest people
- (18) Clarify the definition of “fraudulently” in the Penal Code
 - a. Codify the common law definition of “fraudulently” in s 25
 - b. Qualify that a deceit with the intent of obtaining an advantage or detriment that is objectively so slight that no person of ordinary sense and temper would complain of such advantage or detriment is not fraudulent for the purposes of the Penal Code
 - c. Clarify in s 25 that it is sufficient, in any charge alleging that a thing was done with intent to defraud, to allege a general intent to defraud without naming any particular person intended to be defrauded
- (19) Make clear that the definitions of “dishonestly” and “fraudulently” shall only apply to the provisions of the Penal Code

Section 10.2 – Obstructing or perverting the course of justice

15 These recommendations (a) clarify the provision in the Penal Code to reflect that the offence is completed as long as the act in question objectively tends to lead to the obstruction, prevention, perversion or defeat of the course of justice, without the Prosecution having to prove that it actually led to any such result; and (b) expand the *mens rea* of the provision, from intention, to knowledge that the act is likely to have the effect of perverting the course of justice, to prevent technical defences concerning intention where the act objectively perverts the course of justice.

Recommendations

- (20) Amend the wording of s 204A to criminalise any act “tending and intended to obstruct, prevent, pervert or defeat the course of justice”

(21) Widen the mens rea of s 204A to include knowledge that one's act is likely to have the effect of obstructing etc. the course of justice

Section 10.3 – Dishonestly retaining stolen property

16 This recommendation clarifies that (a) there is no need for the Prosecution to prove the particulars of any offence by which the property became designated as stolen property (also known as the predicate offence); (b) there is no need for the Prosecution to prove that the accused person knew or had reason to believe that the property was obtained through any particular offence; and (c) dishonesty should not be a requirement in ss 411 and 412 because the two provisions contain the element of “reason to believe” (which falls short of actual knowledge which is required for dishonesty).

Recommendation

(22) Align the offences of dishonestly retaining stolen property in the Penal Code with similar offences of money-laundering under the CDSA

- a. Amend s 410 to state that for the purposes of proving whether any property is stolen property under any offence under ss 411 – 414 of the Penal Code, it is not necessary for the Prosecution to prove the particulars of any offence by which property became designated as stolen property*
- b. Amend the mens rea in ss 411, 413 and 414 to knowledge or reason to believe that the property was “obtained in whole or in part through any criminal offence involving fraud or dishonesty”, and abolish the requirement of dishonesty in ss 411 and 412*

Section 10.4 – Cheating

17 This recommendation clarifies that the cheating offences under ss 415 and 420 cover not only scenarios where the person cheated delivers the property to the offender, but also where the person cheated causes another person to deliver the property to the offender.

Recommendation

(23) Amend ss 415 and 420 to include situations where the person deceived causes the delivery of property to any person

Section 10.5 – Falsification of accounts

18 This recommendation amends s 477A to allow a single charge to be tendered in respect of falsification of “a set” of books, electronic records, papers, writings, valuable securities or accounts. This addresses current difficulties in defining what a single “electronic record” is (whether it is a single spreadsheet file, or a tab within the file, or a cell within the tab).

Recommendation

(24) Amend s 477A to include the falsification of “a set of” materials

Section 11 – Terrorist hoaxes and new offences relating to acts triggering emergency responses

19 These recommendations introduce new offences dealing with terrorist hoaxes, and rash acts which trigger emergency responses.

Recommendations

- (25) *Introduce a new offence criminalising the placing of any article in any place whatever, or dispatching any article by post or any means whatever of sending things from one place to another, with the intention of inducing in any person a belief that this article is likely to cause hurt or damage to property by any means*
- (26) *Port the existing bomb hoax transmission offence under s 45 of the TA into the Penal Code, and expand the offence to cover hoax transmissions about threats other than bombs*
- (27) *Introduce a new offence of committing a rash act which triggers an emergency response*

Section 12 – Voyeurism

20 These recommendations introduce new offences dealing with the actions of voyeurs.

Recommendations

- (28) *To create a specific offence involving the observation of a person in circumstances where the person could reasonably expect privacy*
- (29) *To create specific offences involving the making, distribution, possession and accessing of voyeuristic recordings*

Section 13 – Distributing or threatening to distribute intimate images

21 This recommendation introduces a new offence dealing with persons who – without the consent of the person in the image – circulate or threaten to circulate intimate images.

Recommendation

- (30) *Create a new offence criminalising the distribution of, or the threat to distribute, an intimate image*

Section 14 – Sexual exposure

22 This recommendation introduces a new offence dealing with the actions of a person who, knowing or knowing it likely that his or her exposure would cause or likely cause the victim fear, alarm, or distress, exposes his or her genitals to another person.

Recommendation

- (31) *Create a new offence relating to sexual exposure*

Chapter 4 – Enhancing protection for vulnerable victims

Section 15 – Repeal of marital immunity for rape

23 This recommendation repeals the marital immunity for rape, given (a) the principle that all women should be protected from sexual abuse, regardless of their marital status or the identity of the perpetrator, and (b) a majority of Singapore residents no longer subscribe to the belief that through marriage a wife had irrevocably surrendered herself to sexual intercourse with her husband.

Recommendation

(32) Repeal ss 375(4) and 376A(5) of the Penal Code, which provide marital immunity for rape

Section 16 – Sexual offences against minors

24 These recommendations update the Penal Code to ensure that the Code adequately protects minors from sexual predators. The Committee has recommended new offences to ensure that persons below 18 are protected from sexual exploitation and targeted sexual communication, and to ensure that persons who produce, distribute, and possess child abuse material will be severely dealt with. We have recommended that existing provisions pertaining to commercial sex and sexual grooming be revised to better deal with offending behaviour.

Recommendations

- (33) Retain age 16 as the age of consent for sexual activity*
- (34) Retain age 14 as the age below which sexual activity with minors will be regarded as a statutory aggravating factor*
- (35) Increase protections for minors aged 16 to 18, where there is an element of sexual exploitation*
- (36) Expand limited defence of “reasonable mistake as to age” in s 377D to apply to all offenders where the minor victims are 16 years old and above*
- (37) Expand definition of “sexual services” in ss 376B-376D (Commercial sex with minor under 18) to include non-penetrative sexual activity. The offence will continue to have extra-territorial application*
- (38) Expand definition of “sexual touching” in s 376F (Procurement of sexual activity with person with mental disability) to include situations where the offender incites or procures the victim to touch the offender’s body or another person’s body*
- (39) Create a new offence of “exploitative penetrative sexual activity with minors between 16 to 18 years of age”*
- (40) Clarify that s 376A (Sexual penetration of minor) does not cover non-consensual sexual activity for minors below 16 years of age, and provide for enhanced penalties where the minor has been exploited by the offender*
- (41) Create an offence of “statutory sexual assault by penetration” in s 376 (Sexual assault by penetration), to mirror similar provisions of “statutory rape” in s 375 (Rape)*
- (42) Amend s 376G (Incest) to exclude non-consensual sexual penetration and sexual penetration of minors below 16 years of age*
- (43) Amend s 376E (Sexual grooming) so that the number of instances of prior contact is reduced from two to one; to cover the scenario where the victim travels to meet the offender; to introduce a tiered approach towards sentencing; and to introduce transitional arrangements*
- (44) Introduce a new offence of “Sexual communication with a minor below 18 years of age”*
- (45) Introduce a new offence of “Engaging in sexual activity before a minor under 18 years of age, or causing a minor under 18 years of age to look at a sexual image”*
- (46) Introduce new offences relating to “child abuse material”*

Section 17 – General enhancement of penalties for offences knowingly committed against vulnerable victims

25 This recommendation enhances protections for vulnerable victims by increasing the maximum penalties for offences committed against them.

Recommendation

(47) Enhance the maximum penalties for offences committed against children, vulnerable persons, and domestic maids, by up to two times the maximum punishment the offender would otherwise have been liable to, as follows:

- a. Enhance penalties for all offences in the Penal Code committed against children under 14 years of age*
- b. Enhance penalties for all offences in the Penal Code committed against vulnerable persons*
- c. Expand the list of specified offences and scope of offenders covered by s 73, and enhance penalties, for offences against domestic maids*

Section 18 – Dealing with abuse of vulnerable victims leading to death or other forms of grievous hurt

26 These recommendations introduce new offences and clarify existing ones to increase protections of vulnerable victims. These ensure that persons who are aware of abuse against vulnerable victims will not be able to turn a blind eye to such abuse, and put in place severe penalties to deal with persons who repeatedly abuse vulnerable victims leading to their deaths.

Recommendations

(48) Clarify that the actus reus of an offence can be constituted by a series of acts, especially in the context of murder, by:

- a. Amending s 33 of the Penal Code to clarify that a series of acts counts as an “act” for actus reus purposes*
- b. Amending s 300(b) and s 300(c) of the Penal Code such that “bodily injury” also includes “series of bodily injuries”*

(49) Introduce a new offence in the Penal Code of causing or allowing a vulnerable victim to die

(50) Introduce a new offence of sustained abuse leading to death of vulnerable victim

(51) Improve laws on prevention of abuse of vulnerable victims by:

- a. Introducing an additional provision in s 5 of the CYPA to state that “knowingly permits” covers situations of actual and constructive knowledge of the risk of a child or young person being ill-treated, and failure to take reasonable steps*
- b. Waiving marital privilege in s 124 of the EA in situations of sexual offences and offences involving violence to a child of the spouse or accused, or any person under the age of 16 years*

Chapter 5 – Updating the Penal Code

Section 19 – Clarifying fault elements

27 These recommendations (a) codify the definition of various fault elements in the Penal Code, (b) codify the concept of strict liability, and (c) provide clarity on the application of transferred fault.

Recommendations

- (52) Codify the definition of “intention”
- (53) Codify the definition of “knowledge”
- (54) Codify the definition of “rashness”
- (55) Codify the definition of “negligence”
- (56) Abolish the fault element of wilfulness, and replace “wilful” and “wilfully” with “knowingly” or “intentionally” as appropriate
- (57) Group all provisions concerning fault elements in Chapter II, and make them applicable to offences under any written law
- (58) Provide that the elements of all offences committed with the fault elements of intention or knowledge can be satisfied with transferred fault
- (59) Provide that no offence can be committed with transferred fault unless the same offence could have been made out if committed against the contemplated victim
- (60) Provide that no offence can be committed with transferred fault unless the accused person was negligent in relation to his act affecting an unanticipated victim (with a different approach for homicide)
- (61) Provide that that in all charges for offences with transferred fault, transfer of defences will be possible
- (62) Remain silent on transferred fault in respect of the unanticipated victim, where a single act had an effect both on a contemplated and an unanticipated victim
- (63) Codify the concept of “strict liability”

Section 20 – Inchoate offences

28 These recommendations clarify the law on attempts, abetment, and conspiracy. Currently, the provision in the Penal Code on attempts – s 511 – does not set out the elements of an attempt. It is also not clear whether inchoate liability can arise for impossible abetments. The Committee also recommends to retain the offence of criminal conspiracy, to allow the criminal law to intervene at an early stage before a contemplated crime had actually been committed. However, the Committee recommends that only agreements to engage in criminal conduct will be captured, and this represents a narrowing of the scope of criminal conspiracy from the current position.

Recommendations

- (64) Repeal s 511 of the Penal Code, and enact a new provision on criminal attempt setting out the following:
 - a. Physical element: substantial step towards the commission of the offence
 - b. Fault element: Intention to commit the primary offence
 - c. Impossible attempts fall within the scope of attempts
 - d. Prescribed punishment for attempt will be generally equal to the prescribed punishment for the primary offence, except where the prescribed punishment for the primary offence is fixed by law, has a mandatory minimum, or where there is express provision made for the punishment of attempts
- (65) Clarify that inchoate liability can arise even for impossible abetments
- (66) Provide that the prescribed punishment for inchoate abetments should be the same as the punishment for the offence abetted
- (67) Retain a separate inchoate offence of criminal conspiracy, distinct from abetment by conspiracy
- (68) Narrow the scope of criminal conspiracy to agreements to commit offences
- (69) Remove the distinction between “acts” and “means”

(70) Clarify that only one person needs to possess the requisite intent, to be held liable for criminal conspiracy

Section 21 – Corporate criminal responsibility

29 The Committee concluded that it may be premature to make firm recommendations on new rules relating to corporate criminal responsibility, as there may be unintended consequences on commercial activity. This recommendation proposes further study by the Government on issues such as the attribution of criminal liability to corporations, and the failure of corporations to prevent an offence.

Recommendation

(71) While there is no need for legislation at present, the Government should continue to study the adequacy of Singapore’s rules on corporate criminal responsibility, and put in place new rules where needed

Section 22 – Definition of “public servant”

30 This recommendation updates the definition of “public servant”. Many “non-core” law enforcement functions are being carried out by persons who are not Government employees. The current definition is unnecessarily restrictive, and these employees should be regulated and protected as public servants because they are carrying out law enforcement functions on behalf of the Government although they are not directly employed by the Government.

Recommendation

(72) Amend section 21 of the Penal Code to allow for persons who are
a. employed by private contractors, and
b. performing a law enforcement role,
to be deemed public servants under the Penal Code

Section 23 – General defences

31 These recommendations clarify the law on general defences such as mistake of fact, mistake of law, accident, necessity, infancy, consent, duress, and private defence.

Recommendations

- (73) Set out the defence of “acts done by a person bound or justified by law” in a standalone provision*
- (74) Set out the defence of “mistake of fact” in a standalone provision, with the following features:*
- a. References to mistake of law will be removed, and dealt with in a separate provision*
 - b. This defence will apply to all offences, except where expressly excluded by some other written law*
 - c. Clarify that the defence applies to both mistake of fact and ignorance of fact.*
- (75) Clarify that when mistake or ignorance of fact will operate to negate the fault element of an offence, there is no need to rely on a defence of mistake of fact. This can be set out as an explanation, with a suitable illustration*
- (76) Remove references to mistakes of law in ss 76 and 79, and set out the position on mistake of law in a new standalone provision for greater clarity*

- (77) *Preserve the general exclusionary rule that a mistake or ignorance of law does not provide a defence to a criminal charge*
- a. *It is not recommended to create an exception based on reasonable reliance on legal advice*
 - b. *It is not recommended to create an exception based on reasonable reliance on an erroneous official statement of law*
- (78) *Clarify that if mistake or ignorance of law will negate the fault element of an offence, the offence will fail as not all its elements have been proven beyond reasonable doubt*
- (79) *Create an exception to the exclusionary rule based on non-publication of legislation. This involves a codification of the judicially-recognised exception in *Lim Chin Aik v R*, viz. that all legislation must be published, subject to any other provisions on notice or publication in any written law*
- (80) *Clarify the phrase “lawful act” by means of the following explanation: “A lawful act is any act that is not an offence or which is not prohibited by law.”*
- (81) *Remove the words “and without criminal intention or knowledge”*
- (82) *Remove the reference to criminal intention in s 81 of the Penal Code*
- (83) *Raise the minimum age of criminal responsibility (“MACR”) from 7 to 10 years*
- (84) *Amend s 83 of the Penal Code so that nothing is an offence which is done by a child above 10 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion*
- (85) *Introduce a mechanism to compel offenders below the MACR and offenders acquitted by virtue of s 83 to attend treatment/counselling and other non-custodial programmes, where necessary*
- (86) *No amendments are required to provide a statutory definition of “consent”*
- (87) *No amendments are required to clarify the types of misconception of fact in s 90 that will vitiate consent*
- (88) *Continue to require that only the threat of death can trigger the defence of duress*
- (89) *Continue to require that the accused needs to reasonably believe that there was a threat of “instant death” at the time of the offence*
- (90) *Reorganise the provisions on private defence in ss 96 – 106, into two broad categories of “Defence of Person” and “Defence of Property”*
- (91) *Reframe the precondition of “time to have recourse to the protection of the public authorities” as “reasonable opportunity to have recourse to the protection of the public authorities in the circumstances”*
- (92) *Frame “reasonable apprehension of danger” in private defence as a subjective-objective test, ie the defender reasonably believed that the danger existed due to the actions of the victim*
- (93) *Provide that the use of force in private defence must be “reasonably necessary in the circumstances”*
- (94) *Amend s 100(d) to provide that defensive deadly force will be allowed for assaults with the intention of committing penile penetration of the anus or mouth described in s 376(1), or causing penile penetration of the vagina, anus or mouth described in ss 376(1) or (2)*

Section 24 – Defences relating to mental health

32 These recommendations clarify the defences relating to mental health, such as intoxication and diminished responsibility. The recommendations will clarify issues such as (a) whether the insanity condition under the defence must be longstanding, or transient, (b) whether involuntary intoxication requires the malice of a third party, as well as (c) codify the

existing law on the definition of “diminished responsibility”, (d) expand the defence of “unsoundness of mind” to include volitional disorders, and (e) clarify the meaning of the term “wrong” in the “unsoundness of mind” defence.

Recommendations

- (95) *To retain the term "unsoundness of mind" in s 84*
- (96) *To expand the defence of unsoundness of mind to include volitional disorders*
- (97) *To clarify that the phrase "either wrong or contrary to law" in s 84 is meant to be read disjunctively*
- (98) *To amend s 85(2)(a) so that a successful invocation of the defence depends on the absence of the fault of the accused in being intoxicated*
- (99) *To clarify that s 85(2)(b) requires the accused to suffer from an intoxication-induced mental disorder having a degree of permanence*
- (100) *To expand s 86(2) to cover knowledge-based crimes*
- (101) *Not to introduce a special intoxication offence*

Section 25 – Partial defences to murder

33 These recommendations update the partial defences to murder, such as grave and sudden provocation, exceeding private defence, killing while exceeding public powers, sudden fight, consent, and infanticide. The recommendations deal with criticisms that grave and sudden provocation excludes “slow-burn” cases involving battered women or victims of domestic violence, that the defence of sudden fight requires clarity on what the definition of “premeditation” is, and seek to codify the “ordinary person” test as currently set out in case law for grave and sudden provocation.

Recommendations

- (102) *Retain the partial defence of grave and sudden provocation*
- (103) *Clarify that words, gestures or conduct may amount to grave provocation*
- (104) *Clarify that cumulative provocation over a period of time may amount to grave provocation*
- (105) *Codify the ordinary person test for grave and sudden provocation*
- (106) *Amend proviso (b) to Exception 1 (Grave and sudden provocation), to insert a requirement that the offender must have had reasonable ground to believe that the deceased-victim was a public servant who was acting in the lawful exercise of his or her powers*
- (107) *Remove the phrase “in good faith” from Exception 2 (Exceeding private defence)*
- (108) *Retain the partial defence of killing while exceeding public powers as it currently appears*
- (109) *Retain the partial defence of sudden fight*
- (110) *Clarify that premeditation relates to the fault elements for murder under s 300 of the Penal Code*
- (111) *Clarify the definition of “fight” in Exception 4 (Sudden fight)*
- (112) *Insert a new Explanation to clarify that a quarrel does not require verbal exchange*
- (113) *Insert new provisos to clarify the operation of the partial defence of sudden fight*
- (114) *Insert new Illustrations to exemplify situations where the partial defence of sudden fight is not available*
- (115) *Retain the partial defence of consent in its current form*
- (116) *Replace the Illustration to Exception 5 (Consent)*
- (117) *Retain Exception 6 (Infanticide) as it currently appears*

(118) To define diminished responsibility in terms of a substantial impairment of the capacity to understand events, to judge whether actions are right or wrong, or to control those actions

Section 26 – Updating sexual offences

34 These recommendations update the sexual offences in the Penal Code (a) to recognise that non-consensual penile-anal penetration is as severe as that of non-consensual penile-vaginal penetration; (b) to recognise that there is a gap in the existing law where sexual assault is concerned and that a female can force a male to penetrate her non-consensually; and (c) to recognise that a male’s modesty can be insulted for the purposes of s 509 of the Code.

Recommendations

- (119) Not to have a positive statutory definition of “consent” for sexual offences*
- (120) Expand “rape” in s 375 to include penile-anal penetration*
- (121) Expand “sexual assault by penetration” in s 376 to include situations where a woman forces a man to penetrate her vagina, anus, or mouth*
- (122) Amend s 509 (Insult of modesty) to be gender-neutral*

Section 27 – Updating archaic language

35 These recommendations update the language contained in seven offences in the Penal Code.

Recommendations

- (123) Amend section 294 (Obscene songs) to “Obscene acts” and remove “song” and “ballad”*
- (124) Amend section 312 (Causing miscarriage) to define “quick with child” as a situation where the pregnancy is of more than 16 weeks’ duration*
- (125) Amend section 328 (Causing hurt by means of poison, etc., with intent to commit an offence) to define “unwholesome drug or other thing” narrowly*
- (126) Amend section 401 (Punishment for belonging to wandering gang of thieves) to remove “wandering or other”*
- (127) Amend s 367 (Kidnapping and non-consensual penile penetration of anus)*
- (128) Amend s 493 (Deception of lawful marriage) to be gender-neutral*
- (129) Amend s 506 (Criminal intimidation) to remove reference to imputation of unchastity to a woman*

Section 28 – Decriminalisation of attempted suicide

36 These recommendations recognise that treatment (rather than prosecution) is the appropriate response to persons who are so distressed that they attempt suicide. To that end, the PCRC recommends that attempted suicide should no longer be a crime and amendments should be made to other legislation to ensure that responders have the necessary powers to intervene to ensure persons who require help get the help they need.

Recommendations

- (130) Repeal s 309 of the Penal Code (Attempt to commit suicide)*
- (131) Amend the PFA to empower the Police to intervene immediately to prevent harm and loss of lives from suicide attempts*

- (132) Amend s 7 of the MHCTA to:
- a. Empower the Police to apprehend and take persons who are reasonably suspected to have attempted suicide, and who are believed to be dangerous to himself or other persons, to a medical practitioner for assessment
 - b. Empower medical practitioners and the courts to order detention at a psychiatric institution for the purpose of treatment, if it is assessed to be necessary in the interests of the subject's health or safety or for the protection of others
- (133) Amend the CPC to allow the Police to seize evidence in cases of attempted suicide
- (134) Amend ss 305 and 306 of the Penal Code to criminalise the abetment of attempted suicide, update archaic language, and include an additional mens rea requirement

Section 29 – Abolition of marital exemption for harbouring offences

37 These recommendations repeal marital exemption laws relating to harbouring offences, which are based on outdated notions of roles within marriage.

Recommendations

- (135) Repeal the marital exemption in ss 136 (Harbouring a deserter), 212 (Harbouring an offender), 216 (Harbouring an offender who has escaped from custody, or whose apprehension has been ordered), and 216A (Harbouring robbers or gang-robbers, etc.) of the Penal Code
- (136) Insert Illustrations in s 212 to clarify that spouses will not be guilty of the offence of harbouring if they provided food and shelter to an offender-spouse without the requisite intention to screen the offender-spouse from punishment

Chapter 6 – Harmonising provisions

Section 30 – Harmonising provisions within the Penal Code

38 These recommendations update the Penal Code by removing three outmoded provisions and simplifying five clusters of offences. The provisions recommended for repeal deal with offences that are criminalised elsewhere in the Penal Code. The provisions recommended for simplification currently contain too many distinctions, and can be collapsed into a single or fewer sections without there being a loss of protection against the mischiefs.

Recommendations

- (137) Repeal s 209 (Fraudulently or dishonestly making a false claim before a court of justice)
- (138) Repeal s 369 (Kidnapping or abducting child under 10 years with intent to steal movable property from the person of such child)
- (139) Repeal s 508 (Act caused by inducing a person to believe that he will be rendered an object of divine displeasure)
- (140) Rationalise provisions relating to dangerous substance (ss 284 – 286) by:
- a. Removing the distinctions between poisonous substance, combustible materials, explosives under ss 284 – 286, and to collapse these provisions into one single provision concerning “dangerous or harmful substance”
 - i. Penalties for the new omnibus section for negligent conduct with respect to dangerous or harmful substance should be based on harm caused

1. *Where no harm is caused, punishment will remain the same at an imprisonment term of up to 1 year or a fine of \$5,000 or both*
 2. *Where the act endangers human life or causes property damage, maximum punishment will be up to 18 months' imprisonment or fine or both*
- b. *Providing for enhanced punishments for rash/negligent acts causing death, hurt or grievous hurt under ss 304A, 337, and 338 respectively, when dangerous or harmful substance are involved*
 - c. *Creating a new offence of causing or substantially contributing to the risk of causing a fire*
- (141) *Simplify provisions relating to wrongful confinement (ss 342 – 344) by removing the arbitrary number of three and ten days under ss 343 and 344, and collapsing the provisions dealing with wrongful confinement into a single provision. The punishment provision will be pegged to s 344*
- (142) *Simplify provisions relating to house trespass (ss 442 – 460) by removing the distinctions between house-trespass and lurking house-trespass and house-breaking by repealing ss 443 – 446; 449 – 458, and re-labelling “house-trespass” as “house-breaking” in sections 442; 448; 459 – 460. The punishment provisions for the various forms of house-breaking will be recalibrated*
- (143) *Simplify provisions relating to mischief (ss 426 – 434) by removing the arbitrary and outdated quantum of \$500 which distinguishes ss 426 and 427, and replace the scenarios covered by ss 430 to 434 with an offence covering “disruption to essential services or to the carrying out of governmental functions and duties”. The punishment will be pegged to the ten-year imprisonment term which is set out in s 430A*
- (144) *Simplify provisions relating to coin and currency (ss 230 – 254A)*

Section 31 – Review of homicide provisions

39 These recommendations update the homicide provisions in the Code to provide for a more proportionate punishment range for s 304(b) cases where the culpability of the offender might approach that of murder under s 300(d), and also to introduce a strong response in the Code to instances where a person becomes involved in a group crime knowing that serious violence or death is likely to occur, and for which death is actually caused. The recommendations also suggest providing an adequate response in the Code to deal with the deliberate and unauthorised disposal of dead bodies.

Recommendations

- (145) *To preserve the definitions of culpable homicide and murder as they appear in s 299 and s 300*
- (146) *To increase the maximum imprisonment term prescribed for s 304(b) from 10 years to 15 years*
- (147) *To create a new provision dealing with violent group crime resulting in death*
- (148) *To create a specific provision that deals with concealing or otherwise disposing of a corpse which is punishable with imprisonment of up to seven years*

Section 32 – Harmonising Penal Code provisions with other legislation

40 These recommendations seek to avoid overlaps between Penal Code provisions and provisions in other legislation, such as the WMA, and the WC, and the MOA.

Recommendations

- (149) Repeal ss 264-267 on offences relating to weights and measures*
- (150) Port over the following provisions to the WC*
 - a. Section 493 (Cohabitation caused by a man deceitfully inducing a belief of lawful marriage)*
 - b. Section 494 (Marrying again during the lifetime of husband or wife)*
 - c. Section 495 (Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted)*
 - d. Section 496 (Marriage ceremony gone through with fraudulent intent without lawful marriage)*
- (151) Port over the following offences from the MOA to the Penal Code*
 - a. Section 17 (Penalty for depositing corpse or dying person)*
 - b. Section 22 (Possession of housebreaking implements or offensive weapons)*

Chapter 7 – Updating the sentencing framework

Section 33 – Presumptive minimum sentences

41 This recommendation introduces the concept of presumptive minimum sentences to Singapore’s sentencing regime, to allow for more judicial discretion where exceptional circumstances are present for certain offences.

Recommendation

- (152) Introduce presumptive minimum sentences in lieu of mandatory minimum sentences in the following circumstances:*
 - a. First-time offenders who have committed certain offences which currently attract a mandatory minimum sentence of 3 years’ imprisonment or less, and which do not attract a mandatory minimum sentence of caning; and*
 - b. There are exceptional circumstances relating to the offence of the offender which would make it unjust to impose the prescribed minimum sentence*

Section 34 – Clarifying whether punishments are mandatory or discretionary

42 These recommendations seek to ensure that there is no ambiguity in the Penal Code as to the mandatory or discretionary nature of punishment for offences.

Recommendations

- (153) Clarify ss 115 (Abetment of an offence punishable with death or imprisonment for life), 137 (Deserter concealed on board merchant vessel through negligence of master), 307 (Attempt to murder), 376C (Commercial sex with minor under 18 outside Singapore) as to whether punishments are mandatory or discretionary*
- (154) Recommend that new legislation and amendments to existing legislation should use the phrases “shall be punished with” and “may be punished with” to prescribe mandatory and discretionary punishments respectively*

Section 35 – Hurt and grievous hurt

43 These recommendations update the punishment provisions for hurt offences to ensure that the sentencing ranges are proportionate to the harm caused, and introduce a new hurt offence that has a sentencing range which takes into account the victim’s severe injuries.

Recommendations

(155) Increase maximum imprisonment term for s 323 (Voluntarily causing hurt) to 3 years’ imprisonment, while keeping this a non-arrestable offence

(156) Increase maximum imprisonment term for s 334 (Voluntarily causing hurt on grave and sudden provocation) to 6 months’ imprisonment

(157) Introduce a new offence of voluntarily causing hurt resulting in grievous hurt, with a maximum penalty of 5 years’ imprisonment

Section 36 – Assault of public servants

44 This recommendation makes clear the sentencing policy for the offence of causing hurt to a public servant.

Recommendation

(158) Amend s 332 (Voluntarily causing hurt to a public servant) to state that an imprisonment term should generally be imposed, unless the accused can show that there were exceptional circumstances

Section 37 – Use of life imprisonment

45 These recommendations remove life imprisonment as a sentencing option for various offences in the Code, as (a) they are not as severe as other offences which allow for life imprisonment to be imposed (such as culpable homicide, genocide, or offences against the state) and (b) there has been no recorded case where life imprisonment was imposed for these offences.

Recommendations

(159) Removal of life imprisonment for ss 75 (Punishment of persons convicted, after a previous conviction, of an offence punishable with 3 years’ imprisonment), 195 (Giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment), 409 (Criminal breach of trust by public servant, or by banker, merchant, or agent)

(160) Removal of life imprisonment for s 412 (Dishonestly receiving property stolen in the commission of a gang-robbery) and rationalise remaining punishments

Section 38 – Use of fines

46 These recommendations (a) remove the option of imposing a fine as a punishment in addition to the imposition of the death penalty, and (b) limit the imposition of a fine in addition to a life imprisonment sentence to instances where there is a clear element of profitability inherent to the offence. Relatedly, the recommendations also introduce the option of a fine for the offence of possession of forged or counterfeit currency notes or bank notes. This offence has an element of profitability and the lack of an option to impose a fine in addition to a term of imprisonment should be remedied.

Recommendations

- (161) Removal of fines as sentencing option in conjunction with sentences of death*
- (162) Removal of fines as sentencing option in conjunction with sentences of life imprisonment, except when there is an inherent element of profitability in the offence*
- (163) Include fine as a sentencing option for s 489C (Possession of forged or counterfeit currency notes or bank notes)*

Section 39 – Enhancement of penalties to ensure proportionate outcomes

47 These recommendations deal with revisions to maximum punishments for offences which have not been dealt with elsewhere in the recommendations.

Recommendations

- (164) Increase fine and introduce imprisonment sentence as punishment option for repeat offenders under s 290 (Public nuisance)*
- (165) Enhance penalties for ss 272-273 (Offences relating to adulterated food)*
- (166) Enhance penalties for ss 274-276 (Offences relating to adulterated drugs)*
- (167) Enhance penalties for s 277 (Fouling the water of a public spring or reservoir)*
- (168) Enhance penalties for s 278 (Making atmosphere noxious to health)*

Section 40 – Rationalise punishment for Chapter X offences (Contempt of the lawful authority of public servants)

48 These recommendations update the Penal Code (a) to provide the courts with a greater sentencing range given the wide range of factual circumstances for which the offence in s 182 may be committed; (b) to rationalise the fine quantum of several offences to ensure consistency; and (c) to enhance the maximum fine that can be imposed for certain offences where corporations are concerned to ensure that there is a sufficient deterrence against the commission of such offences by bodies corporate which can otherwise absorb the cost of a low fine.

Recommendation

- (169) Rationalise punishments for Chapter X offences by:
 - a. Increasing the maximum imprisonment for s 182 (False information, with intent to cause a public servant to use his lawful power to the injury of another person) from 1 to 2 years, to account for a wide range of factual scenarios*
 - b. Increasing the fines for:
 - i. sections 185 (Illegal purchase or bid for property offered for sale by authority of a public servant) and 187a (Omission to assist public servant when bound by law to give assistance) from \$1000 to \$1500*
 - ii. sections 172b (Absconding to avoid arrest on warrant or service of summons, etc., proceeding from a public servant), 173b (Preventing service of summons, etc., or preventing publication thereof), 174b (Failure to attend in obedience to an order from a public servant), 175b (Omission to produce a document or an electronic record to a public servant by a person legally bound to produce such document or electronic record), 187b (Omission to assist public servant when bound by law to give assistance), and 188b (Disobedience to an order duly promulgated by a public servant) from \$2500 or \$3000 to \$5000;*
 - iii. section 182 from \$5000 to unlimited***

- c. Introducing a fine of up to \$10,000 where Chapter X offences are committed by bodies corporate*
- d. Undertaking further study to rationalise penalties for offences relating to contempt of lawful authority of public servants across all Acts, including the Penal Code*

CHAPTER 2: KEEPING UP WITH TECHNOLOGICAL CHANGE

SECTION 3: CRIMES COMMITTED IN THE VIRTUAL ARENA

SECTION 3.1: DEFINITION OF “PROPERTY”

SUMMARY OF RECOMMENDATIONS

- (1) Amend s 22 of the Penal Code, to set out a comprehensive definition of property which will cover intangible and incorporeal property
- (2) Amend s 378 of the Penal Code to account for the possibility of theft of incorporeal property

Introduction and current law

The definition of “property” is a fundamental legal concept. Section 2(1) of the IA contains the following broad definitions, which are flexible enough to serve most needs:

“immovable property” includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth;
...
“movable property” means property of every description except immovable property

2 Crime-related statutes take a similar approach. The following definition of “property” is used in s 2(1) of the CPC, s 2(1) of the CDSA and s 2(1) of the OCA:

“property” means money and all other property, movable or immovable, including things in action and other intangible or incorporeal property

This definition encompasses traditional forms of intangible property such as debts. However, there is doubt as to whether it includes newer forms of intangible-yet-valuable things such as air miles and virtual currency (eg bitcoins).

3 However, an outlier to this treatment of incorporeal property can be found at the heart of the Penal Code. Section 22 defines “moveable property” as strictly corporeal, as follows:

The words “movable property” are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth.

Impetus for review

4 The main impetus for review is the fact that this narrow definition introduces *lacunae* into the criminal law. Two important offences in the Penal Code exclusively relate to movable property: theft as defined in s 378 and dishonest misappropriation of property under s 403.

5 When property offences first evolved in the common law, it was not thought possible for incorporeal property to be the subject of theft or dishonest misappropriation, although the

physical symbols of such property (such as bank notes or share certificates) could be.¹ Section 22 of the Penal Code, introduced in 1860, represents a codification of this historical principle.

6 Unfortunately, that definition did not anticipate a time when almost all people, rich or poor, keep their money in the intangible medium of bank accounts and are able to receive or transfer it electronically without any physical item being exchanged at all. With these developments, the narrow historical conception of theft and dishonest misappropriation fails to protect the intangible property which is now part of ordinary life. Indeed, the contemporary English fraud statute defines “property” as “any property whether real or personal (including things in action and other intangible property)”².

7 The PCRC observed that an example of the problem this narrow definition of property creates, is that the dishonest transfer of money from another person’s bank account into one’s own is not theft, because what is technically being transferred is a drawing right – not corporeal property.³ For the same reason, the dishonest retention of money accidentally transferred into one’s bank account is not dishonest misappropriation. These significant *lacunae* undermine the ability of the criminal law to regulate and punish dishonest behaviour in relation to these everyday financial transactions.

Recommendation 1: Amend s 22 of the Penal Code, to set out a comprehensive definition of “property” which will cover intangible and incorporeal property

8 The PCRC recommends amending s 22 of the Penal Code to comprehensively define the concept of “property” in the Penal Code, as follows:

“Property” means money and all other property, movable or immovable, including things in action and other intangible or incorporeal property. [consistent with CPC]

“Movable property” means property of every description except immovable property. [consistent with IA]

“Immovable property” means land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. [consistent with IA]

9 These definitions should ensure that traditional forms of intangible property such as debts as well as newer forms of intangible-yet-valuable things such as air miles and virtual currency are captured in the definition of “movable property”. However, the PCRC also notes that there have been recent developments vis-à-vis (a) the ownership of subterranean land⁴ and (b) the broader regulatory framework for virtual currency such as bitcoin. The PCRC therefore recommends that the Government undertake further study of the interaction between these

¹ Sir James Fitzjames Stephen, *A History of the Criminal Law of England* vol 3 (Macmillan and Co, 1883), at pp 125–126. This treatise also indicates that incorporeal property such as choses in action was regarded as neither moveable nor immovable: this is not the approach taken in s 2(1) of the IA, which defines property of every description that is not immoveable (necessarily including incorporeal property) as moveable property.

² Fraud Act 2006 (c 35) (UK) s 5(2)

³ *PP v Niyas Babu Thuruthiyil Abdulkhader* [2013] SGDC 158 (“*Niyas Babu*”) at [48(ii)], upheld in Magistrate’s Appeals No. 124 and 125 of 2013.

⁴ As set out in the State Lands (Amendment) Act 2015 (Act 11 of 2015).

recent developments and the proposals above, before making the relevant amendments to the Penal Code, to ensure that there are no unforeseen inconsistencies created.

Recommendation 2: Amend s 378 of the Penal Code to account for the possibility of theft of incorporeal property

10 On a related note, the PCRC also recommends amending s 378 of the Penal Code as follows, to accommodate an expansion of the definition “moveable property” to include intangible and incorporeal property:

Theft

*378. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person’s consent, moves **or alters** that property in order to such taking, is said to commit theft.*

11 As already mentioned, the offence of theft (or larceny) at common law could only relate to corporeal things. This explains why the original wording of the Penal Code states that the offence is completed upon “movement” of property. The proposed amendment to the definition of “moveable property” extends the offence of theft to incorporeal property, which cannot be physically moved. It is therefore recommended that the element of movement be amended to state that the offence is completed where the accused “moves or alters” the property in order to take it dishonestly out of any person’s possession (as indicated above).

SECTION 3.2: VALUABLE SECURITY IN ELECTRONIC FORM

SUMMARY OF RECOMMENDATIONS

(3) Amend s 30 of the Penal Code, to extend the definition of “valuable security” to include electronic records

Introduction and current law

The definition of “valuable security” is currently found in s 30(1) of the Penal Code:

“Valuable security”

30.—(1) The words “valuable security” denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Impetus for review

2 The definition of “document” under s 29(d) of the Penal Code includes discs or other devices in which data are embodied, but in modern commerce a contract (a classic valuable security) may be drafted, signed and archived entirely in electronic form (eg as a PDF document). In such cases, it is logical to refer to that electronic record as the valuable security, not the hard disk or server on which it resides.

Recommendation 3: Amend s 30 of the Penal Code, to extend the definition of “valuable security” to include electronic records

3 The PCRC therefore recommends that the definition of valuable security extend to electronic records and not just documents. Section 29B of the Penal Code defines “electronic record” with reference to the ETA, s 2(1) of which defines the phrase as “a record generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another”.

SECTION 3.3: CHEATING OF CORPORATE ENTITIES

SUMMARY OF RECOMMENDATIONS

(4) Insert an Explanation to s 415 of the Penal Code, to make clear that corporate entities are capable of being deceived and induced for the purposes of the offence of cheating

Introduction and current law

The offence of cheating is set out in s 415 of the Penal Code:

Cheating

415. Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to “cheat”.

Under s 11 of the Penal Code, the word “person” is defined as including “any company or association or body of persons, whether incorporated or not”. Based on this definition, the present practice of enforcement agencies and the Public Prosecutor is to treat a corporate entity as capable of being deceived for the purposes of the cheating offence.

Impetus for review

2 There is a need for clarification, given the increasing frequency with which corporate entities receive and take action upon information entirely through automated systems. A simple example is where a bank receives an instruction to transfer money out of an account through an internet banking portal or a retailer’s Point of Sales system and acts on it automatically. In such cases, deceptive information may be received and acted upon by the corporate entity without any natural person being deceived by or even seeing the information. It should be made absolutely clear that cheating can be committed in such situations.

3 A recent example of a case that might have been handled differently with such a statutory clarification is that of Tan Kong Chieh, where the offender registered a large number of prepaid SIM cards with mobile service providers using false personal particulars. The registration was done through electronic submission to the service providers’ computer systems.¹ While this offender was eventually charged under the CMCA, with the clarification set out below it would be made clear that he could have been charged with cheating the service providers, which might have better captured the deceptive essence of his scheme.

¹ Amir Hussain, “Man who registered and sold more than 66,000 SIM cards illegally jailed for four years” *The Straits Times* (21 July 2016) <<http://www.straitstimes.com/singapore/courts-crime/man-who-registered-and-sold-more-than-66000-sim-cards-illegally-jailed-for>> (accessed 20 October 2016).

Recommendation 4: Insert an Explanation to s 415 of the Penal Code, to make clear that corporate entities are capable of being deceived and induced for the purposes of the offence of cheating

4 The PCRC therefore recommends that an Explanation be added to s 415 of the Penal Code stating:

A company or association or body of persons, whether incorporated or not:
(a) can be deceived for the purposes of this section if it receives any information that amounts to a deception,² regardless of whether any of its human agents are personally deceived; and
(b) can be induced to act in any of the ways described in s 415, regardless of whether any of its human agents are personally induced to so act.

5 This Explanation is also intended to cover government bodies such as Ministries and Statutory Boards. However, it is not recommended that specific language be included to refer to such bodies, as such bodies are included in the natural meaning of “any ... association or body of persons, whether incorporated or not”. To include specific language referring to the Government may indeed be counter-productive, as it may suggest that the phrase “any ... association or body of persons, whether incorporated or not” is not itself sufficient to include the Government. This would have implications for other legislation.

² It is not proposed to define what information would amount to a deception in this context, as this term is not defined in the Penal Code generally but left to judicial interpretation.

SECTION 3.4: NEW OFFENCES RELATING TO COMPUTER PROGRAMS

SUMMARY OF RECOMMENDATIONS

(5) While no legislative amendments are immediately necessary, the Government should actively explore and develop a suitable framework to address the issue of criminal liability for harm caused by computer programs

Introduction and current law

Since the early days of the Penal Code, it has been recognised that there should be criminal consequences for using machinery in such a way as might likely cause hurt or injury (the latter including injury to property under s 44 of the Penal Code), or for culpably omitting to take care to prevent danger to human life from such machinery. This is because of the potential of such machinery to cause harm. The relevant offence is found in s 287 of the Penal Code as follows:

Negligent conduct with respect to any machinery in the possession or under the charge of the offender

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.

2 Today, computer programs have permeated social and commercial life. They manage medical records, and in the future may even manage aspects of medical diagnosis and treatment.¹ Such programs control industrial machinery and navigate vessels and aircraft. Even leaving aside autonomous road vehicles, computer programs control important functions of conventional vehicles, such as braking and engine power.² To move further away from physical space, such programs (in the form of trading algorithms) execute financial transactions in high volumes, communicate with people via electronic messages or social media postings, and update information in databases. Such programs will have even more dynamic and unpredictable capabilities if they incorporate machine learning, natural language processing and/or have high degrees of autonomy (features which lay persons sometimes term “artificial intelligence”).³

¹ Stanford University website <<https://cs.stanford.edu/people/eroberts/cs201/projects/2010-11/ComputersMakingDecisions/robotic-nurses/index.html>> (accessed on 25 May 2017) and Jessica Hall, “The next major advance in medicine will be the use of AI” (20 May 2016) <<https://www.extremetech.com/extreme/228830-the-next-major-advance-in-medicine-will-be-the-use-of-ai>> (accessed on 25 May 2017).

² Mark Clayton “Scientists hack into cars’ computers – control brakes, engines” (21 August 2010) <<http://abcnews.go.com/Technology/scientists-hack-cars-computers-control-brakes-engine/story?id=11448163>> (accessed on 25 May 2017).

³ Bernard Marr, “What is the difference between artificial intelligence and machine learning?” (6 December 2016) <<https://www.forbes.com/sites/bernardmarr/2016/12/06/what-is-the-difference-between-artificial-intelligence-and-machine-learning/>> (accessed on 25 May 2017).

3 It is worth emphasising that unlike machinery, computer programs are able to simulate communications with human beings. This means that the harm such programs can cause extends beyond physical harm to people and property. They can autonomously cause types of harm that previously required a human perpetrator, such as deception and psychological distress. As an example, on 23 March 2016, Microsoft released a computer program with machine learning capabilities onto social media platforms such as Twitter. It was designed to simulate conversation with users and learn from content on those platforms. Within 24 hours, Microsoft had to take the program offline and apologise, as the program had quickly learned to transmit highly offensive material such as Holocaust denial, racist slurs, support for genocide and misogynistic harassment.⁴

4 As a further example of the unique types of harm autonomous computer programs can cause, between 6 and 7 October 2016, the value of the British pound fell 6% overnight. This “flash crash” was believed to have been caused by algorithmic trading, meaning trading using computer programs that carry out trades automatically based on instructions on what to do in different scenarios. Some such programs are designed to react to news headlines and social media. A sell-off in the currency by some such programs may have led other such programs to join in to cut their operators’ losses, leading to a vicious cycle of selling that suddenly depressed the value of the currency.⁵ All this could have occurred without human intervention and indeed without any human being intending it to happen.

5 Computer programs with high degrees of autonomy are already being used for activities on the margins of legality. As one example, Ashley Madison, an internet-based dating service, was found to have used computer programs to pose as female members. These “chatbots” would engage male members in conversation, and the latter would have to purchase credits from the service to reply, thinking that they were communicating with actual women. The new President of the service’s holding company gave a statement that “bots are widespread in the industry”.⁶

6 Another thought-provoking example is “Random Darknet Shopper”, an autonomous computer program created by a Swiss art group. This program was instructed to log on to an online marketplace on the “dark web”⁷ that was known to sell drugs and other illegal items and purchase a random item once a week, with a budget of US\$100 in Bitcoin.⁸ These items would be delivered to a Swiss art gallery and exhibited. The program ended up purchasing both legal

⁴ Peter Bright, “Tay, the neo-Nazi millennial chatbot gets autopsied” (26 March 2016) <<https://arstechnica.com/information-technology/2016/03/tay-the-neo-nazi-millennial-chatbot-gets-autopsied/>> (accessed on 25 May 2017), Rob Price, “Microsoft is deleting its AI chatbot’s incredibly racist tweets” (24 March 2016) <<http://www.businessinsider.com/microsoft-deletes-racist-genocidal-tweets-from-ai-chatbot-tay-2016-3?r=UK&IR=T>> (accessed on 25 May 2017).

⁵ Rob Davies, “What caused the pound’s flash crash?”, *The Guardian* (7 October 2016) <<https://www.theguardian.com/business/2016/oct/07/what-caused-pound-flash-crash-brexite-fallen-sterling>>(accessed on 25 May 2017).

⁶ David Z. Morris, “Ashley Madison Used Chatbots to Lure Cheaters, Then Threatened to Expose Them When They Complained” (10 July 2016) <<http://fortune.com/2016/07/10/ashley-madison-chatbots/>> (accessed 25 May 2017), Julia Greenberg, “Ashley Madison Hack Exposes (Wait For It) A Lousy Business” (21 August 2015) <<https://www.wired.com/2015/08/ashley-madison-hack-exposes-wait-lousy-business/>> (accessed 25 May 2017).

⁷ A hidden part of the internet not accessible by conventional browsers.

⁸ A difficult-to-trace virtual currency.

and illegal items, including Ecstasy pills. The Swiss police eventually seized and destroyed the Ecstasy pills but took no action against the people behind the program.⁹

7 As further background, the definitions of “computer”, “computer output”, “function” and “computer program” in s 2(1) of the CMCA are set out as follows:

“computer” means an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices ...

“computer output” or “output” means a statement or representation (whether in written, printed, pictorial, graphical or other form) purporting to be a statement or representation of fact —

(a) produced by a computer; or

(b) accurately translated from a statement or representation so produced;

“function” includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer;

“program or computer program” means data representing instructions or statements that, when executed in a computer, causes the computer to perform a function.

Impetus for review

8 It is clear from the background given above that if mismanaged, computer programs have the same or even greater potential for harm than machinery. They are able to cause types of harm that machinery cannot, and can have the capacity to learn and demonstrate emergent behaviour not predicted by their human operators. At the very least, those creating and using such programs ought to be subject to similar potential criminal liability as those operating machinery. Ideally, criminal liability would go even further to take the unique characteristics of computer programs into account.

Recommendation 5: While no legislative amendments are immediately necessary, the Government should actively explore and develop a suitable framework to address the issue of criminal liability for harm caused by computer programs

9 Having said that, the PCRC recognises that the appropriate balance between permissive regulation to encourage industrial development, and criminal liability to safeguard against injury to life and property, is still a subject of debate internationally. In this regard, it is telling that no country has introduced specific rules on criminal liability for artificial intelligence systems. Being the global first-mover on such rules may impair Singapore’s ability to attract top industry players in the field of AI.

⁹ Arjun Kharpal, “Robot with \$100 bitcoin buys drugs, gets arrested” CNBC (21 April 2015) <<http://www.cnbc.com/2015/04/21/robot-with-100-bitcoin-buys-drugs-gets-arrested.html>> (accessed 11 August 2018).

10 On balance, the PCRC recommends that while legislation on this area may be premature, the Government should actively explore and develop a suitable framework to address the issue of criminal liability for harm caused by computer programs. This should be done in the broader context of Singapore’s developing regulatory framework for AI.

11 The PCRC discussed two possible offences, as a starting point for future discussions on the attribution of criminal liability for harm caused by computer programs.

12 First, there could be a new offence of negligence in relation to a computer program, similar to that currently covering machinery in s 287 of the Penal Code. Such offence could be worded along the following lines:

(1) Whoever makes, alters or uses a computer program so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any computer program under his care as is sufficient to guard against any probable danger to human life from such computer program, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.

(2) For the purposes of this section, a person uses a computer program if he causes a computer holding the computer program to perform any function that —
(a) causes the computer program to be executed; or
(b) is itself a function of the computer program.

(3) For the purposes of this section, a computer program is under a person’s care if he has the lawful authority to use it, cease or prevent its use, or direct the manner in which it is used or the purpose for which it is used.

13 This offence would impose potential criminal liability on (i) those who make and alter computer programs (programmers) and (ii) those who use them (operators). This offence covers different ground from the offences in the CMCA, as the latter generally involve a lack of authority or an intent to commit an offence. This offence covers acts and omissions which may be merely negligent

14 This new offence would target risk-creation, and the offence would be committed regardless of whether any hurt or injury is caused. If physical hurt actually arises from the negligent act or omission, other offences will be made out, such as causing hurt by an act which endangers life or the personal safety of others (s 337 of the Penal Code) or causing death by a rash or negligent act (s 304A of the Penal Code).

15 However, this scheme would leave a *lacuna*, in that a computer program may be made, altered or used such as to cause harm other than physical hurt or death, or a negative outcome to society at large (a “victimless crime”). The user may not know this will happen, either because the program is capable of learning new behaviours on its own or because the program is designed to act at random. However, the user may know there is a risk of this happening (*ie* rashness). Where the offences that normally address such bad outcomes require knowledge or intention as a *mens rea*, they may not cover these situations. Some examples and counter-examples follow:

- (a) A person recklessly (but not knowingly) makes a computer program such that it learns how to engage in financial transactions that create a false appearance with respect for the price of a security. The maker commits false trading under s 197(1A)(b) of the SFA, because that offence can be committed with the *mens rea* of recklessness.
- (b) A person rashly makes a computer program such that it makes random purchases on an internet site that sells controlled drugs along with legal items. The program purchases a controlled drug and imports it into Singapore. The maker does not commit an offence under s 7 of the MDA, because that offence requires the *mens rea* of knowledge. However, if the drug enters his possession, he commits an offence of possession of a controlled drug under s 8(a) of the MDA. If the drug is imported but never enters anyone's possession, it is arguable that little harm is caused.
- (c) A person rashly (but not knowingly) makes a computer program such that it learns how to launch a denial of service attack on another person's computer, interfering with the lawful use of that computer. The maker does not commit unauthorised obstruction of use of a computer under s 7 of the CMCA, because that offence requires the *mens rea* of knowledge.
- (d) A person rashly (but not knowingly) makes a computer program such that it learns how to send deceptive messages on social media. One of these messages induces the receiver to do certain things that are harmful to them. The maker does not commit cheating as defined in s 415 of the Penal Code, because that offence requires the *mens rea* of dishonesty or fraudulent intent.
- (e) A person rashly (but not knowingly) makes a computer program such that it learns how to post messages on social media that promote enmity between different groups on grounds of religion or race. The maker does not commit an offence under s 298A(a) of the Penal Code, because that offence requires the *mens rea* of knowledge.

16 One way to address this *lacuna*, could be to regulate the harms that may result from computer programs by imposing a duty to take reasonable steps to cease such harms after they manifest. This could entail creating a new offence along the following lines:

(1) Where a computer program —

- (a) produces any output, or*
- (b) performs any function,*

that is likely to cause any hurt or injury to any other person, or any danger or annoyance to the public, and the computer program is under a person's care,

if that person knowingly omits to take reasonable steps to prevent such hurt, injury, danger or annoyance, he shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.

(2) For the purposes of this section, a computer program is under a person's care if he has the lawful authority to use it, cease or prevent its use, or direct the manner in which it is used or the purpose for which it is used.

SECTION 4: NEW IDENTITY THEFT OFFENCE

SUMMARY OF RECOMMENDATIONS

(6) Create a new offence of illegal possession of another person's identity information

Introduction and current law

The offence of cheating by personation is currently found in s 416 of the Penal Code:

Cheating by personation

416. A person is said to "cheat by personation", if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Impetus for review

2 The offence of cheating by personation is no longer adequate to criminalise the myriad forms of identity theft that can occur in modern society. This is especially because electronic identification is increasingly critical to commercial and financial transactions, but the means of securing such identification has not necessarily kept pace with the ability of criminals to abuse and exploit it.

3 The CMCA was recently amended to create a new offence (in a new s 8A) of obtaining, retaining, supplying, offering to supply, transmitting or making available personal information that was obtained in contravention of ss 3, 4, 5 or 6 of the CMCA (which all relate to computer misuse offences). An exception is also provided, stating that this is not an offence if not done to commit or facilitate any offence. The limitation of the new offence under the CMCA is that the information must have been obtained in contravention of the CMCA: it does not cover information obtained through non-technological means, such as traditional theft of identity documents.

Recommendation 6: Create a new offence of illegal possession of another person’s identity information

4 The PCRC recommends supplementing the new CMCA offence above by creating a new offence of illegal possession of another person’s identity information. “Identity information” may be defined in the same way as in s 8A(7)(a) of the CMCA.¹ Essentially, this would create a non-technological version of the new CMCA offence.

5 It will be an offence to obtain, retain, supply, offer to supply, transmit or make available another person’s personal information knowing or having reason to believe that such act (obtaining, retention etc.) was being done without that person’s consent. The fault element will be that the person knew or had reason to believe that the identity information was being obtained, retained etc. for the purpose of committing, or facilitating the commission of, any offence. It is not proposed to make this an exception with the burden of proof on the Defence, as seems to be the case in the CMCA.

6 The proposed punishment is the same as that for first offences under s 8A(5) of the CMCA, which is a fine not exceeding \$10,000 or imprisonment not exceeding 3 years or both. To maintain differentiation with the CMCA offence and recognise the need for increased deterrence of identity theft committed by technological means, the PCRC does not see the need to incorporate the CMCA’s enhanced punishment for subsequent offences (a fine not exceeding \$20,000 or imprisonment not exceeding 5 years or both).

7 The PCRC also considered the possibility of a lower fault element requirement, where the accused would commit the offence if he merely had knowledge or reason to believe that he had no lawful authority to possess the identity information or did not have the relevant person’s consent to so possess it. However, this formulation would mean that a person who overheard a stranger reading out their Identity Card number over the telephone, or a person who picked up and kept a photograph of a stranger that was dropped on a public path, would be committing a serious offence of identity theft even if they had no other fault element. This seems to give too wide a scope to the offence, given the very wide definition given to the term “identity information”.

¹ The definition in s 8A(7)(a) of the CMCA is “any information, whether true or not, about an individual of a type that is commonly used alone or in combination with other information to identify or purport to identify an individual, including (but not limited to) biometric data, name, address, date of birth, national registration identity card number, passport number, a written, electronic or digital signature, user authentication code, credit card or debit card number, and password”.

SECTION 5: TRANSNATIONAL OFFENCES

SECTION 5.1: TERRITORIAL JURISDICTION FOR WHITE COLLAR CRIMES

SUMMARY OF RECOMMENDATIONS

- (7) *Set out a schedule of offences (consisting of important property and white-collar offences) under which the Singapore courts will have jurisdiction where any fact element of the offence that takes the form of an event occurs in Singapore*
- (8) *Specify that for scheduled offences, the Singapore courts will have jurisdiction where the offence involved an intention to make gain or cause loss or expose another to a risk of loss or cause harm to any person in body, mind, reputation or property, and that gain, loss or harm occurred in Singapore*

Introduction and current law

Many property and white-collar offences have multiple fact elements: *eg* the offence of cheating under s 420 of the Penal Code includes both the element of deception and the element of delivery of property induced by that deception. It is currently not clear which fact elements must occur in Singapore for our criminal justice system to have jurisdiction over that offence.

Impetus for review

2 The approach under Part I of the CJA 1993 is to allow jurisdiction for a list of offences (this list being amendable by subsidiary legislation) where a “relevant event” occurs in England and Wales. A “relevant event” refers to any act or omission or other event (including any result of one or more acts of omissions) proof of which is required for conviction of the offence – in plainer terms, any fact element of the offence that takes the form of an event. This form of jurisdiction is prescribed for a number of property offences, including *inter alia* theft, false accounting, blackmail, handling stolen goods and forgery.

Recommendation 7: Set out a schedule of offences (consisting of important property and white-collar offences) under which the Singapore courts will have jurisdiction where any fact element of the offence that takes the form of an event occurs in Singapore

3 The PCRC recommends inserting a similar provision into the Penal Code to specify that for a schedule of offences, which would consist of important property and white-collar offences, our courts will have jurisdiction where any relevant event of the offence occurs in Singapore or partly in and partly outside Singapore. Similar jurisdictional provisions are found in s 11 of the CMCA and s 339 of the SFA¹ – adopting the proposal would help ensure a consistent approach to territorial jurisdiction for white-collar offences under various statutes. To ensure that no relevant offence is inadvertently omitted, the provision should allow the schedule to contain classes of offences, such as “all offences of fraud or dishonesty involving property”.

¹ This section specifically treats acts done “partly in and partly outside Singapore” as being done wholly in Singapore if that act would constitute an offence under the SFA when done wholly in Singapore.

4 In addition, the legislation would specify that attempts to commit, abetments of, and criminal conspiracies to commit offences of the type specified in the paragraph above will also be under the jurisdiction of our courts. This is similar to the approach taken in the CJA 1993.

5 As a safeguard against overexpansion of jurisdiction, the legislation should state clearly that a “relevant event” does not include fact elements of the offence that do not take the form of an “event”. For example, for the offence of falsification of accounts under s 477A of the Penal Code, one fact element is that the offender was “a clerk, officer or servant” or employed or acting in that capacity. Because this element is not an “event”, the fact that a person was employed as a clerk in Singapore will not bring their act of falsification of accounts under Singapore’s jurisdiction if every other fact element of the offence occurred outside of Singapore. Similarly, if a person was a clerk or servant in Singapore and was entrusted with property in that capacity outside of Singapore, after which they committed criminal breach of trust in respect of that property outside of Singapore, the Singapore courts would not have jurisdiction for an offence under s 408 of the Penal Code.

Recommendation 8: Specify that for scheduled offences, the Singapore courts will have jurisdiction where the offence involved an intention to make gain or cause loss or expose another to a risk of loss or cause harm to any person in body, mind, reputation or property, and that gain, loss or harm occurred in Singapore

6 In relation to offences under the Fraud Act 2006, the CJA 1993 goes further to specify that where the offence involved an intention to make a gain, cause a loss or expose another to a risk of loss, and that gain or loss occurred, that gain or loss is a “relevant event”. In other words, where the gain or loss intended under the offence occurred in England and Wales, jurisdiction is founded.

7 The PCRC therefore recommends inserting a similar provision into the Penal Code to specify that for scheduled offences, our courts will have jurisdiction where the offence involved an intention to make gain or cause loss or expose another to a risk of loss or cause harm to any person in body, mind, reputation or property,² and that gain, loss or harm occurred in Singapore. An example of a scenario that will be caught under this provision is where a person is deceived by a fraudster in another country, which induces him to travel into Singapore and transfer money from his bank account to the fraudster. Under the present law, it is unclear whether jurisdiction could be founded, given that the fact element of deceit under the offence of cheating did not occur in Singapore. However, with the proposed provision, the intended loss to the victim would be completed in Singapore, allowing jurisdiction to be founded.

² Language taken from the definition of “injury” in s 44 of the Penal Code.

SECTION 5.2: LIABILITY FOR CROSS-BORDER CRIMINAL CONSPIRACIES

SUMMARY OF RECOMMENDATIONS

(9) Clarify that criminal conspiracies under s 120A of the Penal Code cover conspiracies in Singapore to commit offences outside Singapore and conspiracies outside Singapore to commit offences in Singapore

Introduction and current law

The definition of criminal conspiracy is currently found in s 120A of the Penal Code:

Definition of criminal conspiracy

120A.—(1) When 2 or more persons agree to do, or cause to be done —
(a) an illegal act; or
(b) an act, which is not illegal, by illegal means,
such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Impetus for review

2 It is not clear whether criminal conspiracy as defined in s 120A and punishable under s 120B of the Penal Code covers cross-border conspiracies. This is in contrast to abetments (including abetments by conspiracy), where abetments in Singapore of offences outside Singapore and abetments outside Singapore of offences in Singapore are clearly criminalised (in ss 108A and 108B of the Penal Code respectively).

Recommendation 9: Clarify that criminal conspiracies under s 120A of the Penal Code cover conspiracies in Singapore to commit offences outside Singapore and conspiracies outside Singapore to commit offences in Singapore

3 The PCRC recommends that s 120A of the Penal Code be amended to expressly cover conspiracies in Singapore to commit offences outside Singapore and conspiracies outside Singapore to commit offences in Singapore. This will remedy the inconsistency highlighted in the preceding paragraph.

SECTION 6: GENERAL EXTENSION OF TERRITORIAL SCOPE

SUMMARY OF RECOMMENDATIONS

(10) *Extend the provisions of Chapters VI (Offences against the State) and VIB (Genocide) of the Penal Code to acts and omissions by Singapore citizens and permanent residents outside Singapore*

Introduction

In the current security climate, “home-grown, self-radicalised lone actors” are a threat to Singapore’s security, with some of these actors going abroad to participate in insurgencies and wars. These actors may even commit genocide (as seen in the systematic violence by the so-called Islamic State against Yazidi minorities). They may then return to Singapore, where they would pose a threat.

2 The PCRC therefore saw a need to ensure that such actors can be prosecuted in Singapore for actions that may have taken place outside Singapore. In particular, the PCRC considered the extension of Chapters VI (offences against the State) and VIB (genocide) of the Penal Code to acts and omissions by Singapore citizens and permanent residents outside Singapore.

Current law

3 It has been held that “a domestic statute has no extra-territorial effect unless it is expressed to have such effect, and that in the absence of such express provision, acts committed outside the jurisdiction are presumed not to constitute an offence under the relevant domestic statute even if they would have amounted to an offence under that statute had they been committed within the jurisdiction”: *Yong Vui Kong v PP*¹ [2012] 2 SLR 872 at [41].

4 Unlike the Indian Penal Code², our Penal Code does not contain any ‘general extraterritorial’ provision based on nationality. Instead, the application of our criminal laws to the acts and omissions of our own citizens and permanent residents abroad is done in a limited and piecemeal fashion.

5 For example, s 108B of the Penal Code allows for the extraterritorial application of our criminal law to persons who abet offences committed in Singapore:

Abetment in Singapore of an offence in Singapore

108B. A person abets an offence within the meaning of this Code who abets an offence in Singapore notwithstanding that any or all of the acts constituting the abetment were done outside Singapore.

6 Within Chapter VI and VIB of the Penal Code, only s 126 clearly makes reference to acts committed outside the jurisdiction while s 125 *could* be read as having extraterritorial

¹ [2012] 2 SLR 872

² See s 4 of the Indian Penal Code (Act XLV of 1860).

application, since wars against the government of another power would conceivably take place on the soil of that other power.³

Committing depredation on the territories of any power in alliance or at peace with Singapore

126. Whoever commits depredation, or makes preparations to commit depredation, *on the territories of any power in alliance or at peace with the Government*, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine, and any property used, or intended to be used, in committing such depredation, or acquired by such depredation, shall be forfeited.

Waging war against any power in alliance or at peace with Singapore

125. Whoever *wages war against the government of any power in alliance or at peace with the Government*, or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added; or with imprisonment for a term which may extend to 15 years, to which fine may be added, or with fine

7 The remaining offences in Chapter VI and the provisions in Chapter VIB do not specifically make reference to acts committed outside the jurisdiction and accordingly do not have extraterritorial application. For example, under the current law, a Singaporean who participates in the collecting of arms or ammunition or otherwise prepares to wage war against Singapore whilst overseas cannot be prosecuted under s 122 of the Penal Code.

Recommendation 10: Extend the provisions of Chapters VI (Offences against the State) and VIB (Genocide) of the Penal Code to acts and omissions by Singapore citizens and permanent residents outside Singapore

Impetus for review

8 In a report dated 2 June 2017, the Ministry of Home Affairs (“MHA”) listed “Home-grown, self-radicalised lone actors” as a possible source of threat.⁴ Two Singaporeans have gone to Syria to join the conflict there, while there has been a significant rise in the number of Singaporeans detained under the ISA for radicalisation – rising from 11 from 2007 to 2014 to 14 since 2015. There has also been an indication that a Singaporean man has been implicated in terrorism activities in the Southern Philippines.⁵

9 As explained above, there is very limited application of offences under Chapters VI and VIB of the Penal Code to acts and omissions of our own citizens and permanent residents abroad. This results in limited levers in our criminal law to deal with threats to Singapore’s

³ “Wages war” has been said to mean “a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of this Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm.” (emphasis added) in *Aung Hla* 1931 Rang 235 cited in *Ratanlal* at p 570.

⁴ Kenneth Cheng, “Singaporeans urged to be alert as terror threat ‘remains high’” *TODAY* (1 June 2017) <www.todayonline.com/singapore/terror-threat-against-singapore-remains-highest-recent-years-mha-assessment-report> (accessed on 11 August 2018).

⁵ Agencies, “Singaporean man involved in southern Philippines terror activities: MHA” *TODAY* (26 May 2017) <<https://www.todayonline.com/world/asia/singaporeans-among-foreign-militants-fighting-philippine-army-marawi>> (accessed on 11 August 2018)

national security. For example, Singaporeans who plan to wage war in Singapore would not be caught by the offences under Chapter VI, if their planning took place abroad.

Recommendation

10 The PCRC therefore recommends extending criminal jurisdiction to Singapore citizens and permanent residents insofar as their acts and omissions abroad, if committed in Singapore, would be offences under Chapters VI and VIB of the Penal Code. In other words, criminal jurisdiction for offences under Chapter VI and VIB of the Penal Code will be based on nationality.

11 The extension of criminal jurisdiction on the basis of nationality is fairly well supported and uncontroversial in international law.⁶ It is also not unprecedented in local criminal laws: See s 4 of the Penal Code, s 8A of the MDA, s 37 of the PCA, s 34 of the TSOFA, and s 7 of the TSOBA.

12 Extraterritorial application of criminal laws to protect national security also has precedent in the practice of various other jurisdiction. For example:

- (a) Section 3.74 of the Canadian Criminal Code provides that any person who commits an act or omission outside Canada that, if committed in Canada, would be a terrorism offence, is deemed to have committed that act or omission in Canada if the person is a citizen or resident of Canada;
- (b) Section 62 of the United Kingdom's Terrorism Act 2000 provides that if a person does anything outside the UK as an act of terrorism or for the purposes of terrorism, and his action would have constituted the commission of one of the stipulated offences, he shall be guilty of an offence; and
- (c) Section 4 of the Malaysian Penal Code, which is similar to our Penal Code, extends Chapters VI (offences against the State), VIA (offences relating to terrorism), and VIB (organized crime) of their Code to any offence committed by, amongst other people, any citizen or any permanent resident in any place without and beyond the limits of Malaysia.

⁶ See Paul Arnell, "The Case for Nationality Based Jurisdiction" (2001) *International and Comparative Law Quarterly*, 50(4), 955-962, where he submits that the nationality principle is symbolic of a broader collective interest of the State in the conduct of its nationals overseas. The cumulative effects of the ever-growing mobility of nationals, the ability to commit crimes remotely, the evolution of the citizen-state relationship, and the increasing internationalisation of criminal law strengthen arguments in favour of nationality-based jurisdiction.

CHAPTER 3: TACKLING EMERGING CRIME TRENDS

SECTION 7: NO-OUTCOME FRAUD

SUMMARY OF RECOMMENDATIONS

(11) Create a new offence of fraud, which is committed by any person who, fraudulently or dishonestly, (a) makes a representation, (b) fails to disclose information which he is under a legal duty to disclose, or (c) abuses, whether by act or omission, a position he occupies in which he is expected to safeguard, or not to act against, the financial interests of another person

Introduction and current law

Broadly, fraud-related offences in the common law fall into one of two categories: (i) those that focus on the *intent* of the accused person to cause loss or gain, or increase the risk of loss, and (ii) those that focus on the *effect* of an accused person's representation, *ie* whether the victim was deceived and whether this in turn led to a loss or gain.

2 In Singapore law, cheating is the most common general-use offence governing fraudulent acts. It requires both elements mentioned above to be present: it only applies where the accused person both intended to cause a loss or gain and the victim was factually deceived, the accused person having thereby induced or caused the victim to do certain acts. This is apparent from the wording of s 415 of the Penal Code:

Cheating

415. Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to "cheat".

Impetus for review

3 In recent years, major common law jurisdictions (UK and some states in Australia) have introduced statutory reform of their fraud-related offences to focus on the intent of the accused person rather than the effects of a deception on the victim.

4 The four primary challenges of an offence such as cheating under Singapore law, which requires that the act of the accused person have the effect of deceiving a victim and inducing them to do something, are:

Challenge	Illustration
(1) The need to establish that the victim was actually deceived, especially in cases where the victim did not apply his mind to	If an accused person knowingly used another's credit card to purchase something without authorisation, and the poorly-trained, poorly-

<p>the truth or falsehood of the accused person’s false representation</p>	<p>motivated retail clerk testifies that he processed the payment without applying his mind to the identity or authority of the person using the card, then arguably the clerk was not deceived and therefore not cheated.</p>
<p>(2) The difficulty of proving inducement, which requires proof of causation between the deceptive act of the accused person and the response of the victim, especially where the victim states that he was deceived but this made no difference to his actions</p>	<p>Even if the same clerk testifies that he was deceived into thinking the accused person had authority to use the credit card, he may take the position that he would have processed the payment regardless of such authority, on the basis that the loss will lie on the bank and not the retailer. In that scenario, the clerk would have been deceived but not induced to do anything – the causal link between the deceit and the processing of payment is absent. Again, cheating is not made out.</p>
<p>(3) The difficulty of establishing that the victim’s response falls within the required acts defined in s 415, especially if the victim confers a benefit on the accused person that is not defined as “delivery of property” in the Penal Code and where the “damage or harm” of that act cannot be clearly defined (eg performing a service for the accused person at no measurable cost to the victim)</p>	<p>Where an accused person uses another’s identity without authorisation to gain access to a service which has been paid for in advance, such as an online newspaper subscription, it may be arguable that cheating is not made out. No property was transferred as a result of the deception. While the service provider may not have made the service available if not for the deception, it may not be provable that this caused any harm to anyone in “body, mind, reputation or property” – if the service had low marginal cost of provision, the harm may be non-existent or <i>de minimis</i> under s 95 of the Penal Code.</p>
<p>(4) The difficulties arising from having to tender a separate charge for each victim deceived and each separate act induced – most notably, the possibility that the separate charges may not be tried jointly, depriving the court of the full picture of a complex fraudulent scheme</p>	<p><i>Goldring, Timothy Nicholas v PP and other appeals</i>¹ concerned a complex investment scam which was charged as 86 separate counts of conspiracy to cheat. Of these, 18 were proceeded with at trial and 68 stood down. Although the convictions of the offenders were upheld on appeal, the appellate court declined to treat the 68 stood down charges as relevant for sentencing as the offenders did not admit to them or consent to them being taken into consideration. If one charge could be tendered for each misrepresentation rather than each victim or act induced, far fewer charges could have been used to encompass the entire scheme, with the court able to consider the totality of the evidence for the purposes of trial and sentencing.</p>

¹ [2015] 4 SLR 742.

5 A more serious scenario was disclosed in the manipulation of the LIBOR. Because LIBOR was calculated through a fixed formula based on interest rates submitted by individual banks, employees at those banks were able to collude to manipulate their submissions and thereby manipulate LIBOR itself.²³ Under Singapore law, rates analogous to LIBOR are not a form of “security” under s 2(1) of the SFA, making the current offences in that Act inapplicable. If such a scheme were detected in Singapore, it would not be possible to prove that anyone affected by the manipulation was cheated unless they relied on some false representation about how the rate was calculated and/or how the underlying figures submitted by the banks were determined. The existence of such a representation, and of such reliance, may be very difficult to establish factually. In January 2017, amendments to the SFA introduced a new regulatory framework for financial benchmarks such as the SIBOR. Criminal sanctions and civil penalties were also introduced to deter manipulation of financial benchmarks. This will cover manipulative acts that occur in Singapore, or are committed in relation to financial benchmarks administered in Singapore, even if the acts are perpetrated overseas.⁴ This highly specific form of regulation is an example of how industry-specific regulators are currently forced to play catch-up with new developments in the world of white-collar crime, only able to close the proverbial stable door after the horse has bolted. A wider offence that is not reliant on the existence or reaction of a specific victim will help prevent impunity for such novel fraudulent acts.

6 The examples above underscore the need for an offence focusing on the deceitful intent and acts of an accused person, not their effect on an alleged victim. The offence of cheating makes the criminal liability of one who intentionally seeks to deceive for gain depend on the gullibility of the alleged victim and his particular response to being deceived. Criminal liability ought not to turn on such factors, which are to a large extent outside the control and contemplation of the accused person, although they may be relevant to sentencing.

Recommendation 11: Create a new offence of fraud, which is committed by any person who, fraudulently or dishonestly, (a) makes a representation, (b) fails to disclose information which he is under a legal duty to disclose, or (c) abuses, whether by act or omission, a position he occupies in which he is expected to safeguard, or not to act against, the financial interests of another person

7 To respond to these challenges, the PCRC recommends the creation of a new offence of no-outcome fraud, similar to that defined in the UK Fraud Act 2006⁵.

² “Libor: What is it and why does it matter?” *BBC News* (3 August 2015), <<http://www.bbc.com/news/business-19199683>> (accessed on 20 October 2016).

³ In England, LIBOR manipulation has been charged with a degree of success under the common law offence of conspiracy to defraud, which focuses on the offenders’ intention to defraud rather than on the effects of any particular persons: see the Serious Fraud Office website on LIBOR, <<https://www.sfo.gov.uk/cases/libor-landing/>> (accessed on 21 October 2016).

⁴ *Singapore Parliamentary Debates, Official Report* (9 January 2017) (Mr Ong Ye Kung, Minister for Education (Higher Education and Skills) and Second Minister for Defence, on behalf of Mr Tharman Shanmugaratnam, Deputy Prime Minister and Minister-in-charge of the Monetary Authority of Singapore).

⁵ See sections 1-5. A post-policy evaluation of the Fraud Act 2006 concluded that the UK Serious Fraud Office and barristers agreed that the Act had simplified fraud law, and enabled the Government to effectively prosecute emerging/technologically-enabled and/or complex modes of committing fraud: see the Ministry of Justice’s website, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217280/post-legislative-assessment-fraud-act-2006.pdf> (accessed on 10 August 2018).

8 This offence would be committed by anyone who, fraudulently or dishonestly:

- (a) Makes a false representation;
- (b) Fails to disclose information which he is under a legal duty to disclose; or
- (c) Abuses, whether by act or omission, a position he occupies in which he is expected to safeguard, or not to act against, the financial interests of another person.

9 The inclusion of the two alternative *mens rea* of “fraudulently” or “dishonestly” ensures that the new offence covers the same states of mind currently covered by the offence of cheating (see s 415 of the Penal Code)⁶.

10 The PCRC recommends the following formulation of the new no-outcome fraud offence:

Fraud

(1) A person commits fraud if he, fraudulently or dishonestly:

- (a) Makes a false representation,
- (b) Fails to disclose information which he is under a legal duty to disclose, or
- (c) Abuses, whether by act or omission, a position he occupies in which he is expected to safeguard, or not to act against, the financial interests of another person.

(2) A person may commit fraud regardless of whether the acts or omissions stated in subsections (1)(a), (b) or (c) were material or not.

(3) For the purposes of this section,

- (a) A “representation” means any representation as to fact or law, including a representation as to the state of mind of the person making the representation, or any other person.
- (b) A representation is false if it is untrue or misleading, and the person making it knows that it is, or might be, untrue or misleading.
- (c) A representation may be express or implied.
- (d) A representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

11 The features of this new offence are elaborated on below.

Exclusion of trivial lies from criminal liability

12 There has been some academic criticism that the Fraud Act 2006 is so broad that it effectively criminalises trivial lies⁷. The PCRC has recommended that the definition of

⁶ See also the recommended reforms to the definition of “dishonestly” in Section 10.3 of the Report.

⁷ Chris Monaghan “To prosecute or not to prosecute? A reconsideration of the over-zealous prosecution of parents under the Fraud Act 2006” J Crim L 2010, 74(3), 259-278: The breadth of the Fraud Act means that it effectively criminalises lying and what some might consider non-egregious forms of deception. The Fraud Act places too much discretion in the hands of the jury. It would be “virtually impossible to distinguish between different

“fraudulently” in s 25 of the Penal Code be amended to make clear that a deceit with the intent of obtaining an advantage or detriment that is objectively so slight that no person of ordinary sense and temper would complain of such advantage or detriment is not fraudulent for the purposes of the Code: see Section 10.1 of the Report. This would avoid trivial lies or abuses being caught in the new offence *eg* lying as part of a prank or using an office photocopier for non-work purposes.

Whether the actus reus of the offence has to be “material”

13 One issue which has arisen in the United States, a jurisdiction with similar offences, is the issue of whether the *actus reus*, meaning the act or omission of the accused person, has to be “material” to make out the offence.⁸ The PCRC recommends expressly excluding any consideration of materiality from the offence, as that would give rise to several of the same challenges as the present cheating offence: it would put the focus back on the state of mind of the alleged victim by asking whether they found the accused person’s act or omission “material”.

14 Instead, as discussed above, the exclusion of trivial lies via the *mens rea* of “fraudulently” trains the focus on the accused person’s intent to cause a non-trivial gain or loss.

Whether fraudulent or dishonest failure to disclose information should be qualified by legal obligation to disclose

15 The Fraud Act 2006 specifies that a dishonest failure to disclose information is only an offence of fraud if the offender was under a legal obligation to disclose it.⁹ The PCRC recommends that the new offence of fraud should be similarly circumscribed: a dishonest or fraudulent failure to disclose information is only an offence of fraud if the offender was under a legal duty to disclose the information. This is consistent with s 32 of the Penal Code, which states that “[i]n every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to *illegal* omissions” [emphasis added]. To otherwise require the disclosure of information which a person is not legally obliged to disclose would introduce uncertainty in terms of what a person is required to do to keep within the law.

False representations to non-human or unspecified victims

16 To ensure that the concept of a “false representation” in the proposed offence covers representations to (a) non-human victims such as corporations using automated systems to receive and/or respond to information and (b) unspecified victims, such as all the possible persons who may read a false representation concerning an investment scam advertised on the internet, the PCRC recommends including a clause stating that for the purposes of this offence, a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).¹⁰

offences in terms of their nature and seriousness, and even to know whether and when one had committed a crime”.

⁸ *Neder v US*, 527 U.S. 1 (1999).

⁹ Fraud Act 2006 (c 35) (UK) s 3(a)

¹⁰ This wording is taken from s 2(5) of the Fraud Act 2006 (c 35).

Clarifying territorial application

17 The PCRC recommends that this new offence of no-outcome fraud should be a scheduled offence, over which our courts will have jurisdiction where either (i) any “relevant event” occurs in Singapore or partly in and partly outside Singapore, where “relevant event” refers to any fact element of the offence that takes the form of an event, or (ii) the offence involves an intention to make gain or cause loss or expose another to a risk of loss or cause harm to any person in body, mind, reputation or property, and that gain, loss or harm occurred in Singapore¹¹.

18 This is similar to the approach in the England and Wales, where ss 24 – 25 of the Fraud Act 2006 (read with ss 1 – 2 of the CJA 1993) prescribes that English courts have jurisdiction over Fraud Act 2006 offences if any fact element of those offences took place in England and Wales, or if the fraud involved an intention to make gain or cause loss or a risk of loss, and that gain or loss occurred in England and Wales.

Sentencing

19 The new fraud offence will exist alongside the cheating offences in the Penal Code (ss 415 – 420), and is not intended to change the sentencing practice for acts currently classified as “cheating”.

20 The PCRC recommends a single punishment tier for the new offence, c.f. the approach of having tiered punishments for variations of the offence of differing severity (which is the approach for cheating offences under ss 415 – 420). Relevant sentencing factors, such as the value of property lost or other harm caused by the fraud will be left to the sentencing judge to consider.

21 The PCRC accepts that this approach would remove the existing clear tiers of punishment for different types of cheating, including mandatory imprisonment for the most serious types. It may affect the ability of the Prosecution and Defence to negotiate a plea of guilty in exchange for proceeding under a less serious punishment tier, which is currently a common practice. However, as cheating offences will continue to co-exist with the new offence, it remains open to the Prosecution to prefer the least serious cheating charge for a more minor offence. In addition, having a more flexible sentencing approach for the new offence will allow judges to establish new sentencing principles as necessary.

22 In considering the appropriate prescribed punishment, the PCRC noted that the same conduct that is charged with multiple counts of cheating today may be charged under far fewer counts of fraud under the proposed offence. Some of the most serious cases of financial crime have involved numerous charges, with multiple consecutive sentences eventually resulting in substantial aggregate sentences. One of the most notorious examples is *PP v Chia Teck Leng*¹², where the aggregate term of imprisonment was 42 years for multiple fraud crimes resulting in a total loss of about \$117.1m. It would be perverse if preferring a single charge under the new fraud offence as opposed to multiple charges for cheating resulted in lower sentences for the most serious fraudulent crimes simply because the new offence allows a smaller number of

¹¹ See Section 5 of the Report for details of the proposal to create a schedule of white collar crimes in respect of which there will be extended territorial jurisdiction.

¹² [2004] SGHC 68.

charges, or single charges, to be proceeded with even for complex multi-victim schemes. To avoid this scenario, the prescribed punishment range must be sufficiently wide to cover the wide range of criminality that can be captured under the new offence. The PCRC therefore recommends setting the maximum punishment for fraud at 20 years' imprisonment, or a fine, or both.

Creating arrestable and non-arrestable variants of the offence based on outcome to ease implementation of new offence

23 The PCRC recommends creating two variants of the new offence (with the same punishment), for ease of implementation. One variant will be made out where any injury¹³ has been caused to any person by the fraud, and this variant will be arrestable. The other variant will be made out in any other situation, and this variant will be non-arrestable. This approach will prevent the police from being inundated with reports of frauds involving no provable loss or harm which are nevertheless arrestable, meaning that the police are obliged to investigate them¹⁴.

¹³ Defined in s 44 of the Penal Code as “any harm whatever illegally caused to any person, in body, mind, reputation or property”.

¹⁴ Under s 17 of the CPC, if a policeman receives information or reasonably suspects that an arrestable offence has been committed, he must investigate the facts and circumstances of the case, unless he has reason to believe that the case is not of a serious nature, or that there are insufficient grounds for proceeding with the matter.

SECTION 8: OBTAINING SERVICES FRAUDULENTLY

SUMMARY OF RECOMMENDATIONS

(12) Create a new offence of obtaining services fraudulently

Introduction and current law

The offence of cheating *simpliciter* is set out in s 415 of the Penal Code.

Cheating

415. Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to “cheat”.

Impetus for review

2 Section 415 requires the response of the person deceived (the “victim”) to fall within the acts defined in the section: the victim must (i) deliver any property to any person, (ii) consent that any person shall retain any property, or (iii) do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property.

3 In some cases, it is difficult to establish that the victim’s response falls within any of these acts, especially if the victim confers a benefit on the accused person that is not defined as “delivery of property” in the Penal Code, and where the “damage or harm” of that act cannot be clearly defined. One such example is when the victim is deceived into providing a service for the accused person at no measurable cost to the victim.

4 In other cases where services are obtained fraudulently, an offence of cheating may not capture scenarios where the fraudulent act does not involve any kind of false representation. This could happen where credits which give access to an online computer game, or online purchases which give access to services, are obtained by merely clicking the “purchase” button on a website, knowing that a glitch is causing the website to transfer credits or authorise the purchase without collecting the usual payment.

Recommendation 12: Create a new offence of obtaining services fraudulently

5 To address the problems concerning the obtaining of services by deception, the PCRC recommends creating a new offence of obtaining services fraudulently. It shall be an offence to fraudulently or dishonestly obtain a service knowing that it is being made available on a for-payment basis, but nevertheless not intending that any payment be made. A proposed text for this offence is modelled on a similar offence of “obtaining services dishonestly” in the Fraud Act 2006 at s 11:

Obtaining Services Fraudulently

A person obtains services fraudulently if he obtains services for himself or another fraudulently or dishonestly, where:

- (a) The services are made available on the basis that payment has been, is being or will be made for or in respect of them,
- (b) He knows they are being made available on this basis, or that they might be,
- (c) He obtains them without any full or partial payment having been made for or in respect of them, and
- (d) He intends that full or partial payment will not be made.

6 Territorial application: The PCRC recommends that this new offence of obtaining services fraudulently should be a scheduled offence, over which our courts will have jurisdiction where either (i) any “relevant event” occurs in Singapore or partly in and partly outside Singapore, where “relevant event” refers to any fact element of the offence that takes the form of an event, or (ii) the offence involves an intention to make gain or cause loss or expose another to a risk of loss or cause harm to any person in body, mind, reputation or property, and that gain, loss or harm occurred in Singapore¹.

7 Sentencing: The outsourcing of critical functions to service-providers is a part of an increasingly globalised economy. Such services may be extremely valuable and costly to provide, such as real-time logistics management services for maritime transport networks. There seems no reason for the fraudulent obtaining of such services to be treated less seriously than any other kind of fraud. The PCRC therefore recommends that this offence be punishable with a maximum of 10 years’ imprisonment or fine or both, similar to the maximum sentence prescribed for the most serious form of cheating under s 420 of the Penal Code.

¹ See Section 5 of the Report for details of the proposal to create a schedule of white collar crimes in respect of which there will be extended territorial jurisdiction.

SECTION 9: CRIMINAL BREACH OF TRUST

SUMMARY OF RECOMMENDATIONS

- (13) Amend s 407 to update archaic language and rationalise categories of relationships covered by provision*
- (14) Amend s 408 to update archaic language and rationalise categories of relationships covered by provision*
- (15) Amend s 409 to rationalise categories of relationships covered by provision*

Introduction and current law

Criminal breach of trust (“CBT”) is criminalised under ss 405 – 409 of the Penal Code. The various provisions set out increasingly aggravated forms of the offence based on the category of relationship of trust involved.

Criminal breach of trust

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits “criminal breach of trust”.

Punishment of criminal breach of trust

406. Whoever commits criminal breach of trust shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.

Criminal breach of trust by carrier, etc.

407. Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment for a term which may extend to 15 years, and shall also be liable to fine.

Criminal breach of trust by clerk or servant

408. Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to 15 years, and shall also be liable to fine.

Criminal breach of trust by public servant, or by banker, merchant, or agent

409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 20 years, and shall also be liable to fine.

2 There are two fundamental ingredients to the offence of CBT: (i) an original trust, and (ii) a dishonest application of trust property. Trust is “a confidence reposed in some other [person]”.¹

Impetus for review

3 Following the decision of the High Court in *Tay Choo Wah v PP*², it was generally accepted that the words “entrusted with property, or with any dominion over property ... in the way of his business as ... an agent” in s 409 of the Penal Code included company directors. However, in the recent decision of the High Court in *PP v Lam Leng Hung* (“*Lam Leng Hung (HC)*”)³, this interpretation was reversed. The High Court interpreted the phrase as referring only to *professional* agents, *ie* those in the profession, trade or business as an agent⁴. The High Court’s decision was upheld in *Lam Leng Hung (CA)*.

4 The Court of Appeal’s decision has implications not just for agents, but also bankers, merchants, factors, brokers and attorneys: “[B]oth the text and context of s 409 indicate that “in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent” only encompasses persons who are entrusted with property or dominion over it in the course of the commercial activities of their trusted trades or professions – including those who are in the business of agency (*ie* professional agents).”⁵

5 As a result, s 409 was found not to cover directors of corporations, governing board members or key officers of a charity and officers of a society⁶, who fall to be punished under the most basic form of CBT under s 406. The Court of Appeal also held that trustees are not necessarily agents.⁷

6 Despite its findings, the Court of Appeal acknowledged that from a policy perspective, it is necessary to treat directors of companies and officers of charities and societies as having heightened culpability and enhanced potential for harm where they commit criminal breach of trust. The Court also noted that there is a strong and urgent impetus to ensure that persons in such positions of responsibility are made to undergo a sentence that reflects the full measure of the harm they caused and their culpability. However, this had to be left to Parliament.⁸

7 In response to the Court of Appeal’s decision, the Government has stated in Parliament that it will amend the law to “ensure that legislation provides for higher penalties for directors and other senior officers who commit criminal breaches of trust.”⁹

8 Aside from the pressing need to rationalise the categories of relationships of trust covered under s 409, the PCRC took this opportunity to review the other CBT provisions, which were inherited from our colonial past and thus contain some fairly outdated language.

¹ *Ratanlal* at p 88.

² [1974 – 1976] SLR(R) 725.

³ [2017] 4 SLR 474.

⁴ *Id.*, at [97] and [102].

⁵ *Id.*, at [286].

⁶ *Id.*, at [287].

⁷ *Id.*, at [281].

⁸ *Id.*, at [276].

⁹ *Singapore Parliamentary Debates, Official Report* (5 Feb 2018) (K Shanmugam, Minister for Home Affairs).

Recommendation 13: Amend s 407 to update archaic language and rationalise categories of relationships covered by provision

9 The PCRC recommends amending s 407 to update the archaic references to “wharfinger” and “warehouse-keeper” – terms which are rarely if ever used in the modern context.

10 These terms should be replaced with terms that refer not just to a specific type of occupation which can be overly restrictive (for example, where a person performs the same functions as a carrier, but is nominally referred to as holding some other occupation), but which are broad enough to capture equivalent occupations. In essence, a carrier is someone who is entrusted with property for the purpose of transportation; a wharfinger and warehouse-keeper are entrusted with property for the purpose of storage. Thus, the PCRC recommends amending s 407 as follows:

Criminal breach of trust by carrier, etc.

407. Whoever, being entrusted with property ~~as a carrier, wharfinger or warehouse keeper~~ **in the way of his business of providing transportation or storage**, commits criminal breach of trust in respect of such property, shall be punished with imprisonment for a term which may extend to 15 years, and shall also be liable to fine.

Illustration

A carrier is an example of a person who is entrusted with property in the way of his business of providing transportation and a warehouse owner or warehouse operator is an example of a person who is entrusted with property in the way of his business of providing storage.

Recommendation 14: Amend s 408 to update archaic language and rationalise categories of relationships covered by provision

11 The PCRC recommends amending s 408 to replace the archaic references to “clerk” and “servant” with “employee”. It is further recommended that it should be clarified that “employee” should include any persons engaged in a capacity similar to that of an employee. This will ensure that all relationships possessing the same fundamental qualities as those in an employer-employee relationship¹⁰ are covered by this aggravated form of CBT, as such accused persons have similar culpabilities and potential for harm.

12 A suggested formulation for the amended s 408 is set out below:

Criminal breach of trust by clerk or servant

408–(1). Whoever, being ~~a clerk or servant, or employed as a clerk or servant~~ **an employee**, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to 15 years, and shall also be liable to fine.

¹⁰ In *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58, the Court of Appeal held at [64] that relationships which “possess the same fundamental qualities as those which inhere in employer-employee relationships” or are “akin to that between an employer and employee” can give rise to vicarious liability.

(2). For the the purposes of subsection (1) –

- (a) an employee includes a person who is engaged in a capacity with the same fundamental qualities as an employee; and
- (b) a person may be an employee or engaged in the capacity mentioned in paragraph (a) even though that person did not receive any salary or other remuneration arising from the person’s employment or engagement.

Recommendation 15: Amend s 409 to rationalise categories of relationships covered by provision

Types of relationships of trust recognised as aggravating factors in other jurisdictions

13 The PCRC considered if there were other lacunae in terms of the types of relationships of trust prescribed in s 409, other than the one identified in *Lam Leng Hung (CA)*.

14 A cross-jurisdictional survey showed that there are generally two ways in which certain types of relationships of trust are recognised as aggravating factors:

- (a) Through the creation of an exhaustive list of the types of relationships of trust which deserve enhanced punishments¹¹; or
- (b) Through identifying categories of relationships of trust which deserve enhanced punishments¹².

15 As between these two methods of prescribing types of relationships of trust in s 409, the PCRC recommends doing so through identifying categories of relationships of trust which deserve enhanced punishments – which is the current approach in s 409. This would minimise the probability of lacunae arising in the CBT provisions when new relationships of trust emerge.

16 The following categories of relationships of trust have been recognised in other jurisdictions¹³:

S/N	Category	Specific professions, roles, duties
1	Clerks or servants	Employees
2	Persons acting or having been acting or desirous or intending to act for or on behalf of any company or other person	Professional agent (insurance agent, real estate agent), auctioneer, architect, clerk of

¹¹ Malaysia: s 409 of the Penal Code includes a comprehensive list of “agents”.

¹² UK: Fraud Act 2006 (c. 35) s 4 (fraud by abuse of position); Canada: Criminal Code (R.S.C., 1985, c. C-46) s 336 (criminal breach of trust by trustee) and s 122 (breach of trust by public officer); New South Wales: Crimes Act 1900 (NSW)(Act 40 of 1900) s 116 (larceny *simpliciter*) and s 156 (larceny by clerks or servants or persons in public service); North Carolina: North Carolina General Statutes, Chapter 14, Article 18 sets out two tiers of punishments based on certain categories of relationships; California: Penal Code, Chapter 6, ss 503 – 515 set out categories of relationships of trust.

¹³ The jurisdictions surveyed were: UK, Hong Kong, Canada, New South Wales, Malaysia, California, New York, India, North Carolina.

S/N	Category	Specific professions, roles, duties
		works, engineer, accountant, auditor, surveyor, buyer, salesman
3	Person entrusted with or having in his control property for the use of any other person	<ul style="list-style-type: none"> • Professions: Banker, broker, merchant, attorney • Fiduciaries: Trustee executor, administrator, liquidator, receiver, trustee within the meaning of any Act relating to trusteeship or bankruptcy
4	Senior management of profit-making organisations	Partner, co-owner, director, manager or other officer of any company, club, partnership or association
5	Senior management of non-profit entities	President, treasurer, etc. of any association, society, charity, religious group or other organisation
6	Persons having under their control personal property for the purpose of transportation for hire	Couriers, etc.
7	Public servants	Public servants

Types of relationships of trust to be recognised in s 409

17 The PCRC recommends including the following additional categories of relationships of trust in s 409:

- (a) A person who is entrusted property in his professional capacity, other than a professional banker, merchant, factor, broker, attorney or agent;
- (b) A director of a corporation;
- (c) An officer of an unincorporated association;
- (d) A partner in a partnership;
- (e) A key executive of a corporation, an unincorporated association or a partnership; and
- (f) A fiduciary.

18 A person who is entrusted property in his professional capacity, other than a professional banker, merchant, factor, broker, attorney or agent: This category covers professionals, who by virtue of their accreditation and specialised knowledge, are hired by clients to perform roles which the client himself cannot perform. This catchall group will cover professionals who are not bankers, merchants, factors, brokers, attorneys or agents, and will allow for the emergence of future professional roles.

19 A director of a corporation; an officer of an unincorporated association; a partner in a partnership; a key executive of a corporation, an unincorporated association or a partnership: These categories address the lacuna identified in *Lam Leng Hung (CA)*, by designating the senior management of companies, charities, societies, etc. as liable under s 409. Senior management is *not* limited to directors and persons in equivalent apex leadership positions, as it is recognised that larger entities tend to adopt more sophisticated governance structures that delegate decision-making powers to other senior leaders. Therefore, this category will also

cover “key executives”, who are defined as persons who have general control and management of the administration of that corporation, unincorporated association or partnership, whether or not an employee and whether or not acting alone or with other persons.

20 A fiduciary: This category covers fiduciary relationships, including but not limited to an executor, an administrator, a liquidator, a receiver and a trustee (other than a trustee of an implied, constructive or resulting trust).

21 The PCRC recommends the following reformulation of s 409:

Criminal breach of trust by public servant, or by banker, merchant, agent, director, officer, partner, key executive or fiduciary.

409-(1). Whoever, being in any manner entrusted with property, or with any dominion over property –

- (a) in his capacity of a public servant;
- (b) in the way of his trade, profession or business as a banker, a merchant, a factor, a broker, an attorney or an agent;
- (c) in his professional capacity (other than of a trade, profession or business mentioned in paragraph (b));
- (d) in his capacity as a director of a corporation;
- (e) in his capacity as an officer of an unincorporated association;
- (f) in his capacity as a partner in a partnership;
- (g) in his capacity as a key executive of a corporation, an unincorporated association or a partnership;
- (h) in his capacity as a fiduciary,

commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine.

(2) In this section –

“director” includes –

- (a) any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors or the majority of the directors of a corporation are accustomed to act and an alternate or substitute director;
- (b) a member of a corporation in the case where the affairs of the corporation are managed by its members and includes a person in accordance with whose

directions or instructions the members or the majority of the members of such corporation are accustomed to act and an alternate or substitute member;

“fiduciary” means a person who has undertaken to act for or on behalf of another person in a matter in circumstances which give rise to a relationship of trust, confidence and loyalty and includes without limitation an executor, an administrator, a liquidator, a receiver and a trustee (other than the trustee of an implied, a constructive or a resulting trust)¹⁴;

“key executive” means a person who, whether or not an employee of the corporation, unincorporated association or partnership, and whether acting alone or together with any other person, has general control and management of the administration of that corporation, unincorporated association or partnership;

“officer”, in relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, and includes —

- (a) any person holding a position analogous to that of president, secretary or member of a committee of the unincorporated association;
- (b) a person in accordance with whose directions or instructions the president, secretary or member of a committee of the unincorporated association or a majority of such persons are accustomed to act; and
- (c) any person purporting to act in any such capacity;

“partner” includes a person purporting to act as a partner;

“partnership” includes a limited partnership and a limited liability partnership within the meaning of section 2(1) of the Limited Liability Partnerships Act (Cap 163A).

(3). For the purposes of this section and to avoid doubt –

- (a) a person may be a director of a corporation, officer of an unincorporated association, partner in a partnership, key executive of a corporation, unincorporated association or partnership even though that person did not receive any salary or other remuneration from that corporation, unincorporated association or partnership (as the case may be);
- (b) a person may be a fiduciary even though it is stated in a contract or agreement between the parties that a fiduciary relationship does not arise or even though that person did not receive any remuneration for acting as a fiduciary.

¹⁴ Adapted from *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533.

SECTION 10: EMERGING CRIME TACTICS

SECTION 10.1: DEFINITIONS OF “WRONGFUL GAIN”, “WRONGFUL LOSS”, “DISHONESTLY”, AND “FRAUDULENTLY”

SUMMARY OF RECOMMENDATIONS

- (16) Amend s 24 to include the wrongful avoidance of a loss or exposure of another to the risk of loss, and explicitly cover both temporary and permanent gain and loss
- (17) Amend s 23 to include situations where a gain, loss, avoidance of a loss or exposure to the risk of loss of property is wrong by the ordinary standards of reasonable and honest people
- (18) Clarify the definition of “fraudulently” in the Penal Code
 - a. Codify the common law definition of “fraudulently” in s 25
 - b. Qualify that a deceit with the intent of obtaining an advantage or detriment that is objectively so slight that no person of ordinary sense and temper would complain of such advantage or detriment is not fraudulent for the purposes of the Penal Code
 - c. Clarify in s 25 that it is sufficient, in any charge alleging that a thing was done with intent to defraud, to allege a general intent to defraud without naming any particular person intended to be defrauded
- (19) Make clear that the definitions of “dishonestly” and “fraudulently” shall only apply to the provisions of the Penal Code

Introduction and current law

The *mens rea* of “dishonestly” and “fraudulently” constitute the fault element of many white-collar and property offences in the Penal Code.

2 Sections 23 and 24 of the Penal Code, together, define the concept of dishonesty:

“Wrongful gain” and “wrongful loss”

23. “Wrongful gain” is gain by unlawful means of property to which the person gaining it is not legally entitled; “wrongful loss” is loss by unlawful means of property to which the person losing it is legally entitled.

“Dishonestly”

24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.

3 This definition is based entirely on an accused person’s understanding of whether they are legally entitled to cause a certain gain or loss and whether their means are lawful. It does not make any reference to morality or to the moral standards of ordinary people.

4 Section 25 defines the concept of “fraudulently” as follows:

“Fraudulently”

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.

5 This definition is a tautology and gives no guidance on the substantive definition of “fraudulently” or “intent to defraud”.

Impetus for review

6 There are three impetuses for reform of the definitions of “dishonestly” and “fraudulently”.

7 First, the definition of “dishonestly” covers only wrongful gain and wrongful loss, without covering the wrongful avoidance of loss or exposure of another to the risk of loss. In the modern commercial context, avoiding a loss or being exposed to the risk of loss are in many cases practically equivalent to making a gain or causing a loss respectively. These types of conduct are covered in contemporary fraud statutes in other jurisdictions, such as the Fraud Act 2006.

8 Second, there is currently a conceptual inconsistency between the *mens rea* of “dishonestly” and “fraudulently” in the Penal Code. As stated above, the statutory definition of “dishonestly” has no reference to morality or to the moral standards of ordinary people. In contrast, the concept of “fraudulently” (having no specific statutory definition in the Penal Code) has been interpreted as acting with an intention that some person be deceived, and by means of such deception, that an advantage or detriment should accrue to some person. Thus, “fraudulently” is broad enough to include both legal and moral wrongdoing.

9 Key white-collar offences in the Penal Code such as cheating and dishonestly inducing a delivery of property (s 420) and criminal breach of trust (s 405) all require the *mens rea* of dishonesty. In the fast-changing marketplace, new commercial practices often emerge in legal “grey areas” where the law does not explicitly define whether a practice is unlawful or not. Under the current law, such a practice may be *fraudulent*, involving intentional deception for gain, but it may not be *dishonest* because of a lack of clarity or development in the law, or where the accused person asserts a lack of understanding of the legal situation. Such conduct would constitute an offence of fraudulent trading under s 340 of the Companies Act¹ if done by a company, and goes beyond the bounds of honesty as defined by ordinary people. But if it is done by an individual or unincorporated syndicate, it would neither be a Companies Act offence nor cheating and dishonestly inducing the delivery of property (s 420) or criminal breach of trust (s 406) under the Penal Code². This leads to an unsatisfactory inconsistency in operation between different types of *mens rea*, and a significant gap in the law in dealing with emergent commercial practices that are morally culpable by an objective standard.

10 Third, the definition of “fraudulently” ought to be better clarified in the Penal Code; case law has developed to fill the gap in the absence of a useful definition in the Code.

¹ Cap 50, 2006 Rev Ed

² Both offences under s 420 and s 406 of the Penal Code have a fault element of dishonesty.

Recommendation 16: Amend s 24 to include the wrongful avoidance of a loss or exposure of another to the risk of loss, and explicitly cover both temporary and permanent gain and loss

11 To address the first impetus for reform, the PCRC recommends amending s 24 to include the wrongful avoidance of a loss or exposure of another to the risk of loss.

12 In addition to the points made at [7] to [10] above, the current definition of “dishonestly” in s 24 does not explicitly state that it is immaterial whether the loss or gain intended is temporary or permanent. In contrast, s 5(2)(b) of the Fraud Act 2006 specifically embraces both temporary and permanent gains and losses. Explanation 1 to s 403 of the Penal Code also states that “[a] dishonest misappropriation for a time only is misappropriation within the meaning of this section”.

13 To align the position within the Penal Code, the PCRC recommends clarifying that causing of gain or loss, avoidance of a loss or exposure to the risk of loss of property in s 24 can be temporary or permanent.

Recommendation 17: Amend s 23 to include situations where a gain, loss, avoidance of a loss or exposure to the risk of loss of property is wrong by the ordinary standards of reasonable and honest people

14 To address the second impetus for reform, the PCRC recommends amending s 23 to state that “a gain, loss, avoidance of a loss or exposure to the risk of loss **of property** is ‘wrongful’ if (a) it is caused by unlawful means and in breach of any legal entitlement, **or** (b) it is wrong by the ordinary standards of reasonable and honest people” (the so-called *Ghosh* test)³.

15 The current definition of “wrongfulness” should be *retained as an alternative* alongside the new one to mitigate a possible weakness in the “ordinary person” standard, which is summed up in the following academic commentary: “a person is not dishonest under the *Ghosh* test if he is so cocooned from the views of ordinary people that he not only disagrees with them but does not even realise that he disagrees. ... The only defendant likely to invoke [this defence] is the professional or business person who asserts that his activities are acceptable in the circles in which he moves.”⁴

16 Under the proposed definition, even if an accused person claims that their background or a pervasive company or industry culture “cocooned” him and rendered him ignorant of the moral standards of ordinary people, he will still be dishonest if he knew he was acting by unlawful means and in breach of any legal entitlement. There should be no room for a person to be found honest if they knew they were acting against the law.

17 The PCRC also recommends including an Explanation to make it clear that dishonesty under the *Ghosh* test requires one to *subjectively know* that the causing of gain or loss, avoidance of a loss or exposure to the risk of loss was wrong by the ordinary standards of

³ This definition is taken from the definition of “dishonesty” in English common law found in *R v Ghosh* [1982] QB 1053.

⁴ Anthony Arlidge QC, Alexander Milne QC and Polly Sprenger, *Arlidge and Parry on Fraud* (Sweet & Maxwell, 4th Ed, 2014) at para 2-030.

reasonable and honest people. For the avoidance of doubt, the Explanation can simply restate the principle in *Ang Teck Hwa v PP* [1987] SLR(R) 513 at [36]:

To intend a wrongful gain or loss requires that one knows the gain or loss is wrongful.

18 Finally, to be clear, “wrongful gain” and “wrongful loss” in the definition of s 23 should continue to refer only to gain or loss “of property”, and not other things such as emotional loss.

Recommendation 18(a): Codify the common law definition of “fraudulently” in s 25

19 The PCRC recommends giving “fraudulently” a clear definition in the Penal Code by codifying the definition in *Law Society of Singapore v Nor’ain bte Abu Bakar and others*⁵ at [46]. The proposed definition would add on to the present s 25 definition the words “a person is said to do a thing with intent to defraud if he does that thing with the intention to deceive some person and by means of such deception, that an advantage should accrue to or detriment should befall some person”.

Recommendation 18(b): Qualify that a deceit with the intent of obtaining an advantage or detriment that is objectively so slight that no person of ordinary sense and temper would complain of such advantage or detriment is not fraudulent for the purposes of the Penal Code

20 Given that the PCRC has also recommended the creation of a new fraud offence which essentially criminalises the act of lying while having a fraudulent *mens rea* (in Section 9 of the Report), it is important that the *mens rea* of “fraudulently” not be excessively wide. This is to avoid this new offence criminalising trivial lies. For this purpose, the s 25 definition should contain the qualification that a deceit with the intent of obtaining an advantage or detriment that is objectively so slight that no person of ordinary sense and temper would complain of such advantage or detriment⁶ is not fraudulent for the purposes of the Code.

Recommendation 18(c): Clarify in s 25 that it is sufficient, in any charge alleging that a thing was done with intent to defraud, to allege a general intent to defraud without naming any particular person intended to be defrauded

21 An Explanation should also be drafted to codify the principle upheld by the Court of Appeal in *PP v Li Weiming and others*⁷ at [84] that “[i]t is clearly possible that a person may carry out an act with an intent to defraud by practicing a deception with the aim of causing an injury, loss or detriment or obtaining an advantage, even if he is indifferent as to who the object of his fraudulent intent is. ... An intent of this nature would be regarded as a general intent to defraud.” This is also similar to the Explanation to s 477A of the Penal Code.

⁵ [2009] 1 SLR(R) 753.

⁶ This formulation borrows the language of s 95 of the Penal Code, which prescribes the *de minimis* defence.

⁷ [2014] 2 SLR 393.

It shall be sufficient in any charge alleging that a thing was done with intent to defraud to allege a general intent to defraud without naming any particular person intended to be defrauded.

Recommendation 19: Make clear that the definitions of “dishonestly” and “fraudulently” shall only apply to the provisions of the Penal Code

22 The PCRC has recommended that all provisions concerning fault elements should be grouped in Chapter II and made applicable to offences under any written law (in Section 19.1 of the Report). As an exception to this general recommendation, the PCRC recommends that the definitions of “dishonestly” and “fraudulently” in the Penal Code shall only apply to the provisions of the Penal Code. This is currently the case in relation to the definitions set out in Chapter II of the Penal Code, unless expressly provided in written law.

23 The PCRC considers that the *mens rea* of “dishonestly” and “fraudulently” are especially complex because they are composite fault elements, that may have different meanings in different contexts. For example, case law for the offence of fraudulent trading under s 340 of the Companies Act has interpreted “fraud” as incorporating an intention to go “beyond the bounds of what ordinary decent people engaged in business would regard as honest” or involving “according to the current notions of fair trading among commercial men, real moral blame”⁸.

24 As such, the PCRC recommends making clear that the definitions of “dishonestly” and “fraudulently” in the Penal Code shall only apply to the Provisions of the Penal Code.

⁸ *Phang Wah and others v PP* [2012] 1 SLR 646 at [24].

SECTION 10.2: OBSTRUCTING OR PERVERTING THE COURSE OF JUSTICE

SUMMARY OF RECOMMENDATIONS

- (20) Amend the wording of s 204A to criminalise any act “tending and intended to obstruct, prevent, pervert or defeat the course of justice”
- (21) Widen the mens rea of s 204A to include knowledge that one’s act is likely to have the effect of obstructing etc. the course of justice

Introduction

The perversion of justice is becoming an increasingly common part of complex, high-stakes white-collar crime. In some cases these acts are the subject of charges under s 204A of the Penal Code, as with alleged witness tampering in the course of investigations into transactions relating to the Malaysian sovereign wealth fund 1MDB¹. In other cases, the perversion of justice is an important background fact in dealing with other offences, whether it is alleged match-fixer Dan Tan Seet Eng asking his wife to put his laptop computers out of CPIB’s reach² or former leaders of City Harvest Church coordinating an afterthought defence by email after being charged³.

Current law

2 Section 204A of the Penal Code criminalises the obstructing, preventing, perverting or defeating of the course of justice:

Obstructing, preventing, perverting or defeating course of justice

204A. Whoever intentionally obstructs, prevents, perverts or defeats the course of justice shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.

Impetus for review

3 Under the present law, there is ambiguity as to when the offence of obstructing etc. the course of justice is completed, as opposed to when it is merely an attempted offence. For example, where an accused person asks a witness to lie during an upcoming criminal proceeding, but the witness reports this to the police before the proceeding – is this a completed offence, on the reasoning that the mere act of asking a witness to lie has the effect of perverting justice, or is this merely an attempted offence, since the investigation and court proceeding was not ultimately affected?

¹ Grace Leong, “Ex-BSI man slapped with more witness-tampering charges,” *The Straits Times* (19 August 2016) <<http://www.straitstimes.com/business/ex-bsi-man-slapped-with-more-witness-tampering-charges>> (accessed on 14 October 2016).

² *PP v Guan Enmei* [2016] SGDC 173 at [3], although in this case the offender was charged with giving false or misleading information to the CPIB under s 28(b) of the PCA.

³ *PP v Lam Leng Hung and others* [2015] SGDC 326 at [159] and [341].

4 The charging practice of the Prosecution has not been entirely consistent, especially across different types of perversion of justice. In the case of *PP v Sollihin bin Anhar*⁴, the accused was charged with attempting to pervert the course of justice by asking five potential witnesses in a prospective criminal trial not to cooperate with the authorities (at [8] and [10]). In contrast, match-fixer Ding Si Yang was charged with a completed offence of perverting the course of justice for hiding a piece of evidence in his sock during investigations.⁵ This was despite the fact that in both cases, the acts of the accused were detected by investigators at an early stage.

Recommendation 20: Amend the wording of s 204A to criminalise any act “tending and intended to obstruct, prevent, pervert or defeat the course of justice”

5 The PCRC recommends amending the wording of s 204A to criminalise any act “tending and intended to obstruct, prevent, pervert or defeat the course of justice”⁶, to remove any ambiguity in the offence, which can lead to inconsistency in charging and sentencing. This will make it clear that the offence is completed as long as the act objectively tends to lead to any of these results, without the Prosecution having to prove that it actually led to any such result.

6 An attempted s 204A offence will only be charged where the act itself was truly inchoate, *eg* a person sending a letter to suborn a witness to the wrong address, or hiding a blank piece of paper mistakenly thinking it was incriminating documentary evidence. This amendment has the additional benefit of preventing a completed s 204A offence from being converted into a mere attempt merely because of factors arising after the accused acted, such as the witness he was trying to suborn resisting his overtures or the investigators being vigilant enough to foil his tampering. The accused should, in principle, not receive the benefit of being charged with a mere attempt for such factors outside their control and contemplation.

Recommendation 21: Widen the *mens rea* of s 204A to include knowledge that one’s act is likely to have the effect of obstructing etc. the course of justice

7 The PCRC recommends widening the *mens rea* of s 204A from intention to knowledge that one’s act is likely to have the effect of perverting the course of justice. This is to prevent technical defences concerning intention where an act has been committed that objectively perverts the course of justice.

8 With these recommendations, s 204 would be amended as follows:

⁴ [2015] 2 SLR 1.

⁵ *PP v Guan Enmei* [2016] SGDC 173 at [38] and Elena Chong, “Match fixer jailed for perverting course of justice and refusing to reveal password”, *The Straits Times* (23 October 2016), <<http://www.straitstimes.com/singapore/courts-crime/match-fixer-jailed-for-perverting-course-of-justice-and-refusing-to-reveal>> (accessed on 17 October 2016).

⁶ This wording is adapted from the English common law offence of perverting the course of justice, which carries a maximum penalty of life imprisonment: *R v Kenny* [2013] 3 WLR 59 at [27] and the Crown Prosecution Service “Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases involving Allegedly False Allegations of Rape and / or Domestic Abuse” at para 28, <http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations/#a09> (accessed on 17 October 2016).

Obstructing, preventing, perverting or defeating course of justice

204A. Whoever ~~intentionally~~ does an act tending and (a) intended to, or (b) knowing it likely that such act may, obstructs, prevents, perverts or defeats the course of justice shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.

SECTION 10.3: DISHONESTLY RETAINING STOLEN PROPERTY

SUMMARY OF RECOMMENDATIONS

- (22) *Align the offences of dishonestly retaining stolen property in the Penal Code with similar offences of money-laundering under the CDSA*
- a. *Amend s 410 to state that for the purposes of proving whether any property is stolen property under any offence under ss 411 – 414 of the Penal Code, it is not necessary for the Prosecution to prove the particulars of any offence by which property became designated as stolen property*
 - b. *Amend the mens rea in ss 411, 413 and 414 to knowledge or reason to believe that the property was “obtained in whole or in part through any criminal offence involving fraud or dishonesty”, and abolish the requirement of dishonesty in ss 411 and 412*

Introduction and current law

The offences of dishonestly retaining stolen property (“DRSP”) are set out at ss 410 – 413 of the Penal Code. Section 410 defines “stolen property”, and ss 411 – 413 set out different variations of the offence of dishonestly stolen property, while s 414 criminalises the assisting in concealment or disposal of stolen property.

2 The definition of “stolen property” (s 410(1)) and the simplest form of the offence of DRSP (s 411(1)) are set out below, for reference:

Stolen property

410.—(1) Property the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which criminal breach of trust or cheating has been committed, is designated as “stolen property”, whether the transfer has been made or the misappropriation or breach of trust or cheating has been committed within or without Singapore. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Dishonestly receiving stolen property

411.—(1) Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the property to be stolen property, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.

Impetus for review

3 Although the offence of DRSP was originally created to deal with persons who ‘fence’ stolen property *eg* by purchasing it from thieves, in recent years it has had a new lease of life

as a money-laundering offence, complementing those in the ss 46 and 47 of the CDSA (“CDSA money-laundering”).⁷

4 In spite of this, the law governing DRSP has diverged from that governing CDSA money-laundering offences in two crucial areas.

5 The first divergence is the standard of proof required to show that the property that is the subject of the charge was ‘stolen property’, *ie* whether a predicate offence had been committed in respect of the property. In *Li Huabo v PP*⁸ at [18], the High Court suggested support for a requirement that the predicate offence be proven beyond reasonable doubt (although leaving the question open). If this is indeed the law, DRSP would be a very difficult offence to prosecute, as it would require two offences to be proven beyond reasonable doubt: the predicate offence and the subsequent offence of DRSP.

6 In contrast, s 47A(1) of the CDSA provides that for CDSA money-laundering, “it is not necessary for the prosecution to prove the particulars of [the predicate offence]”. This is a legislative codification of the finding in *Ang Jeanette v PP*⁹ at [58], which further elaborated that it is sufficient for the Prosecution to adduce “some evidence linking the moneys in question with ... some act that may constitute one or other of the [predicate offences] listed in the Second Schedule”.

7 The second area of divergence is in the *mens rea* requirement of the offences. Here, there are two points of deviation.

(a) First, a common *mens rea* requirement of almost all the DRSP offences (ss 411, 413, 414) is knowledge or reason to believe that property is stolen property. Stolen property is in turn defined as property obtained through one of a closed list of specific criminal offences¹⁰. In other words, a person must know or have reason to believe that the property they are receiving was obtained through an offence on this closed list. In many cases, an accused person may know they are receiving property obtained dishonestly, or even through a criminal offence, without knowing or contemplating the specific offence or means by which it was obtained. The present offence of DRSP does not clearly cover such cases. In contrast, s 47A(2) of the CDSA states that for the purpose of proving the *mens rea* for CDSA money-laundering, it is sufficient that the accused person knows or has reasonable grounds to believe that the property constitutes or represents “the benefits of an offence generally”, and it is not necessary to prove that the person knew or had reasonable grounds to believe that it constitutes or represents the benefits of a particular offence.

(b) Second, dishonesty is an element of DRSP under ss 411 and 412, but not of CDSA money-laundering. A requirement of dishonesty is a poor fit with the element of “reason to believe” that property is stolen property. If a person has reason to believe

⁷ For background on DRSP’s relevance to the money-laundering context, see *Ang Jeanette v PP* [2011] 4 SLR 1, especially at [67]–[69].

⁸ [2014] 3 SLR 1308.

⁹ [2011] 4 SLR 1.

¹⁰ Theft, extortion, robbery, criminal misappropriation, criminal breach of trust, and cheating. These are essentially all the offences of dishonesty or fraud by which property can be obtained in the Penal Code.

but no actual knowledge that the property he is receiving is stolen property, it is for all practical purposes impossible for him to also be receiving it dishonestly, because he would not know that he was making a wrongful gain or causing a wrongful loss. Such knowledge is an essential component of dishonesty: see *Ang Teck Hwa v PP*¹¹ at [36]. This combination of elements is internally contradictory and tends to render the element of “reason to believe” otiose. Indeed, dishonesty is not currently an element of offences under ss 413 and 414 of the Penal Code (habitually dealing in stolen property and assisting in concealment or disposal of stolen property respectively). In other words, there is inconsistency in *mens rea* even within the class of Penal Code offences closely related to DRSP.

Recommendation 22(a): Amend s 410 to state that for the purposes of proving whether any property is stolen property under any offence under ss 411 – 414 of the Penal Code, it is not necessary for the Prosecution to prove the particulars of any offence by which property became designated as stolen property

8 The PCRC recommends addressing the first divergence by amending s 410 of the Penal Code to state that for the purposes of proving whether any property is stolen property under any offence under ss 411– 414 of the Penal Code, it is not necessary for the Prosecution to prove the particulars of any offence by which property became designated as stolen property. It is sufficient that the Prosecution adduce some evidence linking the property in question with an act that may constitute one or other of the offences listed in s 410(1) of the Penal Code.

Recommendation 22(b): Amend the *mens rea* in ss 411, 413 and 414 to knowledge or reason to believe that the property was “obtained in whole or in part through any criminal offence involving fraud or dishonesty”, and abolish the requirement of dishonesty in ss 411 and 412

9 The PCRC recommends addressing the second divergence by:

- (a) Amending *mens rea* requirement ss 410, 413 and 414 to knowledge or reason to believe that the property was “obtained in whole or in part through any criminal offence involving fraud or dishonesty”. It is not necessary for the Prosecution to prove that the accused person knew or had reason to believe that the property was obtained through any particular offence. However, this amendment should not apply to s 412 (dishonestly receiving property stolen in the commission of a gang-robbery), as that offence prescribes a higher punishment on account of the presence of a specific *mens rea* – knowledge that gang-robbery was used to obtain property.
- (b) Abolishing the requirement of dishonesty in ss 411 and 412. These offences should also be renamed to remove any reference to dishonesty.

¹¹ [1987] SLR(R) 513.

SECTION 10.4: CHEATING

SUMMARY OF RECOMMENDATIONS

(23) Amend ss 415 and 420 to include situations where the person deceived causes the delivery of property to any person

Introduction and current law

The offences of cheating (s 415), and cheating and dishonestly inducing a delivery of property (s 420) cover scenarios where an accused person has deceived someone else and caused the person so deceived to deliver property to any person.

Cheating

415. Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to “cheat”.

Cheating and dishonestly inducing a delivery of property

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

Impetus for review

2 A common scenario which occurs is where an accused person deceives someone with the motive of acquiring property dishonestly, but the one deceived instructs another person to deliver the property to the accused: for example, where an offender submits a fraudulent sales order to a company employee in charge of sales, who then instructs a different employee in charge of logistics to deliver the items to the offender. This situation is not neatly captured in the present wording of the cheating offence, but will become increasingly common as companies with complex and decentralised operations become the target of cheating offences.

Recommendation 23: Amend ss 415 and 420 to include situations where the person deceived causes the delivery of property to any person

3 The PCRC recommends amending ss 415 and 420 to state that cheating is committed where a deception dishonestly induces the person deceived to “deliver or cause the delivery of property to any person”.

SECTION 10.5: FALSIFICATION OF ACCOUNTS

SUMMARY OF RECOMMENDATIONS

(24) Amend s 477A to include the falsification of “a set of” materials

Introduction and current law

Section 477A criminalises the falsification of accounts:

Falsification of accounts

477A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully and with intent to defraud destroys, alters, conceals, mutilates or falsifies any book, electronic record, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book, electronic record, paper, writing, valuable security or account, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

Impetus for review

2 In present commercial practice, it is extremely common for accounts to be kept in electronic form. It is possible for numerous line items or data fields in such electronic accounts to be altered and falsified with a single operation. In such circumstances, enforcement agencies and the Prosecution face three problems. These are (i) conceptual difficulties in defining what constitutes a single electronic record, *eg* whether it is a single spreadsheet file, a tab within that file, or a cell within one of those tabs; (ii) the resource burden of managing a large number of charges arising from a single act that alters numerous accounting data, and (iii) arbitrariness, in that different accused persons doing the same act of falsification may face different numbers of charges purely based on the system used to organise the electronic accounts.

Recommendation 24: Amend s 477A to include the falsification of “a set of” materials

3 To resolve these difficulties, the PCRC recommends an amendment to s 477A to allow a single charge to be tendered in respect of falsification of “a set” of books, electronic records, papers, writings, valuable securities or accounts, *ie* s 477A will be amended to state “any book, electronic record, paper, writing, valuable security or account or set thereof”.

4 If necessary, an Explanation can be drafted stating that such materials form a “set” if they serve the same function in relation to the employer’s affairs.

SECTION 11: TERRORIST HOAXES AND NEW OFFENCES RELATING TO ACTS TRIGGERING EMERGENCY RESPONSES

SUMMARY OF RECOMMENDATIONS

- (25) *Introduce a new offence of placing any article in any place whatever, or dispatching any article by post or any means whatever of sending things from one place to another, with the intention of inducing in any person a belief that this article is likely to cause hurt or damage to property by any means*
- (26) *Port the existing bomb hoax transmission offence under s 45 of the TA into the Penal Code, and expand the offence to cover hoax transmissions about threats other than bombs*
- (27) *Introduce a new offence of committing a rash act which triggers an emergency response*

Introduction

We currently live in an environment that has a heightened risk of terrorist attacks, as seen in a number of serious incidents that occurred around the world in recent years. This means that emergency services must be on alert and respond decisively to any sign that might be indicative of possible imminent terror attacks. Triggering emergency responses can be costly and disruptive, as they may include the evacuation and sealing-off of public spaces and the shutting down of public infrastructure such as public transport networks and roads. These are in addition to the inherent costs of activating emergency services.

2 In the interests of public safety, emergency services are obliged to respond to such incidents even though not every incident will turn out to be a real terrorist attack. It is therefore important to deter acts that unnecessarily trigger an emergency response.

Current law

3 Section 45(a) of the TA makes it an offence to transmit a false message referring to a bomb or other thing liable to explode or ignite, punishable with up to 7 years' imprisonment or a fine of up to \$50,000:

Sending false message

45. Any person who transmits or causes to be transmitted a message which he knows to be false or fabricated shall be guilty of an offence and shall be liable on conviction —

- (a) in the case where the false or fabricated message contains any reference to the presence in any place or location of a bomb or other thing liable to explode or ignite, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 7 years or to both; and
- (b) in any other case, to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 3 years or to both.

Impetus for review

4 While s 45 of the TA covers some terrorist hoaxes, there are two scenarios that currently fall outside the scope of s 45:

- (a) Hoaxes that do not involve transmitting a message, or
- (b) Hoaxes that concern threats other than bombs or similar devices (such as chemical, biological or radiological agents).

Recommendation

Recommendation 25: Introduce a new offence criminalising the placing of any article in any place whatever, or dispatching any article by post or any means whatever of sending things from one place to another, with the intention of inducing in any person a belief that this article is likely to cause hurt or damage to property by any means

5 The PCRC recommends creating a new offence of placing any article in any place whatever, or dispatching any article by post or any means whatever of sending things from one place to another, *with the intention of inducing* in any person a belief that this article is likely to cause hurt or damage to property by any means. It shall not be necessary for the offender to have any particular person in mind in whom he intends to induce the relevant belief.¹ This should be punishable with up to 7 years’ imprisonment or a fine of up to \$50,000, which is similar to the offence in s 45(a) of the TA. While it is conceivable that a terrorist hoax may take a form outside this wording, such forms should generally be covered by the offence of criminal intimidation in s 503 read with s 506 of the Penal Code.

Recommendation 26: Port the existing bomb hoax transmission offence under s 45 of the TA into the Penal Code, and expand the offence to cover hoax transmissions about threats other than bombs

6 On a related note, the PCRC also recommends that the existing bomb hoax transmission offence under s 45(a) of the TA be ported into the Penal Code, and expanded to cover hoax transmissions about threats other than bombs. This will bring all offences relating to terrorist hoaxes within the same piece of legislation.

7 The wording of s 45(a) of the TA could be amended as follows, before being ported into the Penal Code:

Sending false message

45. Any person who transmits or causes to be transmitted a message which he knows to be false or fabricated shall be guilty of an offence and shall be liable on conviction —

- (a) in the case where the false or fabricated message contains any reference to the presence in any place or location of ~~a bomb or other thing liable to explode or ignite~~ any article likely to cause hurt or damage to property by any means, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 7 years or to both

¹ This is a modified form of the bomb hoax offence in ss 51(1) and 51(3) of the Criminal Law Act 1977 (c. 45) (England and Wales).

Recommendation 27: Introduce a new offence of committing a rash act which triggers an emergency response

Current law

8 Acts short of intentional terrorist hoaxes (which would be covered by the proposed provision in Recommendation 1) that may trigger an emergency response are at the moment only punishable as public nuisance under s 268 read with s 290 of the Penal Code:

Public nuisance

268. A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Punishment for public nuisance

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to \$1,000.

Impetus for review

9 The maximum sentence of \$1,000 does not seem sufficient in situations where the offender *knew his act carried a real risk* of triggering an emergency response but took that risk regardless. This is demonstrated by the significant disruption of service to the public and waste of emergency services' resources during two recent incidents at MRT stations.²

Recommendation

10 The PCRC therefore recommends creating a new offence of intentionally placing any article in any place whatever, or dispatching any article by post or any means whatever of sending things from one place to another, *knowing that there is a real risk* that any person would believe that this article is likely to cause hurt or damage to property by any means.³

11 This offence should be punishable with imprisonment for up to 6 months or a fine not exceeding \$5,000 or both, which is similar to that for intentionally causing alarm or distress under s 3 of the POHA.

² Chew Hui Min and Ng Jun Sen, "Police arrest man, 39, for leaving bag unattended at Hougang MRT station" *The Straits Times* (updated 3 April 2017) <<http://www.straitstimes.com/singapore/trains-to-skip-hougang-station-due-to-security-incident> and *Straits Times*> (accessed on 13 August 2018) and Lee Min Kok, Seow Bei Yi and Lydia Lam, "Woodleigh MRT incident: Man, 69, arrested for leaving substance, which turns out to be flour, at station." *The Straits Times* (18 April 2017) <<http://www.straitstimes.com/singapore/woodleigh-mrt-station-closed-due-to-security-incident-police-say-suspicious-substance>.> (accessed May 16, 2017)

³ This *mens rea* requirement is essentially rashness as defined in *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [65].

SECTION 12: VOYEURISM

SUMMARY OF RECOMMENDATIONS

- (28) *To create a specific offence involving the observation of a person in circumstances where the person could reasonably expect privacy*
- (29) *To create specific offences involving the making, distribution, possession and accessing voyeuristic recordings*

Introduction

"Voyeurism" refers to situations where an offender observes or records (whether by filming, photography or otherwise) someone who is engaged in circumstances of undress or intimacy. It also refers to situations where the observance or recording is of a person who has a reasonable expectation of privacy.

2 Voyeurism is a recognised psychiatric disorder. The High Court had the opportunity to consider this disorder and the effect it had on offending behaviour in *Chong Hou En v PP* [2015] 3 SLR 222. After considering expert psychiatric evidence, the High Court was clear that voyeurism is not an impulse-control disorder. The mental faculties of a person diagnosed with voyeurism are nimble, with the unfettered ability to cogitate and plan coherently and deliberately.

Current law

3 The observance and recording of someone who is engaged in circumstances of undress or intimacy or of someone who has a reasonable expectation of privacy is one aspect of voyeuristic behaviour. Another aspect involves the possession and distribution of images taken in such circumstances. Neither aspect is addressed by a specific provision in current law.

4 Depending on the offending behaviour and gender of the victim, the provisions that are most commonly used to address voyeuristic behaviour are set out below:

S/N	Offence	Provision
1.	Section 509, Penal Code (insult of modesty)	<p>Insulting the modesty of a woman</p> <p>Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.</p>
2.	Section 29, FA (making of obscene films)	<p>Offences involving dealings in obscene films</p> <p>Any person who makes or reproduces any obscene film (whether or not for the purposes of exhibition or distribution to any other person), knowing or having reasonable cause to believe the film to be obscene shall be guilty of an offence and shall be liable on conviction —</p> <p>(a) to a fine of not less than \$20,000 but not more than \$40,000 or to imprisonment for a term not exceeding 2 years or to both; and</p> <p>(b) in the case of a second or subsequent conviction, to a fine of not less than \$40,000 but not more than \$100,000 or to imprisonment for a term not exceeding 2 years or to both.</p>
3.	Section 30, FA (possession of obscene films)	<p>Possession of obscene films</p> <p>(1) Any person who has in his possession any obscene film shall be guilty of an offence and shall be liable on conviction to a fine of not less than \$500 for each such film he had in his possession (but not to exceed in the aggregate \$20,000) or to imprisonment for a term not exceeding 6 months or to both.</p> <p>(2) Any person who has in his possession any obscene film knowing or having reasonable cause to believe the film to be obscene shall be guilty of an offence and shall be liable on conviction:</p> <p>(a) to a fine of \$1,000 for each such film in his possession (but not to exceed in the aggregate \$40,000) or to imprisonment for a term not exceeding 12 months or to both; and</p> <p>(b) in the case of a second or subsequent conviction, to a fine of not less than \$2,000 for each such film in his possession (but not to exceed in the aggregate \$80,000) or to imprisonment for a term not exceeding 2 years or to both.</p>

Impetus for review

5 The existing law is inadequate to address the serious problems that technology has created. There is a bustling market online for "upskirt" videos and photos but the current law neither acknowledges nor is adequate to address this phenomenon. A patchwork of laws has to be relied on to deal with the many components involved in the market for voyeuristic content. An obvious lacuna is the absence of any provision to deal with the possession of voyeuristic still images (*ie* not films or videos).

6 While several jurisdictions like the UK (England and Wales)¹, New Zealand², Scotland³, and Australian states (like Victoria⁴ and the New South Wales⁵) have introduced new criminal offences to deal with these challenges, Singapore has not done so yet.

7 The existing law is especially inadequate to deal with the surreptitious recording of others in circumstances of undress or intimacy and the dissemination of such recordings. There are four important ways filming or recording are in a different realm from the conventional "Peeping Tom" cases:

- (a) The photograph or recording makes a permanent image.
- (b) Photographs and recordings can reveal more than one would see through casual observation, especially through the opportunity for repeated scrutiny or the enlargement possibilities of modern technology.
- (c) Photographs and recordings permit dissemination to a much larger audience and to people beyond those anticipated by the victim.
- (d) Technology enables people to make images that are not readily accessible to the eye, whether through long-range lenses or cameras placed below women's dresses and skirts.

8 The fact that s 509 of the Penal Code is gender-specific further creates an anomaly in the way offenders are prosecuted and sentenced. In a recent case, *PP v Colin Teo Han Jern*⁶, the District Court observed that Parliament had not seen fit to render it an offence to insult the modesty of a man. According to the District Court, the fundamental question as to whether a man's modesty could be insulted was for Parliament to resolve. On this basis, the court declined to use sentencing benchmarks in relation to an offence under s 509 of the Penal Code although the wrongdoing committed was similar.

Recommendations

Recommendation 28: To create a specific offence involving the observation of a person in circumstances where the person could reasonably expect privacy

¹ SOA 2003 s 67.

² Crimes (Intimate Covert Filming) Act.

³ Sexual Offences (Scotland) Act 2009 (2009 asp 9) s 9.

⁴ Summary Offences Act 1966 s 41 A-C.

⁵ Crimes Act 1900 (NSW) (Act 40 of 1990) s 91J.

⁶ [2017] SGMC 74.

9 The PCRC recommends the creation of an offence to cover the conventional "Peeping Tom" who *observes* another person in circumstances where the person could reasonably expect privacy.

10 Therefore, it will be an offence for any person to intentionally observe another person in circumstances where he can reasonably expect privacy without the consent of that person.

11 The term, "circumstances where he can reasonably expect privacy", should be left open-ended. This is similar to the position in England and Wales. The English provision refers to "a place which, in the circumstances, would reasonably be expected to provide privacy". This is determined objectively and will vary according to the circumstances. For example, in an open-plan changing room, a person does not have a reasonable expectation of privacy in respect of casual observation by other users of the changing room. There would, however, be a reasonable expectation of privacy from being observed by someone who had drilled a hole in the shower wall for that purpose.

12 The following factors may be considered in determining whether a person was in circumstances where he could reasonably expect privacy:

- (a) if he or she was nude or had his or her genitals, pubic area, buttocks, or her breasts exposed or partially exposed; or was
- (b) engaged in sexual activity; or
- (c) engaged in showering, toileting, or other personal bodily activities that involve dressing or undressing.

13 The term, "sexual activity", will mirror the definition in s 377C(d) of the Penal Code. Therefore, an activity will be considered "sexual" if:

- (a) because of its nature it is sexual, whatever its circumstances or any person's purpose in relation to it may be; or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) is sexual.

Recommendation 29: To create specific offences involving the making, distribution, possession and accessing of voyeuristic recordings.

Making of voyeuristic recordings

14 The PCRC recommends the creation of an offence to cover situations: (a) where someone *makes a recording* of a person who is in circumstances where he can reasonably expect privacy; or (b) where a recording was made under a person's clothing for the purpose of viewing his genitals, pubic area, buttocks, or breasts.

15 It will be offence for any person:

- (a) to intentionally or knowingly make or intend to make a visual recording of a person who is in circumstances where he can reasonably expect privacy,
- (b) without the consent of the person who is the subject of the recording.

16 The offence includes the alternative *mens rea* of "knowingly" to address those cases where those who deliberately leave a recording device in a changing room (or in any circumstances where a person can reasonably expect privacy) knowing that someone would be filmed.

17 The term, "circumstances where he can reasonably expect privacy", has the same meaning as that set out at [11]-[12] above.

18 This offence will include situations where a person intends to make voyeuristic recordings. Thus, someone who takes active steps to make such voyeuristic recordings but factually fails to record any, would be caught under the offence. To illustrate, if a person places a recording device in a bathroom cubicle with the intention to make voyeuristic recordings but the device is discovered before any recordings can be made, this will be an offence.

19 The PCRC considered whether consent should be presumed in cases where someone makes a recording of an individual who is in circumstances where he can reasonably expect privacy. Typically, voyeuristic recordings (such as "upskirt" photographs and recordings) do not capture features that can identify the person recorded. Even if they do, investigators will face an uphill task identifying and then locating the person depicted in the recordings.

20 The PCRC is of the view that it is far easier for the person who made the recording to prove that he had the consent of the person depicted in the recording than for investigators to prove that the person depicted had not given such consent. Therefore, the PCRC is of the view that where a person is proven to have made a recording in circumstances where he or she can reasonably expect privacy, it will be *presumed* that the person depicted had not consented to being recorded in any way. The burden will be on the recorder of the voyeuristic image to prove, on a balance of probabilities, that the recording was made with the consent of the person depicted in the recording.

Distribution of voyeuristic recordings

21 The PCRC recommends the creation of an offence to address the intentional distribution of voyeuristic recordings. The PCRC considers that this offence is necessary to complement the offence of making a voyeuristic recording. Specifically, it will be an offence for anyone to:

(a) intentionally distribute a voyeuristic recording; or

(b) have a voyeuristic recording in his possession for the purposes of distribution;

knowing or having reason to believe that the recording was made in the circumstances described at [11]-[12] above.

22 Similar to the offence involving child abuse material, the term “distribute” should be defined to include:

(a) the publication, exhibition, communication, sending, supplying, selling or transmitting the material to any other person or the possession of such material for any of these purposes; or

(b) making the material available for access by any person.⁷

Possession and accessing voyeuristic recordings

23 The PCRC recommends that there should be a separate offence of simple possession. Possession of voyeuristic recordings perpetuates the initial privacy intrusion. Such an offence would be directed at the "demand" end of the chain and reinforce the policy behind the proposed offences.

24 The PCRC further recommend that accessing voyeuristic recordings should be prohibited conduct. This recognises the fact that the Internet has obviated the need for anyone to actually possess voyeuristic recordings in the form of physical copies. Such recordings can simply be viewed on or streamed from a website.

25 It will be an offence for a person who:

(a) without reasonable excuse;

(b) accesses or possesses a recording;

(c) knowing or having reason to believe that the recording was obtained through the commission of the offence of making a voyeuristic recording.

26 There are two requirements built into the offence to ensure that the offence is not overly broad:

(a) To require that the accessing or possession of voyeuristic recordings must be "without reasonable excuse". Examples of what constitutes "reasonable excuse" should be provided. The PCRC suggests that where a person comes into unsolicited possession of voyeuristic recordings and takes reasonable steps to cease possession of the material as soon as it is practicable to do so, this should amount to "reasonable excuse".

(b) To require the possessor or accessor to know or have reason to believe that the image had been unlawfully recorded or distributed.

⁷ This is meant to capture the sending of voyeuristic recordings in an email or uploading the material to a website for others to view or download.

Punishment for the offences

27 The PCRC recommends the following scheme of punishments:

S/N	Offence	Maximum punishment where the victim is below 14 years of age	Maximum punishment in any other case
1.	Observance	Mandatory imprisonment of up to two years, or fine, or caning, or any combination of such punishments.	Discretionary imprisonment of up to two years, or fine, or both.
2.	Accessing and possession of voyeuristic recordings		
3.	Making of a "voyeuristic" recording	Mandatory imprisonment of up to two years, or fine, or caning, or any combination of such punishments.	Discretionary imprisonment of up to two years, or fine, or both, and optional caning.
4.	Distribution of voyeuristic recordings	Mandatory imprisonment of up to five years, or fine, or caning, or any combination of such punishments.	Discretionary imprisonment of up to five years, or fine, or caning, or any combination of such punishments.

28 In proposing the maximum punishments for the four new offences, the PCRC considered that:

- (a) The punishments prescribed must reflect the differences in the four new offences as far as the objective severity of the offences is concerned.
- (b) The punishments prescribed should be sufficient as a general deterrent to protect people in circumstances where they can reasonably expect privacy and as denunciation of such conduct.

29 Some PCRC members were of the view that the punishment prescribed for the making of voyeuristic recordings should be similar to that prescribed for distributing voyeuristic recordings. The majority considered that, generally, apprehended offenders are usually found to be in possession of multiple voyeuristic recordings. Therefore, multiple charges are preferred against him. Therefore, it is important that the cumulative effect of such multiple charges is taken into account when considering the maximum punishments for these offences.

30 Under the PCRC's recommended scheme of punishment, the maximum imprisonment terms for the offences of (a) observance; (b) accessing and possession; and (c) making of a "voyeuristic" recording will be the same. Reference has been taken from the offence of making an obscene film under section 29(1) of the FA in determining what the appropriate punishment scheme should be for the three offences outlined above.

31 The PCRC recommends a substantially higher maximum prescribed punishment for the offence of distributing or possessing for the purpose of distributing voyeuristic recordings. This offence involves suppliers of voyeuristic recordings and it is necessary that the punishments prescribed are adequate to deter the proliferation of such recordings. The wide range of punishment prescribed is intended to give the courts flexibility in terms of sentencing. The

punishment proposed will be sufficient to address cases involving repeat offenders or where the distribution is done for monetary profit.

32 Finally, the PCRC proposes that *discretionary* caning be an option for the offence of (a) making of a "voyeuristic" recording; and (b) the offence of distributing or possessing for the purpose of distributing voyeuristic recordings. In terms of the spectrum of offending behaviour, these are the two most serious offences. What distinguishes these offences from the other two offences is the fact that these two offences involve the creation or proliferation of a permanent record that is capable of being repeatedly scrutinised. Discretionary caning is also proposed for all voyeurism offences committed against victims who are minors below 14 years old, as these offences are especially serious due to the young age of the victims.

Conclusion

33 The introduction of the specific offence of "voyeurism" will serve to clearly define and provide punishments for these offences, regardless of the gender of the victims. This will ensure that the law continues to provide for consistent and proportional outcomes based on the seriousness of the offences committed.

SECTION 13: DISTRIBUTING OR THREATENING TO DISTRIBUTE INTIMATE IMAGES

SUMMARY OF RECOMMENDATIONS

(30) Create a new offence criminalising the distribution of, or the threat to distribute, an intimate image

Introduction

"Revenge pornography" is a media-generated term to describe the distribution of nude, semi-nude, or other sexual images without consent. The term, however, is a misnomer and has been widely rejected by scholars, practitioners, and lawmakers for two reasons. First, not all perpetrators are motivated by revenge. Second, not all images are pornographic or serve the purpose of pornography.

Current law

2 The Penal Code does not have a specific offence that criminalises the distribution of nude, semi-nude, or other sexual images without consent. The provisions that are most commonly used to address such conduct are set out below:

S/N	Offence	Provision
1.	Section 292(a) of the Penal Code	<p>Sale of obscene books etc.</p> <p>Whoever sells, lets to hire, distributes, transmits by electronic means, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, transmission, public exhibition or circulation, makes, produces, or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure, or any other obscene object whatsoever shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.</p>
2.	Section 383 punishable under s 384 of the Penal Code	<p>Extortion</p> <p>383. Whoever intentionally puts any person in fear of any harm to that person or to any other person, in body, in mind, reputation or property, whether such harm is to be caused legally or illegally, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".</p> <p>384. Whoever commits extortion shall be punished with imprisonment for a term of not less than 2 years and not more than 7 years and with caning.</p>
3.	Section 503 punishable under	<p>Criminal intimidation</p>

S/N	Offence	Provision
	s 506 of the Penal Code	<p>503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.</p> <p>506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or with imprisonment for a term which may extend to 7 years or more, or impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.</p>

Impetus for review

3 The proliferation of the Internet and smart phones has made it extremely easy for images to be created, uploaded, and downloaded on various platforms, and very difficult for such images to be removed. Existing law should be updated to respond to this contemporary phenomenon. While several jurisdictions like the UK (England and Wales)¹, Canada², New Zealand³, Scotland⁴, and the majority of Australian states and territories (such as Victoria⁵, New South Wales,⁶ and Australian Capital Territory⁷) have introduced new criminal offences to deal with these challenges, Singapore has not done so yet.

4 A stronger and consistent response is required to address the actual or threatened distribution of nude, semi-nude, sexual or sexually explicit images without consent. The PCRC considered three recent cases to illustrate the point that our reliance on a patchwork of existing provisions may lead to an inconsistent legal response to cases where the offending conduct is similar:

- (a) *PP v Lu Yi*⁸: The accused and his girlfriend had exchanged nude photographs when they were in a relationship between June and August 2015. They parted ways in January 2016 because his girlfriend found him abusive. The accused continued sending her text messages after they broke up and had a dispute over an event. When the accused discovered that the victim was communicating with another man, he decided to

¹ SOA 2003 s 33.

² Canadian Criminal Code s 162.1.

³ Harmful Digital Communications Act 2015 s 22.

⁴ Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 2.

⁵ Summary Offences Act 1966 s 41DA and 41DB.

⁶ Crimes Act 1900 (NSW) (Act 40 of 1990) s 91Q and 91R.

⁷ *Id.*, at Crimes Act 1900 (ACT) s 72C and 72E.

⁸ Unreported. See Elena Chong, "Man sent ex-girlfriend's nude photos to website", *The Straits Times* (4 April 2017) <<https://www.straitstimes.com/singapore/courts-crime/man-sent-ex-girlfriends-nude-photos-to-website>> (accessed 11 August 2018).

disseminate her nude photographs (together with her name, school details, and e-mail address) to the web administrator of a Tumblr page. Eight of these nude photographs were uploaded and viewed. The photographs were removed after several hours. The victim felt embarrassed, ashamed, and guilty. The accused was charged for an offence under s 292(a) of the Penal Code, which carries a maximum imprisonment term of three months. He was sentenced to 4 weeks' imprisonment.

(b) *PP v Daryl Cheong Zhi Yong*⁹: The accused threatened to distribute nude photographs of his girlfriend to her parents when she refused to sign up for two mobile phone plans for him. Out of fear, his girlfriend complied and subscribed to two different plans worth \$1,455 and \$1,688. He pleaded guilty to a charge of extortion and was sentenced to 2 years' imprisonment (mandatory term of imprisonment) and 2 strokes of the cane.

(c) *PP v Mohamed Hirwandie Mohd Hashim*¹⁰: The accused threatened to post nude photographs of a woman he befriended online and had never met when she ended all contact with him. Several months later, he stumbled on the victim's online profile on Facebook. The accused created an account using a moniker and tried to add the victim as a friend on Facebook. When she did not accept his request, he forwarded a screenshot of her nude photographs to her in a bid to underscore the gravity of his threats. He threatened to circulate her nude photographs among her family, friends, school, and online sex forums. She finally agreed to meet him but had alerted the police of their arrangement to meet. The accused was sentenced to 4 months' imprisonment.

5 The PCRC noted that the case (*PP v Lu Yi*) which involved the actual distribution of intimate images and harm to the victim (in terms of causing her embarrassment) attracted the lowest sentence.

Recommendation 30: Create a new offence criminalising the distribution of, or the threat to distribute, an intimate image

6 To overcome the difficulties presented by the current state of the law and ensure consistency in legal response to conduct involving "revenge pornography", the PCRC recommends creating a new offence of "distributing or threatening to distribute an intimate image".

7 The PCRC is of the view that the term, "revenge pornography", is neither appropriate nor accurate to describe the distribution of nude, semi-nude, or sexual images. For the law to condemn a private and intimate image as "obscene" (as it currently does under s 292(a) of the Penal Code) or "pornography" may further insult and humiliate the person depicted in those images.

8 In addition, the distribution or threat to distribute such images may not necessarily be motivated by a demand for something in return.

⁹ Unreported.

¹⁰ Unreported. See Elena Chong, "Designer jailed for threat to circulate woman's nude photos, fined \$23K for obscene video films", *The Straits Times* (4 April 2017) < <https://www.straitstimes.com/singapore/courts-crime/designer-jailed-for-threat-to-circulate-womans-nude-photos-fined-23k-for>> (accessed 11 August 2018).

Elements of the offence

9 The PCRC recommends adopting the term, "intimate image", to describe the nature of images that should be captured by the new offence. An "intimate image" is defined as:

- (a) A visual recording (which may be in the form of a photograph, film or video recording) in which a person is nude (whether partially or fully) or is engaged in sexual activity; or
- (b) A visual recording that has been *altered* to show that a person is nude or is engaged in sexual activity.

10 The term, "sexual activity", will mirror the definition in s 377C(d) of the Penal Code. Therefore, an activity will be considered "sexual" if:

- (a) because of its nature it is sexual, whatever its circumstances or any person's purpose in relation to it may be; or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) is sexual.

11 In relation to the scope of the offending behaviour, the PCRC recommends adopting the position in Scotland and several Australian states and territories (such as Victoria, New South Wales, and Australian Capital Territory) which makes it an offence for a person to *threaten* the distribution of intimate images (in addition to criminalising the actual distribution of such images).

12 The PCRC is of the view that there should be no requirement to prove the offender's motivation in distributing or threatening to distribute the images. There may be a variety of reasons why a person may distribute or threaten to distribute such images – he could be motivated by revenge, malice, or neither. An offender's motive should be irrelevant as far as the commission of the offence is concerned. Undoubtedly, this would be a factor to consider in terms of sentencing.

13 It will hence be an offence for anyone to intentionally or knowingly distribute an intimate image of another person without the consent of that person and knowing or knowing it likely that such conduct would cause that person harassment, alarm, or distress. In addition, it will be an offence for anyone to *threaten* the distribution of an intimate image of another person without the consent of that person and knowing or knowing it likely that such conduct would cause that person harassment, alarm, or distress.

Punishment for the offence

14 The PCRC recommends that the new offence of distributing or threatening to distribute an intimate image be punished as follows:

- (a) Where the offence is committed against a victim below 14 years of age, the prescribed punishment should be mandatory imprisonment of up to five years, or fine, or caning, any combination of such punishments.

- (b) Where the offence is committed in any other case, the prescribed punishment should be discretionary imprisonment of up to five years, or fine, or caning, any combination of such punishments.

15 Two reasons justify this recommendation.

16 First, the punishment should be pegged to two comparable offences. These offences are: (a) criminal intimidation under s 503 punishable under s 506 which carries a maximum term of two years' imprisonment; and (b) extortion under s 383 which carries a mandatory minimum term of two years' imprisonment and a maximum term of seven years' imprisonment in addition to mandatory caning.

17 Second, the spectrum of punishment prescribed should be able to accommodate egregious cases (*eg* where the image is actually distributed and where serious harm is caused to the victim). At the same time, the punishments prescribed should not be automatically harsh as a starting point in all cases because there could be less egregious (*eg* where an image is threatened to be distributed and the harm caused to the victim is not as serious).

Conclusion

18 With the proliferation of the Internet and smart phones, it is extremely easy for such intimate images to be uploaded and shared on various platforms, and very difficult for these images to be removed completely, causing the victim harm and distress. The introduction of the new offence of “distributing or threatening to distribute an intimate image” will provide a stronger and more consistent response to these actions.

SECTION 14: SEXUAL EXPOSURE

SUMMARY OF RECOMMENDATIONS

(31) Create a new offence relating to sexual exposure

Introduction

“Sexual exposure” refers to situations where an offender displays his genitals intending or knowing it likely that such display would humiliate or cause distress or fear to the observer. Such offenders are colloquially referred to as “flashers”.

Current Law

2 Today, the following laws may be used to punish such conduct:

S/N	Offence	Provision
1.	Section 27A(1), MOA	Appearing nude in public or private place Any person who appears nude – (a) in a public place; or (b) in a private place and is exposed to public view, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 3 months or to both.
2.	Section 294(a), Penal Code	Obscene songs Whoever, to the annoyance of others – (a) does any obscene act in any public place; or (b) sings, recites or utters any obscene song, ballad, or words in or near any public place, shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.
3.	Section 509, Penal Code	Word or gesture intended to insult the modesty of a woman Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Impetus for review

3 The current patchwork of laws presents the following challenges:

- (a) The *mens rea* for the provisions currently used to prosecute such conduct, particularly s 27 of the MOA and s 294(a) of the Penal Code, does not capture sexual or malicious motives.

- (b) The prescribed punishments are too low and do not capture the essence of the wrongdoing.
- (c) Section 27A of the MOA and s 294(a) of the Penal Code do not apply where the offender exposes his genitals in a private place. In such a situation, only prosecution under s 509 of the Penal Code is possible, but there are conceptual difficulties with using the broad wording in s 509 of the Penal Code to cover such a wide spectrum of conduct.
- (d) “Sexual exposure” is a sexual offence, and ought to be listed under Chapter XVI of the Penal Code (in the sub-Chapter on Sexual Offences), instead of Chapter XIV (Offences affecting the public tranquillity, public health, safety, convenience, decency and morals) or Chapter XXII (Criminal intimidation, insult and annoyance).

4 The following two cases involving serial “flashers” who were prosecuted differently and sentenced differently as a result, demonstrate the problems with ensuring consistency in this area of the law:

- (a) *PP v Budiman Shah Mohd Noreel Azman*¹: The accused exposed himself in public seven times in five months, targeting girls and women. He also molested a woman on a train. The accused had a string of convictions for exposing himself in public dating back to 2007, and had committed similar offences while he was on court bail. The victims he exposed himself to included girls between 12 and 15 years old, and some of his offences involved not just exposure but also touching himself. In relation to the acts of exposure and touching himself, the accused was charged under s 294(a) of the Penal Code for doing an obscene act. He was sentenced to a total of nine months’ imprisonment.
- (b) *PP v Samyapal Muthusamy*²: The accused had been fined and jailed numerous times between 1987 and 2013 for committing obscene acts in public places. In the latest instance, the accused had exposed and fondled himself in view of a woman on the train. He was sentenced to five months’ imprisonment for insulting the modesty of a woman under s 509 of the Penal Code.

5 The abovementioned cases were prosecuted under ss 249(a) and 509 of the Penal Code – neither offence captures the essence of the wrongdoing or their sexual motives. These cases would have been more appropriately characterised and punished as “sexual offences”.

6 Furthermore, in both offences, the nature of the offending was similar, but the offenders were prosecuted under different offences, with different prescribed penalties.

¹ Amir Hussain, “Serial flasher who exposed himself to 7 people and molested woman given 9 months’ jail”, *The Straits Times* (24 Oct 2016), <<https://www.straitstimes.com/singapore/courts-crime/serial-flasher-who-exposed-himself-to-7-people-and-molested-woman-given-9>> (accessed on 2 May 2018).

² Valerie Koh, “Extremely brazen flasher, 54, sentenced to five months jail”, *Today Online* (updated on 2 October 2015), <<https://www.todayonline.com/singapore/extremely-brazen-flasher-54-sentenced-five-months-jail>> (accessed on 2 May 2018).

Recommendation 31: Create a new offence relating to sexual exposure

7 To overcome the difficulties presented by the current state of the law and ensure consistency in legal response to conduct involving sexual exposure, the PCRC recommends creating a new offence of sexual exposure.

8 All the jurisdictions surveyed – England and Wales³, Ireland⁴, Scotland⁵ and Canada⁶ – have specific offences to deal with the public exposure of genitalia. While the Scottish and Canadian legislation focus on the sexual purpose or motive of the exposure (*viz.* that it be done for a “sexual purpose”, or for “sexual gratification”), the English and Irish provisions only require that the exposure be done with the intention of causing fear, alarm or distress.

9 The PCRC is of the view that there should be no requirement for the prosecution to prove that the sexual exposure was for a sexual purpose or for sexual gratification. From the perspective of protecting victims from “flashers”, it is irrelevant what the purpose of the exposure was. Concerns that the offence may be overly broad may be ameliorated by requiring knowledge on the accused's part that his exposure would cause or likely cause the victim fear, alarm, or distress.

10 Elements of the offence: It will be an offence for anyone to expose his genitals to anyone, whether in a private or public place, intending that someone will see them, and if he knew or knew it likely that his exposure would cause or likely cause the victim fear, alarm or distress.

- (a) The word “genitals” should be defined to refer to the male or female genitalia. This would exclude breasts, and breastfeeding mothers would therefore not be inadvertently caught by this new offence. It would also exclude the baring of one’s buttocks (colloquially called “mooning”, which is an act done for provocation or to express protest in some places), although this may constitute an obscene act under s 294(a) of the Penal Code.
- (b) As the offence requires an intention for someone to see the exposed genitalia, and knowledge that this exposure would cause or is likely to cause the victim fear, alarm or distress, this would rule out exposure for the purpose of medical examination, and the careless exposure of genitalia (such as when a person relieves himself in a place he believes to be deserted but is inadvertently seen by someone else).

³ Section 66 of the SOA 2003 makes it an offence to intentionally expose one’s genitals, intending that someone will see them, and be caused alarm or distress. The maximum sentence prescribed is 2 years’ imprisonment.

⁴ Section 45 of the Criminal Law (Sexual Offences) Act 2017 contains several offences involving exposure and offensive conduct of a sexual nature, intending to cause fear, distress or alarm to another person. On summary conviction, the offences are punishable with a fine or imprisonment for a term not exceeding six months or to both. On indictment, the offences are punishable with a fine or to imprisonment for a term not exceeding two years or to both.

⁵ Section 8 of the Sexual Offences (Scotland) Act 2009 makes it an offence to intentionally expose one’s genitals in a sexual manner to another person with the intention that the person will see them without that persons’ consent, and without any reasonable belief that the person consented. The offence is committed only where the accused’s purpose is to obtain sexual gratification or to humiliate, distress or alarm the victim.

⁶ Section 173(2) of the Canadian Criminal Code makes it an offence for a person who, in any place, for a sexual purpose, exposes his genital organs to a person who is under the age of 16 years. On indictment, the offence is punishable with an imprisonment term not exceeding two years and with a minimum punishment of 90 days’ imprisonment. On summary conviction, the offence is punishable with imprisonment for a term of not more than six months and to a minimum punishment for a term of 30 days’ imprisonment.

11 Punishment for the offence: The PCRC recommends that the new offence of sexual exposure be punished as follows:

- (a) Where the offence is committed against a victim who is below 14 years of age, the prescribed punishment should be imprisonment of up to two years, or fine, or caning, or any combination of such punishments. Discretionary caning may be appropriate where the accused is a serial offender who targets children, *eg* see the case of *PP v Budiman Shah Mohd Noreel Azman* above.
- (b) Where the offence is committed in any other case, the prescribed punishment should be imprisonment of up to one year, or fine, or both. This is on par with the maximum prescribed punishment in s 509 of the Penal Code.

Conclusion

12 The introduction of a specific offence relating to “sexual exposure” would sufficiently deal with the mischief of persons who intentionally expose their genitals to others with malicious motives. This will enable the law to provide a consistent and proportionate response to such offending behaviour, especially when serial offenders or children are involved.

CHAPTER 4: ENHANCING PROTECTION FOR VULNERABLE VICTIMS

SECTION 15: REPEAL OF MARITAL IMMUNITY FOR RAPE

SUMMARY OF RECOMMENDATIONS

(32) *Repeal ss 375(4) and 376A(5) of the Penal Code, which provide marital immunity for rape*

Introduction

Under TOR 2(b)(i), the PCRC is to “rationalise, recalibrate and modernise the substantive offences in the Penal Code, including proposals with respect to removing outmoded offences”. In this Chapter, the PCRC considered whether ss 375(4) and 376A(5) of the Penal Code, which provide marital immunity for rape, should be retained, amended, or repealed.

2 Societal expectations regarding the nature of conjugal relations within marriage are not homogenous and they continue to evolve over generations. Even within a single generation, expectations are not homogenous. It is therefore not surprising that various segments of society can have very different expectations as regards marital immunity for rape.

3 Nevertheless, the PCRC is of the view that it is difficult to disagree with the principle that all women should equally be protected from sexual abuse, regardless of their marital status, or the identity of the perpetrator. It is with this principle in mind that the PCRC has made the recommendations in this section.

Current law

4 The origin of marital immunity is attributed to a pronouncement in 1736 by then UK Chief Justice Matthew Hale that through marriage, a wife had irrevocably surrendered herself to sexual intercourse with her husband. Matrimonial consent to sexual intercourse given by the wife was taken to be irrevocable while the contract of marriage existed.

5 In 2007, Singapore’s Penal Code was amended to withdraw marital immunity under circumstances which signalled a breakdown in the marriage. Under ss 375(4) and 376A(5) of the Penal Code, a husband cannot be prosecuted for raping his wife, or sexually penetrating her if she is above 13 years of age, except under the following circumstances:

- (a) Both spouses are living apart *and*:
 - (i) are under an interim judgment of divorce or nullity, judicial separation or a written separate agreement;
 - (ii) proceedings have been commenced for divorce, nullity or judicial separation;
or
 - (iii) the wife has commenced proceedings to obtain a protection order against her husband;
- (b) there is a court injunction to restrain the husband from sexual intercourse with his wife; or
- (c) the wife has a protection order against the husband.

6 The full text of the marital immunity provisions (ss 375(4) and 376(5) of the Penal Code) is in the Annex.

7 This approach was grounded in the philosophy that the sanctity and intimacy of a marriage should be protected, and the law should not intrude into this private relationship. As articulated in Parliament during the Second Reading of the Penal Code (Amendment) Bill in 2007, instead of repealing marital immunity entirely, a calibrated approach was preferred to strike a balance between (a) preserving the conjugal rights and expression of intimacy in marriage; and (b) protecting women whose marriages were on the verge of a breakdown or had broken down and who had signalled a withdrawal of their implicit consent to conjugal relations.

8 The number of marital rape reports thus far remains low. From August 2008 to December 2015, the Police received 23 reports under s 375(4) and no reports under s 376A(5), made by wives against their husbands. The Police investigated all reports, and there have been *no prosecutions* under the marital rape provisions to date. However, it should be noted that these statistics describe cases which fall within the *exceptions* to marital immunity set out in s 375(4), and do not cover instances where marital immunity was exercised.

Impetus for review

9 Given that over a decade has elapsed since the 2007 reforms to marital immunity for rape, the PCRC considered whether the current provisions are adequate to afford all women equal protection from sexual abuse, regardless of their marital status, or the identity of the perpetrator.

Arguments for the full repeal of marital immunity for rape

10 Many Members of Parliament (MPs) have been vocal supporters of the repeal of marital immunity for rape. In the Parliamentary debates during the Second Reading of the Penal Code amendments in 2007, MPs raised the following arguments in support of the repeal of marital immunity:

- (a) The past rationale for marital immunity is no longer applicable since marriage in the modern context is seen as a partnership of equals – a woman does not give her husband the irrevocable consent to engage in sexual intercourse with her at any time;
- (b) Rape is a serious offence and a man should not be allowed to hide behind marriage to cause hurt to his wife;
- (c) Sexual violence would likely have occurred before any of the marital immunity exceptions would have come about – the law should not require the victim to first take legal steps to terminate her husband's marital immunity before she can be protected; and
- (d) Vulnerable wives (*eg* lowly-educated wives) who are dependent on their husbands are unlikely to be in a position to seek help and invoke the conditions required to withdraw marital immunity.

11 The United Nations (UN) General Assembly declared marital rape a human rights violation in 1993.¹ In the decade since the 2007 reforms were introduced, domestic and international groups have increased their calls for the complete repeal of marital immunity in Singapore. In 2009, local advocacy group “No to Rape” put together an online petition in 2009 calling for the repeal of marital rape immunity, which garnered slightly over 3,600 signatures.² In 2011, local non-Government Organisations (NGOs) such as the Association of Women for Action and Research (AWARE) called for the repeal of marital immunity in their submissions to the UN Committee on the Convention on the Elimination of Discrimination against Women (CEDAW), for Singapore’s fourth periodic report in July 2011.³ During Singapore’s second UN Universal Periodic Review (UPR) in 2016, four countries – Spain, Belgium, Colombia and Canada – recommended that Singapore criminalise marital rape.⁴ Ahead of the 68th Session of the UN Committee on CEDAW in October 2017, a coalition of 13 local NGOs⁵ submitted a joint Shadow Report calling for the repeal of marital immunity for rape.⁶ This call was echoed by the UN CEDAW Committee in its Concluding Observations on the fifth periodic report of Singapore, in which the Committee specifically called upon Singapore to revise its Penal Code to criminalise marital rape.⁷

12 Finally, there has been a marked global shift towards criminalising marital rape. There is no marital immunity for rape in *more than 100 countries*, including Australia, Canada, New Zealand, the United Kingdom (UK), the United States of America (USA), South Korea, the Philippines, and Thailand.

Arguments against full repeal of marital immunity for rape

13 The central argument against the full repeal of marital immunity for rape is that the philosophy undergirding the 2007 amendments which effected a limited repeal of marital immunity for rape still stands. The 2007 amendments were made on the basis that conjugal relations are integral to the institution of marriage; thus, marital rape should only be an offence under situations where the marriage has clearly broken down.

¹ Declaration on the Elimination of Violence against Women (20 December 1993), United Nations General Assembly, A/RES/48/104, Art 2 <<http://www.un.org/documents/ga/res/48/a48r104.htm>> (accessed 19 August 2018).

² No to Rape website <<http://www.notorape.com>> (accessed 19 August 2018).

³ Association of Women Action and Research, *CEDAW Shadow Report* (15 May 2011), at para 33. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fSGP%2f49%2f10021&Lang=en> (accessed 19 August 2018).

⁴ 32nd Session of the United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Singapore* (15 April 2016), A/HRC/32/17 <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/17> (accessed 19 August 2018).

⁵ The 13 NGOs are: AWARE, Business & Professional Women’s Association of Singapore - Third Chapter, Daughters of Tomorrow, Humanitarian Organization for Migration Economics, MARUAH, Project X, Sayoni, Singapore Association of Women Lawyers, Soroptimist International of Singapore (Garden City), The Athena Network, The Gentle Warriors’ Trust, Transient Workers Count Too, and the Zonta Club of Singapore.

⁶ United Nations Committee on CEDAW, *Report on CEDAW and the Republic of Singapore, “Many Voices, One Movement: Coalition Report of National NGOs”* (2017) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fSGP%2f29054&Lang=en> (accessed 19 August 2018).

⁷ United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the fifth periodic report of Singapore* (21 November 2017), CEDAW/C/SGP/CO/5, at para 21(c). <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fSGP%2fCO%2f5&Lang=en> (accessed 19 August 2018).

14 The close link between marriage and conjugal relations may pose difficulties in obtaining evidence as to whether consent to sexual intercourse was given in a particular instance. Additional investigative resources may be required by law enforcement agencies to deal with the increased complexity in determining if there was consent to the act in such cases.

15 Notwithstanding the global shift towards the criminalisation of marital rape, there are countries which continue to retain marital immunity for rape in limited circumstances. For example, in Sri Lanka, marital immunity for rape is withdrawn if the court has ordered a spousal separation. This was also the legal position in the UK and certain states in the USA for some years, *before marital immunity was completely abolished*. Other jurisdictions have created new laws to criminalise forced sexual intercourse within marriages, without penalising them as rape. For instance, Malaysia introduced a law in 2007 that made it a crime for a man to cause hurt or fear of death to his wife in order to have sexual intercourse with her.

16 An alternative option is to emulate the Malaysian approach of preserving marital immunity for rape, while criminalising acts of sexual penetration carried out against the wife's will by creating a new offence of "marital assault". Creating a marital assault provision has the following advantages:

- (a) The provision would avoid the risk of social problems arising from making marital rape an offence (*eg* causing misunderstandings among married couples).
- (b) The provision would allow for the option of specifying maximum penalties for marital assault that differ from the maximum penalties for rape.
- (c) The provision would allow social workers counselling the victim to use a different terminology from "rape", which carries social stigma.

Recommendation 32: Repeal ss 375(4) and 376A(5) of the Penal Code, which provide marital immunity for rape

17 The majority of the PCRC is of the view that marital immunity for rape should be fully repealed. Some Committee Members had differing views, primarily to honour the sanctity and intimacy of a marriage. Nevertheless, the PCRC recommends a *full, unqualified* repeal of marital immunity for rape.

18 Repealing marital immunity for rape will provide equal access to protection for sexually abused wives. Although married persons have conjugal rights over each other, such rights should be exercised reasonably. Married women whose husbands no longer exercise reasonable conjugal behaviour and inflict sexual violence/serious harm on them should have the same access to protection as unmarried women.

19 Concerns about false accusations of rape by vindictive wives *should not be reasons to maintain marital immunity*. The risk of false accusations of rape is equally present where the complainant and defendant are not married. Existing safeguards in the form of evidentiary requirements, prosecutorial discretion and judicial scrutiny are in place to prevent the miscarriage of justice for all other types of rape accusations.

20 Finally, the repeal of marital immunity for rape will also ensure consistency with other sexual offences. For example, there is currently no marital immunity for the offence of sexual assault by penetration (s 376 of the Penal Code). In fact, this provision carries the same punishments as rape, and it is already possible for vindictive wives to make false accusations

of sexual assault. The fact that there is no known history of such accusations suggests that the link between a repeal of marital immunity for rape and increase in false accusations is tenuous at best.

21 The PCRC also considered the option of creating a marital assault provision. However, this option is *not recommended*, for the following reasons:

- (a) No greater ease in proving guilt: The need to amass sufficient evidence to prove guilt beyond reasonable doubt would apply equally to the proposed marital assault offence and to marital rape. Difficulties in proving the absence of consent would remain.
- (b) Preference to retain parity with rape: The victim will face the same psychological barriers, regardless of the terminology of the offence, when deciding to make a police report. It would accord victims greater justice to recognise that non-consensual sexual intercourse between spouses is as serious as rape. Retaining the rape terminology and parity of penalties would avoid perpetrating the notion that it is improper for wives to accuse their husbands of rape.
- (c) Difficult to defend another half-step towards marital rape: It would be difficult to account for the introduction of a marital assault offence which has ingredients that are practically the same as marital rape. Taking the half-step of introducing this provision is not a viable long-term solution.

Conclusion

22 The law does not operate in a vacuum. For the issue of marital rape in particular, values, culture and traditions are paramount. Nonetheless, to equally protect all women from sexual abuse, whether in a marital relationship or otherwise, the PCRC recommends a full repeal of marital immunity for rape.

Annex: Sections 375 and 376A of the Penal Code

Provisions for marital immunity are in red

Rape

375. — (1) Any man who penetrates the vagina of a woman with his penis —

(a) without her consent; or

(b) with or without her consent, when she is under 14 years of age,

shall be guilty of an offence.

(2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

(3) Whoever —

(a) in order to commit or to facilitate the commission of an offence under subsection (1) —

(i) voluntarily causes hurt to the woman or to any other person; or

(ii) puts her in fear of death or hurt to herself or any other person; or

(b) commits an offence under subsection (1) with a woman under 14 years of age without her consent,

shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

(4) No man shall be guilty of an offence under subsection (1) against his wife, who is not under 13 years of age, except where at the time of the offence —

(a) his wife was living apart from him —

(i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;

(ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;

(iii) under a judgment or decree of judicial separation; or

(iv) under a written separation agreement;

(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;

(d) there was in force a protection order under section 65 or an expedited order under section 66 of the WC made against him for the benefit of his wife; or

(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded.

(5) Notwithstanding subsection (4), no man shall be guilty of an offence under subsection (1)(b) for an act of penetration against his wife with her consent.

Sexual penetration of minor under 16

376A. —(1) Any person (A) who —

(a) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);

(b) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus, as the case may be, of a person under 16 years of age (B);

(c) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person including A; or

(d) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus, as the case may be, of any person including A or B,

with or without B's consent, shall be guilty of an offence.

(2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

(3) Whoever commits an offence under this section against a person (B) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

(4) No person shall be guilty of an offence under this section for an act of penetration against his or her spouse with the consent of that spouse.

(5) No man shall be guilty of an offence under subsection (1)(a) for penetrating with his penis the vagina of his wife without her consent, if his wife is not under 13 years of age, except where at the time of the offence —

(a) his wife was living apart from him —

(i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;

(ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;

(iii) under a judgment or decree of judicial separation; or

(iv) under a written separation agreement;

(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;

(d) there was in force a protection order under section 65 or an expedited order under section 66 of the WC made against him for the benefit of his wife; or

(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded.

SECTION 16: SEXUAL OFFENCES AGAINST MINORS

SECTION 16.1: GENERAL PRINCIPLES

SUMMARY OF RECOMMENDATIONS

- (33) Retain age 16 as the age of consent for sexual activity
- (34) Retain age 14 as the age below which sexual activity with minors will be regarded as a statutory aggravating factor
- (35) Increase protections for minors aged 16 to 18, where there is an element of sexual exploitation

Introduction

In this section, the PCRC reviewed current *minor-specific* sexual offences in the Penal Code. Minor-specific sexual offences refer to sexual offences which would *only* be made out if the victim is below a certain age (eg 16 years old for s 376A). This can be contrasted with sexual offences of *general application*, such as s 354 (Outrage of modesty) and s 375 (Rape) which apply to victims of all ages.

2 The PCRC reviewed the general principles that underlie minor-specific sexual offences, to ensure that these principles continued to be relevant.

Current law

Age of consent – 16 years of age

3 In Singapore, the age of consent for sexual activity is set at 16 years of age, with a higher age of 18 years old set for commercial sexual activity.¹

4 In order to protect minors under 16, s 376A does not distinguish between situations where the minor has consented or failed to consent. In determining the offences and age of consent for sexual activity of minors, the criminal law imposes liability on anyone who engages in sexual activity with a person below the age of consent or involves such a person in sexual activity.

5 The rationale behind this, as explained by the Hong Kong Law Review Commission, is that the law recognises that persons below the age of consent may not be able to give informed and meaningful consent to sexual activity and understand its consequences. The danger of exploitation is real because of their young age.²

6 This principle has been judicially acknowledged in Singapore. In *PP v AOM*³, the High Court observed in respect of offences of statutory rape (s 375(2)) and sexual penetration of a

¹ See s 376B, Penal Code.

² The Law Reform Commission of Hong Kong, *Sexual offences involving children and persons with mental impairment, Consultation Paper, Review of Sexual Offences Sub-Committee* (November 2016), at para 2.3. In Hong Kong, the existing age of consent is 16.

³ [2011] 2 SLR 1057.

minor under 16 (s 376A), that as a matter of societal morality and legislative policy, girls below 16 years of age are, due to their inexperience and presumed lack of sexual and emotional maturity, considered to be vulnerable and susceptible to coercion and hence incapable of giving informed consent.

7 Internationally, the United Nations Convention on the Rights of the Child provides that a child means a person below 18 years of age, unless under the law applicable, the age of majority is lower.⁴ However, due to the need to strike a balance between sexual autonomy and the protection of young persons, jurisdictions have come to an age of consent lower than 18 years.⁵

Age below which sexual activity with such minors is an aggravated offence – 14 years of age

8 Apart from the age of consent, most jurisdictions set a lower age for minors below which sexual activity with such minors is an aggravated offence. This is signalled through either the inapplicability of defences such as “reasonable mistake as to age”, or enhanced penalties for offences committed against minors of this age.

9 This issue was considered in detail by the UK Home Office, and it stated that this age (where consent of the minor to any sexual activity could not be recognised in law) “would have to be one below which it could be safely said that there was neither actual mutual agreement (because one or both parties were too young to possess the necessary knowledge, understanding and maturity to know what they were agreeing to) nor legal consent, where children should be protected from all sexual activity.”⁶

10 The current age set in Singapore for such aggravated offences is 14 years of age. Enhanced penalties such as mandatory minimum sentences and caning apply where the prosecution is able to prove that the minor did not consent to the activity. An example of such a provision is set out below.

Rape

375.—(1) Any man who penetrates the vagina of a woman with his penis —

(a) without her consent; or

*(b) with or without her consent, **when she is under 14 years of age,***

shall be guilty of an offence.

(2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

...

⁴ Convention on the Rights of the Child (20 November 1989), Art 1 (entered into force 2 September 1990).

⁵ The Law Reform Commission of Hong Kong, *Sexual offences involving children and persons with mental impairment, Consultation Paper, Review of Sexual Offences Sub-Committee* (November 2016), at para 2.18 - 2.19. In Australia, the different states peg their age of consent to be between 16-17 years old. Canada, New Zealand, the Netherlands, Scotland, South Africa, Switzerland, and England and Wales have their age of consent as 16. Other European countries such as Denmark, France, Sweden have their age of consent as 15, with Germany and Portugal setting theirs at 14, and Spain has the lowest age of consent with 13. The United States has different ages of consent depending on the individual states, and they range from 16–18.

⁶ United Kingdom Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at para 3.5.8 – 3.5.11.

(3) *Whoever —*
(a) *in order to commit or to facilitate the commission of an offence under subsection (1) —*
(i) *voluntarily causes hurt to the woman or to any other person; or*
(ii) *puts her in fear of death or hurt to herself or any other person; or*
(b) *commits an offence under subsection*
(1) *with a woman under 14 years of age without her consent,*
shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

Higher maximum age of victim for commercial sexual exploitation – 18 years of age

11 The Penal Code currently prohibits commercial sex with minors below 18 years of age. The provisions are set out below:

Commercial sex with minor under 18

376B. — (1) *Any person who obtains for consideration the sexual services of a person, who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.*
(2) *Any person who communicates with another person for the purpose of obtaining for consideration, the sexual services of a person who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.*
(3) *No person shall be guilty of an offence under this section for any sexual services obtained from that person’s spouse.*
(4) *In this section, “sexual services” means any sexual services involving —*
(a) *sexual penetration of the vagina or anus, as the case may be, of a person by a part of another person’s body (other than the penis) or by anything else; or*
(b) *penetration of the vagina, anus or mouth, as the case may be, of a person by a man’s penis.*

12 When s 376B was introduced through the amendments to the Penal Code in 2007, the Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee explained that the purpose of this provision was to “prevent the sexual exploitation of children around the world”.⁷ Therefore, the age of the minor was set at 18, instead of 16. This was in order “to protect a higher proportion of minors”, because young persons below 18 are “immature and vulnerable and can be exploited and, therefore, should be protected from providing sexual services.”⁸

Recommendation 33: Retain age 16 as the age of consent for sexual activity

13 The PCRC is of the view that having the age of consent at 16 years of age strikes a good balance between sexual autonomy and the protection of young persons, and there is no compelling reason to either raise or reduce the age of consent.

⁷ *Singapore Parliamentary Debates, Official Reports* (22 October 2007) Vol 83 at col 2175 (Ho Peng Kee, Senior Minister of State for Home Affairs).

⁸ *Ibid.*

Recommendation 34: Retain age 14 as the age below which sexual activity with minors will be regarded as a statutory aggravating factor

14 The PCRC agrees with the view of the various jurisdictions such as U.K. and Australia that there should continue to be an age below which sexual activity with such minors is an aggravated offence. Below this age, such very young minors would neither have the emotional maturity nor understanding about the consequences of sexual activity, and it is highly likely that there has been some form of manipulation and exploitation to cause the child to engage in such sexual activity. In these cases, the consent of the child is irrelevant, and no defences should apply.

15 The PCRC recommends that the age below which sexual activity with minors will be regarded as a statutory aggravating factor should remain at 14 years of age. Similar to the age of consent, there is no compelling reason to increase or decrease this age. Enhanced penalties should apply for sexual offences committed against minors below 14 years of age. This will signal society's severe disapproval of such behaviour given that sexual offences committed against very young minors may be particularly harmful.

Recommendation 35: Increase protections for minors aged 16 to 18, where there is an element of sexual exploitation

16 With the advent of the Internet and the proliferation of smartphones, it has become extremely easy for young persons to be exploited and manipulated by predatory offenders for sexual activity. As such, the PCRC is of the view that the maximum age of the victim should be increased from 16 to 18 years of age for all sexual offences where there is an element of exploitation. This will be a broadening of the ambit of such offences, which is today only limited to commercial sexual exploitation under s 376B.

17 This move would be aligned with the proposal by the Ministry of Social and Family Development ("MSF") to raise the age of "young person" in the CYPA from 16 to 18 years of age to "extend statutory protection under the realm of the Child Protective Services".⁹ Currently, the CYPA contains provisions that protect children and young persons below the age of 16 from abuse, neglect, and sexual exploitation.¹⁰ An increase in the age of the minor victim for minor-specific sexual offences where there is an element of exploitation would hence be consistent with the expansion of the protective principle to protect a larger group of minors from sexual exploitation.

Conclusion

18 In the review of the principles that underlie minor-specific sexual offences in the Penal Code, the PCRC is of the view that the current principles relating to the age of consent and the age below which the age of the minor is a statutory aggravating factor continue to be relevant and valid.

19 However, there is a need to extend and expand protection for minors who may be exploited into sexual activity. Hence, the PCRC recommends for the maximum age of the

⁹ *Singapore Parliamentary Debates, Official Reports* (18 May 2018) Vol 94 (Desmond Lee, Minister for Social and Family Development and Second Minister for National Development and Deputy Leader of the House).

¹⁰ See s 5 and s 7, CYPA.

victim to be increased from 16 to 18 years of age for all such sexual offences, where there is an element of exploitation. This is consistent with the Government's expansion of the protective principle to a larger group of minors under the CYPA.

SECTION 16.2: GENERAL DEFENCES

SUMMARY OF RECOMMENDATIONS

(36) *Expand limited defence of “reasonable mistake as to age” in s 377D to apply to all offenders where the minor victims are 16 years old and above*

Introduction

In this section, the PCRC reviewed current defences which apply only to *minor-specific* sexual offences in the Penal Code, and considered how to strike a balance between ensuring fairness to the accused and protecting minors.¹

Current law

2 Section 377D(2) of the Penal Code offers a defence limited to persons below the age of 21 years old, who have made a “reasonable mistaken belief” that the minor, who is of the opposite sex, was of or above the age of 16 years where the offence of sexual penetration of a minor is concerned, or the age of 18 years where the offence of commercial sex is concerned. This is commonly referred to as the “young man’s defence”, as it only applies to persons below the age of 21 years. The full provision is set out below.

Mistake as to age

377D.—(1) *Subject to subsections (2) and (3) and notwithstanding anything in section 79, a reasonable mistake as to the age of a person shall not be a defence to any charge of an offence under section 376A(2), 376B or 376C.*

(2) *In the case of a person who at the time of the alleged offence was under 21 years of age, the presence of a reasonable mistaken belief that the minor, who is of the opposite sex, was of or above —*

(a) *the age of 16 years, shall be a valid defence to a charge of an offence under section 376A(2); or*

(b) *the age of 18 years, shall be a valid defence to a charge of an offence under section 376B or 376C.*

(3) *For the purposes of subsection (2), the defence under that subsection shall no longer be available if at the time of the offence, the person charged with that offence has previously been charged in court for an offence under section 376A, 376B, 376C or 376E, or section 7 of the CYPA or s 140(1)(i) of the Women’s Charter (Cap. 353).*

3 The setting of the age of under 21 years for eligibility for the defence was a “calibrated approach” meant “as a concession for such first time youthful offenders”.² If successfully pleaded, this defence is a *complete defence*. Since its introduction in 2007, there have been no reported instances of the defence having been pleaded successfully.

¹ For avoidance of doubt, the PCRC did not consider the application of general defences of the Penal Code to minor-specific sexual offences.

² *Leu Xing-Long v PP* [2014] 4 SLR 1024 at [24].

4 The effect of s 377D of the Penal Code has been interpreted by the courts to have created an “offence of absolute liability [referring to s 376B(1)], in so far as the issue of the minor’s age is concerned, in respect of all adult offenders and certain repeat offenders below the age of 21.”³ Arguably, since the defence of s 377D applies to ss 376A(2) and 376C, the same assessment would apply, and these would be absolute liability offences.

Analysis

5 The PCRC is of the view that there is a need to balance “between society’s need to protect vulnerable children and to ensure the interests of justice and fairness to the defendant are met where there is a genuine mistake of fact.”⁴ The UK Home Office set out the competing tensions as follows: “The interests of justice and fairness require an honest mistake to be recognised ... the adult may have sex with an under-age child with no intention to do so. On the other hand, it is all too easy to claim an honest mistake when no such mistake existed and there is evidence that some men specialise in the targeting of young girls.”⁵

6 Jurisdictions such as Australia, England & Wales, Scotland, and Canada do not impose absolute liability for sexual offences involving young persons, although they do impose absolute liability for sexual activity with children below a certain age. The main rationale for this is to recognize that a person who makes a genuine mistake on reasonable grounds that the person is not a minor should not be penalized, but having sexual activity with children below a certain age is absolutely wrong - such children would *clearly* be minors, and there could be no reasonable grounds on which the offender makes a genuine mistake with regard to their age.

7 In some states in Australia, it is a defence if the accused “believed on reasonable grounds”⁶ that the minor was above the required age of consent. In Canada, the accused needs to have taken “all reasonable steps”⁷ to ascertain the age of the child. England and Wales have taken a different approach, where it is an *element* of child sex offences that the accused did not reasonably believe that the child was above the age of consent.⁸ This means that the prosecution must adduce evidence to show that the accused, at the time of the incident, did not believe the child to be 16 or above. Hong Kong continues to retain absolute liability for offences of sexual intercourse with a girl under 16.

Recommendation 36: Expand limited defence of “reasonable mistake as to age” in s 377D to apply to all offenders where the minor victims are 16 years old and above

8 The PCRC is of the view that the current s 377D, in only providing protection to young persons below the age of 21 years old, should be *extended to beyond young persons below the age of 21 years old*. The interests of fairness and justice require that an honest mistake be recognised.

³ *Leu Xing-Long v PP* [2014] 4 SLR 1024 at [23], and *Buergin Juerg v PP* [2013] 4 SLR 87 at [5].

⁴ United Kingdom Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at para 3.6.11 - 3.6.12.

⁵ United Kingdom Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at para 3.6.12.

⁶ Australia Capital Territory (Crimes Act 1900, s 55); Queensland (Criminal Code Act 1899, s 215(5)); South Australia (Criminal Law Consolidation Act 1935, s 49) etc.

⁷ Sections 150.1(4), 150.1(5) of the Canadian Criminal Code (RSC, 1985, c. C46).

⁸ Sections 9, 10, 11, 15, SOA 2003

9 While protection of minors is undoubtedly an important consideration, imposing absolute liability for such offences may not achieve fairness in the criminal justice process. The PCRC proposes that the defence of “reasonable mistake as to age” in s 377D be extended to *all offenders, regardless of age*.

10 The PCRC recommends that there be an additional requirement in the defence that the offender must have taken *all reasonable steps* to ascertain the minor’s age, making it clear that the law requires that such offenders have taken *active steps* to ensure they were not engaging in sexual activity with minors. This precludes arguments that an accused person met the minor in circumstances where he “assumed” that she was above the age of consent (*eg* if she was engaged in an age-restricted activity such as smoking), or in commercial sex situations where the minors may be exploited by pimps to lie about their age to customers. This will necessarily be a question of fact, to be determined by the court based on the circumstances of the case.

11 An *Explanation* should also be included to state that the mere observation of a minor taking part in age-restricted activities, such as smoking, would not be sufficient in and of itself to show “reasonable belief”, or that this observation fulfilled the requirement to take “all reasonable steps”.

12 The defence would continue to be unavailable for offenders who had previously been charged in court for an offence under ss 376A, 376B, 376C or 376E, or s 7 of the CYPA, or s 140(1)(i) of the WC.⁹

13 In addition, the PCRC recommends that the provision be amended so the *defence would not apply where the minor is below 16 years of age*. In effect, this would mean that sexual activity involving such minors would be an offence of absolute liability as far as the age of the victim is concerned, to signal that sexual activity with such young minors and children is absolutely wrong, and that such activity would not be tolerated. This would be a tightening of the current law for commercial sex and sexual activity with elements of abuse and/or exploitation. However, the PCRC is of the view that this would be consistent with the narrative of protecting such minors.

Conclusion

14 The defence of “reasonable mistake as to age” will hence be expanded to apply more widely in some cases, but tightened where minors need to be protected the most. This reflects the policy principle that the key mischief to be dealt with by minor-specific sexual offences is to protect minors from offenders who seek to exploit their youth and immaturity for sexual gratification.

⁹ Section 377D(3), Penal Code.

SECTION 16.3: COMMERCIAL EXPLOITATION

SUMMARY OF RECOMMENDATIONS

- (37) *Expand definition of “sexual services” in ss 376B-376D (Commercial sex with minor under 18) to include non-penetrative sexual activity. The offence will continue to have extra-territorial application*
- (38) *Expand definition of “sexual touching” in s 376F (Procurement of sexual activity with person with mental disability) to include situations where the offender incites or procures the victim to touch the offender’s body or another person’s body*

Introduction

In this section, the PCRC considered whether the current offences relating to commercial sexual exploitation of minors were sufficient to deal with the increased ease in which such exploitation could be conducted through the Internet and aided by technology.

Current law

Commercial sex with minors

2 Currently, the Penal Code prohibits commercial sex with minors under 18 years of age, whether the activity takes place in Singapore or overseas. The relevant provisions are as follows:

Commercial sex with minor under 18

376B. — (1) *Any person who obtains for consideration the sexual services of a person, who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.*

(2) *Any person who communicates with another person for the purpose of obtaining for consideration, the sexual services of a person who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.*

(3) *No person shall be guilty of an offence under this section for any sexual services obtained from that person’s spouse.*

(4) *In this section, “sexual services” means any sexual services involving —*

(a) sexual penetration of the vagina or anus, as the case may be, of a person by a part of another person’s body (other than the penis) or by anything else; or

(b) penetration of the vagina, anus or mouth, as the case may be, of a person by a man’s penis.

Commercial sex with minor under 18 outside Singapore

376C. — (1) *Any person, being a citizen or a permanent resident of Singapore, who does, outside Singapore, any act that would, if done in Singapore, constitute an offence under section 376B, shall be guilty of an offence.*

(2) *A person who is guilty of an offence under this section shall be liable to the same punishment to which he would have been liable had he been convicted of an offence under section 376B.*

3 When the provisions were introduced in the amendments to the Penal Code in 2007, then Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee said that the

purpose of ss 376B – 376D were to “prevent the sexual exploitation of children around the world”. The age of the minor was set at 18, instead of 16 in other provisions on sexual offences in the Penal Code “to protect a higher proportion of minors”, because young persons below 18 are “immature and vulnerable and can be exploited and, therefore, should be protected from providing sexual services.”¹

4 The setting of the age at 18 years for commercial sex is consistent with Singapore’s obligations as a signatory to the International Labour Organisation’s (“ILO”) Worst Forms of Child Labour Convention, where the “use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances”² has been defined as one of the worst forms of child labour.³

Impetus for review

5 Though the key impetus for the introduction of ss 376B – 376D is to protect minors vulnerable to exploitation, s 376B defines “sexual services” as penetrative sexual activity *only*.

6 Commercial sexual exploitation, as defined by the ILO, does not only involve sexual penetration. It includes the trafficking of children for sex trade, the use of children for sexual activities, child sex tourism, and the production, promotion, and distribution of pornography involving children, and the use of children in sex shows (public or private).⁴

7 There has been an increasing recognition in other jurisdictions such as the United Kingdom and Canada that the sexual exploitation of children does not only include penetrative sexual assault by the offender, but extends to non-penetrative sexual conduct, such as sexual touching.

Recommendation 37: Expand definition of “sexual services” in ss 376B-376D (Commercial sex with minor under 18) to include non-penetrative sexual activity. The offence will continue to have extra-territorial application

8 The PCRC proposes that the definition of “sexual services” in s 376B be expanded to include non-penetrative sexual activity, including touching (for a sexual purpose) by the victim of the offender’s body, her own body, or another person’s body.⁵

¹ *Singapore Parliamentary Debates, Official Reports* (22 October 2007) Vol 83 at col 2175 (Ho Peng Kee, Senior Minister of State for Home Affairs).

² Worst Forms of Child Labour Convention (17 June 1999), Art 3 (entered into force 19 November 2000).

³ The United Nations Convention on Rights of the Child (“UN CRC”) further obliges State Parties (including Singapore) to “take all appropriate national, bilateral and multilateral measures to prevent: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performance and materials.” See Convention on the Rights of the Child (20 November 1989), Art 34 (entered into force 2 September 1990).

⁴ International Labour Organization, “Commercial sexual exploitation of children and adolescents – the ILO’s Response” (2009) <http://lastradainternational.org/lisdocs/Commercial_sexual_exploitation_of_children_and_adolescents_The_IL_O_s_response.pdf> (accessed 20 August 2018).

⁵ Reference can be taken from s 152 of the Canadian Criminal Code (RSC, 1985, c. C46) which criminalises “Invitation to sexual touching” of a minor under 16 years old. “Sexual touching” is defined as to “touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years”.

9 The current s 376B clearly requires the offender and minor to be in the same location, since only penetrative sexual activity is required. With the expansion of the offence to include non-penetrative sexual activity, including the touching of the victim of her own body or the body of a person *other* than the offender, it is possible for the offender and minor to be in different countries.

10 The PCRC proposes that s 376B will continue to have extra-territorial application under s 376C. The offence will hence cover situations where persons in Singapore or Singaporeans/PRs in other countries provide consideration for sexual acts performed by minors below 18 years old, including activities such as sexually explicit performances in “sex shows”.

Recommendation 38: Expand definition of “sexual touching” in s 376F (Procurement of sexual activity with person with mental disability) to include situations where the offender incites or procures the victim to touch the offender’s body or another person’s body

Current law

11 Section 376F of the Penal Code currently prohibits “sexual touching” of a person with mental disability in circumstances when the consent of the person with the mental disability was obtained through “inducement offered or given, a threat made or a deception practised”. The full provision is set out below.

Procurement of sexual activity with person with mental disability

376F.—(1) Any person (A) shall be guilty of an offence if —

- (a) A intentionally touches another person (B) who has a mental disability;*
- (b) the touching is sexual and B consents to the touching;*
- (c) A obtains B’s consent by means of an inducement offered or given, a threat made or a deception practised by A for that purpose; and*
- (d) A knows or could reasonably be expected to know that B has a mental disability.*

(2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

(3) If the touching involved —

(a) penetration of the vagina or anus, as the case may be, with a part of the body or anything else; or

(b) penetration of the mouth with the penis,

a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

(4) No person shall be guilty of an offence under this section for any act with that person’s spouse.

(5) For the purposes of this section —

“mental disability” means an impairment of or a disturbance in the functioning of the mind or brain resulting from any disability or disorder of the mind or brain which impairs the ability to make a proper judgement in the giving of consent to sexual touching;

“touching” includes touching —

(a) with any part of the body;

(b) with anything else; or

(c) through anything,

and includes penetration.

Impetus for review

12 Although “sexual touching” in the current s 376F involves activity beyond sexual penetration, an offence is only disclosed if the offender touches the victim with mental disability, and not if the offender incites or otherwise procures the person with mental disability to touch the offender’s body, or another person’s body (including his own).

Recommendation

13 Similar to the expansion of “sexual services” in s 376B to include non-penetrative sexual activity, including the sexual touching of a person *other* than the offender, including the body of the victim herself, the PCRC recommends that the definition of “sexual touching” in s 376F be expanded. The expansion will cover situations where the offender may have incited the mentally disabled victim to participate in sexually explicit activities and performances, including touching the offender’s body, or another person’s body, including her own.

SECTION 16.4: EXPLOITATIVE PENETRATIVE SEXUAL ACTIVITY

SUMMARY OF RECOMMENDATIONS

- (39) Create a new offence of “exploitative penetrative sexual activity with minors between 16 to 18 years of age”
- (40) Clarify that s 376A (Sexual penetration of minor) does not cover non-consensual sexual activity for minors below 16 years of age, and provide for enhanced penalties where the minor has been exploited by the offender
- (41) Create an offence of “statutory sexual assault by penetration” in s 376 (Sexual assault by penetration), to mirror similar provisions of “statutory rape” in s 375 (Rape)
- (42) Amend s 376G (Incest) to exclude non-consensual sexual penetration and sexual penetration of minors below 16 years of age

Introduction

In this section, the PCRC considered how to deal with circumstances where an offender has engaged in penetrative sexual activity with minors below 18 years of age, in the context of an exploitative relationship.

Current law

Overlaps in current framework for penetrative sexual offences committed against minors

2 The current framework of Penal Code provisions which cover *penetrative sexual offences* that are committed against minors and the associated punishments is set out in the table below:

Type of Activity	Age of Victim		
	Below 14 years	14 to below 16 years	16 to below 18 years
Non-consensual (With hurt, fear of hurt/death caused)	<ul style="list-style-type: none"> Sections 375(3)(b), 376(4)(b): minimum 8 years’ imprisonment up to maximum of 20 years, discretionary fine, minimum 12 strokes of the cane Section 376A(3): Maximum 20 years’ imprisonment, discretionary fine, discretionary caning 	<ul style="list-style-type: none"> Sections 375(3)(a), 376(4)(a): minimum 8 years’ imprisonment up to maximum of 20 years, discretionary fine, minimum 12 strokes of the cane Section 376A(2): Maximum 10 years’ imprisonment, and/or discretionary fine 	<ul style="list-style-type: none"> Sections 375(3)(a), 376(4)(a): minimum 8 years’ imprisonment up to maximum of 20 years, discretionary fine, minimum 12 strokes of the cane
Non-consensual	<ul style="list-style-type: none"> Sections 375(3)(b), 376(4)(b): Minimum 	<ul style="list-style-type: none"> Sections 375(2), 376(3): Maximum 	<ul style="list-style-type: none"> Sections 375(2), 376(3): Maximum

Type of Activity	Age of Victim		
	Below 14 years	14 to below 16 years	16 to below 18 years
(No hurt, fear of hurt/death caused)	8 years' imprisonment up to maximum of 20 years, discretionary fine, minimum 12 strokes of the cane • Section 376A(3): Maximum 20 years' imprisonment, discretionary fine, discretionary caning	20 years' imprisonment, discretionary fine, discretionary caning • Section 376A(2): Maximum 10 years' imprisonment, and/or discretionary fine	20 years' imprisonment, discretionary fine, discretionary caning
Exploitative (Commercial only)	• Section 376B(1): Maximum 7 years' imprisonment and/or fine		
Consensual	Sections 375(2), 376A(3): Maximum 20 years' imprisonment, discretionary fine, discretionary caning	• Section 376A(2): Maximum 10 years' imprisonment, and/or discretionary fine	-

3 As can be seen from the table, there are overlaps between ss 375, 376, and 376A, which may cause confusion, especially in relation to the issue of consent.

4 Section 376A was introduced in the amendments to the Penal Code in 2007 to criminalise sexual penetration of minors below 16 years of age, regardless of the minor's consent. The punishments were tiered based on the age of the minor. Relevant excerpts of the provision are set out below:

Sexual penetration of minor under 16

376A. —(1) Any person (A) who —

- (a) penetrates, with A's penis, the vagina, anus or mouth, as the case may be, of a person under 16 years of age (B);
- (b) sexually penetrates, with a part of A's body (other than A's penis) or anything else, the vagina or anus, as the case may be, of a person under 16 years of age (B);
- (c) causes a man under 16 years of age (B) to penetrate, with B's penis, the vagina, anus or mouth, as the case may be, of another person including A; or
- (d) causes a person under 16 years of age (B) to sexually penetrate, with a part of B's body (other than B's penis) or anything else, the vagina or anus, as the case may be, of any person including A or B,

with or without B's consent, shall be guilty of an offence.

(2) Subject to subsection (3), a person who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

(3) Whoever commits an offence under this section against a person (B) who is under 14 years of age shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

5 The current prosecutorial approach is that if a victim, who is above 14 years of age but below 16 years of age, *consents* to the penetrative sexual acts, the prosecution will proceed with a charge under s 376A. In *PP v Joshua Robinson*, the Attorney-General’s Chambers (“AGC”), in response to criticism that Robinson had committed “sexual assaults” (and should have been charged with rape or statutory rape), clarified in a press release that both the victims had “consented to the sexual acts”, and accordingly, the offences of rape and sexual assault were not committed.¹ In fact, the AGC stated that a charge under s 376A was “the most serious charge that the Prosecution could have brought on the facts of the case”.

6 Section 376A(1) states that sexual penetration of the minor, “with or without [the minor’s] consent” would be an offence. Ostensibly, this provision admits the possibility that *non-consensual* sexual penetration could be covered by s 376A. If so, then the highest range of sentences in s 376A is likely to cater for such circumstances. The overlaps within the current framework may then result in under-sentencing for *consensual* sexual penetration – because such offences will be punished at the lower to mid-spectrum of the sentencing range under s 376A.

Case law on exploitative penetrative sexual activity

7 Apart from commercial sexual exploitation of minors in s 376B of the Penal Code, there are currently no laws relating to penetrative sexual activity with minors arising from exploitation and manipulation by the offender in the Penal Code.² Such exploitation typically arises in the context of a relationship between the offender and the minor. While the minor may not have resisted the sexual activity, the quality of her consent may well have been compromised due to exploitation or manipulation by the offender. Whilst this is currently not recognised in legislation, it is an aggravating factor in case law, and the courts have enhanced punishments for offenders in such circumstances.

8 In *Ng Kean Meng Terence v PP* (“*Terence Ng*”) ³, the Court of Appeal set out three sentencing bands for the offence of rape.⁴ First, the court should identify the band which the offence in question would fall within, having regard to the factors which related to the manner and mode by which the offence was committed, as well as the harm caused to the victim.⁵

¹ AGC press release on *PP v Joshua Robinson* (8 March 2017) < <https://www.agc.gov.sg/home/agc-media-release-pp-vs-joshua-robinson> > (accessed 20 August 2018).

² The PCRC notes that s 7 of the CYPA criminalises “sexual exploitation” of the minor. However, the penalties remain low with maximum 5 years’ imprisonment and/or maximum fine of \$10,000 for the first offence, and a maximum 7 years’ imprisonment and/or maximum \$20,000 for subsequent offences. The PCRC has recommended amendments to this provision in the CYPA.

³ [2017] 2 SLR 449.

⁴ In *Terence Ng*, the victim was 13 years of age. As such, the offender was charged with statutory rape under s 375(1)(b), punishable under s 375(2) with a maximum term of 20 years, discretionary fine and discretionary caning.

⁵ [2017] 2 SLR 449 at [42].

9 After determining the band which the offence fell in, the court would then have regard to the aggravating and mitigating factors which were personal to the offender to calibrate the appropriate sentence.

10 The court in *Terence Ng* set out “abuse of position and breach of trust” as an offence-specific factor which would serve to aggravate the offence. The court’s views are set out in full below (emphasis added):

Abuse of position and breach of trust: This concerns cases where the offender is in a position of responsibility towards the victim (eg, parents and their children, medical practitioners and patients, teachers and their pupils), or where the offender is a person in whom the victim has placed her trust by virtue of his office of employment (eg a policeman or social worker). *When such an offender commits rape, there is a dual wrong: not only has he committed a serious crime, he has also violated the trust placed in him by society and by the victim.*⁶

11 The court said that cases of statutory rape where (a) the victim was below 14 years old, (b) consented to the sexual penetration, and (c) there were no further notable aggravating factors fall in the *upper end of Band 1* (ie 12 years’ imprisonment, and 6 strokes of the cane).⁷ These offences were *inherently aggravated* because of the age of the victim. Where there was a *further aggravating factor* of abuse of position or breach of trust, these cases would fall within Band 2, punishable with 13-17 years’ imprisonment, and 12 strokes of the cane.

Cross-jurisdictional survey

12 Various jurisdictions have recognised that the exploitation of a relationship of trust should be a statutory aggravating factor for sexual activity with minors. In the United Kingdom and some Australian states, sexual activity between adults in specified positions of trust and authority with minors is prohibited. It should also be noted that the maximum age of minors who could be victims of such offences is *higher* than the age of consent in these jurisdictions. The circumstances where an adult would be found to be in a position of trust and authority *vis-a-vis* the minor include parents, step-parents, teachers, coaches.

13 Canada, on the other hand, does not have a list of specified relationships which would qualify as positions or relationships of trust. Instead, the Canadian Criminal Code creates an offence of “sexual exploitation” which can be committed when the offender is either (a) in a “position of trust or authority” towards a young person (who is a person with whom the young person is in a “relationship of dependency”); or (b) who is in a relationship with a young person that is exploitative of the young person. Guidance is provided in the Canadian Criminal Code, which states that (emphasis added):

[A] judge *may* infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including (a) the *age* of the young person; (b) the *age difference* between the person and the young person; (c) the *evolution* of the relationship; and (d) the *degree of control or influence* by the person over the young person.

⁶ [2017] 2 SLR 449 at [44(b)]. It should be noted that these sentencing bands set out are higher than the statutory provision for a mandatory minimum imprisonment of 8 years’ and minimum 12 strokes of the cane.

⁷ [2017] 2 SLR 449 at [51].

Recommendation 39: Create a new offence of “exploitative penetrative sexual activity with minors between 16 to 18 years of age”

Recommendation 40: Clarify that s 376A (Sexual penetration of minor) does not cover non-consensual sexual activity for minors below 16 years of age, and provide for enhanced penalties where the minor has been exploited by the offender

14 The PCRC recommends that a new offence of “exploitative penetrative sexual activity” should be created, and cover a larger group of minors. The offences should provide for more severe punishments in cases where penetrative sexual activity with minors is obtained through exploitation and manipulation by the offender, in the context of an existing relationship. The recommendations in this section are limited only to offences involving penetrative sexual activity.

15 The PCRC is of the view that while a list of specified relationships (similar to the approach in the United Kingdom and some states in Australia) will provide clarity, a closed and exhaustive list of such relationships would not cover the myriad of relationships that could develop between young persons and offenders. It is not the *form* of the relationship, but the *quality* and *substance* of the interactions within the relationship which are crucial to proving exploitation. This would mirror the current fact-sensitive approach taken by the courts.⁸

16 Hence, the PCRC recommends that the Canadian definition of “exploitative relationship” should be adopted, which sufficiently sets out the factors for the courts to consider to determine whether exploitation was present in each case. These factors are:

- (a) the age of the minor;
- (b) the age difference between the offender and the minor;
- (c) the nature of the relationship; and
- (d) the degree of control or influence by the offender over the minor.

17 To provide clarity to the law, a specified list of relationships should be included in the new provision. Where these relationships exist between the offender and the minor, this would trigger a rebuttable presumption of an exploitative relationship. The presumption can be rebutted if the offender proves, on a balance of probabilities, that the relationship was not exploitative. It should be made clear that apart from the listed relationships, the courts continue to have the discretion to assess the circumstances of the relationship between the offender and the minor to determine if exploitation was present.

18 Thus, the PCRC recommends that a new provision should be introduced into the Penal Code for exploitative penetrative sexual activity involving minors between 16 and below 18 years of age.

⁸ For example, in *Terence Ng*, the offender had no parental relationship with the minor, and had formed a relationship with her when she started loitering around his cobbler stall. Nevertheless, the court found that the offender had offered to take care of the victim and act as her “godfather”, an arrangement which was agreed to by the victim’s parents. The offender had raised the argument that “godfather” did not indicate any formal relationship of dependency or trust, and the parties’ relationship was merely platonic. This argument was not accepted by the Court of Appeal, which examined the circumstances of the case and found that the commission of the offences against the victim was “not just an abuse of trust reposed in him, but a complete abnegation of his duty to act *in loco parentis*”. Hence, his offence fell within the lower end of Band 2, due to the presence of the aggravating factor of abuse of trust.

19 In terms of punishment, the PCRC is of the view that cases involving exploitation are those where the minor cannot be said to have given “genuine consent”. Therefore, the PCRC recommends that the maximum prescribed punishment for offences relating to exploitative sexual activity should be pegged to those of non-consensual sexual activity with minors. Thus, the recommended maximum punishment are as follows:

- (a) Minors below 14 years of age: Minimum 8 years’ imprisonment up to a maximum of 20 years’, minimum 12 strokes of the cane, discretionary fine.
- (b) Minors 14 years of age to below 16 years of age: Maximum 20 years’ imprisonment, discretionary fine, discretionary caning.
- (c) Minors 16 years of age to below 18 years of age: Maximum 20 years’ imprisonment, discretionary fine, discretionary caning.

20 For minors below 16 years of age, the current s 376A should be amended to include enhanced punishment provisions for minors below 14 years of age and minors between 14 years and below 16 years of age, where these minors have been “exploited” by the offender. In such cases, it will be for the Prosecution to prove that the minor had indeed been “exploited” by the offender.

Recommendation 41: Create an offence of “statutory sexual assault by penetration” in s 376 (Sexual assault by penetration), to mirror similar provisions of “statutory rape” in s 375 (Rape)

21 Currently, s 375(2) makes it an offence for a man to penetrate the vagina of a woman below 14 years of age, *with or without her consent*. This is more commonly known as “statutory rape”. The punishment for this offence is a maximum imprisonment term of 20 years, discretionary fine, and/or discretionary caning. Where it is proven that the minor did not consent to the penetration, the punishment is enhanced, under s 375(3)(b), to a mandatory minimum of 8 years’ up to a maximum of 20 years’ imprisonment, and minimum 12 strokes of the cane.

22 Other forms of penetrative sexual activity not involving penile-vaginal penetration, *without the minor’s consent*, are covered by s 376 (Sexual assault by penetration), with the same punishments. Section 376A (Sexual penetration of minor under 16) covers situations of penetrative sexual activity with minors below 14 years of age, *regardless of consent*, and the punishments are the same as that in s 375(2), but lower than that in s 375(3)(b).

23 The PCRC is of the view that sexual activity with minors below 14 years of age is especially egregious, due to their young age and lack of emotional maturity and understanding of sexual activity. Thus, provisions relating to sexual activity with such young minors should be situated within the most serious sexual offences provisions in the Penal Code: s 375 (Rape) and s 376 (Sexual assault by penetration). Section 376 of the Penal Code should be amended to criminalise consensual acts of sexual penetration (excluding penile-vaginal penetration, which is covered under s 375) committed against minors under the age of 14, *with or without consent*.

24 Therefore, there will be a new offence of “statutory sexual assault by penetration” in s 376. This is similar to the offence of statutory rape under s 375, where the consent of the minor below the age of 14 is irrelevant for the purposes of liability. This way, a clear signal is sent to

the offender and society that due to their inherent vulnerabilities, penetrative sexual activity with such young minors should be labelled more severely as “sexual assault”, *cf* the current label of such an act as “sexual penetration of a minor under 16” under s 376A(3), which does not convey the same opprobrium.

25 This would be a rationalisation of the provisions, but with no change in the prescribed sentences. The PCRC has considered that the punishments prescribed currently are sufficient having taken into account the sentencing benchmarks set out in *Terence Ng*.⁹

Recommendation 42: Amend s 376G (Incest) to exclude non-consensual sexual penetration and sexual penetration of minors below 16 years of age

26 With a view to rationalise minor-specific offences, the PCRC proposes to amend s 376G (Incest) to clarify the following:

- (a) Non-consensual sexual penetration should not be dealt with by the offence of incest. Rather, it is more appropriately prosecuted under s 375 (Rape) and s 376 (Sexual assault by penetration) which carry harsher penalties;
- (b) Sexual penetration of minors below 16 years of age should not be dealt with by incest. Rather, such cases should be prosecuted under the revised framework of exploitative penetrative sexual activity with minors which carry harsher penalties;
- (c) An *Explanation* should be included to clarify that victims of exploitative penetrative sexual activity should not be themselves prosecuted for the offence of incest. This *Explanation* removes the risk of victims being prosecuted because there is an overlap between the specified relationships criminalised under s 376G (Incest), and those proposed for the new offence for exploitative penetrative sexual activity.

27 The proposed amendments to s 376G are in red font, as follows:

Incest

376G.—(1) Any man of or above the age of 16 years (A) who —

(a) sexually penetrates the vagina or anus of a woman (B) with a part of A’s body (other than A’s penis) or anything else; or

(b) penetrates the vagina, anus or mouth of a woman (B) with his penis, with ~~or without~~ B’s consent where B is to A’s knowledge A’s granddaughter, daughter, sister, half-sister, mother or grandmother (whether such relationship is or is not traced through lawful wedlock), shall be guilty of an offence.

(2) Any woman of or above the age of 16 years who, with consent, permits her grandfather, father, brother, half-brother, son or grandson (whether such relationship is or is not traced through lawful wedlock) to penetrate her in the manner described in subsection (1)(a) or (b), knowing him to be her grandfather, father, brother, half-brother, son or grandson, as the case may be, shall be guilty of an offence.

(3) Subject to subsection (4), a man who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 5 years.

⁹ [2017] 2 SLR 449.

(4) If a man commits an offence under subsection (1) against a woman under 14 years of age, he shall be punished with imprisonment for a term which may extend to 14 years.
(5) A woman who is guilty of an offence under subsection (2) shall be punished with imprisonment for a term which may extend to 5 years.

***Explanation:** A person who is a victim of exploitative penetrative sexual activity under [enhanced punishment provisions for exploitation of minors in s 376A] and [new offence of exploitative penetrative sexual activity for minors between 16 to below 18 years of age] shall not be liable for an offence under this section.*

Conclusion

28 With the recommendation of new offences to deal with exploitative penetrative sexual activity, the PCRC hopes that predatory and manipulative offenders who seek to exploit minors in the contexts of relationships for sexual gratification will be punished with sentences that are commensurate with their egregious behaviour.

SECTION 16.5: DEALING WITH PREDATORY OFFENDERS

SUMMARY OF RECOMMENDATIONS

- (43) Amend s 376E (Sexual grooming) so that the number of instances of prior contact is reduced from two to one; to cover the scenario where the victim travels to meet the offender; to introduce a tiered approach towards sentencing; and to introduce transitional arrangements
- (44) Introduce a new offence of “Sexual communication with a minor below 18 years of age”
- (45) Introduce a new offence of “Engaging in sexual activity before a minor under 18 years of age, or causing a minor under 18 years of age to look at a sexual image”

Introduction

In this section, the PCRC considered whether the current offences relating to the spectrum of targeted, predatory conduct by adult offenders seeking to commit sexual offences with minors was sufficient to deal with the scourge of sexual abuse against minors.

2 The proposals under this section will be tiered according to the framework set out in sections 16.1 and 16.2 of the PCRC report as follows:

- (a) For victims who are between 16 and below 18 years of age: an offence is made out only if “exploitation” of the victim can be proven by the Prosecution.
- (b) For victims who are below 14 years of age: enhanced punishments will apply.

Recommendation 43: Amend s 376E (Sexual grooming) so that the number of instances of prior contact is reduced from two to one; to cover the scenario where the victim travels to meet the offender; to introduce a tiered approach towards sentencing; and to introduce transitional arrangements

Current law

3 Section 376E, relating to the sexual grooming of minors under 16, was introduced to deal particularly with the growing phenomenon of online sexual predators. This section was modelled after s 15 of the United Kingdom’s SOA 2003, and covers both online grooming and grooming in the physical realm. The full provision is set out below:

Sexual grooming of minor under 16

- 376E.**—(1) Any person of or above the age of 21 years (A) shall be guilty of an offence if having met or communicated with another person (B) on 2 or more previous occasions —
- (a) A intentionally meets B or travels with the intention of meeting B; and
 - (b) at the time of the acts referred to in paragraph (a) —
 - (i) A intends to do anything to or in respect of B, during or after the meeting, which if done will involve the commission by A of a relevant offence;
 - (ii) B is under 16 years of age; and
 - (iii) A does not reasonably believe that B is of or above the age of 16 years.
- (2) In subsection (1), “relevant offence” means an offence under —
- (a) section 354, 354A, 375, 376, 376A, 376B, 376F, 376G or 377A;
 - (b) section 7 of the Children and Young Persons Act (Cap. 38); or

(c) section 140(1) of the Women’s Charter (Cap. 353).

(3) For the purposes of this section, it is immaterial whether the 2 or more previous occasions of A having met or communicated with B referred to in subsection (1) took place in or outside Singapore.

4 Section 376E was introduced in 2007 through the Penal Code amendments to protect minors from sexual predators in the online and physical realms. The provision was intended to allow law enforcement authorities to intervene earlier, and an accused could be prosecuted for preparatory acts that took place upstream before any physical sexual encounter. In contrast, successful prosecution for an attempted sexual offence requires the offender to be “caught in doing something very close in proximity to the sexual offence in question”.¹ Then Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee had said that the Government would monitor the effect of the legislation, to consider its impact and effect before making further amendments.²

Impetus for review

5 Despite evidence worldwide of the increase in online child sex abuse, there have been very few prosecutions under s 376E. One possible reason could be that the following two compound requirements of the offence are difficult to meet:

- (a) the age requirement of the offender, and
- (b) the minimum requirement for two prior communications or meetings before the accused meets or travels with intention of meeting the victim, intending to commit a sexual offence against the victim.

Recommendations

Age requirement of offender

6 The requirement that the offender is someone who is 21 years of age or above at the time of the offence may prevent sexual grooming charges from being preferred in cases where the offence would otherwise have been made out.

7 A notable example is *PP v Goh Kar Aip*³ (unreported). In that case, the 20-year-old accused used social media to befriend girls aged 12 and 13. His *modus operandi* was to chat up his victims on private messaging platforms on social media, before introducing sex-related topics into their communications. He would then arrange to meet up, and sexually violate them. He was charged with 34 offences, committed against ten victims. The accused pleaded guilty to four charges – three for penile-oral and digital-vaginal sexual penetration of a minor under 14 under s 376A(1)(a), punishable under s 376A(3) of the Penal Code, and one for sexual assault by penetration of a minor under 14 under s 376(2)(a), punishable under s 376(4)(b) of the Penal Code. While awaiting sentencing for these offences, new offences committed when the accused was on bail after being charged over his earlier offences, were uncovered and

¹ *Singapore Parliamentary Debates*, Official Reports (22 October 2007) vol 83 (Ho Peng Kee, Senior Minister of State for Home Affairs).

² *Ibid.*

³ Selina Lum, “Man admits to sexual offences against girls” *The Straits Times* (20 February 2018).

preferred. These charges were taken into consideration when he was eventually sentenced. He was sentenced to 16 years' imprisonment and 15 strokes of the cane.⁴

8 In the abovementioned case, the accused person was a sexual predator who targeted multiple young victims. If the primary offences involving actual physical contact had not been committed, such as if the accused was intercepted before he could meet his victims after sexually grooming them online, the police may have been limited in the charges that could actually be preferred. Section 376E of the Penal Code – the most appropriate offence that captures the crux of the wrongdoing, would not have been made out because of the age of the offender (below 21 years old). Therefore, some members proposed reducing the age requirement of the offender from 21 years old and above to 18 years old and above.

9 Other members were of the view that there is no need for the age requirement for the offender to be reduced from 21 years old and above to 18 years old and above. This is to ensure that sexting between younger minors will be sieved out and will avoid serious resource implications due to the increased prevalence of such sexting behaviour in the context of dating. This maintains the status quo under s 376E, where the age of the offender is set at 21 years old and above, as the offence is “targeted at adult sexual predators who themselves target vulnerable minors, not quite the experimenting teenagers or those who are not predators”⁵. Where the sexual interaction between a young couple escalates beyond sexting to penetrative physical intimacy, other offences like sexual penetration of a minor under 16 years old will become applicable.

10 The PCRC's view is that it is a policy call whether to set the age of the offender at 18 years old or 21 years old. Due to a lack of strong consensus either way, the PCRC puts both options up for the Government's consideration.

Reduce the number of instances of prior contact from two to one

11 The PCRC proposes that the number of instances of prior contact with the minor before the accused meets or travels with the intention of meeting the victim, intending to commit a sexual offence against the victim, should be reduced from two to one.

12 Notably, this requirement (for two instances of prior contact) was removed in subsequent amendments to s 15 of the United Kingdom's SOA 2003.

13 In 2015, following concerns raised by a cross-party Parliamentary inquiry supported by children's charity Barnardo's⁶ into the effectiveness of legislation for tackling child sexual exploitation and trafficking in the United Kingdom, s 36 of the CJCA 2015 amended s 15 so that the number of initial occasions on which the defendant must meet or communicate with the child in question in order to commit the offence is reduced from two to one. In particular, during the inquiry, evidence was received that the Child Exploitation and Online Protection Centre reported in 2013 (emphasis added) “that online child sexual exploitation has shifted in

⁴ Selina Lum, “Youth who sexually preyed on more than 10 young victims gets 16 years' jail and 15 strokes” *The Straits Times* (23 April 2018).

⁵ Singapore Parliamentary Debates, Official Reports (23 October 2007) vol 83 (Ho Peng Kee, Senior Minister of State for Home Affairs).

⁶ United Kingdom, *Report of the Parliamentary Inquiry into the effectiveness of legislation for tackling child sexual exploitation and trafficking within the UK* (April 2014) (Chairman: Sarah Champion)

its nature, with the *time between initial contact and offending behaviour often extremely short and characterised by rapid escalation to threats and intimidation.*” It describes a ‘scatter gun’ approach taken by perpetrators who target a large number of potential victims. The inquiry agreed with the evidence received that there was no reason why a second contact should be required, especially since when combined with the other requirements of meeting or travelling to meet a child, with the intention of abusing them, the threshold remains high.

14 This requirement also does not feature in similar pieces of legislation in Scotland, Canada, and Australia (Victoria).

15 The PCRC agrees with the approaches taken in jurisdictions such as the United Kingdom, Scotland, Canada, and Australia (Victoria). The reduction in the number of prior instances of contact from two to one will also allow the Police to intervene at an even earlier stage to protect minors from predatory offenders.

Making it an offence if the victim travels to meet the offender

16 The PCRC proposes to make it an offence if the offender has arranged a meeting with a victim following one occasion of prior contact, and the victim travels to meet the offender, rather than vice versa.

Introducing more severe punishments where the victim is below 14 years of age

17 To ensure consistency within the scheme of sexual offences in the Penal Code, the PCRC recommends adopting a tiered approach to sentencing, and proposes that:

- (a) Where the *victim is below 14 years of age*, and the accused does not reasonably believe that the victim is of or above the age of 14 years, the prescribed punishment should be discretionary imprisonment of up to 4 years, or fine, or both. This is an increase in the punishment prescribed for s 376E which is discretionary imprisonment of up to 3 years, or with fine, or with both.
- (b) Where the victim is *14, or above 14 and under 18 years of age*⁷, and the accused does not reasonably believe that the victim is of or above the age of 18 years, the prescribed punishment should remain the same, *ie* discretionary imprisonment of up to 3 years, or fine, or with both.

Expanding “relevant offence” to include new sexual offences being created

18 The PCRC had earlier proposed to create new sexual offences, and recommends that these new offences be included as “relevant offences” under s 376E(2). This will ensure that an accused who meets, or travels with the intention to meet a victim to commit such relevant offences in respect of the victim will commit an offence of sexual grooming.

⁷ The age of the victim will be increased to under 18 years of age. The element of “exploitation” required for offences to be made out where the victims are between 16 to below 18 years of age would be inherent in the “relevant offences” which the offender must have intended to commit, see s 376E(2).

Transitional arrangements

19 The PCRC recommends that the amendments to s 376E apply even where the prior contact (communication or meeting) with the victim takes place before the amendments come into force, provided that the accused does not meet or travel to meet the victim before that, *ie* the offence is not completed.

Recommendation 44: Introduce a new offence of “Sexual communication with a minor below 18 years of age”

Current law

20 The current law on sexual grooming under s 376E only allows authorities to intervene where an offender meets or attempts to meet victims face-to-face *and* where there has been communication on two or more previous occasions. There is no specific legal response available where an offender sexually communicates with a victim, with no intention of meeting or attempting to meet the victim.

Impetus for review

21 There has been an increased utilisation of communication *via* online communication technology, which has facilitated opportunities for individuals to gain access to minors for sexual activity. There is hence a need to move further upstream to target early predatory conduct by adult offenders, which could facilitate sexual activity with such minors later.

22 Offences criminalising sexual communication with minors exist in jurisdictions such as England and Wales, and Australia (Western Australia). The laws in the jurisdictions surveyed are similar in that the conduct that precedes the commission of a sexual offence is criminalised, regardless of whether there is an intention to facilitate or commit an underlying offence. This recognises that sexual communication is a common method to facilitate by helping to bring about, or make probable, the commission of a more serious sexual offence.

Recommendation

23 The PCRC recommends the creation of an offence which targets sexual communication by adult predators with minors under 16 years old. This will ensure that all the different sequential stages of sexual grooming are criminalised: someone who communicates with a minor over the Internet, then subsequently makes plans to meet up with him/her, and then commits a sexual offence against him/her, will be liable for all three offences – this new offence of sexual communication, sexual grooming under s 376E, and the primary sexual offence which the accused goes on to commit.

24 The proposed offence should only criminalise sexualised communication. Non-sexual communication which is intended to gain a child’s trust or create some form of relationship with her to facilitate a sexual offence later on will be caught under s 376E, if it can be shown that the accused had met or travelled to meet the child with an intent to commit a sexual offence.

25 The elements of the proposed new offence are as follows:

- (a) The offence should only apply to older offenders. This is to ensure that communication between young people (*eg* sexting) is not criminalised. The age of offender should be set at the same level as that for s 376E (sexual grooming of minor under 16). The PCRC has put up two options for setting the age of offender for the Government’s consideration: 18 years old and above, or 21 years old and above.
- (b) The victims of the proposed offence should be between 16 years and below 18 years of age (when “exploitation” of the offender can be proven), or below 16 years of age.
- (c) The communication must be sexual in nature. The PCRC proposes to adopt the definition of “sexual” under s 377C(d), such that the communication is “sexual” if:
 - (i) because of its nature it is sexual, whatever its circumstances or any person’s purpose in relation to it may be; or
 - (ii) because of its nature it may be sexual and because of its circumstances or the purpose any person in relation to it (or both) it is sexual.
- (d) It is unnecessary for a response to be made to the communication.
- (e) The communication, like in the case of s 376E, does not necessarily have to take place online. The offence can apply to offline communications like written notes or conversations held in person.

26 The proposed punishments for these offences are tiered, and enhanced for offences committed against minors below 14 years of age. The PCRC has considered that the punishment for this offence should be lower than that prescribed for an offence under s 376E. An offence under s 376E is objectively *more serious*, since the offender has taken a further step of meeting or travelling with the intention of meeting that victim. The proposed punishments are hence as follows:

- (a) Where the victim is under 14 years of age, and the accused does not reasonably believe that the victim is of or above the age of 14 years, the prescribed punishment should be up to 3 years’ imprisonment, or fine, or both.
- (b) Where the victim is between 14 years and under 18 years of age, and the accused does not reasonably believe that the victim is of or above the age of 18 years, the prescribed punishment should be up to 2 years’ imprisonment, or fine, or both.

Recommendation 45: Introduce a new offence of “Engaging in sexual activity before a minor under 18 years of age, or causing a minor under 18 years of age to look at a sexual image”

Current law

27 Currently, there is no specific provision which deals with the causing of a minor to look at a sexual image. There is a broader provision – s 292 of the Penal Code, which deals with the exhibiting or circulation or distribution or sale of obscene objects. Section 293 sets out enhanced punishments when the offences in s 292 are committed against a person under 21. The maximum punishments provided for are discretionary imprisonment of up to one year, or fine, or both.

28 Furthermore, there is currently no law in Singapore that specifically deals with offenders who engage in sexual activity before a minor. These offences would likely be dealt with under s 509 (Insult of modesty).

Impetus for review

29 The PCRC is of the view that the maximum punishments under s 293 and s 509 are inadequate. In addition, these do not adequately reflect the gravity of the offence, especially when the victims are minors under 14 years of age.

30 In a cross-jurisdictional survey on sexual offences in other jurisdictions, the PCRC has also found that jurisdictions such as England and Wales, and Scotland criminalise such activities specifically.

Recommendation

31 The PCRC hence recommends that a new offence of “engaging in sexual activity before a minor under 18 years of age, or causing a minor under 18 years of age to look at a sexual image” be introduced. The proposed elements of the offence are as follows:

- (a) The offence should only apply to adult offenders. This is to ensure that communication between young people (*eg* sexting) is not criminalised.
- (b) The offender intentionally causes a person under 18 (“B”) to look at a sexual image, or engages in sexual activity before B.
- (c) For the purposes of:
 - (i) obtaining sexual gratification; or
 - (ii) humiliating, distressing or alarming B.

32 Where the victim is between 16 years of age and below 18 years of age, there is an added requirement that the offender must have “exploited” the minor.

33 The proposed punishments are as follows:

- (a) Where the *victim is under 14 years of age*, the prescribed punishment should be up to 3 years’ imprisonment. This is an uplift of the punishment proposed for the offence below (where the victim is older).
- (b) Where the victim is *between 14 years and under 18 years of age*, the prescribed punishment should be imprisonment which may extend to one year, or fine, or both.

Conclusion

34 The recommendations made in this section are meant to deal with the entire spectrum of predatory behaviour by adult offenders, who seek to groom and manipulate minors for their own sexual gratification. It is hoped that these recommendations will enable authorities to intervene and punish offenders early, before more serious sexual offences are committed, and greater harm caused to the victims.

SECTION 16.6: CHILD ABUSE MATERIAL

SUMMARY OF RECOMMENDATIONS

(46) Introduce new offences relating to "child abuse material"

Introduction

In this section, the PCRC examined the need for dedicated laws against "child pornography", a widely recognised term used to refer to images depicting children who are sexually victimised.

Current law

2 There are no specific offences involving child pornography, and a current patchwork of laws exist to address offences involving pornography.

3 Generally, the definition of pornography is covered under s 2(1) of the Films Act¹. Importantly, there is no distinction drawn between child pornography and other types of obscene films, and similar penalties are provided for these offences. The Films Act² contains several offences relating to the possession, making, importation, and distribution (among other things) of "obscene films".³

4 Section 292 of the Penal Code contains several offences relating to the sale, distribution, importation, and advertisement (among other things) of any "obscene object". These offences are punishable with imprisonment which may extend to three months, or with a fine, or both.

5 Section 11 of the Undesirable Publications Act⁴ contains offences involving "obscene publications". These offences pertain to the making, reproduction, importation, and sale (among other things) of obscene publications. The offences are punishable, on conviction, to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding two years or to both.

¹ Section 2(1) of the Films Act (Cap 2002, 1998 Rev Ed) states:

In this Act, unless the context otherwise requires –

"obscene", in relation to a film, means a film the effect of which or (where the film comprises 2 or more distinct parts or items) the effect of any one of its parts or items is, if taken as a whole, such as to tend to deprave or corrupt persons who are likely, having regard to all relevant circumstances, to see or hear the film.

² (Cap 2002, 1998 Rev Ed).

³ The key offences are:

- (a) Making or reproducing any obscene film, knowing or having reasonable cause to believe the film to be obscene (s 29(1));
- (b) Importing any obscene film knowing or having reasonable cause to believe the film to be obscene (s 29(2));
- (c) Distributing an obscene film knowing or having reasonable cause to believe the film to be obscene (s 29(3));
- (d) Exhibiting an obscene film knowing or having reasonable cause to believe the film to be obscene (s 29(4));
- (e) Possessing any obscene film (s 30(1));
- (f) Possessing any obscene film knowing or having reasonable cause to believe the film to be obscene (s 30(2));
- (g) Advertising any obscene film for the purposes of distribution or exhibition (s 31(1));
- (h) Advertising any obscene film for the purposes of distribution or exhibition, knowing or having reasonable cause to believe the film to be obscene (s 31(2)).

⁴ (Cap 338, 1998 Rev Ed).

Impetus for review

6 The proliferation of the Internet, as well as the rapid development of other technology such as the smartphone, has allowed for fast, widespread, and anonymous distribution of child pornography. Before the rise of the Internet, distributing child pornography would have been a more time-intensive and expensive undertaking which required making physical copies of images or videos, taking out advertisements for interested parties, and physical delivery of these copies to the intended recipients.

7 That situation is a stark juxtaposition to the situation now. Technology has not just facilitated the distribution of child pornography, but the *demand* for it as well. Anyone who possesses such pornographic material on his computers or mobile phone may distribute these images to countless individuals, at nearly zero cost with minimal compromise on quality. Anyone can search for and download pornographic images easily, anonymously, and in high volume.

8 The use of web cameras and video-conferencing, commercial sexual exploitation of minors has expanded to include Webcam Child Sex Tourism (“WCST”), where an offender pays or offers rewards to direct and view live streaming video footage of children in another country performing sexual acts in front of a webcam.⁵ Worldwide, the number of sites devoted to child pornography is growing, and the number of predators connected to the Internet at any one time is estimated to be 750,000.⁶ Even though there is no sexual penetration of the child by the offender in such situations, the psychological damage is serious, to the children who are exploited to be part of such activities. Most children who engage in sexual acts for the production of pornography report dysfunctional sexualised behaviour, feelings of worthlessness and shame.⁷

9 The current law was not designed for, and is inadequate to address the serious problems that the rise of the Internet has created for offences such as child pornography.

Cross-jurisdictional survey

10 Across the world, there is an increasing recognition of the special harm and depravity inherent in child pornography. Jurisdictions such as the United States of America, Australia, England and Wales, Canada, Hong Kong, and Japan criminalise the creation, possession, and distribution of child pornography.

⁵ Terre des Hommes Netherlands, “Webcam Child Sex Tourism, Becoming Sweetie: a novel approach to stopping the global rise of Webcam Child Sex Tourism” (4 November 2013) <https://www.terredeshommes.nl/sites/tdh/files/uploads/research_report.pdf> (accessed 20 August 2018) at p 11.

⁶ 12th Session of the United Nations Human Rights Council, “*Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat M’jid Maalla, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*” (13 July 2009) A/HRC/12/23, at para 34 <<http://lastradainternational.org/doc-center/2247/promotion-and-protection-of-all-human-rights-civil-political-economic-social-and-cultural-rights-including-the-right-to-development>> (accessed 20 August 2018). It should be noted that in this report, child pornography “depicts a child engaged in real or simulated explicit sexual activities or lewdly depicting parts of a child’s body, with the intention of stimulating sexual arousal and gratification.”

⁷ Terre des Hommes Netherlands, “Webcam Child Sex Tourism, Becoming Sweetie: a novel approach to stopping the global rise of Webcam Child Sex Tourism” (4 November 2013) at p 29 <https://www.terredeshommes.nl/sites/tdh/files/uploads/research_report.pdf> (accessed 20 August 2018)..

11 There are differences in the type of material that is covered. Jurisdictions like England and Wales, Hong Kong, and Australia include fictional material (such as cartoons, *manga*, and anime) within their definition of child pornography. Jurisdictions like the United States of America, Japan, and Canada do not include fictional material with their definition of child pornography. Except for the Australian states, none of the other jurisdictions surveyed included non-sexual abuse within the scope of their offences. In addition, while some jurisdictions (the United States of America, Japan, and Hong Kong) only criminalise visual depictions, other jurisdictions (Canada and the Australian states of NSW and Victoria) criminalise audio recordings and written materials that involve child pornography.

Recommendation 46: Introduce new offences relating to “child abuse material”

12 The PCRC recommends introducing new offences relating to “child abuse material”. These offences will address the rapid development of several other technologies which has allowed for fast, widespread, and anonymous distribution of such exploitative and abusive material.

13 There should be sufficient offences to deal with the entire ecosystem of offences perpetrated in the production, distribution, and consumption of such material, taking into account the rapid development of technology and the Internet.

14 The PCRC has taken reference from the schema of the Films Act and offences available in the jurisdictions surveyed, and proposes the creation of the following offences:

- (a) Using or involving a child in the making of such material.
- (b) Making of such material.
- (c) Distribution, selling, transmitting, etc., and possession of such material for these purposes.
- (d) Advertising or the seeking of such material.
- (e) Accessing and possession *simpliciter*.

15 The PCRC has recommended the application of specific defences for these offences as well. These defences are discussed at [41] below.

Definition of child abuse material

16 Instead of the term “child pornography”, the PCRC recommends that the term “child abuse material” be used instead, to reflect the true nature of such material and its harms.

17 There is some controversy surrounding the use of the term “child pornography”. A growing number of academics and activists contend that the term ought not be used to refer to sexually explicit images of children.⁸ They argue that the term “child pornography” fails to capture the horrible nature of the harm suffered by children who are depicted.⁹ The term “likely conjures up images of younger-looking adults striking provocative poses, as opposed to the

⁸ Clarissa B Hessian, *Refining Child Pornography Law: Crime, Language, and Social Consequences* (University of Michigan Press, 2016) at p 2.

⁹ *Ibid.*

reality of an increasingly violent collection of photographs and videos depicting younger and younger children being violently victimised”.¹⁰

18 The PCRC recommends that the definition of “child abuse material” should include the following:

- (a) Visual depictions (including any photograph, film, video, picture, or computer-generated image) and audio recordings which:
 - i. Involves the use of a child engaging in any sexual activity.
 - ii. Involves any poses of a child wholly or partially naked.
 - iii. Involves a child as the subject of torture, cruelty, or physical abuse (whether or not the torture, cruelty or abuse is sexual in nature).
- (b) An *Explanation* will be included to state that fictional material will also be included in the definition of “child abuse material”.
- (c) For the avoidance of doubt, depictions for a genuine family purpose will not fall within the definition of "child abuse material" merely because it depicts any pose of a child wholly or partially naked.

19 A child will be defined as any person below the age of 18 years old. Where the victims are minors between 16 to below 18 years of age, the Prosecution will be required to prove that the offences were committed in the context of an “exploitative relationship”.

20 Text and written material will be excluded from the definition of “child abuse material”.

21 The definition covers not only sexual, but physical abuse as well. This is to recognise that the trade in depictions of physical abuse of a child can be very harmful, like depictions of sexual abuse.

22 The PCRC recommends that fictional material should be covered because such material could be used for grooming children, and could fuel child abuse by reinforcing potential abusers’ inappropriate feelings towards children. While the PCRC is unaware of any specific research into whether there is a link between accessing fictional images of sexual abuse and the commission of offences against children, the possession and circulation of such images serves to legitimise and reinforce highly inappropriate views about children. Therefore, the PCRC is of the view that fictional material should be included within the definition of “child abuse material”.

23 However, the PCRC is of the view that there should be lower punishments prescribed for fictional “child abuse material”. This is to recognise the fact that fictional material does not involve actual children.

Using or involving a child in the making of “child abuse material”

24 The PCRC proposes that it should be an offence for any person:

- (a) to use a child for the production of such material;
- (b) to cause or procure a child to be so used; or

¹⁰ *Ibid.*

- (c) having the care of a child, to consent to the child being so used or allows the child to be so used.

25 A person who has “care” of a child need not necessarily be someone who is entitled by law to have custody of the child. The PCRC intends for the offence to apply to *anyone*, who, having the care of a child, consents to the child being used for the production of such material. This could include parents, guardians, and even babysitters tasked with temporary care of the child.

Making of “child abuse material”

26 The PCRC recommends that a similar offence to s 29(1) of the Films Act¹¹ be introduced for “child abuse material” with more severe punishments, and a clear requirement of *mens rea* for the definition of the term “making”. As such, the PCRC proposes that it would be an offence for any person to intentionally make material that is “child abuse material”.

27 The term “make” should be defined to include:

- (a) filming, printing, photographing, and recording; or
- (b) altering or manipulating material; or
- (c) reproducing material.

28 The term “make” will make it clear that the original creation of the material, as well as later alterations and edits would constitute “making” for the purposes of this offence.

Distributing, selling, transmitting, etc., and possession of “child abuse material” for these purposes

29 Taking reference from s 29(3) of the Films Act¹², the PCRC recommends the creation of a similar offence, but with a clear requirement for *mens rea*, and a clear definition of the term “distribute”. As such, it would be an offence for any person knowing or having reason to believe that the material is “child abuse material” to:

- (a) intentionally distribute “child abuse material”; or
- (b) have child abuse material in his possession for the purposes of distribution.

30 The term “distribute” should be defined to include:

- (a) the publication, exhibition, communication, sending, supplying, selling or transmitting the material to any other person or the possession of such material for any of these purposes; or
- (b) making the material available for access by any person.

31 This broad definition is meant to capture the sending of “child abuse material” in an email or via mobile communications, or uploading the material to a website for others to view or download.

¹¹ (Cap 2002, 1998 Rev Ed).

¹² *Ibid.*

Advertisement for and the seeking of “child abuse material”

32 Section 31(1) of the Films Act¹³ makes it an offence for any person who, for the purposes of distributing or exhibiting any obscene film to any other person, advertises the films by any means.

33 The PCRC proposes that a similar offence be created for “child abuse material”. Therefore, it will be an offence for any person who, for the purpose of distributing any “child abuse material”, advertises the availability of the material, by any means. In addition, the PCRC proposes that an offence should be created for those who seek out “child abuse material” through any form of advertisement. Together, both offences will address the demand and supply part of the chain involving “child abuse material”.

Accessing and possession simpliciter of “child abuse material”

34 The PCRC proposes that the acts of accessing and possession *simpliciter* of “child abuse material” in itself should be an offence. If not for the users, there would be no market for those who abuse children by creating this material. The relationship between the maker of pornography and the user has been likened to the relationship between receivers and thieves.¹⁴ Without a market for stolen goods, there would be no incentive to steal. Similarly, without a market for “child abuse material”, there would be no incentive to abuse children to produce it. Therefore, users are *complicit* in the abuse involved in the production of the image.

35 The offence of possession of child pornography exists in most jurisdictions surveyed such as Canada, Australia, United States of America, and the United Kingdom.

36 The offence of “accessing” such material appears in jurisdictions that have modernised their legislation, such as Canada and Australia.¹⁵ For example, in Victoria, a new offence of “accessing child abuse material” was created to target the intentional viewing of child abuse material. At that point in time, the existing offence of *possession* of such material did not criminalise those who viewed the material online if the prosecution could not prove that the person knew they possessed the material because it was simultaneously downloaded into the computer’s memory. This new offence was thus introduced to close the loophole and criminalise consumers of “child abuse material”.

37 The PCRC proposes to adopt Australia (Victoria)’s position. A specific offence of accessing material better describes and closely matches the offender’s conduct than to treat viewing a website as a form of “production”. The specific offence would also take into account the proliferation of live-streaming websites which provide for webcam child sex tourism and live “sex shows” by children.

¹³ Ibid.

¹⁴ *R v Jongasma* (2004) 150 A Crim R 386 at [28] per Batt JA.

¹⁵ Jurisdictions that do not have an offence of “accessing” child pornography have to rely on the common law. At common law, accessing child pornography from a website is prosecuted as *production* of child pornography. This is because the act of accessing the material downloads a local and temporary copy of the material. However, evidence of production requires evidence that the accused was *aware* that accessing the material involved downloading a temporary local copy. See *R v Bowden* [2000] 2 All ER 418; *R v Atkins* [2000] 2 Cr App R 248; *R v Smith* [2003] 1 Cr App R 13; *Director of Public Prosecutions v Kear* [2006] NSWSC 1145.

38 Therefore, the PCRC recommends that it would be an offence for any person:

- (a) to possess or access “child abuse material”;
- (b) knowing or having reason to believe that the material was “child abuse material”.

39 Possession of “child abuse material” should not merely be limited to *physical* possession. A person may “possess” such material that is electronic if he controls access to the material; it is irrelevant whether or not he has physical possession of that electronic material. To illustrate this point, *Y* might have an online storage account for electronic material accessible with a username and password. *Y* has control of what is stored in the account and can upload or delete material from the account. If *Y* has an electronic folder in which he uploads electronic child abuse material, he has possessed child abuse material.¹⁶

40 The concept of “accessing” may be explained in legislation to mean that a person accesses such material if he knowingly causes the material to be viewed by, or transmitted, to himself.¹⁷

Whether the offences relating to “child abuse material” should have defences

41 The PCRC proposes that the following limited defences be made available to an accused:

- (a) Unsolicited possession: This defence will cover situations where someone receives unsolicited images containing child abuse material and takes reasonable steps to destroy these images. To illustrate, *Y* receives an image containing child abuse or child exploitation material without any prior request made by him or on his behalf. *Y* deletes the image within a reasonable time. *Y* has not committed an offence of accessing or possessing child abuse or child exploitation material.¹⁸
- (b) Legitimate purpose related to the administration of justice or to science, medicine, education or art: Examples of situations this defence covers are individuals and organisations that come into contact with child abuse material as part of their official duties or work. Such individuals include police officers responsible for the investigation of offences involving child abuse material. This defence may also apply to legitimate research. While what constitutes legitimate research is ultimately a question of fact, it should be clear that the defence is not open to anyone simply on the grounds of pursuing general research.¹⁹

¹⁶ Based on s 51G of the Crimes Act 1958 (Vic).

¹⁷ This definition is adopted from s 163(4.2) of the Canadian Criminal Code (RSC, 1985, c. C46).

¹⁸ We have adopted this illustration from the English case of *R v Collier* [2005] 1 Cr App R 9.

¹⁹ Similarly, in *Atkins v Director of Public Prosecutions* [2002] 2 Cr App R 248, Simon Brown LJ stated that what constitutes a legitimate reason is ultimately a question of fact depending on the legitimacy of the research and whether the defendant is essentially a person of unhealthy interests in the possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession.

Extra-territorial application of certain offences

42 The PCRC recommends that the offence of: (a) using or involving a child in the making of “child abuse material”; and (b) making of such material should have extra-territorial application. Our recommendation is consistent with the rationale behind giving extra-territorial effect to the offence of engaging in commercial sex with a person under 18 under s 376C of the Penal Code. Like s 376C, the extra-territorial application will only have effect if the accused is a Singapore citizen, or permanent resident.

Proposed prescribed punishments

43 The PCRC considered the following when proposing maximum punishments for the new offences described above:

- (a) The provisions currently used to cover offences involving child pornography (*ie* s 292 of the Penal Code, ss 29-30 of the Films Act²⁰) are inappropriate points of reference. The provisions do not have the objective of protecting children from abuse, and are unsuitable to meet the modern issues presented by the Internet.
- (b) Offences involving fictional child abuse material should be punishable with lower punishments to reflect the lower severity of harm.
- (c) The punishments prescribed must reflect the differences in the new offences as far as objective severity of the offences is concerned.
- (d) The punishments prescribed should be sufficient to act as a denunciation of child abuse material and a general deterrent to protect children from abuse.

44 With the abovementioned considerations in mind, the PCRC proposes the following punishments:

S/N	Offence	Maximum punishment for offences involving fictional children	Maximum punishment for offences involving actual children
1	Using/involving a child in the making of child abuse material	-	Mandatory imprisonment for up to 10 years, discretionary caning, and discretionary fine
2	Making of child abuse material	Discretionary imprisonment for up to 5 years, discretionary caning, and discretionary fine	Mandatory imprisonment for up to 10 years, discretionary caning, and discretionary fine
3	Distribution, selling, transmitting etc., and possession for these purposes	Discretionary imprisonment for up to 3 years, discretionary caning, and discretionary fine	Mandatory imprisonment for up to 7 years, discretionary caning, and discretionary fine
4	Advertising	Discretionary imprisonment for up to 2	Mandatory imprisonment for up to five years,

²⁰ (Cap 2002, 1998 Rev Ed).

S/N	Offence	Maximum punishment for offences involving fictional children	Maximum punishment for offences involving actual children
		years, discretionary caning, and discretionary fine	discretionary caning, and discretionary fine
5	Accessing and possession of abusive/exploitative material	Discretionary imprisonment for up to 2 years, discretionary caning, and discretionary fine	Mandatory imprisonment for up to five years, discretionary caning, and discretionary fine

Conclusion

45 The PCRC is of the view that dedicated laws against child abuse material, punishable by appropriate penalties that take into account the grave nature of such material, are necessary. The enactment of such laws is necessary to provide better protection for children.

**SECTION 17: GENERAL ENHANCEMENT OF PENALTIES FOR OFFENCES
KNOWINGLY COMMITTED AGAINST VULNERABLE VICTIMS**

SUMMARY OF RECOMMENDATIONS

- (47) *Enhance the maximum penalties for offences committed against children, vulnerable persons, and domestic maids, by up to two times the maximum punishment the offender would otherwise have been liable to, as follows:*
- a. *Enhance penalties for all offences in the Penal Code committed against children under 14 years of age*
 - b. *Enhance penalties for all offences in the Penal Code committed against vulnerable persons*
 - c. *Expand the list of specified offences and scope of offenders covered by s 73, and enhance penalties, for offences against domestic maids*

Introduction

In this section, the PCRC considered whether current enhanced punishment provisions in the Penal Code for offences committed against vulnerable groups such as children below 14 years of age, vulnerable persons, and domestic maids should be strengthened to better protect these groups.

2 In general, the vulnerability of the victim is considered during sentencing. The characteristics of the victim and the degree of exploitation by the offender are currently provided for within the current sentencing ranges for offences. Sentencing is a fact-sensitive exercise, and courts typically consider all the facts and circumstances of the case before determining the most appropriate sentence. However, there is a case to be made for such vulnerability to be a specified aggravating factor in certain cases, where there is either a high degree of victim vulnerability, or a high degree of exploitation by the offender of the victim's circumstances. In such instances, there is scope to increase the maximum penalties for such offences, beyond current sentencing ranges. This reflects the egregious nature of offences that deliberately target vulnerable persons, on account of their vulnerabilities, and an offender who does so would be more morally culpable. There is thus a need to send a stronger deterrent signal that such acts will not be tolerated.

3 The recommendations of the PCRC in the following sections take reference from the existing enhancement of penalties in s 73 of the Penal Code, which provide for enhanced penalties of up to one-and-a-half times the maximum punishments for a specified list of offences committed by an employer of a domestic maid or a member of the employer's household against their domestic maid. The PCRC recommends extending similar protection to children under the age of 14 and vulnerable persons, defined as a person who is, by reason of mental or physical infirmity, disability or incapacity, substantially unable to protect himself or herself from abuse, neglect or self-neglect. The PCRC recommends further enhancing the existing protections for domestic workers as well.

4 Beyond the groups highlighted above, the PCRC had considered imposing enhanced penalties for offences committed against the elderly and individuals who may not fall within the proposed vulnerable groups of victims identified in recommendation 47(a)-(c), but who were nevertheless vulnerable and susceptible to crime. The expansion of the scope of such

enhanced punishment provisions would have had a stronger signalling effect in deterring crime against vulnerable victims in society. However, the PCRC is of the view that it is at present, not necessary to do so. Enhanced punishment should be reserved for the most egregious cases, and victims with lower level of vulnerabilities would still be protected through higher punishments within the current sentencing ranges for offences.

Recommendation 47(a): Enhance the maximum penalties for offences committed against children under 14 years of age by up to two times the maximum punishment the offender would otherwise have been liable to

Current law

5 Children under 14 years of age are currently afforded additional protection under the Penal Code in an *ad hoc* and piecemeal manner, through enhanced punishments for certain offences committed against them. Examples of such provisions in the Penal Code are set out below

Assault or use of criminal force to a person with intent to outrage modesty

354.—(1) *Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.*

(2) *Whoever commits an offence under subsection (1) against any person under 14 years of age shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with caning, or with any combination of such punishments.*

Outraging modesty in certain circumstances

354A.—(1) *Whoever, in order to commit or to facilitate the commission of an offence against any person under section 354, voluntarily causes or attempts to cause to that person death, or hurt, or wrongful restraint, or fear of instant death, instant hurt or instant wrongful restraint, shall be punished with imprisonment for a term of not less than 2 years and not more than 10 years and with caning.*

(2) *Whoever commits an offence under subsection (1) —*

(a) in a lift in any building; or

(b) against any person under 14 years of age,

shall be punished with imprisonment for a term of not less than 3 years and not more than 10 years and with caning.

Impetus for review

6 Children are *inherently vulnerable* due to their young age, smaller physical stature, lack of maturity and knowledge, and inability to identify perpetrators of and seek redress from harm. The current *ad hoc* protection provided by the Penal Code in specific provisions does not cover the full spectrum of offences which children are vulnerable to, especially those relating to physical hurt.

Recommendation

7 The PCRC recommends introducing a new provision in the Penal Code to provide for the doubling of punishments for offences committed against children under 14 years of age. The definition of “child” as a person under the age of 14 years takes reference from the current definition in the CYP A, and is consistent with the enhanced protection that is currently offered in the Penal Code through enhanced punishment provisions provided for sexual offences committed against such children. The PCRC is also of the view that below 14 years of age, such young children are generally physically smaller, more naïve and easily exploited.

8 This new section would apply to all offences in the Penal Code for which there could be a natural victim. Offences which already provide for enhanced penalties for offences committed against children below the age of 14 years, such as s 354 (Outrage of modesty), s 375 (Rape), and s 376 (Sexual assault by penetration), will be excluded.

9 To ensure fairness to the offender, the PCRC recommends that the *mens rea* required for the enhancement of penalties is that the offender “knew” or “ought reasonably to have known” that the victim was a child at the time he committed the offence. There should be a nexus between the offence committed and the particular vulnerability of the child due to his young age. The enhanced penalties would not apply if the offender is able to show that the particular vulnerability of the victim did not make him more “susceptible” to the crime committed, and it would be for the offender to prove that there was no such nexus.

Recommendation 47(b): Enhance the maximum penalties for offences committed against vulnerable persons by up to two times the maximum punishment the offender would otherwise have been liable to

Current law

10 As part of the Vulnerable Adults Act passed in Parliament in May 2018, consequential amendments were made to the Penal Code to provide for enhanced penalties for offences committed against “vulnerable adults”. The definition of “vulnerable adult” and the new s 74A of the Penal Code is set out below.

“vulnerable adult” means an individual who –

(a) Is 18 years of age or older; and

(b) Is, by reason of mental or physical infirmity, disability or incapacity, incapable of protecting himself or herself from abuse, neglect or self-neglect.

Enhanced penalties for offences against vulnerable adults

74A.—(1) This section applies where a person is convicted on or after the date of commencement of the Vulnerable Adults Act of an offence specified in subsection (3) (called in this section the offence) against a vulnerable adult.

(2) The court may sentence the offender to one and a half times the amount of punishment to which the offender would otherwise have been liable for that offence, where at the time of committing the offence the offender knew or ought reasonably to have known that the victim was a vulnerable adult.

(3) The offence referred to in subsection (1) is any of the following offences:

- (a) an offence under section 304A, 323, 324, 325, 334, 335, 336, 337, 338, 341, 342, 343, 344, 346, 347, 352, 354, 355, 357, 358, 376G, 508 or 509;
- (b) an offence of criminal intimidation which is punishable with imprisonment for a term which may extend to 2 years, or with fine, or with both, under section 506.

Impetus for review

11 The Vulnerable Adults Act provides powers to the State to take protective measures such as removal of the vulnerable adult from their living conditions as a last resort. A tight definition of “vulnerable adults” was thus adopted to strike a balance between respecting individuals’ autonomy while protecting those in need of help. At the point when the Vulnerable Adults Act was introduced in Parliament, the PCRC had not completed its review, and s 74A was introduced taking reference from the current formulation of s 73 in the Penal Code.

12 Given the need to further enhance protection for vulnerable persons, the PCRC has proposed additional recommendations to s 74A, to cover more persons and offences, and to increase the level of enhancement for penalties under s 74A. This recognises that the definition of “vulnerable adults” in the Vulnerable Adults Act may be too tightly scoped for the purposes of s 74A in the Penal Code, and s 74A will also be further enhanced together with proposed changes to s 73.

Recommendation

13 The PCRC recommends amending s 74A in the Penal Code to provide for the following:

- (a) Enhancement of penalties for offences committed against “vulnerable persons”, defined as an individual who is, by reason of mental or physical infirmity, disability or incapacity, substantially unable to protect himself or herself from abuse, neglect, or self-neglect. This removes the age requirement of 18 years and above for “vulnerable adults”, such that younger vulnerable persons with similar disabilities or incapacities would also be covered. The threshold of vulnerability will also be lowered from “*incapable* of protecting themselves from abuse, neglect or self-neglect” to “*substantially unable to protect* themselves from abuse, neglect or self-neglect”. This would cover situations where victims may be capable of caring for their day-to-day affairs, but could be more susceptible to crime and abuse due to some mental or physical disability or infirmity;
- (b) Doubling of punishments for offences committed against “vulnerable persons”. The enhancements will apply consistently across vulnerable persons, children, and domestic maids;
- (c) Extension of provision to cover all offences in the Penal Code for which there could be a natural victim. This would cover all situations which such vulnerable persons may be more susceptible to offences committed against them, such as financial crimes. While the current safeguards in proposed s 74A that the offender “knew” or “ought reasonably to have known” that the victim was a vulnerable person would continue to apply, there should be a nexus between the offence committed and the particular vulnerability of the victim. For example, being physically incapacitated may render a victim more susceptible to physical

harm, but not necessarily to financial crimes such as Cheating, if the mental faculties of the victim are still intact. It would be for the offender to prove that there was no nexus between the offence committed and the particular vulnerability of the victim.

14 The PCRC notes that the broader definition above would lead to better and wider protection for more vulnerable persons. However, the definition of “vulnerable adult” in the Vulnerable Adults Act will remain the same. This ensures the careful exercise of coercive powers in the Vulnerable Adults Act, which should only be exercised in cases where the person displays a high level of vulnerability, *and is incapable* of caring for and protecting himself.

15 The considerations are different for the Penal Code. There is a need to increase the protection of vulnerable persons from exploitation and being targeted for crime through stronger deterrent measures. Where crimes are committed against these vulnerable persons, there is a concomitant need to set the prescribed punishment for offences committed against vulnerable persons at the level that reflects the greater culpability and society’s more severe disapprobation of such conduct. Therefore, the definition of “vulnerable person” in the Penal Code should be scoped more broadly to extend the protection of the law to persons who require it, and the sanction of the law to those who deserve it.

Recommendation 47(c): Expand the list of specified offences and scope of offenders covered by s 73 (Enhanced penalties for offences against domestic maids), and enhance penalties, for offences against domestic maids

Current law

16 The Penal Code currently provides for enhanced punishments for a specified list of offences committed against domestic maids by their employers or members of the employer’s household. Relevant excerpts of the provisions are set out below.

Enhanced penalties for offences against domestic maids

73.—(1) *Subsection (2) shall apply where an employer of a domestic maid or a member of the employer’s household is convicted of—*

(a) an offence of causing hurt or grievous hurt to any domestic maid employed by the employer punishable under section 323, 324 or 325;

(b) an offence of wrongfully confining any domestic maid employed by the employer punishable under section 342, 343 or 344;

(c) an offence of assaulting or using criminal force to any domestic maid employed by the employer punishable under section 354;

(d) an offence of doing any act that is intended to insult the modesty of any domestic maid employed by the employer punishable under section 509; or

(e) an offence of attempting to commit, abetting the commission of, or being a party to a criminal conspiracy to commit, an offence described in paragraphs (a) to (d).

(2) Where an employer of a domestic maid or a member of the employer’s household is convicted of an offence described in subsection (1)(a), (b), (c), (d) or (e), the court may sentence the employer of the domestic maid or the member of his household, as the case may be, to one and a half times the amount of punishment to which he would otherwise have been liable for that offence.

...

(4) For the purposes of this section —

“domestic maid” means any female house servant employed in, or in connection with, the domestic services of her employer’s private dwelling-house and who resides in her employer’s private dwelling-house;

“dwelling-house” means a place of residence and includes a building or tenement wholly or principally used, constructed or adapted for use for human habitation;

“member of the employer’s household”, in relation to a domestic maid, means a person residing in the employer’s private dwelling-house at the time the offence was committed whose orders the domestic maid has reasonable grounds for believing she is expected to obey.

17 The provision was introduced in 1998, recognising that due to their circumstances, domestic maids who “work within the confines of their employers’ home for 24 hours of the day, and except during their time-off, are isolated from the rest of society nearly all the time, and depend on their employer for food and lodging”, are “more vulnerable to abuse by employers and their immediate family members, than any other categories of employees”.¹ An added dimension was that abuse of foreign domestic maids could “damage our international reputation and bilateral relations”. Hence, the enhancement of penalties of certain offences committed against domestic maids by one-and-a-half times was to “signal clearly to employers of domestic maids that the Government takes a serious view of maid abuse”.

18 This principle has been recognised in the courts which have applied s 73 to enhance sentences. Then Chief Justice Yong Pung How said “[a]n employer should not exploit his maid’s dependence on him for food and lodging, for these are basic rights. A maid’s abased social status does not mean that she is any less of a human being and any less protected by the law”.² More recently, the High Court has acknowledged that “it goes without saying that there is ordinarily a pressing need for general deterrence in cases of maid abuse”, and that maids are “a class of highly vulnerable victims; their employers can subject them to strict control, which means that abuse can go unreported and undetected for long periods of time”.³

Impetus for review

19 Section 73 does not address all types of offences in the Penal Code which may be committed against domestic maids.

20 In addition, s 73 of the Penal Code covers a limited scope of offenders, and does not cover offenders who may act in a similar capacity as the employer, and wield similar authority over the domestic maid. Section 73 currently applies only where the accused person falls within the following two categories:

¹ *Singapore Parliamentary Debates, Official Reports* (20 April 1998) Vol 68 at cols 1923-1924 (Wong Kan Seng, Minister for Home Affairs).

² *Farida Begam d/o Mohd Artham v PP* [2001] 3 SLR(R) 592 at [27].

³ Per Chao Hick Tin JA in *Soh Mei Yun v PP* [2014] 3 SLR 299 at [44].

- (a) Employer: The requirement of the domestic maid’s employer has been interpreted *strictly* by the courts to apply only to “registered employers”.⁴
- (b) Member of the employer’s household: This only covers “family members of the maid’s employer who are residing in the same home as the employer and the maid”. Then Minister (Home Affairs) had also specifically excluded the scenario where “a maid’s employee sends her to work in another household, say, his brother’s home on an *ad hoc* basis, and a member of the household, say, his brother, subsequently abuses her”.⁵

Recommendation

21 The PCRC recommends that s 73 of the Penal Code be amended to provide for the following:

- (a) Extension of provision to cover all offences in the Penal Code for which there could be a natural victim. This would provide full protection to domestic maids who are exploited, abused, or mistreated by their employers.
- (b) Increase the enhancement of maximum punishments which the offenders would be liable to from one-and-a-half to two times. This would signal society’s strong disapprobation of such offences, and strengthen the deterrent effect of s 73. The enhancements would also be consistent with similar enhancements to offences committed against children and vulnerable persons.
- (c) Expand scope of offenders covered by s 73 to include (i) someone who was acting in a similar capacity as the employer, and whose orders the domestic maid has reasonable grounds for believing she is expected to obey, and (ii) the agent of the domestic maid, or someone who was acting in a similar capacity as the agent and whose orders the domestic maid has reasonable grounds for believing she is expected to obey.

Conclusion

22 The recommendations in this section serve to strengthen protection of vulnerable groups in society by enhancing penalties and broadening the scope of the offenders and victims to which these protections would apply. Three specific groups – children, vulnerable persons, and domestic maids – have been identified for especial protection in the Penal Code. It is hoped that the additional protection through enhanced deterrence for offences committed against them will serve to deter and prevent crimes committed against these vulnerable victims.

⁴ See *Ho Yean Theng Jill v PP* [2004] 1 SLR (R) 254 at [55]. In that case, the victim’s work permit was registered under the offender’s ex-husband. However, her ex-husband had moved out of the matrimonial flat before the material incidents took place. The maid was working in the offender’s household and took instructions from the offender at all material times. The High Court noted at [56] and [58] that in this case, s 73 of the Penal Code did not apply “because [the offender] was not the registered employer”.

⁵ *Singapore Parliamentary Debates, Official Reports* (20 April 1998) Vol 68 at cols 1925-1926 (Wong Kan Seng, Minister for Home Affairs).

SECTION 18: DEALING WITH ABUSE OF VULNERABLE VICTIMS LEADING TO DEATH OR OTHER FORMS OF GRIEVOUS HURT

SUMMARY OF RECOMMENDATIONS

- (48) Clarify that the actus reus of an offence can be constituted by a series of acts, especially in the context of murder, by:
- a. Amending s 33 of the Penal Code to clarify that a series of acts counts as an “act” for actus reus purposes
 - b. Amending s 300(b) and s 300(c) of the Penal Code such that “bodily injury” also includes “series of bodily injuries”
- (49) Introduce a new offence in the Penal Code of causing or allowing a vulnerable victim to die
- (50) Introduce a new offence of sustained abuse leading to death of vulnerable victim
- (51) Improve laws on prevention of abuse of vulnerable victims by:
- a. Introducing an additional provision in s 5 of the CYPA to state that “knowingly permits” covers situations of actual and constructive knowledge of the risk of a child or young person being ill-treated, and failure to take reasonable steps
 - b. Waiving marital privilege in s 124 of the EA in situations of sexual offences and offences involving violence to a child of the spouse or accused, or any person under the age of 16 years

Introduction

The recommendations set out in the previous section aim to enhance protection for children under the age of 14, vulnerable persons¹, and domestic maids, by empowering the courts to enhance the maximum penalties for offences committed against these vulnerable groups by up to two times.

2 Building on the previous section, this section focuses on the specific issue of abuse of vulnerable groups leading to death or other forms of grievous hurt. Given the spate of high profile fatal abuse cases in 2016 – 2017 involving vulnerable victims, especially young children, the PCRC considered that additional protection might be warranted for cases of abuse leading to death or other forms of grievous hurt.

Cases of abuse leading to death or other forms of grievous hurt in Singapore

3 The PCRC observed a notable spike in the number of prosecutions of fatal abuse of vulnerable victims.² Between January 2016 and December 2017, at least five such cases were charged or sentenced in the courts.³ The five cases over 2016 – 2017 represent a sharp rise from

¹ In this section, a “vulnerable person” is any person who by reason of mental or physical infirmity, disability or incapacity is substantially unable to protect himself or herself from abuse, neglect or self-neglect.

² “Fatal abuse” refers to cases where death resulted from deliberate causing of hurt. It does not cover deaths caused by accidental injuries and/or diseases.

³ The five cases are: *PP v Zaidah and Zaini Bin Jamari* (2016) (Unreported – “Daniel Nasser” case); *PP v BDB* [2018] 1 SLR 127; *PP v Tan Hui Zhen and Pua Hak Chuan* (2017) (Unreported – “Annie Ee” case); *PP v Azlin bin Arujunah & Ridzuan bin Mega Abdul Rahman* (ongoing as of July 2018); and *PP v Prema S Naraynasamy and Gaiyathiri Murugaiyan* (ongoing as of July 2018).

the seven cases of fatal abuse of vulnerable victims prosecuted from 2000 – 2011. Details of the 12 cases of fatal abuse from 2000 – 2017 are at Annex A.

4 From 2000 – 2017, there were no convictions under murder (s 300 of the Penal Code) for cases of fatal abuse involving vulnerable victims. Of the 12 cases studied by the PCRC, most were prosecuted under s 304(b) or s 325 of the Penal Code. Both s 304(b) and s 325 of the Penal Code are only punishable by a maximum of ten years’ imprisonment, with discretionary fine and caning.

5 Past cases of fatal abuse have typically attracted additional charges for previous injuries inflicted on the victim. These previous injuries have resulted in charges under s 5 of the CYPA, or ss 323, 325 or 326 of the Penal Code. Even so, the global sentence for cases of fatal abuse involving vulnerable victims from 2000 – 2017 has not exceeded 16 years’ imprisonment. The sentencing outcomes for the ten concluded cases are summarised below.

Penal Code charges	Total sentence	No. of cases	Victim
Section 304(a)	18.5 years’ imprisonment + 12 strokes of the cane	1	Domestic worker
Section 326 (two counts)	14 – 16 years’ imprisonment + 14 strokes of the cane	1	Adult with intellectual disabilities
Section 325 (two counts)	12 – 14.5 years’ imprisonment + 12 strokes of the cane	3	Children
Section 325 (one count)	10 – 11 years’ imprisonment + 12 strokes of the cane	1	Child
Section 304(b)	5 – 10 years’ imprisonment	4	Children

6 The prevailing public sentiment is that these sentences do not adequately reflect the culpability of the offender, given that in each case, a life was lost as a result of the deliberate infliction of abuse, often over a prolonged period. Society reserves special disapprobation for the abuse of vulnerable persons when such abuse is perpetrated by their caregivers or others in a position of trust, and instances where death resulted have caused public outrage. This can be seen from the public reaction to the 2016 “Daniel Nasser” case ⁴ and 2017 “Annie Ee” case ⁵.

Limitations in current legal framework for abuse leading to death or other forms of grievous hurt

7 Having studied local cases of fatal abuse of vulnerable victims, as well as experiences in other jurisdictions, the PCRC identified the following four limitations in the current legal framework for abuse of vulnerable victims leading to death or other forms of grievous hurt:

⁴ *PP v Zaidah and Zaini Bin Jamari* (2016) (Unreported); Vanessa Paige Chelvan and Kimberly Spykerman, “Couple who tortured 2-year-old boy sentenced to jail” *Channel NewsAsia* (5 July 2016) <<https://www.channelnewsasia.com/news/singapore/couple-who-tortured-2-year-old-boy-sentenced-to-jail-7941658>> (accessed 20 August 2018).

⁵ *PP v Tan Hui Zhen and Pua Hak Chuan* (2017) (Unreported); “Couple who tortured Annie Ee: Prosecutor could not charge them with murder, says AGC” *Channel NewsAsia* (18 December 2017) <<https://www.channelnewsasia.com/news/singapore/annie-ee-couple-tortured-prosecutor-murder-agc-9506392>> (accessed 20 August 2018).

- (a) Possible lacuna in addressing scenarios where it is not clear which injury caused the death. In the following scenario, it is unclear if the accused can be prosecuted for causing the death of the child:

Evidence exists that the accused intentionally assaulted the child on three occasions within a 12-hour period. It is clear that at least one of these assaults caused the death of the child, but it is medically not possible to ascertain which of those acts caused the death of the child.

- (b) Lacuna in addressing scenarios where it is not clear which of two or more persons with exclusive opportunity to kill the victim actually caused the victim's death. In the following scenario, it will not be possible to prosecute such persons for causing the child's death:

A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two caregivers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the caregivers is guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one caregiver was asleep, or out of the room.

- (c) Fatal abuse cases are not charged under the appropriate provisions. Charges of culpable homicide under s 304(b) or voluntarily causing grievous hurt under s 325 have been preferred because most abuse cases leading to death do not fall within the definition of murder under s 300, or culpable homicide under s 304(a). In past cases of fatal abuse, the caregiver did not intend to cause the death of the child in his or her care, or even to cause an injury that the caregiver knew to be sufficient in the ordinary course of nature to cause death. Consequently, fatal abuse of vulnerable victims has not been prosecuted under offences that adequately reflect the heinous nature of the crime.
- (d) Legal remedies for prevention of abuse can be improved. In most cases of death, there is a history of abuse of the vulnerable victim, and the death could have been prevented if earlier intervention had taken place. The PCRC considered whether the current legal framework of mandatory reporting duties and spousal privileges in evidence-provision could be amended to improve prevention of abuse.

Recommendation 48(a): Clarify that the *actus reus* of an offence can be constituted by a series of acts, especially in the context of murder, by amending s 33 of the Penal Code to clarify that a series of acts counts as an “act” for *actus reus* purposes

8 This recommendation aims to address the first limitation as set out in paragraph 7(a), namely, the possible lacuna in addressing scenarios where it is not clear which injury (out of multiple injuries) caused the vulnerable victim's death. The lacuna arises because of the lack of clarity in s 33 and s 300 of the Penal Code.

Current law

9 The word “act” is defined in s 33 of the Penal Code as follows:

“Act” and “omission”

33. The word “act” denotes as well a series of acts as a single act; the word “omission” denotes as well a series of omissions as a single omission.

10 The offence of murder can be found in s 300 of the Penal Code:

Murder

300. Except in the cases hereinafter excepted culpable homicide is murder —

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Impetus for review

11 The PCRC is of the view that it is useful to make clear that the *actus reus* of an offence, being an “act”, can be satisfied by a “series of acts”. Any other interpretation may lead to a miscarriage of justice in, for example, the following scenario:

Evidence exists that the accused intentionally assaulted the child on three occasions in the course of a day. Evidence also exists that each of the three assaults is sufficient in the ordinary course of nature to cause death.

It is clear that at least one of these assaults caused the death of the child, but it is medically not possible to ascertain which of those acts caused the death of the child.

12 In the above scenario, all of the elements for murder under s 300(c) are present if the series of assaults constitutes “an act”. However, there is some doubt as to whether the “series of assaults” constitutes an “act” in the above scenario, if it is not medically possible to ascertain which of the three acts of assault actually caused the child’s death.

Recommendation

13 In order to resolve the lack of clarity in s 33, the PCRC recommends inserting an *Illustration* to make clear that some of the “multiple acts” scenarios encountered in past cases can be treated as the *actus reus* of a single offence. A draft of the recommended *Illustration* is as follows:

*A gives Z small doses of poison at different times over the course of a few days, with intent to murder Z. Z dies from poisoning, although it is not known which of those doses (individually or collectively) caused his death. A has committed murder.*⁶

14 In addition, the following clarification can be inserted into s 33:

To avoid doubt, where a person does a series of acts, one or more of which caused a certain outcome, he shall be taken to have caused that outcome by that series of acts notwithstanding that it is not known which of the acts in that series caused that outcome.

15 For avoidance of doubt, the recommended clarification to s 33 is intended to have general application, *ie* it is not intended to be restricted to cases of abuse of vulnerable victims. In addition, it should be emphasised that the proposed *Illustration* and clarification do not change the current state of the law; the *Illustration* provides guidance as to its practical application.

16 The recommended clarification to s 33 will not affect the need to prove concurrence between the *actus reus* and *mens rea*. The Prosecution must still prove that the appropriate *mens rea* is present for *each act* in the series of acts. For example, if a person is charged with murder under s 300(c) for doing a series of acts that cumulatively cause a bodily injury that causes death, the Prosecution must prove that *each act* in the series was done with the intention to inflict that bodily injury, and that bodily injury was sufficient in the ordinary course of nature to cause death; although there is no need in the case of a s 300(c) offence to show that the person had intended to cause death.

Recommendation 48(b): Clarify that the *actus reus* of an offence can be constituted by a series of acts, especially in the context of murder, by amending s 300(b) and s 300(c) of the Penal Code such that “bodily injury” also includes “series of bodily injuries”

17 In addition, the PCRC recommends clarifying that the term “bodily injury” in s 300(b) and s 300(c) of the Penal Code includes “series of bodily injuries”. The clarification can be made by inserting an Explanation in s 300 which states “In this section, the words ‘bodily injury’ denotes as well a series of bodily injuries as a single bodily injury.”

18 The proposed clarification does not affect the need to prove the relevant *mens rea*. For example, in a prosecution under s 300(c) where the *actus reus* involves multiple acts causing multiple injuries, the Prosecution would have to prove that the accused:

- (a) did a series of acts with the intention of causing a series of bodily injuries;
- (b) that series of bodily injuries was sufficient in the ordinary course of nature to cause death; and
- (c) that series of bodily injuries caused death.

Recommendation 49: Introduce a new offence in the Penal Code of causing or allowing a vulnerable victim to die

⁶ This *Illustration* is modified from the factual matrix in *PP v Fong Quay Sim* [2010] SGDC 224, as well as from *Illustration (a)* to s 37 of the Penal Code.

19 This recommendation aims to address the limitation set out in paragraph 7(b), namely, the lacuna in addressing scenarios where it is not clear which of two or more persons with exclusive opportunity to cause the victim’s death actually did so. This is sometimes referred to as the “who did it” problem, and is exemplified by the following scenarios:

A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two caregivers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the caregivers is guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one caregiver was asleep, or out of the room.

Current law

20 In Singapore, there are two possible ways of prosecuting accused persons when faced with the above scenario.

21 First, the accused persons can be jointly charged under the appropriate offence (either s 300, s 304(a), s 304(b) or s 325) read with s 34, provided there is evidence of common intention. Section 34 is appended for reference.

Each of several persons liable for an act done by all, in like manner as if done by him alone

34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

22 Alternatively, the accused persons can be charged under s 5 CYPA (ill treatment of child or young person) if the victim is a child or young person. Under s 5 CYPA, it is a crime to *knowingly permit* a child or young person to be ill-treated by any other person. Where death is caused, this is currently punishable by up to seven years’ imprisonment; in all other cases, the maximum sentence is four years’ imprisonment. Section 5 CYPA is appended at [Annex B](#) for reference.

23 There are no analogous laws to deal with cases of knowingly permitting the ill-treatment of an adult who, by reason of mental or physical infirmity, disability or incapacity, is incapable of protecting himself or herself from abuse, neglect or self-neglect.

Impetus for review

24 Current legislation does not provide satisfactory redress for situations where two or more persons had exclusive opportunity to kill the vulnerable person, but it is impossible to identify the *specific* person responsible for the vulnerable person’s death. The first approach (joint enterprise) requires the establishment of the requisite *mens rea* and *actus reus* under ss 304, 325 or 300 by the accused parties. In cases where the caregivers deny any ill-treatment of the victim whatsoever, it may not be possible to establish the requisite elements, and full acquittal may result. The second approach (knowingly permitting ill-treatment) will also not

be able to capture cases where both caregivers deny ill-treatment, and it is not possible to prove which one committed the abuse, and which one permitted the abuse; full acquittal may also result. Clearly, full acquittal of two parties who had exclusive opportunity to kill or seriously hurt the victim would be a gross miscarriage of justice.

Laws in other jurisdictions

25 Although Singapore has not witnessed any acquittals in fatal abuse cases for the reason set out above, such cases have occurred in other jurisdictions such as the UK and Australia. They have consequently enacted new offences to address the problem. A summary of the landmark cases in South Australia and the UK which prompted legislative reform is provided:

South Australia: R v Macaskill [2003] SASC 61 (“R v Macaskill”)

In *R v Macaskill*, a three-month-old baby died from a head injury. The only persons who could have inflicted the injury were the baby’s mother and father. Both of them were charged with manslaughter, but the charges against the father were later withdrawn. The father was a key witness in the Crown case. A jury found the mother guilty of manslaughter, but she appealed successfully on the basis that the trial judge did not give the jury a strong warning about the need to scrutinise the father’s evidence with particular care given his motive to exculpate himself. At the retrial by judge alone, the judge found the father to be an unreliable witness and ultimately delivered a verdict of not guilty.⁷

UK: R v Lane [1985] 82 Cr App R 5 (“Lane and Lane”)

In *Lane and Lane*, evidence showed that the Lanes’ child was killed between 12 noon and 8.30pm. During this period, each parent had been present for some of this time and absent for some of this time. It could not be proved that one was the principal and one was the accessory, nor could it be proved that both were acting jointly. The Court of Appeal was hence forced to overturn the conviction of two parents for manslaughter of their child.

Following *Lane and Lane*, the defendants in *R v Aston and Mason [1992] 94 Cr App R 180 (“Aston and Mason”)*, *R v Strudwick [1994] 99 Cr App R 326*, *R v S and C [1996] Crim LR 346* were acquitted due to lack of evidence as to the roles of each accused person, despite the fact that the accused persons were the only persons who could have been responsible for the child’s death.

26 The offences in the UK and South Australia which were enacted to address the “who did it” problem have been in operation for over a decade. In the PCRC’s view, both s 5 of the Domestic Violence, Crime and Victims Act 2004⁸ (“DVCVA”) in the UK and s 14 of the Criminal Law Consolidation Act 1935⁹ (“CLCA”) in South Australia have proven effective in addressing the problem of “who did it”. Both offences address the problem by explicitly releasing the Prosecution from the need to prove which of two or more defendants who had exclusive opportunity to hurt the victim actually killed or harmed the victim. The types of cases prosecuted under both laws have also been largely similar.

⁷ Lenny Roth, “Criminal liability of carers in cases of non-accidental death or serious injury of children” (September 2014) NSW Parliamentary Research Service e-brief 12/2014.

⁸ Domestic Violence, Crime and Victims Act 2004 (c 28) (UK).

⁹ Criminal Law Consolidation Act 1935 (No 2252) (South Australia).

United Kingdom

27 The UK introduced the offence of “Causing or allowing a child or vulnerable adult to die or suffer serious physical harm”, punishable by up to 14 years’ imprisonment under s 5 of the DVCVA. This offence was an expanded version of the proposed new offence recommended by the Law Commission in 2003.¹⁰ Originally applying only to cases involving death, it was expanded in 2012 to cover cases involving serious injury. Between 2005 and 2010, 31 people were convicted of an offence under s 5 of the DVCVA.¹¹

28 Section 5 of the DVCVA applies if the defendant was the person whose act caused the death or serious harm, *or* if the defendant failed to protect the victim from harm. Crucially, the *exact roles of the accused persons (either as a principal or an accessory) do not have to be proven* – s 5(2) states that “the prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies”. The full text of s 5 of the DVCVA is appended at Annex C for reference.

29 The case of *R v Ikram & Anor* [2008] EWCA Crim 586 (“*R v Ikram*”) is illustrative of the operation of s 5 of the DVCVA. In this case, a 16-month-old boy died while living with his father and his father’s female partner. The boy suffered 21 different injuries which were less than 48 hours old, including a fatal fracture to the left femur which occurred within 12 hours of death. It was established that only the father and his partner were present during the period in which the fatal injury was inflicted, although the father had been absent for around two hours. Both defendants were charged for murder, but claimed not to know how the injuries were obtained.

30 As it was not possible to establish which of the defendants was responsible for inflicting the fatal injury, the Prosecution decided not to proceed with the murder charge. Both were instead charged under s 5 of the DVCVA. The jury was not able to determine which of the two defendants inflicted the fatal injury, but established that each of the two defendants must either have caused the death, or failed to prevent it. Consequently, both defendants in *R v Ikram* were convicted of an offence under s 5 of the DVCVA. The judge sentenced both defendants to 9 years’ imprisonment, on the basis that both had caused the death of the child.

South Australia

31 Two years after the 2003 case of *R v Macaskill*, South Australia introduced a new offence of criminal neglect, under s 14 of the CLCA. The key legal innovation in s 14 of the CLCA which overcomes the problem of “who did it” lies in s 14(2), which relieves the Prosecution of the need to prove that a specific person committed the unlawful act which resulted in death. Subsection 14(2) states:

(2) If a jury considering a charge of criminal neglect against a defendant finds that—

¹⁰ United Kingdom Law Commission, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials) Report* (16 September 2003) at para 1.12-1.13.

¹¹ Ministry of Justice and the Rt Hon Kenneth Clarke QC, “Child abuse loophole closed”, *Press Release* (29 June 2012) <www.gov.uk/government/news/child-abuse-loophole-closed> (accessed 20 August 2018).

(a) there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim's death or serious harm; but

(b) the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,

the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.

The full provision is provided at [Annex C](#).

32 The rationale for s 14(2) was explained in Parliament as follows:

When a person is charged with criminal neglect, the assumption is that the unlawful act that killed or harmed the victim was committed by someone else. In cases where it is impossible to tell which of two or more people killed or harmed the victim, but it is clear that one of them did, it would be possible to escape conviction for criminal neglect by repudiating that assumption. The accused could simply point to the reasonable possibility that it was he or she, and not someone else, who killed or harmed the victim. To prevent this perverse outcome, the Bill makes it clear that a person accused of criminal neglect cannot escape conviction by saying there was a reasonable possibility that he or she was the author of the unlawful act.¹²

33 From 2006 to September 2014, eight persons were convicted under six separate cases of an offence under s 14 of the CLCA. In four of the cases, none of the accused parties admitted to inflicting the injury on the child. The sentences imposed ranged from a good behaviour bond to 10 years' imprisonment. A brief summary of the facts of the six cases is at [Annex D](#).

Recommendation

34 The majority of the PCRC is of the view that there is a clear lacuna in Singapore's law, such that acquittal is likely to result in cases of fatal or serious abuse where it is not clear which of two or more persons with exclusive opportunity to kill the victim actually caused the victim's death. Acquittal in such cases would be a gross miscarriage of justice. Some PCRC members, however, were of the view that this lacuna was less applicable in Singapore than in other jurisdictions, given that Singapore has not had any cases of unjust acquittals. Nevertheless, the PCRC recommends that the lacuna should be addressed by way of introduction of a new offence of causing or contributing to the death or serious injury of a vulnerable victim.

35 The PCRC recommends that the new Penal Code offence of "causing or allowing death or serious injury of child or vulnerable person" be modelled after both s 5 of the DVCVA in the UK and s 14 of the CLCA in South Australia. Specifically, the new offence should contain the following elements:

Elements of recommended new offence of causing or allowing death or serious injury of child or vulnerable person

¹² South Australia, Parliamentary Debates (12 October 2004) at p 334 (M Atkinson).

- (a) Victim must be a child under the age of 14 or an individual who by reason of mental or physical infirmity, disability or incapacity, is substantially unable to protect himself or herself from abuse, neglect or self-neglect.
- (b) Victim must have sustained grievous hurt as a result of an unlawful act.
- (c) The defendants must have owed, at the time of the act, a duty of care to the victim.
- (d) The defendant must either have committed the unlawful act in (b), or:
 - (i) known or ought to have known that there was a significant risk of the unlawful act in (b) being caused to the victim by the other defendant(s);
 - (ii) failed to take such steps as he could reasonably have been expected to take to protect the victim from the risk; and
 - (iii) the unlawful act in (b) occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen.
- (e) Prosecution does not have to establish which of the two scenarios in (d) actually occurred.

36 The PCRC recommends that the new offence be punishable by up to 20 years' imprisonment, fine, and/or caning, for parity with the enhanced penalties for voluntarily causing grievous hurt to a vulnerable victim.¹³

Recommendation 50: Introduce a new offence of sustained abuse leading to death of vulnerable victim

37 This recommendation aims to address the limitation set out in paragraph 7(c), namely, that fatal abuse cases are not charged under the appropriate provisions.

38 As explained in paragraph 4, most cases of fatal abuse of vulnerable victims are prosecuted either for culpable homicide (s 304(b) of the Penal Code) or for voluntarily causing grievous hurt (s 325 of the Penal Code). The elements and punishments for the available offences where fatal abuse occurs are as follows:

Offence	<i>Actus reus</i>	<i>Mens rea</i>	Current maximum punishment	Enhanced maximum punishment ¹⁴
Section 304(b), Penal Code	Causing death by doing an act	Knowledge that the act by which death is caused is likely to cause death	<ul style="list-style-type: none"> • Mandatory imprisonment up to 10 years • Discretionary fine • Discretionary caning 	<ul style="list-style-type: none"> • Mandatory imprisonment up to 20 years • Discretionary fine • Discretionary caning
Section 325, Penal Code	Doing an act which causes grievous hurt, the grievous	Intention to cause grievous hurt OR Knowledge that the act is likely to	<ul style="list-style-type: none"> • Mandatory imprisonment up to 10 years • Discretionary fine 	<ul style="list-style-type: none"> • Mandatory imprisonment up to 20 years • Discretionary fine

¹³ Details of recommendation to enhance penalties for offences against vulnerable victims are in section 17 of this Report.

¹⁴ As per recommendations in section 17 of this report.

	hurt being death	cause grievous hurt	• Discretionary caning	• Discretionary caning
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Impetus for review

39 Where the abuse consists of a series of acts that eventually leads to death, the abuser is likely to be prosecuted under s 325 of the Penal Code¹⁵. This is because there is often insufficient evidence in such cases to prove that the abuser possessed the requisite *mens rea* needed for a charge of culpable homicide.

40 This is unsatisfactory, because a person who abuses a child or other vulnerable victim over a period of time, eventually leading to the death of the victim, is arguably as culpable as a person who commits culpable homicide against a person in a one-off incident, even if the person in the first scenario possessed a lower *mens rea* on the whole. Such persons should be subject to a range of punishments which adequately reflects such culpability.

Recommendation

41 The PCRC recommends creating a new offence of causing death by sustained abuse of a child, domestic maid, or vulnerable person. This offence should be punishable with the same prescribed punishment as that for culpable homicide of a vulnerable victim under s 304(b), ie up to 20 years’ imprisonment or fine or caning or any combination thereof. The elements of the recommended new offence are set out in the following table:

<i>Actus reus</i>	<i>Mens rea</i>
Causing death of a child/ domestic maid/vulnerable person by engaging in sustained abuse. <ul style="list-style-type: none"> • “sustained abuse” means a course of conduct which must consist of voluntarily causing hurt and/or knowing neglect to the child/domestic maid/vulnerable person on two or more occasions. 	The relevant <i>mens rea</i> for each occasion of abuse must be proven, ie: <ul style="list-style-type: none"> • For “voluntarily causing hurt”: intention of causing hurt, or knowledge that the act is likely thereby to cause hurt • For “knowing neglect”: knowledge that the lack of provision to the child/domestic maid/vulnerable person of essential care is likely to cause personal injury or physical pain to, or injury to the physical health of, the child/domestic maid/vulnerable person

42 The definition of “sustained abuse” in the new offence requires a “course of conduct” of abuse. Whether any given series of acts constitutes a “course of conduct” is a question of fact.¹⁶ It will therefore be for the courts to decide whether the acts of abuse together constitute a “course of conduct”, as opposed to isolated incidents.

43 The term “neglect” in the new offence means the lack of provision to the vulnerable victim of essential care (such as but not limited to food, clothing, medical aid, lodging and other necessities of life) to the extent of causing personal injury or physical pain to, or injury

¹⁵ See, for eg, *PP v BDB* [2018] 1 SLR 127 and *PP v Zaidah and Zaini Bin Jamari* (“Daniel Nasser case”).

to the physical health of, the vulnerable victim. In addition, the new offence will state that neglect can only be committed by:

- (a) in the case of a child, a person who has custody, charge or care of the child;¹⁷
- (b) in the case of a domestic maid, the domestic maid’s employer or any person who was at the material time acting in a similar capacity as the employer, and whose orders the domestic maid has reasonable grounds for believing she is expected to obey¹⁸; and
- (c) in the case of a vulnerable person, a person who has custody, charge or care of the vulnerable person.¹⁹

44 While the recommended *mens rea* requirement is lower than that for culpable homicide under s 304(b) of the Penal Code, the need to prove a sustained course of abusive conduct ensures that the offence only captures persons who are of similar culpability as persons who commit culpable homicide. The wide sentencing range also allows the courts to impose a lower sentence in instances where the offender’s culpability is lower, while still more accurately capturing the essence of the conduct, which is the causing of death of a vulnerable victim (as opposed to charging the accused with voluntarily causing grievous hurt).

Recommendation 51: Improve laws on prevention of abuse of vulnerable victims

45 This recommendation aims to improve legal remedies for the prevention of abuse of vulnerable victims. As explained in paragraph 7(d), the PCRC observed that in most cases of fatal abuse, there is a history of abuse of the vulnerable victim, and the death could have been prevented if earlier intervention had taken place.

Current law

46 The PCRC considered the following scenario:

A is a caregiver of, or in the same household as B. B is a vulnerable victim.²⁰ B is abused by some other person C. A comes to know of the fact of B’s abuse after the fact. A fails to report the abuse or take other steps to prevent future abuse of B.

In the above scenario, the omission of A does not currently amount to any offence, apart from one under s 424 of the CPC.

47 Section 424 of the CPC imposes a duty to give information about certain matters, including the commission of or intention of any other person to commit any arrestable offence punishable under Chapter XVI of the Penal Code (“Offences affecting the human body”, which include hurt offence and sexual offences). Non-compliance with s 424 of the CPC amounts to an offence under s 202 of the Penal Code (“Intentional omission to give information of an

¹⁷ Modelled on s 5(1) of the CYPA.

¹⁸ Consistent with the PCRC’s earlier recommendation to expand the classes of persons who would be liable for enhanced punishment under s 73 of the Penal Code.

¹⁹ Adapted from s 11(2)(a) of the Vulnerable Adults Bill (Bill No. 20 of 2018).

²⁰ That is, a child under 14 years of age, or a domestic maid, or a vulnerable person.

offence, by person bound to inform”), which is punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

48 Section 120 of the Penal Code (Concealing a design to commit an offence punishable with imprisonment, knowing it to be likely that he will thereby facilitate the commission of the offence), and s 5 of the CYPA (Knowingly permitting a child or young person to be ill-treated) do not apply because they apply to *fore-knowledge*, whereas in the scenario at paragraph 46, the caregiver would only have come to know about the abuse *after* it had already occurred.

49 Under s 87 of the CYPA, any person who knows or has reason to suspect that a child or young person is in need of care or protection may make a notification to the Director of Social Welfare²¹ or a police officer of the facts and circumstances on which his knowledge or suspicion is based. A person who makes such a notification shall not be liable for breach of ethical or professional obligations, and shall not incur civil or criminal liability as long as he has acted in good faith. Similarly, s 23 of the Vulnerable Adults Act does not impose a mandatory duty to report abuse, and gives informants certain protections (*eg* from breach of ethical or professional obligations) when they report a reasonable suspicion or knowledge of abuse of a vulnerable adult.

50 At the same time, marital communication privilege (“marital privilege”) under s 124 of the EA appears to disallow a spouse from giving evidence about what another spouse tells them about an offence committed by the latter.²² Under s 124, marital privilege is only lifted in “proceedings in which one married person is prosecuted for any crime committed against the other”.

Impetus for review

51 Current laws do not compel a caregiver of a vulnerable victim to intervene to prevent future abuse. There is no statutory duty to act, and the failure to report where a duty to report exists carries a relatively low penalty. In addition, where the evidence of abuse is uncovered through a confession by an abuser who is the informant’s spouse, the informant may be hampered from reporting the offence on account of marital privilege.

52 The PCRC therefore considered (i) whether a *sui generis* duty to report, punishable with suitably deterrent penalties, should be introduced, and (ii) whether a duty to act to prevent future abuse should be introduced.

²¹ As appointed under s 3 of the CYPA.

²² In *Lim Lye Hock v PP* [1994] 3 SLR(R) 649, the Court of Appeal rationalised the interaction of s 123 and s 134(5) of the EA as follows:

(a) When a spouse of an accused is called as a witness, under s 134(5), he/she is compellable to give evidence of any fact and produce any document which would or might incriminate the accused in respect of the offence the latter is charged, save that under s 124, he/she is not compelled to disclose any marital communication made by the accused, except where the offence in question is committed against the spouse. If the spouse is prepared to disclose it, he/she is not permitted to do so without the consent of the accused.

(b) In practice, this means that a wife may be compelled to give relevant evidence of what she saw her husband do, or how he appeared, but may not be permitted without her husband’s consent, to give evidence of what her husband told her.

Cross-jurisdictional survey

Mandatory reporting of offences against vulnerable victims, including children, and duty to act

53 In Ireland and the state of Victoria in Australia, where the victim is a child, mandatory reporting laws tend to apply only to professional workers (typically those involved in education, law enforcement, welfare and health systems).²³ Where the victim is a vulnerable adult, Canada (Nova Scotia)²⁴ and the United States (California)²⁵ have laws that require the reporting of abuse.

54 Mandatory reporting laws do not apply in England and Wales, Scotland, and New Zealand. In its consultation paper of March 2018, the English Government recommended *against* the introduction of a mandatory reporting obligation for the following concerns: (a) unsubstantiated reporting out of an abundance of caution may lead to a dilution of investigative resources; (b) mandatory reporting will not improve the quality of judgment in reporting; and (c) mandatory reporting may lead to a perverse outcome where informants consider their moral obligations discharged upon reporting. Instead of imposing a mandatory reporting duty, England and Wales²⁶ and New Zealand²⁷ impose a broader duty to act, by criminalising the failure to protect a child from abuse.

55 Based on the PCRC's research, the first mandatory reporting laws for child abuse were enacted in the US between 1963 and 1967.²⁸ These laws were initially limited to requiring medical professionals to report suspected physical abuse inflicted by a child's parent or caregiver. The classes of professionals selected as mandated reporters are those who frequently come into contact with children, and who would thus have the best opportunity to discover instances of abuse. They also have the relevant training and expertise to identify signs of abuse. This could explain why in many jurisdictions, caregivers are not covered: they are the target of the reporting obligation.

Marital privilege

56 In England and Wales,²⁹ Ireland,³⁰ and the state of New South Wales in Australia³¹, marital privilege does not apply in the context of offences in the domestic setting, *ie* violence against the spouse, child or a young person. In Scotland³² and New Zealand,³³ spouses are compelled to give evidence for all proceedings against their spouse.

²³ Schedule 2 and s 14(12) of the Children First Act 2015 in Ireland; Part 4.4 of the Children, Youth and Families Act 2005 (No 96) in Victoria, Australia.

²⁴ Adult Protection Act, s 5 and s 16.

²⁵ Welfare and Institutions Code, s 15630(1).

²⁶ Domestic Violence, Crime and Victims Act 2004 (c 28) (UK), s 5.

²⁷ Crimes Act 1961 (No 43) (NZ), s 195A.

²⁸ Ben Mathews & Maureen C Kenny, "Mandatory Reporting Legislation in the United States, Canada and Australia: A Cross-Jurisdictional Review of Key Features, Differences and Issues" (2008) *Child Maltreatment* 13(1), Sage Publications, at pp 50 – 63.

²⁹ Police and Criminal Evidence Act 1984 (c 60) (UK), s 80

³⁰ *Ibid.*

³¹ Evidence Act 1995 (No 25) (NSW), s 18 and s 19; Criminal Procedure Act 1986 (No 209) (NSW), s 279(2).

³² Criminal Justice and Licensing (Scotland) Act 2010, s 86.

³³ Evidence Act 2006 (No 69) (NZ), s 71.

Recommendation 51(a): Improve laws on prevention of abuse of vulnerable victims by introducing an additional provision in s 5 of the CYPA to state that “knowingly permits” covers situations of actual and constructive knowledge of the risk of a child or young person being ill-treated, and failure to take reasonable steps

Mandatory reporting of offences against vulnerable victims, including children, and duty to act

57 The PCRC found the reasons set out by the English Government against the introduction of a mandatory reporting obligation, as set out in paragraph 54, compelling.

58 In addition, the PCRC is concerned about other unintended consequences, such as deterring reporting. Reporting of abuse may be deterred due to fears that a belated report may incriminate the reporter of the offence of non-reporting, or fears that a report may incriminate several caregivers of the offence of non-reporting. If the mandatory reporting obligation also extends to doctors, counsellors or MSF child protection officers, it may also deter caregivers from informing these professionals of abuse, for fear that the whole matter must then be reported to the police, resulting in the caregiver being found guilty of a non-reporting offence.

59 There are also further concerns about self-incrimination since, in many cases, parents or caregivers are themselves complicit in the abuse either as an abettor of the primary offence, or through s 120 of the Penal Code or s 5 of the CYPA.

60 In light of these concerns, the PCRC recommends *not* to introduce a further *sui generis* mandatory reporting requirement, on top of what already exists in s 424 of the CPC. To be clear, the PCRC is *not* recommending abolishing the mandatory reporting obligation under s 424 either. To do so could have an adverse signaling effect, *viz* that we are scaling back the protections currently afforded to victims in the law.

61 Instead, the PCRC recognises that in other jurisdictions, there is a broader duty to act – the failure to protect a child is criminalised. One example is s 195A of the Crimes Act 1961³⁴ in New Zealand, which makes it an offence for a person (who is either a member of the same household as the victim or is a staff member of any hospital, institution or residence where the victim resides) to fail to take reasonable steps to protect the victim from a risk of death, grievous bodily harm or sexual assault. These steps can include reporting the abuse, or removing the suspected offender from the victim’s vicinity. In England and Wales, under s 5 of the Domestic Violence, Crime and Victims Act 2004³⁵, it is an offence if a member of the same household as the victim knows, or ought to know, that the victim is at significant risk of serious physical harm arising from an unlawful act of another person in the same household, and fails to take reasonable steps to protect the victim.

62 Section 5 CYPA (care-giver who knowingly permits a child or young person to be ill-treated by any other person) already provides some form of duty to protect children from ill-treatment.

³⁴ Crimes Act 1961 (No 43) (NZ).

³⁵ Domestic Violence, Crime and Victims Act 2004 (c 28) (UK).

63 Instead of requiring a caregiver to report an abuse *ex post facto*, the PCRC recommends requiring a care-giver to take reasonable steps to prevent future or ongoing abuse, where there is knowledge (actual or constructive) of a risk of serious physical or sexual harm. This would be a more effective solution to preventing child abuse, and can be achieved through the addition of a subsection to s 5 CYPA, as follows:

Ill-treatment of child or young person

5. –(1) A person shall be guilty of an offence if, being a person who has the custody, charge or care of a child or young person, he ill-treats the child or young person or causes, procures or knowingly permits the child or young person to be ill-treated by any other person.

(1A) Without limiting the generality of s 5(1), a person knowingly permits a child or young person to be ill-treated by any other person if he knows, or ought to know, that the victim is at risk of being ill-treated by any other, and fails to take reasonable steps to protect the victim from that risk.

Punishments:

Where death is caused - maximum imprisonment term of 7 years and/or maximum fine of \$20,000

Any other case – maximum imprisonment term of 4 years and/or maximum fine of \$4,000

64 For other categories of vulnerable victims, the PCRC recommends that a similar offence to s 5 of the CYPA be introduced in respect of domestic maids and vulnerable persons, with the following modifications:

- (a) Where the victim of ill-treatment (same definition as that in the CYPA) is a domestic maid, the offender must be the maid’s employer/agent, member of the employer/agent’s household, or acting in a similar capacity as the employer or agent, and whose orders the domestic maid has reasonable grounds for believing she has to obey.
- (b) Where the victim of ill-treatment (same definition as that in the CYPA) is a vulnerable person, the offender must be a person who has custody, charge or care of the vulnerable person.

Recommendation 51(b): Waiving marital privilege in s 124 of the EA in situations of sexual offences and offences involving violence to a child of the spouse or accused, or any person under the age of 16 years

65 The doctrine of marital communications privilege is rooted in the public interest in the protection of marriages and the preservation of domestic harmony. There are two rationales for the privilege. The first is to promote absolute frankness and candour in marital communications without which, it has historically been thought, marriages would undoubtedly suffer. The second is to avoid the domestic dissension and unhappiness that might arise if one spouse were to reveal matters communicated during the subsistence of the marriage without the other’s permission.³⁶

³⁶ *EQ Capital Investments Ltd and Sunbreeze Group Investments Ltd and others* [2017] SGHCR 15 at [23].

66 In most of the jurisdictions surveyed (England and Wales, Scotland, Ireland, Australia, New Zealand), marital privilege does not apply in the context of offences in the domestic context, committed against the spouse or a child.

67 The PCRC recommends that marital privilege should similarly be abolished in respect of sexual offences and offences involving violence or threat of violence to a child of the spouse or the accused, or any person under the age of 16 years old (including conspiracy to commit or attempts or abetments of such offences). To this end, the PCRC recommends that s 124 of the EA can be amended to include this exception to marital communication privilege, which is modelled on s 22 of Ireland's Criminal Evidence Act 1992. This amendment prioritises the safety and protection of the child, over the interest in domestic harmony.³⁷

68 For other categories of vulnerable victims, the PCRC recommends that marital privilege should be abolished in respect of sexual offences and offences involving violence or threat of violence to the following victims:

- (a) Where the victim is a domestic maid, the offender must be the maid's employer/agent, member of the employer/agent's household, or acting in a similar capacity as the employer or agent, and whose orders the domestic maid has reasonable grounds for believing she has to obey.
- (b) Where the victim is a vulnerable person, the offender must be a person who has custody, charge or care of the vulnerable person.

Conclusion

69 The abuse of vulnerable victims is universally condemned. Such abuse is all the more heinous when it results in death or other forms of grievous hurt. Through these recommendations, the PCRC aims to deter fatal abuse, by ensuring that all cases of abuse leading to death or serious injury will have adequate recourse to the law.

³⁷ See also the argument in by Burger CJ in *Trammel v US* (1979) 445 US 40 at [52], that that the rationale for protecting domestic harmony is weakened in the context of criminal proceedings - "When one spouse is willing to testify against the other in a criminal proceeding...their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than foster family peace."

Annex A: Charges and sentences for abuse of vulnerable victims leading to fatalities in 2000 – 2017

S/N	Victim	Case	Charges	Sentence
1	Child	<i>PP v Dwi Arti Samad</i> Criminal Case No 12 of 2000 (unreported)	Section 304(b)	8 years' imprisonment
2	Child	<i>PP v Sumarni Binti Pono</i> Criminal Case No 11 of 001 (unreported)	Section 304(b)	5 years' imprisonment (mental illness)
3	Domestic worker	<i>PP v Ng Hua Chye</i> (2002) SGHC 154	Section 304(a) Section 324 Section 344	18 years and 6 months' imprisonment + 12 strokes
4	Child	<i>PP v Teo Chee Seng</i> (2005) 3 SLR 250	Section 304(b)	7 years' imprisonment
5	Child	<i>PP v Firdaus Bin Abdullah</i> (2010) 3 SLR 225	Section 325 (2 counts) Section 5(5)(b) CYPA	12 years' imprisonment + 12 strokes.
6	Child	<i>PP v Mohd Azhar Ghapar</i> Subordinate Courts Case No 31981 of 2010 (unreported)	Section 325 (2 counts) Section 5(5)(b) CYPA	12 years' imprisonment + 12 strokes.
7	Child	<i>PP v AFR</i> (2011) 3 SLR 653	Section 304(b)	10 years' imprisonment + 10 strokes
8	Child	<i>PP v Zaidah and Zaini Bin Jamari</i> District Arrest Cases Nos 942245 of 2015 and others (unreported)	Zaidah: Section 325 + s 5(1) CYPA Zaini: Section 325	Zaidah: 11 years' imprisonment Zaini: 10 years' imprisonment + 12 strokes.
9	Child	<i>PP v BDB</i> [2018] 1 SLR 127	Section 325 (2 counts) Section 5(5)(b) CYPA (2 counts)	14.5 years' imprisonment
10	Vulnerable person	<i>PP v Tan Hui Zhen and Pua Hak Chuan</i> (2017) (Unreported – “Annie Ee” case)	Tan: Section 325 (2 counts) + s 326 (2 counts) Pua: Section 323 + s 326 (2 counts)	Tan: 16 years and 6 months' imprisonment Pua: 14 years' imprisonment + 14 strokes
11	Child	<i>PP v Azlin bin Arujunah & Ridzuan bin Mega Abdul Rahman</i>	<i>Unknown – ongoing case</i>	

12	Domestic worker	<i>PP v Prema S Naraynasamy and Gaiyathiri Murugaiyan</i>	<i>Unknown – ongoing case</i>
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Annex B: Section 5 of the CYPA

Ill-treatment of child or young person

5.—(1) A person shall be guilty of an offence if, being a person who has the custody, charge or care of a child or young person, he ill-treats the child or young person or causes, procures or knowingly permits the child or young person to be ill-treated by any other person.

(2) For the purposes of this Act, a person ill-treats a child or young person if that person, being a person who has the custody, charge or care of the child or young person —

- (a) subjects the child or young person to physical or sexual abuse;
- (b) wilfully or unreasonably does, or causes the child or young person to do, any act which endangers or is likely to endanger the safety of the child or young person or which causes or is likely to cause the child or young person —
 - (i) any unnecessary physical pain, suffering or injury;
 - (ii) any emotional injury; or
 - (iii) any injury to his health or development; or
- (c) wilfully or unreasonably neglects, abandons or exposes the child or young person with full intention of abandoning the child or young person or in circumstances that are likely to endanger the safety of the child or young person or to cause the child or young person —

- (i) any unnecessary physical pain, suffering or injury;
- (ii) any emotional injury; or
- (iii) any injury to his health or development.

(3) For the purpose of subsection (2)(c), the parent or guardian of a child or young person shall be deemed to have neglected the child or young person in a manner likely to cause him physical pain, suffering or injury or emotional injury or injury to his health or development if the parent or guardian wilfully or unreasonably neglects to provide adequate food, clothing, medical aid, lodging, care or other necessities of life for the child or young person.

(4) A person may be convicted of an offence under this section notwithstanding —

- (a) that any actual suffering or injury on the part of the child or young person or the likelihood of any suffering or injury on the part of the child or young person was obviated by the action of another person; or
- (b) the death of the child or young person in respect of whom the offence is committed.

(5) Subject to subsection (6), any person who is guilty of an offence under this section shall be liable on conviction —

- (a) in the case where death is caused to the child or young person, to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 7 years or to both; and
- (b) in any other case, to a fine not exceeding \$4,000 or to imprisonment for a term not exceeding 4 years or to both.

(6) The court may, in lieu of or in addition to any punishment specified in subsection (5), order the person guilty of an offence under this section to execute a bond, with or without sureties, as the court may determine, to be of good behaviour for such period as the court thinks fit, and may include in such bond a condition requiring such person to undergo such counselling, psychotherapy or other programme as may be specified therein.

(7) If a person who is ordered to execute a bond of good behaviour under subsection (6) fails to comply with any of the conditions of such bond, he shall —

- (a) if such bond is in lieu of a penalty under subsection (5), be liable to the penalty provided for in that subsection; or
- (b) if such bond is in addition to a penalty under subsection (5), be liable to a further fine not exceeding \$20,000 or to a further term of imprisonment not exceeding 7 years or to both.

Annex C: Legislation in other jurisdictions which address the “who did it” problem

United Kingdom: Section 5, Domestic Violence, Crime and Victims Act 2004

Causing or allowing a child or vulnerable adult to die or suffer serious physical harm

5. The offence

(1) A person (“D”) is guilty of an offence if—

- (a) a child or vulnerable adult (“V”) dies or suffers serious physical harm as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
- (b) D was such a person at the time of that act,
- (c) at that time there was a significant risk of serious physical harm being caused to by the unlawful act of such a person, and
- (d) either D was the person whose act caused V’s death or serious physical harm or —
 - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

(2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.

(3) If D was not the mother or father of V—

- (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V’s death or serious physical harm;
- (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.

(4) For the purposes of this section—

- (a) a person is to be regarded as a “member” of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
- (b) where V lived in different households at different times, “the same household as V” refers to the household in which V was living at the time of the act that caused V’s death or serious physical harm.

(5) For the purposes of this section an “unlawful” act is one that—

- (a) constitutes an offence, or
- (b) would constitute an offence but for being the act of—
 - (i) a person under the age of ten, or
 - (ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

(6) In this section—

“act” includes a course of conduct and also includes omission;

“child” means a person under the age of 16;

“serious” harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c. 100);

“vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

(7) A person guilty of an offence under this section of causing or allowing a person’s death is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

(8) A person guilty of an offence under this section of causing or allowing a person to suffer serious physical harm is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or to a fine, or to both.

South Australia, Section 14, Criminal Law Consolidation Act 1935

14—Criminal liability for neglect where death or serious harm results from unlawful act

(1) A person (the *defendant*) is guilty of the offence of criminal neglect if—

- (a) a child or a vulnerable adult (the *victim*) dies or suffers serious harm as a result of an unlawful act; and
- (b) the defendant had, at the time of the act, a duty of care to the victim; and
- (c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and
- (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant’s failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.

Maximum penalty:

- (a) where the victim dies—imprisonment for 15 years; or
- (b) where the victim suffers serious harm—imprisonment for 5 years.

(2) If a jury considering a charge of criminal neglect against a defendant finds that—

- (a) there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim’s death or serious harm; but
 - (b) the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,
- the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.

(3) For the purposes of this section, the defendant has a duty of care to the victim if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim’s care.

(4) In this section—

act includes—

- (a) an omission; and
- (b) a course of conduct;

child means a person under 16 years of age;

cognitive impairment includes—

- (a) a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);
- (b) an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);
- (c) a mental illness;

serious harm means—

- (a) harm that endangers, or is likely to endanger, a person's life; or
- (b) harm that consists of, or is likely to result in, loss of, or serious and protracted impairment of, a part of the body or a physical or mental function; or
- (c) harm that consists of, or is likely to result in, serious disfigurement;

unlawful—an act is unlawful if it—

- (a) constitutes an offence; or
- (b) would constitute an offence if committed by an adult of full legal capacity;

vulnerable adult means a person aged 16 years or above whose ability to protect himself or herself from an unlawful act is significantly impaired through physical disability, cognitive impairment, illness or infirmity.

Annex D: Cases prosecuted under s 5 DVCVA (UK) and s 14 CLCA (South Australia)

United Kingdom: Section 5, Domestic Violence, Crime and Victims Act 2004

Case	Summary
<p><i>R v Ikram and another</i> [2008] EWCA Crim 586</p>	<p>Facts: Child living with defendants found dead with multiple injuries including fractured femur – Cause of death pulmonary fat embolism due to fractured femur – Defendants (child’s father and his partner) charged with murder and causing or allowing death of child – Compelling evidence of deliberate and repeated violence causing multiple injuries – Defendants claim not to know why the child died – Crown withdrawing murder charge against first defendant after close of evidence – Father and partner both convicted under s 5 of the DVCVA.</p> <p>Sentence: Nine years’ imprisonment for both.</p>
<p><i>R v Khan and others</i> [2009] EWCA Crim 2</p>	<p>Vulnerable adult beaten to death by husband – husband convicted of murder. Medical evidence of numerous injuries (ten rib fractures) sustained by the deceased over three weeks before her death causing serious pain and resulting in impeded movement – deceased found to be vulnerable as a result of these injuries. Defendants members of same household as deceased and had frequent contact – defendants ought to have known deceased was being abused. Four defendants convicted for allowing death of vulnerable adult.</p> <p>Sentence: Two years’ imprisonment for two defendants. Third defendant sentenced to 12 months’ imprisonment suspended for two years with an order that he carry out unpaid work. Last defendant sentenced to three years’ imprisonment.</p>
<p><i>R v Uddin (Tohel)</i> [2017] EWCA Crim 1072</p>	<p>19-year-old vulnerable adult beaten to death in family home. Deceased’s eldest brother and his wife charged for murder. Deceased’s four other brothers, one sister and one sister-in-law charged for offence under s 5 of the DVCVA. Evidence of sustained physical and emotional abuse (<i>eg</i> no access to mobile phone), including regular beatings and degrading punishments (eating faeces and vomit, force feeding, deprivation of sleep etc) – all six family members either active or complicit in abuse of the deceased. Deceased’s eldest brother’s wife convicted of murder. Five other family members convicted under s 5 of the DVCVA.</p> <p>One defendant appealed his s 5 of the DVCVA conviction on the basis that the deceased was not “vulnerable”. Deceased found to be vulnerable as a result of prolonged physical and emotional abuse. Sentence of four years’ imprisonment upheld.</p>

Case	Summary
<i>R v Wiltshire (Jeffrey) and another</i> [2017] EWCA Crim 1686	<p>17-week-old infant died of head injuries in the care of her parents – evidence of serious physical violence on at least three occasions (fractured wrist, 40 rib fractures, skull fractured in multiple places two to five days before death, underlying brain injury). Parents charged under s 5 of the DVCVA. Both claimed not to have caused the injuries and provided no account of their cause. Both convicted under s 5 of the DVCVA, and sentenced on the basis that they had allowed the deceased to die.</p> <p>Sentence: Ten years' imprisonment.</p>

South Australia, Section 14, Criminal Law Consolidation Act 1935 ³⁸

Case	Summary
<i>Barty</i> 14/12/06	<p>Facts: 21 month old child died after being hit – mother had a history of violence towards child – only persons who were present were mother and her male partner – mother charged with murder, causing grievous bodily harm, and criminal neglect – male partner charged with criminal neglect on basis that left child alone with mother after she had been violent towards child – he pleaded guilty – he also was a witness in mother's murder trial at which she was found guilty – note that the mother alleged in her murder trial that it was her male partner rather than her who had inflicted the violence on her child</p> <p>Sentence: Male partner was sentenced to two years imprisonment – mother was sentenced to life imprisonment for murder</p>
<i>Dean</i> 14/12/07	<p>Facts: Three-year-old child suffered injuries as a result of swallowing caustic soda at home - mother was using this to manufacture methyl amphetamine with her male partner – mother charged with manufacture of methyl amphetamine and criminal neglect – she pleaded guilty to both charges – man only charged with manufacture of methyl amphetamine and he pleaded guilty to this charge</p> <p>Sentence: Mother sentenced to three years two months' imprisonment (for both offences) – Her male partner received a suspended sentence of 18 months' imprisonment for manufacture of methyl amphetamine.</p>

³⁸ Case summaries from Lenny Roth, "Criminal liability of carers in cases of non-accidental death or serious injury of children" (September 2014) NSW Parliamentary Research Service e-brief 12/2014.

Case	Summary
<i>Partridge & Field</i> 10/7/08	<p>Facts: Three-year-old child died from blow to stomach - at time of injury child was in care of his mother and his mother's male partner – no evidence as to which person inflicted injury on child - mother and partner both charged with criminal neglect - both pleaded guilty</p> <p>Sentence: mother was sentenced to six years imprisonment – her male partner was sentenced to ten years imprisonment – he appealed against sentence on several grounds including that it was disproportionate to the mother's sentence – appeal was dismissed with court noting that he did not explain why he did not take the child to doctor as condition was deteriorating; and that he had criminal antecedents: see [2008] SASC 323</p>
<i>Clarke</i> 19/7/10	<p>Facts: 12-week-old child suffered damage to brain and eyes as a result of shaking or being thrown onto a soft surface – father charged with recklessly causing serious harm and criminal neglect – pleaded not guilty and said injuries may have been caused when mother was feeding – he was found guilty of criminal neglect</p> <p>Sentence: suspended sentence of three years' imprisonment</p>
<i>Bath</i> 20/3/14	<p>Facts: Four-year old child suffered extensive injuries as a result of violence by mother's male partner over a period of three weeks – evidence that male had been violent towards several former partners – no evidence that violent towards mother but controlling behaviour towards her – mother charged with criminal neglect on basis that did not do anything to protect her child – she ensured that the child's father had no access to him at the time of the violence and she kept him away from preschool – she pleaded guilty – male partner charged with offences of assaulting child and five other women</p> <p>Sentence: judge said mother's culpability was of a high order and sentenced her to three years two months' imprisonment – male partner sentenced to 16 years' imprisonment for all offences</p>
<i>N-T & C</i> 27/3/14	<p>Facts: Four-month-old daughter died from inflicted head injuries and lack of medical attention – mother and father only persons who could have injured child – both charged with criminal neglect – both pleaded guilty – in a disputed facts hearing, judge accepted mother's evidence that father inflicted injuries – there was evidence that the father had previously been violent towards both mother and child</p> <p>Sentence: Father sentenced to nine years' imprisonment – mother sentenced to a two year good behaviour bond on basis that she had a significantly reduced capacity to protect her child due to her depression and due to the intimidation by the father</p>

CHAPTER 5: UPDATING THE PENAL CODE

SECTION 19: CLARIFYING FAULT ELEMENTS

SECTION 19.1: DEFINING THE FAULT ELEMENTS

SUMMARY OF RECOMMENDATIONS

- (52) Codify the definition of “intention”*
- (53) Codify the definition of “knowledge”*
- (54) Codify the definition of “rashness”*
- (55) Codify the definition of “negligence”*
- (56) Abolish the fault element of wilfulness, and replace “wilful” and “wilfully” with “knowingly” or “intentionally” as appropriate*
- (57) Group all provisions concerning fault elements in Chapter II, and make them applicable to offences under any written law*

Introduction and current law

Basic fault elements such as intention, wilfulness, knowledge, rashness, and negligence are used in various parts of the Penal Code (including the definitions of some other mental states) without being statutorily defined. Definitions for these terms have been developed over the years in case law. Some, like rashness, have only been recently clarified judicially. Others, especially intention, remain ambiguous after a long, fraught history of evolving or even being subject to contradictory definitions in local and foreign decisions.

Impetus for review

2 Given the centrality of fault elements in establishing criminal liability, the PCRC thought that it was necessary to consider whether the various fault elements should be defined for clarity and certainty. In particular, the PCRC noted that the fault element of intention, which is the fault element for the most serious crimes in our criminal law, is currently the subject of some lack of conceptual clarity (the details will be set out below). This is not desirable, as it impairs the ability of the public to understand and obey the law.

Recommendation 52: Codify the definition of “intention”

3 The case law concerning intention is complex and, in some places, internally contradictory. The PCRC therefore recommends codifying the definition of intention as set out below, for clarity and public understanding:

Whoever does anything that is an act deliberately, not by accident or inadvertence, is said to do that act intentionally.

Whoever does anything that causes an effect with the purpose of causing that effect, or knowing that this effect would be virtually certain (barring some unforeseen intervention) to result, is said to cause that effect intentionally.

To avoid doubt, a person is not deemed to intend or foresee a result of his actions by reason only of it being a natural and probable consequence of those actions.¹

To avoid doubt, nothing in this [provision] shall prevent a court from relying on a person's foresight that a certain effect was a probable consequence of his actions as basis to draw an inference that the person caused that effect intentionally.

Explanation – Intention is a distinct concept from motive or desire, and a person may do an act or cause an effect intentionally even if doing so was not his motive or he had no desire to do so

4 In formulating the definition of intention, the PCRC considered two types of intention separately: (a) direct intention and (b) oblique intention.

Direct intention

5 Direct intention refers to intention in the ordinary dictionary sense: a person is said to intend a certain result if he wants or purposes that result to come about: see *Cunliffe v Goodman*² and *Jai Prakash v State (Delhi Administration)*³.

6 Desire-based intention was also recognised in *Daniel Vijay s/o Katherasan and others v PP*⁴:

The difference between knowledge and intention is succinctly summarised in Glanville L Williams, *Jurisprudence by Sir John Salmond* (Sweet & Maxwell Limited, 10th Ed, 1947) as follows (at pp 380–381):

[H]e who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended. When King David ordered Uriah the Hittite to be set in the forefront of the hottest battle, he intended the death of Uriah only, yet he knew for a certainty that many others of his men would fall at the same time and place.

Oblique intention

7 In contrast, oblique intention⁵ refers to a situation where a person recognises that an effect or result will be virtually certain (barring some unforeseen intervention) to result from his voluntary act, even though he may not have had any desire to achieve that result. He is

¹ Modified from s 8(1) of the Criminal Justice Act 1967 (c 80) (UK).

² [1950] 2 KB 237 at 253.

³ (1991) 2 SCC 32 (“*Jai Prakash*”) at [42].

⁴ [2010] 4 SLR 1119 (“*Daniel Vijay*”) at [88].

⁵ This term is used in Dennis J. Baker, *Glanville Williams Textbook of Criminal Law* (Sweet & Maxwell, 4th Ed, 2015) (“*Glanville Williams*”) at paras 4-022–4-023.

nevertheless said to intend that effect or result for the purposes of criminal liability and punishment: see *Regina v Woollin*⁶, which was followed in *Ong Beng Leong v PP*^{7, 8}.

8 *Glanville Williams* states that “not to allow [oblique intention] would in some contexts make the concept of intention notably defective for practical purposes”.⁹ The PCRC agrees.

9 In this regard, there has been academic commentary arguing against the inclusion of any kind of foresight as a type of intention. For example, M. Cathleen Kaveny argues that any kind of foresight, regardless of the degree of probability, is conceptually distinct from intention. She proposes an alternative solution, which is to formally expand the fault element for murder (and presumably other similar offences of intention) beyond intention to include a sufficient degree of foresight of the prohibited outcome.¹⁰

10 The PCRC notes that Kaveny’s proposal is, to a certain extent, already a part of the Penal Code, as a number of important offences can be committed either intentionally *or* with knowledge that a certain outcome is probable to a certain degree: this includes culpable homicide under s 299, murder under s 300(d), voluntarily causing hurt under s 321 and mischief under s 425.

11 However, offences with the fault element of dishonesty are not formulated in this way. Dishonesty is defined in s 24 of the Penal Code as having the intention of causing wrongful gain to one person or wrongful loss to another person. There are cases where accused persons take away the property of others but not for the purpose of making a gain or causing a loss. This was the situation in *Queen-Empress v Ram Baran*¹¹ and *Parichat v Emperor*¹². In both cases, the offenders took cattle from their owners without consent to prevent the cattle from being slaughtered (a religious motivation). They were held guilty of theft, on the basis that motive is irrelevant to criminal liability. However, the separation between motive and intention cannot easily be maintained if the concept of intention is limited only to the accused person’s actual purpose. As will be seen below, judicial efforts to explain how a person can intend something without reference to motive have almost invariably relied on the concept of oblique intention.

12 The PCRC therefore recommends that oblique intention should continue to be recognised in Singapore law to ensure that the concept of intention remains usable in practice, especially in terms of excluding the concept of motive.

Whether oblique intention should require knowledge that an outcome will occur with absolute certainty

⁶ [1998] 3 WLR 382 (“*Woollin*”) at 392.

⁷ [2005] 1 SLR(R) 766 (“*Ong Beng Leong*”) at [24].

⁸ The same concept of intention was subsequently used in *PP v Goh Kah Heng alias Shi Ming Yi and another* [2009] SGDC 499 (“*Goh Kah Heng*”) and *PP v Lam Leng Hung and others* [2015] SGDC 326 at [186]. These findings were not disturbed on appeal in *Goh Kah Heng (alias Shi Ming Yi) v PP* [2010] 4 SLR 258 and *Lam Leng Hung (HC)* respectively.

⁹ *Glanville Williams* at para 4-020.

¹⁰ M. Cathleen Kaveny, “Inferring Intention from Foresight” (2004) 120 LQR 81.

¹¹ ILR 1893 All 299.

¹² (1909) 9 CriLJ 389.

13 One member of the PCRC, while agreeing that the law should recognise oblique intention, was of the view that the required standard should be knowledge that a result would be *absolutely certain* and not merely *virtually certain*. The learned authors of *Criminal Law in Malaysia and Singapore*¹³ take the same position.

14 The main argument raised was that s 300 of the Penal Code, which defines murder, provides for one form of murder where death is caused intentionally (s 300(a)), and a separate form where death is caused with knowledge that one's act "is so imminently dangerous that it must in all probability cause death". The learned authors suggest that based on these words, the Penal Code distinguishes between intention and knowledge that an outcome will happen "in all probability". They therefore conclude that the Penal Code also distinguishes between intention and knowledge that a certain outcome will happen "with virtual certainty".¹⁴ This argument implicitly equates knowledge to the extent of "in all probability" with knowledge "with virtual certainty".

15 The majority of the PCRC nevertheless agreed that the standard for oblique intention should be virtual certainty, and not absolute certainty, for the following reasons.

16 First, knowledge that an outcome will happen with virtual certainty reflects a much higher threshold, based on a much higher degree of likelihood, than knowledge that an outcome will "in all probability" happen. *Glanville Williams* defines the former situation as where the defendant "*knows* that if she does *x* it will be *virtually impossible* for *y* not to occur" [emphasis in original].¹⁵ On the same note, H L A Hart wrote, "For outside the law a merely foreseen, though unwanted, outcome is not usually considered as intended. ... The exceptions to this usage of "intentionality" are cases where a foreseen outcome is so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd, or such as only a mentally abnormal person would seriously entertain."¹⁶ This is the level of certainty that is meant by the words "virtually certain".

17 The majority of the PCRC were thus of the view that the form of knowledge in s 300(d) of the Penal Code – knowledge that an outcome must "in all probability" occur – falls short of knowledge that it will be *virtually impossible* for the outcome not to occur. At most, it constitutes knowledge that it will be unlikely, or improbable, for the outcome not to occur. Put in Professor Hart's terms, where an outcome is foreseen to occur "in all probability", it is not absurd, or in the province of the mentally abnormal, to entertain the suggestion that it might not happen.

18 In other words, treating knowledge that a certain outcome is virtually certain as a type of intention does not cause ss 300(a) and 300(d) of the Penal Code to have the same fault element. Put another way, it does not render s 300(d) redundant or otiose.

¹³ *YMC Rev 2nd Ed* at paras 4.11 and 9.39.

¹⁴ The learned authors of *YMC Rev 2nd Ed* at para 9.39, also provide a further reason, namely, that knowledge and intention are treated as separate fault elements in most Penal Code offences. With great respect, this does not settle the issue of whether intention can extend to include certain types of knowledge. After all, the authors themselves recognise knowledge that a certain outcome is absolutely certain as a form of intention even though this is not direct intention (*ie* where the actor purposed the outcome).

¹⁵ *Glanville Williams* at para 4-020.

¹⁶ H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd Ed, 2008) at p 120.

19 Second, a requirement of knowledge with absolute certainty is not practically or doctrinally workable. *Glanville Williams* addresses this issue in relation to a hypothetical accused person who puts a time-bomb in an aircraft directly intending to destroy an insured parcel and claim on the insurance. She does not care whether the people on board live or die, but she knows that success in her scheme will inevitably involve their deaths as a side-effect.¹⁷ Responding to the argument that the bomb might have gone off but the pilot might miraculously have brought the stricken plane to safely land, the learned author states:

These cases could be said to involve what might be described as absolute certainties, but one cannot confine the notion of foresight of certainty to certainty in the most absolute sense. *It is a question of human certainty, or virtual certainty, or practical certainty.*¹⁸ [Emphasis added]

20 It is therefore very likely that a court, faced with deciding on the meaning of “absolute certainty”, is likely to take the pragmatic course of holding that absolute certainty cannot refer to philosophically absolute certainty but only practical certainty or human certainty – which is the same as the standard of “virtual certainty” already endorsed by our courts in *Ong Beng Leong*.¹⁹

Foresight of consequences as evidence of direct intention

21 One potential confusion between direct and oblique intention arises because some cases have held that foresight that a certain result was a probable consequence of one’s actions may be evidence from which direct intention can be inferred: see *Daniel Vijay* at [89]–[90], *Sim Yew Thong v Ng Loy Nam Thomas*²⁰ at [18] and *Regina v Moloney*²¹ at 929F.

22 The learned author of *Glanville Williams* states that this evidential principle is separate from, and co-exists with, the concept of oblique intention.²² The difference between (a) direct intention inferred from foresight of certain consequences and (b) oblique intention is one of degree. Where the accused person’s foresight of the consequences of his actions reaches the level of “virtual certainty” (see *Woollin*), that state of mind is no longer simply evidence of direct intention. It itself substantively constitutes intention, in the form of oblique intention.²³ The PCRC agrees with this analysis.

Whether one is deemed to intend the natural consequences of one’s acts regardless of whether one knew those were the natural consequences

23 At one point in English law, there was a common law doctrine that when one acts, one is deemed to foresee the risk of a certain result of that act that a reasonable person would have

¹⁷ *Glanville Williams* at para 4-022.

¹⁸ *Id.*, at para 4-029.

¹⁹ This is also consistent with the Court of Appeal’s holding in *Tan Kiam Peng v PP* [2008] 1 SLR(R) 1 (“*Tan Kiam Peng*”) at [129] that virtual certainty refers to actual knowledge in its purest form: the Court did not require that such knowledge be based on philosophically absolute certainty.

²⁰ [2000] 3 SLR(R) 155 (“*Sim Yew Thong*”).

²¹ [1985] 1 AC 905 (“*Moloney*”).

²² This is also consistent with the Court of Appeal’s holding in *Tan Kiam Peng* at [129] that virtual certainty refers to actual knowledge in its purest form: the Court did not require that such knowledge be based on philosophically absolute certainty.

²³ *Glanville Williams* at para 4-024.

foreseen. Based on this proposition, an accused person was deemed to have intended the natural consequences of his act regardless of whether he subjectively knew those were the natural consequences of his act: *Director of Public Prosecutions v Smith*²⁴.

24 This doctrine was widely criticised, and was legislatively overturned by s 8 of the Criminal Justice Act 1967²⁵ (the history is set out in *Woollin* at 392C–392E). Even leaving the English legislation aside, *Smith* was rejected as a wrong turn in the common law by the Privy Council in *Graham Ralph Frankland v The Queen*²⁶ and by the Malaysian Federal Court in *Yeo Ah Seng v Public Prosecutor*^{27, 28}.

25 In the more recent Singapore decision of *Sim Yew Thong*, it was held at [18] that “[a] person is said to intend the natural consequences of his act”. However, this was clearly in the context of using a person’s knowledge of the consequences of his act as *evidence* of his direct intention.

26 In *PP v AFR*²⁹, Lee Seiu Kin J stated at [34] that “[a] person is deemed to intend the ordinary and natural consequences of his acts.” However, he immediately qualified this statement by saying (at [35]) that “[t]he true question ... is whether the accused intended to inflict the fatal injuries on the deceased. In the absence of an admission, the Prosecution must prove such intention from the circumstances of the act.” In other words, Lee J ultimately reaffirmed the orthodox requirement of proof of subjective intention, rather than the rejected deeming approach in *Smith*. The PCRC agrees with Lee J’s reaffirmation of the orthodox requirement of subjective intention.

Intention as distinguished from motive and desire

27 Finally, the PCRC affirms that intention does not depend on concepts of motive or desire. That intention and motive are distinct concepts is clear in our law, and was recently affirmed by the High Court in *Lam Leng Hung*³⁰.

28 The learned authors of *Criminal Law in Malaysia and Singapore* state the following at paras 4.8 – 4.9 of that work:

... In these two passages, the concept of intention is closely connected with that of desire. This should be avoided since desire introduces an emotional or motivational element that may or may not be present in intention. For example, D’s purpose is to kill V in self-defence even if he may not desire to do so since V is his best friend.

²⁴ [1961] AC 290 (“*Smith*”)

²⁵ This provides, “A court or jury, in determining whether a person has committed an offence, — (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reasons only of it being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

²⁶ [1987] 2 WLR 1251 at 1263.

²⁷ [1967] 1 MLJ 231.

²⁸ At the time of this decision, the Federal Court was technically still the apex court of Singapore, even though Singapore had already become independent: see Walter Woon, “Precedents that Bind – A Gordian Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore” (1982) 24 *Malaya Law Review* 1.

²⁹ [2011] 3 SLR 653.

³⁰ *Lam Leng Hung (HC)* at [180].

Accordingly, it would be far better for intention to be defined as purposive or goal oriented.

Similarly, intention should not be confused with motive. Motive is the emotional force behind D's conduct and is distinguished from intention which is a technical concept denoting a mental state in which D acts with the purpose to bring about a result. ...

29 The *Explanation* set out above serves to put this position beyond doubt.

Recommendation 53: Codify the definition of “knowledge”

30 The PCRC recommends codifying the definition of knowledge as follows:

Whoever does anything with awareness that a circumstance exists, will exist, or is virtually certain to exist, is said to do that thing knowingly in respect of that circumstance.

Whoever does anything with awareness that an effect will be caused, or is virtually certain to be caused, is said to do that thing knowingly in respect of that effect.

Where doing anything knowingly is an element of an offence, that element is also established where that thing is done intentionally.

31 In formulating the definition of knowledge, the PCRC affirmed that it is clear from the case law that “knowledge” means *actual* knowledge. However, there are also references in case law to “wilful blindness”. These concepts are considered in turn.

Actual knowledge

32 Actual knowledge was defined in *Jai Prakash* as “a state of mental realisation with the bare state of conscious awareness of certain facts in which the human mind remains simple and inactive”.

33 In Singapore, various courts have also sought to define knowledge. In *PP v Koo Pui Fong*³¹ at [14], Yong CJ stated, “I think that it would be reasonable to say that a person “knows” a certain fact if he is aware that it exists or is almost certain that it exists or will exist or occur. Thus knowledge entails a high degree of certainty”. In *Tan Kiam Peng* at [127] *per* Andrew Phang Boon Leong JA, the Court of Appeal noted that where the phrase “virtual certainty” is used, it “borders on – if not actually epitomises – actual knowledge rather than wilful blindness” [original emphasis removed]. At [129], Phang JA stated more explicitly that virtual certainty refers to “actual knowledge in its purest form. Similarly, in *PP v Mas Swan bin Adnan and another*³² at [55], Steven Chong J (as he then was) held that “[a]ctual knowledge is the subjective mental state where one is certain of the existence of a set of facts.

34 In *Sim Yew Thong*, however, Yong CJ appeared to go further than the other definitions in case law when he said at [18] that “for the purposes of s 321 of the PC, the term “knowledge” encompasses both recklessness (where an accused knows he is likely to cause a result) and

³¹ [1996] 1 SLR(R) 734 (“*Koo Pui Fong*”).

³² [2011] SGHC 107 (“*Mas Swan*”).

negligence (when an accused has reason to believe that he is likely to cause a result). I was reinforced in this view by the general definition of the term “voluntarily” in s 39 of the PC ...”.

35 The PCRC considered this case and concluded that the passage cited was meant to apply strictly to s 321 of the Penal Code (defining the offence of voluntarily causing hurt), with express reference to the definition of the term “voluntarily” in s 39 of the Code. Section 39 of the Penal Code expressly includes both “knowledge” and “reason to believe”.³³ This is almost certainly the reason Yong CJ made this finding in *Sim Yew Thong*, and also explains why this finding should not apply more generally throughout the Penal Code.

Wilful blindness

36 The concept of wilful blindness was explained in *Tan Kiam Peng* as follows:

- (a) Wilful blindness is considered, in law, to be the equivalent of actual knowledge (at [43], [123] and [124]);
- (b) Wilful blindness is established through (i) suspicion, firmly grounded and targeted on specific facts, combined with (ii) a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is (at [125]–[127]); and
- (c) A person may be wilfully blind as to a fact even if he does not have actual knowledge of that fact (at [124]). Wilful blindness and actual knowledge are not identical concepts (at [127]).

37 In spite of this seemingly-clear articulation, the courts’ position on whether wilful blindness is (a) a distinct mental state from actual knowledge that is deemed to be equivalent to actual knowledge or (b) merely an evidential basis for inferring actual knowledge has appeared to fluctuate over time.

38 In *Koo Pui Fong* (reported in 1996) at [14], Yong CJ stated that “[the] concept of wilful blindness does not introduce a new state of mind to that of knowing ... [i]t is simply a reformulation of actual knowledge. It seems to me that it is wholly in keeping with common sense and the law to say that an accused knew of certain facts if he deliberately closed his eyes to the circumstances, his wilful blindness being *evidence from which knowledge may be inferred*” [emphasis added]. However, at [15], Yong CJ continued by saying that “this is different from saying that wilful blindness should be automatically equated with knowledge”, thus seeming to recognise a conceptual difference between the two states of mind (as noted in *PP v Lim Boon Hiong*³⁴ at [67]).

39 In *Tan Kiam Peng* (reported in 2008), as highlighted above, wilful blindness and actual knowledge were expressly stated to be conceptually non-identical

40 In *Mas Swan* (decided in 2011) at [55], Chong J (as he then was) seemed to take both sides by saying that wilful blindness was “an evidential tool towards establishing actual

³³ The term “constructive knowledge” can be used to encompass both these states of mind.

³⁴ [2010] 4 SLR 696.

knowledge”, but also that “[w]ilful blindness may be the legal equivalent of actual knowledge, but it is not the same as actual knowledge”.

41 Finally, in *Nagaenthran a/l K Dharmalingam v PP*³⁵, the Court of Appeal (including Phang JA, who delivered the judgment in *Tan Kiam Peng*) made the following observation at [30] *per* Chan Sek Keong CJ, which is worth quoting in full:

In *Tan Kiam Peng* at [141], this court held that s 18(2) of the MDA included both *actual knowledge* in its “purest form” (also referred to as “actual knowledge *simpliciter*” in *PP v Lim Boon Hiong* [2010] 4 SLR 696) as well as *wilful blindness*. However, one must be careful to avoid unnecessary refinement of the fault element of knowledge. Wilful blindness (or “Nelsonian blindness”) is merely “lawyer-speak” for *actual knowledge* that is *inferred* from the circumstances of the case. It is an indirect way to prove actual knowledge; *ie*, actual knowledge is proved because the inference of knowledge is *irresistible* and is the *only rational inference* available *on the facts* (see *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 at 3). It is a subjective concept, in that the extent of knowledge in question is the knowledge of the *accused* and not that which might be postulated of a hypothetical person in the position of the accused (although this last mentioned point may not be an irrelevant consideration) (*ibid*). Wilful blindness is not negligence or an inadvertent failure to make inquiries. It refers to the blindness of a person to facts which, in the relevant context, he *deliberately refuses* to inquire into. Such failure to inquire may sustain an inference of knowledge of the actual or likely existence of the relevant drug. It must also be emphasised that where the Prosecution seeks to rely on actual knowledge in the form of wilful blindness, the alleged wilful blindness must be proved *beyond a reasonable doubt*. [Emphasis in original]

42 The PCRC agreed that this line of case law does lead to a consistent and rational position, reflected in *Nagaenthran*. This position is simply that wilful blindness is conceptually different from actual knowledge. However, when proven to the required standard by the Prosecution, wilful blindness leads irresistibly to an inference of actual knowledge, or put another way, actual knowledge is the only rational available inference available once wilful blindness is properly established. This reconciles the various judicial findings that wilful blindness is distinct from actual knowledge, and is evidence proving actual knowledge by inference, while at the same time being “legally equivalent” to actual knowledge.

43 However, the PCRC was of the view that there was no real need to define wilful blindness, since it was merely a conceptual tool used to establish knowledge, and the concept did not exist in the Penal Code. Further, establishing wilful blindness is a fact-sensitive exercise requiring flexibility. The PCRC therefore recommends not to codify the definition of wilful blindness.

Recommendation 54: Codify the definition of “rashness”

44 The PCRC recommends codifying the definition of rashness, as follows:

³⁵ [2011] 4 SLR 1156 (“*Nagaenthran*”).

Whoever does anything knowing that there is a risk that a circumstance exists or will exist is said to do that thing rashly in respect of that circumstance if it is unreasonable to take that risk.

Whoever does anything knowing that there is a risk that an effect will be caused is said to do that thing rashly in respect of that effect if it is unreasonable to take that risk.

Where doing anything rashly is an element of an offence, that element is also established where that thing is done knowingly or intentionally.

45 This definition is drawn from the recent decision of the High Court in *PP v Hue An Li*³⁶ at [45]–[46]:

45 In our judgment, awareness of the potential risks that might arise from one’s conduct ought, in general, to be the dividing line between negligence and rashness. For both negligence and rashness, the offender would have fallen below the requisite objective standard of the reasonable person. The harsher sentencing regime for rashness is justified on the basis that the offender was actually advertent to the potential risks which might arise from his conduct, but proceeded anyway despite such advertence. This is essentially a restatement of the definitions of “rashness” and “negligence” enunciated in *Poh Teck Huat*, which, in our judgment, remain good law. In short, advertence to risk will generally be an essential element of rashness. We have qualified this statement of principle as one that would “generally” apply because there remains a class of cases where the risks may be said to be so obvious had the offender paused to consider them that it would be artificial to ignore this fact (see also our comments at [49]–[55] below). We leave it open as to whether advertence to risk must actually be proved before a finding of rashness can be made in this class of cases (“blatantly obvious risk” cases). In our judgment, it would be best to develop this issue by case law rather than by a pre-emptive statement of principle.

46 We note that advertence to risk is also the dividing line that is used in a similar context in England. In *Regina v G* [2004] 1 AC 1034 (“*R v G*”), which involved the offence under s 1 of the Criminal Damage Act 1971 (c 48) (UK) (“the 1971 UK Criminal Damage Act”) of damaging property “being reckless as to whether any such property would be damaged”, the House of Lords held that a person was reckless if he chose to act despite being aware of the risk of harm (at [41]).

46 The PCRC notes that the High Court in *Hue An Li* had made an *obiter* comment at [45] that rashness may extend to certain cases where the risks taken were “blatantly obvious” but the accused person did not pause to consider them. The PCRC recommends not to extend the definition as suggested, as to do so would undermine the consistent and clear interpretation of the concept of rashness.

47 In this regard, the PCRC notes that in *Hue An Li* at [49]–[55], this extended concept of rashness was said to be potentially useful in the context of road traffic offences, but the Court also noted that the Road Traffic Act did not use the term “rashly” in the offences discussed, but instead used the term “recklessly”. If the general definition of rashness provided above is

³⁶ [2014] 4 SLR 661 (“*Hue An Li*”).

viewed as inappropriately narrow for any offence, that offence can be amended to provide a special fault requirement. This is preferable to over-extending the concept of rashness beyond its core meaning.

Recommendation 55: Codify the definition of “negligence”

48 The PCRC recommends codifying the definition of negligence, as follows:

Whoever omits to do anything which a reasonable person would do, or does anything which a reasonable person would not do, is said to do so negligently.

Where doing anything negligently is an element of an offence, that element is also established where that thing is done rashly, knowingly or intentionally.

49 This definition is drawn from the High Court’s recent decision in *Hue An Li* at [38] that negligence is “the omission to do something which a reasonable person would do, or the doing of something which a reasonable person would not do”.

Whether criminal negligence should require gross negligence

50 Several members proposed that the standard of criminal negligence stated in *Hue An Li* ought to be narrowed to cases of “gross negligence”, to differentiate between negligence in the civil and criminal contexts. These members raised two main arguments in support of narrowing the definition of criminal negligence:

- (a) A higher threshold of criminal negligence is consistent with the trends in other common law jurisdictions.
- (b) A higher threshold of negligence ought to be required, before the law censures a person for a criminal offence.

51 The majority of the PCRC, however, supported the codification of negligence as set out by the High Court in *Hue An Li*³⁷ (ie at the civil standard) for the following reasons, which are elaborated on below:

- (a) The gross negligence standard found its way into the common law through the offence of manslaughter, and was clearly influenced by the extreme seriousness of that offence. This does not apply to Singapore. Further, the gross negligence standard has proven to be difficult to apply in other jurisdictions and generates uncertainty, especially in the medical context.
- (b) In Singapore, calibrated penalties, appropriate physical elements and clear defences work together to ensure that offences of negligence operate proportionally

52 As regards the use of a higher standard of negligence³⁸ than the civil standard in other common law jurisdictions, the PCRC noted that in these countries, the most serious offence of

³⁷ The PCRC also noted that this was a decision of a 3-Judge High Court, which has been described as a *de facto* pronouncement by the Court of Appeal: *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 at [47].

³⁸ See *R v Adomako* [1995] 1 AC 171 (“*Adomako*”); *R v D* (1984) 3 NSWLR 29; *R v Pullman* (1991) 25 NSWLR 89; *Burns v The Queen* [2012] 246 CLR 334; Criminal Code (R.S.C., 1985, c. C-46) (Canada) s 219.

negligence was manslaughter, which was punishable with up to life imprisonment.³⁹ In contrast, the most serious offence of negligence in Singapore is causing death by a negligent act under s 304A(b) of the Penal Code, which is only punishable with up to 2 years' imprisonment. The majority of the PCRC agreed that given the differences in the most serious negligence offence in Singapore, and the most serious negligence offence in these other common law jurisdictions, it would not be appropriate to follow in the footsteps of such jurisdictions by raising the standard of criminal negligence.

53 This was further buttressed by the fact that these jurisdictions do in fact see the value of imposing criminal liability for mental states short of gross negligence. In the context of driving offences, for example, England and Wales, New South Wales, and Canada all require a standard of negligence lower than gross negligence.⁴⁰

54 Against this background, the PCRC noted that by rejecting negligent manslaughter, Singapore goes further than many of the jurisdictions cited in ensuring that any kind of negligence is never used as a threshold for the most serious offences. However, the practice in Singapore is consistent with the practice in other jurisdictions in ensuring that negligent offences carry lower punishments, and apply to acts that are inherently dangerous.

55 The general negligence offences in the Penal Code – ss 304A(b), 338(b), 337(b), 336(b) – all require that death must be caused or that the act must be such as to “endanger human life or the personal safety of others”. Further, the punishments are relatively low – ranging from a maximum of 3 months' imprisonment to a maximum of 2 years' imprisonment – to reflect the lower culpability of offenders who commit these offences.

56 Similarly, the context-specific negligent offences in the Penal Code – ss 269, 279 – 280, 282, 284 – 289 – all involve acts that are inherently dangerous, and, for the most part, require danger to human life or personal safety. They also impose relatively low punishments of up to 1 year's imprisonment to reflect lower culpability.

57 Some members also raised the specific example of criminal liability for negligent doctors, if the civil standard of negligence is retained. However, the majority of the PCRC noted that the English experience has shown that gross negligence standard does nothing to ameliorate this perceived over-extension of criminal liability, since many of the leading gross negligence manslaughter cases in English law in fact involve medical or allied health professionals.⁴¹

58 Instead, the approach in the Penal Code was that the defence in s 88 of the Penal Code would likely apply in such circumstances, since the medical procedures were carried out for the benefit of the patient, with their consent. The majority of the PCRC agreed that even if the statutory defences were not sufficient to cover the acts and omissions in the course of medical care, the correct approach should be to refine the statutory defences.

³⁹ See Offences Against the Person Act 1861 (c 100) (UK) s 5; Crimes Act 1900 (No 40) (New South Wales, Australia) s 24; s 220 of the Canadian Criminal Code.

⁴⁰ See Road Traffic Act 1988 (c 52) (UK) s 3ZA(2); *R v D* (1984) 3 NSWLR 29 at 31 (New South Wales, Australia); s 249(1)(a) of the Canadian Criminal Code and *R v Woodward* (1993) 1993 CanLII 8183 (Canada).

⁴¹ *Adomako* (Anaesthetist who failed to notice disconnection of patient's oxygen supply); *R v Misra and Srivastava* [2005] 1 Cr App R 21 (Doctors who failed to notice patient's infection); *Honey Maria Rose v Regina* [2017] EWCA Crim 1168 (Optometrist who failed to notice and refer swelling of the patient's optic nerve).

59 In light of the reasons set out above, the majority of the PCRC recommends codifying the standard of criminal negligence as set out by the three-Judge High Court in *Hue An Li*.

Recommendation 56: Abolish the fault element of wilfulness, and replace “wilful” and “wilfully” with “knowingly” or “intentionally” as appropriate

60 The PCRC recommends abolishing the fault element of wilfulness, and replacing “wilful” and “wilfully” with “knowingly” or “intentionally” as appropriate. The PCRC agrees that the term “wilful” is archaic and has given rise to alternative interpretations in English law.⁴² The term has also been interpreted somewhat ambiguously in Singapore case law.⁴³ It would therefore be preferable to replace the term with intention or knowledge, as the context requires.

Recommendation 57: Group all provisions concerning fault elements in Chapter II, and make them applicable to offences under any written law

61 Finally, the PCRC recommends that all the provisions in Chapter II of the Penal Code relating to fault elements should be grouped together into special Part under that Chapter. This will centralise all the fault element definitions into one place for ease of reference and comparison.

62 The provisions in this Part should be made applicable to all offences under any written law, in the same way that the General Exceptions in Chapter IV are applicable to all offences under any written law.⁴⁴

⁴² See *R v Sheppard* [1981] AC 394; *Attorney-General’s Reference (No. 3 of 2003)* [2005] QB 73 at [27]; JA Andrews, “Wilfulness, a lesson in ambiguity” (1981) 1 Legal Studies 303.

⁴³ *Chng Gim Huat v Public Prosecutor* [2000] 2 SLR(R) 360 at [76].

⁴⁴ This is provided for by the Penal Code.

SECTION 19.2: TRANSFERRED FAULT

SUMMARY OF RECOMMENDATIONS

- (58) Provide that the elements of all offences committed with the fault elements of intention or knowledge can be satisfied with transferred fault
- (59) Provide that no offence can be committed with transferred fault unless the same offence could have been made out if committed against the contemplated victim
- (60) Provide that no offence can be committed with transferred fault unless the accused person was negligent in relation to his act affecting an unanticipated victim (with a different approach for homicide)
- (61) Provide that that in all charges for offences with transferred fault, transfer of defences will be possible
- (62) Remain silent on transferred fault in respect of the unanticipated victim, where a single act had an effect both on a contemplated and an unanticipated victim

Introduction

The doctrine of “transferred fault” allows for the imposition of criminal liability in situations where an effect is caused to a person or object other than the one contemplated by the accused person. In other words, where an accused person’s acts and mental state satisfy the elements of a criminal offence *except that* their acts affected a person or object other than the one they contemplated, that accused person is nevertheless guilty of the same offence.

2 Imposing criminal liability in such a situation reflects the moral intuition that the accused person, having (a) committed the physical element of an offence with the required fault element, and (b) caused the exact type of harm prohibited by the offence, should not escape punishment for the offence just because the victim was not the one he contemplated. It has been described as yielding “rough justice ... notwithstanding its lack of any sound intellectual basis” (*Attorney-General’s Reference (No. 3 of 1994)*¹ at 261B *per* Lord Mustill). Such liability is recognised as part of common law in the major common law jurisdictions.²

3 The doctrine of “transferred fault” does *not* include cases of mistaken identity, where the act had the effect on the person or object contemplated by the accused person, but the accused person mistakenly thought they were some other person or object.³ Neither does transferred fault include cases where the accused person did not contemplate their act having an effect on any particular person or object. This is because normal criminal liability applies in these scenarios, without the need for any special doctrine.

4 In a prosecution for an offence with transferred fault, the phrase “transfer of defences”, or similar terms, refers to allowing the same formal defences (*eg* provocation, private defence)

¹ [1998] AC 245 (“*A-G’s Ref 3 of 1994*”).

² *Ibid* (England and Wales); *Vallance v R* [1961] HCA 42; (1961) 108 CLR 56 at [12] (Australia); *R v Kundeus* [1976] 2 SCR 272 (“*Kundeus*”) (Canada).

³ This was the finding of the Indian Supreme Court in *Shankarlal* AIR 1965 SC 1260; (1965) 2 Cri LJ 266 (SC). See also *Gyanendra Kumar* AIR 1972 SC 502; 1972 Cri LJ 308 (SC); A. J. Ashworth, “Transferred Malice and Punishment for Unforeseen Consequences” in *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (P. R. Glazebrook ed) (Stevens & Sons, 1978) at pp 77–78; and Chapter 4.2 of *Model Code for Singapore* at para 4.2.5.

to apply to that prosecution as would have applied if only the contemplated victim were affected.

Current law

5 There is no general doctrine of transferred fault in Singapore law; whether it applies to specific offences is determined through statutory interpretation: *Sim Yew Thong*⁴. The application of this ‘statutory interpretation’ approach can be seen in the following *obiter* remarks from *Sim Yew Thong* at [19].

“s 321 of the PC is worded in such a way that the *intended* victim need not be the *actual* victim – the section does not state that the accused must cause hurt to that same person whom he had the intention to hurt... Instead, the requisite *mens rea* for an offence under s 321 of the PC is possessing either “the intention to cause hurt to *any person*”... and the *actus reus* of the offence is the act of causing hurt to “*any person*” (as opposed to “*the person*” or “*that same person*”). Undoubtedly, the use of the words “any person” throughout the section was deliberate. The purpose of this must have been to allow the section to cover cases where the defendant, with the intention to cause hurt to O... actually causes hurt to P in the process. In effect, this is a very specific and limited statutory application of the doctrine of “transferred malice”. [emphasis in original]

6 The only statutory provision in the Penal Code expressly covering transferred fault relates to offences of culpable homicide (and therefore also murder). This is contained in s 301 of the Penal Code:

Culpable homicide by causing the death of a person other than the person whose death was intended

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

7 By using the words “of the description of which it would have been” etc., s 301 seems to provide that any defences that would have applied to a charge of culpable homicide in respect of the contemplated victim would apply to a charge of culpable homicide in respect of the actual victim – in other words, it provides for transfer of defences.

8 The ‘statutory interpretation’ approach in *Sim Yew Thong* gives rise to a number of problems, because of the way the Penal Code is drafted. These are briefly set out as follows, with detailed analysis in the section below:

- (a) Inconsistent applicability of transferred fault;
- (b) Risk of constructive liability for more serious offences;

⁴ *Sim Yew Thong* at [17] and [19].

- (c) Lack of clarity on whether a fault element is required in respect of unaccomplished victim;
- (d) Inconsistency in transfer of defences; and
- (e) Lack of clarity on whether two separate charges are possible if both the contemplated victim and an unaccomplished victim are affected by an offence.

Recommendation 58: Provide that the elements of all offences committed with the fault elements of intention or knowledge can be satisfied with transferred fault

Impetus for review

9 The manner in which Penal Code offences are drafted creates an illogical and unacceptable inconsistency in the applicability of transferred fault to broadly similar offences. For example, the offence of voluntarily causing hurt in s 321 of the Penal Code embraces hurt to “any person”, and therefore allows transferred fault. However, the similar offence causing hurt by means of poison under s 328 of the Penal Code confines the hurt to “such person” intended to be hurt, meaning transferred fault does not apply. Criminal force defined in s 350 of the Penal Code also refers to the force being used to “that person” and “the person” the accused intended to use force against, suggesting that it does not allow transferred fault.

10 A similar issue arises for common offences against property. The offence of mischief defined in s 425 of the Penal Code allows transferred fault, but the offence of theft defined in s 378 of the Penal Code does not.

Recommendation

11 The PCRC recommends introducing a provision stating that all offences committed with the fault element of intention or knowledge can be committed with transferred fault. This would by necessary implication extend to fault elements that are constituted by certain types of intention and/or knowledge, such as dishonesty, fraudulent intention and voluntariness.⁵ This should apply to all offences, including offences outside the Penal Code, unless otherwise stated.

12 There is no need to make provision for offences committed with the fault element of rashness or negligence, as those mental states generally exist without contemplation of a specific victim. For instance, rashness in respect of one victim is necessarily rashness in respect of another potential victim in the same situation (*eg* when one rashly throws a plant pot from a high window, one is rash not only in respect of the person one can see walking below, but any other person in the same area). In contrast, when one has intention or knowledge in respect of a specific victim, one does not necessarily have intention or knowledge in respect of any other potential victim, even if they are in the same situation.

13 The PCRC notes that the physical elements of certain offences may not logically allow those offences to be committed with transferred fault. For example:

⁵ It is for this reason that we have chosen the term “transferred fault” rather than “transferred intention”: our proposal could not logically have stopped only at the fault element of intention.

A shouts at B the words, “I will kill you”, with intent to cause alarm to B. C hears these words.

14 The physical element of the offence of criminal intimidation as defined in s 503 of the Penal Code is to “threaten another with any injury.” Even if A’s words had some effect on C, A arguably did not commit the physical element of criminal intimidation against C as it does not seem logically possible to threaten someone without intending to do so.⁶

15 The PCRC therefore further recommends that the general provisions relating to transferred fault should be drafted such as to make clear that transferred fault may not be possible in the context of certain offences, and to guide courts in the necessary statutory interpretation.

Recommendation 59: Provide that no offence can be committed with transferred fault unless the same offence could have been made out if committed against the contemplated victim

Impetus for review

16 It is not clear whether transferred fault can result in an accused person being charged with a different offence than the one he would be charged with if his acts only affected the contemplated victim. One instance in which this may occur is illustrated as follows:

Where A throws a stone at B intending to hurt B, but the stone hits a porcelain vase, A commits mischief in respect of the vase.

17 Such a result would be unprincipled and illogical. The offence of which A is convicted bears no resemblance to the one he set out to commit, and the moral signal sent by the conviction is thus totally distorted. This kind of transfer is clearly forbidden in several jurisdictions where transferred fault is a common law doctrine.⁷

18 This may also lead to constructive liability⁸ in situations where the Penal Code provides for a basic offence with more aggravated versions. For example, voluntarily causing hurt *simpliciter* is punishable under s 323 of the Penal Code with imprisonment of up to 2 years, but voluntarily causing hurt to a public servant in discharge of his duty is punishable under s 332 of the Penal Code with up to 7 years’ imprisonment. If there is no clear restriction on transfer of fault elements between different offences, the following may result:

⁶ A may be found guilty of a different offence of causing alarm to C by threatening words under the POHA s 3(a), but this offence is broadly worded such that C can be the immediate victim without transferred fault. This is therefore separate from our discussion.

⁷ See *A-G’s Ref 3 of 1994*, at 259G (following *Regina v Pembrilton* (1872–75) LR 2 CCR 119); the Ontario Court of Appeal in *R v Gordon* (2009) 241 CCC (3d) 388; 2009 ONCA 170 at [42] and the Supreme Court of Canada in *Kundeus*.

⁸ The term “constructive liability” is used in this report to refer to liability for a criminal offence where not every physical element is accompanied by a corresponding fault element. For example, murder under s 300(c) of the Penal Code is a constructive liability offence because the physical element of death being caused is not accompanied by any corresponding fault element, such as intention to cause death or knowledge that death will be caused.

Where A throws a stone at B intending to hurt B, but the stone hurts P, a police officer in discharge of his duty, A commits an aggravated offence of voluntarily causing hurt to P under s 332 of the Penal Code despite the absence of any fault element in respect of causing hurt to a police officer.

19 The PCRC notes that in *Foo Siang Wah Frederick v PP*⁹ at [50], Yong CJ interpreted s 26(b) of the PCA (prohibiting hindrance of a CPIB officer in execution of his duty) as inherently requiring a fault element (intention or constructive knowledge) in respect of the victim's identity.¹⁰ This reflects the policy principle that specific physical elements that convert certain offences into a more aggravated form, aim to provide "extra-deterrent effect". They would thus be rendered superfluous if not accompanied by corresponding fault elements.

20 This provides a clear policy reason for avoiding constructive liability for this kind of offence, whether it arises from the mechanism of transferred fault or otherwise.¹¹

Recommendation

21 The PCRC therefore recommends prohibiting the transfer of fault elements between different offences, to deal with the risk of constructive liability outlined above. This can be done by providing that no offence can be made out with transferred fault unless the same offence could have been made out if committed against the contemplated victim. For example:

Where A throws a stone at B intending to hurt B (but not intending or knowing himself to be likely to cause grievous hurt), but the stone causes grievous hurt to C, A commits an offence of voluntarily causing hurt against C under s 321 of the Penal Code but does not commit an aggravated offence of voluntarily causing grievous hurt against C under s 322 of the Penal Code. This is because the latter offence could not have been made out even if the stone caused grievous hurt to B, due to lack of the required fault element.

Recommendation 60: Provide that no offence can be committed with transferred fault unless the accused person was negligent in relation to his act affecting an unanticipated victim (with a different approach for homicide)

Impetus for review

22 It is not clear whether any fault requirement exists in respect of the *uncontemplated* victim in cases of transferred fault, as the relevant case law is unclear and/or inconsistent. This question arises because criminal liability for transferred fault inherently permits conviction for

⁹ [1999] 1 SLR(R) 996 ("*Frederick Foo*").

¹⁰ In other words, the accused person must know, or have reason to know, that the victim is such an officer in execution of his duty.

¹¹ The learned author of Alvin Chen, "Transferred Malice in the Singapore Penal Code" (November 2004) Law Gazette ("*Alvin Chen*") took the view that transferred fault did permit constructive liability in respect of a charge under s 332 of the Penal Code, but this was based on the premise that "the same *mens rea* is required under sections 323 and 332 [of the Penal Code]". The holding in *Frederick Foo* at [50] makes clear that this premise was incorrect, as it clearly implies that s 332 requires a further fault requirement of constructive knowledge that the victim is a public servant in discharge of his duty.

an offence even though the accused person did not possess the fault element for the offence in respect of the un contemplated victim.

Recommendation

23 The PCRC recommends providing that no offence can be committed with transferred fault unless the accused person was negligent in relation to their act affecting an un contemplated victim. This adopts the position favoured by Glanville Williams, when criticising the English law’s lack of a requirement for fault in respect of the un contemplated victim:

*Hitherto [the doctrine] has been applied only in gross cases, and although there are no clear authorities on the bounds to be set to it, the rule should be confined to cases where it appears to conform to the plain man’s view of justice, and so should be limited to cases where the consequence was brought about by negligence in relation to the actual victim.*¹²

24 This position also finds support in Indian case law. In *Empress v Sahaee Rae*¹³, the accused person was convicted of causing grievous hurt to an infant by aiming a blow at the infant’s mother, who was carrying it, without intending to hurt the infant. The facts in *Dayal Singh and others v King Emperor*¹⁴ were very similar. The accused person struck an infant carried by its mother, intending to hurt only the mother. However, an additional fact was present. The whole episode took place in the dark, and the Court found that the accused person could not have seen the child or known that the mother was carrying a child. On this basis, the Court held that “the offence appears to be equivalent to striking the woman and nothing more”. This suggests that for transferred fault to operate, there needs to be an element of subjective foresight in respect of the un contemplated victim.¹⁵

25 By way of comparison, the Penal Code also imposes a requirement of subjective foresight to make an accused person criminally liable for the unintended outcomes of his *abetments* under ss 111 and 113 (as held in *Lee Chez Kee v PP*¹⁶). This seems consistent with the principle in *Dayal Singh*. It is inconsistent to require subjective foresight of the actual outcome in making an accused person criminally liable for the unintended outcomes of his *abetments*, but not to require any kind of mental state in respect of the actual outcome in making such a person criminally liable for the unintended outcomes of his *acts*.

26 Requiring no fault element at all in respect of the un contemplated victim can lead to unjust outcomes in cases of transferred fault. For example:

¹² Glanville Williams, *Criminal Law: The General Part* (Stevens, 2nd Ed, 1961) at pp 132–133, as cited in A J Ashworth, “Transferred Malice and Punishment for Unforeseen Consequences”, in *Reshaping the Criminal Law: Essays in honour of Glanville Williams* (P. R. Glazebrook ed) (Stevens & Sons, 1978), at p 82.

¹³ [1873] ILR 3 Cal 623.

¹⁴ AIR 1924 Lah 47 (“*Dayal Singh*”).

¹⁵ As observed in *Alvin Chen*.

¹⁶ [2008] 3 SLR(R) 447 at [241]–[242].

Where A throws a stone at B intending to hurt B, but the stone hurts C, who was hiding in a bush in a pitch-dark forest with no possibility of A knowing he was there, A commits an offence of voluntarily causing hurt to C under s 321 of the Penal Code.

27 On balance, requiring that no offence can be made out with transferred fault unless the accused person was negligent in relation to their act affecting an unanticipated victim strikes the right balance. While harsher on the accused person than the position taken in *Dayal Singh*, it is less harsh than the position in English law. It recognises that where a prohibited harm is caused with full fault element, it would be too lenient on the accused person to require subjective foresight of the precise victim affected. However, it would be too harsh on the accused person to impose liability in respect of a victim that no reasonable person could have foreseen.

A different approach for homicide

28 Under the present law as reflected in ss 299 and 301 of the Penal Code, no fault element is required in respect of the unanticipated victim for charges of culpable homicide with transferred fault. The PCRC recommends retaining this position, which is illustrated as follows:

Where A fires a gun at B intending to kill B, but the bullet kills C, who was hiding in a bush in a pitch-dark forest with no possibility of A knowing he was there, A commits an offence of murder against C under s 300(a) of the Penal Code.

29 The alternative is that A would only be guilty of attempted murder without hurt in respect of B and no offence at all in respect of C, which, in the PCRC's view, would send an unacceptably lenient moral signal in relation to the loss of C's life.

30 This position is consistent with the decision of the Madras High Court in *Public Prosecutor v Mushunooru Suryanarayanamoorthy*¹⁷. The accused person intended to kill a person with poisoned food to claim a large life insurance payment. The intended victim discarded the food after tasting it – he was poisoned but did not die. However, a child in the same house picked up the food, ate it and died. The majority held that the accused person was guilty of murder, overturning his acquittal at first instance. They found that based on statutory interpretation of s 299 of the Indian Penal Code¹⁸ alone,¹⁹ the offence of culpable homicide is worded such as to inherently incorporate liability for transferred fault with no fault element required in respect of the unanticipated victim. Ralph Benson J said, “[i]t is sufficient if death is actually, even though involuntarily, caused to one person by an act intended to cause the death of another”. Abdur Rahim J said, “I do not see why it should make any difference whether the act done with [intention to kill] causes the death of the person aimed at or of some one else. ... Section 301 also supports this construction.”²⁰

¹⁷ (1912) MWN 136; (1912) 13 Cri LJ 145 (Mad) (“*Mushunooru*”).

¹⁸ (Act 45 of 1860).

¹⁹ These sections are equivalent to the same sections in our Penal Code.

²⁰ The same analysis was followed by the Allahabad High Court in *Ganga Singh and others v State* (1980) Cri LJ 235 (All), to wit, that s 299 of the Indian Penal Code implies (although does not provide expressly) “that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely to kill”, with s 301 serving both to make this express and to provide that whether the homicide

31 The reasons for a separate approach to transferred fault for homicide offences as opposed to other offences, are as follows:

- (a) The extremely high degree of culpability needed to commit culpable homicide or murder, and the permanent, extreme harm reflected in loss of life, seems to justify a harsher form (for the accused person) of transferred fault than in other offences; and
- (b) Attempted culpable homicide and attempted murder carry lesser punishments than completed culpable homicide and completed murder respectively, meaning that the sentence for a charge of attempt in relation to the contemplated victim will be substantially lower than the sentence for a completed homicide in relation to the un contemplated victim. In contrast, in the non-homicide context, reforms are proposed for attempted offences to carry the same maximum punishment as completed ones.

Recommendation 61: Provide that that in all charges for offences with transferred fault, transfer of defences will be possible

Impetus for review

32 Under the present law, it seems that defences can be transferred for culpable homicide offences, but not for any other kind of offence. This is highly inconsistent.

33 As noted above, in the context of homicide offences, s 301 of the Penal Code seems to provide for the transfer of defences, whether they be partial defences to murder under s 300 or total defences such as private defence. However, there is no similar provision for transfer of defences for any non-homicide offence. To focus especially on the provisions on private defence, which is one of the most important defences in this context, ss 100 and 101 allow the causing of harm to “the assailant”, and ss 103 and 104 allow the causing of harm to “the wrongdoer”.²¹This defence is thus expressly *not* transferred.

34 The inconsistency created can be illustrated as follows:

*If A fires a gun at B in exercise of his right of private defence against B, and the bullet kills C, A will be able to rely on the defence of private defence if charged for the killing of C with transferred fault.*²²

If A throws a stone at B in exercise of his right of private defence against B, and the stone hurts C, A will not be able to rely on the defence of private defence if charged for voluntarily causing hurt to C with transferred fault.

amounts to murder or not “will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed”.

²¹ While s 106 of the Penal Code appears on its face to provide something like a transfer of defences, in fact it provides for a special type of defence in respect of taking a risk of hurting innocent victims while defending against a deadly assault. This does not refer to any transferred fault situation.

²² These were the facts in *Wassan Singh v The State of Punjab* 1996 Cri LJ 878 (SC), and the Indian Supreme Court held that the defence of private defence was available to the accused person and he should therefore be acquitted.

Recommendation

35 The PCRC recommends introducing a general provision stating that where a person is charged with any offence with transferred fault, the transfer of defences will be possible. Section 301 should also be amended to make clear that it provides for the transfer of defences. This addresses the inconsistency in transfer of defences outlined above.

Recommendation 62: Remain silent on transferred fault in respect of the unanticipated victim, where a single act had an effect both on a contemplated and an unanticipated victim

Impetus for review

36 Under the present law, it is not clear how many offences are committed in the scenario where the fault element and physical element of an offence are fully made out in respect of a certain victim, but the act also affected another unanticipated victim. For example:

A fires a gun at B intending to kill B. The bullet kills B, then penetrates B's body and also kills C.

37 The ambiguity arises because of s 301 of the Penal Code, which states that in culpable homicide with transferred fault, “the culpable homicide committed by the offender is of the description of which it would have been *if he had caused the death* of the person whose death he intended or knew himself to be likely to cause” [emphasis added]. The phrase “if he had caused the death” is conditionally worded, implying that s 301 applies only in situations where the death of the victim contemplated by the accused person did not happen.

38 The ambiguity in statute has also given rise to divided case law: see *Mushunooru and Hakim Singh v State of Rajasthan RLW*²³. Some commentators have also observed that it should be conceptually impossible for two offences to be made out in the given scenario, as it is illogical to argue that fault can be “untransferred” and “transferred” at the same time.²⁴

Recommendation

39 The PCRC considered whether the Penal Code should explicitly provide for the scenario where a single act had an effect both on the contemplated victim and on an unanticipated victim and all the required fault elements are made out. The PCRC noted that the scenarios which such a provision seeks to cover would be extremely rare, and, where they occur, are likely to involve firearms since the impact of a discharged round can be highly unpredictable.

40 Given the rarity of these scenarios, and the availability of serious offences under the Arms Offences Act²⁵ as well as other offences that could possibly be utilised in respect of the unanticipated victim (eg s 300(d) of the Penal Code), the PCRC recommends that the Penal Code need not explicitly provide for transferred fault in respect of the unanticipated victim,

²³ 2004(3) Raj 1475.

²⁴ Wilfred J Ritz, “Felony Murder, Transferred Intent, and the Palsgraf Doctrine in the Criminal Law” (1959) 16 Wash. & Lee L. Rev. 169 at 188.

²⁵ (Cap 14, 2008 Rev Ed)

where a single act had an effect both on a contemplated and an un contemplated victim. The PCRC also agreed that there was no need to amend section 301 to make this position explicit.

SECTION 19.3: DEFINING STRICT LIABILITY

SUMMARY OF RECOMMENDATIONS

(63) Codify the concept of “strict liability”

Introduction and current law

A strict liability offence is one which does not have any fault elements that need to be proven to establish liability (*M V Balakrishnan v PP*¹). However, case law has established that a common law defence of reasonable care applies to strict liability offences. The statutory defence of mistake of fact has also been held to be applicable.

2 Absolute liability offences are defined as offences which “do not allow the accused to raise due diligence or reasonable mistake of fact as a defence” (*Leu Xing-Long v PP*²). It will be seen that absolute liability offences are basically strict liability offences where certain defences are not available.

3 At present, whether an offence is interpreted as strict liability or not depends on a common law balancing test: more details will be provided below.

Impetus for review

4 The common law test for determining if an offence is strict liability or not (where no fault element is provided) is complicated. The test as set out in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong*³ (followed in *Chng Wei Meng v PP*⁴) is:

- (a) there is a presumption of law that a fault element is required before a person can be held guilty of a criminal offence;
- (b) the presumption is particularly strong where the offence is ‘truly criminal’ in character;
- (c) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
- (d) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; and
- (e) even where a statute is concerned with such an issue, the presumption of a fault element stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

5 It is not possible for a lay person to assess, just from reading the words of an offence, whether a court will interpret it as strict liability. Moreover, even if an offence is not found to

¹ [1998] SGHC 416 (“*M V Balakrishnan*”).

² [2014] 4 SLR 1024 at [22].

³ [1985] AC 1 (“*Gammon*”) at [14].

⁴ [2002] 2 SLR(R) 566 (“*Chng Wei Meng*”).

be strict liability, it is not possible to know for certain what exact fault element the court will find it to have.

6 It is not desirable or reasonable to expect the public to wait for each such offence (and there are many such offences, many of them regulatory in nature) to be interpreted in court before they have certainty in how to comply with them. It is proposed that what strict liability is and how it works, including its applicable defences, should be codified in the Penal Code to resolve this situation

Recommendation 63: Codify the concept of “strict liability”

Definition of “strict liability”

7 The PCRC therefore recommends codifying the definition of “strict liability” as set out below, for clarity and public understanding⁵:

An offence of strict liability is one where, for all of the physical elements of the offence, there are no corresponding fault elements.

Strict liability is said to apply to a particular physical element of an offence where there is no corresponding fault element for that physical element, regardless of whether or not the offence is one of strict liability.

8 It should be further provided that:

A fault element of an offence refers to any state of mind proof of which is needed to establish liability under that offence, including but not limited to intention, wilfulness, knowledge, rashness, and negligence.

9 If thought necessary, it can also be provided that:

A physical element of an offence refers to any fact proof of which is needed to establish liability under that offence that is not a fault element of that offence.

10 While Div 6.2 of the Australian Criminal Code Act 1995⁶ also defines “absolute liability”, the PCRC recommends that there is no need to have such a definition in the Penal Code until it is needed to facilitate provision for a default fault element (see below).

Defences

11 It should be provided that:

In a prosecution for a strict liability offence, it is a defence for the accused person to prove that in doing anything or omitting to do anything specified in the offence, he exercised reasonable care.

⁵ This definition is adapted from the Australian Criminal Code Act 1995 (Act 12 of 1995) s 5.1, Div 6, and s 9.2 of the Schedule.

⁶ (Act 12 of 1995).

This reflects the common law position in *Chng Wei Meng* and *M V Balakrishnan*.

Default fault element

12 A logical part of codifying the concept of strict liability is to provide a default fault element that will apply where the statute does not expressly provide for one, and also does not expressly state that it incorporates strict or absolute liability. This removes any uncertainty in statutory interpretation arising from applying the common law balancing test in *Gammon*.

13 For example, in Div 5.6 of the Australian Criminal Code Act 1995, it is stated that unless an offence is expressly drafted to incorporate strict or absolute liability, where the physical element of the offence is conduct, the associated fault element is intention. Where the physical element is a circumstance or result, the associated fault element is recklessness.

14 Having said that, the PCRC recognises that the provision of a default fault element requires careful execution to avoid unintended consequences. There are many criminal offences on our statute books that do not expressly provide for fault elements for some or all of their physical elements. Where the courts have interpreted some of these offences, they have done so in a nuanced way, determining the fault element of the relevant offence by balancing literal and purposive statutory interpretation.

15 One example is the judgment in *Frederick Foo*. There, Yong Pung How CJ interpreted s 26(b) of the PCA, which prohibits hindrance of a CPIB officer in execution of his duty but does not expressly state whether the accused person must know that the victim is such an officer in execution of his duty (the lack of provision for a fault element was observed at [48]). Yong CJ held (at [50]) that this offence required fault element in the form of intention or constructive knowledge.⁷ The fault element was set at this level because

- (a) allowing a person to be convicted of such offences of hindrance without this fault element accords unnecessarily favourable protection to police officers who may consequently abuse the authority reposed in them;
- (b) the extra-deterrent effect intended from the enhanced punishment set out for hindrances of police officers becomes superfluous if the offender did not and could not possibly have known that the person hindered was a police officer in the execution of his duty;
- (c) however, the law must prevent accused persons from presenting the argument that lay persons could not possibly have known the full scope of police duties, as a result of which they did not have the knowledge that [the victim] was acting in the execution thereof.

16 Imposing a “one size fits all” default fault element without careful consideration would necessarily skip over such important and nuanced deliberation about the policy purpose of various criminal offences. However, it is also not desirable to simply leave the many statutes that do not expressly provide for fault elements in an ambiguous state, to the detriment of the general public who rely on the written law for guidance

⁷ In other words, the accused person must know, or have reason to know, that the victim is such an officer in execution of his duty.

17 Taking these realities into account, the PCRC recommends that a default fault element be adopted, but only after a full and careful review of all offence-creating legislation. This will be a large-scale effort, requiring numerous government agencies to review the legislation under their charge, decide what fault elements they wish to apply, and amend the law if necessary. The respective agencies' inputs should also be sought on what precise default fault element should apply in the absence of express provision for a fault element.

SECTION 20: INCHOATE OFFENCES

SECTION 20.1: ATTEMPTS

SUMMARY OF RECOMMENDATIONS

(64) Repeal s 511 of the Penal Code, and enact a new provision on criminal attempt setting out the following:

- a. *Physical element: substantial step towards the commission of the offence*
- b. *Fault element: Intention to commit the primary offence*
- c. *Impossible attempts fall within the scope of attempts*
- d. *Prescribed punishment for attempt will be generally equal to the prescribed punishment for the primary offence, except where the prescribed punishment for the primary offence is fixed by law, has a mandatory minimum, or where there is express provision made for the punishment of attempts*

Introduction

Criminal liability, in general, requires the existence of both culpability and harm. In the case of inchoate offences, there is no harm, yet the criminal law intervenes to impose liability. The justifications for doing so are generally similar to those set out in the context of attempts, below.

2 There are two main justifications for criminalising attempts:

- (a) The argument from culpability. A person who tries to cause harm and fails is not materially different from the person who tries and succeeds, in terms of moral culpability. The criminal law should not “subordinate itself to the vagaries of fortune by focusing on results rather than on culpability.”¹
- (b) Preventing the infliction of harm. There are two variations of this argument. First, Jeremy Horder argues that criminalising attempts prevents harm by allowing law enforcement and the criminal courts to intervene before any harm has been done. Criminalising attempts is therefore an *exception* to the harm principle.² In contrast, the High Court in *Chua Kian Kok v PP*³ justified the criminalisation of attempts as an *extension* of the harm principle, in that the harm caused in an attempt is “the presence of individuals in society who would have committed crimes if they had been successful in their efforts; individuals who would have succeeded but for some extraneous and perhaps accidental reason; individuals who may very well try again if they had the chance”.

3 Macaulay’s draft Penal Code of 1837 did not include a general attempt provision. Instead, Macaulay sought to specifically criminalise attempts for certain offences, *eg* murder and culpable homicide. This may have been because the concept of criminalising attempts was

¹ Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press, 8th Ed, 2016)(“Horder”) at p 470.

² *Id.*, at p 471.

³ [1999] 1 SLR(R) 826 (“*Chua Kian Kok*”) at [31].

not fully entrenched in English law at that time. The predecessor of s 511 of the Penal Code was, however, included in the Indian Penal Code when it was passed in 1860, thus filling the lacuna. Despite the inclusion of a general provision for attempt, however, the specific attempt provisions remained. This has led to the current state of overlap and potential inconsistency in the law on attempts in the Penal Code.⁴

Current law

4 There is no unified concept of when liability for an attempt to commit an offence arises in Singapore's criminal law. In the Penal Code, s 511 is the general provision on attempt:

Punishment for attempting to commit offences

511.—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.

(2) The longest term of imprisonment that may be imposed under subsection (1) shall not exceed —

(a) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or

(b) one-half of the longest term provided for the offence in any other case.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

Impetus for review

5 It is immediately obvious that s 511 does not set out the elements of an attempt. Instead, it sets out the *punishments* for attempts to commit offences, whether in the Penal Code or under any written law. It is no surprise then that the Singapore courts, in seeking to define the elements of an attempt under the Penal Code, have chosen to ignore the precise wording of s 511, and have instead analysed Malaysian and English case law in setting out the elements of criminal attempts.⁵

⁴ *YMC Rev 2nd Ed* at paras 36.7 and 36.8.

⁵ See *Chua Kian Kok* at [25] – [47].

6 In addition to s 511 of the Penal Code, another general provision on criminal attempt can be found in s 38 of the IA⁶. There is also an array of offences and statutes which have their own attempt provisions.⁷ The various provisions criminalising attempt have inconsistencies in their physical elements, fault elements, the stated position on impossibility, and prescribed punishment.

7 The lack of consistency is clearly undesirable.⁸ This undermines legal certainty, and is out of step with leading common law jurisdictions.⁹ The PCRC thus recommends repealing s 511 of the Penal Code and re-enacting a new provision setting out the substantive elements of criminal attempt. This new provision should apply to all offences, except where otherwise provided for.

Recommendation 64(a): Physical element: substantial step towards the commission of the offence

8 The PCRC recommends that the physical element of criminal attempt should be “substantial step towards the commission of the offence”. An *Explanation* should also be added stating that any act can only be held to constitute a substantial step if it is strongly corroborative of the actor’s intention to commit the offence. This test should be accompanied by a non-exhaustive list of examples that may constitute a “substantial step”.

9 The physical element of attempt can fall anywhere on the spectrum between two approaches. On the one hand, there is the fault-centred approach, which posits that “any person who has gone so far as to translate a criminal intention into action has crossed the threshold of criminal liability”. On the other hand, there is the act-centred approach, within which there are two main arguments. The first argument is that “one cannot be sure that the deterrent effect of the criminal law has failed until [the accused] has done all the acts necessary”. The second argument is that the law should require “proof of an unambiguous act close to the commission of the crime”, to avoid the danger of oppressive official action, to the detriment of individual liberties.¹⁰

10 Section 511 of the Penal Code currently requires that the accused must have done “any act towards the commission of the offence”. This test in its pure form, according to the UK Law Commission, requires only for the accused to have done the first overt act towards the commission of the offence. This is the position in Stephen’s *Digest of the Criminal Law*, and

⁶ (Cap 1, 2002 Rev Ed).

⁷ See, for *eg*:

- (a) Section 307 of the Penal Code: Standalone offence of attempted murder
- (b) Section 308 of the Penal Code: Standalone offence of attempt to commit culpable homicide
- (c) Section 393 of the Penal Code: Attempt to commit robbery
- (d) Section 12 of the MDA: Attempts to commit drug-related offences
- (e) Section 54 of the CDA: Attempts to commit service offence
- (f) Section 38 of the PFA: Attempt to commit service offence

⁸ For the inconsistencies in the various provisions, see *Model Code for Singapore* at paras 6.2.8 to 6.2.13. See also *YMC Rev 2nd Ed* at paras 36.6 and 36.57.

⁹ See Criminal Attempts Act 1981 (c 47) (England and Wales); Criminal Code (R.S.C., 1985 c. C-46) (Canada) s 24; Criminal Code Act 1995 (Act 12 of 1995) (Australia) Div 11 of Part 2.4; Crimes Act 1961 (1961 No 43) (New Zealand) s 72; American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (The American Law Institute, 1985) (United States) (“*US Model Penal Code*”) Section 5.01.

¹⁰ *Holder* at p 479.

is the position set out in the Indian Penal Code, which has the same physical element as s 511 of our Penal Code.¹¹ A literal reading of this test would fall squarely within the fault-centred approach outlined above.

11 However, in *Chua Kian Kok*, Yong Pung How CJ (sitting in the High Court) rejected a literal reading of s 511, stating at [33] that a literal reading would lead to “fairly absurd” conclusions. Instead, he analysed English case law and adopted the line of English authority requiring that an offender must have “embarked on the crime proper”. This is a question of fact in which all the surrounding circumstances have to be considered. In arriving at his conclusion, Yong CJ rejected both the “Rubicon test” as well as Stephen’s test that the accused must have done an act which formed “part of a series of acts which would constitute its actual commission”.¹² In so doing, Yong CJ moved the test away from the fault-centred approach (if read literally) towards the act-centred approach.

12 In *PP v Mas Swan bin Adnan*¹³, the Court of Appeal had no need to decide on the appropriate physical element of attempt. However, the Court of Appeal commented that the test chosen in *Chua Kian Kok* was a “rather vague formulation”.

13 Besides the wording of s 511 and the test in *Chua Kian Kok*, the PCRC considered a number of options for the physical element of attempts¹⁴:

- (a) Proximity test: The accused must have done some overt act which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime.
- (b) Last act test: The accused must have done all the acts which he believed to be necessary to commit the substantive offence.
- (c) Apparent intention test: The accused must have conducted himself in a manner which indicates in itself a clear and unequivocal intention to commit the offence.
- (d) Substantial step test: The accused must have progressed a substantial way towards the completion of the offence.

14 Having considered these options, the PCRC was of the view that the physical element should be a “*substantial step towards the commission of the offence*”. An *Explanation* should also be added stating that any act can only be held to constitute a substantial step if it is strongly corroborative of the actor’s intention to commit the offence. This test should be accompanied by a non-exhaustive list of acts that may constitute a “substantial step”.¹⁵ This proposal is

¹¹ United Kingdom, The Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No. 102, 1980) (“*Law Commission on Attempt*”) at para 2.22.

¹² *Chua Kian Kok* at [34]–[36]. Yong CJ cited the English case of *R v Gullefer* [1990] 3 All E.R. 882, which rejected the “Rubicon test” in *DPP v Stonehouse* [1978] AC 55 at 65 as well as the definition from *Stephens’ A Digest of the Criminal Law (Crimes and Punishment)* (Sir Herbert Stephen, Bart and Harry Lushington Stephen gen ed) (Macmillan and Co, 5th Ed, 1894).

¹³ [2012] 3 SLR 527 (“*Mas Swan*”) at [34].

¹⁴ These options can be found in *YMC Rev 2nd Ed* at paras 36.17 – 36.22; and were also cited by the High Court in *Public Prosecutor v BPK* [2018] SGHC 34 (“*BPK*”) at [131].

¹⁵ In the *US Model Penal Code*, the following, if strongly corroborative of the actor’s intention to commit the offence, may constitute a “substantial step” –

adapted from the US Model Penal Code, and proposals by local academics as well as by Andrew Ashworth.¹⁶

15 The key strength of this test is that it focuses the mind of the judge on the steps *already* taken. This is similar in spirit to, but more certain than, Yong CJ’s test of requiring the accused to have “embarked on the crime proper”. Further, it is already found in two separate pieces of legislation. This reduces the need for further legislative intervention to rationalise the physical element for attempts across our criminal law.¹⁷

16 The PCRC further recommends that this proposed physical element should apply consistently across all attempts, including attempt to murder and attempt to commit culpable homicide. There is no cogent reason for there to be different physical elements for different attempted offences; the same test ought to apply for all attempts. The relevant amendments to ss 307 and 308 will have to be made such that only one test for the physical elements applies.

Recommendation 64(b): Fault element: Intention to commit the primary offence

17 The PCRC recommends codifying the fault element for attempt as “*intention to commit the primary offence*”. This reflects the current position in case law, as set down by the High Court in *Chua Kian Kok* and later confirmed by the Court of Appeal in *Mas Swan*.

18 In *Chua Kian Kok* at [31], the High Court reasoned that the criminal law usually steps in to punish a person for the infliction of public harm. Inchoate offences form a special exception where “no physical public harm was really done”. The “public harm”, in this case, is of a lower level. It comes in the form of the presence of individuals in society who would have committed crimes if they had been successful but for some extraneous and perhaps accidental reason; individuals who may very well try again if they had the chance. The Court of Appeal later agreed that a more stringent requirement should be imposed for inchoate offences, and upheld this formulation of the fault element. It also added that the Indian courts support this position.¹⁸

19 The PCRC recommends codifying the fault element as set out by the High Court, for the following reasons:

-
- (a) lying in wait, searching for or following the contemplated victim of the crime;
 - (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
 - (c) reconnoitring the place contemplated for the commission of the crime;
 - (d) unlawful entry of a place in which it is contemplated that the crime will be committed;
 - (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
 - (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
 - (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

¹⁶ See *YMC Rev 2nd Ed; Model Code for Singapore*; and Andrew Ashworth, “Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law” (1988) 19 Rutgers L.J. 725 at 753. The authors of *YMC Rev 2nd Ed*, while generally agreeing with the “substantial step” test, rejected the use of examples to guide the courts.

¹⁷ See s 54 of the CDA and s 38 of the PFA.

¹⁸ *Mas Swan* at [32] – [33].

- (a) Codifying the fault element for attempts increases legal certainty. It is unsatisfactory for the Penal Code to remain silent on the fault element for attempt, especially when the Court of Appeal has already unequivocally affirmed that the fault element is intention to commit the primary offence.
- (b) The fault element for attempts should be as strict as possible, because the public harm caused by a criminal attempt is lower than the harm caused by the relevant completed offence.¹⁹
- (c) This position enjoys local academic support²⁰ and is consistent with the approach taken in leading common law jurisdictions²¹.

20 The PCRC recommends that this fault element should apply to attempts of all offences, save where there is express provision otherwise.

Fault element for attempted murder and attempted culpable homicide not amounting to murder

21 The PCRC considered in particular whether the fault element of “*intention to commit the primary offence*” should apply to attempted murder and attempted culpable homicide under ss 307 and 308 of the Penal Code. This is a narrowing of the fault element required under ss 307 and 308, which currently embraces both intention and knowledge.²²

22 In this regard, the PCRC notes that the High Court explicitly recognised that the fault element for attempt could be narrower than the primary offence: See *Chua Kian Kok* at [26] and [30], per Yong Pung How CJ –

“The *mens rea* of attempt is intention. The accused must intend to commit the substantive offence, *even though a lower mental state would have sufficed to satisfy the ingredients of the substantive offence*... it must be remembered that a s 511 offence is an inchoate offence... In inchoate offences, no physical public harm was really done... the fact that inchoate offences are punishable under criminal law shows that there is still some sort of harm inflicted on the public. *This public harm is of a lower level than that which is caused when a full offence is committed*... *it seems right that there has to be a stricter requirement than that for the completed offence.*” [emphasis added]

23 The Court of Appeal later agreed with the High Court’s reasoning. See *Mas Swan* at [33], per Chan Sek Keong CJ –

“We agree that the *mens rea* for the general offence of attempt under s 511 of the Penal Code is the intention to commit the primary offence. As was held in *Chua Kian Kok*, *it would not be appropriate to hold that the mens rea of the primary offence is the required*

¹⁹ *Chua Kian Kok* at [26]–[33]; and *Mas Swan* at [32]–[33].

²⁰ See *Model Code for Singapore* at paras 6.2.1 and 6.2.3.

²¹ See, for *eg*, the positions in England and Wales, Canada, and New Zealand.

²² Despite the apparently clear wording of ss 307 and 308 of the Penal Code, the authors of *YMC Rev 2nd Ed* at paras 36.35–36.36 point out that some Indian cases have required intention, without attempt to reconcile this requirement with the wording of the provision. However, the High Court has recently observed, in *BPK* at para 128, that it was “doubtful [that such a] reading of s 307 can be accommodated by the language of the provision.”

mental element. A more stringent requirement should be imposed for inchoate offences.” [emphasis added]

24 Under the current law, therefore, intention is required to establish liability for attempt, notwithstanding that the primary offence may only require a lower fault element, *eg* knowledge. The PCRC agrees with the reasoning of the High Court and Court of Appeal, and has sought to codify this position in its proposals.

25 Sections 307 and 308 represent an exception to the general rule. This appears to be a quirk of history. Sections 307 and 308 pre-dated the predecessor of s 511 of the Penal Code; the former were included in Macaulay’s draft Penal Code of 1837 but the latter was only inserted when the Indian Penal Code was passed in 1860. Local academics postulate that this was because the concept of criminalising attempts was not fully entrenched in the criminal law in 1837.²³ In other words, ss 307 and 308 were not formulated in view of any general doctrine of criminal liability for attempts.

26 The PCRC recommends that the fault element of intention should also apply to ss 307 and 308 of the Penal Code, for the following reasons:

- (a) The rationale for requiring intention as the fault element for criminal attempt applies with equal force to ss 307 and 308 of the Penal Code. The rationale for requiring intention is to ensure that persons accused of attempts are sufficiently culpable to justify punishment despite there being no prohibited outcome. This is especially important where the physical element for attempts, as in our proposals, is quite wide. Criminalising attempts represents an exception to the general principle that the criminal law’s interference with individual liberty is justified because some public harm injurious to society is caused. In the case of inchoate offences, the prohibited outcome has not materialised. Despite this, the criminal law intervenes nonetheless on the basis that there is some lower form of public harm that has occurred. A higher fault element of intention for attempted murder is justified because the public harm caused in cases of attempted murder is lower than that for a completed offence of murder.
- (b) Retaining the fault element of knowledge would be out of line with a majority of leading common law jurisdictions.

Recommendation 64(c): Impossible attempts fall within the scope of attempts

27 The PCRC recommends clarifying that impossible attempts fall within the scope of criminal attempts under the Penal Code. This is consistent across all the common law jurisdictions surveyed, as well as with the position set out in Singapore case law.

28 All three types of impossible attempts should fall within the scope of criminal liability for attempt.²⁴

²³ *YMC Rev 2nd Ed* at para 36.7.

²⁴ *Chua Kian Kok* at [43]–[45]. The High Court also considered a fourth kind of “impossible attempt”, where the accused has completed his or her actions in accordance with his beliefs and intentions, but it would not amount to an offence as such actions are not criminal in Singapore. This is not listed here, as even the completed action would not be an offence. There is no “offence” to be attempted.

- (a) Physical impossibility: Those situations covered by the *Illustrations* to s 511.
- (b) Impossibility by law: Classic example – accused takes away his own umbrella from a stand with the intent to steal it as he genuinely believes that it belongs to another.
- (c) Impossibility through ineptitude of accused: *eg* attempting to steal items from within a safe using telepathic powers or using an insufficiently large tool to break open a safe.

29 Case law already states that impossible attempts are within the ambit of s 511 of the Penal Code. The High Court in *Chua Kian Kok*²⁵ noted that impossibility through the ineptitude of the accused may capture absurd situations such as the person who tries to break into a safe using telepathic powers. Such cases, as the High Court has stated, are unlikely to reach the courts because they will be filtered out through the use of prosecutorial discretion. Where such cases *do* reach the courts, the courts will be able to filter out the most extreme of cases (*eg* the telepathic powers case) by reasoning that the proposed physical element, *viz.*, a “substantial step towards the commission of the offence”, is not satisfied. Where the relevant fault element of intention and the physical element is sufficiently satisfied, there is no reason why the accused should not be liable for attempt; he or she, upon discovering his or her ineptitude, may well return to try again with more effective methods (as pointed out by the High Court).

30 The persuasiveness of this position is further reflected by the remarkable consistency amongst all the jurisdictions surveyed, which all provide that impossible attempts should not escape criminal liability. The Penal Code should therefore make clear that impossible attempts fall within the scope of attempt liability. The existing *Illustrations* in s 511 of the Penal Code should also be deleted, to make clear that all types of impossible attempt fall within the scope of attempt liability.

Recommendation 64(b): d. Prescribed punishment for attempt will be generally equal to the prescribed punishment for the primary offence, except where the prescribed punishment for the primary offence is fixed by law, has a mandatory minimum, or where there is express provision made for the punishment of attempts

31 The PCRC recommends that attempts should generally be punishable with the same prescribed punishments as the primary offence, save where express provision is made by the Penal Code or any other written law. The exceptions to this general rule (other than offences with specific sentencing provisions for attempts) are set out as follows –

S/N	Punishment for primary offence	Punishment for attempt
1	Mandatory death penalty	20 years’ imprisonment, and caning
2	Discretionary death penalty	
3	Mandatory life imprisonment	20 years’ imprisonment, and caning
4	Discretionary life imprisonment	
5	Mandatory minimum punishment of imprisonment	No mandatory minimum punishment; maximum prescribed punishment remains the same

²⁵ *Id.*, at [45]–[46].

32 The PCRC agrees with the principle that, all things being equal, attempts ought not to be punished as severely as the completed offence. However, the precise discount to be given is an assessment more suited for judicial discretion rather than an arbitrary reduction in the maximum term of imprisonment as s 511 of the Penal Code currently sets out.²⁶

33 The allowance for specific attempt provisions to prevail allows for instances where the legislature wishes to specifically retain the option of life imprisonment (*eg* attempted murder) and even death (*eg* attempt to wage war against the Government) for attempts, because of the uniquely heinous nature of such crimes.

34 This also allows for the imposition of sentences that more accurately capture the culpability of the offender, notwithstanding that the prohibited outcome did not materialise. There is no reason in principle why someone who attempts an offence is only half as blameworthy as someone who has completed the offence.

35 Take for example the case of *PP v Huang Shiyou*²⁷. The offender in this case committed various sexual offences against nine girls aged 9 to 14, over the course of 16 months. The Prosecution proceeded on 5 charges, with a further 9 charges taken into consideration for the purposes of sentencing. One of the 5 charges was a charge for attempted rape. The offender pleaded guilty to the charges. On the attempted rape charge, he was sentenced to the maximum of 10 years' imprisonment and 15 strokes of the cane. He was eventually sentenced to an aggregate sentence of 32 years' imprisonment and 24 strokes of the cane. This sentence was upheld on appeal (unreported). In passing a sentence of general deterrence, the High Court also noted in particular that "the accused [was] a danger to society, especially to young girls, which were his target for his sexual offences. A very long sentence would be called for to put him out of circulation within and for the protection of the community."

36 The facts relating to his attempted rape charge are as follows – the offender followed the victim, a 14-year-old student, on to a bus and alighted at the same stop as her. He continued to follow her and trailed her into a lift. In the lift, the offender took out a knife and forced the victim to follow him to a lift landing. There, he started to touch the victim's breasts and genitals. He then forced the victim to perform fellatio on him. After she performed fellatio on him for some time, the offender attempted to insert his penis into the victim's vagina but was unsuccessful. She testified that she felt something poking her vagina about 10 times. The offender then desisted, and left the scene.

37 This case illustrates the serious arbitrariness of the one-half punishment set out in s 511 of the Penal Code. The culpability of the offender in the above case is not, by any measure, half of the culpability of a person who had completed the offence. While the aggregate sentence in this case was sufficient to reflect the offender's overall culpability, it is not inconceivable that a case involving a similar level of culpability may arise in the future where for some reason it may be difficult for the Prosecution to secure a similarly lengthy sentence for an offender of similar culpability. As the High Court observed, lengthy sentences may be required for certain offenders who attempt serious offences for the protection of the public; the arbitrary halving of

²⁶ The UK Law Commission also agreed that the appropriate sentence for an attempt should be left to the discretion of the court, subject to the maximum sentence prescribed for the completed offence: *Law Commission on Attempt*, at para 2.108.

²⁷ [2010] 1 SLR 417.

the maximum prescribed imprisonment should not be an obstacle to obtaining such sentences where the offender's culpability demands it.

SECTION 20.2: INCHOATE ABETMENTS

SUMMARY OF RECOMMENDATIONS

- (65) Clarify that inchoate liability can arise even for impossible abetments
(66) Provide that the prescribed punishment for inchoate abetments should be the same as the punishment for the offence abetted

Introduction

The Penal Code recognises three forms of abetment – abetment by instigation, conspiracy and aiding. Section 108 of the Penal Code and its accompanying *Explanations* make clear that a person can be guilty of abetment even where the primary offence is not committed:

Abettor

108. A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 2 – To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Explanation 3 — It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge

2 The amendments proposed here follow on from the amendments proposed to the law on attempt above.

Recommendation 65: Clarify that inchoate liability can arise even for impossible abetments

Current Law

3 The language of the abetment provisions in the Penal Code do not make clear whether inchoate liability can arise for impossible abetments. There is also no local jurisprudence on the issue.

Recommendation

4 The PCRC recommends clarifying that an abettor cannot argue impossibility to negate liability for an inchoate abetment. There is no reason why the law on inchoate abetments should differ from the law on attempts in this regard. It is suggested that a sub-section similar to s 120A(2) of the Penal Code be inserted into s 107 of the Penal Code.¹

¹ Section 120A(2) of the Penal Code states, “A person may be a party to a criminal conspiracy notwithstanding the existence of facts of which he is unaware which make the commission of the illegal act, or the act, which is not illegal, by illegal means, impossible.”

Recommendation 66: Provide that the prescribed punishment for inchoate abetments should be the same as the punishment for the offence abetted

Current Law

5 The current prescribed punishment for inchoate abetments in general can be found in s 116 of the Penal Code. Where the offence abetted is not committed in consequence of the abetment, the accused is liable to be punished with imprisonment for a term which may extend to one-fourth of the longest term provided for that offence. There is no discount on the fine, if any. If the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of the offence abetted, the discount is only half, with no discount on the fine.

6 The exception to the general rule on prescribed punishments for inchoate abetments set out in s 116, is where the offence abetted is punishable with death or imprisonment for life. In such situations, the abettor is liable to be punished with up to 7 years' imprisonment (no discount on the fine, if any). If any act for which the abettor is liable in consequence of the abetment causes hurt to any person, the maximum punishment rises to 14 years' imprisonment (no discount on the fine, if any).

Recommendation

7 The PCRC recommends ss 115 and 116 of the Penal Code be amended, to mirror the proposed prescribed punishments for attempt as set out above. The reasons that apply in respect of the prescribed punishments for the attempt apply here with equal force, namely, that the appropriate discount on sentencing to be applied for inchoate abetments (as opposed to complete abetments) ought to be left to judicial discretion, and allows for the imposition of sentences that more accurately capture the culpability of the offender. The current arbitrary discounts should be removed. It is notable that this is the position taken for abetments in some other local statutes², and also in some other Penal Code provisions.³

² See, for *eg*, s 12 of the MDA; the PCA s 29; the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed) s 140; s 55 of the CDA; s 39 of the PFA.

³ See, for *eg*, ss 121, 121C, 125, 131, 132, 477A.

SECTION 20.3: CRIMINAL CONSPIRACY

SUMMARY OF RECOMMENDATIONS

- (67) Retain a separate inchoate offence of criminal conspiracy, distinct from abetment by conspiracy*
- (68) Narrow the scope of criminal conspiracy to agreements to commit offences*
- (69) Remove the distinction between “acts” and “means”*
- (70) Clarify that only one person needs to possess the requisite intent, to be held liable for criminal conspiracy*

Introduction

The offence of criminal conspiracy did not exist in the Indian Penal Code at its inception in 1860. The only “conspiracy” offence at that time was that of abetment by conspiracy. Abetment by conspiracy required, as it does today, “an act or illegal omission [that] takes place in pursuance of [the] conspiracy”.

2 The offence of criminal conspiracy was only inserted into the Indian Penal Code by the Criminal Law Amendment Act of 1913¹. The intent of inserting the new offence of criminal conspiracy was to import the wider offence of conspiracy that was then a part of English common law, viz., “an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means”.² The offence of criminal conspiracy became part of Singapore law when the Straits Settlement Penal Code was similarly amended in 1941, to include s 120A.³

3 The justifications for criminal conspiracy are similar to attempt, in that it enables the early intervention of law enforcement and the criminal courts, and persons who reach an agreement on committing offences may not be significantly less blameworthy or dangerous than persons who conspire and successfully commit the primary offence.⁴ There are three further justifications unique to criminal conspiracy. First, the formation of criminal groups generates an identity leading to some loss of control by individuals as a group dynamic takes over. Individuals may become afraid to withdraw and participants will spur each other on. It is therefore more likely that the primary offence will be committed. Second, the involvement of several persons may make offences easier to commit by enabling individual members of the conspiracy to distance themselves from the actual harm by focusing only on their own involvement. Third, the involvement of several persons in a criminal enterprise causes greater public alarm.⁵

Current law

4 The inchoate offence of criminal conspiracy is found in s 120A of the Penal Code:

¹ (Act No 8 of 1913).

² *Ratanlal* at pp 531–532.

³ *YMC Rev 2nd Ed* at p 915.

⁴ *Horder* at p 485.

⁵ *Id.*, at pp 487–488.

Culpable homicide by causing the death of a person other than the person whose death was intended

120A.—(1) When 2 or more persons agree to do, or cause to be done —

(a) an illegal act; or

(b) an act, which is not illegal, by illegal means,

such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

(2) A person may be a party to a criminal conspiracy notwithstanding the existence of facts of which he is unaware which make the commission of the illegal act, or the act, which is not illegal, by illegal means, impossible.

Explanation —It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

5 The physical element for criminal conspiracy is agreement to commit an offence in the agreement. There must be two or more parties involved, and there must be a meeting of minds, in order for there to be an agreement.⁶ The fault element for criminal conspiracy is intention to be a party to the agreement, and intention to carry out the agreement.⁷

Recommendation 67: Retain a separate inchoate offence of criminal conspiracy, distinct from abetment by conspiracy

Impetus for review

6 Some academics have suggested that criminal conspiracy as an inchoate offence distinct from abetment by conspiracy be repealed. First, they argue that there is “nothing inadequate about a requirement for an act to be done as required by abetment by conspiracy”. Second, they point out that “agreeing to do something which is not a crime should not attract criminal liability”.⁸

Recommendation

7 The PCRC nonetheless recommends retaining a separate inchoate offence of criminal conspiracy. The UK Law Commission in 1976 opined that “the most important reason for retaining conspiracy as a crime was that it enabled the criminal law to intervene at an early stage before a contemplated crime had actually been committed ... and ... the necessity that there should be proof of an agreement is a sufficient safeguard against the danger of punishing conduct too far removed from an actual crime”. This reasoning continues to be persuasive. In fact, the need to have a distinct offence of criminal conspiracy may be more keenly felt today,

⁶ *YMC Rev 2nd Ed* at pp 916–917.

⁷ *Id.*, at p 919.

⁸ *Model Code for Singapore*, at para 6.1.3.

with the threat of terrorist activity and organised crime. Indeed, this was the position taken by the Law Commission as recently as 2007.⁹

Recommendation 68: Narrow the scope of criminal conspiracy to agreements to commit offences

Current Law

8 Section 120A of the Penal Code currently criminalises agreements to do an “illegal act” or “an act, which is not illegal, by illegal means”. The word “illegal” is defined in s 43 of the Penal Code as “applicable to every thing which is an offence, or which is prohibited by law, or which furnishes ground for a civil action”. This means that liability for criminal conspiracy can arise when two or more persons agree to do something which is a mere civil wrong, albeit only when “some act besides the agreement is done by one or more parties to such agreement in pursuance thereof”.¹⁰

Impetus for review

9 This expansive view of criminal conspiracy originated in English common law, and reflects the broad nature of criminal conspiracy in English common law up till the 1960s and 1970s. However, the passing of the Criminal Law Act 1977, following the Law Commission’s report on conspiracy in 1976, represented a decisive narrowing of the scope of criminal conspiracy. While the Law Commission could not complete its examination of conspiracy so as to repeal all existing conspiracies not premised on conduct that would be criminal if done by one person,¹¹ the Act set out the general position that criminal conspiracy should be limited to agreements to commit offences.¹²

Recommendation

10 The PCRC recommends that s 120A of the Penal Code should be amended such that only agreements to engage in criminal conduct are captured. There is no reason for the criminal law to intervene in conduct which would not be criminal if done by one person only. Where there is conduct seen as not sufficiently blameworthy when done by one person to attract criminal liability but which seems to be sufficiently blameworthy to attract criminal liability when agreed upon by two or more persons, new offences should be created to address the specific mischief rather than relying on the inchoate offence of criminal conspiracy. Given that there are no reported instances of the use of s 120A of the Penal Code against conspiracies to engage in non-criminal conduct, there ought to be little impact in practice of narrowing the scope of criminal conspiracy in this manner.¹³

Recommendation 69: Remove the distinction between “acts” and “means”

⁹ United Kingdom, The Law Commission, *Conspiracy and Attempts: A Consultation Paper* (Consultation Paper No. 183, 2007) at paras 2.4 to 2.10.

¹⁰ See proviso to s 120A(1) of the Penal Code.

¹¹ See the Criminal Law Act 1977 (c 45) (UK) s 5, which preserved three common law conspiracies; conspiracy to (i) defraud, (ii) outrage public decency, and (iii) corrupt public morals.

¹² *Horder* at p 485 – 486.

¹³ *Model Code for Singapore* at para 6.1.40.

Impetus for review

11 Section 120A(1) currently contains a curious distinction between an “illegal act” and “illegal means” used to do a legal act. There is no local jurisprudence on the distinction between an “illegal act” and “illegal means” in the Penal Code. It appears that the second limb of s 120A(1) was targeted at situations where “two or more persons agree together to ... use unlawful means in the carrying out of an *object* not otherwise unlawful”¹⁴. This was rendered in s 120A(1) of the Indian Penal Code as the two limbs which still exist in our Penal Code today.

Recommendation

12 The PCRC recommends removing the distinction between an “illegal act” and “illegal means” used to do a legal act in s 120A(1) of the Penal Code.

13 *Ratanlal* cites as authority for the proposition that “[a]n agreement to effect something which in itself may be indifferent or even lawful by unlawful means amounts to conspiracy” the case of *Daniel O’ Connell and others v R*¹⁵.¹⁶ In that case, Lord Chief Justice Tindal stated the principle as follows: “The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful.” In that case, the state of affairs which the accused persons sought to “effect” was getting large numbers of people to meet together. This was lawful. The “unlawful means” alleged was the accused persons did so by “intimidation”. Lord Campbell stated a similar principle as follows: “A conspiracy to effect an unlawful purpose, or to effect a lawful purpose by unlawful means, is, by the common law of England, an indictable offence”.

14 With respect, this distinction between “effect[ing] something” or “purpose”, and the “means” by which the conspirators achieve their objective is not meaningful. It would be much clearer for the charge to say simply that the accused persons conspired to do the unlawful act, *viz.*, “intimidation”. The current distinction between “means” and “acts” in s 120(A)(1) of the Penal Code is not only meaningless, but confusing because it introduces an additional concept of “means” that are not “acts”. The PCRC therefore recommends that this distinction in s 120A(1) of the Penal Code be removed.

Recommendation 70: Clarify that only one person needs to possess the requisite intent, to be held liable for criminal conspiracy

Impetus for review

15 Under s 120A(1) of the Penal Code, “2 or more persons” must agree to commit an offence for a criminal conspiracy to exist. This *may* be taken to mean that at least 2 parties to the agreement must possess the requisite fault element for there to be liability for criminal conspiracy. This means that it may not be possible for a person who enters into an agreement to commit an offence with an undercover police officer to be found guilty of criminal conspiracy, because the latter would not possess the intention for the offence to be carried out.

¹⁴ *Ratanlal* at p 532.

¹⁵ (1844) 8 E.R. 1061; 11 CL & F 155, 233.

¹⁶ *Ratanlal* at p 541.

Recommendation

16 The PCRC recommends amending s 120A(1) of the Penal Code along the following lines, to focus on individual culpability.

120A. — (1) When ~~2 or more persons agree~~ a person agrees with another to do, or cause to be done...

Illustration

A agrees with B to do an illegal act. At the time of the agreement, B did not intend to carry out the agreement. A has nonetheless committed the offence defined in this section.

17 In the scenario outlined above, there is no reason why the person with the required fault element should not be liable for criminal conspiracy.¹⁷ The lack of intention on the part of the undercover police officer does not significantly affect the culpability or dangerousness of the other party to the conspiracy. Making it clear that such persons are liable for criminal conspiracy is more consistent with holding persons liable for abetment even where the act abetted is not carried out, and with holding persons liable for attempt even if the completion of the offence is impossible.

¹⁷ *YMC Rev 2nd Ed* at p 922.

SECTION 21: CORPORATE CRIMINAL RESPONSIBILITY

SUMMARY OF RECOMMENDATIONS

(71) *While there is no need for legislation at present, the Government should continue to study the adequacy of Singapore's rules on corporate criminal responsibility, and put in place new rules where needed*

Introduction

The PCRC considered the adequacy of the current rules on corporate criminal responsibility and found that there were various areas where the rules were unsatisfactory. However, the PCRC also acknowledged that any changes in this area, if not carefully scoped, have the potential to cause unintended consequences to Singapore's economy. The PCRC therefore makes broad recommendations below for further study by the Government, in consultation with stakeholders who will be able to give input on the economic impact of any changes.

Current law

Attribution of criminal liability to corporations

2 Singapore criminal law adopts the traditional approach: an employee's act can only be attributed to the company if the employee can be considered the "living embodiment of the company", and his acts were performed as part of a delegated function of management.

3 For a human actor to be sufficiently "identified" with the company, he must be recognised as the "brains" of the company, rather than its "hands". This usually requires some kind of superiority in the company hierarchy.

4 In *Tom-Reck Security Services Pte Ltd v PP*¹, the High Court held that a certain employee's criminal act could not be attributed to the company. In arriving at its decision, the court took into account the following factors:

- (a) The natural person was a new hire (who joined the company only one month before the incident);
- (b) The natural person was placed relatively low in the chain of command; and
- (c) The natural person was still under probation when he committed the offence.

5 In contrast the Singapore courts have adopted a more expansive approach towards attribution in civil liability cases, and have accepted other rules of attribution. Through cases like *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings)*² and *The Dolphina*³, both the High Court and Court of Appeal have accepted into Singapore law

¹ [2001] 1 SLR(R) 327.

² [2014] 3 SLR 329.

³ [2012] 1 SLR 992.

Hoffmann LJ's three Rules of Attribution in *Meridian Global Funds Management Asia Ltd v The Securities Commission*⁴. These rules are wider than the “living embodiment” test used so far in the criminal context.

6 There has not yet been an instance in Singapore where Hoffmann LJ's analysis has been applied to a company's breach of a regulatory or criminal offence, although *Meridian Global* itself contemplated the same analysis applying to criminal offences as to civil wrongs.

Penalties for corporate offenders: fines

7 Currently, the mechanism used to punish corporate offenders is fines. As stated by Yeo, Morgan and Chan, this is due to the “practical problem of a corporation being a fictitious entity is that it is incapable of receiving bodily punishments such as imprisonment or caning”.⁵

Impetus for review

Difficulty of attributing criminal liability to corporations

8 The narrowly scoped rule of attribution currently recognised by our criminal courts results in the ill effects described below.

9 First, the rule of attribution makes it difficult to hold a company liable even where their employees or agents did something highly culpable. This is because only a small percentage of human actors will be recognised as being sufficiently identified with the company under the “living embodiment” standard, such that their criminal acts can be regarded as being “the company's” acts.⁶ This allows the company to dissociate itself from the acts of lower-level management and employees and escape liability.

10 This ease of escaping liability ignores the reality of corporate decision-making.⁷ Individuals in the company are part of a greater enterprise – their acts both contribute to the corporate effect and are consequences of the corporate effect.⁸ As a result, corporate decision-making is often the product of organisational policies and collective procedures, not individual decisions.⁹ Corporations undoubtedly have the power to influence or control the acts and mental processes of their employees. Put more plainly, in many cases, the culpable acts of even low-ranking employee or agents are influenced by the policies, procedures, and corporate culture established by a corporation's management. It may be artificial to let the corporation off the hook too easily in such situations

11 Second, the current approach may provide senior management of a corporation, such as the Board of Directors, with a perverse incentive to keep ignorant about the affairs of the

⁴ [1995] 3 WLR 413 (“*Meridian Global*”).

⁵ *YMC Rev 2nd Ed* at para 37.40.

⁶ Richard Mays, “Towards Corporate Fault as the Basis of Criminal Liability of Corporations” (1998) 2(2) *Mountbatten Journal of Legal Studies* 31 (“*Mays*”) at 40.

⁷ *Id.*, at 52.

⁸ Celia Wells, “Corporations: Culture, Risk and Criminal Liability” (1993) *Criminal Law Review* 551 at 560.

⁹ *Mays* at 52.

corporation, *eg* via devolved decision-making, aversion to paper trails, and multiple levels of management.¹⁰

12 This leads directly to the third point, which is that the current attribution rule may be discriminatory, favouring large employers who have the ability to implement hierarchies and decision-making ‘firewalls’.¹¹ The “living embodiment” rule of attribution means that corporate criminal liability is easily inflicted on a small company, where a human actor can be easily identified as representing the company both in mind and in action, but difficult to inflict on a large company, where decision-making and execution reside in different levels of management. However, large companies have large-scale operations that may have a huge impact on social life *eg* transport operators that are responsible for the safety of large numbers of passengers, pharmaceutical companies that distribute drugs to the public, and financial institutions that hold the deposits of members of the public. The current rules therefore lead to the perverse result that the companies that are most difficult to hold criminally liable are the same ones that have the greatest potential to harm the public.

Failure to criminalise corporate facilitation of harm as distinct from directly causing harm

13 This issue arises from the reality highlighted above, that in corporations, many managers may contribute to or facilitate the offence of an officer, employee or agent even if they do not actually cause the offence to happen. There is a principled reason to hold a corporation criminally liable for such contribution or facilitation. However, the present principle of attribution does not allow this.

14 The law should recognise that corporations do not just owe a social duty to avoid directly committing crimes, but also to put in place processes and systems to avoid crimes being committed where those crimes have a sufficiently close connection with the corporation’s operations. This principle has been termed the “Corporate Fault Model”. It recognises that an offence arises because of structural problems within the corporation (*ie* “the expressions of the collective will”),¹² as opposed to the acts of certain individuals only. Under this model, criminal liability is predicated on identified corporate practices and policies which tacitly authorise, even encourage, non-compliance with the law.

15 An advantage of this model is that it accurately and holistically encapsulates the true “wrong” perpetuated by corporations, especially the large modern corporations. It identifies the true mischief that is being guarded against as the corporation’s mind/intentions, as expressed in company policies, coupled with the criminal act caused by these policies.¹³ The fault lies with the way the company organises or operates its business affairs.¹⁴

- (a) For example, if safety procedures are routinely disregarded by employees, the underlying reason might be a blameworthy corporate culture that accommodates or emboldens law-breaking – not merely the single negligent act of the particular employee/agent who caused harm. As *Yeo, Morgan and Chan* puts it,

¹⁰ James Gobert, “Corporate Criminality: Four Models of Fault” (1994) 14 *Legal Studies* 393 (“*Gobert*”) at 400.

¹¹ Muir, “Tesco Supermarkets, Corporate Liability and Fault” (1973) 5 *New Zealand Universities Law Review* 357.

¹² Mays at 60.

¹³ *Ibid.*

¹⁴ *Gobert* at 405.

“Accidents arising from corporate activity frequently originate from deficient corporate management and its system of accountability instead of individual failures. It is for this reason that it should be the corporation that is publicly censured for the disaster and held criminally liable for the consequences.”¹⁵

(b) Using the example of the Clapham Rail crash, Gobert stated

“The Clapham Rail crash would not have occurred if British Rail had paid closer attention to whether its safety regulations were being adhered to. Nor would it have occurred if the technician and his supervisor had been more diligent. It was the combination of these actions and inactions which proved lethal. Rather than setting off these failings against one another, however, it would seem more appropriate to add them together in order to capture the true extent of the company’s fault.”¹⁶

Penalties for corporate offenders: fines

16 Even where criminal liability is successfully attributed to a corporation, the lack of suitable penalties for corporate offenders is unsatisfactory.

17 Many offences that can be committed by corporations, such as corruption offences, have maximum limits on fines that apply both to corporate and individual offenders. This means that the fine imposed may not be able to achieve proportionality to the wealth of a corporation (which can be much higher than that of a natural person) or the amount of gain the corporation derived from its criminal act. If the corporation is doing well financially, the fine may simply be regarded as a slap on the wrist, and absorbed as business overheads.¹⁷ There is thus no incentive for the corporation to mend its ways.

18 In most cases, courts will impose a higher fine on a corporate offender than on a human offender. While this goes some way towards reflecting the potential discrepancy between a corporation’s wealth and an individual’s wealth, the present situation remains unsatisfactory, for several reasons:

- (a) An individual may potentially be liable for a default term of imprisonment if he fails to pay a fine. A company cannot face further adverse consequences if it does not pay a fine; and
- (b) The true perpetrators of a corporate offence (*eg* managers and directors) generally do not directly suffer the consequences of a fine. Instead, the brunt of a fine often

¹⁵ *YMC Rev 2nd Ed* at para 37.2.

¹⁶ *Gobert* at 403-404. Gobert also goes further at pp 405, 409–410 by suggesting that the court should be able to hold a company liable without also attaching fault to any particular individual. Under this view, it should be the company’s responsibility to collect and collate information known by employees, and implement policies that prevent foreseeable risk from materialising. This would then prevent individuals from being scapegoated. However, the PCRC does not agree with this approach as it seems excessively fictional to attribute criminal liability, including a culpable state of mind, to a corporation without any individual actually having enough information to form a culpable state of mind. To most people, that is poor management and coordination, not culpability.

¹⁷ *YMC Rev 2nd Ed* at para 37.40.

falls on innocent stakeholders – who in most situations have little to no control or influence over a company. These stakeholders are

- (i) Shareholders – as the company’s capital is reduced, share prices of the company fall. This is especially if there is adverse publicity surrounding the crime. A fine so large that it causes the company to become insolvent will mean that shareholders have lost their investment. Although shareholders do retain a power to remove and reappoint new directors, such power is often only significant when exercised by the controlling shareholder
- (ii) Ordinary employees – a fine may lead to cash-flow difficulties (even insolvency) for the company, thereby leading to unemployment for employees. Corporate fines may therefore actually cause greater financial misery to employees who had neither participated in nor benefitted from the crime.
- (iii) Creditors – their interests will be adversely affected if the company becomes insolvent as a result of the fine.

Lack of general principle of reverse attribution

19 This last point is closely connected to the problem above, that the adverse financial impact of corporate fines is often not borne by the human controllers of the company. Under the present law, even where companies are found criminally liable and fined, many of the managers who may have contributed in various ways to the offence will not be found to have themselves offended the law and will not be punished. Only the small number of “living embodiments” of the company whose actions caused the company to be liable may potentially be charged and punished personally.

20 As stated by Yeo, Morgan and Chan, individuals who run companies should occasionally be held liable for crimes committed by such companies. “Such officers are held individually liable because the offence committed by the corporation is attributable to, or facilitated by, their neglect of duty.”¹⁸ This report uses the term “reverse attribution” to refer to principles which impose criminal liability on certain responsible individuals within a corporation where the corporation has committed an offence.

21 According to Kennedy, individual and corporate penalties are “not so much parallel means”, but “tools with complementary but distinct functions”.¹⁹ Penalties on individual agents are meant to eliminate any personal motives the individuals may have in causing the company to commit corporate crime. By contrast, penalties in corporations are meant to remove the profit motive as a stimulus for the company to commit crime.

22 Such sentiments were also expressed by the District Court in *PP v Shun Sugawara*²⁰:

¹⁸ *Id.*, at para 37.11.

¹⁹ Christopher Kennedy, *Criminal Sentences for Corporations: Alternative Fining Mechanisms* (1985) 73 California Law Review 443 at 443, 451.

²⁰ [2008] SGDC 42.

“[T]he purpose of [the statutory provision] must be to make designated officers account for their role in contravention of the [Factories Act] in the context of their scope of work within the company. It is to prevent the corporate identity from providing a shield for individuals within the company responsible for dangerous workplace practices. A company’s decisions are, after all, made by its officers...”

Recommendation 71: While there is no need for legislation at present, the Government should continue to study the adequacy of Singapore’s rules on corporate criminal responsibility, and put in place new rules where needed

23 The PCRC ultimately concluded that it may be premature to make firm recommendations on new rules relating to corporate criminal responsibility, as there may be unintended consequences on commercial activity. The PCRC therefore recommends that, while no legislative intervention is needed at present, the Government should continue studying the adequacy of Singapore’s rules on corporate criminal responsibility. Some possible lines of inquiry for further study are set out below.

Possible new general offence of “corporate failure to prevent an offence”

24 The Government should study the possibility of introducing a new offence of corporate failure to prevent an offence. This would send a clear signal that corporations have a responsibility not just to avoid committing offences, but to take reasonable steps to prevent their commission where such offences are sufficiently connected with the company’s operations. This would in practice have the effect of addressing some of the excessive narrowness of the common law rules of attribution, by making corporations liable for failure to prevent an offence even if they are not found to have actually committed the offence

25 Such an offence is not one of vicarious liability, but is a primary offence in itself. It criminalises the company’s own omission to put in place systems or procedures that can detect and prevent offences.²¹

26 It should be designed to attribute liability to a corporation for the negligent omissions of a wider class of managers, and not just the “living embodiments” of the corporation. For example, under s 12.3(6) of the Australian Federal Criminal Code Act 1995, liability can be attributed to an “employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy”. Having an expanded rule of attribution for this specific offence strikes a compromise between the narrowness of the “living embodiment” test and the potentially wide effects of expanding the rule of attribution for all offences.

27 The PCRC was of the view that such an offence, if adopted, should have a *mens rea* of negligence. Requiring proof of wilfulness, intention or knowledge on the part of the company or its managers would lead to some of the same difficulties as the “living embodiment” test (*eg* complex management structures that prevent senior managers from having actual knowledge of operations). In addition, where the company’s managers are proven to have deliberately or knowingly omitted to implement policies, systems and procedures to prevent the offence from being committed with the knowledge or intention that the offence would thereby be assisted,

²¹ James Gobert, “Corporate Criminality: New Crimes for the Times” (1994) Crim LR 722 at 723–724.

they can be prosecuted as abettors. The offence should therefore aim to deal with situations where such proof is not possible.

28 As Sir Edward Garnier QC wrote,²² the aim of a corporate failure offence is to bring home the fact that it is the company's duty to exercise due care and diligence, to prevent its employees or agents from committing a crime:

“Part of the beauty of the ‘failure to prevent’ approach is that it focuses the company’s attention on the right processes to prevent the commission of a crime. It has led to a marked change in the corporate response to bribery and corruption and had an important preventive effect.”

29 The imposition of negligence liability, paired with the appropriate “failure to prevent” *actus reus* formulation, will encourage companies (and their management) to actively direct their minds to implementing adequate procedures and processes.

30 The PCRC also recognised that it is important to provide business certainty. In this regard, any offence should be accompanied by guidance on what constitutes a “reasonable” standard of care. This should be set out in subsidiary legislation. Under such a regime, companies need not wait for a judge to adjudicate on whether their arrangements and measures satisfy the legal standard of care required.

31 Such an approach is in line with the UK approach: s 47 of the Criminal Finances Act 2017²³ and s 9 of the Bribery Act 2010²⁴ oblige the Chancellor of the Exchequer and the Secretary of State, respectively, to prepare, publish and revise guidance about procedures that relevant bodies or commercial organisations may implement, to avoid liability.

32 An advantage of such an approach is that it facilitates and invites participation by stakeholders in devising the relevant guidance. According to a note by Norton Rose Fulbright, government guidance (published by HMRC) as required under the Criminal Finances Act 2017 has been supplemented by government-endorsed guidance from industry bodies like the Law Society and Chartered Institute of Taxation.²⁵ Such an approach will likely increase acceptance of the new law, if industry players know that their peers have had a hand in crafting the framework of what constitutes “reasonableness”.

33 As Burgess Salmon LLP noted, HMRC has specifically published draft guidance for “lower risk SMEs”, to assist them on designing and implementing reasonable prevention procedures. This addresses concerns that SMEs will be disproportionately burdened by the new law, because they are unable to enjoy the economies of scale enjoyed by larger MNEs.²⁶

²² Sir Edward Garnier QC, “Time to plug the gaps in corporate criminal law”, *The Brief Premium* (The Times), (19 October 2017).

²³ (c 22) (UK).

²⁴ (c 23) (UK).

²⁵ Dominic Stuttaford, Sam Eastwood, Susie Brain, “Criminal Finances Bill: The new corporate offences of failing to prevent facilitation of tax evasion” *Norton Rose Fulbright* (September 2017) <<http://www.nortonrosefulbright.com/knowledge/publications/143796/criminal-finances-bill-the-new-corporate-offences-of-failing-to-prevent-the-facilitation-of-tax-evasion>> (accessed 13 August 2018).

²⁶ Thomas Webb, “The Criminal Finances Bill and HMRC guidance on prevention procedures” *Burgess Salmon LLP* (29 November 2016) <<https://www.burgess-salmon.com/news-and-insight/legal-updates/the-criminal-finances-bill-and-hmrc-guidance-on-prevention-procedures/>> (accessed 13 August 2018).

Alternatively, an exemption regime may also be appropriate for micro-companies, where the ordinary Identification Approach will operate the most effectively.

New offence to be punished with fine with no specified limit

34 The PCRC recommends that, if a new offence is introduced, it should be punishable by fine with no specified limit. The reasons for this are as follows:

- (a) Some offences committed by an employee, officer or agent of a corporation that are connected with the corporation's operations may be extremely serious, such as murder or child sex offences where the person's position in the corporation put them in a position to commit the offence. There is a risk that a maximum fine may not be sufficient to reflect the corporation's culpability in failing to prevent such an offence
- (b) Similarly, there may be situations where a corporation may reap extremely large benefits from an offence committed by an employee, officer or agent, such as bribery that results in valuable contracts being awarded to the corporation. Where the fine for failing to prevent such an offence is limited, the maximum may not be commensurate with the benefit enjoyed by the corporation

35 However, just because a fine is unlimited should not mean that sentences are no longer governed by the principle of proportionality. This principle should continue to apply, along with the usual possibility of payment by instalments if the court grants leave.²⁷

Introduction of reverse attribution into new offence

36 The PCRC also recommends that any new offence should incorporate aspects of reverse attribution (as can be seen in the Australian model). The practical advantage of this is that the courts will have flexibility in apportioning the burden of the criminal penalties between the corporation and the individual managers. For example, where a publicly-owned corporation and its managers are both charged, the courts may impose a heavier sentence on the managers and a lesser one on the corporation to reflect the reality that fines on the corporation will impact the corporation's shareholders and creditors rather than the individuals responsible. Prosecutors may also make similar assessments in making charging decisions

Schedule of offences to which the corporate failure offence will apply

37 The PCRC recognises that the introduction of any new offence may have significant impact on corporations. One way in which this could be ameliorated could be to apply the new corporate failure offence to certain serious offences that are commonly facilitated by weak corporate control and have serious consequences. This gradual start would enable the Government to monitor the burden placed on companies, identify and resolve any problems in investigating and prosecuting the offence, and evaluate the overall success of this approach in reducing serious crime.

²⁷ In this regard, the PCRC noted that the UK Sentencing Council has set out helpful principles and guidelines for the imposition of fines on corporations, where the quantum of fine is unlimited for certain offences. See UK Sentencing Council website <<https://www.sentencingcouncil.org.uk/offences/item/corporate-offenders-fraud-bribery-and-money-laundering/>> (accessed 13 August 2018).

SECTION 22: DEFINITION OF “PUBLIC SERVANT”

SUMMARY OF RECOMMENDATIONS

(72) Amend s 21 of the Penal Code to allow for persons who are

- a. employed by private contractors, and
- b. performing a law enforcement role,

to be deemed public servants under the Penal Code

Introduction and current law

Section 21(g) of the Penal Code currently provides as follows:

“Public servant”

21. The words “public servant” denote a person falling under any of the following descriptions:

(g) every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words “public servant” occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

2 Section 21(g) is currently limited to “officers of Government”. There are no cases interpreting the meaning of this phrase. However, s 2 of the IA defines “public officer” as “the holder of any office of emolument in the service of the Government” and s 2 of the Government Proceedings Act provides that “officer” in relation to the Government “includes a person in the permanent or temporary employment of the Government...” The suggestion is thus that “officers of Government” under s 21(g) of the Penal Code is a reference to those employed by the Government.

Impetus for review

3 Currently, many “non-core” law enforcement functions are being carried out by persons who are not Government employees. Then Minister for Home Affairs, Mr Wong Kan Seng, said in Parliament on 2 March 2007 that:

“We are constantly reviewing our roles to focus on security and other core functions. One of the strategies in this effort is to outsource non-core functions, and this is done

carefully to ensure that we do not compromise the public interest. This includes the outsourcing of enforcement of illegal parking.”¹

4 As employees of private contractors, these persons are not “officers of Government” and accordingly do not fall under s 21(g) of the Penal Code. They are not “public servants” unless covered by some other legislation other than the Penal Code.

5 For example, auxiliary police officers (“APOs”) are employees of the respective Auxiliary Police Forces and not the Government. Nevertheless, under s 92(5) of the PFA, APOs are deemed to be public servants for the purposes of the Penal Code when they exercise any police power in the performance of their duties or when they carry out any duties of a police officer.

6 There are some instances however, where certain categories of private law enforcers appear not to be categorised as public servants by any legislation. For example, there is a lack of clarity on whether some of those who are deployed by the LTA to conduct illegal parking enforcement are “public servants”. LTA deploys “traffic wardens, auxiliary police officers and its own uniformed enforcement officers to carry out (the enforcement of illegal parking.”² For LTA employees, s 11(1) of the Land Transport Authority of Singapore Act³ provides that “[a]ll members, officers and employees of the Authority shall be deemed to be public servants for the purposes of the Penal Code.” APOs are covered by s 92(5) of the PFA. However, “traffic wardens” appear to be a distinct category of persons who are neither APOs nor LTA employees and who are not covered by any specific legislation classing them as “public servants”.

Recommendation 72: Amend section 21 of the Penal Code to allow for persons who are (a) employed by private contractors, and (b) performing a law enforcement role, to be deemed public servants under the Penal Code

7 The PCRC recommends amending s 21 of the PCRC to allow for persons employed by private contractors, and who are performing a law enforcement role, to be deemed public servants under the Penal Code.

8 The PCRC noted that the trend towards outsourcing has led to the current definition in s 21(g) being unnecessarily restrictive. The focus should be on the nature of the duties that they are carrying out rather than whether the person carrying out the duties of law enforcement is “of the Government”. In other words, these employees should be regulated and protected as public servants because they are carrying out law enforcement functions on behalf of the Government even though they are not directly employed by the Government. In this regard, the PCRC noted the comments of the Law Commission of India, in its 42nd Report of 1971 where they opined as regards the Indian equivalent of our s 21(g) that “the words “of Government” are unduly restrictive... The test should be the nature of the duty, and not whether the officer is under the Government.”

¹ *Singapore Parliamentary Debates, Official Report* (2 March 2007) vol 82 at col 2374 (Wong Kan Seng, Minister for Home Affairs).

² LTA News Release, “LTA Takes Over Five Traffic Police Functions”, *LTA* (15 September 2010) <<https://www.lta.gov.sg/apps/news/page.aspx?c=2&id=30ya12oic8h2s624yawxxh1606jnz24xsox2uovg6b1mi af42>> (accessed 13 August 2018).

³ (Cap 158A, 1996 Rev Ed).

9 The PCRC also observed that there are a number of recent statutes that have made provision for persons other than those employed by the Government to be covered as public servants. Examples include s 5 of the Public Entertainments and Meetings (Amendment) Act 2017⁴, and s 7 of the Infrastructure Protection Act 2017⁵. The proposed expansion of the definition of “public servant” is consistent with these developments, and will serve to ensure that no employees of contractors doing law enforcement work are inadvertently missed out.

10 This expansion should result in such persons being both regulated and protected as public servants. They should be subject to the standards expected of public servants (*e.g.* no taking of gratification) and protected by the relevant provisions that provide for higher sentences when force or hurt is used against them. Essentially, they will enjoy the protections, and face the special duties, imposed by the criminal law on public servants. For completeness, therefore, the PCRC also recommends that ss 5(ii) and 8 of the PCA be amended to cover “public servants” under our proposed extended definition.⁶

11 Finally, the PCRC recommends that the scope of “law enforcement role” be limited to the following duties:

- (a) Maintaining law and order;
- (b) Preserving public peace;
- (c) Preventing and detecting crimes;
- (d) Apprehending offenders;
- (e) Executing summonses, subpoenas, warrants, commitments and other legal processes issued by the courts and Justices of the Peace;
- (f) Keeping order in the courts; and
- (g) Escorting and guarding accused persons and prisoners.

12 This list of duties is adapted from *PP v Yeo Ek Boon Jeffrey*⁷. In that case, the 3-Judge High Court was dealing with an appeal by the PP against the sentence imposed by the District Court for a s 332 Penal Code offence⁸, committed against a police officer. In setting out the sentencing framework for such offences, the High Court held that the sentencing framework should also apply to such offences when committed against “public servants who are performing duties akin to police duties at the material time”. The PCRC therefore recommends adapting for our purposes the list set out by the High Court, given the similar policy reasoning underpinning the High Court’s decision – that such persons are deserving of additional protection because of the *nature* of the duties they are carrying out. The list is not adopted wholesale, as law enforcement duties are narrower than police duties.⁹

⁴ (No 28 of 2017).

⁵ (No 41 of 2017).

⁶ At present, those sections refer to “member, officer or servant of a public body” and “person in the employment of the Government” respectively.

⁷ [2018] 3 SLR 1080; [2017] SGHC 306 at [53] (“*Jeffrey Yeo*”).

⁸ Section 332 of the Penal Code states, “Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with caning, or with any combination of such punishments.

⁹ The two duties listed by the High Court, which the PCRC does not recommend to adopt, are: (i) “protecting people from injury or death and public property from damage or loss, whether arising from criminal acts or in any other way”; and (ii) “regulating traffic and processions in public roads and public places”.

13 The PCRC also notes that there *may* still be gaps in the coverage of persons employed by statutory boards.¹⁰ In this regard, s 20 of the Public Sector (Governance) Act 2018 (“PSGA”)¹¹ appears to be directed at ensuring that there is a considered decision taken on whether persons employed by statutory boards should be deemed “public servants” for the purposes of the Penal Code. While not making any specific recommendations on the coverage of these persons, the PCRC nevertheless recommends that the Government ensure that there is consistency in the treatment of persons employed by statutory boards, whether by way of the PSGA or in the Penal Code.

¹⁰ The PCRC had also considered whether there was a gap in the coverage of persons employed by Town Councils and Organs of State. However, the PCRC eventually found that there was no gap, as employees of the former are deemed public servants under s 56 of the Town Councils Act (Cap 329A, 2000 Rev Ed) and employees of the latter are already covered under s 21(h) of the Penal Code as officers “in the service or pay of Government”.

¹¹ Section 20 of the Public Sector (Governance) Act 2018 (No 5 of 2018) states:

20.—(1) The following individuals of a Group 1, Group 2 or Group 3 public body are each deemed to be a public servant for the purposes of the Penal Code (Cap. 224) in relation to his or her carrying out any function of the public body:

- (a) the chairperson and a member of the public body;
- (b) the chief executive of the public body;
- (c) an officer of the public body.

The three Groups cover 61 of the 65 statutory boards in Singapore.

SECTION 23: GENERAL DEFENCES

SECTION 23.1: MISTAKE OF FACT

SUMMARY OF RECOMMENDATIONS

(73) Set out the defence of “acts done by a person bound or justified by law” in a standalone provision

(74) Set out the defence of “mistake of fact” in a standalone provision, with the following features:

a. References to mistake of law will be removed, and dealt with in a separate provision

b. This defence will apply to all offences, except where expressly excluded by some other written law

c. Clarify that the defence applies to both mistake of fact and ignorance of fact

(75) Clarify that when mistake or ignorance of fact will operate to negate the fault element of an offence, there is no need to rely on a defence of mistake of fact. This can be set out as an explanation, with a suitable illustration

Introduction

The defence of mistake of fact recognises that a person who, as a result of a mistake of fact held in good faith (*ie* with due care and attention), believed himself to be bound or justified in doing the act, is not criminally blameworthy.¹

Current law

2 The defence of mistake of fact is codified in two provisions: ss 76 and 79 of the Penal Code. Section 76 concerns a situation where a person under a mistake of fact believes he was bound by law to do an act. Section 79 concerns a situation where a person under a mistake of fact believes he was justified by law to do it.

Act done by a person bound, or by mistake of fact believing himself bound by law

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Act done by a person justified, or by mistake of fact believing himself justified by law

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

3 Sections 76 and 79 are composite provisions, providing for two types of defences, and an express statement of a non-defence:

¹ *YMC Rev 2nd Ed* at para 17.7.

- (a) First, it is a defence to do an act which one is bound by law to do, or justified by law in doing. This is no more than a trite statement that it is a defence to do something that is lawful.
- (b) Second, it is a defence to do an act under a mistake of fact, in good faith believing oneself to be, bound by law to do it, or justified by law in doing it. This is defence of mistake of fact.
- (c) Third, mistake of law does not provide a defence.

4 The elements that are required to be proved on the balance of probabilities, in order to establish the defence of mistake of fact under ss 76 or 79, are as follows²:

- (a) The accused had been induced by a mistake to commit the criminal act comprising the offence;
- (b) The mistake was one of fact, not law;
- (c) The accused mistakenly believed that he was bound or justified by law in doing the criminal act; and
- (d) The mistake was believed by him in good faith, *ie* his belief must have been arrived at with due care and attention.

5 As ss 76 and 79 are general defences under Part IV of the Penal Code, they apply to all offences, including non-Penal Code offences, unless excluded by statute. Notably, this means that the defence should apply to strict liability offences.³

6 Mistake as to age under s 377D of the Penal Code is one such express exclusion of the general defence of mistake of fact. Under s 377D(1), notwithstanding s 79, a reasonable mistake as to the age of a person shall not be a defence to any charge of an offence under s 376A(2) (sexual penetration of a minor), s 376B (commercial sex with minor under 18) or s 376C (commercial sex with minor under 18 outside Singapore).

7 The location of ss 76 and 79 under Chapter IV on General Exceptions means that mistake of fact under ss 76 and 79 is a defence to be pleaded and proven on a balance of probabilities by an accused.

Impetus for review

8 By and large, the defence of mistake of fact has not presented much difficulty in application. However, on occasion, there has been some confusion about how mistake of fact

² *YMC Rev 2nd Ed* at para 17.21.

³ In *Tan Khee Wan Iris v PP* [1995] 1 SLR(R) 723, the High Court recognized that as there was nothing in the Public Entertainments Act (Cap 257, 1985 Rev Ed) that excluded the operation of the defence of mistake under s 79 of the Penal Code in respect of a strict liability offence for providing public entertainment without a valid licence under s 18(1)(a) of the Act, the defence was available.

operates to negate criminal responsibility. In particular, two erroneous approaches have emerged:

- (a) Treating mistake of fact as *not* being able to negate the fault element of an offence: It has been suggested that allowing mistake of fact to operate as a denial of the fault element of an offence is incorrect: whenever an accused's claim of mistake of fact can be cast in terms of a belief that he was bound or justified by law in doing it, the claim must be dealt with under ss 76 or 79, even though the claim can be described or applied in another manner to exculpate the accused.⁴
- (b) Treating the defence as an application of the doctrine of "due diligence": On occasion, the defence of mistake of fact has been confused with the doctrine of "due diligence".⁵ "Due diligence", which can be employed as a defence in strict liability offences, states that an accused is not criminally liable if he had taken all "due care" or "reasonable care" when performing the criminal act.

9 The review of the Penal Code presents an opportunity to clarify how the defence of mistake of fact operates, and to impose greater legislative clarity about the various defences/non-defences to be found in ss 76 and 79.

Recommendation 73: Set out the defence of "acts done by a person bound or justified by law" in a standalone provision

10 The PCRC recommends setting out the defence of "acts done by a person bound or justified by law" in a separate, standalone provision. This provision will state that nothing is an offence which is done by a person bound by law to do it, or justified by law in doing it.

11 This preserves the defence of acts done by a person bound by law and acts done by a person justified by law in ss 76 and 79. This defence will become separate from the defence of mistake of fact, which is a distinct defence. This was also the approach suggested by the Law Commission of India in its 42nd Report.⁶

⁴ *YMC Rev 2nd Ed* at paras 17.12 – 17.13. Some may cite the decision of the Singapore High Court in *PP v Teo Eng Chan* [1987] SLR 475 to support this view. In that case, the High Court held, in respect of an offence of rape, that s 79 places the burden of proof on the accused to show on the balance of probabilities that he had in good faith held a mistaken belief that the victim had consented. However, since the definition of rape in the Penal Code makes no mention of any fault element such as knowledge or recklessness, mistake of fact could not have negated a fault element of the offence, and had to be pleaded under s 79.

⁵ This was the High Court's approach in *Comfort Management Pte Ltd v PP* [2003] 2 SLR(R) 67. In the case, the accused had employed a foreign worker as an electrician, and had authorised him to drive a company vehicle in breach of the conditions of the work permit. The Court said that "[a]n accused is entitled to be acquitted if he can prove on a balance of probabilities that he has taken due care and attention to comply with the statutory requirements", and that this conclusion is "mandated by s 79, read with ss 40(2) and 52 of the Penal Code".

⁶ Law Commission of India, "*Indian Penal Code*" (42nd Report, June 1971), at [4.5]. The Law Commissioners took the view that "[w]hile neither section 76 nor section 79 requires any modification of substance, the four propositions contained in the two sections should ... be paired differently". The Law Commissioners felt that the first two parts of the two sections naturally go together, and the second parts of the two sections which have the common elements of mistake of fact and *bona fide* belief should be combined in s 79. Thus, they proposed a rearrangement of ss 76 and 79, as follows:

"76. *Act done by a person bound or justified by law.* – Nothing is an offence which is done by a person who is bound by law to do it or is justified by law in doing it.

Recommendation 74: Set out the defence of mistake of fact in a standalone provision

12 The PCRC recommends setting out the defence of mistake of fact in a standalone provision, with the following features:

- (a) The defence of mistake of fact will apply to all offences, including strict liability offences, except where expressly excluded by some other written law, *eg* s 377D of the Penal Code. In particular, the defence will continue to apply in cases where the fact about which the accused was mistaken did not relate to the fault element of the offence, *eg* where the fact about which the accused was mistaken relates to an element of a *defence*. Most of the illustrations in ss 76 and 79 are precisely the sort of scenarios in which the fact about which the accused was mistaken related to the availability of an exception under the Penal Code.
- (b) “Mistake” is not defined in the Penal Code. Mistake has been described as “a positive and conscious conception, which is, in fact, a misconception”⁷, while ignorance connotes passiveness and “does not pretend to knowledge”⁸. Despite this, no distinction is drawn between mistake and ignorance in *Ratanlal*.⁹ The PCRC’s view is that a more important criteria in this context is whether the mistake or ignorance of fact was held in good faith, *ie* with due care and attention. This criterion will eliminate cases where the accused ought reasonably to have verified the facts or his understanding of the facts. As such, in the context of the defence of mistake of fact, there is no conceptual reason to distinguish between mistake and ignorance.

Recommendation 75: Clarify that when mistake or ignorance of fact will operate to negate the fault element of an offence, there is no need to rely on a defence of mistake of fact. This can be set out as an explanation, with a suitable illustration

13 The PCRC recommends clarifying that when mistake or ignorance of fact will operate to negate the fault element of an offence, it is not necessary to rely on a defence of mistake of fact. If mistake of fact is pleaded to negate the fault element, the Prosecution must prove beyond reasonable doubt that the accused had not been labouring under a mistake of fact that had the effect of negating the requisite fault element. All that an accused is required to do is to introduce reasonable doubt that he had the requisite fault element as a result of labouring under a mistake of fact.

14 It is a fundamental tenet of our criminal justice system that before an accused person can be convicted of a crime, his guilt must be proved beyond a reasonable doubt.¹⁰ This means

79. *Act done by a person by mistake of fact believing himself bound or justified by law. – Nothing is an offence which is done by any person who, by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be bound by law to do it or justified by law in doing it.*”

⁷ *Weerakoon v Ranhamy* (1921) NLR 33 at 45, *per* Bertram CJ. In the result, Bertram CJ found that ss 76 and 79 are confined to mistake of fact alone, and not ignorance of fact.

⁸ *Ratanlal 26th Ed* at p 281, as cited by *Model Code for Singapore* at p 251.

⁹ *Ratanlal* at p 291. Mistake of fact” is defined in *Ratanlal* as follows: “A mistake of fact consists in an unconsciousness, ignorance, or forgetfulness of a fact, past or present, material to the transaction, or in the belief of the present existence of a thing material to the transaction, which does not exist, or in the past existence of a thing which has not existed.”

¹⁰ *Sakthivel Punithavathi v PP* [2007] 2 SLR(R) 983 at [78] – [81].

that the onus is on the Prosecution to prove every physical and fault element of an offence beyond reasonable doubt. To read into ss 76 and 79 a requirement that any claim of mistake of fact should be proved by the accused, at a standard of a balance of probabilities, even if that mistake would negate the fault element of the offence, is to overturn this fundamental tenet, and place the burden of proof on the accused instead.

15 While not a decision of a superior court, the Magistrate's Court in *PP v Zaba bin Mohamed*¹¹ adopted a similar approach with regard to the operation of mistake of fact. This was a case of outrage of modesty, in which the accused had raised a claim of mistaken belief in the consent of the victim. The court rejected the submission that in order for the accused to rely on a defence of mistaken consent, he must satisfy the requirements of s 79 of the Penal Code: if the Prosecution does not cross the hurdle of proving its case beyond a reasonable doubt, the question of the general exceptions does not arise.¹²

16 In practice, the accused would still be required to raise the claim of mistake of fact negating a fault element of the offence, and the onus would then fall upon the Prosecution to rebut this beyond reasonable doubt. In determining whether the accused was genuinely mistaken about a fact, the court will have regard to whether the mistake was reasonable or not – a claim would be more credible if the mistake was a reasonable one to make.

17 This proposal can be implemented by way of an explanation to the provision, together with a suitable illustration:

A mistakenly believes that Z, a human being, is a tiger and attacks and kills Z with an axe while labouring under such mistaken belief. A has not committed an offence of homicide as he did not possess the requisite *mens rea* of intention or knowledge. There is no need for A to rely on a defence under this section.

¹¹ [2012] SGDC 336.

¹² *Id.*, at [30].

SECTION 23.2: MISTAKE OF LAW

SUMMARY OF RECOMMENDATIONS

- (76) Remove references to mistakes of law in ss 76 and 79, and set out the position on mistake of law in a new standalone provision for greater clarity
- (77) Preserve the general exclusionary rule that a mistake or ignorance of law does not provide a defence to a criminal charge
- a. It is not recommended to create an exception based on reasonable reliance on legal advice
 - b. It is not recommended to create an exception based on reasonable reliance on an erroneous official statement of law
- (78) Clarify that if mistake or ignorance of law will negate the fault element of an offence, the offence will fail as not all its elements have been proven beyond reasonable doubt
- (79) Create an exception to the exclusionary rule based on non-publication of legislation. This involves a codification of the judicially-recognised exception in *Lim Chin Aik v R*, viz. that all legislation must be published, subject to any other provisions on notice or publication in any written law

Introduction

Mistake of law is not a recognised defence in Singapore. In a survey of a handful of civil law and common law jurisdictions, there was no discernible pattern to whether, and to what extent, this defence is recognised elsewhere.

2 On the one hand, a person who acts in the belief that his conduct is non-criminal or without knowing that it is criminal, is not morally blameworthy, and arguably ought not to be held criminally responsible.¹ Yet, mistake of law is unconditionally recognised as a defence in very few jurisdictions.² In common law jurisdictions, this defence is not recognised because pragmatic³ and utilitarian⁴ considerations dominate in this sphere.

¹ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th Ed., 2006) (“*Principles of Criminal Law*”) at p 232.

² Since the landmark case of *S v De Blom* 1977 (3) SA 513 in 1977, South Africa has recognised a complete defence of mistake of law, and does not distinguish between mistakes of fact and mistakes of law. Even so, there is a distinction drawn between offences requiring *dolus* (*dolus* requires actual intention or foresight of probability or possibility) and those requiring *culpa* (*culpa* is a state of blameworthiness where the accused ought to have committed or omitted certain acts, and has been described as a form of negligence). For offences requiring *dolus*, any honest mistake, e.g. an honest mistake that the act was unlawful, however unreasonable, would be sufficient to negate criminal responsibility. For offences requiring *culpa*, the defence of mistake would succeed only if that mistake were honest and reasonable. See K. Amirthalingam, “Men Rea and Mistake of Law in Criminal Cases: A Lesson from South Africa”, [1995] University of New South Wales Law Journal, Vol. 18(2), 428, for a more detailed analysis of *S v De Blom*.

³ For example, it would be very difficult to ascertain evidentially if someone was truly ignorant of the law: see John Austin, *Lectures on Jurisprudence* (J Murray, 1885, reprint 1972) Vol 1 at p 483.

⁴ Recognising the defence of mistake of law “would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice of the individual is rightly outweighed by the larger interest on the other side of the scales”: see O W Holmes, *The Common Law* (Boston: Little, Brown & Co, 1881, 42nd reprint, 1948) at p 41.

3 Other theories suggest that mistake of law is excluded as a defence because of an individual's duty to know the law as a responsible citizen. Mere ignorance will not excuse, but if an individual has discharged his duties of citizenship by taking reasonable steps to become acquainted with the criminal law, *eg* if he received legal advice which he reasonably relied on, the defence of mistake of law is available.⁵

4 Finally, an argument based on reliance and estoppel may provide an exception to the strict exclusion of the defence of mistake of law: the State and the courts should not convict a person who has placed reasonable reliance on their or their officers' advice.⁶ This view justifies an exception to the exclusionary rule based on officially induced error, as can happen when there has been reasonable reliance on erroneous official advice, or where the mistake/ignorance of law arises from non-publication of laws.

Current law

5 Sections 76 and 79 expressly make clear that a mistake of law cannot operate as a defence to a criminal charge. This exclusionary rule is strict, and a defence that the mistake of law has been made in reliance on official or legal advice has not been recognised in our courts.⁷

6 Sections 77 and 78 of the Penal Code recognise certain limited types of mistakes of law related to judicial acts and court orders as a defence.

7 The courts have crafted some judicial exceptions to the rule on mistake of law:

(a) Bona fide "claim of right" defence: It has been held that an honest but erroneous belief in ownership is a defence to property offences.⁸ However, mistakes as to ownership in such cases negate the *mens rea* of dishonesty and there is no need to rely on the defence in ss 76 and 79. As such, the "claim of right" defence is not a true exception to the rule that mistake of law is not a defence.

(b) Non-publication of laws: Another exception to the rule on mistake of law was articulated in *Lim Chin Aik v R*⁹, a Privy Council decision on an appeal from Singapore. The accused was charged with an offence under the Immigration Ordinance of 1952 for unlawfully remaining in Singapore, contrary to a prohibition order made by the Minister. The accused was not aware of the prohibition, as it had not been published. The Prosecution argued that as the Ministerial Order was part

⁵ *Principles of Criminal Law* at p 236.

⁶ *Principles of Criminal Law* at p 236.

⁷ *PP v Teo Ai Nee & Anor* [1995] 1 SLR(R) 450 at [102]. The accused persons were charged with exposing for sale and possession for the purpose of selling of infringing copies of sound recordings under ss 136(1)(b) and 136(2)(a) of the Copyright Act (Cap. 63, 1988 Ed.) r/w s 34 of the Penal Code (Cap. 224, 1985 Rev. Ed.). As part of their defence, it was argued that they had obtained assurances from their suppliers and legal advice from a qualified intellectual property lawyer on the legality of the importation. On this basis, they argued that they did not know, and could not have known that the imported articles infringed the Copyright Act. As it turned out, the assurance and legal advice were wrong in law. Yong Pung How CJ reaffirmed the general rule that mistake of law (in this case a reliance on legal advice) did not operate as a defence. The accused persons were using the fact that advice had been sought as evidence to disprove the inference that they ought reasonably to know that the articles in question were infringing.

⁸ *Mat Salleh v Sarah* (1883) 3 Kyshe 167 (SC, Straits Settlements), *PP v Lim Soon Gong* [1939] MLJ 8 and *State v Pappu v Damodaran* AIR 1968 Kerala 128.

⁹ [1963] AC 160.

of the law of Singapore, the accused's ignorance of the law could not provide a defence. This argument was rejected by the Privy Council: "[E]ven if the making of the order by the Minister [can] be regarded as an exercise of the legislative ... function (as [we] do not concede), the maxim [that ignorance of the law is no excuse] cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision ... for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is."¹⁰

Impetus for review

8 By and large, the exclusionary rule has not presented much of a problem in Singapore. The judicious exercise of prosecutorial discretion means that there are no known cases where prosecution has been pursued where an accused relied reasonably on erroneous official advice. However, the PCRC took the opportunity of this review to consider if it would be appropriate to codify the exceptions to the exclusionary rule, or to introduce further exceptions.

Recommendation 76: Remove references to mistakes of law in ss 76 and 79, and set out the position on mistake of law in a new standalone provision for greater clarity

9 The PCRC had recommended in Section 27.1 General Defences – Mistake of Fact, that the various distinct components of ss 76 and 79 be separated into standalone provisions for greater clarity.

10 Similarly, the PCRC recommends removing references to mistakes of law in ss 76 and 79, and setting out the position on mistake of law in a standalone provision.

Recommendation 77: Preserve the general exclusionary rule that a mistake or ignorance of law does not provide a defence to a criminal charge

11 The PCRC recommends preserving the general exclusionary rule that a mistake or ignorance of law does not provide a defence to a criminal charge. Specifically, the PCRC recommends not to introduce any further exceptions to the general exclusionary rule, including an exception based on reasonable reliance on official advice or legal advice.

12 No distinction is drawn between mistake and ignorance of law, because none of the theories that underpin the defence recognises a difference. In this regard, *Ratanlal 26th Ed* states that "whatever merits this distinction [between mistake of law and ignorance of law] may possess in academic discussion, it has been rejected by the Courts as being a refinement too subtle for application to practical affairs".¹¹

13 Thus, a standalone provision will state that except as provided for in any written law, mistake or ignorance of law shall not constitute a defence to any criminal charge.

¹⁰ This comment is *obiter*, as the case was in fact decided on the grounds that the offence was not strict liability, and that the Prosecution had failed to prove the *mens rea* of knowledge of wrongfulness of the act because the accused was not even aware of the prohibition order against him.

¹¹ *Ratanlal 26th Ed* at p 296.

Recommendation 77(a): It is not recommended to create an exception based on reasonable reliance on legal advice

14 Although some legal scholars have advocated recognising an exception of reasonable reliance on professional legal advice¹², the reality is that most common law jurisdictions have not recognised this exception.

15 Of the foreign jurisdictions surveyed (England and Wales, Australia, Canada, the United States, Germany and France), only Germany and France recognise a defence of reasonable reliance on legal advice.¹³ Notably, the application of the defence of reasonable reliance on legal advice in Germany and France has not been unqualified. In Germany, if the legal advice is wrong, it does not exculpate the offender unless the advisor was “reliable and could guarantee impartial responsible legal advice”¹⁴. This seems to demonstrate a reluctance to allow just any legal advice to give coverage. The test would also appear to entail difficult and invidious assessments about a legal counsel’s reliability and impartiality. In the case of France, the defence of unavoidable mistake of law is reportedly seldom successful.¹⁵

16 Pollock CB’s observation in *Cooper v Simmons*¹⁶ can account for some of the reservation in accepting such a defence: “it would be dangerous if we were to substitute the opinion of the person charged ... for the law itself”. In the case of reliance on legal advice, it is the opinion of lawyers that would count for more.

17 There is an additional concern about the potential for abuse. In this regard, Glanville Williams cautioned that allowing reliance on legal advice might open up a broad route to exculpation for corporate defendants in particular.¹⁷ One example of abuse might be if an accused deliberately withheld certain information from his lawyer, or presented information in a certain manner. While the requirement for “reasonable reliance” may eliminate some of these false defences, it is possible to imagine a disingenuous client falling back on his lack of legal expertise to justify why he instructed his lawyer a certain way. To scrutinise the communications between lawyer and client would also require a lifting of legal professional privilege. These pragmatic and utilitarian reasons militate against recognising an exception based on reasonable reliance on professional legal advice.

¹² For example, Andrew Ashworth in *Principles of Criminal Law* at p 236, and Chan Wing Cheong, Stanley Yeo & Michael Hor in *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) (“*A Model Code*”) at [7.6.21].

¹³ In the United States, the 7th circuit in *U.S. v Cheek* (3 F.3d 1057), has recognised a defence of reliance on legal advice of counsel. In order to establish the defence of good-faith advice of counsel, a defendant must establish that: (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report. That said, in *Cheek*, the court held that reliance on counsel’s advice could operate to negate the *mens rea* element of wilfulness – therefore, it would not have been regarded as a “true” defence in that case.

¹⁴ Mohamed Elewa Badar, “*Mens rea – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*”, (2005) *International Criminal Law Review* 5 at p 243.

¹⁵ Annemieke van Verseveld, *Mistake of Law – Excusing Perpetrators of International Crimes* (T.M.C. Asser Press, 2012) at p 52.

¹⁶ (1862) 7 H and N 707.

¹⁷ Glanville Williams, “The Draft Code and Reliance on Official Statements” (1989) 9 *Legal Studies* 177 at pp 186 – 187.

Recommendation 77(b): It is not recommended to create an exception based on reasonable reliance on an erroneous official statement of law

18 The PCRC considered the following arguments against recognising such a defence:

- (a) There is nothing to suggest that reliance on erroneous official advice leading to prosecution for criminal offences is a problem in Singapore. Where a person has committed an offence in reliance on erroneous official advice, the Public Prosecutor will exercise the prosecutorial discretion judiciously. It is a duty of the Public Prosecutor to exercise such discretion in the public interest, and there would arguably be no such public interest in the prosecution of someone who had placed reasonable reliance on an erroneous official advice obtained in good faith. Thus far, there have been no complaints of such prosecutions.
- (b) The possible adverse effect of such a defence on the service-oriented attitude adopted by public sector agencies. Recognising this defence will potentially lead to more requests for official guidance and advice – many of which will be sought as a form of immunity from criminal liability for the person relying on such advice. This imposition on limited public service resources as a *de facto* legal advisor can undermine the ability of public sector agencies to respond to genuine requests for advice. Recognising this defence may also lead public officers to be overly apprehensive and guarded when giving advice which may not benefit the public.
- (c) The effect of recognizing this defence is to allow the opinions of a person to be substituted for the law itself. Recognizing this defence will mean that the views of the executive will replace what Parliament had enacted. That said, the mistake of the individual is not norm-changing, i.e. the law is not altered by that understanding in other cases.

19 The PCRC considered the following arguments for recognising such a defence:

- (a) Furthering good citizenship and utilitarian goals by encouraging people to take measures to comply with the law. If persons who reasonably rely on erroneous advice are prosecuted, there would be less incentive to seek official clarification when in doubt about the lawfulness of their actions.
- (b) Promotion of fairness. In the interest of fairness, the State should not convict a person who has placed reasonable reliance on their or their officers' advice.
- (c) Variations of this defence have been recognised in other jurisdictions. The defence is recognized in civil jurisdictions which recognize reasonable mistake of law as a defence, e.g. Germany¹⁸ and France¹⁹. Certain common law jurisdictions like Canada²⁰ and the US²¹ have recognized the defence of reliance on official advice. In England and Wales, the courts may stay a prosecution for abuse of process, on

¹⁸ Section 17 of the German Criminal Code (Strafgesetzbuch).

¹⁹ Article 122-3 of Code Pénal 1994.

²⁰ *R v Jorgensen* [1995] 4 S.C.R. 55. Applied in *R v Lévis (City) v Tétreault* [2006] 1 S.C.R. 420.

²¹ Model Penal Code s 2.04(3). See also *US v Barker* 546 F.2d 940, and *Ostrosky v State of Alaska* 913 F.2d 590.

the basis that a person had acted on erroneous official advice that his act was lawful.²²

20 On balance, the PCRC's conclusion is that there is no clear advantage to recognising mistake arising from reasonable reliance on official advice as a defence. Most compellingly, the judicious exercise of the prosecutorial discretion would sieve out cases where it would be unjust to prosecute a person who had reasonably relied on erroneous official advice in good faith. The concerns about introducing such a defence are also not easily ameliorated.

Recommendation 78: Clarify that if mistake or ignorance of law will negate the fault element of an offence, the offence will fail as not all its elements have been proven beyond reasonable doubt

21 The PCRC *recommends* setting out the truism that when a mistake/ignorance of law negates the fault element of an offence, the offence is not made out for want of having proved all elements beyond reasonable doubt. This clarifies that a mistake/ignorance of law can absolve criminal responsibility by negating the fault element of an offence. An example of a mistake of law operating to negate the *mens rea* can be seen in the *bona fide* right of claim variety of cases: in a property offence (e.g. theft), a mistake as to a proprietary right over a property may negate the *mens rea* of dishonesty.

Recommendation 79: Create an exception to the exclusionary rule based on non-publication of legislation. This involves a codification of the judicially-recognised exception in *Lim Chin Aik v R*, viz. that all legislation must be published, subject to any other provisions on notice or publication in any written law

22 In all the jurisdictions surveyed (England and Wales, Australia, Canada, the United States, Germany and France), mistake of law arising from non-publication of the law that is infringed is a valid defence. In Singapore, this defence is also recognised in the common law in *Lim Chin Aik v R*, viz. that all legislation must be published in a way that persons affected can become aware of its content by exercising due diligence. The PCRC recommends codifying this exception.

23 The PCRC recommends the following formulation of this exception:

Non-publication of legislation

(1) Subject to any other provision on notice or publication in any written law, mistake or ignorance of law shall be a defence to any criminal charge if at the time of the act constituting the criminal charge, the Act or subsidiary legislation that directly or indirectly, creates or affects the scope or operation, of the offence which is the subject of the criminal charge, has not been made publicly available, and has not been otherwise made available to persons likely to be affected by it.²³

²² *Posternobile Plc v the London Borough of Brent*, 1997 WL 1103943. In the case, a company acted on wrong advice, by members of the local council's planning department that the erection of advertising boards would not require planning consent. The prosecution brought by the council was stayed as an abuse of process, as it is "important that the citizen should be able to rely on the statements of public officials".

²³ Adapted from the Australian federal provision in s 9.4(2) of the Criminal Code Act 1995.

(2) “Subsidiary legislation” means any order in council, proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Ordinance or other lawful authority and having legislative effect.²⁴

(3) Without prejudice to other methods of making an Act or subsidiary legislation publicly available, an Act or subsidiary legislation shall be regarded as having been made publicly available if it has been published online, or by Gazette.

24 An Act or subsidiary legislation shall be regarded as having been made available to the public if it has been published online, or by Gazette.²⁵ This will ensure that there are no onerous publication burdens placed on the Government. This defence will apply to any offence, i.e. it would cover offences with fault elements, strict liability offences²⁶, and absolute liability offences.

²⁴ This is consistent with s 2 of the IA.

²⁵ Currently, under s 23 of the Interpretation Act, all subsidiary legislation made under any Act or other lawful authority shall, unless it is otherwise expressly provided in any Act, be published in the Gazette. Unless it is otherwise provided in the subsidiary legislation, the subsidiary legislation would come into operation on the date of its publication. This would in fact mean that most subsidiary legislation will only come into force upon publication in the Gazette.

²⁶ See Section 19.3 of this report on “Defining strict liability”.

SECTION 23.3: ACCIDENT

SUMMARY OF RECOMMENDATIONS

(80) Clarify the phrase “lawful act” by means of the following explanation: “A lawful act is any act that is not an offence or which is not prohibited by law.”

(81) Remove the words “and without criminal intention or knowledge”

Introduction

The defence of accident under s 80 of the Penal Code has been described as “inadvertence without culpability”¹. It excuses conduct that would otherwise constitute an offence on account of the fact that the act(s) complained of occurred “accidentally, and without design in the course of a lawful action”.

2 While the defence is not meant to negate the elements in an offence, some of the exculpatory facts relied upon to establish the defence may in themselves be capable of raising a reasonable doubt in relation to the elements of the offence, *eg* the subjective *mens rea* of intention and knowledge).²

Current law

3 Section 80 states:

Accident in the doing of a lawful act

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

4 The defence comprises the following elements³:

- (a) The act done by the accused constituting the alleged offence was the result of or arose from a misfortune or an accident⁴;

¹ John Dawson Mayne, Subharama Swaminadhan, *Mayne’s Criminal Law of India* (Higginbotham, 4th Ed, 1914) at pp 394 – 397.

² *Leu Xing-Long v Public Prosecutor* [2014] 4 SLR 1024; [2014] SGHC 193 (“*Leu Xing Long*”) at [46].

³ *Id.*, at [43].

⁴ The definition of “accident” in Sir James Fitzjames Stephens, *A Digest of the Criminal Law (Crimes and Punishment)* (Macmillan and Co, 3rd Ed, 1883), p 143 has been adopted by our Courts in *Leu Xing Long* (at [42]): “[A]n effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence is not so probably that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.”

- (b) The act constituting the alleged offence took place or occurred in the course of the accused performing a lawful act “X” in a lawful manner, by lawful means;
- (c) The act “X” was done with proper care and caution; and
- (d) The act “X” was not done with any criminal intention or knowledge.

5 The Penal Code does not define “lawful act”. This was considered by the Court of Appeal in *Tan Chor Jin v PP*⁵, but the Court stopped short of providing a definitive explanation of the phrase. The Court stated that the distinction between crimes *malum in se* (ie conduct which was unlawful in and of itself) and crimes *malum prohibitum* (ie conduct prohibited by legislation) was relevant in determining what constituted a lawful act. One may infer from the Court’s decision that crimes *malum in se* are definitely unlawful, but that crimes *malum prohibitum* are capable of being regarded as lawful provided that the harm resulting from the accident must not be the sort of harm that the statute intended to prevent.⁶

6 While “criminal intention or knowledge” is not defined, some commentators have suggested that it simply denotes an intention or knowledge that is not wrongful.⁷

Impetus for review

7 Section 80 has rarely been pleaded as a defence in Singapore, and where it has, it has not presented many difficulties. However, the PCRC took the opportunity of this review to consider if it would be appropriate to clarify some of the terms in s 80 that are not clear on the face of the legislation or defined in case law, particularly “lawful act” and “criminal intention or knowledge”.

Recommendation 80: Clarify the phrase “lawful act” by means of the following explanation: “A lawful act is any act that is not an offence or which is not prohibited by law.”

8 As mentioned above, while “lawful act” is not defined in the Penal Code, the Court of Appeal in *Tan Chor Jin* appeared to exclude crimes *malum in se* from “lawful act”.

9 In February 2008, s 43 of the Penal Code, which originally set out the definition of “illegal”, was amended to create a definition for the word “unlawful”. The Parliamentary debates are silent about the policy intent behind the amendment. As a result of the amendment, s 43 now reads:

“Illegal”, “unlawful” and “legally bound to do”

43. The word “illegal” or “unlawful” is applicable to every thing which is an offence, or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be “legally bound to do” whatever it is illegal or unlawful in him to omit.

⁵ [2008] 4 SLR(R) 306 (“*Tan Chor Jin*”).

⁶ *YMC Rev 2nd Ed* at para 18.14.

⁷ *Ratanlal* at p 308: “Criminal intention simply means the purpose or design of doing an act forbidden by the criminal law without just cause or excuse. An act is intentional if it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied.”

10 The introduction of a definition for “unlawful” may inadvertently allow someone to argue that a “lawful act” is one that is not “unlawful” – a term which is defined in the Penal Code. Because of the way an “unlawful” act is defined as including something which furnishes ground for a civil action, one may argue that if an act can provide grounds for a civil action, it is not a “lawful act”.

11 This is a narrowing of the definition of a “lawful act” in *Tan Chor Jin*. It means that someone who does an act which is not an offence, but which furnishes grounds for a civil action, would be denied the defence of accident. This can lead to perverse outcomes, *eg* the man using the axe in the illustration to s 80 may be deprived of this defence if his use of the axes is in breach of some contractual obligation.

12 To provide greater clarity about what constitutes a “lawful act” and to avoid unintended consequences of the creation of a definition of “unlawful” in 2008, the PCRC recommends the introduction of the following explanation of “lawful act” in s 80:

A lawful act is any act that is not an offence or which is not prohibited by law.

Recommendation 81: Remove the words “and without criminal intention or knowledge”

13 The PCRC recommends removing the words “and without criminal intention or knowledge” in s 80. As “and without criminal intention or knowledge” denotes intention or knowledge that is not wrongful, the phrase is redundant in light of requirement that the accident must arise in the doing of a lawful act in a lawful manner and by lawful means.

14 With the recommended amendments, s 80 will read (amendments in red font):

Accident in the doing of a lawful act

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge , in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

<i>Explanation</i>

A lawful act is any act that is not an offence or which is not prohibited by law.

<i>Illustration</i>

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

SECTION 23.4: NECESSITY

SUMMARY OF RECOMMENDATION

(82) Remove the reference to criminal intention in s 81 of the Penal Code

Introduction

The defence of necessity is provided for in s 81 of the Penal Code. There is no case law in Singapore on necessity, and the cases in Malaysia and India do not provide significant guidance on the application on the defence. However, having considered the defence under s 81 and the analogous defences in other overseas jurisdictions (such as England, Australia and Canada), the PCRC recommends that no substantive amendment be made to s 81 of the Penal Code.

2 The only exception would be a clarification to s 81 as a result of the codification of the definition of “intention”, and in particular the retention of “oblique intention” as part of the definition of “intention”, which the PCRC has recommended in Chapter 5 of this report. The issues raised are discussed below.

Current law

3 Section 81 states:

Act likely to cause harm but done without a criminal intent, and to prevent other harm

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, *if it be done without any criminal intention to cause harm*, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation — It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations

...

(b) A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A’s act, A is not guilty of the offence.

4 The defence of necessity under s 81 (read with the illustrations and the explanation to s 81) has the following requirements:

- (a) There must be a harm to person or property to be prevented or avoided;
- (b) The act of the accused for which the defence of necessity is being sought must have been done without criminal intention to cause harm and in good faith for the purpose of preventing the harm;

- (c) The harm to be prevented or avoided must be of such a nature and so imminent as to justify or excuse the act. This is a question of fact; and
- (d) The accused was not at fault in creating the situation where the harm sought to be prevented or avoided presented itself.

Impetus for review

5 Section 81 provides a total defence where something is done with the knowledge that it is likely to cause harm for the purpose of preventing or avoiding other harm to person or property. However, this includes a proviso that this act cannot be done with an *intention* to cause harm, and it must be in good faith for the purpose of preventing or avoiding harm.

6 The PCRC notes that the highlighted proviso, if extended to oblique intention, may render s 81 unworkable due to the proviso becoming excessively wide. Referring to Illustration (b), when A pulls down houses to save human life or property in a fire, he obliquely intends to harm those houses as he knows with virtual certainty that they will be destroyed. In fact, one might also say that he has direct intention to harm the houses, to create a fire break. The proviso thus suggests that he has no defence under s 81 (it is not clear what the word “criminal” in “criminal intention” adds to this analysis). However, s 81 is clearly designed to provide A with a defence.

Recommendation 82: Remove the reference to criminal intention in s 81 of the Penal Code

7 In order to resolve this issue, the PCRC recommends amending s 81 of the Penal Code as follows:

Act likely to cause harm but done ~~without a criminal intent, and~~ to prevent other harm

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done ~~without any criminal intention to cause harm, and~~ in good faith for the purpose of preventing or avoiding other harm to person or property.

SECTION 23.5: MINIMUM AGE OF CRIMINAL RESPONSIBILITY

SUMMARY OF RECOMMENDATIONS

- (83) Raise the minimum age of criminal responsibility (“MACR”) from 7 to 10 years
- (84) Amend s 83 of the Penal Code so that nothing is an offence which is done by a child above 10 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion
- (85) Introduce a mechanism to compel offenders below the MACR and offenders acquitted by virtue of s 83 to attend treatment/ counselling and other non-custodial programmes, where necessary

Introduction

The defence of infancy in the Penal Code operates to protect a child still in his developmental years from the damage that might otherwise result from an early entry in the criminal justice system, by setting a minimum age at which a child can be held criminally responsible. The underlying rationale for the defence is that children under a certain age, no matter what their backgrounds might be, are insufficiently developed to fully understand the physical nature and consequences of their conduct.¹

Current law

2 The defence of infancy is codified in ss 82 and 83 of the Penal Code.

Act of child under 7 years of age

82. Nothing is an offence which is done by a child under 7 years of age.

Act of child above 7 and under 12 years of age, who has not sufficient maturity of understanding

83. Nothing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.

3 Under the Penal Code, there are two age-groups of children that are protected under the defence of infancy:

- (a) Those who are under 7 years of age are deemed by law to be *doli incapax* (incapable of crime).
- (b) When a child is above 7 years of age, and under 12 years of age, his incapacity to commit an offence only arises where it can be proved that he had not attained sufficient maturity to judge of the nature and consequences of his conduct on that occasion. This defence will have to be specifically pleaded and proved. The ability to judge of one’s conduct is the ability to understand the “natural and physical

¹ *YMC Rev 2nd Ed* at para 28.2.

consequences” that will flow from acts, *eg* when fire is applied to a flammable substance, it will burn; or a heavy blow with an axe or sword will cause death or grievous hurt.²

Impetus for review

4 The defences in ss 82 and 83 were adopted from the Indian Penal Code, which in turn adopted the position in the English common law in colonial times. Under English common law, a child under the age of 7 was conclusively presumed to be incapable of crime, and children above the age of 7 and under the age of 14 were presumed to be incapable of crime unless this presumption was rebutted.³ This presumption could be rebutted if the prosecution could prove a “mischievous discretion” on the part of the accused child, *ie* the capacity to differentiate right and wrong.⁴

5 The English common law position has since been amended by statute. The MACR has been raised to 10 years old (s 50 of the Children and Young Persons Act 1933⁵, as amended by s 16 of the Children and Young Persons Act 1963⁶), and the rebuttable presumption of *doli incapax* for those between 7 and 12 years of age has been abolished by s 34 of the Crime and Disorder Act 1998⁷.

6 The evolution of the MACR in England and Wales gives us pause for consideration about whether our own MACR is appropriately set. A brief account of this evolution is set out below:

- (a) The MACR was first raised from 7 to 8 years of age in 1933. A Member of Parliament, Mr Rhys Davies remarked during the Second Reading of the Children and Young Persons Bill in the House of Commons: “As we have extended the average age of life of the individual in this country by 10 or 12 years, so we ought to regard the child as being a child longer than we used to...”
- (b) The MACR was then raised again from 8 to 10 years of age in 1963. This decision was a “compromise solution” with some segments who had advocated an MACR of 12.⁸ The Lord Chancellor had, during the debate on the Children and Young Persons Bill on 24 Jan 1963 in the House of Lords, highlighted that if the MACR was set at 12, there would be a large group of those aged 10 and 11, which age-

² *Ratanlal* at p 316. See also *YMC Rev 2nd Ed* at para 28.6, where the authors observed that “... a child can successfully rely on s 83 without needing to prove that he or she lacked sufficient maturity to know that, in the given circumstances, it was wrong for him or her to ignite an inflammable substance or to strike a person with an axe.”

³ Sir William Blackstone, *Commentaries of the Laws of England: In Four Books*, Vol II, Book IV (Thomas M Cooley ed) (Chicago, Callaghan and Company, Third Rev Ed, 1884) (“*Blackstone*”) at p 22.

⁴ *C. (A Minor) v Director of Public Prosecutions* [1995] 2 WLR 383 at 388 where Lord Lowry observed as follows (citing PJ Richardson and Archbold, *Criminal Pleading Evidence & Practice* (Sweet & Maxwell, 1993 Ed) vol. 1, p 52, at para 1-96) “... Between 10 and 14 years a child is presumed not to know the difference between right and wrong and therefore incapable of committing a crime because of lack of *mens rea*... Wrong means gravely wrong, seriously wrong, evil or morally wrong.”

⁵ (23 and 24 Geo 5 c 12) (UK).

⁶ (c 37) (UK).

⁷ (c 37) (UK).

⁸ United Kingdom, House of Lords, Parliamentary Debates (24 January 1963) Vol 246 at col 213 (the Lord Chancellor, Viscount Dilhorne).

group formed a sizeable proportion of those who were found guilty and cautioned for offences, who would be out of the law’s reach.⁹

- (c) There have been more recent calls to raise the MACR in England and Wales from 10 to 12 years of age. In 2016, Lord Dholakia moved an Age of Criminal Responsibility Bill, contending that children under 12 were not mature enough to be criminally liable (not that they cannot be responsible for their actions), and that putting such children through the criminal justice system would be detrimental to them. This move to raise the MACR ultimately failed. The Minister of State, Ministry of Justice, Lord Faulks, said during the debate on the Bill on 29 January 2016, that “*The Government believe that children aged 10 and above are, for the most part, able to differentiate between bad behaviour and serious wrong doing and should therefore be held accountable for their actions.* Where a young person commits an offence, it is important that they understand that it is a serious matter.” (emphasis added) His Lordship also highlighted that “*Having the age of criminal responsibility set at 10 years allows flexibility to deal with young offenders. If particular needs are identified in a young offending team’s assessment of a child... the multiagency youth offending team, which includes representatives from health, housing, children’s services and education, can refer the child on to other statutory services...*” (emphasis added)

Recommendation 83: Raise the MACR from 7 to 10 years

7 The PCRC recommends raising the MACR under s 82 of the Penal Code from 7 to 10 years old.

8 The PCRC makes this recommendation for the following reasons:

- (a) Although there is no scientific consensus on when a child is mature enough to appreciate right and wrong and/or the natural consequences of his actions, there is some authority that a 10-year-old is generally able to appreciate the importance of law and order concerns.
- (b) As international trends go, there is no consensus on what age to set the MACR at. A MACR of 7 years old is, however, the lowest age-point amongst states which have a MACR.
- (c) From a community-protection perspective, conferring immunity from criminal liability on 7 to 9-year-olds would not present a significant risk in Singapore, as the number of children arrested from this age-group is small. There is however, a

⁹ *Id.*, at col 209, 212: “At present, some 18,000 children under 12 are found guilty of offences... each year. Of these, about 13,400 are aged 10 or 11 and 4,700 are 8 or 9. In addition, over 7,000 are formally cautioned... about 4,000 of them 10 or 11 and 3,000 8 or 9.

...
It is not, I submit, realistic to expect (the schools) to deal, without the backing of the courts, with the 13,000 10 or 11-year-olds who are not at present responding to the remedial influences which the schools have brought to bear on them. We agree that criminal proceedings are not suitable for children of 8 or 9, and that their delinquency should be regarded as a problem for the social services – the schools, the child guidance clinics and the children’s departments of local authorities... At this age these services can and should give the child and his parents whatever help the child’s behaviour may suggest is necessary.”

marked increase in the number of juveniles arrested from age 10 onwards, and there is therefore a need to have a means to intervene via the criminal justice system for the age-group of 10 years old and above.

Children at 10 years old are mature enough to appreciate law and order concerns

9 There is some authority that children at 10 years of age are mature enough to appreciate law and order concerns:

(a) Academic Opinion: The American psychologist, Lawrence Kohlberg, developed a framework for the various stages of moral development.¹⁰

(i) At the pre-conventional level (children between the ages of 4 and 10), the observance of rules and regulations at this level is mainly based on a desire to avoid punishment.

(ii) At the conventional level (children between the ages of 10 and 13), children at the lower end of this age-group conform to generally acceptable norms and rules with an intent to avoid the disapproval and dislike of others. As they grow older within this bracket, children begin to conform for the purposes of avoiding sanctions by legitimate authorities and findings of guilt as a result of breaking the law.

(iii) At the post-conventional level (children around 13 years of age), children conform to the law as a result of a motivation to maintain and preserve community welfare.

(b) Hong Kong: In various submissions to the Hong Kong Law Reform Commission (“HKLRC”), it was suggested that children are able to discern right from wrong from age 10 onwards:

(i) The Hong Kong Department of Health said that a child’s ability to judge morally follows a “development path” closely tied to his age, and children 10 years and under are generally too young to judge right and wrong and to properly realise the consequences of their actions.¹¹

(ii) The Hong Kong Psychological Society submitted that a 7-year-old is too young to bear criminal responsibility. The Society’s view was that children would have learned of the importance of law and order and society’s expectations of them by the age of 10 to 12 years, corresponding to the age at which a child’s cognitive and moral maturity begins to develop.¹²

¹⁰ Cited in the Law Reform Commission of Hong Kong, *Report on The Age of Criminal Responsibility in Hong Kong* (25 May 2000) (“HKLRC Report”) at para 3.32.

¹¹ *Id.*, at para 3.36.

¹² *Id.*, at para 3.34.

10 Some experts even go so far as to suggest that people do not fully mature until at least 20 years of age¹³. There are also some who have observed that there are many antecedents which exercise causal effects on actions (*eg* chemical, neurological, biological, social, peer example, education, knowledge and beliefs).¹⁴

11 Thus, while there is some evidence that the age of 10 years may be an appropriate minimum age to attribute criminal liability to a child, there is no scientific consensus on what the MACR should be and the PCRC does not think that scientific views alone can be conclusive on this matter. In the words of the of the Kilbrandon report, a minimum age of criminal responsibility is “not a reflection of an observable fact”, but an “expression of public policy” – a practical working rule that determines the cases and procedure which may result in applying punishment to children.¹⁵

Setting the MACR at 7 years old is low by comparison to international standards

12 Our current MACR of 7 years of age is low from an international perspective:

- (a) United Nations: The United Nations Committee on the Rights of Children recommends that the internationally acceptable MACR should be 12.¹⁶
- (b) England and Wales: As outlined above, the MACR was raised in England and Wales over the years, from 7 to 10 years of age.
- (c) Northern Ireland: The MACR in Northern Ireland is 10 years of age. In an independent review commissioned in 2010 by the Minister of Justice, David Ford, it was suggested to raise the MACR from 10 to 12, with a view to further raising the MACR further to 14 after a period of time.¹⁷ The review also noted that while the small number of children below these ages would still need support and discipline and be held to account for their behaviour, this should not be through a

¹³ For example, the former Children’s Commissioner for England, Dr Maggie Atkinson, argued that attribution of full criminal culpability to a 10-year-old child runs counter to available evidence that the pre-frontal cortex, responsible for impulse control and decision making continues to develop into the early 20s: Pam Hibbert et al, “Age of criminal responsibility must be raised to protect children’s rights”, *The Guardian* (5 December 2012) <<https://www.theguardian.com/society/2012/dec/05/age-criminal-responsibility-childrens-rights>> (accessed 14 August 2018).

¹⁴ The Royal Society, “Brain Waves Module 4: Neuroscience and the law” (December 2011) at pp 12 to 14. The Royal Society is a Fellowship of many of the world’s most eminent scientists and is the oldest scientific academy in continuous existence (founded in London on 28 Nov 1660 with King Charles II as its patron): Information from Royal Society website <<https://royalsociety.org/about-us/history/>> (accessed 14 August 2018).

¹⁵ Committee Appointed by The Secretary of State for Scotland, *The Kilbrandon Report: Children and Young Persons Scotland* (Cmnd 2306, 1964) (Chairman: Lord Kilbrandon). See also, the judgment of Lord Reed in *V v United Kingdom* ECHR Application 24888/94 (cited in the *HKLRC Report* at [6.16]) where his Lordship said: “... the purpose of attributing criminal responsibility to a child is not to cause that child suffering or humiliation, but to reflect the consensus of the society in question as to the appropriate age at which a child is sufficiently mature to be held criminally responsible for his or her conduct. Since perceptions of childhood reflect social, cultural and historical circumstances, and are subject to change over time, it is unsurprising that different States should have different ages of responsibility.”

¹⁶ See UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“*The Beijing Rules*”), Rule 4 UN Doc A/RES/40/33.

¹⁷ Northern Ireland Department of Justice, *A Review of the Youth Justice System in Northern Ireland* (2011).

criminal justice process that further damages them. Opposition by the Democratic Unionist Party prevented an increase of the MACR to 12 years.¹⁸

- (d) Hong Kong: The MACR was raised in Hong Kong from 7 to 10 years of age in 2003, pursuant to the recommendations in the HKLRC Report. In particular, the HKLRC noted that (a) the weight of opinion seems to be that a 7-year-old cannot fully appreciate the criminal nature of his/her actions, and (b) statistics in Hong Kong suggest that there is no significant criminal activity among children below 10, and that there appears to be a marked increase in criminal activity from the age of 10.¹⁹

Conferring immunity from criminal liability on 7 to 9-year-olds would not present a significant community-protection risk

13 In Singapore, there appears to be little criminal activity among children below the age of 10.

14 From 2014 to 2016, the number of children from 7 to 9 years of age arrested by the police was about 150 and formed only about 2 to 4% of the total number of juveniles (from 7 to 15 years old) arrested each year.

15 In light of these statistics, the PCRC's view is that there would not be a significant threat to public safety if children in the age-group of 7 to 9-year-olds are excluded from criminal responsibility.

Recommendation 84: Amend s 83 of the Penal Code so that nothing is an offence which is done by a child above 10 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion

16 The PCRC recommends amending section 83 of the Penal Code to provide that nothing is an offence which is done by a child of or above 10 years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.

17 The above amendment is a natural corollary to the raising of the MACR from 7 to 10 in that the defence under s 83 of the Penal Code would no longer be necessary for those aged 7 to 9 once the MACR is raised to 10.

Recommendation 85: Introduce a mechanism to compel offenders below the MACR and offenders acquitted by virtue of s 83 to attend treatment/counselling and other non-custodial programmes, where necessary

18 The PCRC recommends putting in place a framework to address offending behaviour in children below the MACR (where necessary) and offenders found to not have attained

¹⁸ "Age of criminal responsibility could rise says David Ford", *BBC News* (23 October 2012) <<https://www.bbc.com/news/uk-northern-ireland-20043029>> (accessed 14 August 2018).

¹⁹ *HKLRC Report* at paras 6.3 – 6.19.

sufficient maturity of understanding to judge of the nature and consequence of their conduct by virtue of s 83.

19 The PCRC is of the view that although the children below the MACR and those who have not attained sufficient maturity of understanding cannot be criminally liable for their actions, there is still offending behaviour that has to be addressed from two perspectives:

- (a) The interest of the child and the public in guiding these children away from such conduct in the future; and
- (b) Where the offending behaviour has caused serious harm, the public interest in ensuring that public safety is safeguarded.

Therefore, there should be options available to require such children to attend programmes or undergo supervision if necessary.

20 The key features of the proposed framework are:

- (a) Statutory provisions to allow the relevant agency to refer children below the MACR who have committed offences to the Youth Court²⁰ or a suitable body for orders to be made against them. This is intended to be a non-criminal framework.
- (b) The orders that may be made against such children should be limited to non-custodial, community-based programmes *eg* treatment/evaluation, counselling, workshops, curfew, area restrictions, supervisions by suitable adult. Short residential programmes should not be excluded if these are appropriate. The law can specify a limit for the duration of any residential programmes (*eg* 3 to 5 days).
- (c) The parents of such children are to ensure compliance of the child, failing which a fine may be imposed. The parents may also be ordered to attend relevant programmes *eg* counselling, workshops, treatment.
- (d) Such orders may be made on proof of an act that would have been an offence if the child was above the MACR. The civil standard of proof (balance of probabilities) should be adopted. Such a standard is acceptable since the orders are intended to be beneficial for the child and are non-custodial in nature.
- (e) Provisions to make clear that police can investigate offences involving children under the MACR.
- (f) The relevant agency should be provided with powers to refer appropriate cases for evaluation to determine treatment, programmes and follow-up action.
- (g) Most cases involving children below the MACR can continue to be dealt with by the child's school or parents and referral to the Youth Court or the appointed body can be reserved for cases which are assessed to be unsuitable for the existing arrangements.

²⁰ The hearings should be as unthreatening as possible and should be held in chambers, if possible.

21 For offenders above the MACR who are acquitted by virtue of s 83 (insufficient maturity of understanding), the court that acquitted the child may make the orders that are available for children below the MACR (*ie* the orders in paragraph 20(b) and (c) above). The PCRC is of the view that children who are acquitted by virtue of s 83 may require assistance or intervention in order to prevent them from offending in future and the court should be given the option to make the necessary orders.

22 While there is a possibility of children between 7 to 9 years of age committing serious crimes, this is expected to be extremely small in number, if any. Such cases can be dealt with by the mandatory treatment or counselling orders referred to above. The range of powers available to the Youth Court or such other body appointed, including mandating supervision by a suitable adult or guidance officer, should be sufficient to reform the child and prevent re-offending. Seeking to keep such children in detention would be contrary to the spirit and rationale of raising the MACR, and such detention may also expose the child other negative influences.

SECTION 23.6: CONSENT

SUMMARY OF RECOMMENDATIONS

(86) *No amendments are required to provide a statutory definition of “consent”*

(87) *No amendments are required to clarify the types of misconception of fact in s 90 that will vitiate consent*

Introduction

The moral limits of criminal law, including the extent to which a person is permitted to consent to harms against himself, depend largely on the interaction of three principles of moral philosophy¹: (i) liberalism², (ii) paternalism³, and (iii) legal moralism⁴.

2 In Singapore, liberalism is the dominant principle in the defence of consent. With a small number of exceptions, consent is usually a defence to the causing of harm. Considerations of legal moralism also feature in this area of the law: s 91 of the Penal Code makes clear that consent is no defence in a victimless crime, *eg* incest (s 376G). There is also an element of pragmatism in the way the Code framers chose to draft the provisions on the defence of consent: “We cannot prohibit men from destroying the most valuable effects, or from disfiguring the person of one who has given his unextorted and intelligent consent to such destruction or such disfiguration, without prohibiting at the same time gainful speculations, innocent luxuries, manly exercises, healing operations.”⁵

Current law

3 The provisions relating to the defence of consent in the Penal Code are set out in ss 87 – 92, and Exception 5 to s 300. Consent can feature as an element of an offence, *e.g.* the offence of rape under s 375 of the Penal Code is defined as having sexual intercourse with a woman without her consent, so that the Prosecution will have to prove beyond reasonable doubt that the victim had not consented⁶. Consent can also feature as a defence, *e.g.* in an offence of

¹ Law Commission Consultation Paper No. 139, *Consent in the Criminal Law* (1995) (“*Consent in the Criminal Law*”) at para C.22 – 23.

² Liberalism is closely associated with the “harm principle”, *i.e.* the principle that the acceptable limits of criminal law is to prevent harm to others: *Consent in the criminal law* at para C.25 – 28. Thus, prohibition of consensual activities is not justified, even when they are likely to harm the interests of the consenting parties: Joseph Feinberg, *The Moral Limits of the Criminal Law, Volume One: Harm to Others* (1984) at pp 35 – 36.

³ Paternalism justifies a state using its coercive powers “to force a person to act or forbear to act against his will in order to promote his own self-interest and well-being”: *Consent in the Criminal Law* at para C.59. Paternalism is a competing principle with liberalism.

⁴ Legal moralism goes a step further than paternalism. It is used to justify proscribing any immorality even if it causes no harm or offense to anyone (including the doer of the act). This sort of immorality has been described as “free-floating non-grievance evils”, *i.e.* evils that “float free” of human interests, including sexual immorality such as adultery, violation of social or religious taboos, and the extinction of cultural identity: *Consent in the Criminal Law* at para C.71.

⁵ Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners* (London: Pelham Richardson, 1838), Note B at p 80.

⁶ *YMC* at [19.1]. See also *Ong Ming Wee v PP* [2013] 1 SLR 1217 at [44], which referred to the Prosecution’s burden of establishing the elements of the charge, *i.e.* that the complainant did not consent to sexual intercourse with the appellant, beyond a reasonable doubt.

voluntarily causing hurt, an accused can be exonerated by proving on the balance of probabilities that the victim had consented to the hurt that was caused.

4 As a defence, if consent is successfully pleaded, it affords a complete defence to the charge (ss 87 – 92). However, with regard to murder, consent will only operate as a partial defence to reduce a charge of murder to one of culpable homicide not amounting to murder (Exception 5 to s 300).⁷

5 The types of situations in which consent would operate as a complete defence, or where harm-causing acts are permitted for the victim’s benefit in the absence of consent (under s 92), can be classified into three categories:

- (a) Section 87: Where the accused neither intended to cause death or grievous hurt, nor knew that the act was likely to cause death or grievous hurt, and the victim who is above 18 years old had consented (whether expressly or impliedly) to suffer the harm caused, irrespective of whether the harm caused was for the benefit of the victim. An example of a situation which would be covered by this defence is competitive sports, e.g. fencing, where competitors consent to take the risk of harm.
- (b) Section 88: Where the accused did not intend to cause death, and had intended in good faith the act to be for the victim’s benefit, and the victim who is 12 years old and above, had consented to suffer the harm caused or to take the risk of that harm. An example of a situation which would be covered by this defence is a surgeon who performs a high-risk surgery likely to cause the victim’s death, but not intending to cause his death, for the benefit of the victim.
- (c) Sections 89 and 92: These provisions cover situations where the act done was for the benefit of the victim, where the victim could not consent. Where the victim was unable to give consent because he is under 12 years of age, or of unsound mind, s 89 permits the guardian to do a harm-causing act, or give consent to the victim suffering harm, provided that the harm-causing act is done in good faith for the victim’s benefit. Where no guardian can be found to give consent, or the circumstances are such that it is impossible for the victim to signify consent, s 92 permits the accused in good faith to engage in acts which cause harm to the victim for the victim’s benefit – this is intended to cover emergency situations. An example of a situation which would be covered by this defence is a parent who consents to a child undergoing an operation for the child’s benefit. Also covered by this defence would be instances of school discipline or parental discipline of a child.

What constitutes consent

6 The term “consent” is not defined in the Penal Code, but s 90 sets out a list of circumstances when consent will not be regarded as consent, i.e. consent is vitiated.

Consent given under fear or misconception, by person of unsound mind, etc., and by child

⁷ The partial defence to murder is discussed in greater detail in Section 25.5 of the Report.

90. A consent is not such a consent as is intended by any section of this Code —

(a) if the consent is given by a person —

(i) under fear of injury **or wrongful restraint to the person or to some other person**; or

(ii) under a misconception of fact, and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;

(b) if the consent is given by a person who, from unsoundness of mind, **mental incapacity**, intoxication, **or the influence of any drug or other substance**, is unable to understand the nature and consequence of that to which he gives his consent; or

(c) unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.

Red font indicates amendments to s 90 that were made pursuant to the 2007 Penal Code amendments.

7 As “consent” is undefined, s 90 prescribes a non-exhaustive list of grounds for vitiating consent. The non-exhaustive prescription of grounds that can vitiate consent in legislation is consistent with the approach taken in other jurisdictions like England and Wales⁸ and Australia⁹.

8 On what would amount to a “misconception of fact” under s 90(a)(ii), in *Siew Yit Beng v PP*¹⁰ (“*Siew Yit Beng*”), the High Court found in relation to an allegation of rape that as there was no misconception as to the *nature of the act*, consent was not vitiated. This was a case involving an appellant convicted of an offence of knowingly giving false information that she had been raped by her physician. The appellant contended that she had only agreed to sexual intercourse with the physician, as she was labouring under the misconception that he would cure her thereafter. The High Court found that as the appellant had no misconception regarding the nature of the sexual act, and did not regard it as part of her treatment, her consent could not be vitiated. As such, the appellant’s allegation of rape was false.

9 In the context of sexual offences, the definition of “consent” has been developed by case law. In *Pram Nair v PP*¹¹, a 5-Judge Court of Appeal applied the concept of consent as defined in *Ratanlal 26th Ed*:

“... Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent... A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of

⁸ See ss 74 – 76 of the SOA 2003, which define consent in the context of sexual offences.

⁹ In every state jurisdiction in Australia, legislation prescribes some circumstances where consent to a sexual act is defined not to exist; these circumstances are non-exhaustive: Australian Law Reform Commission & New South Wales Law Reform Commission, *Family Violence – A National Legal Response Vol. 1*, Final Report (ALRC Report 114; NSWLRC Report 128, Oct 2010) at paras 25.89 and 25.121. See also *Halsbury’s Laws of Australia* at para 130-2015.

¹⁰ [2000] 2 SLR(R) 785.

¹¹ [2017] SGCA 56 at [93].

her physical and moral power to act in a power she wanted. Consent implies the exercise of free and untrammelled right to forbid or withhold what is being consented to; it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.”

Offences excluded from the defence of consent

10 Section 91 states that the defence of consent under ss 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause to the consenting party. This section makes clear that ss 87, 88 and 89 apply only to offences that have as an element the causing of harm to the consenting party, and the defence would not apply to acts which are offences for other reasons. Hence, offences like rioting and gross indecency, being offences quite apart from any harm being caused to the consenting party, do not admit the defence of consent.

Impetus for review

11 The defence of consent has not presented much difficulty in application, as evidence by the general paucity of contentious discussion in case law on these provisions. However, the PCRC took the opportunity of this review to consider, amongst other things, whether it would be beneficial to provide a general positive definition of “consent”.

Recommendation 86: No amendments are required to provide a statutory definition of “consent”

12 The PCRC recommends that no amendments are required to provide a statutory definition of “consent”.

13 Some legal scholars have suggested that “consent” should be defined positively in the Penal Code: “For consent to be established, the recipient of the harm suffered must have been a sober and mentally sound person above 12 years of age who has freely given his or her consent based on facts which are material to his or her decision-making.”¹² However, the proposed formulation, and indeed any formulation, will not be free from difficulty. In the case of the proposed formulation, it is at least debatable what “free consent” entails, and what sort of facts will be regarded as “material” to decision-making. The experience of England and Wales has shown that having a positive definition very seldom assists in clarifying the scope of consent.¹³ Given the current scope of s 90 (which already covers capacity to consent, and the voluntary and informed nature of consent) it is also difficult to envisage what else the positive definition of “consent” will cover which is not already addressed in s 90.

14 Although a general definition of “consent” may not assist the courts in practice, the PCRC considered whether such a definition could serve an educative or signalling function. In jurisdictions that have trial by jury, this would simplify the judge’s task of giving directions to

¹² *YMC* at [19.13].

¹³ In England and Wales, in respect of the general definition of consent under s 74 of the SOA 2003, “the concepts of freedom, agreement, choice, and capacity do not provide sufficiently clear signposts to prevent inconsistent outcomes”: Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press, 2016) at p 364.

the jury, and may also make it easier for the jury to understand what is meant by consent¹⁴. But this consideration is irrelevant in Singapore. As a means of education, s 90 is already able to perform that role. In particular, s 90 provides a guide as to the elements true consent must possess – true consent must be voluntary and informed, and given by a person who has capacity to give such consent. Furthermore, education is not the primary purpose of legislation, and this may be better achieved through other more effective means such as formal education in schools, and social awareness campaigns.

15 Instead, the PCRC’s view is that the current s 90 PC provides a *de facto*, functional and simple to use “definition”, by listing the types of consent that would not amount to consent under the Penal Code. In practice, our courts have not appeared to suffer from the lack of a statutory positive definition of “consent”. Given the lack of any obvious faults with our current legislation on consent, and the lack of any obvious utility to including a general definition of consent, the PCRC recommends that a statutory definition of “consent” is not required.

Consent in the context of sexual offences

16 The PCRC gave especial consideration to whether a definition of “consent” would at least be beneficial in the context of sexual offences. After all, it is more common to find a positive definition of “consent” in the context of sexual offences in other jurisdictions, than it is to find a general definition of “consent” that applies to all offences.¹⁵

17 In particular, AWARE has advocated for the introduction of a statutory definition of consent in the context of sexual activity¹⁶ for the following reasons: while Singapore’s case law on consent in this context is fairly nuanced¹⁷, it is not accessible to most people; and while s 90 sets out some factors which vitiate consent, “the absence of a single clear and comprehensive statutory definition can lead to public confusion, including among sexual assault survivors and agencies who may encounter them”. This is also the view held by some in England and Wales: “[setting a statutory definition of consent in the context of sexual activity] would enable Parliament to consider and recommend what should and should not form acceptable standards of behaviour in a modern society”.¹⁸

¹⁴ Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law in sexual offences*, (Cm 5668, November 2002) (“*Protecting the Public*”) at para 2.10.3.

¹⁵ **California:** “‘consent’ shall be defined to mean positive co-operation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.” (Penal Code, section 261.6)

Canada: “‘consent’ means ... the voluntary agreement of the complainant to engage in the sexual activity in question.” (Criminal Code, section 273.1)

England and Wales: “... a person consents if he agrees by choice, and has the freedom and capacity to make that choice.” (SOA 2003, section 74)

Scotland: “‘consent’ means free agreement (and related expressions are to be construed accordingly).” (Sexual Offences (Scotland) Act 2009, section 12)

Victoria: “‘consent’ means free agreement.” (Crimes Act 1958, section 36)

¹⁶ AWARE, “AWARE response to AGC statement (Joshua Robinson case)” <<https://www.aware.org.sg/2017/03/aware-response-to-agc-statement-joshua-robinson-case/>> (accessed 24 August 2018).

¹⁷ For example, the courts have recognised that consent initially given can later be withdrawn during sexual activity, and that consent to one form of intimacy, such as kissing, is not consent to other forms of intimacy, such as intercourse.

¹⁸ *Protecting the Public* at para 2.10.3.

18 However, the PCRC maintains its view that a positive definition of “consent” would need to be broad to account for the multitude of circumstances where the issue of consent would arise; its broadness means that it would be of little practical use to the courts. Such a definition would still have to be supplemented either with case law, or additional provisions setting out what does and does not constitute consent. In the end, the introduction of a definition of “consent” in England and Wales also failed to resolve the ambiguities about its meaning and scope.¹⁹

19 The PCRC agrees that the application of the concept of consent in particular situations that come before our courts should be publicised. This will contribute towards a greater public understanding of how sexual relations should be conducted. However, the PCRC takes the view that this objective is better achieved through targeted approaches, such as formal sex education in schools and social awareness campaigns. The written law is a poor vehicle in this regard, as it is less readily accessible by the layperson and arguably does not have the same reach or impact as the other approaches. In addition, attempting to set out exhaustively all the types of situations in which the issue of consent may arise will ultimately be a futile enterprise. Instead, guided by s 90, the courts have so far been able to navigate the contours of “consent” without much difficulty.

20 On balance, the PCRC does not think that introducing a positive statutory definition of “consent” would enhance either the court’s or the public’s understanding of the scope of the law in sexual relations.

Recommendation 87: No amendments are required to clarify the types of misconception of fact in s 90 that will vitiate consent

21 A related point that the PCRC considered is whether “misconception of fact” under s 90(a)(ii) ought to be given a wide reading, to cover any misconception of fact relevant to the consent or conversely, whether this should be narrowed in any way.

22 The PCRC recommends maintaining the status quo, and making no amendments to s 90.

23 Under s 90, the list of situations that can vitiate consent is broadly worded. A plain reading of “misconception of fact” in s 90(a)(ii) does not suggest that any limits are meant to be imposed on the types of misconceptions of fact that can vitiate consent: misconception of fact can vitiate consent, and the misconception of fact is not, like in the common law, qualified or limited to the nature of the act or the identity of the accused. A number of Indian cases appear to support this wide interpretation of “misconception of facts”.²⁰

24 However, there are potential problems with accepting that every misconception of fact relevant to the decision is sufficient to vitiate consent. Take for example the offence of rape: this could result in a myriad of misconceptions of fact, however tenuously connected to the issue of consent, that can vitiate consent, and lead to an increase in the cases that may be

¹⁹ *Consent in the Criminal Law* at para C.71.

²⁰ For example, in *State v Jayanti Rani Panda* 1984 Cri LJ 1535, the Calcutta High Court found that in a case where a young woman had agreed to sexual intercourse with the accused after he had promised to marry her, if it could be proved that from the very inception the accused never intended to marry the woman, her consent would have been vitiated, and an offence of rape made out.

classified as rape. Consider the situation where the accused deceives the victim into thinking that he will pay her for sex when he has no intention of doing so, and she agrees to sexual intercourse on this basis. This was the situation in *R v Linekar*²¹, and the English Court of Appeal found in that case that rape was not made out.

25 In cases like *R v Linekar*, ordinary notions of justice suggest that they should amount to a lesser offence than rape. If we accept that rape is one of the most severe offences in the criminal law, then we must also accept that it is fair to label as rape only offences that cross that level of severity. Yet based on the current text of s 90, the above cases could amount to rape.

26 The PCRC's view is that it is sufficient in a case like *R v Linekar* that the accused can be caught under the offence of cheating in the Penal Code; an offence of cheating would cohere with ideas of fair labelling, as the nub of the accused's wrongdoing lies in his deception. There are also other provisions that protect vulnerable groups of persons from sexual exploitation through fraud: e.g. s 376F PC makes it an offence to procure sexual activities with a person with mental disability who is capable of consent, but where inducement, threat or deception was used to obtain that consent.

27 Furthermore, the decision in *Siew Yit Beng* evinces a reluctance by the Court to read "misconception of fact" widely – the particular misconception of fact in *Siew Yit Beng* was found not to have vitiated consent.²²

28 As such, the current state of law is not entirely satisfactory. On the one hand, a plain reading of s 90(a)(ii) suggests that *any* misconception of fact can vitiate consent, and some Indian cases support this interpretation. On the other hand, it is not desirable as a matter of policy to allow *all and any* misconceptions of fact to vitiate consent, and the Court in *Siew Yit Beng* appeared to take the view that not *all* misconceptions can vitiate consent.

29 The PCRC looked to other jurisdictions for potential solutions. However, it has not been the approach of jurisdictions like England and Wales²³, and Australia²⁴, to set out an exhaustive list of circumstances in which consent will be regarded as vitiated. These jurisdictions have chosen to set out non-exhaustively, only the most obvious consent-vitiating types of misconceptions of fact, *viz.* misconceptions as to the nature of the act (and in England and Wales, the purpose of the act), and misconceptions as to the identity of the wrongdoer. This approach recognizes that it is impossible to predict the numerous ways in which consent can be vitiated. Instead, the courts are given flexibility to develop the contours of consent, and do justice in each case.

²¹ [1995] 2 Cr App R 49.

²² It should be noted that *Siew Yit Beng* does not exhaustively or definitively sets out the types of facts, misconception of which, would vitiate consent (e.g. consider misconception about the identity of the accused, or a misconception as to purpose). The court focussed on what it thought was the crucial issue – whether the misconception related to the nature of the act, without considering other misconception of facts.

²³ Section 76 of the SOA 2003.

²⁴ Australian Law Reform Commission & New South Wales Law Reform Commission, *Family Violence – A National Legal Response Vol. 1*, Final Report (ALRC Report 114; NSWLRC Report 128, Oct 2010) at [25.100].

30 In the end, the PCRC recognized that it was not possible to list exhaustively all the types of misconceptions of fact that would vitiate consent. Listing only the most obvious ones would also serve little utility in guiding the courts or the public.

31 As we have functioned well enough with the current definition of consent in s 90, as clarified by case law such as *Siew Yit Beng*, the PCRC recommends maintaining the status quo and making no amendments to s 90. In particular, we may continue to rely on the judicious exercise of prosecutorial discretion in not pursuing trivial forms of deceptions/misconceptions under serious offences (such as rape), and fall back on intermediate offences such as cheating to punish less egregious forms of deceptions.

SECTION 23.7: DURESS

SUMMARY OF RECOMMENDATIONS

- (88) Continue to require that only the threat of death can trigger the defence of duress
(89) Continue to require that the accused needs to reasonably believe that there was a threat of “instant death” at the time of the offence

Introduction

The underlying rationale of the defence of duress is that the accused was placed in circumstances where he lacked free choice as to whether or not to commit the crime in question. The defence recognises that it would be unfair to convict and punish someone whose only choice was the morally unacceptable one between either self-sacrifice or breaking the law.¹

Current law

2 Under section 94 of the Penal Code, the defence of duress is recognised in limited circumstances. It does not apply to murder and offences against the State punishable with death.²

3 In *PP v Ng Pen Tine*³, the High Court said that the following requirements must be satisfied before a plea of duress may be successful (at [154]):

- (a) The harm that the accused was threatened with was death;
- (b) The threat was directed at the accused or other persons which would include any of his family members;
- (c) The threat was of “instant” death;
- (d) The accused reasonably apprehended that the threat will be carried out⁴; and
- (e) The accused had not voluntarily or from a reasonable apprehension to himself short of instant death, placed himself in that situation by which he became subject to such constraint.

¹ *YMC Rev 2nd Ed* at para 22.6.

² Under Chapter VI of the Penal Code, s 121 (Waging or attempting to wage war or abetting the waging of war against the Government) and s 121A (Offences against the President’s person) provide for the punishment of death. Section 70 of the ISA provides that s 94 of the Penal Code shall have effect as if offences punishable with death under Part III of the Act (Special Provisions Relating to Security Areas) were offences included in Chapter VI of the Penal Code punishable with death. Under Part III of the ISA, s 58 (Offences relating to firearms, ammunition and explosives) and s 59 (Consorting with person carrying or having possession of fire arms or explosives) carry the death penalty, and are therefore excluded from the defence of duress (being regarded as an offence against the State punishable with death).

³ [2009] SGHC 230 (“*Ng Pen Tine*”).

⁴ Based on *Ng Pen Tine, id.*, at [158], where the Court concluded that the 2nd accused’s belief that the threat would be carried out was “reasonably held”, this requirement is to be assessed by a subjective-objective test.

4 Besides the above requirements, the High Court in *Ng Pen Tine* also considered whether the second accused (who claimed duress) had a “reasonable opportunity to escape”: if he did, he would not be able to rely on the defence.⁵ The High Court said in this regard that the test was a “subjective one, *ie* it was the 2nd accused’s reasonable belief which mattered.”⁶ This test also incorporated a requirement that the opportunity to escape must be an effective one, *ie* the escape must be of such a nature that would have dissipated the threat. Thus, the current standard applied is whether the accused reasonably believed that there was a reasonable opportunity to escape.⁷

Impetus for review

5 The PCRC observed that there was some variation in the elements of the defence of duress in other jurisdictions, especially in relation to the level of harm threatened, and the imminence of that threatened harm. The PCRC thus considered whether it was appropriate to adopt some of these features.

Recommendation 88: Continue to require that only the threat of death can trigger the defence of duress

Impetus for review

6 Section 94 currently only recognises threats of death, namely, that the accused must have been compelled to commit the offence with a threat of death. No other kind of threat would suffice.

7 One way to rationalise why such a high level of threat is required is that duress overrides the usual mechanics of criminal law, which in itself, is a “system of compulsion on the widest scale”. This compulsion from a coercer to break the law goes directly against the compulsion from the law not to break it, and if a person were to be excused for breaking the law, this compulsion from the coercer should be of such a great nature that, in a sense, the breaking of the law would be the lesser of the ‘evils’ confronting the person coerced.⁸

8 Serious threats other than the threat of death have been recognised in other jurisdictions⁹. There is, however, a divergence in views on whether serious threats should be limited to threats of serious *bodily* injury, or whether *psychological* injuries should also be included.

⁵ *Id.*, at [160].

⁶ This is a reference to the subjective-objective test.

⁷ The duty to take such evasive action as the accused may reasonably believe to be available and effective is found in other jurisdictions, like Canada (see the Criminal Code (R.S.C., 1985, c. C-46) (Canada) s 17; *R v Ruzic* [2001] 1 SCR 687 (“*Ruzic*”)) and Australia (see the Criminal Code 1899 (Act 9 of 1899) (Queensland) s 31(1); *Taiapa v The Queen* [2009] HCA 53).

⁸ James Fitzjames Stephen, *A History of the Criminal Law of England: Vol III* (Macmillan and Co, 1883) at p 107.

⁹ Jurisdictions that recognise serious threats other than threats of death include England and Wales (see *R v Hudson and Taylor* [1971] 2 QB 202 at 206; *R v Z* [2005] 2 SC 467 at [21] (“*R v Z*”); *R v Quayle* [2005] EWCA Crim 1415 at [77]), Canada (see s 17 of the Canadian Criminal Code; qualified by *R v McCraw* [1991] 3 SCR 72, where the Supreme Court of Canada held that “bodily harm” is broad enough to include psychological harm), New Zealand (see Crimes Act 1961 (1961 No 43) (New Zealand) s 24(1); *The Queen v Maurirere* [2000] NZCA 34), and Australia (see the Criminal Code Act 1924 (Act 69 of 1924) (Tasmania) s 20(1); s 31(1)(d)(i) of the Queensland Criminal Code 1899; the Crimes Act 1958 (No 6231 of 1958) (Victoria) s 322O).

Recommendation

9 There are threats short of death that can be as compelling as threats of death. The PCRC therefore carefully considered whether s 94 ought to be amended such that the type of threat which triggers the defence of duress includes not only the threat of death, but also the threat of serious bodily harm of a physical nature¹⁰. This is usually where the line is drawn in other jurisdictions, in order to minimise the potential for abuse of the defence.

10 However, there are strong countervailing policy reasons in favour of retaining the threat of death as the trigger for the defence. The experience in England and Wales is particularly relevant, because of the striking similarities with our own experience.

11 In *R v Z¹¹*, the House of Lords noted the following the features of the defence:

- (a) Duress affords a complete defence if raised and not disproved;
- (b) The victim of the crime in duress may be perceived as morally innocent; and
- (c) Duress is difficult for the prosecution to investigate and disprove beyond reasonable doubt.

12 The House of Lords then went on to reason as follows¹²:

- (a) Duress has become a popular plea in answer to a criminal charge;
- (b) Where policy choices are to be made, the House of Lords was inclined towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on;
- (c) Duress, if not carefully circumscribed may become a charter for terrorists, gang-leaders and kidnapers that permits a subject to set up a countervailing system of sanctions or by terrorism confer immunity on his gang;
- (d) Duress must be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale; and
- (e) Verification of a spurious claim of duress may prove difficult. Hence courts should be alive to the need to apply reasonable, but strict standards for the application of the defence.

13 The experience in England is that the defence is usually used in drug cases.¹³

¹⁰ As to how “serious bodily harm” might be defined, the PCRC considered the formulation of pegging this to grievous hurt as defined under s 320 of the Penal Code, but excluding certain less serious or non-permanent forms of hurt such as “privation of any member or joint”, “fracture or dislocation of a bone”, and hurt which causes the sufferer to be “unable to follow his ordinary pursuits”, and adding a further limb to allow the courts the discretion to allow unlisted forms of serious bodily harm if they are of a comparable severity to the harms listed.

¹¹ [2005] 2 SC 467 at [19] – [20].

¹² *Id.*, at [22].

¹³ See submission of prosecution in *R v Z* at 475.

14 Similar policy considerations have been observed in our context. In the last 10 years (*ie* from 2008), the defence had been raised in four reported cases before the High Court and Court of Appeal. All of these cases involved the importation or trafficking of controlled drugs, with claims of duress occurring in another jurisdiction.¹⁴

15 While the burden under the Penal Code is on the accused to prove the defence on the balance of probabilities, these claims are easy for accused persons to raise, and difficult for the authorities to verify¹⁵. This is especially so when the threats made against the accused take place overseas. As duress affords a complete defence, a widening of the defence may lead to an increase in acquittals that would run contrary to enforcement efforts, particularly in drug cases. A limited defence would deter the abuse of the defence, while a widening would merely encourage coercers to exploit the vulnerable.

16 There were some members of the PCRC who were of the view that the defence of duress should be expanded to allow the defence where the threat from a coercer was one that was short of death but was one of “grievous hurt”. One reason for this view is that crime-control considerations (especially relating to drug crimes) should not take centre-stage so as to prevent morally deserving application of the defence as it would be possible to imagine situations where an accused would be placed in a moral dilemma arising from a threat short of death. In those situations, the acquittal of the accused would also accord with our societal values and expectations. Another reason is that the burden of proving the defence is on the accused and this is not an easy burden for the accused to meet.

17 On balance, the PCRC recommends retaining the requirement for threat of death to trigger the defence. Where the accused has truly been compelled by serious threats falling short of death, this can be taken into account by the prosecution in preferring a less serious charge or declining to prosecute, and by the courts in imposing a lesser sentence where no mandatory minimum punishment applies.

Recommendation 89: Continue to require that the accused needs to reasonably believe that there was a threat of “instant death” at the time of the offence

Impetus for review

18 Section 94 currently requires that the threat apprehended by the accused at the time of the offence must be “instant”.

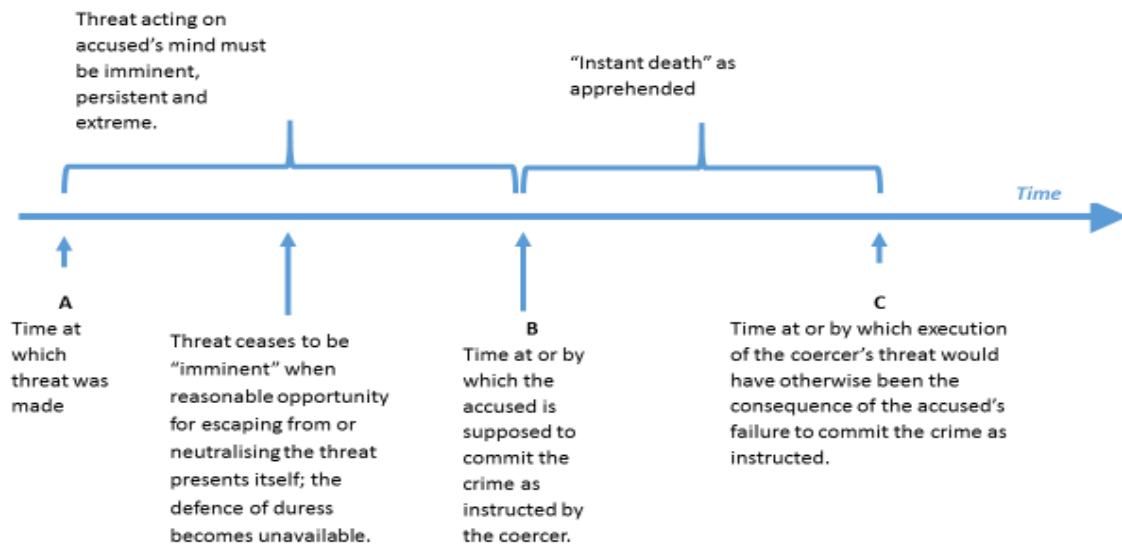
19 In *Nagaenthran*, the High Court held that “instant death” was a reference to the time period between when the accused was supposed to have committed the offence as instructed by the coercer (point B in Diagram 1 below), and when the coercer would execute the threat if the accused did not do as instructed (point C in Diagram 1 below): this had to be instant. In previous cases, the court had said that the duress had to be “imminent, extreme and

¹⁴ The cases are *Ng Pen Tine*; *PP v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830 (“*Nagaenthran*”) (and [2011] 4 SLR 1156 on appeal); *PP v Siva a/l Sannasi* [2015] SGHC 73; and *PP v Khartik Jasudass and another* [2015] SGHC 199.

¹⁵ See for example *Ng Pen Tine*, where the claim of duress was accepted in the context of a capital drug trafficking trial, based on the accused’s statements.

persistent”¹⁶. The High Court in *Nagaenthran* rationalised that this was not a different standard, but a reference to the interval between the time the coercer issued the threat (Point A in Diagram 1) and the time the harm would have been caused (Point C in Diagram 1): there could be an interval of time between Points A and C. The High Court reasoned that the use of the word “imminent” was meant to show that the threat continued to “impress upon the accused” a reasonable apprehension that “instant death” would otherwise be the consequence of his failure to commit the crime as instructed by the coercer. Where the accused had a reasonable opportunity to escape from or neutralise the threat made by the coercer, the causation link would be broken and the defence of duress would not be available.

Diagram 1



20 Some legal scholars have criticised the requirement of “instant death” as being too demanding.¹⁷ Instead, it is suggested that “instant” should be replaced with “imminent”, which refers to a threat that is impending but not necessarily immediate or instant. The PCRC thus considered whether the defence should be relaxed to require “imminent”, rather than “instant” harm.

Recommendation

21 The PCRC notes that a requirement of “immediacy” is found in most jurisdictions, such as England and Wales¹⁸, Tasmania (Australia)¹⁹, and New Zealand²⁰. However, the case law

¹⁶ In *Tan Seng Ann v Public Prosecutor* [1949] MLJ 87, the court held that “duress to be pleaded successfully must be imminent, extreme and persistent.” See also, *Nagaenthran* at [28].

¹⁷ *YMC Rev 2nd Ed* at para 22.21.

¹⁸ In *R v Z* at [28], the House of Lords stated that the implementation of the threat must follow “immediately or almost immediately”. If there is no reasonable expectation of such “immediate or almost immediate” threat, then the accused could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged.

¹⁹ Section 20(1) of the Tasmanian Criminal Code Act 1924: threat has to be one “of immediate death or grievous bodily harm”.

²⁰ Section 24(1) of the New Zealand Crimes Act 1961: the threat has to be one of “immediate death or grievous bodily harm. See also *The Queen v Noho* [2009] NZCA 299, where the court said at [11] that “...It is that belief

in some jurisdictions like Victoria (Australia)²¹ and Canada²² have used the term “imminent”.

22 Some members of the PCRC were of the view that the defence of duress should be available where the threat was of imminent death (instead of instant death) as it is possible that the threats of the coercer would not take place immediately after the failure to commit the offence. The reasons mentioned at para 16 were also raised in support of this view.

23 As discussed above at paras 10 – 15, there are strong policy considerations that militate against a further widening or relaxation of the defence of duress. To reiterate, the defence is easy for accused persons to raise, and difficult for the authorities to verify. This is especially so when the threats made against the accused take place overseas. As duress affords a complete defence, a widening of the defence could seriously undermine law enforcement efforts, especially in the area of anti-drug enforcement.

24 Quite aside from the policy reasons, the requirement for “immediate”, which is similar to “instant”, is found in a number of other jurisdictions surveyed. This policy is also rooted in reason: if the threat were not immediate or almost immediate, the accused would have time to [escape or] have recourse to the authorities.²³ Such an opportunity to evade the harm threatened would break the chain of causation between the threat and the accused’s conduct, depriving the accused of the defence. The PCRC therefore recommends retaining the requirement that the accused needs to reasonably believe that there was a threat of “instant death” at the time of the offence.

Other issues related to the defence of Duress – exclusion of murder and offences against the State punishable with death from the defence of duress

Impetus for review

25 Section 94 currently provides that “murder and offences against the State punishable with death” are excluded from the defence of duress.

26 The rationale for excluding murder may be summarised as follows:

- (a) The principle underpinning the rule is “the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another’s life.”²⁴ Rather than allow duress to excuse the taking

in the inevitability of immediate and violent retribution for failure on his part to comply with the threatening demand which provides the justification for exculpation from criminal responsibility.”

²¹ Although s 322O of the Victorian Crimes Act 1958 is silent, the language used by the Supreme Court of Victoria in *R v Hurley and Murray* [1967] VicRp 57 was that the threat had to be “present and continuing, imminent and impending”.

²² Although s 17 of the Canadian Criminal Code, provides that the threat must be “of immediate death or bodily harm”, in *Ruzic*, the Supreme Court of Canada held at [86] that the common law allowed for threats of future harm and that the “strict criterion of immediacy is no longer a generally accepted component of the defence”.

²³ *R v Z*.

²⁴ Per Lord Griffiths in *R v Howe* [1987] 2 WLR 568 at 586 (“*R v Howe*”). See also *Blackstone* at p 29 that “(The Defence of *duress per minas* or duress by means of menaces and threats) applies only to ‘positive crimes’ created by society “and which therefore society may excuse”, but not to ‘natural offences’ “so declared by the law of God, wherein human magistrates are only the executioners... therefore, though a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.”

of life, the law should “set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.”²⁵

- (b) The “rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it.”²⁶

27 As for offences against the State punishable with death, it is likely that this exclusion was put in place to communicate that the preservation of the State is paramount and prevails over the preservation of the individual.²⁷

28 The PCRC notes that while murder is excluded from the defence of duress, upon a conviction for murder within the meaning of sections 300(b) to (d), the court may impose either life imprisonment and caning or the death penalty. A conviction for murder within the meaning of section 300(a) will attract the death penalty. Therefore, in the event that the elements of duress are present in a particular case, the court may take the duress into account and impose a lesser penalty in situations under 300(b) to (d). This option is not available for section 300(a).

29 The PCRC considered whether duress should be made a mitigating factor for murder within the meaning of section 300(a) so that if successfully pleaded the court will have the discretion to impose life imprisonment and caning or the death penalty. The PCRC was divided on this issue.

To make duress a mitigating factor for sentencing for murder within the meaning of section 300(a)

30 The members of the PCRC who supported this approach were of the view that: -

- (a) The operative principle in duress is that the accused’s will was overcome. Allowing duress to operate to mitigate section 300(a) cases in the manner suggested is a small concession to the accused given the other recommendations for the *status quo*, and since, in most other cases, an accused would be completely acquitted if he successfully raises the duress defence. This approach offers a balance between having regard for the sanctity of life and the difficult circumstance that the accused was in.
- (b) There will continue to be safeguards against abuse as the accused continues to bear the burden of proving the defence. It is still up to the court whether or not to exercise the discretion to impose the sentence of life imprisonment instead of the death penalty.
- (c) The defence continues to be tightly circumscribed. *Eg* the accused who voluntarily placed himself in the situation by which he became constrained cannot raise the defence, only the threat of instant death can trigger the defence.

²⁵ Per Lord Hailsham of St Marylebone LC in *R v Howe* at 578.

²⁶ Per Lord Griffiths in *R v Howe* at 590.

²⁷ As observed in *YMC Rev 2nd Ed* at para 22.11: The decision of whether to remove the exclusion for offences against the State punishable with death “is a decision which depends on whether one considers state security as prevailing over self-preservation. As Gour puts it: ‘English law permits a man to save his life at the expense of the State, but in India, the State demands that it shall be preserved... at the expense of its subject.’” (citing *Gour’s Penal Law of India* Vol 1 (Law Publishers, 11th Ed, 2000) at p 774).

- (d) Although other jurisdictions have not adopted such an approach, this is probably because there has not been a need to. In the other jurisdictions where the defence of duress is excluded for the offence of murder (*eg* Canada, New Zealand and UK²⁸), the death penalty is not a sentencing option.

31 The members of the PCRC who did not support this approach were of the view that: -

- (a) Such an approach may give the impression that it is legally permissible for an accused to make cold calculations about the viability of killing an innocent victim in exchange for a potential life imprisonment term. An accused who commits section 300(a) murder commits the most serious kind of murder. He intends to cause the death of another. Duress should not be available for such act nor should it be allowed to mitigate the penalty for such a grave crime.
- (b) Such an approach may incentivise organised criminal groups and terrorist groups, especially foreign ones, to exploit or abuse the proposed change in the law.
- (c) The defence of duress is a difficult one for the prosecution to rebut, especially in the cases where bare allegations are made about duress that takes place in a different country. It is difficult for law enforcement officers to verify the allegations of duress and safeguard against fabrication.

Conclusion

32 In view of the difference in views, the PCRC makes no recommendation on this issue. The Government may however wish to consider whether or not duress should be made a mitigating factor for sentencing for murder within the definition of s 300(a), taking into account the views of the PCRC members and other policy requirements.

²⁸ In England and Wales, the House of Lords in *R v Z* noted at [21] that “Duress does not afford a defence to charges of murder... attempted murder... and perhaps, some forms of treason.” Their Lordships in *R v Z* found the recommendations in the Law Commission Report 1977 that the defence should be available to “all offences, including murder” irresistible in terms of logic, but the recommendation was not adopted “because it is felt that in the case of the gravest crimes, no threat to the defendant, however extreme, should excuse the commission of the crime.”

In Canada, s 17 of the Canadian Criminal Code provides that the defence is not available to a wide range of offences, namely, high treason, treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing harm, arson, or the abduction and detention of young persons.

A similar exclusionary list (as the list in s 17 of the Canadian Criminal Code) exists in s 24 of the New Zealand Crimes Act 1961.

SECTION 23.8: PRIVATE DEFENCE

SUMMARY OF RECOMMENDATIONS

- (90) *Reorganise the provisions on private defence in ss 96 – 106, into two broad categories of “Defence of Person” and “Defence of Property”*
- (91) *Reframe the precondition of “time to have recourse to the protection of the public authorities” as “reasonable opportunity to have recourse to the protection of the public authorities in the circumstances”*
- (92) *Frame “reasonable apprehension of danger” in private defence as a subjective-objective test, ie the defender reasonably believed that the danger existed due to the actions of the victim*
- (93) *Provide that the use of force in private defence must be “reasonably necessary in the circumstances”*
- (94) *Amend s 100(d) to provide that defensive deadly force will be allowed for assaults with the intention of committing penile penetration of the anus or mouth described in s 376(1), or causing penile penetration of the vagina, anus or mouth described in ss 376(1) or (2)*

Introduction

Private defence permits a person to ward off imminent dangers that cannot be averted otherwise than by a counter-attack. It is preventive, and not punitive or retributive. It does not permit retaliation.¹

Current law

2 Private defence is codified in ss 96 – 106 of the Penal Code. These provisions have been described as “complex, disorganised, and illogical in sequence”.²

3 There are two preconditions that must be satisfied before the right of private defence arises³:

- (a) The person purporting to exercise the right of private defence (the “defender”) must be acting against an offence (see s 97); and
- (b) The defender must have attempted to seek help from the relevant public authorities if there was a reasonable opportunity for him to do so (see s 99(3)). The test for whether the defender had time to have recourse to the public authorities is an objective one. In this regard, the Indian cases appear, quite correctly, to equate the words “time to have recourse to the protection of the public authorities) with “reasonable opportunity of redress by recourse to the public authorities”. Further the defender should not be expected to seek the protection of public authorities if the time needed to do so would result in the mischief being completed.⁴

¹ *Ratanlal* at pp 371 – 372.

² *YMC 1st Ed* at [20.1], cited with approval by the Court of Appeal in *Tan Chor Jin* at [35].

³ *Tan Chor Jin* at [39], citing *YMC 1st Ed* at para 20.7 with approval.

⁴ *Id.*, at [46(b)].

4 When these two preconditions are satisfied, the other requirements of private defence of the body are as follows⁵:

- (a) If the defender was the aggressor, he would *prima facie* be less likely to successfully raise the defence. Much would depend on the facts of the case: if, for instance the defender was armed with a deadly weapon from the outset, it is very unlikely that the right of private defence would ever arise.
- (b) The defender must prove that, at the time of acting in private defence, he reasonably apprehended the danger due to an attempt or a threat by the victim to commit an offence affecting the body. This is a subjective test.
- (c) Where the defender has killed the victim, he has to prove that the offence which occasioned the exercise of the right of private defence was one of the offences listed in s 100, *ie* an assault that reasonably caused the apprehension of death or grievous hurt, or with the intention of committing rape, gratifying unnatural lust, kidnapping or abducting, or wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. If the defender is unable to show that he exercised his right of private defence owing to one or more of the offences listed in s 100, his right will not extend to causing of the victim's death, although s 101 would still permit him to cause "any harm other than death" to the victim.
- (d) The defender must prove that the harm caused to the victim was reasonably necessary in private defence. Due allowance should be given to the dire circumstances under which the defender was acting.

Impetus for review

5 As the sections on private defence have been described as "disorganised and illogical", the PCRC considered how the provisions, especially their sequencing, could be improved. In addition, the PCRC considered whether some of the details of the elements of the defence which have been developed in case law can be incorporated legislatively for greater clarity. On the whole, the PCRC did not recommend making substantive changes to the law on private defence.

Recommendation 90: Reorganise the provisions on private defence in ss 96 – 106, into two broad categories of "Defence of Person" and "Defence of Property"

6 To address the "disorganised and illogical" sequence of the provisions, the PCRC recommends that ss 96 – 106 be reorganised into two broad categories of "Defence of Person" and "Defence of Property". See [Annex](#) for the proposed reorganisation and reformulation, incorporating the other recommendations of the PCRC below.

Recommendation 91: Reframe the precondition of "time to have recourse to the protection of the public authorities" as "reasonable opportunity to have recourse to the protection of the public authorities in the circumstances"

⁵ *Id.*, at [46].

7 As mentioned above, the Court of Appeal had elaborated that the test for whether the defender had “time to have recourse to the protection of the public authorities” is an objective one, and endorsed the approach in the Indian cases that equate the words “time to have recourse to the protection of the public authorities” with “reasonable opportunity of redress by recourse to the public authorities”. The PCRC recommends codifying the Court of Appeal’s endorsement, by replacing the words “time to have recourse to the protection of the public authorities” in s 99(3) with “reasonable opportunity to have recourse to the protection of the public authorities in the circumstances”.

8 The PCRC also recommends making clear that this is a continuing condition of the defence, *ie* even though the conditions of the precondition existed to give rise to the commencement of the defence, the circumstances may change such that the defence ceases to continue once recourse to the public authorities becomes available, *eg* a police patrol arrives at the scene. The PCRC proposes to introduce two illustrations for this purpose (see [Annex](#)).

Recommendation 92: Frame “reasonable apprehension of danger” in private defence as a subjective-objective test, *ie* the defender reasonably believed that the danger existed due to the actions of the victim

9 One of the requirements of private defence is that the defender must have reasonably apprehended the danger (see ss 99, 100, 102, 103, 105 and 106).

10 Some legal scholars have observed that the phrase “as may reasonably cause the apprehension” and its variations in the private defence provisions are susceptible to two interpretations.⁶ The first, is that the defender’s apprehension must be reasonable (a subjective-objective test). The second is that a reasonable person in the defender’s position would have had the same apprehension (an objective-subjective test).

11 The Court of Appeal had said that “The defender must prove that, at the time of acting in private defence, *he reasonably apprehended the danger* due to an attempt or a threat by the victim to commit an offence affecting the body. *This is a subjective test ...*”⁷ (emphasis added). In the PCRC’s view, this is a reference to the subjective-objective test, given that the Court of Appeal required that the defender “reasonably apprehended” the danger, *ie* the defender’s apprehension or belief (subjective) must have a reasonable basis (objective).

12 The subjective-objective test has also been applied by the Indian and Malaysian courts.

- (a) In India, the Supreme Court in *Jai Dev v The State of Punjab*⁸ said: “To begin with, the person exercising the right of private defence must consider whether the threat to his person or his property is immediate and real. *If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right.*” (emphasis added). The starting point of the enquiry of perception of threat is thus whether the person exercising the right considers the threat to be “immediate and real”. It is the defender’s perception (as opposed to the reasonable man in his circumstances) which matters, but this perception must be reasonable.

⁶ *YMC Rev 2nd Ed* at para 20.27.

⁷ *Tan Chor Jin* at [46(d)].

⁸ AIR 1963 SC 612 (“*Jai Dev*”) at 617.

(b) In Malaysia, the High Court of Kota Bahru in *Ya bin Daud v Public Prosecutor*⁹ applied a subjective-objective test, citing *Public Prosecutor v Ngoi Ming Sean*¹⁰ with approval: "... the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant *if the person who exercises his right of private is under a reasonable apprehension that death or grievous hurt would be caused to him by the assailant*" (emphasis added).

13 The PCRC therefore recommends framing the "reasonable apprehension of danger" in private defence as a subjective-objective test, *ie* the defender reasonably believed that the danger existed due to the actions of the victim. Quite apart from the endorsement by the various courts, including our Court of Appeal, a subjective-objective test comports with a realistic understanding of the defence. In private defence, the defender's actions are brought under scrutiny to determine whether they are justified. An important preliminary question that must be asked at the outset is: what triggered the defender's actions? This line of inquiry must necessarily be answered from the perspective of the defender, kept in check by standards of objectivity that will help to exclude spurious claims.

Recommendation 93: Provide that the use of force in private defence must be "reasonably necessary in the circumstances"

14 Section 99(4) of the Penal Code provides that "[t]he right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purposes of defence". The PCRC recommends providing that the standard of allowable harm be what is "reasonably necessary in the circumstances" and not merely "necessary".

15 The use of only the word "necessary" can be erroneously read as requiring that a defender's response be only a *minimum necessary response* and such a reading has been criticised as excessively harsh and exacting.¹¹ The recommendation averts any possible misunderstanding in this regard.

16 In fact, the recommendation is merely a codification¹² of the standard which the Court of Appeal had already endorsed in *Tan Chor Jin* (at [46(d)]): "The defender must prove that the *harm caused to the victim was reasonably necessary in private defence. Due allowance should be given to the dire circumstances under which the defender was acting.*" (emphasis added).

17 This standard of allowable harm has also been applied in India¹³ and Malaysia¹⁴.

⁹ [1997] 4 MLJ 322.

¹⁰ [1982] 1 MLJ 24 ("*Ngoi Ming Sean*").

¹¹ *YMC Rev 2nd Ed* at paras 20.38 and 20.42. An example of a case where the "minimum necessary response" approach was applied is *Roshdi v PP* [1994] 3 SLR(R) 1. This judgment has been criticized as applying an "unduly objective" standard; the standard should be read to encompass not only the least harmful response but a number of possible responses all of which could be regarded as reasonably necessary in the circumstances: *YMC Rev 2nd Ed* at para 20.46.

¹² See also *PP v Vijayakumar s/o Veeriah* [2005] SGHC 221, where the High Court stated at [52] that "one should not weigh the proportionality of the accused's response on golden scales".

¹³ *Jai Dev* 617: "It would be inappropriate to adopt tests of detached objectivity which would be so natural in the court room, for instance, so long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force which he uses should not be weighed in golden scales.

¹⁴ *Ngoi Ming Sean*.

Recommendation 94: Amend s 100(d) to provide that defensive deadly force will be allowed for assaults with the intention of committing penile penetration of the anus or mouth described in s 376(1), or causing penile penetration of the vagina, anus or mouth described in ss 376(1) or (2)

18 Section 100 justifies the killing of an assailant in defence of the body, where there is reasonable apprehension of any one of the serious crimes enumerated.

19 In the PCRC’s view, s 100(d) which limits causing death in self-defence only to “assault with the intention of committing non-consensual penile penetration of the anus” is too narrow. Assault with the intention of committing non-consensual penile penetration of the vagina, *ie* rape, is covered by s 100(c). Yet, other equally harmful forms of penile penetration are not covered, *eg* penile-mouth penetration. Intention to cause (vs commit) penile penetration of the vagina, mouth or anus is also not covered, *ie* intending to cause the defender to penetrate a third person, or intending the defender to penetrate the aggressor.

20 All these forms of penile penetrative acts involve the risk of transmission of sexual diseases and a greater degree of intrusion into the sexual autonomy of the defender.¹⁵

21 Given that defensive deadly force is allowed for non-consensual penile-anal penetration, the PCRC recommends extending the allowance for defensive deadly force to all forms of non-consensual penile penetration, *ie* this will cover instances where an aggressor penetrates the mouth or anus of the defender with his penis, or causes the defender to penetrate his/her vagina, mouth or anus with the defender’s penis, or causes the defender to penetrate another person’s vagina, anus or mouth as the case may be with the defender’s penis. In short, this will cover all forms of penile penetration of the anus or mouth described in s 376(1) of the Penal Code, or causing penile penetration of the vagina¹⁶, anus or mouth described in ss 376(1) or (2) of the Penal Code.

Additional issues considered: scope of offences to which defence applies

22 The PCRC considered the additional issues of (a) whether private defence should be extended to other offences and (b) whether the right to voluntarily cause death should be retained for the defence of property.

Whether private defence should be extended to other offences

23 On issue (a), private defence is currently limited under s 97 to offences affecting the human body and the property offences of theft, robbery, mischief and criminal trespass. Arguably, there are other offences, *eg* extortion, that may warrant an allowance for self-help as the harm caused could be serious and irreparable.

¹⁵ See the Court of Appeal’s remarks in *Pram Nair v PP* [2017] 2 SLR 1015; [2017] SGCA 56 at [150]; and the High Court’s remarks in *PP v BMD* [2013] SGHC 235 at [73] on the severity of penile penetrative acts.

¹⁶ Note: The PCRC has also recommended amending s 376 to criminalise the actions of a female (A) who causes a man (B) to penetrate with B’s penis, the vagina, anus or mouth of A, as sexual assault by penetration under s 376 (see Section 26 of this report). Currently, this is only an offence under s 376A(1)(c) if the victim, B, is below 16 years old.

24 While appreciating the attractiveness of such an argument, the PCRC nevertheless recommends not extending the scope of private defence to further offences. From a law and order perspective, we should not be encouraging private individuals to take the law into their own hands by increasing the availability of the defence. Where necessary, specific new offences or stricter punishments can be legislated to deal with threats that are considered to be prevalent or have significant adverse social impact. That would be a more appropriate response in a civilised society.

25 In other jurisdictions like Canada¹⁷ and Australia¹⁸, private defence is confined to the defence of the person and property.

Retention of the right to voluntarily cause death for the defence of property

26 On issue (b), it has been argued that it would not be reasonable and proportionate to allow for the right to inflict death in the defence of property interests, as it is currently permitted under s 103.¹⁹

27 The PCRC's view is that it would not be necessary to remove the defence under s 103, as the right to defensive deadly force under that section is subject to the restrictions mentioned in s 99, and s 99(4) confines the inflicting of harm to no more than is necessary to inflict for the purposes of the defence.

28 While s 103(b) and (c)²⁰ do not require apprehension that death or grievous hurt will be the consequence, the contexts in which the offence is committed in those sub-sections (*ie* house-breaking during a vulnerable time of the day and the causing of fire to premises used for dwelling) are sufficiently serious to entitle the accused the right to cause death if the situation proves to be necessary. It is important to note that while s 103 permits the use of deadly force, the defender will still have to show that the harm inflicted was no more than was reasonably necessary in the circumstances (see recommendation 3 above). Factors such as whether there was reasonable belief in the circumstances that death or grievous hurt will be the result, the circumstances of the confrontation, in the case of s 103(c), whether the fire caused or likely to be caused by the mischief is a serious one²¹, will all be relevant in the assessment whether deadly force was reasonably necessary in the circumstances. In most situations, it would be expected that deadly force would only be justified if there was a reasonable belief that death or grievous hurt would otherwise be the result.

¹⁷ Sections 34 and 35 of the Canadian Criminal Code.

¹⁸ The Criminal Code 2002 (A2002-51) (Australian Capital Territory) s 42.

¹⁹ Cheah Wui Ling, "Private Defence" in *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Wing-Cheong Chan, Barry Wright, and Stanley Yeo ed) (Routledge, 2016) ch 8 at p 201.

²⁰ Sections 103(b) and 103(c) respectively allow for defensive deadly force to be used against house-breaking by night and mischief by fire committed on any building, tent or vessel. Which building, tent or vessel is used as a human dwelling, or as a place for the custody of property.

²¹ The act of mischief may involve only a small non-threatening fire.

Annex: Proposed reformulation of provisions on private defence

S/N	Proposed Reordering/ Amendments	Current Provision
I. General Statements		
1	Nothing is an offence which is done in the exercise of the right of private defence.	Section 96
2	<p>Every person has a right, subject to the restrictions in [the provisions below], to defend –</p> <p>(a) His own body, and the body of any other person, against any offence affecting the human body;</p> <p>(b) The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.</p>	Section 97
3	The right of private defence does not extend to the inflicting of more harm than is reasonably necessary in the circumstances.	Section 99(4)
4	<p>The right of private defence is not available when the accused has reasonable recourse to the protection of the public authorities in the circumstances.</p> <p style="text-align: center;"><i>Illustrations</i></p> <p>(a) Z ambushes A in a secluded area and attempts to kill A. A kills Z while fending off Z's attack. A is guilty of no offence as, in the circumstances, A had no reasonable recourse to the protection of the public authorities.</p> <p>(b) Z ambushes A in a secluded area and attempts to kill A. A's right of private defence arises as, at that point, he had no reasonable recourse to the protection of the public authorities. In the midst of the struggle between A and Z, a police patrol arrives on the scene. A's right of private defence ceases the moment A had reasonable recourse to the protection of the police patrol.</p>	Section 99(3)
5	<p>When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.</p> <p style="text-align: center;"><i>Illustrations</i></p>	Section 98

S/N	Proposed Reordering/ Amendments	Current Provision
	<p>(a) Z, under the influence of madness, attempts to kill A. Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.</p> <p>(b) A enters, by night, a house which he is legally entitled to enter. Z, in good faith, taking A for a housebreaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.</p>	
6	<p>If, in the exercise of the right of private defence against an assault under which the defender reasonably believes that death would be caused to him or to any other person and the defender is so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.</p> <p style="text-align: center;"><i>Illustration</i></p> <p>A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.</p>	Section 106

S/N	Proposed Reordering/ Amendments	Current Provision
II. Defence of Persons		
1	The right of private defence of persons arises when the defender reasonably believes that there is danger to the human body (either his own or that of any other person) arising from any act which is an offence against the human body or any attempt to or threat to commit such an offence, though the offence may not have been committed. The right of private defence continues as long as such belief of danger continues.	Section 97(a) and Section 102
2	<p>(2) The right of private defence of the body extends to voluntarily causing death to the assailant if the offence giving rise to the exercise of the right falls under the descriptions below. If it does not, then the right only extends to committing any harm other than death:</p> <p>(i) An assault where the defender reasonably believes that death would otherwise be the consequence</p> <p>(ii) An assault where the defender reasonably believes that grievous hurt will otherwise be the consequence;</p> <p>(iii) An assault that the defender reasonably believes to be done with the intention of committing rape;</p> <p>(iv) An assault that the defender reasonably believes to be done with the intention of:</p> <p style="padding-left: 40px;">(a) committing penile penetration of the anus or mouth described in section 376(1); or</p> <p style="padding-left: 40px;">(b) causing penile penetration of the vagina, anus or mouth described in section 376(1) or (2).</p> <p>(v) An assault that the defender reasonably believes to be done with the intention of committing kidnapping or abduction;</p> <p>(vi) An assault that the defender reasonably believes to be done with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to believe that he will be unable to have recourse to the public authorities for his release.</p>	Section 100 and Section 101
III. Defence of Property		
1	(1) The right or private defence of property arises when the defender reasonably believes that there was a danger to property (either his own or that of any other person) arising from any act which is an offence	Section 97(b) and

S/N	Proposed Reordering/ Amendments	Current Provision
	falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit such an offence.	Section 105(1)
2	(2) The right of private defence of property against theft continues till the offender has effected his retreat with the property, or till the assistance of the public authorities is obtained, or till the property has been recovered.	Section 105(2)
3	The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.	Section 105(3)
4	The right of private defence of property against criminal trespass or mischief, continues as long as the offender continues in the commission of criminal trespass or mischief.	Section 105(4)
5	The right of private defence of property against house-breaking by night continues as long as house-trespass which has been begun by such house-breaking continues.	Section 105(5)
6	<p>(6) The right of private defence of property extends to voluntarily causing death to the assailant if the defender reasonably believes that there was danger to property (either his own or that of any other person) arising from any of the following. If it does not, then the right only extends to committing any harm other than death.</p> <ul style="list-style-type: none"> (i) Robbery; (ii) house-breaking by night; (iii) mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property; (iv) theft, mischief or house-trespass, under such circumstances where the Defender reasonably believes that death or grievous hurt will be the consequence if such right of private defence is not exercised. 	Section 103 and Section 104
IV. No Private Defence		
1	(1) There is no right of private defence against an act which does not cause the defender to reasonably believe that death or of grievous hurt would result, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.	Section 99(1)

S/N	Proposed Reordering/ Amendments	Current Provision
2	<p>(2) There is no right of private defence against an act which does not cause the defender to reasonably believe that death or of grievous hurt would result, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.</p> <p><i>Explanation 1.</i> — A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.</p> <p><i>Explanation 2.</i> — A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.</p>	Section 99(2)

SECTION 24: DEFENCES RELATING TO MENTAL HEALTH

SECTION 24.1: UNSOUNDNESS OF MIND

SUMMARY OF RECOMMENDATIONS

(95) To retain the term "unsoundness of mind" in s 84

(96) To expand the defence of unsoundness of mind to include volitional disorders

(97) To clarify that the phrase "either wrong or contrary to law" in s 84 is meant to be read disjunctively

Introduction and current law

The defence of unsoundness of mind is set out in s 84 of the Penal Code:

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

2 Where the defence is established, the accused person is acquitted on the ground of unsoundness of mind. He is then ordered to be kept in a place of safe custody which is, typically, a psychiatric institution.

3 The defence of unsoundness of mind manifests the basic principle of criminal responsibility which regards individuals as responsible agents who should be punished for choosing to engage in prohibited conduct. Where the accused's actions are a result of mental impairment, the defence arises. While people who successfully plead the defence are free from blame, they pose a threat to themselves and to society. Therefore, it is inappropriate for them to receive an unqualified acquittal. The response of the criminal law is for the court to declare a special verdict of not guilty by reason of unsoundness of mind. This sets in train a procedure for the removal of such persons to a psychiatric institution where they can be treated.

4 The provision on insanity in Macaulay's draft Penal Code of 1837 was succinct. It stated that "nothing is an offence which is done by a person in consequence of being mad or delirious at the time of doing it." This formulation did not find its way into the final version contained in the Indian Penal Code. In 1843, the English common law on insanity was pronounced in what is known as the *M'Naghten Rules*. The rules, of extra-judicial origin, were formulated by the Queen's Bench in response to a series of questions put to them by the House of Lords following the controversial acquittal on the ground of insanity of Daniel M'Naghten for the murder of the Prime Minister's Private Secretary.¹

¹ Daniel M'Naghten had armed himself with two pistols and shot Edward Drummond, Sir Robert Peel's Private Secretary, perhaps in the belief that he was shooting Peel himself. M'Naghten was arrested immediately and Drummond died of his injuries later. M'Naghten was a Scottish national who believed that he was being persecuted by Tories – that he was "incessantly watched and dogged by certain parties who had an ill-will to him". See Arlie Loughnan, "M'Naghten's Case (1843)" in *Landmark Cases in Criminal Law* (Philip Handler, Henry Mares, Ian Williams ed) (Hart Publishing, 2017) ch 7 at pp 127-128.

5 In answer to the question: 'In what terms ought the question [of insanity] be left to the jury as to the prisoner's state of mind at the time the act was committed?', the Queen's Bench replied:

The jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing what was wrong.

6 In 1849, the Legislative Council of India enacted legislation which included a statutory formulation of the M'Naghten Rules. The present version of the defence appeared as s 84 in the IPC 1860.² The provision did not include irresistible impulse or volitional impairment as a separate limb of the unsoundness of mind test. While there is no existing record of the IPC drafters' discussions of s 84, "there is no reason to think that they even considered including irresistible impulse or volitional impairment in s 84".³

7 James Fitzjames Stephen, however, argued that the insanity defence should include an irresistible impulse provision and included such a provision in his Criminal Code Bill of 1878.⁴ However, the English Royal Commissioners expressly excluded Stephen's recommendation in their Draft Criminal Code of 1879.⁵ In their Report on the Draft Code, the Royal Commissioners opposed inclusion of an irresistible impulse provision on the grounds that it was not "practical or safe" in the sense that it would be nearly impossible to distinguish between an impulse which was irresistible because of ungoverned passion.⁶

8 One can only speculate why the drafters of the IPC 1860 chose to use the words, "unsoundness of mind" rather than insanity. The expression, "unsound mind", was not an entirely uncommon one in describing insanity. The common law Latin expression "*non compos mentis*" was in common use and it literally meant "not of sound mind". In Daniel M'Naghten's case, Tindal CJ used the expression, "sound mind" in charging the jury. It could have been that the codifiers of the IPC 1860 felt the expression, "unsoundness of mind", was simpler and clearer than the M'Naghten language of "insanity" and "defect of reason, from disease of the mind".⁷

² *YMC Rev 2nd Ed* at pp 680-682.

³ Gerry Ferguson, "Unsound Mind (Insanity), Automatism and Diminished Responsibility under the Indian Penal Code: Proposals for Reform" (unpublished) ("*Ferguson*") at p 21.

⁴ *Ibid* citing House of Commons, Bill 178, Criminal Code (Indictable Offences) Bill, 1878. See also Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan and Co., 1883).

⁵ See Criminal Code Bill Commission, "Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners (Cmnd 2345, 1879), Appendix, section 22", in *Irish University Press Series of British Parliamentary Papers: Royal Commission Select Committee and Other Reports on the Criminal Law with Proceedings Minutes of Evidence Appendix and Index 1847-79, vol 6, Legal Administration of Criminal Law* (Shannon University Press, 1971) at 386.

⁶ *Ferguson* at p 21.

⁷ *Ibid*, at pp 9-10.

Recommendation 95: To retain the term "unsoundness of mind" in s 84

9 The PCRC acknowledges that the term, "unsoundness of mind" is archaic but nevertheless recommends retaining it. Two PCRC members expressed their preference for the term to be replaced with a term that is modern and readily comprehensible. The majority of the PCRC were of the view that although the term is archaic, it has acquired a meaning with the passage of time. This meaning is something that is now easily understood and which has not posed any difficulties in practice.

Recommendation 96: To expand the defence of unsoundness of mind to include volitional disorders

10 The PCRC recommends that the defence be expanded to include volitional or conative disorders. Therefore, someone who is completely unable to control his actions because of a mental disorder, should be allowed a defence.

11 Those who suffer from such disorders may, on account of a mental disorder, appreciate what they are doing and that what they are doing is wrong or contrary to law. However, they may be unable to control their actions because of that mental disorder. The PCRC is of the view that there is no good reason why the criminal law should not account for the fundamental principle that a person is not to be held criminally responsible for involuntary conduct. In addition, there are no good reasons why the partial defence of diminished responsibility recognises volitional or conative disorders while this defence does not.

12 The PCRC appreciates the argument that there is, to date, no objectively verifiable scientific test which can differentiate between someone who could not control his conduct and one who would not.⁸ In reply, it can be argued that this is not very different from other issues in the criminal law involving questions of degree such as loss of control in provocation or in respect of legal concepts such as "knowledge" and "negligence". In addition, given that the burden of proving the elements of the insanity defence lies with the accused, it would be incumbent on the court to require cogent evidence from the accused to prove, on a balance of probabilities, that he had a sufficiently severe conative disorder which rendered him not criminally responsible.⁹

13 The PCRC also considered that there are several jurisdictions like the Australian states of Queensland, Tasmania, Western Australia as well as Ireland and South Africa that do recognise such disorders.

Impetus for review

14 What the phrase "either wrong or contrary to law" means may be controversial because there are three competing interpretations:

- (a) The accused must have known that the act was legally wrong (*ie* "wrong" is synonymous with "contrary to law"). This is synonymous with the English position.

⁸ Stanley Yeo, "The Insanity Defence in the Criminal Laws of the Commonwealth Nations" (2008) *Sing JLS* 241 at 254, citing Abraham S. Goldstein, *The Insanity Defense* (Yale University Press, 1967) at pp 67-68.

⁹ *Ibid.*

- (b) The accused must show that he was incapable of knowing that the act was morally wrong *and* legally wrong (this is known as the "conjunctive approach").
- (c) The accused must show that he knew the act was legally wrong or morally wrong (this is known as the "disjunctive approach").

15 Whether the conjunctive or disjunctive approach is to be adopted, the concept of moral wrongness has also been criticised for being vague and variable "according to the opinion of one man or of a number of different people."¹⁰

Recommendation 97: To clarify that the phrase "either wrong or contrary to law" in s 84 is meant to be read disjunctively.

16 Two members of the PCRC were of the view that the provision should not be amended in any way because it was unclear what "wrong" meant. Any amendments to the provision could inadvertently narrow or widen the existing defence. Therefore, the interpretation of the phrase "either wrong or contrary to law", should be left to case-law.

17 One member was of the view that the word, "wrong", should be clarified to mean a "legal wrong". This is the position in England.

18 The majority of the PCRC were of the view that since we had an opportunity to clarify the position legislatively, we should do so.

19 In addition, the PCRC does not suggest adopting the English position. The statutory language in s 84 is significantly different from the law of insanity there. In England, the *M'Naghten Rules* requires that the "defect of reason" the offender was suffering from was such that he "did not know what he was doing or, if he did know, he did not know the act was wrong". Section 84, on the other hand, requires that the "unsoundness of mind" the offender was suffering from was such that he was "incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law".

20 The majority of the PCRC recommend clarifying that the phrase, "either wrong or contrary to law", is meant to be read disjunctively for four reasons:

- (a) In ordinary usage, "and" is conjunctive and "or" is disjunctive".¹¹
- (b) It seems counter-intuitive to require a person claiming to have suffered from an unsoundness of mind to show that he was incapable of knowing that the act was contrary to law. In fact, this requirement is premised upon the "fictitious assumption that normal people are capable of knowing that their conduct was contrary to law, in spite of the proliferation and complexity of the law".¹²
- (c) Recognising an incapacity to know that an act was morally wrong accommodates situations where the accused, owing to unsoundness of mind, believed that he was (for example) acting under divine instruction.¹³

¹⁰ *YMC Rev 2nd Ed* at para 24.24.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

(d) From the standpoint of criminal responsibility, the deterrent effect of punishment would be useless on persons whose mental disorder was such as to enable them to know that their act was contrary to law but who nevertheless persisted in the firm belief that their act was morally justified. In such cases, clinical intervention rather than punishment is the proper recourse.¹⁴

21 There may be concerns that it is difficult to determine moral wrongness in a socially diverse society. However, it must be borne in mind that the accused would have been charged with a crime which, in most cases, would comprise conduct which was morally wrong in the eyes of most reasonable people in his society.¹⁵ In addition, the crux of the matter is that the accused has been found, on account of mental impairment, to be lacking the ability to reason about the rightness or wrongness of his conduct which "sane" people would be capable of doing.¹⁶ No persons should be convicted and punished for crimes when their mental faculties were so disordered as to prevent them from living "socially integrated lives and to choose conduct which conforms with both moral and legal norms."¹⁷

22 Therefore, we suggest making it clear that what constitutes a "morally wrong" act is to be assessed by reference to an objective standard which stands independent of the offender's subjective beliefs about the justifiability of his/her actions.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, citing Andrew Simester & Warren Brookbanks, *Principles of Criminal Law* (Thomson Brookers, 3rd Ed, 2007) at p 317.

SECTION 24.2: INTOXICATION

SUMMARY OF RECOMMENDATIONS

- (98) *To amend s 85(2)(a) so that a successful invocation of the defence depends on the absence of the fault of the accused in being intoxicated*
- (99) *To clarify that s 85(2)(b) requires the accused to suffer from an intoxication-induced mental disorder having a degree of permanence*
- (100) *To expand s 86(2) to cover knowledge-based crimes*
- (101) *Not to introduce a special intoxication offence*

The defence of intoxication takes three forms: involuntary intoxication under s 85(2)(a), insane intoxication under s 85(2)(b), and intoxication negating intention under s 86(2).

Intoxication when a defence

85.—(1) Except as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —

- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
- (b) the person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.

Effect of defence of intoxication when established

86. —(1) Where the defence under section 85 is established, then in a case falling under section 85(2)(a) the accused person shall be acquitted, and in a case falling under section 85(2)(b), section 84 of this Code and sections 251 and 252 of the Criminal Procedure Code 2010 shall apply.

(2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

Interpretation

(3) For the purposes of this section and section 85 “intoxication” shall be deemed to include a state produced by narcotics or drugs.

2 Macaulay's 1837 draft Code for India contained a clear and progressive provision which recognised involuntary intoxication as a defence. It did not contain any provision on voluntary intoxication. In that respect, Macaulay's Code reflected the prevailing view at the time that voluntary intoxication is never a defence to the commission of a crime. The IPC adopted the same view at the time and inserted a provision that expressly recognised that voluntary

intoxication is not a defence even though it negates the knowledge or intent required for an offence.

3 That IPC provision was altered in Singapore¹ after amendments were made to the Penal Code² in 1935 via the Penal Code (Amendment No 2) Ordinance 1935³.

4 These amendments represented an attempt to codify the English common law on intoxication, namely, the House of Lords decision of *Director of Public Prosecutions v Beard*.⁴ In *Beard*, Lord Birkenhead LC, who delivered the leading judgment, observed at 500-502:

1. [I]nsanity, whether produced by drunkenness or otherwise, is a defence to the crime charged ...

2. [E]vidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had the intent.

3. [E]vidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

5 There are three avenues through which the defence of intoxication under ss 85-86 can be raised: (a) involuntary intoxication under s 85(2)(a); (b) insane intoxication under s 85(2)(b); and (c) intoxication negating intention under s 86(2). For both (a) and (b), the accused must show that he did not know that his act or omission was wrong or did not know what he was doing.

Impetus for review

Involuntary intoxication

6 Involuntary intoxication under s 85(2)(a) has yet to be relied on in practice. This is possibly due to the fact that real life occasions are rare and that if they did exist, criminal charges would probably not be laid.

7 This provision requires the accused to prove that the intoxication was caused without his consent by the malicious or negligent conduct of a third party. In addition, the intoxication must have been so severe that the accused did not know that the alleged criminal conduct "was wrong or did not know what he was doing". This provision has been criticised for wrongly focusing on a third party's malice or negligence when the inquiry is concerned with the

¹ And Malaysia but not India.

² (SS Ord No 4 of 1871).

³ (SS Ord No 16 of 1935).

⁴ [1920] AC 479 ("*Beard*"). The accused had raped and killed a 12-year-old girl. The accused's proffered excuse neatly captured the legal basis for his defence and highlights the indistinct boundary between intoxication and insanity at the time: "I should not have injured the girl in any way if I had not been sodden and mad with drink". See Philip Handler, "DPP v Beard (1920)" in *Landmark Cases in Criminal Law* (Philip Handler, Henry Mares, Ian Williams ed) (Hart Publishing, 2017) ch 9 at p 173.

accused's blameworthiness. Thus, the defence would be unavailable to an accused whose friend had spiked his drink intentionally (since this friend was neither negligent nor malicious).

Insane intoxication

8 First, it is unclear if there is a connection between unsoundness of mind under s 84 and insane intoxication. Second, there is confusion as to whether the insanity condition under s 85(2)(b) must be longstanding or transient.

9 In relation to the first point, there is a preponderance of judicial⁵ and academic commentary⁶ that favours equating "insanity" under s 85(2)(b) with the concept of "unsoundness of mind" under s 84.⁷ There is, however, judicial⁸ and academic commentary⁹ that takes the contrary view (*ie* the concepts of "insanity" and "unsoundness of mind" do not refer to the same thing). In *Tan Chor Jin*, the Court of Appeal had the opportunity to discuss what "insanity" constituted in the context of s 85(2)(b) but it did not do so although it ruled that the provision was conceptually different from s 84.

10 In relation to the second point, s 85(2)(b) is problematic because it is not clear if the intoxicant-induced insanity alluded to in the provision must be longstanding or whether it can merely be transient (which the words, "temporarily or otherwise", would ostensibly permit). The decision by the Court of Appeal in *Tan Chor Jin* that a person who has no underlying condition but who suffers from a temporary bout of insanity can rely on the defence of insane intoxication, should be clarified.

Intoxication negating intention

11 Section 86(2) was derived from the rule in *Beard*. A key difference between s 86(2) and the rule in *Beard* concerns the type of intention-based crimes covered by the defence of intoxication. *Beard* holds that voluntary intoxication can provide a defence only to crimes of specific intent. Section 86(2), on the other hand, is available for all crimes which require intention as a fault element to commit them. One reason why s 86(2) is confined to intention-based offences might be in order to restrict its operation to serious crimes requiring a higher degree of fault. This is analogous to the English common law's restriction of the defence to crimes of specific intent. However, unlike English law where the accused would be invariably convicted of a basic intent crime, our Penal Code does not provide for this outcome.¹⁰

12 Section 86(2) is confined to intention-based crimes only. Crimes based on other fault elements such as knowledge, rashness, or negligence are not covered by s 86(2). To illustrate this point, s 86(2) will apply to someone who is charged with the first three limbs of murder under s 300 since they involve intention. However, the defence would not apply to the fourth limb which only involves knowledge. Academics have pointed out that "there appears to be no

⁵ *PP v Tan Ho Teck* [1987] SLR 226; *PP v Mohamed Bachu Miah* [1991] SGHC 81; *PP v Jin Yugang* [2003] SGHC 37 reaffirmed in [2004] SGCA 22.

⁶ W Davis, "The Defences of Insanity and Intoxication in Malayan Criminal Law" (1958) 1 MLJ lxxvi at lxxx.

⁷ Stanley Yeo, "Intoxication and Mental Disorder Defences" (2004) 16 SAcLJ 488 at 491-492.

⁸ See *Tan Chor Jin*

⁹ Lee Kiat Seng, "Case note: *Public Prosecutor v Tan Ho Teck*" (1990) 2 SAcLJ 332 at 336-338.

¹⁰ Chan Wing Cheong, "Criminal Law" (2002) 3 SAL Ann Rev 164, at paras 10.59-10.60.

strong reason why the defence of intoxication should not be extended to cover knowledge-based crimes."¹¹

Special intoxication offence

13 The PCRC noted that several civil law jurisdictions – Germany, Austria, and Switzerland – have a special intoxication offence. This is a "fall-back" offence which is used when intoxicated offenders cannot be convicted for the primary offences committed. The rationale for the offence is the public policy generated objective of protecting the community from criminal conduct committed by grossly intoxicated offenders and to ensure that they do not escape liability for harm while under that condition. The PCRC considered whether there should be a similar offence created in Singapore.

Recommendation 98: To amend s 85(2)(a) so that a successful invocation of the defence depends on the absence of the fault of the accused in being intoxicated

14 The PCRC recommends that s 85(2)(a) be amended so that it depends on the absence of the fault of the accused in becoming intoxicated, as opposed to the malice or negligence of a third party.

Recommendation 99: To clarify that s 85(2)(b) requires the accused to suffer from an intoxication-induced mental disorder having a degree of permanence

15 The PCRC recommends that s 85(2)(b) be clarified to require that the accused suffers from an intoxicant-induced mental disorder having a degree of permanence which requires and justifies treatment.

16 Those who become insane under the influence of drinks or drugs are a danger to society and consideration needs to be given to how future recurrent instances can be avoided. However, if a person suffers from a temporary bout of insanity but does not suffer from an underlying condition that may be treated, he should not be committed to a psychiatric institution. This is because there is no reason to fear repetition. Therefore, the PCRC is of the view that the intoxicant-induced insanity alluded to in the provision must be longstanding and not merely transient.

Recommendation 100: To expand s 86(2) to cover knowledge-based crimes

17 The PCRC recommends that the provision be expanded to cover intention and knowledge-based crimes. This will overcome the problem presented by offences which recognise both intention and knowledge as fault elements. The PCRC considered whether the provision ought to cover all the subjective fault elements (ie rashness) and not only intention and knowledge. The PCRC recognised that there is some debate about whether rashness can be objective. Until the debate is resolved, the PCRC is of the view that s 86(2) ought to cover only intention and knowledge-based offences. The fault elements of intention and knowledge, unlike rashness, are clearly subjective.

¹¹ *YMC Rev 2nd Ed* at para 25.17.

Recommendation 101: Not to introduce a special intoxication offence.

18 The PCRC recommends against creating a special intoxication offence like that which exists in several civil law jurisdictions. The PCRC considers that the creation of a special intoxication offence will undermine fundamental principles of criminal responsibility. An accused will be held accountable under a special offence although he may have acted unintentionally or involuntarily. In other words, the criminal law will be punishing people for moral irresponsibility (*ie* consuming alcohol or other stupefying substances) when it should be punishing them for breaching the law.

19 Apart from this concern, there are difficulties with imposing a penalty under a special offence. Such a penalty fails to distinguish appropriately between serious and less serious offences. Typically, accused persons are charged for committing serious offences; it is difficult to select which offence is to form the basis for the imposition of a penalty under a special offence. In any event, it is questionable why a penalty should be measured by reference to an offence which the Prosecution has failed to prove that the accused had committed.

SECTION 25: PARTIAL DEFENCES TO MURDER

SECTION 25.1: GRAVE AND SUDDEN PROVOCATION

SUMMARY OF RECOMMENDATIONS

- (102) Retain the partial defence of grave and sudden provocation
- (103) Clarify that words, gestures or conduct may amount to grave provocation
- (104) Clarify that cumulative provocation over a period of time may amount to grave provocation
- (105) Codify the ordinary person test for grave and sudden provocation
- (106) Amend proviso (b) to Exception 1 (Grave and sudden provocation), to insert a requirement that the offender must have had reasonable ground to believe that the deceased-victim was a public servant who was acting in the lawful exercise of his or her powers

Introduction

The defence of grave and sudden provocation originates from the English common law existing at the time the Indian Penal Code was enacted. The defence existed in the English common law as a distinct ground to reduce murder to manslaughter in the 16th century as a way of avoiding the mandatory death penalty. The rationale for recognising the defence was a concession to human frailty in cases where the accused had lost self-control on account of having been severely provoked by the deceased.¹

2 The defence of grave and sudden provocation in the Indian Penal Code at the time of its enactment closely adhered to the English common law.² Thomas Macaulay (“Macaulay”), the principal framer of the Indian Penal Code, explained the rationale behind the defence of grave and sudden provocation as follows:³

“[H]omicide committed in the sudden heat of passion, on great provocation, ought to be punished; but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming themselves to govern their passions; and in some few cases for which we have made provision, we conceive that it ought to be punished with the utmost rigour.

In general, however, we would not visit homicide committed in violent passion, which had been suddenly provoked, with the highest penalties of the law. We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course, — a course which would shock the universal feeling of mankind, and would engage the public sympathy on the side of the delinquent against the law.”

¹ Stanley Yeo, *Criminal Defences in Malaysia & Singapore* (Malayan Law Journal, 2005) (“*Criminal Defences*”) at [14.5].

² *Id.*, at [14.7].

³ Thomas Babington Macaulay, *The Works of Lord Macaulay: Speeches, Poems & Miscellaneous Writings*, Vol I (Longmans Green and Co, Albany Ed, 1898)(“*Macaulay*”), at pp 120-121.

3 Macaulay also contemplated that conduct which hurts the feelings,⁴ rather than the body, could, in certain situations, suffice for the offender to invoke this defence:⁵

“It is an indisputable fact that *gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain.* On the contrary, the circumstance that a man resents an insult more than a wound is any thing but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honour more acutely than an outrage which had fractured one of his limbs...

One outrage which wounds only the honour and the affections is admitted by Mr. Livingston to be an adequate provocation. “A discovery of the wife of the accused in the act of adultery with the person killed is an adequate cause.” The law of France, the law of England and the Mahomedan law are also indulgent to homicide committed under such circumstances. We must own that we can see no reason for making a distinction between this provocation and many other provocations of the same kind. We cannot consent to lay it down as an universal rule that in all cases this provocation shall be considered as an adequate provocation. Circumstances may easily be conceived which would satisfy a Court that a husband had in such a case acted from no feeling of wounded honour or affection, but from mere brutality of nature, or from disappointed cupidity”

[Emphasis added]

Current law

4 The partial defence of grave and sudden provocation is set out in Exception 1 to s 300 of the Penal Code:

When culpable homicide is not murder

Exception 1.—Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

⁴ Words, gestures, and even circumstances observed by the offender (who subsequently unlawfully kills the deceased).

⁵ Macaulay at pp 121-122.

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

...

5 The defence of grave and sudden provocation would be successfully raised if an offender can prove on a balance of probabilities that:⁶

- (a) He was subjectively deprived of his self-control by the provocation (“the subjective test”); and
- (b) The provocation was objectively grave and sudden, involving the application of the reasonable man test (“the objective test”).
 - (i) The “reasonable man” test involves considering whether an ordinary person of the same gender and age as the accused, sharing such of his characteristics as would affect the gravity of the provocation, and placed in the same situation as the accused, would have been so provoked as to lose his self-control.⁷ Individual peculiarities is not a factor to be considered, unless it is relevant in the sense that it affects the gravity of the provocation.⁸ It should also be noted that the expression “reasonable man”, though convenient, is somewhat misleading – the objective test was introduced to ensure a uniform standard of self-control, and to deny the defence to those who overreact because they are “exceptionally pugnacious and bad-tempered and over-sensitive”.⁹ The objective test demands only that the offender should have exercised the same degree of self-control as an ordinary person. It does not require that his act of killing must be somehow capable of being viewed as “reasonable”.¹⁰
 - (ii) In determining whether the objective test is satisfied, regard must be given to the test of proportionality. In deciding if an accused had exercised sufficient self-control for the objective test, a relevant question is whether the degree of loss of self-control was commensurate with the severity of the provocation.¹¹ There is no requirement for the provocation and the response to it be clinically matched; instead, the test is whether it can be said that a

⁶ *PP v Kwan Cin Cheng* [1998] 1 SLR(R) 434 (CA) (“*Kwan Cin Cheng*”) at [44]; *Seah Kok Meng v PP* [2001] 2 SLR(R) 24 (CA) (“*Seah Kok Meng*”) at [21]; *PP v Sundarti Supriyanto* [2004] 4 SLR(R) 622 (HC) (“*Sundarti Supriyanto*”) at [97].

⁷ *Kwan Cin Cheng* at [62]; *Seah Kok Meng* at [21]; *Sundarti Supriyanto* at [97].

⁸ *Sundarti Supriyanto* at [97]; *Ithinin bin Kamari v PP* [1993] 1 SLR(R) 547 at [39].

⁹ *Kwan Cin Cheng* at [65].

¹⁰ *Ibid.*

¹¹ *Id.*, at [69].

reasonable person would have lost self-control in the situation in view of the provocation alleged.¹² It has been stressed that the test of proportionality is not a separate test to be satisfied in the grave and sudden provocation defence, but a factor to be taken into account in determining if the objective test is satisfied.¹³ It has also been stressed that where the grave and sudden provocation defence is concerned, the accused's loss of self-control would *ex hypothesi* be of an extreme degree, resulting in the killing of another person. In practice, an inquiry into "proportionality" does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have lost his self-control to that extent and reacted as the accused did.¹⁴

Common law development of the "reasonable man" test

6 The "reasonable man" test was not drafted in the Indian Penal Code. It was a test devised by the English common law in the seminal case of *Director of Public Prosecutions v Camplin*¹⁵ as a control device to ensure that the defence would be kept within acceptable limits.¹⁶ Our courts have similarly made the "reasonable man" test an essential requirement of the defence, and closely followed English common law pronouncements on the test.¹⁷

7 Lord Simon explained the rationale of the "reasonable man" test in *Camplin* at [180]:

"The original reasons in this branch of the law were largely reasons of the heart and of common sense, not the reasons of pure juristic logic. The potentiality of provocation to reduce murder to manslaughter was, as Tindal CJ said in *R v Hayward* ((1833) 6 C & P 157 at p 159), "in compassion to human infirmity". *But justice and common sense then demanded some limitation: it would be unjust that the drunk man or one exceptionally pugnacious or bad-tempered or over-sensitive should be able to claim that these matters rendered him peculiarly susceptible to the provocation offered, where the sober and even tempered man would hang for his homicide.* Hence, I think, the development of the concept of the reaction of a reasonable man to the provocation offered ..."

[Emphasis added]

8 Lord Goff also instructively explained what the "reasonable man" test entailed in House of Lords decision of *R v Morhall*¹⁸ said at 665:¹⁹

¹² *Seah Kok Meng* at [34]; Chan Wing Cheong, "Criminal Law" (2003) 4 SAL Ann Rev 178 at [10.15].

¹³ *Seah Kok Meng*.

¹⁴ *Kwan Cin Cheng* at [69].

¹⁵ [1978] AC 705 (House of Lords) ("*Camplin*"). The following seminal pronouncement was made by Lord Diplock at 718: "[T]he reasonable man ... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him...". *Camplin* was cited with approval in *Kwan Cin Cheng* at [48].

¹⁶ *Kwan Cin Cheng* at [63].

¹⁷ Stanley Yeo, "English Reform of Provocation and Diminished Responsibility: Whither Singapore?" (2010) Sing JLS 177 ("*Stanley Yeo*") at 177.

¹⁸ [1995] 3 All ER 659.

¹⁹ Cited with approval in *Kwan Cin Cheng* at [64].

“In truth the expression “reasonable man” or “reasonable person” in this context’ can lead to misunderstanding...*the “reasonable person test” is concerned not with ratiocination, nor with the reasonable man whom we know so well in the law of negligence (where we are concerned with reasonable foresight and reasonable care), not with reasonable conduct generally. The function of the test is only to introduce, as a matter of policy, a standard of self-control which is to be complied with if provocation is to be established in law...Lord Diplock himself spoke of “the reasonable or ordinary person”, and indeed to speak of the degree of self-control attributable to the ordinary person is ... perhaps more apt and certainly less likely to mislead, than to do so with reference to the reasonable person.*”

[Emphasis added]

Recommendation 102: Retain the partial defence of grave and sudden provocation

Impetus for review

9 The PCRC noted that the defence of grave and sudden provocation has been abolished in a number of jurisdictions – Commonwealth of Australia, Victoria, Tasmania, Western Australia, and New Zealand – and considered whether Singapore should follow suit, and abolish the defence.

Recommendation

10 The PCRC recommends retaining the partial defence of grave and sudden provocation. An examination of reforms of this defence in various jurisdictions reveals that the partial defence has only been abolished in jurisdictions which do not impose a mandatory sentence of life imprisonment or worse for murder. In contrast, the partial defence has been retained in jurisdictions where murder attracts a mandatory minimum sentence of life imprisonment, although limits may have been placed on its application.²⁰

11 Provocation can therefore be treated as a mitigating factor in those jurisdictions which do not impose mandatory sentences of at least imprisonment for murder. Singapore, however, continues to retain the mandatory death penalty for intentional murder (s 300(a)) and the discretionary death penalty for other limbs of murder under s 300, and it would accordingly be difficult for provocation to apply as an ordinary mitigating factor in the sentencing equilibrium.

Recommendation 103: Clarify that words, gestures or conduct may amount to grave provocation

Recommendation

12 The PCRC recommends making it clear that words, gestures or conduct may amount to grave provocation. First, this is consistent with Macaulay’s intent when he drafted the Indian

²⁰ Ian Leader-Elliott, “Provocation” in *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Wing-Cheong Chan, Barry Wright and Stanley Yeo ed) (Routledge, 2016) ch 12 at p 297.

Penal Code. Second, our courts have already recognised that both words and conduct can amount to grave provocation; codification will add clarity to the existing law.

Recommendation 104: Clarify that cumulative provocation over a period of time may amount to grave provocation

Impetus for review

13 The partial defence has been strenuously criticised for tending to favour the typical male reaction to provocation of instantaneous reaction, and that it has the undesirable tendency of excluding “slow-burn” cases involving offenders whose reaction was delayed or built up gradually, particularly in cases involving battered women or victims of domestic violence.²¹ In such “slow-burn” cases, the offenders (the initial victims) tend not to react with instant violence to taunts or violence as men tend to do, as such a response may likely to lead to more violence. Instead, such offenders tend to respond by suffering a “slow-burn” of fear, despair and anger, which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed. An upshot of this defence is that it appears to favour a person who responds to sudden threat/anger over a person who, over a lengthy period, has become sensitised to danger from the batterer and who is required to wait until a knife is uplifted, a gun is pointed, or a fist is clenched, before the apprehension of danger is deemed reasonable.²²

14 The counter argument to this is that if the requirement for “suddenness” is removed from the defence, cold-blooded killers who kill in a calculated manner may be excused and find themselves able to justify the premeditated killing, when the defence was meant for actions which were a result of passion.²³

15 This tension can be seen in the cases *Sundarti Supriyanto* and *PP v Sundarti Supriyanto (No. 2)*²⁴. The case involved a 23-year-old female domestic worker charged with murder under s 300 of the 1985 Penal Code²⁵, She was convicted of an amended charge under s 304(a) of the PC 1985 after successfully raising the defence of grave and sudden provocation on a balance of probabilities.

16 In that case, the deceased victim had subjected the accused to physical and emotional abuse over a period of time.²⁶ On the day of the deceased’s death, the deceased made the accused eat noodles in the toilet, hit the accused on the buttocks with a cane alleging that she ate the baby’s food, used a spoon to poke her, threw soiled tissues stained with faeces at her face, dragged her out from the toilet when she wanted to drink some water as she was thirsty, and scratched her face. A fight then ensued during which the accused stabbed the deceased in a haphazard manner. She then set the crime scene on fire to conceal her crime.

17 In holding that the defence of grave and sudden provocation was made out, the trial judge found that the events of abuse over a period of time prior to the material day went towards

²¹ *Stanley Yeo* at 185.

²² Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation: Report* (QLRC R 64, September 2008) at [15.102].

²³ *Id.*, at [15.124]; *Stanley Yeo* at p 184.

²⁴ [2004] SGHC 244.

²⁵ (Cap 224, 1985 Rev Ed) (“PC 1985”).

²⁶ *Sundarti Supriyanto* at [142] and [178].

forming the “mental background” of the accused at the time of the provocation, and that a reasonable maid in the position of the accused with that “mental background” would have been so provoked by the acts of the deceased. The trial judge found that there was no break in time or cooling period between the events of abuse and the killing, and that the “provocation was ongoing”, and even though there were “breathing spaces” in between, the “breathing spaces” were not so significant to constitute a cooling-off period to put an end to the provocation.²⁷

18 On the one hand, academics have argued that the previous provocative incidents which served as the setting for the main triggering provocative act strictly speaking did not constitute provocation.²⁸ This is due to the fact that as its name indicates, a *strict reading* of the provision requires the provocative conduct to have been “sudden” (in the sense of being unexpected) and to have occurred within a short period of time before the killing.²⁹ On the other hand, it has been contended that past provocative acts can have a “cumulative effect” with the last (and even trivial) provocative act being viewed as the straw that broke the camel’s back.³⁰

19 This case illustrates the confusion and controversy in the current state of the law on the issue of (a) whether the provocation must have been “sudden” or (b) whether the suddenness of the provocation should be regarded together with the gravity of the provocation to render the analysis a holistic one, in which the court is to determine whether an ordinary person in the position of the offender would have been so provoked by the acts of the deceased.³¹

Recommendation

20 The PCRC recommends clarifying in *Exception 1* that cumulative provocation over a period of time may amount to grave provocation. The position taken in *Sundarti Supriyanto* should be codified. A new *Illustration (g)* along the following lines could be inserted into *Exception 1*, to make this clear:

Illustrations

(g) A and Z are married to each other. A, while under loss of self-control induced by Z’s provocation, intentionally kills Z a short time after the provocation was given. Although the provocation, when viewed in isolation, would not amount to grave and sudden provocation, it was the last of a series of prolonged physical and mental abuse by Z towards A. Provided an ordinary person in A’s position could have lost self-control and have done what A did, A has committed only culpable homicide not amounting to murder.

21 To elaborate, the PCRC is of the view that the partial defence should not be extended so far as to apply to pure “slow burn” cases where there is no sudden “final straw”. The requirements for loss of self-control and grave and sudden provocation therefore remain intact.

22 While the PCRC agrees that such cases may deserve to be treated differently by the law, the solution lies in the partial defence of diminished responsibility. In this regard, the

²⁷ *Id.*, at [165].

²⁸ *Criminal Defences* at [14.14].

²⁹ *Id.*, at [14.11], citing *Chong Teng v Public Prosecutor* (1960) 26 MLJ 154, *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, *Che Omar bin Mohd Akhir v Public Prosecutor* [1992] 2 MLJ 289.

³⁰ *Id.*, at [14.14].

³¹ *Ibid.*

PCRC notes that an attempt to provide for pure “slow burn” cases under this partial defence may lead to uncertainty in the way that the defence is applied.³²

23 In particular, the removal of the requirement of “suddenness” may unduly widen the defence to cover revenge killings in circumstances other than in “slow burn” cases. The PCRC is of the view that the defence of provocation has worked reasonably well in practice, including in *Sundarti*’s case, and does not therefore require any further widening.

Recommendation 105: Codify the ordinary person test for grave and sudden provocation

Impetus for review

24 The PCRC noted that academics had two broad planks of criticism of the “reasonable man” test in assessing the offender’s level of self-control.

25 First, some academics have argued that the refusal of the common law to recognise *ethnicity* as a characteristic in the “reasonable man” test is unfair to ethnic minorities in a multi-cultural society like Singapore.³³ The case for considering an offender’s *ethnic background* in assessing his *level of self-control* (and not just in assessing the *gravity of the provocation*) is premised on the following arguments:

- (a) A person’s emotions and personality are very much moulded by his customs and traditions;
- (b) Recognition of an offender’s ethnic background is of particular significance especially to new immigrants and foreign visitors who have yet to assimilate into the mainstream culture;
- (c) Recognition of the different ethnic groups’ responses to provocation will not violate any principles of fairness and equality toward other members of society, since it may not be fair to expect the same level of composure and temperament from all members of the society;
- (d) It is by no means an easy task for an offender to show that an ordinary person from the same background could have lost self-control in the circumstances. If the offender’s power of self-control is regarded as abnormal even within his own class, the peculiar temperament is precluded from the ordinary person test; and
- (e) Recognising ethnic differences underscores the “concession to human frailty” basis of the defence, the same reason why differences in age or sex of the individual are recognised in the test.

³² In this regard, English attempts to reform the defence are instructive. See Barry Mitchell, “Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!” in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Michael Bohlander and Alan Reed ed) (Routledge, 2016) ch 3 at pp 39 and 50; Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (Oxford University Press, 8th ed., 2018) at pp 242-243.

³³ Chan Wing Cheong, “The Present and Future of Provocation as a Defence to Murder in Singapore” (2001) *Sing. J.L.S.* 453 at 457 – 458, 461–463; see also Stanley Yeo, “Ethnicity and the Objective Test in Provocation” (1987) 16 *Mel U LR* 67 at 79.

26 *Somwang Phatthanasraeng v PP*³⁴ is illustrative of the tension as to whether ethnicity should be recognised as a factor in the “reasonable man” test. In *Somwang*, the accused admitted to killing the deceased but raised the defence of provocation. Both the accused and the deceased were Thais employed as construction workers in Singapore. The accused gave evidence that he had loaned \$800 to the deceased but was not repaid despite requests over several months. On reminding the deceased to pay again the night before the accused was to leave for Thailand, the deceased got angry and used a broom to hit the accused twice. The accused ran away, but later retrieved an axe and used it to hit the deceased seven times on the head, killing him. Both the High Court and the then Singapore Court of Criminal Appeal (“CCA”) rejected the evidence of the alleged loan and of the fight between the deceased and the accused immediately before the incident. The CCA commented that “[t]he provocation was not so grave, by the standards of a reasonable man, as to warrant a retaliation by the appellant with the use of an axe”.

27 This case has been criticised on the basis that it would be better if the gravity of the provocation was not assessed with reference to a purely hypothetical “reasonable man” but based on the standards of a reasonable Thai or, perhaps more properly, a reasonable Thai from the North-east of the country, given that the provocation defence was run on the basis that being hit with a broom is particularly insulting to a North-eastern Thai.

28 Second, academics have argued that permitting the offender’s sex to affect the power of self-control in the “reasonable man” test (see para 5, above) disadvantages female offenders. This is because of the assumption that the stereotypical woman has a higher level of self-control compared to males. Academics have also contended that our courts should avoid differentiating the capacity for self-control according to sex, as such an approach would promote contentious stereotyping which depict women as the gentler sex and normally passive and submissive in the face of provocation, while men are normally active and aggressive, which may be an overgeneralisation.³⁵ That said, there do not appear to be any local cases which have applied this characteristic.

Recommendation

29 Notwithstanding the criticisms above, the PCRC recommends that it is sufficient to codify the “ordinary person” test as currently set out in case law, and allow the courts to shape the contours of the test over time. The current test used by the courts strikes the right balance between objectivity, and the need to take into account relevant personal characteristics of the offender.

Recommendation 106: Amend proviso (b) to Exception 1 (Grave and sudden provocation), to insert a requirement that the offender must have had reasonable ground to believe that the deceased-victim was a public servant who was acting in the lawful exercise of his or her powers

Impetus for review

³⁴ [1992] 1 SLR(R) 682 (“*Somwang*”).

³⁵ *YMC Rev 2nd Ed* at para 29.51.

30 The current provision (b) to *Exception 1* has the effect of depriving the offender of the partial defence where the provocation in question was “given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant”. This may lead to a situation where the offender is deprived of the offence even where he or she had no grounds for believing that the deceased was such a public servant.

Recommendation

31 To ensure fairness to the accused the PCRC recommends amending proviso (b) to *Exception 1* such that an offender is only deprived of the partial defence where there were reasonable grounds for belief that the deceased was acting in obedience to the law or was a public servant in the lawful exercise of his or her powers.

SECTION 25.2: EXCEEDING PRIVATE DEFENCE

SUMMARY OF RECOMMENDATION

(107) Remove the phrase “in good faith” from Exception 2 (Exceeding private defence)

Introduction

The doctrine of exceeding private defence found expression in the Indian Penal Code at its inception.¹ Macaulay explained the rationale behind the doctrine of exceeding private defence as follows:²

“That portion of the law of homicide which we are now considering is closely connected with the law of private defence, and must necessarily partake of the imperfections of the law of private defence. But wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, we are inclined to think that it will always be expedient to make a separation between murder and what we have designated as voluntary culpable homicide in defence.

The chief reason for making this separation is that the law itself invites men to the very verge of the crime which we have designated as voluntary culpable homicide in defence. It prohibits such homicide indeed; but it authorises acts which lie very near to such homicide; and this circumstance, we think, greatly mitigates the guilt of such homicide.”

2 It is uncertain where the Code framers drew the inspiration for the doctrine from.³ One possible source may have been certain English cases decided around the time when it was being drafted. Another source could have been from the human and social conditions of the Indian subcontinent as perceived by the Code framers, where Indian people were generally lacking in spirit to defend themselves, thereby prompting the Code framers to explore ways whereby the law encouraged self-help.

3 The rationale of the defence is that the culpability of a person who kills another in defence of person or property, and who honestly believes the force to be necessary, when it was not, falls short of the culpability normally associated with murder.⁴ The Code framers expressed their reasons for recognising the exception as a halfway house between a murder conviction and a complete acquittal:

“That a man who deliberately kills another in order to prevent that other from pulling his nose should be allowed to go absolutely unpunished, would be most dangerous. The law punishes and ought to punish such killing. But we cannot think that the law ought to punish such killing as murder. For the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage,— to give the assailant a cut with a knife across the fingers which

¹ *YMC Rev 2nd Ed* at para 21.4.

² *Macaulay* at pp 126-127.

³ *YMC Rev 2nd Ed* at para 21.4.

⁴ *Id.*, at para 21.6.

may render his right hand useless to him for life, or to hurl him down stairs with such force as to break his leg ; and it seems difficult to conceive that circumstances which would be a full justification of any violence short of homicide should not be a mitigation of the guilt of homicide. That a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the code if he kills the same assailant; that there should be only a single step between perfect innocence and murder, between perfect impunity and liability to capital punishment, seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death.

Thus we allow a man to kill if he has no other means of preventing an incendiary from burning a house; and we do not allow him to kill for the purpose of preventing the commission of a simple theft. But a house may be a wretched heap of mats and thatch, propped by a few bamboos, and not worth altogether twenty rupees. A simple theft may deprive a man of a pocket-book which contains bills to a great amount, the savings of a long and laborious life, the sole dependence of a large family. That in these cases the man who kills the incendiary should be pronounced guiltless of any offence, and that the man who kills the thief should be sentenced to the gallows, or, if he is treated with the utmost lenity which the Courts can show, to perpetual transportation or imprisonment, would be generally condemned as a shocking injustice.”

4 However, a complete acquittal would not be appropriate as the offender would have grossly overstepped his or her use of force in defence and is not entirely free of moral blame.⁵

Current law

5 The partial defence of exceeding the right of private defence is set out in Exception 2 to s 300 of the Penal Code:

When culpable homicide is not murder

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

6 The Court of Appeal held that the following elements have to be proved by the offender on a balance of probabilities in order to establish Exception 2:⁶

- (a) the right of private defence has arisen;
- (b) the right was exercised in good faith
- (c) the death was caused without premeditation; and

⁵ *Id.*, at para 21.8.

⁶ *Soosay v PP* [1993] 2 SLR(R) 670 (“*Soosay*”) at [29].

- (d) the death was caused without any intention of doing more harm than was necessary for the purpose of such defence

7 In *Tan Chor Jin*, the Court of Appeal set out the following three-step approach to be adopted in cases where Exception 2 is pleaded (at [42]):

- (a) *First, were there circumstances giving rise to the right of private defence?* If ‘yes’ both the general plea of private defence and Exception 2 may be available. If ‘no’ both pleas are unavailable and the inquiry is at an end.
- (b) *Second, was the offender confronted with one of the specific types of threats mentioned in ss 100 or 103 of the Penal Code, and did his or her act of killing constitute no more harm than was necessary to inflict for the purpose of private defence?* If ‘yes’ the general plea of general defence is likely to be available. If ‘no’ the general plea is unavailable but Exception 2 may be available.
- (c) *Third, was the offender’s act of killing (i) done without premeditation and (ii) without an intention of doing more harm than was necessary for the purpose of private defence?* If ‘yes’ Exception 2 is likely to be available. If ‘no’ the defence is unavailable

8 The third question of whether the offender’s act of killing was done without premeditation and without an intention of doing more harm than was necessary is a subjective inquiry. In assessing the offender’s intention, the court will consider his subjective perception concerning the nature of the threat and the need for the force used to counter it.⁷

Recommendation 107: Remove the phrase “in good faith” from Exception 2 (Exceeding private defence)

Impetus for review

9 There have been some cases that have connected the expression, “in the exercise in good faith” with whether the force was necessary.⁸ This interpretation is problematic because it only requires the accused to have honestly and reasonably believed that the killing was necessary. This interpretation has been criticised by academics for the following three reasons:⁹

- (a) First, to require an offender to honestly and reasonably believe that the *force used was necessary* would effectively require the offender to believe that the *killing was necessary*. Given that s 52 of the Penal Code defines good faith to mean doing something with “due care and attention”, it follows that the accused must have honestly and reasonably believed the *killing to be necessary*.¹⁰ However, if an accused had used “due care and attention” in determining whether the force used was necessary, then it would be tautological for the exception to further require that the accused’s defensive action was done (i) “*without premeditation*” and (ii)

⁷ *YMC Rev 2nd Ed* at para 21.21

⁸ *Soosay*.

⁹ *YMC Rev 2nd Ed* at para 21.15.

¹⁰ *Id*, at para 21.19.

“without any intention of doing more harm than is necessary”. How can a person who believes that the *force was necessary* also concurrently intend to do “more harm than is necessary”? Similarly, how can a person who believes that force was necessary for the purposes of *defending* himself also have premeditated the situation to inflict the necessary amount of harm by way of private defence?

- (b) Second, requiring the offender to have *reasonably* believed that his defensive action was necessary runs counter to the rationale of Exception 2. The rationale for Exception 2 is that the culpability of a person who kills another in defence of person or property, and who honestly believes the force to be necessary, when it was not, falls short of the culpability associated with murder. As such, if an offender honestly (albeit *unreasonably*) believed that killing was necessary, his culpability would be mitigated by the fact that the force was in response to an offence committed by the deceased against the offender.
- (c) Third, such an interpretation is completely contrary to how Exception 2 is meant to operate. If more harm was used than was necessary, that would only mean that the *general right of private defence* (which is a *complete defence*) would have failed, but not necessarily Exception 2, given that Exception 2 itself contemplates that the right of private defence had been *exceeded*.

10 The courts have also diluted the expression, “in good faith”, considerably to give effect to the view that Exception 2 will succeed as long as the accused honestly believed that the killing was necessary in private defence. Thus, in *Soosay*¹¹, the Court of Appeal stated at [39] that:

“[t]he question must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to be inflicted regardless of his rights.”

[Emphasis added]

11 This interpretation equates the term “good faith” to an honest subjective belief and removes the requirement of reasonableness from the accused’s belief relating to the killing. It has been observed that this interpretation suffers from a number of defects:¹²

- (a) First, the interpretation fails to address the criticism of tautology. *If* Exception 2 already requires, by the virtue of the expression “in good faith”, the honest belief by the accused that the act of killing was necessary, there should be no need for the

¹¹ In *Soosay*, the offender was charged with the murder of the victim by stabbing him to death. The appellant and his friend, Kuppiah, went in search of the victim after suspecting that the victim stole their friend’s properties. When they found the victim, he feigned ignorance and subsequently pointed a knife at Kuppiah and made as if to go at Kuppiah with the knife. The appellant kicked the victim in the stomach and the victim fell and lost hold of the knife. The appellant did not go for the knife until he noticed that the victim was reaching out for it. After the appellant picked up the knife, the victim rushed at him, and he stabbed the victim’s buttock. The victim grabbed the appellant’s upper arm, and the appellant stabbed the victim a second time to free himself, inflicting the first of two fatal wounds. The victim was unrelenting and charged at him again, whereupon the second fatal wound was inflicted by the offender.

¹² *YMC Rev 2nd Ed* at para 21.22.

accused to then have acted "without intention of doing more harm than is necessary".

- (b) Second, it is not correct to ascribe a different meaning to "good faith" when this has been defined by the Penal Code. Under s 52 of the Penal Code, "[n]othing is said to be done or believed in good faith which is done or believed without due care and attention". The definition under the Penal Code is an objective one. The interpretation given to the term "good faith" by case law (*ie Soosay*) inserts subjectivity into what should be an objective standard.

Recommendation

12 The PCRC therefore recommends deleting the phrase "in good faith" from Exception 2. The defence already requires the existence of the circumstances set out in ss 99 – 103 of the Penal Code (as these are the preconditions to the right of private defence). This, in the PCRC's view, is sufficient to exclude undeserving cases.

SECTION 25.3: KILLING WHILE EXCEEDING PUBLIC POWERS

SUMMARY OF RECOMMENDATION

(108) Retain the partial defence of killing while exceeding public powers as it currently appears

Introduction

The partial defence of killing while exceeding public powers exists because it would be unjust to punish persons who cause death while carrying out acts which they are duty bound to do as if they were murderers.¹ Additionally, it is also a recognition that public servants are often required to make quick decisions in maintaining law and order and so may miscalculate at times. Hence they are afforded greater protection than civilians.²

Current law

2 The partial defence to murder available to public servants and persons aiding public servants who cause death while exceeding public powers is set out in *Exception 3* to s 300 of the Penal Code. It states:

When culpable homicide is not murder

Exception 3.— Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

3 While there are no reported cases in which accused persons have had recourse to *Exception 3*, there has been academic suggestion (which conforms with a plain reading of the provision) that an accused would have to prove the following to avail himself of the partial defence:³

- (a) He was a “public servant” as per the meaning of that term in s 21 of the Penal Code or a person aiding such a public servant.
- (b) He believed in good faith (*ie* with due care and attention⁴) that the act resulting in death was lawful and necessary for the discharge of his duty as a public servant.
- (c) He did not bear any ill-will towards the deceased.

Recommendation 108: Retain the partial defence of killing while exceeding public powers as it currently appears

¹ *Ratanlal* at p 1525.

² *Criminal Defences* at [18.26].

³ *Id.*, at [18.17].

⁴ See s 52 of the Penal Code.

Recommendation

4 The PCRC recommends retaining *Exception 3* as it currently appears. The additional protection it grants to public servants is necessary and will facilitate discharge of their duties. Its narrow scope will prevent abuse.

SECTION 25.4: SUDDEN FIGHT

SUMMARY OF RECOMMENDATIONS

- (109) Retain the partial defence of sudden fight
- (110) Clarify that premeditation relates to the fault elements for murder under s 300 of the Penal Code
- (111) Clarify the definition of “fight” in Exception 4 (Sudden fight)
- (112) Insert a new Explanation to clarify that a quarrel does not require verbal exchange
- (113) Insert new provisos to clarify the operation of the partial defence of sudden fight
- (114) Insert new Illustrations to exemplify situations where the partial defence of sudden fight is not available

Introduction

Macaulay did not provide for the partial defence of sudden fight when he drafted the Indian Penal Code.¹ It was a late addition to the Indian Penal Code when it was enacted in 1860 and there is no published account of the reasons that led the Legislative Council to provide for the partial defence of sudden fight.²

2 The defence of sudden fight appears to have been borrowed from the English common law doctrine of *chance medley* or *mutual combat*.³ The doctrine applied in cases where the accused who had been assaulted in a sudden brawl (in respect of which he or she was not entirely without blame) had declined further combat and withdrawn but the adversary had launched a fresh and unprovoked attack against which the accused in necessary defence killed the attacker. The doctrine is a common law defence which reduced murder to excusable homicide which only involved forfeiture of goods. Chance medley became obsolete when the Offences Against the Person Act 1828⁴ abolished punishment and forfeiture in any case of killing without felony thereby removing the distinction which had until then existed between chance medley and other cases of excusable homicide such as killing under provocation. It has been inferred that Macaulay must have therefore agreed with this development since he did not include the doctrine in his draft Penal Code of 1837. However, for reasons unknown, the final version of the Indian Penal Code inserted a section which bore a close resemblance to the doctrine.

3 Regardless of the origin of this exception, it has been accepted that the defence of sudden fight was envisaged to apply to cases where, irrespective of the cause of the fight, the subsequent conduct of parties put them on an equal footing in respect of blameworthiness.⁵ In this connection, Dr Sir Hari Singh Gour provides a succinct account of the rationale for the partial defence; it is meant to apply in cases of *mutual provocation*:

¹ Ian Leader-Elliot, “Revising the Law of Murder in the Indian Penal Code: A Macaulayan Reconstruction of Provocation and Sudden Fight” (2010) University of Adelaide Law Research Paper No. 2010-002 (“*Ian Leader-Elliot*”) at p 46, citing Sir William Oldnall Russell, *A Treatise on Crimes and Misdemeanours* (Charles Sprengel Greaves ed) (T&JW Johnson, 3rd Ed, 1843), Vol 1, 585-92.

² *Id.*, at p 46.

³ *Criminal Defences* at [15.3].

⁴ (9 Geo 4 c 31) (UK).

⁵ Lee Kiat Seng, “Sudden Fight: Life after Seow Khoon Kwee” (1996) Sing JLS 442 (“*Lee Kiat Seng*”) at 443.

“The position of the combatants under this clause is...this: There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to blame. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn that it did. There is then mutual provocation and aggravation and it is difficult to apportion the blame that attaches to each fighter.”

4 The standard judicial explanation of the partial defence of sudden fight, repeated with mechanical regularity in decisions of the Indian Supreme Court, is a more extended version of Gour’s summary statement set out above.⁶ In the words of the Indian Supreme Court, the origin of the dispute does not matter, “the subsequent conduct of both parties puts them in respect of guilt on an equal footing”.⁷

Current law

5 The partial defence of sudden fight is set out in Exception 4 to s 300 of the Penal Code:

When culpable homicide is not murder

Exception 4.— Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation —It is immaterial in such cases which party offers the provocation or commits the first assault.

6 The following elements must all be present, before an offender can avail himself or herself of the partial defence:

(a) Sudden fight in the heat of passion upon a sudden quarrel:

- (i) “Sudden fight”: The term “fight” has been judicially defined by the Court of Appeal as consisting of mutual provocation and blows on each side, and it is not sufficient that there is at least an offer of violence on both sides, and it must mean “more than a mere quarrel”.⁸ Where a person strikes another, there will only be a fight if the other hits him back or at the very least prepares himself to strike back, even if he ultimately does not strike back because of the lack of opportunity, as there cannot be a fight if the victim keeps quiet and does nothing, as that would constitute a one-sided attack.⁹

⁶ *Ian Leader-Elliott* at p 48; citing *Baban Bandu Patil v State of Maharashtra* [2009] INSC 737 (“*Baban Bandu Patil*”) for a standard judicial account to the same effect.

⁷ *Baban Bandu Patil*.

⁸ *Tan Chee Wee v PP* [2004] 1 SLR(R) 479 (“*Tan Chee Wee*”) at [60].

⁹ *Id.*, at [61].

To constitute a fight, it is necessary that blows should be exchanged even if they do not all find their target.¹⁰ Pushing would constitute a fight.¹¹

(ii) “upon a sudden quarrel”: It has been held that an actual verbal exchange is not required. In *Tan Chun Seng v*¹², it was accepted that there was a stand-off between the deceased (*deaf-mute*) and the offender just before the offender pushed the offender to the ground, causing the deceased to subsequently react and hit the deceased. Although there was no verbal exchange, it was held that the defence of sudden fight was established.

(iii) Requirement for immediacy of the fight: Courts have found that there needs to be immediacy between the quarrel and the fight, and if there is a cooling-off period between the quarrel and the fight, it would suggest that reason has overcome passion and the fight is not sudden.¹³

(b) Absence of premeditation: The definition of “premeditation” is in a state of confusion. Premeditation has been unsatisfactorily defined variously as follows:

(i) An intention to kill;¹⁴

(ii) An intention to cause grievous hurt;¹⁵

(iii) An intention to do the act which caused death;¹⁶ or

(iv) Any kind of pre-planned conduct to get into a fight or an element of design or prior planning.¹⁷

(c) No undue advantage and not acting in a cruel or unusual manner: Undue advantage has been judicially defined as “unfair advantage”.¹⁸ All the facts of the case must be taken into consideration especially those attributes unique to the other party in the fight (*eg* physique, age, ability, aggression, etc.).¹⁹ Generally, an offender who had acted in a cruel and unusual manner would have also taken undue advantage of the deceased. However, the converse is not true. For instance, in *Tan Chee Wee*, the offender entered the deceased’s flat and tried to rob her. In the course of the robbery, a struggle ensued. The deceased had a knife while the offender had a hammer. The offender managed to hit the deceased with the hammer on the head, and while she

¹⁰ *Ibid*; *Atma Singh v The State*, AIR 1955 Punj 191, at 192: The term ‘fight’ occurring in Exception 4 to s 300 is not defined in the Code. It takes two to make a fight. It is not necessary that weapons should be used in a fight. An affray can be a fight even if only one party in the fight is successful in landing a blow on his opponent. In order to constitute a fight, it is necessary that blows should be exchanged even if they do not all find their target.

¹¹ *Tan Chun Seng v PP* [2003] 2 SLR(R) 506 (“*Tan Chun Seng*”) at [24].

¹² [2003] 2 SLR(R) 506.

¹³ *Lee Kiat Seng* at 445 and 475; citing *Mohamad Yassin bin Jappar v PP* [1994] 3 SLR(R) 17 at [20].

¹⁴ *Mohamed Kunjo v PP* [1977–1978] SLR(R) 211 (“*Kunjo*”) at [21]; and *Soosay* at [20]; *PP v Seow Khoon Kwee* [1988] 2 SLR(R) 310 (“*Seow Khoon Kwee*”) at [35].

¹⁵ *Soosay* at [20].

¹⁶ *Lee Kiat Seng* at p 456, citing *Chan Kin Choi v PP* [1991] 1 SLR(R) 111.

¹⁷ *Tan Chun Seng* at [22]; *Kunjo* at [21].

¹⁸ *Kunjo* at [21].

¹⁹ *Tan Chee Wee* at [70].

was lying helpless on the floor, he delivered several more blows to her head. The Court of Appeal held that while the appellant had not taken undue advantage of the deceased by using the hammer (since the deceased had a knife), he had acted in a cruel and unusual manner by striking her head several times when she was lying helpless on the floor.²⁰

Recommendation 109: Retain the partial defence of sudden fight

Impetus for review

7 The PCRC noted that there have been suggestions that the defence of sudden fight should be abolished, on the ground that the law should not be seen to condone fights and that the defences of provocation and exceeding private defence adequately covers cases where an accused deserves to escape a conviction for murder.²¹ The PCRC thus considered whether to abolish this defence.

Recommendation

8 The PCRC recommends retaining the partial defence of sudden fight, for the following reasons:

- (a) First, this recognises the reality that fights do occur suddenly and that people who kill in the course of one are less morally culpable than those who coolly plan and carry out a murder;
- (b) Second, there are cases where the defence of sudden fight has prevailed when the defences of *provocation* and *exceeding private defence* have failed.²² Accordingly, the view that sudden fight may be easily subsumed under the other two defences is inaccurate; and
- (c) Third, the defence of sudden fight appears to have operated reasonably well in practice and it would suffice to make amendments to bring greater clarity.

Recommendation 110: Clarify that premeditation relates to the fault elements for murder under s 300 of the Penal Code

²⁰ *Id.*, at [66]-[68], [70] and [74].

²¹ *Criminal Defences* at [15.3].

²² See for instance, *Seow Khoo Kwee*. A day prior to the fight, a disagreement arose between the accused and the deceased whereupon the accused challenged the deceased to a fight. The two were restrained. When the prison warden looked into the enclosure to investigate the commotion, he found the deceased appearing angry. The deceased refused to answer the warden's enquiry as to what had happened. The deceased was put in an isolation ward and was subjected to consecutive interviews by the prison officers before being released later in the day. The next day, the accused was seen talking to the deceased, while holding a piece of glass wrapped in a towel. The deceased suddenly struck out at the accused who was thrown back by the force of the punch. The deceased charged at the accused and they fought. After the altercation, the deceased stepped back, clutching his chest which was bleeding heavily, and collapsed. The deceased was rushed to hospital where he died. The court accepted that there was a sudden fight and convicted the accused of a charge of culpable homicide not amounting to murder. However, the court rejected the defence of provocation as it found that the deceased did not inflict the fatal injury whilst he was deprived of the power of self-control (at [31]). The court also found that the defence of exceeding private defence failed as the accused had time to have recourse to the protection of the prison officers ([30]-[32]).

Impetus for review

9 As earlier mentioned, there is confusion in the case law on the definition of “premeditation” in *Exception 4*. The PCRC therefore considered how to resolve the inconsistencies in the case law.

Recommendation

10 The PCRC recommends making it clear that “premeditation” in *Exception 4* relates to one of the types of fault under s 300 of the Penal Code. Bearing in mind that sudden fight is an *exception* to s 300 of the Penal Code, it follows that the term “premeditation” must relate to the four types of fault for murder under s 300 of the Penal Code.²³ In other words, the partial defence should be unavailable to a person who with premeditation:

- (a) *intended* to cause death (s 300(a));
- (b) *intended* to cause such bodily injury as the offender knows to be likely to cause death (s 300(b));
- (c) *intended* to cause such bodily injury which is sufficient in the ordinary course of nature to cause death (s 300(c)); or
- (d) *knew* that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death (s 300(d)).

11 The first three types of fault, being intentional in nature, comport with the notion of premeditation. The last type of fault is concerned with knowledge of the risk of injury which the offender intentionally exposed the deceased to, and it is therefore conceivable that the offender had premeditated the exposure of the deceased to such risk.²⁴

12 However, if an offender premeditated a lesser type of injury other than that prescribed for murder, but eventually causes death, the exception should be available, as the offender’s murderous intent was only formed during the course of the fight.²⁵ For instance, if the offender only premeditated a light slap to the deceased (hurt), but the deceased unexpectedly responds by taking a knife charging to slash the offender’s chest, who in turns takes hold of the knife to stab the deceased’s chest, it is conceivable that the offender did not anticipate such an exchange and had no premeditation to cause any of the injuries which led to death, and the exception should therefore be available.

Recommendation 111: Clarify the definition of “fight” in Exception 4 (Sudden fight)

Impetus for review

13 The plain meaning of the word “fight” would suggest a successful exchange of blows. However, “fight” has been judicially defined to mean situations where blows are exchanged

²³ *Criminal Defences* at [15.22].

²⁴ *Ibid.*

²⁵ *Ibid.*

even if they do not all find their target and also defined to include one single push. The PCRC thus considered whether legislative clarification is needed.

Recommendation

14 The PCRC recommends inserting an *Explanation* to bring greater clarity to the definition of “fight” in *Exception 4*. The *Explanation* should state that *Exception 4* has no application “unless there was an exchange of blows or other force between the offender and the person killed, even if the blows and force do not find their target”.

Recommendation 112: Insert a new Explanation to clarify that a quarrel does not require verbal exchange

Impetus for review

15 The requirement for there to be a “quarrel” has been criticised, on the basis that the term “quarrel” suggests the need for a *verbal exchange* which triggered the fight. It also seems to take into account the fact that a mutual hard stare and showdown may sometimes be more aggressive than a verbal banter, and that the touchstone should not be whether there was any verbal exchange, but whether there was some form of confrontation between the parties before the fight began.

16 Having said that, the courts accepted in *Tan Chun Seng* that an actual verbal exchange was not required. In that case, the Court of Appeal accepted that a stand-off between the deceased (deaf-mute) and the offender just before the deceased pushed the offender to the ground appeared to suffice to constitute a quarrel which precipitated the accused’s subsequent reactions.

17 Academics have also argued that the exception should not be read strictly as requiring the existence of a quarrel just prior to a sudden fight.²⁶ While such a quarrel may serve as the catalyst for a fight, there may be circumstances where the fight began without immediately being preceded by a quarrel. For instance, the parties may have quarrelled the day before, and on meeting each other unexpectedly, commenced fighting. It has been argued that the defence should not be denied just because the fighting did not immediately follow right after the quarrel

Recommendation

18 The PCRC recommends inserting a new *Explanation* to codify the position in *Tan Chun Seng v PP*. As mentioned, the Court of Appeal had accepted that a stand-off between the deceased (a deaf-mute who could not have quarrelled) and the offender just before the deceased pushed the offender to the ground, causing the deceased to subsequently react and hit the deceased, could satisfy the definition of “sudden fight in the heat of passion upon a sudden quarrel”.

19 The PCRC agrees that requiring a verbal exchange fails to take into account the fact that a hard stare between the parties could sometimes be more aggressive in nature than verbal banter. Take an example of two men staring at each other. No words are exchanged. After one

²⁶ *YMC Rev 2nd Ed* at para 30.14.

minute of dressing each other down through the art of staring, one pushes the other and the other retaliates, resulting in a fight. The PCRC is of the view that the exception of sudden fight should operate in the case presuming the other requirements are met given that a showdown between the parties could suffice to precipitate the fight. The touchstone should not be whether there was a verbal exchange but whether there was some form of confrontation before the fight began, which appears to be the touchstone adopted by the Court in *Tan Chun Seng*.

Recommendation 113: Insert new provisos to clarify the operation of the partial defence of sudden fight

Impetus for review

20 There has been academic commentary that it appears to have escaped the notice of the Legislative Council who introduced the defence of sudden fight to have subjected the exception to the same limitations as provocation.²⁷ The PCRC therefore considered whether there was a need to insert provisos to *Exception 4*, in the same way that *Exception 1* is limited by provisos.

Recommendation

Proviso (a): If the offender deliberately and voluntarily sought the fight as an excuse for killing or doing harm, this would not be a "sudden" fight

21 The PCRC considered this proviso, but does not recommend introducing such a proviso for *Exception 4*. While the argument that aggressors should not be allowed to invoke the defence if they had sought or voluntarily provoked the fight as an excuse for killing or doing harm to any person may be attractive at first blush, introducing the proviso would create conceptual difficulties with the proposed clarification to the scope of "premeditation".

22 As mentioned, the PCRC recommends clarifying that "premeditation" is in relation to one of the types of fault for murder. Applying this proviso will mean that the defence of sudden fight will not apply to persons who merely intended to cause hurt to the victim, but who ended up killing the victim in the midst of a sudden fight. This is inconsistent with the proposed scope of "premeditation".

23 Further, it would not be justifiable to deny a person the defence of sudden fight if all he intended to do was cause some form of hurt to the victim but ended up killing the victim in the often dynamic circumstances surrounding sudden fights. In this regard, the PCRC notes that there are already limitations within *Exception 4* which will disallow an: (a) offender who participates in a unilateral or engineered act or aggression; (b) offender who persists in using unnecessary violence against someone whom he has clearly overpowered. The limitations exist in the form of requiring a "fight" (that is, an exchange of blows or other force between the offender and the person killed) and the requirement that the offender must not have taken "undue advantage or acted in a cruel or unusual manner". It is therefore not necessary to subject *Exception 4* to proviso (a).

²⁷ *Ian Leader-Elliott* at p 50.

Proviso (b): If the deceased was acting under the cover of the law or under the cover of his authority, the offender ought not to be able to plead the defence of sudden fight in response to the deceased's actions

24 The PCRC recommends inserting a new proviso to *Exception 4*, along the lines of the current proviso (b) to *Exception 1*. This would ensure that undeserving offenders, such as the offender in *Doole v Republic of Sri Lanka*²⁸ would not be able to avail themselves of the partial defence. In that case, the offender *successfully* relied on the defence of sudden fight in the context of shooting and killing a police constable who was lawfully discharging his duty. The PCRC is of the view that such cases should not be eligible for the partial defence.

25 In line with the earlier proposal to amend proviso (b) to *Exception 1*, this proviso should also require that there must have been reasonable grounds for the offender to believe that the person killed was a public servant who was acting in the lawful exercise of the powers of such public servant. This will ensure fairness to the offender.

Proviso (c): The partial defence of sudden fight would not be available if the person killed were acting in the lawful exercise of the right of private defence

26 The PCRC finally considered whether to introduce the equivalent of proviso (c) to *Exception 1*. The PCRC does not recommend introducing this proviso to *Exception 4*.

27 This is because the objective of not allowing the accused to exculpate himself by relying on the act of the victim who was acting to protect himself could be adequately satisfied by the existing requirement that the offender must not have taken advantage or acted in a cruel and unusual manner. Introducing a new proviso in addition to this requirement would unnecessarily complicate this partial defence, and may not be workable in practice since it would be difficult to pinpoint the moment at which the deceased can be said to be exercising his right of private defence especially if the accused and deceased are in a melee.

Recommendation 114: Insert new *Illustrations* to exemplify situations where the partial defence of sudden fight is not available

Impetus for review

28 The PCRC noted that an academic had proposed two *Illustrations* to exemplify situations in which sudden fight cannot defeat an allegation of murder.²⁹ The PCRC considered whether these *Illustrations* would be helpful.

Recommendation

29 The PCRC recommends inserting one of the *Illustrations* as proposed by Leader-Elliott, as well as a new *Illustration* outside of the context of an existing relationship. These *Illustrations* are instructive and illustrate the relationship between grave and sudden provocation, sudden fight, and the right of private defence.

²⁸ (1978-79) Sri LR 33.

²⁹ *Ian Leader-Elliott* at p 52.

30 The two *Illustrations* are as follows:

Illustrations

(a) A and Z, who are rival gang members, are in a coffee shop seated at different tables. They mutually stare at each other fiercely without exchanging any words. Z disengages from A by turning away and starts to leave the coffee shop. A sees a cutlery knife on his table which he had earlier used for his meal. A picks up the cutlery knife and stabs Z's throat in the heat of passion. Z falls on the ground and was pronounced dead at scene. This is murder, there being no exchange of blows or force between A and Z.

(b) A had a consensual sexual relationship with Z until Z terminated the relationship. A came to Z's house and asked her if she would have sex with him. Z refused. A became angry and said he would use force, if necessary. He grappled with Z who resisted his advances and struck his face. Enraged by her resistance, A kills Z. This is murder, since Z was acting in private defence.

SECTION 25.5: CONSENT

SUMMARY OF RECOMMENDATIONS

(115) Retain the partial defence of consent in its current form

(116) Replace the Illustration to Exception 5 (Consent)

Introduction

Historically, the rationale for the partial defence of consent are as follows. First, the motivations that drive men to kill with the consent of their victims are “generally far more respectable than those which prompt men to the commission of murder”. The examples given by Macaulay include a soldier putting a wounded comrade out of pain at his request and a “high-born native of India... stab[bing] the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders”. The public would not deem such persons deserving of punishment of the same degree of severity as those who commit murder.¹

2 Second, from a utilitarian perspective, such crime is not “productive of so much evil to the community as murder” because it does not contribute to general, society-wide fear for one’s safety and thus is deserving of less severe punishment.²

Current law

3 The partial defence of consent is set out in *Exception 5* to s 300 of the Penal Code:

When culpable homicide is not murder

Exception 5.— Culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.

Illustrations

A, by instigation, voluntarily causes Z, a person under 18 years of age, to commit suicide. Here, on account of Z’s youth, he was incapable of giving consent to his own death. A has therefore abetted murder.

4 An offender has to prove the following, to succeed with the partial defence under *Exception 5*:³

- (a) The victim specifically consented to the infliction of death or running the risk of having death inflicted;
- (b) The consent was unequivocal and unconditional;

¹ Macaulay at pp 123-124

² *Id.*, at p 124.

³ See *PP v Leong Siew Chor* [2006] 3 SLR(R) 290 at [95] (The appeal against the High Court judgment was dismissed in *Leong Siew Chor v PP* [2006] SGCA 38. The Court of Appeal did not disturb the legal test set out in the High Court judgment but instead appears to have accepted it (see [11])) and *YMC Rev 2nd Ed* at para 19.53.

- (c) The victim consented to the mode of killing;
- (d) The victim consent was given with full knowledge of the identity of the person who was to kill him; and
- (e) The victim's consent existed before and right up to the time of the killing.

5 For completeness, s 90 of the Penal Code sets out the circumstances in which consent is vitiated:

Consent given under fear or misconception, by person of unsound mind, etc., and by child

90. A consent is not such a consent as is intended by any section of this Code —

(a) if the consent is given by a person —

- (i) under fear of injury or wrongful restraint to the person or to some other person; or
- (ii) under a misconception of fact,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;

(b) if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent; or

(c) unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.

6 Given that the burden of proof falls on the accused to establish the defence on which he relies on a balance of probabilities, he would bear the burden of establishing that the victim's consent was real and not vitiated by the existence of one or more of the circumstances mentioned in s 90 of the Penal Code. Additionally, since consent is undefined, s 90 cannot be viewed as prescribing an exhaustive list of grounds for vitiating consent.⁴

Recommendation 115: Retain the partial defence of consent in its current form

Impetus for review

7 The PCRC noted that there have been calls for some or all of the judicially imposed limitations on the defence to be expressly incorporated into the wording of the Exception.⁵

⁴ *YMC Rev 2nd Ed* at para 19.13.

⁵ *Id.*, at para 19.56.

8 The PCRC also noted criticism by the UK Law Commission of s 4 of the Homicide Act 1957⁶. Section 4 of the UK Homicide Act covers only killings in pursuance of suicide pacts and hence is much narrower in scope than our *Exception 5*. It is, however, the provision most analogous in English law to *Exception 5*. Section 4 of the UK Homicide Act states:

Suicide pacts

(1) It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other being killed by a third person.

(2) Where it is shown that a person charged with the murder of another killed the other or was a party to his being killed, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him and the other.

(3) For the purposes of this section “suicide pact” means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

9 The UK Law Commission had, in a consultation paper⁷, raised certain criticisms that may equally be levelled against *Exception 5*. First, s 4 of the Homicide Act may be overly broad in that persons motivated by less than noble intentions may also avail themselves of its benefit. It cited the following examples to demonstrate that consent by itself provides an inadequate basis for reducing an offence from a more to a less serious one:⁸

EXAMPLE 1: D and V are involved in a shoot-out with the police. Eventually, they realise that capture is inevitable. D and V agree that D will kill V and then turn the gun on himself. D kills V, but is arrested before he can turn the gun on himself as agreed.

EXAMPLE 2: D is the leader of a fringe religious cult. He persuades his followers to meet to commit suicide together. At the meeting, with his followers’ consent, he pours a lethal poison down their throats but finds he cannot summon the courage to do the same to himself when the moment comes.

10 Second, the UK Law Commission expressed concern that dominating men who coerce the women for whom they care into consenting to suicide pacts may avail themselves of this defence and hence receive “unduly lenient treatment at the hands of the law”. It noted that there was evidence that most suicide pacts were entered into by older people and that there was further evidence showing that it is the man who takes the lead with the wife co-operating. It considered that this raised the suspicion that men may be using coercion in suicide pacts. Such men should not receive punishment for a lesser offence unless they can also provide proof that

⁶ (c. 11) (UK) (“*UK Homicide Act*”).

⁷ UK Law Commission, *A New Homicide Act for England and Wales? A Consultation Paper* (Consultation Paper No 177, 28 November 2005).

⁸ *Id.*, at paras 8.21 and 8.24.

a medically recognised abnormality of mental functioning played a significant part in their decision.⁹

11 Despite its concerns, the UK Law Commission eventually retracted its provisional proposal to repeal s 4 of the UK Homicide Act. However, it did not address its earlier objections in its final report. Rather it merely said that it would be “inappropriate to recommend repeal...in the absence of any wider review of ‘mercy’ and consensual killings.” Further it noted that there was no evidence that the current law was proving problematic in practice. Lastly, it accepted that some rational and deserving persons who kill with the consent of their victims may end up too harshly punished as they will be deprived of a partial defence if its earlier proposal was accepted.¹⁰

12 The PCRC nevertheless considered the UK Law Commission’s criticisms, in the context of *Exception 5*.

Recommendation

13 The PCRC recommends retaining the partial defence of consent in its current form. First, the codification of judicially imposed limitations may unduly limit the development of the law in this area. There is also no indication that the lack of codification has resulted in any problems in practice. It is also worth noting that the Law Commission of India appears to have taken a similar approach because it considered judicial clarification of the law adequate.¹¹ It did not think that the appropriate limitations to *Exception 5* had to be further codified.

14 As regards the UK Law Commission’s criticisms earlier mentioned, the PCRC is of the view that there is a principled basis for allowing *all* who murder with the victim’s consent to escape liability for murder. As explained by Prof Leader-Elliott, *Exception 5* is justifiable based on the principle of “conditionality of our rights”. The basis for punishing the offender to a lesser extent lies in the victim having “diminished his right not to be harmed by the perpetrator” by his own acts.¹² This should be adequate to relieve the accused of liability for murder regardless of the motivations for his act.

15 While the moral culpability of perpetrators who are able to avail themselves of *Exception 5* will vary, this can be adequately accounted for at the sentencing stage as the court has the discretion under s 304 of the Penal Code to sentence those convicted of culpable homicide not amounting to murder to life imprisonment and caning or imprisonment for a term up to 20 years and a fine or caning. This wide sentencing discretion can be used to distinguish between cases where the perpetrator is driven to murder by noble intentions and those where his motivations are of a baser kind.

16 The concern of dominating males who coerce their wives into consenting to be killed, is also adequately addressed by the fact that in Singapore, unlike the position in the UK¹³, the

⁹ *Id*, at paras 8.68, 8.62, 8.75, 8.78, 8.82.

¹⁰ UK Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 28 November 2006) at paras 7.38–7.39.

¹¹ Law Commission of India, *Indian Penal Code* (42nd Report, June 1971) at pp 235–236.

¹² Ian Leader-Elliott, “Sudden Fight, Consent and the Principle of Comparative Responsibility in the Indian Penal Code” [2010] Sing JLS 282 at 285.

¹³ See *YMC Rev 2nd Ed* at para 2.26.

accused bears the burden of proving *Exception 5* on a balance of probabilities. This means that the accused would also have to show there were no facts vitiating consent. The Prosecution would only have an evidential burden to adduce some facts to show the victim was coerced (eg, history of overbearing behaviour).¹⁴ This is an adequate safeguard to prevent unmeritorious accused persons from availing themselves of *Exception 5*.

Recommendation 116: Replace the Illustration to Exception 5 (Consent)

Impetus for review

17 The PCRC noted criticism that the *Illustration to Exception 5* appears to equate murder with suicide without appreciating the fundamental difference between the two. Courts and commentators have long assumed that murder and culpable homicide not amounting to murder under the Penal Code only encompasses what is done to another person and not what is done to oneself. This distinction is blurred in the illustration to *Exception 5*.¹⁵ What is abetted in the illustration to *Exception 5* is suicide of a person under 18 years of age (expressly punishable under s 305 of the Penal Code) and not murder.¹⁶

Recommendation

18 The PCRC recommends deleting the *Illustration to Exception 5* and replacing it with a new *Illustration*. The new *Illustration*, which is set out below, will resolve the problem identified above:

“A and Z, both being persons above the age of 18 years, decide to commit suicide together. With Z’s consent, A pours a lethal poison down Z’s throat but finds he cannot summon the courage to do the same to himself when the moment comes. Here A has not committed murder but merely culpable homicide”

¹⁴ The accused will not be able to argue that consent is only vitiated if s 90 is satisfied because s 90 is not exhaustive. Thus, consent can be vitiated in ways other than those stipulated.

¹⁵ Lee Kiat Seng, “Suicide and Life Policies – A Fresh Perspective” [1996] Sing JLS 79 at 94–96.

¹⁶ *Ratanlal* at p 1541.

SECTION 25.6: INFANTICIDE

SUMMARY OF RECOMMENDATION

(117) *Retain Exception 6 (Infanticide) as it currently appears*

Introduction and current law

Infanticide appears as a partial defence under Exception 6 to murder under s 300:

Exception 6.—Culpable homicide is not murder if the offender being a woman voluntarily causes the death of her child being a child under the age of 12 months, and at the time of the offence the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child.

Impetus for review

2 The concept of infanticide, which has its origins in the nineteenth century in England, has attracted four main criticisms.

3 First, it has been argued that the retention of infanticide is unnecessary because of the availability of the defence of diminished responsibility. Second, there is considerable debate about the psychiatric foundation of infanticide. Third, the defence is only limited to biological mothers and it is unjust not to extend the defence to other carers because the pressures of caring for infants apply to all parents (whether biological or not). Fourth, the age limit of the victim which is 12 months or less, is arbitrary.

Recommendation 117: Retain Exception 6 (Infanticide) as it current appears

4 The PCRC recommends retaining Exception 6 as it appears currently.

5 First, if infanticide is abolished, mothers who intentionally killed their young children could possibly be convicted of murder. While these women could argue that they were suffering from an abnormality of mind that substantially impaired their responsibility, due to the high level of impairment required under the current law, it is possible that this argument might be unsuccessful.

6 Second, the preservation of the defence recognises the difficulties and complexities which may present in a woman's relationship with her infant (*ie* a child under the age of 12 months) and the type of factors which can influence the killing of her infant.

7 Third, there is no conclusive evidence about whether the defence does or does not have a psychiatric basis.

8 Fourth, there is no consensus on what the upper age limit should be increased to (if at all). The PCRC did note, however, that medical literature showed that most postpartum psychiatric disorders linked to infanticide are resolved within 12 months after birth.

9 Lastly, the defence is based on a physiological/psychiatric foundation which only applies to the biological mother. A mother's relationship with her infant is unique and distinguishable from all others. For that reason, the defence should be confined to the natural mother.

SECTION 25.7: DIMINISHED RESPONSIBILITY

SUMMARY OF RECOMMENDATION

(118) *To define diminished responsibility in terms of a substantial impairment of the capacity to understand events, to judge whether actions are right or wrong, or to control those actions*

Introduction and current law

Diminished responsibility, found in Exception 7 to s 300, is a defence to murder which if proven reduces murder to culpable homicide. The provision is set out below:

Exception 7 — Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

2 A similar provision appears in s 33B(3)(b) of the MDA. However, diminished responsibility does not operate as a defence under the MDA.¹

3 The defence of diminished responsibility originated in Scotland in the nineteenth century and has had a long history. It was developed there by the courts as a way of avoiding murder convictions for those offenders otherwise liable for murder, who did not satisfy the restrictive test for the “insanity defence”, but whose mental state was nevertheless impaired.

4 The defence evolved at common law by the Scottish courts and was expressed in the following terms in *HM Advocate v McLean*:

... without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account, not only in awarding punishment, but in some cases even in considering within what capacity of offences the crime shall be held to fall.²

5 The defence was enacted as s 2 of the English Homicide Act 1957³. The expression, 'abnormality of mind' was left undefined in the provision. Thus, it was left to the courts to

¹ Section 33B of the MDA allows an offender to be sentenced to life imprisonment instead of death if he can satisfy two conditions. First, he must show that he committed the offence merely as a courier. Second, he must also prove, on a balance of probabilities, that he was suffering from an abnormality of mind that substantially impaired his mental responsibility for his criminal act (see *Phua Han Chuan Jeffrey v PP* [2016] 3 SLR 706).

² (1876) 3 Coup 334 at 334 per Lord Deas.

³ (c 11) (UK) (“1957 English Act”).

elaborate on the meaning of 'abnormality of mind'. In the leading English case *R v Byrne*.⁴ Lord Parker CJ described 'abnormality of mind' as:

... a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.⁵

6 Exception 7 was derived from s 2 of the 1957 English Act.⁶ Both provisions are *in pari materia*. The effect of this defence is that:

... where the [fact-finder] is satisfied that a person charged with murder, though not insane, suffered from mental weakness or abnormality bordering on insanity to such an extent that his responsibility was substantially diminished, the crime may be reduced from murder to culpable homicide.⁷

7 It is well-established that there are three limits that must be satisfied by the accused for the defence of diminished responsibility to succeed:

- (a) The accused was suffering from an abnormality of mind ("first limb").
- (b) Such abnormality of mind arose from a condition of arrested or retarded development, any inherent causes, or was induced by disease or injury ("second limb").
- (c) The abnormality of mind substantially impaired his mental responsibility for his acts and omissions in causing the death.

Impetus for review

8 Exception 7 has remained unmodified since it was introduced into the Penal Code in 1961. However, the partial defence of diminished responsibility has not presented much difficulty in application.

⁴ [1960] 3 WLR 440 ("*Byrne*"). *Byrne* strangled a young woman in a hostel and mutilated her corpse. Evidence was tendered that from an early age he had been subject to perverted violent desires; that the impulse or urge of those desires was stronger than the normal impulse or urge of sex, that he found it very difficult or, perhaps, impossible in some cases to resist putting the desire into practice and that the act of killing was done under such an impulse or urge.

⁵ *Id.*, at 443-444.

⁶ *Singapore Parliamentary Debates, Official Report* (24 May 1961) vol 14 at cols 1509-1510 (KM Byrne, Minister for Labour and Law) ("*Second Reading of the Penal Code (Amendment) Bill (Bill 138 of 1961)*").

⁷ United Kingdom, Royal Commission on Capital Punishment (1949-1953), *Report* (Cmnd 8932, September 1958) at para 378.

9 In *Iskandar bin Rahmat v PP*⁸, the Court of Appeal considered whether the aetiology of the "abnormality of mind" found in the bracketed portion of Exception 7 ("prescribed causes") was meant to limit when the defence of diminished responsibility applied. While finding that it did, the court observed that the prescribed causes had been removed in similar provisions in England and the New South Wales.

10 The court further observed that whether Exception 7 should be similarly amended was a matter reserved solely for the Singapore Parliament to decide. Importantly, however, the court noted that the prescribed causes were wide enough to include most recognised disorders.

Recommendation 118: To define diminished responsibility in terms of a substantial impairment of the capacity to understand events, to judge whether actions are right or wrong, or to control those actions

Whether the term, "abnormality of mind", should be retained

11 The PCRC considered if the term "abnormality of mind" should be substituted with modern terminology like "abnormality of mental functioning" as in England. The term "abnormality of mind" is not a medical term. It is a legal term that has acquired a well-established definition, which is easily understood, with the passage of time. The term has worked reasonably well in practice so as not to require replacement by some other ambiguous expression. This view was echoed by several psychiatrists who did not express any difficulties with the existing term. Therefore, the PCRC recommends the retention of the term, "abnormality of mind".

Whether the prescribed causes should be deleted

12 The PCRC also considered the positions in England and the New South Wales to determine whether the prescribed causes contained in the bracketed portion of the defence should be removed.

13 Some of us were of the view that the prescribed causes should be replaced with the concept of an "underlying condition" like the equivalent provisions in the New South Wales. They were of the opinion that the retaining the prescribed causes unnecessarily requires an extra layer of inquiry; the accused's condition would first have to be diagnosed and that condition would then have to be ascribed to one of the three prescribed causes. They suggested that the law would be more readily understood and applied if it required the expert witness to diagnose the accused's condition as a recognised mental disorder and proceed directly to explain how that disorder impaired the accused's mental functioning.

14 The majority of us, however, were of the view that the prescribed causes contained in the bracketed portion of the defence should be retained for three reasons:

- (a) First, psychiatrists who were consulted did not express any significant difficulties when trying to ascribe a mental condition to any of the prescribed causes. Recent reported judgments also show that neither the courts nor psychiatrists have had trouble ascribing a medical condition to the corresponding prescribed case (see

⁸ [2017] 1 SLR 505 ("*Iskandar*").

*Phua Han Chuan Jeffrey v PP*⁹) or in determining that conditions could not be ascribed to any of the prescribed causes (see *Nagaenthran a/l K Dharmalingam v PP*¹⁰).

- (b) Second, these psychiatrists agreed with the observation by the Court of Appeal in *Iskandar* that "the wording of the prescribed causes do appear wide enough to include most recognised medical conditions". Only minor disorders would not fall within the ambit of the prescribed causes. The defence of diminished responsibility should not apply to minor disorders given the gravity of the offence involved.
- (c) Third, the prescribed causes all comprise an underlying condition which is more than of an ephemeral or transitory nature. The existence of these prescribed causes limit when the defence of diminished responsibility can apply.

Clarifying what substantial impairment of mental responsibility constitutes

15 The majority of us recommend defining diminished responsibility in terms of a substantial impairment of the capacity to understand events, to judge whether actions are right or wrong, or to control those actions. In this way, we have spelt out what has generally been regarded since *Byrne* as the essential meaning of "abnormality of mind" under the existing provision. This reformulation omits any reference to a substantial impairment of the accused's "mental responsibility". The term "mental responsibility" is unknown elsewhere in the Penal Code and ambiguous. To be clear, this recommendation is not intended to change the existing law. Rather, it is intended to codify the existing law while omitting the term, "mental responsibility".

⁹ [2016] 3 SLR 706 at [4].

¹⁰ [2017] SGHC 222 at [82].

SECTION 26: UPDATING SEXUAL OFFENCES

SUMMARY OF RECOMMENDATIONS

- (119) Not to have a positive statutory definition of “consent” for sexual offences
- (120) Expand “rape” in s 375 to include penile-anal penetration
- (121) Expand “sexual assault by penetration” in s 376 to include situations where a woman forces a man to penetrate her vagina, anus, or mouth
- (122) Amend s 509 (Insult of modesty) to be gender-neutral

Introduction

The PCRC’s recommendations in this section seek to review and reform sexual offences to reflect modern societal norms and values.

Recommendation 119: Not to have a positive statutory definition of “consent” for sexual offences

Current law

2 The fact that the alleged victim *did not consent* to the act is a key element in sexual offences in Singapore, such as rape and sexual assault by penetration. Although Singapore has no statutory definition of consent, s 90 of the Penal Code sets out situations where consent is vitiated.

Consent given under fear or misconception, by person of unsound mind, etc., and by child

90. A consent is not such a consent as is intended by any section of this Code —

(a) if the consent is given by a person —

(i) under fear of injury or wrongful restraint to the person or to some other person; or

(ii) under a misconception of fact,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;

(b) if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent; or

(c) unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.

3 Section 90 of the Penal Code defines circumstances in which there is no consent. In addition to this negative definition of consent, a positive definition of consent has been developed by case law.

4 In *Pram Nair v PP*⁶⁴⁵, the Court of Appeal found applicable the concept of consent as defined in *Ratanlal*⁶⁴⁶:

⁶⁴⁵ *Pram Nair v PP* [2017] 2 SLR 1015

⁶⁴⁶ *Ratanlal* 26th Ed at p 2061

“... Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent... A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a power she wanted. Consent implies the exercise of free and untrammelled right to forbid or withhold what is being consented to; it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.”⁶⁴⁷

5 In relation to offences involving rape, the courts have found that there was no consent when the complainant was unconscious, that consent cannot be extrapolated where it is absent⁶⁴⁸, and that consent must be given specifically to the act of penetration⁶⁴⁹. Hence, s 90 cannot be viewed as prescribing an exhaustive list of grounds for vitiating consent. This is consistent with the approach taken in other jurisdictions like England and Wales and Australia, where non-exhaustive grounds that can vitiate consent are set out in certain legislation.

Impetus for review

6 The PCRC considered whether there was a need for a positive definition of consent in the Penal Code, and specifically, in relation to sexual offences.

Analysis

7 There are two main arguments for having a statutory definition of consent.

8 First, a definition will provide some degree of *certainty* and *clarity* about what constitutes consent. A statutory definition would be beneficial in clarifying the concept of consent for the general public.

9 Second, the process of considering the appropriate statutory definition of consent would enable the legislature to formulate acceptable standards of behaviour in modern society.

10 However, any definition of consent would have to be general and broad in order to take into account the myriad facts and circumstances that may exist. Incorporating concepts such as “voluntariness”, “free will”, and “capacity” into the statutory definition of consent would shift the ambiguity surrounding consent to these terms instead. The courts would then have to interpret these terms in case law.

11 The PCRC considered that a positive definition of consent has not resolved the ambiguities about its meaning or scope in other jurisdictions such as England and Wales. For example, s 74 of the SOA 2003 (which contains the definition of consent) states that “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. This is a vague definition which contains four amorphous concepts of “agreement”, “choice”, “freedom”, “capacity”, which are inherently difficult to define.

⁶⁴⁷ *Ratanlal* at p 2304

⁶⁴⁸ *PP v Mohamed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601

⁶⁴⁹ *Ong Mingwee v PP* [2013] 1 SLR 1217

Recommendation

12 The PCRC is of the view that the inclusion of a positive definition of consent would be too broad to be of practical use to the courts. Therefore, the PCRC recommends that the current negative statutory definition of consent in s 90 be retained.

13 A positive definition of consent would invariably have to be supplemented either with case law, or additional provisions spelling out what does and does not constitute consent. Our courts do not appear to have encountered any difficulties with a lack of a positive statutory definition of consent. Section 90 has served as a functional and simple-to-use negative definition of consent.

14 The PCRC has considered the argument that a positive definition of consent may serve a secondary educative function to set out society's views on the standards of acceptable behaviour, in particular for sexual offences. The PCRC is of the view that the current s 90, in setting out what consent is not, already serves this function. Section 90 requires that consent has to be voluntary (and not obtained via threats of injury or wrongful restraint), informed (and not obtained under a misconception of fact), given by a person who has the capacity to give consent, and given by a person who is able to understand the nature and consequences of his consent. Furthermore, the purposes of education are better served through targeted approaches such as formal sex education in schools, and social awareness campaigns.

Recommendation 120: Expand “rape” in s 375 to include penile-anal penetration

Current law

15 Currently, rape is defined in s 375 as the penetration of a woman's vagina with a man's penis without her consent, or regardless of her consent when she is below 14 years of age. This means that *only* women can be victims of rape. Other forms of penetrative sexual activity are covered in s 376 (Sexual assault by penetration). Both s 375 and s 376 provide for similar maximum prescribed punishments. Therefore, a person who is convicted of an offence under s 375 or s 376 shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to a fine or to caning.

Impetus for review

16 There have been developments in other jurisdictions to expand the scope of rape beyond non-consensual penile penetration of the vagina. In these jurisdictions, the offence of rape applies to both male and female victims.

17 The offence of rape in other jurisdictions such as England and Wales, Scotland, and South Africa has been expanded to include penile penetration of the mouth and anus as well. The rationale for this expansion is that penile penetration of another person's anus or mouth is *as severe* an infringement of sexual autonomy as violation of the vagina.⁶⁵⁰ With this expansion, both men and women can be victims of the offence of rape.

⁶⁵⁰ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com 209, 2007) at para 3.23

18 On the other hand, only women can be victims of rape in India and Malaysia.⁶⁵¹

19 In South Africa, women can also be perpetrators of rape and men can also be victims.⁶⁵²

Recommendation

20 The PCRC recommends that the definition of rape be expanded to include penile penetration of the anus (in addition to penile penetration of the vagina). The expansion of the definition of rape provides an appropriate label for forced penile-anal penetration, which, like penile penetration of the vagina, carries with it the dangers of forced transmission of sexually transmitted diseases.

21 The extension of the definition of rape would mean that in Singapore, a man can be prosecuted for rape if he engaged in non-consensual anal sex with another man or woman. This is consistent with the practice in jurisdictions that have expanded the scope of rape. These jurisdictions have found no reasons why male and female victims of penile assault should be treated differently.⁶⁵³

22 The PCRC notes that the Singapore High Court has found that forced penile-oral penetration would probably be "more disgusting" than forced penile-anal penetration, because it involves the victim's mouth. Semen is also ejaculated into the front end of the alimentary system⁶⁵⁴. Forced penile-oral penetration also carries the dangers of transmission of sexually transmitted diseases, and involves the invasion of the body with the penis.

23 However, the PCRC anticipates that it may be difficult to achieve public consensus in Singapore that non-consensual penile-oral penetration is equivalent in gravity to non-consensual penile-vaginal penetration or non-consensual penile-anal penetration. Therefore, the PCRC proposes not to include non-consensual penile penetration of the mouth in the definition of rape.

Recommendation 121: Expand "sexual assault by penetration" in s 376 to include situations where a woman forces a man to penetrate her vagina, anus, or mouth

Current law

24 Currently, "sexual assault by penetration" in s 376 deals with situations where a female forces a male to penetrate her vagina with other body parts (*eg* tongue, finger), *excluding his penis*. The relevant excerpt from s 376 is set out below:

⁶⁵¹ In Malaysia and India, rape continues to be gender specific (*ie* only men can be rapists and only women can be victims).

⁶⁵² In South Africa, oral, anal, or vaginal penetration can constitute rape, and both men and women can be rape victims and perpetrators. In the United States, Attorney-General Eric Holder announced in 2012 a revised definition of rape for nationwide data collection: "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." The new definition includes any gender of victim and perpetrator. The United States Department of Justice website <<https://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-revisions-uniform-crime-report-s-definition-rape>> (accessed 13 August 2018)

⁶⁵³ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com 209, 2007) at para 3.23

⁶⁵⁴ *PP v BMD* [2013] SGHC 235 at [73]

Sexual assault by penetration

376. – (2) Any person (A) who –

(a) sexually penetrates, with a part of A’s body (other than A’s penis) or anything else, the vagina or anus, as the case may be, of another person (B);

(b) causes a man (B) to penetrate, with B’s penis, the vagina, anus or mouth, as the case may be, of another person (C); or

(c) causes another person (B), to sexually penetrate, with a part of B’s body (other than B’s penis) or anything else, the vagina or anus, as the case may be, of any person including A or B,

shall be guilty of an offence if B did not consent to the penetration.

25 It is likely that cases involving males 16 years and above who are forced to penetrate a woman’s vagina, mouth or anus with his penis would be prosecuted under s 354 (Outrage of modesty) instead.⁶⁵⁵

26 In contrast, *males under 16 years of age* are protected from a female assailant who forces them to penetrate her vagina, mouth or anus with his penis. Section 376A(1)(c) provides that it is an offence for any person (A) who “causes a man under 16 years of age (B) to penetrate, with B’s penis, the vagina, anus, or mouth, as the case may be, or another person including A”, with or without B’s consent.

27 The need for s 376A(1)(c) was explained during the second reading of the Penal Code (Amendment) Bill: the Government had received feedback regarding female sexual abuse of male minors, and accepted that younger male children could be exploited by older women.⁶⁵⁶

Impetus for review

28 The possibility of an adult male being forced into engaging in penetrative sex against his will is covered in the Penal Code as follows:

(a) The forcing of a man to penetrate, with his penis, a corpse (s 377(3)); and

(b) The forcing of a man to penetrate, with his penis, an animal (s 377B(3)(a)).

29 Since the Penal Code envisions a possibility where an adult male may be coerced into sexual penetration against his will (insofar as corpses and animals are concerned), there is no reason why the possibility of an adult male being forced to penetrate a woman with his penis against his will should also not be covered by the Code.

Recommendation

⁶⁵⁵ In its review, the UK Home Office considered whether there was evidence that a woman could force a man to penetrate her against his will. Although it found a little anecdotal evidence, it did not discover sufficient evidence to convince it that this was the equivalent of rape. However, the Home Office recognised the *existence* of such coercive behaviour and thought it should be subject to the criminal law, making separate recommendations about offences of compelling sexual penetration. See United Kingdom, Home Office Consultation Paper, *Setting the Boundaries: Reforming the law on sex offences* (July 2000) at para 2.8.2

⁶⁵⁶ *Singapore Parliamentary Debates*, Official Report (22 October 2007) vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

30 The PCRC recommends to criminalise the actions of a female (A) who causes a man (B) to penetrate, with B’s penis, the vagina, anus, or mouth, of A as sexual assault involving penetration under s 376. The principle should be that a woman who violates a man’s sexual autonomy by forcing the man to penetrate her vagina, anus, or mouth with his penis, as the case may be, is guilty of sexual assault. Consequently, the title of s 376 should be amended to read “Sexual assault *involving* penetration”, given that the assault is not by penetration.

Recommendation 122: Amend s 509 (Insult of modesty) to be gender-neutral

Current law

31 Section 509 criminalises the insulting of the modesty of a woman. The provision has not been amended since it was adapted from the Indian Penal Code. The full provision is set out below.

Insulting the modesty of a woman

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

32 Section 509 has been used for various offences such as voyeurism (including against “Peeping Toms” and for “up-skirt recordings”) and sexual exposure offences (“flashing”) committed against female victims.

Impetus for review

33 As s 509 only applies to women, similar acts committed against male victims have to be prosecuted under other pieces of legislation.⁶⁵⁷

Recommendation

34 The PCRC recommends amending s 509 to make the offence gender-neutral. The proposed revised provision is as follows.

Insulting the modesty of a ~~woman~~ person

509. Whoever, intending to insult the modesty of any ~~woman~~ person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such ~~woman~~ person, or intrudes upon the privacy of such person ~~woman~~, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

⁶⁵⁷ For example, sexual exposure to male victims would be covered by s 27A (Appearing nude in a public or private place), MOA. Voyeurism, if done with a recording device, would be covered by ss 29 (Offences involving dealings in obscene films) and 30 (Possession of obscene films) of the FA.

35 The PCRC also considered whether there was value in retaining s 509 in light of the proposed new sexual offences relating to voyeurism and sexual exposure. The PCRC recommends that s 509 should still be retained as a residual provision to address offences involving a sexual dimension to complement the harassment laws under the POHA.

36 In addition, the offence should be sited under the title “Sexual Offences” under Chapter XVI of the Penal Code, instead of Chapter XXII (“Criminal Intimidation, Insult and Annoyance”). This is to ensure that the offence is labelled accurately.

Conclusion

37 With a view to modernising the Penal Code, the PCRC has endeavoured to update the Penal Code to ensure that it covers circumstances where offences are committed against males *and* females, to reflect changing societal norms and views on the roles of men and women.

SECTION 27: UPDATING ARCHAIC LANGUAGE

SUMMARY OF RECOMMENDATIONS

- (123) Amend s 294 (Obscene songs) to “Obscene acts” and remove “song” and “ballad”
- (124) Amend s 312 (Causing miscarriage) to define “quick with child” as a situation where the pregnancy is of more than 16 weeks’ duration
- (125) Amend s 328 (Causing hurt by means of poison, etc., with intent to commit an offence) to define “unwholesome drug or other thing” narrowly
- (126) Amend s 401 (Punishment for belonging to wandering gang of thieves) to remove “wandering or other”
- (127) Amend s 367 (Kidnapping and non-consensual penile penetration of anus)
- (128) Amend s 493 (Deception of lawful marriage) to be gender-neutral
- (129) Amend s 506 (Criminal intimidation) to remove reference to imputation of unchastity to a woman

Introduction

Under TOR 2(b)(i), the PCRC is to “rationalise, recalibrate and modernise the substantive offences in the Penal Code, including proposals with respect to removing outmoded offences”. As much of the language of the original 1871 Penal Code is retained in our current Penal Code, a key task for the PCRC was to update archaic language that is no longer fit for purpose.

2 In respect of archaic language (as opposed to outmoded concepts), the PCRC recommends amendments to five provisions of the Penal Code. The amendments are not intended to cause any substantive change to the provisions, and merely aim to clarify and modernise the language of the Penal Code.

Recommendation 123: Amend section 294 (Obscene songs) to “Obscene acts” and remove “song” and “ballad”

Current law

3 Section 294 of the Penal Code is worded as follows:

Obscene songs

294. Whoever, to the annoyance of others —

(a) does any obscene act in any public place; or

(b) sings, recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.

4 The main provision relating to obscenity (s 292, “Sale of obscene books, etc”) was introduced to uphold the social norms of sexual modesty.¹ The PCRC infers that the object of s 294 is similar. The test of “obscenity” in the Indian Penal Code follows the test set out in

¹ Ratanlal at p 1276

*Hicklin*², that is, “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences.”³

5 The historical focus of this provision on obscene songs and ballads arises from the pervasiveness of “eve-teasing” (mild to moderate sexual harassment in public areas) in the form of obscene songs at the time when the law was enacted.⁴ Subsection (b) is not entirely covered by subsection (a), since subsection (a) only applies to specific acts committed in a public place, but subsection (b) also applies to offences committed both in and near a public place.⁵

Impetus for review

6 Currently, the majority of prosecutions under s 294 are for obscene acts and not obscene songs. Moreover, the act of “eve-teasing” is not prevalent today. Given that s 294 is today primarily used to deal with obscene acts, the title of the provision should be updated to reflect this. The words “song” and “ballad” in subsection (b) are also superfluous; they are adequately covered by “words”, and can be removed.

Recommendation

7 The PCRC recommends renaming s 294 to “Obscene acts”, and removing the words “song” and “ballad” from subsection (b). The proposed amendments to the provision are in red:

Obscene ~~songs~~ acts

294. *Whoever, to the annoyance of others —*

(a) does any obscene act in any public place; or

(b) sings, recites or utters any obscene ~~song, ballad or~~ words in or near any public place, shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.

Recommendation 124: Amend section 312 (Causing miscarriage) to define “quick with child” as a situation where the pregnancy is of more than 16 weeks’ duration

Current law

8 Section 312 of the Penal Code is as follows:

Causing miscarriage

312. Subject to the provisions of the Termination of Pregnancy Act (Cap. 324), whoever voluntarily causes a woman with child to miscarry, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both; and if the woman is quick with child, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.

² *Regina v. Hicklin* [1868] LR 3 QB 360

³ *Ratanlal* at p 1286

⁴ *Ratanlal* at p 1299

⁵ *Ratanlal* at p 1298

Explanation — A woman who causes herself to miscarry is within the meaning of this section.”

9 Section 312 provides for causing a “woman with child” to miscarry. If the woman is “quick with child”, the maximum punishment is higher. According to the *Textbook of Medical Jurisprudence and Toxicology*⁶, the term “quickening” refers to the perception of foetal movement by the mother. At the first perception of “quickening”, the mother is said to be “quick with the child”. This typically occurs at any time between 18 – 20 weeks.

Impetus for review

10 The phrase “quick with child” is not accepted medical terminology, and creates ambiguity in law. The Termination of Pregnancy Act (Cap 324, 1985 Rev Ed) allows only authorised and qualified medical practitioners to carry out abortions if the pregnancy is more than 16 weeks’ duration. Under the Termination of Pregnancy Act, no termination is allowed after 24 weeks’ duration unless it is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

Recommendation

11 The PCRC recommends replacing the term “quick with child” the description of a pregnancy which is more than 16 weeks’ duration, as 16 weeks is the latest point in a pregnancy where the State allows authorised and qualified medical practitioners to carry out abortions. The recommended amendments to the provision are in red:

Causing miscarriage

312. Subject to the provisions of the Termination of Pregnancy Act (Cap. 324), whoever voluntarily causes a woman with child to miscarry, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both; and if the woman’s pregnancy is of more than 16 weeks’ duration as defined in the Termination of Pregnancy Act (Cap. 324) is quick with child, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.

Explanation — A woman who causes herself to miscarry is within the meaning of this section.

Recommendation 125: Amend section 328 (Causing hurt by means of poison, etc., with intent to commit an offence) to define “unwholesome drug or other thing” narrowly

Current law

12 Section 328 of the Penal Code is as follows:

Causing hurt by means of poison, etc., with intent to commit an offence

⁶ *Modi’s Medical Jurisprudence and Toxicology* (B. V. Subrahmanyam ed) (Butterworths India, 22nd Ed, 1999) at p 482

328. *Whoever administers to, or causes to be taken by, any person any poison or any stupefying, intoxicating or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning.*

Impetus for review

13 Currently, the Prosecution does not use s 328 for situations where offenders put semen, urine and other bodily fluids into the food or drinks of victims, preferring to proceed under s 425 (Mischief) instead. Thus, the wording of the phrase “unwholesome drug or other thing” is broader than the intent of the provision, which is only to criminalise the use of substances that are harmful to the human body.

14 The PCRC recommends taking reference from s 324 in replacing the phrase “unwholesome drug or other thing”. Voluntarily causing hurt by means of poison is covered in s 324. Under s 324, it is an offence to voluntarily cause hurt “by means of any poison . . ., or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood”.

Recommendation

15 The PCRC’s recommendation is to replace the phrase “unwholesome drug or other thing” with “any substance which it is harmful to the human body to inhale, to swallow, or to receive into the blood”. The recommended amendments to the provision are in red:

Causing hurt by means of poison, etc., with intent to commit an offence

328. *Whoever administers to, or causes to be taken by, any person any poison or any stupefying ~~or; intoxicating~~ ~~or unwholesome drug or other thing~~ substance, or any substance which it is harmful to the human body to inhale, to swallow, or to receive into the blood, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning.*

16 As a consequential amendment, the PCRC recommends replacing the word “deleterious” in s 324 with “harmful”, for alignment with the revised s 328. The recommended amendments to the provision are in red:

Voluntarily causing hurt by dangerous weapons or means

324. *Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is ~~deleterious~~ harmful to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with caning, or with any combination of such punishments.*

Recommendation 126: Amend section 401 (Punishment for belonging to wandering gang of thieves) to remove “wandering or other”

Current Law

17 Section 401 of the Penal Code is as follows:

Punishment for belonging to wandering gang of thieves

401. Whoever shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being gang-robbers, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be punished with caning with not less than 4 strokes.

Impetus for review

18 Section 401 was intended to criminalise the habitual association with a gang for the purpose of committing theft or robbery.⁷ Before s 401 can apply, the prosecution must prove that the accused person charged under section 401 belonged to a gang of persons, and that the gang of persons were “associated for the purpose committing theft or robbery”, and that “theft or robbery was to be committed habitually”.⁸ The historical focus of the provision appears to be on the association with a body of persons for the habitual commission of theft or robbery, and not the wandering nature of the gang.

19 The term “wandering” is not relevant in today’s context, as we do not have roving bands of thieves or robbers in Singapore. Where a group of persons commits theft or robbery, the acts of these persons would still be criminalised under s 401, even if the term “wandering” is removed.

Recommendation

20 The PCRC recommends removing the phrase “wandering or other” from s 401. The recommended amendments to the provision are in red:

Punishment for belonging to wandering gang of thieves

401. Whoever shall belong to any ~~wandering or other~~ gang of persons associated for the purpose of habitually committing theft or robbery, and not being gang-robbers, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be punished with caning with not less than 4 strokes.

Recommendation 127: Amend s 367 (Kidnapping and non-consensual penile penetration of anus)

Current law

21 Section 367 of the Penal Code is set out below, with emphasis added.

⁷ *Ratanlal* at p 2537

⁸ *Ratanlal* at p 2538

Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.

367. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt or slavery, or to non-consensual penile penetration of the anus, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning.

Impetus for review

22 Penetration of the anus is already considered a form of “grievous hurt” as defined in s 320 of the Penal Code.⁹

Recommendation

23 The PCRC recommends the removal of the term “or to non-consensual penile penetration of the anus”. There is no need to single out this specific form of “grievous hurt” for mention in s 367, when “grievous hurt” is already mentioned.

Recommendation 128: Amend s 493 (Deception of lawful marriage) to be gender-neutral

Current law

24 Section 493 currently covers situations where a man deceives a woman into believing that they are lawfully married.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage

493. Every man, who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

Impetus for review

25 Section 493 punishes a man (either married or unmarried) who induces a woman to become, as she thinks, his wife (but in reality his concubine); and on the basis of inducing that belief, proceeds to either cohabit or engage in sexual intercourse with the woman.¹⁰

26 Today, a woman may be guilty of such an offence as well. This is unlike the 1860s, when a woman was unlikely to initiate marriage.

Recommendation

27 The PCRC recommends amending s 493 to make it gender-neutral; another provision could be added to clarify that this offence applies where a woman has deceived a man into believing that they are lawfully married.

⁹ Section 320(i) of the Penal Code defines “penetration of the vagina or anus, as the case may be, or a person without that person’s consent, which causes severe bodily pain” as a form of “grievous hurt”.

¹⁰ *Ratanlal* at p 2978

Recommendation 129: Amend s 506 (Criminal intimidation) to remove reference to imputation of unchastity to a woman

Current law

28 Section 506 criminalises criminal intimidation, with enhanced punishments when it is done to impute unchastity to a woman. The full provision is set out below.

Criminal intimidation

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or with imprisonment for a term which may extend to 7 years or more, or impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

29 Section 506 has been used to prosecute individuals who coerced their victims into sexual acts by threatening to release nude photos of the victims on the internet.

Impetus for review

30 Acts involving “imputing chastity to a woman” included examples such as threatening to release obscene pictures of a woman to the public.¹¹ The enhanced punishment for “imputing unchastity to a woman” probably reflected societal norms at the time, where the reputational damage of imputing unchastity to a woman was higher than it is today.

31 At present, the enhanced punishment of 10 years’ imprisonment, which equally applies to criminal intimidation where the threat is to cause death or grievous hurt, is disproportionately high for criminal intimidation where the threat is to impute unchastity.

32 The PCRC is also recommending the introduction of a new sexual offence for distributing or threatening to distribute an intimate image, which would make it an offence for anyone to threaten the distribution of an intimate image of another person without the consent of that person and knowing or knowingly it likely that such conduct would cause that person harassment, alarm, or distress.¹²

Recommendation

33 The PCRC recommends amending s 506 to remove the term “or impute unchastity to a woman”, as the societal norms when the provisions were first enacted have evolved. There is also little need for such an offence, since the PCRC has recommended to introduce specific offences to deal with the mischief of circulation of intimate images without consent.

¹¹ *Ratanlal* at pp 3179 - 3180

¹² See section 13 of this report.

SECTION 28: DECRIMINALISATION OF ATTEMPTED SUICIDE

SUMMARY OF RECOMMENDATIONS

- (130) Repeal s 309 of the Penal Code (Attempt to commit suicide)
- (131) Amend the PFA to empower the Police to intervene immediately to prevent harm and loss of lives from suicide attempts
- (132) Amend s 7 of the MHCTA to:
- a. Empower the Police to apprehend and take persons who are reasonably suspected to have attempted suicide, and who are believed to be dangerous to himself or other persons, to a medical practitioner for assessment
 - b. Empower medical practitioners and the courts to order detention at a psychiatric institution for the purpose of treatment, if it is assessed to be necessary in the interests of the subject's health or safety or for the protection of others
- (133) Amend the CPC to allow the Police to seize evidence in cases of attempted suicide
- (134) Amend ss 305 and 306 of the Penal Code to criminalise the abetment of attempted suicide, update archaic language, and to include an additional mens rea requirement

Introduction

Under TOR 2(b)(i), the PCRC is to “rationalise, recalibrate and modernise the substantive offences in the Penal Code, including proposals with respect to removing outmoded offences”. In this Chapter, the PCRC considered whether section 309 of the Penal Code, which criminalises attempted suicide, should be repealed.

2 The reasons for suicides are often complex and multi-dimensional. In reviewing section 309 of the Penal Code, the PCRC was mindful that legislation is but one part of Singapore’s overall approach to suicide prevention and support. This overall approach was explained by the Minister for Health in Parliament in 2016:

“Singapore adopts an inter-agency, multi-pronged approach to prevent suicide that is aligned with the recommended approach under the WHO Public Health Action for the Prevention of Suicide Framework.”¹

3 In developing the recommendations in this Chapter, the PCRC was guided by the following question: Given Singapore’s preventive approach to reducing suicide attempts, how can *legislation* best support preventive efforts on the ground, and ensure that persons who attempt suicide receive the appropriate assistance?

4 The PCRC would like to thank the Ministry of Health, the Institute of Mental Health (IMH), and the Singapore Police Force (SPF) for their views and comments on the recommendations set out in this Chapter. The PCRC also considered relevant Parliamentary Questions by Members of Parliament and feedback by members of the public, including Non-Governmental Organisations such as AWARE.

¹ *Singapore Parliamentary Debates*, Official Report (7 November 2016) vol 94 at col 33 (Mr Gan Kim Yong, Minister for Health)

Current law

5 Attempting to commit suicide is an offence in Singapore under section 309 of the Penal Code:

Attempt to commit suicide

309. Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

6 The Penal Code distinguishes the abetment of attempted suicide² from the abetment of a successful suicide. Section 305 criminalises the abetment of the suicide of a child or insane person,³ while section 306 criminalises the abetment of the suicide of any other person.⁴

Current situation

7 The act of attempting suicide is a criminal offence because it was thought to be important that society should oppose people taking their own lives. It is also mandatory to report persons who attempted suicide. While attempted suicide is an arrestable offence, in practice, prosecutions are rare.

8 In 2015, out of 1096 reported cases of attempted suicide, 837 persons were arrested. From 2013 – 2015, an average of 0.6% of reported cases resulted in prosecution each year. Attempted suicide is rarely a standalone charge; prosecutions are for offenders facing other charges. Prosecution is also sought for offenders who repeatedly attempt suicide, or cases with aggravating circumstances, such as those who attempt to commit suicide in a manner which could endanger others. Typically, prosecution is sought for repeat offenders because only the Courts have the power to compel persons to seek treatment, via issuing a Mandatory Treatment Order (MTO).

9 SPF and SCDF generally provide the first response by authorities to cases of attempted suicide. In responding to cases of attempted suicide, the priority is to ensure the safety of the person who is attempting to commit suicide, and who would typically be emotionally and psychologically distressed. SPF and SCDF work together to rescue the person from the suicide attempt. Thereafter, SCDF will assess if urgent medical attention is required, and convey the person to hospital if necessary.

10 To prevent suicidal subjects from doing harm, either to themselves or to others, arrests may be necessary. Arrests may not be effected when it is assessed that there is no such risk, for instance, when the suicidal person is already in the care of a hospital and the immediate risk of harm is mitigated by the presence of medical professionals. When an arrest is made, Police officers use handcuffs when they assess that there is a need to ensure the safety of the person; to prevent the person from further self-harm; to prevent the person from causing harm to

² Section 309 read with s 107, which carries a maximum prescribed punishment of one-year imprisonment or a fine or both.

³ Section 305 carries a maximum punishment of death or life imprisonment.

⁴ Section 306 carries a maximum punishment of 10 years' imprisonment, as well as a fine.

escorting officers or members of public in the vicinity; or to prevent the person from absconding.

11 Police may refer the person to the Samaritans of Singapore for counselling, or engage the next-of-kin to assist in supporting and caring for the person. If there are clear signs indicating possible mental instability, Police officers may refer the person to IMH for an assessment of the person's mental state. If deemed necessary by medical professionals, the person may subsequently be warded at IMH for care and treatment.

12 SPF will also conduct investigations, as attempted suicide is currently an offence.

Impetus for review

13 While society remains opposed to suicide, there is growing recognition that treatment, not prosecution, is the appropriate response to persons who are so distressed that they attempt to take their own lives. Our current law enforcement practice proceeds on this basis, as can be seen from the extremely low rates of prosecution under section 309, coupled with SPF's referrals of persons who have attempted suicide to a hospital or IMH for assessment. Since the criminal justice system is not suited for the care and treatment of persons who have attempted suicide, repealing section 309 would allow such persons to be more appropriately managed primarily by the healthcare and social assistance systems.

14 Internationally, the majority of countries criminalise only the abetment of suicide, and not the act of attempted suicide. Attempting suicide is not a crime in the United Kingdom, Canada, Australia, New Zealand and most of Europe. According to the World Health Organisation's 2014 World Suicide Report, only 25 of the 192 countries and states surveyed have laws and punishments for attempted suicide. Singapore, along with Malaysia and Bangladesh, is among the minority of states in which attempting suicide is illegal and punishable.

15 Although section 309 has, on balance, attracted limited public attention, local civil society groups have called for the decriminalisation of suicide in Singapore. Criticism of section 309 by these groups has focused on (a) the arrest and investigation of suicidal subjects, which create further distress for subjects; (b) mandatory reporting of suicide attempts, which may deter help-seeking; and (c) whether law enforcement officers are appropriately sensitised to the social, psychological and medical issues related to suicide.

Recommendation 130: Repeal s 309 of the Penal Code (Attempt to commit suicide)

16 The criminal justice system is not ideal for managing cases of attempted suicide, as those who attempt suicide are typically distressed individuals who require medical help and may not be deterred by punishment. There is also global shift towards the decriminalisation of suicide. With this in mind, the PCRC recommends that section 309 be repealed, subject to the following policy objectives being achieved:

- (a) Police and SCDF officers must be empowered, in situations where the suicidal person may be a danger to himself or others, to immediately intervene to prevent harm or loss of life;

- (b) Police officers must be empowered to arrest and take persons who have attempted suicide to a medical practitioner for assessment, while medical practitioners and the courts should be able to compel treatment if necessary;
- (c) The public should be encouraged to report attempted suicides, although there is no need to impose a mandatory reporting requirement;
- (d) Police officers must be empowered to seize evidence in cases of attempted suicide where harm is caused, as such evidence would be needed if the person subsequently passes away and a Coroner’s Inquiry is launched; and
- (e) The abetment of attempted suicide must remain a crime. While the person who attempted suicide may not be morally culpable, the abettor who voluntarily facilitates in the ending of a life should. This is in line with the general policy of penal culpability for homicide and the causing of death.

17 The five objectives above are currently achieved via the Penal Code, together with powers under the CPC which are attendant to the commission of an offence. If section 309 is repealed, alternative legislation is required to empower the authorities to intervene in cases of attempted suicide to achieve the five objectives. The proposed approach is to amend the most relevant legislation for each objective, as follows:

<i>Objective</i>	<i>Recommendation</i>
a. Police and SCDF officers must be empowered, in situations where the suicidal person may be a danger to himself or others, to immediately intervene to prevent harm or loss of life	Amend the PFA
b. Police officers must be empowered to arrest and take persons who have attempted suicide to a medical practitioner for assessment, while medical practitioners and the courts should be able to compel treatment if necessary	Amend s 7 of the MHCTA
c. The public should be encouraged to report attempted suicides, although there is no need to impose a mandatory reporting requirement	No legislative amendments proposed
d. Police officers must be empowered to seize evidence in cases of attempted suicide where harm is caused, as such evidence would be needed if the person subsequently passes away and a Coroner’s Inquiry is launched	Amend the CPC
e. The abetment of attempted suicide must remain a crime. While the person who attempted suicide may not be morally culpable, the abettor who voluntarily facilitates in the ending of a life should. This is in line with the general policy of penal culpability for homicide and the causing of death	Amend the Penal Code

18 The repeal of section 309 and the proposed amendments to the PFA, MHCTA and CPC will clearly signal that attempted suicide is a health and social issue, rather than a criminal one. With the proposed amendments, the medical institutions will be responsible for assessing the psychological state of suicidal persons, and requiring treatment where necessary. The courts will also act as a safeguard on the authorities’ ability to compel persons to undergo treatment. The primary role of the SPF will be to save lives and refer persons to the medical institutions where necessary.

Recommendation 131: Amend the PFA to empower the Police to intervene immediately to prevent harm and loss of lives from suicide attempts

Issues considered

19 The main difficulty that arises from repealing section 309 is the loss of the primary legal basis for Police officers to intervene to stop a suicide attempt. Currently, the Police are empowered to intervene to prevent the commission of an offence such as attempted suicide on the basis of section 63 of the CPC (Prevention of offences and use of lethal force by police).⁵ As the powers to intervene under the CPC are attendant to the commission of an offence, the repeal of section 309 will remove this legal basis for intervention.

20 While the PFA provides legal grounds for intervention to prevent injury or death, it does not provide the Police with related powers of intervention, such as powers to use reasonable force to break and enter into any place,⁶ or powers of search.⁷ Thus, if attempted suicide is decriminalised, new legal provisions should be enacted to provide Police with the necessary powers to intervene in cases of attempted suicide.

Recommendation

21 The PCRC recommends that the powers of search and forced entry for attempted suicide cases be provided in the PFA, for the following reasons:

- (a) SPF is the main responder to cases of attempted suicide. The PFA is the natural legislation to provide the SPF with the necessary powers to continue playing this role.
- (b) By amending the PFA (instead of the CPC), attempted suicide will no longer be dealt with by the two primary pieces of legislation pertaining to criminal matters – the Penal Code and the CPC. This will avoid creating the erroneous impression that suicide attempts are criminal, which would undermine the broader policy intent of treating suicide attempts as a signal of distress which requires help, instead of a criminal offence.

22 The PCRC thus recommends introducing a new provision in the PFA to provide powers for Police intervention in cases of attempted suicide. This provision may be introduced under Part III, Division 1 (Duties of police officers). This will allow the Police to continue to intervene to prevent suicide attempts, through retaining their current powers of search and forced entry.

Recommendation 132: Amend s 7 of the MHCTA to: (a) Empower the Police to apprehend and take persons who are reasonably suspected to have attempted suicide, and who are believed to be dangerous to himself or other persons, to a medical practitioner for assessment; (b) Empower medical practitioners and the courts to order detention at

⁵ CPC s 63.—(1) Any police officer who has reasonable grounds to suspect that any offence may be committed may intervene for the purpose of preventing and must, to the best of his ability, use all lawful means to prevent the commission of the offence.

⁶ See CPC s 31(2).

⁷ See CPC s 34(1).

a psychiatric institution for the purpose of treatment, if it is assessed to be necessary in the interests of the subject's health or safety or for the protection of others

Issues considered

23 Currently, SPF regularly refers persons arrested for attempted suicide under section 309 to a hospital or IMH for assessment, although there are no specific provisions for referrals or assessment in the Penal Code or CPC.

24 The power to compel a person to receive medical or psychiatric treatment currently lies in the courts' sentencing powers, through sections 339, 340 and 352 of the CPC. Upon the recommendation of an appointed psychiatrist, the court may sentence a person convicted under section 309 to a MTO, which requires the person to undergo psychiatric treatment at IMH for a period not exceeding 24 months. If the conditions of the MTO are breached, upon the application of the appointed psychiatrist, the court may take one of the following four actions: issue a warning; vary the MTO; impose a fine of up to \$1000; or revoke the MTO and sentence the offender for the original offence.

25 With the repeal of section 309, to ensure that persons who attempt suicide continue to receive the necessary treatment, clear legal powers will be necessary for Police officers to apprehend persons who attempt suicide for the purpose of referring them to hospitals or the IMH for assessment.

Approaches in other jurisdictions

26 The PCRC considered the legislative approaches to attempted suicide in other jurisdictions. In the United Kingdom, the decriminalisation of suicide was accompanied by the introduction of provisions in mental health legislation to allow for the apprehension and assessment of those who attempt to commit suicide. India has gone further than the UK in its 2017 Mental Healthcare Act, which imposes a duty on the Government to provide care and treatment for persons who attempt suicide.

- (a) United Kingdom: In the UK, section 136 of the 1983 Mental Health Act provides for the detention and medical assessment of a person found in a public place who appears to be mentally disordered and to be in immediate need of care or control. The 1961 Suicide Act, which decriminalised attempted suicide, was supported by the 1959 Mental Health Act, which provided clear powers for the authorities to intervene in cases of attempted suicide. (The 1959 Mental Health Act was subsequently replaced by the 1983 Mental Health Act.)
- (b) India: The 2017 Mental Healthcare Act (MHA) superseded the 1987 Mental Health Act. Section 115 of the 2017 Act effectively decriminalised attempted suicide – under section 115, any person who attempts suicide will be presumed to be suffering from mental illness, and will not be punished under section 309 of the Indian Penal Code. Instead, “the Government will have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.” In addition, under section 100 of the 2017 Act, the Police have a duty to take under protection any person suspected of having a mental disorder, and to refer the person to the nearest public health establishment within 24 hours for assessment of the person's healthcare needs. The public health establishment will then be responsible

for assessing the person's needs, and arranging for treatment as provided for in the other sections of the 2017 Act.

Recommendation

27 The PCRC recommends amending the MHCTA to empower the Police to apprehend persons who have attempted suicide and take them to a medical practitioner for assessment, and to empower designated medical practitioners and the courts to compel, where necessary, treatment of those found to be suffering from mental disorders.

Current scope of MHCTA

28 The MHCTA was enacted in 2008 to provide for the admission, detention, care and treatment of mentally disordered persons in designated psychiatric institutions. The Act was enacted following the repeal of the Mental Disorders and Treatment Act. It was stated in the Second Reading speech for the Mental Health (Care and Treatment) Bill that the intent of the Act was to “regulate the involuntary detention of a person in a psychiatric institution for treatment if:

- (a) He is suffering from a mental disorder which warrants the detention for treatment; and
- (b) It is necessary in the interests of the health or safety of the person or for the protection of other persons that the person be detained.”

29 Section 7 of the MHCTA currently provides the Police with powers to apprehend a person reported as mentally disordered and believed to be dangerous to himself or others by reason of mental disorder, and to take the person to a medical practitioner for assessment. The medical practitioners will then act in accordance with section 9 of the MHCTA – this allows all medical practitioners to refer persons suspected of mental disorder to a psychiatric institution for treatment. Section 10 then empowers designated medical practitioners at the psychiatric institution to order detention at a psychiatric institution for the purpose of treatment for up to 7 months, if it is assessed to be necessary in the interests of the subject's health or safety and protection of others. Under section 13 of the MHCTA, the court is empowered to order further detention for a maximum of 12 months.

30 As currently worded, section 7 of the MHCTA does not allow the Police to intervene in all cases of attempted suicides. It only allows the apprehension of persons who are *reported to be mentally disordered* and who are believed to be dangerous to themselves or other persons *by reason of mental disorder*. While many suicide attempts may be motivated by depression or other mental illnesses, *not all persons who attempt suicide may be reported to have mental illnesses*. Consequently, there will be cases of attempted suicide which fall outside the scope of section 7 of the MHCTA.

Recommended amendments to the MHCTA

31 In view of the limitations described in the preceding paragraphs, the PCRC recommends expanding section 7 of the MHCTA, to allow for the apprehension of persons who attempt suicide *and* who are believed to be dangerous to themselves or other persons for the purpose of conveyance to a medical practitioner for assessment. The recommended amendments to section 7 of the MHCTA are in red below.

Apprehension of ~~mentally disordered~~ persons reasonably suspected of mental disorder

7. It shall be the duty of every police officer to apprehend any person who is ~~reported to be mentally disordered and is~~ believed to be dangerous to himself or other persons, ~~where such danger is reasonably suspected to be due to by reason of~~ mental disorder, and take the person together with a report of the facts of the case without delay to —

- (a) any medical practitioner for an examination and the medical practitioner may thereafter act in accordance with section 9; or
- (b) any designated medical practitioner at a psychiatric institution and the designated medical practitioner may thereafter act in accordance with section 10.

32 The recommended amendments to section 7 of the MHCTA will provide Police officers with the power to apprehend persons who attempt suicide *and* who are reasonably suspected of having a mental disorder, *for the purpose* of referring them to medical practitioners for assessment. If assessed to have a mental disorder, appropriate treatment can then be provided as per other existing provisions of the MHCTA.

33 In cases of attempted suicide where no mental disorders are suspected, SPF will continue to recommend appropriate follow-ups, such as referring the person to the Samaritans of Singapore for counselling, or engaging the next-of-kin to assist in supporting and caring for the person.

34 The mandatory reporting requirement for attempted suicide under section 424 of the CPC is currently attendant to the commission of an offence. Should section 309 be repealed, the mandatory reporting requirement will no longer apply since attempted suicide is no longer an offence.

Recommendation

35 The PCRC does not recommend creating a mandatory reporting requirement for attempted suicide in the law. In general, mandatory reporting is imposed only for offences; it would not be appropriate to impose a mandatory reporting requirement for attempted suicide after it has been decriminalised. Moreover, enforcement of such a requirement would be difficult, as it would not be appropriate to punish a member of the public for failing to report a suicide attempt, when the suicide attempt itself is not subject to punishment.

Recommendation 133: Amend the CPC to allow the Police to seize evidence in cases of attempted suicide

Issues considered

36 As attempted suicide is currently an offence, Police officers are empowered under section 35 of the CPC to seize or prohibit the disposal of or dealing in any property related to the act of attempted suicide.⁸ For other unnatural deaths subject to a Coroners' Inquiry, Police

⁸ Section 35.—(1) A police officer may seize, or prohibit the disposal of or dealing in, any property —
(a) in respect of which an offence is suspected to have been committed;
(b) which is suspected to have been used or intended to be used to commit an offence; or

only have investigative powers under the Coroners' Act after death occurs, and not before. Should section 309 be repealed, the Police should retain powers to seize evidence in cases of attempted suicide where harm is caused in order to adequately address cases where the person who attempted suicide eventually passes away and a Coroner's Inquiry is launched.

Recommendation: Amend the CPC

37 The power to seize evidence should be provided through making section 35 of the CPC applicable to cases of attempted suicide where harm is caused. The recommended amendments to section 35(1) are in red:

Powers to seize property in certain circumstances

35.—(1) A police officer may seize, or prohibit the disposal of or dealing in, any property

-
- (a) in respect of which an offence is suspected to have been committed;
- (b) which is suspected to have been used or intended to be used to commit an offence; ~~or~~
- (c) which is suspected to constitute evidence of an offence; *or*
- (d) *which is suspected to have been used or intended to be used to attempt suicide, if the person caused harm to himself, or did an act that may result in harm to him in the future, in his suicide attempt.*

Recommendation 134: Amend ss 305 and 306 of the Penal Code to criminalise the abetment of attempted suicide, update archaic language, and include an additional *mens rea* requirement

Issues considered

38 At present, the abetment of *completed* suicide is an offence under sections 305 and 306 of the Penal Code. These are much more serious offences as compared to attempted suicide under section 309. In particular, section 305 is an aggravated form of 306, imposing the death penalty or imprisonment of life for the abetment of completed suicide by persons below 18 years of age or with limited mental capacity. The two sections are reproduced below.

Abetment of suicide of child or insane person

305. If any person under 18 years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide shall be punished with death or imprisonment for life, or with imprisonment for a term not exceeding 10 years, and shall also be liable to fine.

Abetment of suicide

306. If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

(c) which is suspected to constitute evidence of an offence.

39 The repeal of section 309 will not affect the operation of these two provisions as they apply to *completed* suicides. However, it will remove the legal basis for criminalising the abetment of *attempted* suicide under section 107 Penal Code.

40 Assigning criminal culpability to abetment of suicide is in line with the general policy of penal culpability for homicide and the causing of death. In particular, section 305 assigns a similar level of moral culpability to the abetment of suicide of persons with limited mental capacity as to murder or culpable homicide. While the person who attempted suicide may not be morally culpable, the abettor who voluntarily facilitates in the ending of a life should be. Whereas a person who attempts suicide of his own accord is judged to be sufficiently distressed that he deserves treatment rather than punishment, the same cannot be said for a person who voluntarily facilitates the ending of someone else’s life. Therefore, even with the decriminalisation of suicide, the abetment of suicide should remain a crime.

Recommendation

(A) Criminalisation of abetment of attempted suicide

41 The PCRC recommends criminalising the abetment of *attempted* suicide, via amendments to expand the scope of sections 305 and 306.

42 At present, penalties for the abetment of suicide depend on two factors – first, whether death was caused; second, whether the person attempting suicide lacked sufficient mental capacity to understand the consequences of suicide. The current maximum penalties for abetment of attempted and completed suicide are set out in the following table.

Consequences	Victim	Maximum punishment	Section
Victim dies	Minor under 18 or adult with limited mental capacity ⁹	Death or life imprisonment or imprisonment up to 10 years	305
	Any other person	10 years’ imprisonment	306
Victim attempts suicide unsuccessfully	Any person	1 year imprisonment	309 r/w 109

Mental capacity

43 The PCRC agrees with the current practice of enhancing punishments for abetment of suicide by a minor under 18 or an adult with insufficient mental capacity to understand the consequences of suicide. The abetment of the suicide of such persons’ capacity is morally comparable to murder or culpable homicide, as such persons are much less capable of resisting instigations. Consequently, the PCRC recommends that the abetment of suicide by persons with *limited* mental capacity should remain a separate offence under s 305; s 306 should continue to criminalise abetment of suicide by adults with *sufficient* mental capacity.

⁹ Defined in s 305 Penal Code as “any person under 18 years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication”

Whether death caused

44 As set out in paragraph 42, current penalties for abetment of suicide only differentiate between whether death was caused or not. If death is not caused, the maximum punishment is only 1 year's imprisonment. However, if death is caused, the maximum punishment increases dramatically – to death or life imprisonment (if a minor or an adult with low mental capacity commits suicide), or to 10 years' imprisonment (if any other adult commits suicide).

45 The PCRC recommends that punishments for abetment of suicide should be enhanced if the attemptee sustained grievous hurt, as defined in s 320 of the Penal Code (which includes death). Whether a suicide attempt results in death or grievous hurt typically depends on factors independent of the abettor and attemptee, such as whether the attemptee was discovered and rescued in good time. Consequently, moral culpability for abetments which result in grievous hurt or death should be similar. In addition, from the victim's perspective, a suicide attempt which results in grievous hurt such as full-body paralysis, coma, or brain injury, may be equally traumatic as, or worse than, death. Consequently, the PCRC recommends that ss 305 and 306 be rationalised such that enhanced punishments are provided when grievous hurt is caused.

Rationalisation of penalties

46 Given the considerations in paragraphs 43 – 45, the PCRC recommends rationalising the penalties for abetment of suicide as follows:

- (a) Retain two separate offences of abetment of suicide: s 305 to address abetment of suicide by a minor under 18 or adult with limited mental capacity; s 306 to address with abetment of suicide by adults with sufficient mental capacity.
- (b) Within ss 305 and 306, create two tiers of punishments: Tier one to address cases where grievous hurt (including death) is caused; tier two to address cases where grievous hurt is not caused.
 - (i) Maximum punishments for tier one to be retained at present level. For tier one of s 305, which is punishable by (1) death or life imprisonment, or (2) imprisonment up to 10 years, the gap between options (1) and (2) should be removed.
 - (ii) Maximum punishments for tier two to be set at 50% of punishments for tier one.

The recommended framework of punishments for abetment of suicide is set out in the following table (recommended amendments in red).

Section	Person attempting suicide	Consequence	Maximum punishment
305	Minor under 18 or adult with limited mental capacity ¹⁰	Suicide attempt results in grievous hurt (which includes death)	Death or life imprisonment or imprisonment up to 20 10 years

¹⁰ Defined in s 305 Penal Code as “any person under 18 years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication”

		Suicide attempt does not result in grievous hurt	10 years' imprisonment 1 year imprisonment
306	Adult with sufficient mental capacity	Suicide attempt results in grievous hurt (which includes death)	10 years' imprisonment
		Suicide attempt does not result in grievous hurt	5 years' imprisonment 1 year imprisonment

(B) Updating of section 305

47 In addition, the PCRC recommends updating section 305, to replace the archaic phrases “delirious” and “idiot”, and to ensure that knowledge of the victim’s limited mental capacity is required for culpability under section 305.

48 Section 305 imposes enhanced punishments on persons who abet the suicide of persons who have less capacity to fully understand the consequences of suicide, defined as “persons under 18 years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication”. The terms “delirious” and “idiot” are archaic. Better alternative language exists in section 90 of the Penal Code (consent given under fear or misconception, by person of unsound mind, etc., and by child). Section 90(b) states that consent is not consent if given by “a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent”. The mental states in s 90(b) which prevent a person from giving consent would also prevent a person from fully appreciating the consequences of a suicide attempt. Accordingly, the PCRC recommends that similar language be adopted for the purpose of s 305.

49 Finally, the PCRC recommends the inclusion of an additional *mens rea* requirement that the abettor knew or had reason to suspect that the person who attempted suicide was under 18 years of age, or unable to understand the consequences of attempted suicide due to impaired mental faculties. If the abettor did not know, and had no reason to suspect, that the person he was abetting had significant difficulties appreciating the consequences of suicide, his culpability should be the same as that under section 306.

Conclusion

50 The PCRC reaffirms society’s opposition to suicide. Nonetheless, we recommend decriminalising attempted suicide, via the repeal of section 309 of the Penal Code. Section 309, a 19th century provision, exists because it was thought that criminalisation was the best way to deter suicide attempts. Today, the PCRC accepts the view that *treatment*, not prosecution, is the most appropriate response to persons who are so distressed that they attempt to take their own lives.

51 The PCRC therefore recommends repealing section 309 of the Penal Code, and expanding section 7 of the MHCTA to ensure that persons who require mental health assistance receive the appropriate assessment and treatment. As it may not be possible to rule out foul play in all suicide attempts at the first instance, the PCRC also recommends amendments to the PFA and the CPC, to ensure that Police retain their powers of search, forced entry, and seizure

of evidence. Finally, to clearly signal society's continued opposition to suicide, the PCRC recommends that it remain an offence to abet suicide attempts, regardless of whether such attempts succeed.

SECTION 29: ABOLITION OF MARITAL EXEMPTIONS FOR HARBOURING OFFENCES

SUMMARY OF RECOMMENDATIONS

- (135) *Repeal the marital exemption in ss 136 (Harbouring a deserter), 212 (Harbouring an offender), 216 (Harbouring an offender who has escaped from custody, or whose apprehension has been ordered), and 216A (Harbouring robbers or gang-robbers, etc.) of the Penal Code*
- (136) *Insert Illustrations in s 212 to clarify that spouses will not be guilty of the offence of harbouring if they provided food and shelter to an offender-spouse without the requisite intention to screen the offender-spouse from punishment*

Introduction

English and colonial law, from which Singapore's laws are derived, have always accorded some level of exception to the marital relationship. As societal and legal conceptions of the marital relationship evolved, so too have the level of marital exemptions and privileges, and their corresponding justifications.

2 Several marital exceptions are still provided for in Singapore's criminal law.¹ Broadly speaking, there are exceptions for the spouse as a perpetrator, accessory,² or witness.³ Apart from marital immunity for rape,⁴ the only other marital exemption in the Penal Code pertains to the spouse as an accessory – specifically, the marital exemption in the Penal Code for harbouring offenders under ss 136, 212, 216 and 216A. The focus of this section is on the spouse as an accessory.

Overview

Historical justifications for marital exceptions and privileges

3 Marital exceptions and privileges have been justified on the grounds of (a) the doctrine of conjugal unity (under which the wife and husband could not be treated as separate legal entities); (b) the presumption of dominance by one party over the other (the wife is presumed to have acted under the coercion of her husband); and (c) social interest in preserving marital harmony.⁵ The first two justifications have diminished in relevance with the shift in societal

¹ Marital exceptions in civil law are beyond the scope of this paper. Marital privileges or exceptions which are no longer in force today (eg competence and compellability of spouses, criminal conspiracy between spouses) are also not discussed in this paper.

² An accessory to a crime typically refers to an individual who, knowing that another individual has committed a crime, receives, relieves, comforts or assists the offender in order to enable him to escape being arrested, tried, or to shield him from punishment.

³ Issues relating to the spouse as a witness are beyond the scope of this Penal Code review, as marital communications privilege is provided for in the EA.

⁴ See section 15 of this report

⁵ "The Effect of Marriage on the Rules of the Criminal Law" (1961) 61 Columbia Law Review 73 ("The Effect of Marriage on the Rules of the Criminal Law") at p 73

values over time, leaving the last as the remaining basis for the special treatment of the marital relationship in criminal law.

Conjugal unity

4 In the 17th century, extensive marital exceptions and privileges were justified by the doctrine of conjugal unity. The legal view of husband and wife as one person is of biblical origin, and appears to be a natural consequence of the legal guardianship exercised by a husband over his wife, and inability of wives to own property.⁶ The classic statement of the conjugal unity doctrine, as expressed by Lord Coke in 1628, is:

“A wife cannot be produced either against or for her husband, *quia sunt duae animae in carna una* [who are two spirits in one flesh].”⁷

5 Property rights were extended to married women over the 19th century. Over time, this had the effect of delegitimising the conjugal unity doctrine as an appropriate basis for marital exceptions and privileges. Today, conjugal unity is no longer seriously defended as a basis for criminal law. As early as in 1947, Glanville Williams stated that the fiction of marital unity “ought to be used only to bolster up a decision arrived at on other grounds, and it is not in itself a satisfactory basis of decision.”⁸

Marital coercion

6 An alternative historical justification for marital exceptions is the presumed dominance of the husband. Because the legal and practical powers of husband over his wife were assumed to be so overwhelming as to render her incapable of resisting his suggestions or influence, criminal law introduced a presumptive defence of marital coercion, to excuse wives from criminal liability for crimes in all but the most exceptional situations. The mere presence of the husband at the commission of a crime by the wife was sufficient to trigger the presumption of marital coercion.⁹

7 Hawkins stated that a wife “is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of, her husband.”¹⁰ Notwithstanding that Hawkins refers only to theft, the scope of the presumption of marital coercion was extremely broad, applying in all cases except those concerning treason or murder.¹¹

8 The presumptive defence of marital coercion rests on the anachronistic assumption that women are incapable of forming independent criminal intent. The validity of this assumption has diminished over time. From the 19th century, the courts began to treat the presumption of

⁶ *Ibid.*

⁷ See David Lusty, “Is there a common law privilege against spouse incrimination” (2004) 27(1) UNSW Law Journal 1 at p 6

⁸ Glanville Williams, “The Legal Unity of Husband and Wife” (1947) 10 Modern Law Review 16 at p 31

⁹ Matthew Hale, *Historia placitorum coronae: the History of the Pleas of the Crown, by Sir Matthew Hale, Pub. from the original manuscripts by Sollom Emlyn. With additional notes and references to modern cases concerning the pleas of the crown. By George Wilson. A New Ed. And an abridgement of the statutes relating to felonies continued to the present time, with notes and references by Thomas Dogherty.* (T. Payne [etc], 1800) at p 44

¹⁰ William Hawkins, *Treatise of Pleas of the Crown, Book I* (J Walthoe, 1716) at p 2

¹¹ William Hawkins, *Treatise of Pleas of the Crown, Book I* (J Walthoe, 1716) at p 2

marital coercion as rebuttable.¹² The presumption of marital coercion was eventually abolished in England by the Criminal Justice Act 1925; however, the same Act established the defence of marital coercion for wives. The defence of marital coercion was finally abolished in 2014 in England and Wales.¹³ The presumption of marital coercion was abolished much earlier in Canada¹⁴ and New Zealand¹⁵. While virtually all common law jurisdictions have abolished the presumption of marital coercion, some, such as the Australian states of Victoria and South Australia¹⁶ still retain a separate legal defence of marital coercion.¹⁷

9 Presumption of marital coercion is no longer tenable in the modern context. As Justice Frankfurter of the US Supreme Court said in a case involving the common law immunity on conspiracies, the assumption that “a wife must be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing participant ... implies a view of American womanhood offensive to the ethos of our society.”¹⁸

10 The historical defence of marital coercion has never existed in Singapore law. Coercion by a spouse is the same as coercion by any other person – it is only a valid defence if it qualifies under the defence of duress in section 94 of the Penal Code.

Social interest in the preservation of marital harmony

11 Finally, in more recent times, the exceptions made for married persons in criminal law have been justified on the grounds of social interest. In relation to the marital exception for spouses who are accessories after the fact and marital privileges in evidence, it has been argued that preservation of marital harmony requires certain exceptions to be made for spouses, so as not to destroy the intimate emotional bonds and mutual obligation of confidence upon which a marriage depends.¹⁹

Impetus for review

12 The level of exception accorded to the marital relationship by the criminal law reflects a trade-off between two competing public interests: preservation of marital harmony on the one hand, and administration of justice on the other.

13 The marital exemption for the offences under ss 136, 212, 216 and 216A has remained unchanged since the enactment of the Penal Code in 1871. The exemption reflects the historical judgement that the preservation of marital harmony should prevail over the administration of justice *in all cases*. However, the marital exemption for harbouring offenders is an anomaly. Many other marital privileges and exceptions have been abolished (criminal conspiracy between spouses; incompetence and non-compellability of spouses to testify, marital coercion as a defence) or reduced (privilege against spousal incrimination, marital immunity for rape). Such changes reflect that societal and legal conceptions of marriage have evolved sufficiently

¹² *The Effect of Marriage on the Rules of the Criminal Law* at 89

¹³ Anti-social Behaviour, Crime and Policing Act 2014 (c 12) s 177.

¹⁴ Criminal Code (R.S.C., 1985, c C-46), s 18

¹⁵ Crimes Act 1908 (NZ No. 32), s 44(2)

¹⁶ Criminal Law Consolidation Act 1935 (Version 13 Aug 2018, South Australia), s 328

¹⁷ Crimes Act 1958 (No. 6231 of 1958, Vic), s 336

¹⁸ Conspiracy and Attempts, The Law Commission (Consultation Paper No 183, 2007) at 142, at paragraph 9.27

¹⁹ *The Effect of Marriage on the Rules of the Criminal Law* at 82

so as to require a new balance to be struck between the public interests in the preservation of marital harmony and the administration of justice. It is therefore timely to review the lone marital exemption which remains in the Penal Code.

Current Law

14 The harbouring of an offender is criminalised under ss 130, 136, 157, 212, 216, and 216A of the Penal Code. Of the 6 harbouring offences in the Penal Code, only ss 136, 212, 216 and 216A contain express exemptions for husbands and/or wives.

15 Under ss 212, 216 and 216A, the offence of harbouring is made out when one supplies a person with “shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension”, with the intention of screening that person from legal punishment, or preventing apprehension of that person, or facilitating the commission of robbery. The mere act of providing food or shelter, without intention to help the fugitive escape punishment or commit crimes, is not an offence.

16 Section 136 does not require any intention on the part of the harbourer to assist the offender in evading punishment. Under s 136, the *mens rea* requirement is that of knowledge: it is an offence to harbour a person knowing that the person has deserted the military. The intentions of the harbourer are irrelevant.

17 The key elements of the four offences with marital exemption are appended. The full provisions are provided at [Annex A](#).

Section	Elements of offence
136	<ul style="list-style-type: none"> • Concealment of a person, knowing that the person has deserted the military • The marital exemption applies <i>only to wives</i>, and not husbands
212	<ul style="list-style-type: none"> • Harbouring, <i>with the intention of screening from punishment</i>, persons who have <i>actually</i> committed certain offences under the Penal Code or an offence under some other law, when the thing punishable under such law is punishable with imprisonment for a term of 1 year or more • The marital exemption applies <i>to wives and husbands</i>
216	<ul style="list-style-type: none"> • Harbouring an offender who has escaped from custody after being convicted of or charged with an offence, or whose apprehension has been ordered, <i>with the intention of preventing him from being apprehended</i> • The marital exemption applies <i>to wives and husbands</i>
216A	<ul style="list-style-type: none"> • Harbouring, with the intention of <i>facilitating robbery or screening from punishment</i>, any person who is about to commit or has recently committed robbery or gang robbery • The marital exemption applies <i>to wives and husbands</i>

18 The Penal Code provisions for general harbouring of offenders are rarely used. There have been no prosecutions under ss 136, 216 and 216A from 2007 – 2017; from Oct 2001 – Mar 2018, one charge under s 212 was recorded on the Sentencing Information and Research Repository. Conceivably, this is because the Prosecution has favoured charges under the dedicated offences where they exist – for example, intentional, reckless or negligent harbouring of immigration offenders is frequently prosecuted under s 57(1)(d) of the Immigration Act (Cap 133, 2008 Rev Ed)(“*Immigration Act*”).

Cross-jurisdictional survey on continuing availability of marital exemption for harbouring

Australia

19 In Australia, the states of Victoria²⁰, Tasmania²¹ and West Australia²² provide marital exemption for harbouring or other types of assistance to offenders. However, there is no marital exemption for the harbouring of offenders in the Australian Capital Territory²³, the Northern Territory²⁴, Queensland²⁵, New South Wales²⁶, or South Australia²⁷.

20 In 1975, the Victorian Law Reform Commissioner took the view that the special accessory rule in favour of wives rested upon a view that “the relationship of husband and wife involved, for the wife, a deep obligation to give help and comfort to her husband and to respect his confidences; and upon a view that if, being faced with a conflict of duties, she gave precedence to that personal obligation, over her general duty as a citizen not to obstruct the administration of justice, her conduct was at least so far excusable, or extenuated, that it should not be regarded as criminal.”²⁸ Accordingly, it recommended that the exemption ought to be accepted and maintained, not only as being supported by the clearest authority; but also because “personal loyalty between husband and wife may properly be regarded as of fundamental importance to the stability of the family as the basic unit in our society.”²⁹ As of 2018, s 338 of the Crimes Act 1958 (Vic) embodies this philosophy.

England

21 The offence of harbouring created by s 22(2) of the Criminal Justice Act 1961³⁰ does not contain any marital exemption. However, as of April 2018, the charging guidance by the Crown Prosecution Service states that “often, the public interest will not demand proceedings against a wife or parent who has been put under pressure to harbour a husband or son, especially if the offence for which the prisoner was incarcerated is not serious.”³¹

Canada

22 In Canada, an accessory after the fact is a person who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape. Before 2000, there was full marital exemption for spouses for the offence of being an accessory after the fact under s 23(2) of the Criminal Code.³² However, the marital

²⁰ Crimes Act 1958 (No. 6231 of 1958, Vic), s 338

²¹ Criminal Code Act 1924 (Tasmania), Schedule 1, s 6

²² Criminal Code Act Compilation Act 1913 (West Australia), Schedule, s 10

²³ Criminal Code 2002 (Republication No 42, Australian Capital Territory), s 717

²⁴ Criminal Code Act (Reprint C038, Northern Territory of Australia), Schedule 1, s 13(2)

²⁵ Criminal Code Act 1899 (Reprint 16 Mar 2018, Queensland), Schedule 1, s 545

²⁶ Crimes Act 1900 No 40, (Reprint 13 Aug 2018, New South Wales), s 347A

²⁷ Criminal Law Consolidation Act 1935 (Version 13 Aug 2018, South Australia), s 255

²⁸ Law Reform Commissioner of Melbourne (1975) at 15

²⁹ Working Paper No. 2, Criminal Liability of Married Persons (Special Rules), January 1975 at 15

³⁰ Criminal Justice Act 1961 (c 39) UK s 22(2)

³¹ UK Crown Prosecution Service, “Public Justice Offences incorporating the Charging Standard – Legal Guidance”, <<https://www.cps.gov.uk/legal-guidance/public-justice-offences-incorporating-charging-standard>> (accessed 19 April 2018)

³² Criminal Code (R.S.C., 1985, c C-46) s 23(2)

exemption was repealed in 2000 via the Modernization of Benefits and Obligations Act³³. Today, there is no marital exemption for the offence of acting as an accessory after the fact.

United States

23 In the United States, while there is no federal law that provides a family member with an exemption from prosecution, there are state laws which exempt spouses, parents, grandparents, children, grandchildren, and siblings from prosecution for providing assistance to an offender after the commission of a crime with the intent that the offender avoids or escapes detection, arrest, trial, or punishment.³⁴

Arguments for maintaining the marital exemption for harbouring

Conjugal unity, marital coercion

24 As explained at paragraphs 3 – 11, the historical justifications of conjugal unity and marital coercion are no longer seriously defended as a basis for marital exemptions in modern criminal law, both in Singapore and elsewhere.

Preserving marital harmony

25 As explained at paragraph 11, the current basis for the marital exemption lies in the societal interest in preserving marital harmony, which would otherwise be disrupted.³⁵ The historical view has been that a marriage would be seriously damaged if a spouse could not conceal his or her spouse from legal punishment. The exemption was created taking into account the spouse's deep obligation to give help and comfort to the principal offender and to respect his confidences, and that when duty to state and duty to spouse conflict, the conduct of the concealer is excusable or extenuated to the extent that it should not be treated as criminal. Society also has a stake in the institution of marriage and in the preservation of individual marriages.

Arguments for abolishing the exemption

Criminal law must strike a consistent balance between preserving marital harmony on the one hand, and safeguarding the administration of justice on the other

26 Criminal law must strike a balance between preserving marital harmony on the one hand, and safeguarding the administration of justice on the other. However, the provision of marital exemptions for ss 136, 212, 216 and 216A results in an inconsistent balance being struck in the law:

- (a) For the four harbouring offences in the Penal Code with marital exemptions (ss 136, 212, 216, 21A), the balance strongly favours marital harmony.
- (b) For two harbouring offences in the Penal Code (ss 130, 157), and all other offences that obstruct justice, the balance strongly favours administration of justice as there are no marital exemptions.

³³ Modernization of Benefits and Obligations Act (S.C. 2000, c 12) s 92

³⁴ States with such exemptions include Wisconsin (see WI Stat § 946.47 2012 through Act 45) and Nevada (see NRS 195.030).

³⁵ *The Effect of Marriage on the Rules of the Criminal Law* at p 82

27 The provision of marital exemption for ss 136, 212, 216 and 216A gives rise to inconsistency with the treatment of other criminal offences in our legislation in three ways.

- (a) There is no marital exemption for other harbouring offences in the Penal Code. While marital exemption for harbouring is available for ss 136, 212, 216 and 216A, it is not available for ss 130 and 157. While s 130 is a fairly serious offence, the same cannot be said of s 157. Section 157 criminalises the harbouring, receiving or assembling in one's house any person known to have been hired, engaged or employed to become members of an unlawful assembly. Unlawful assembly offences are punishable by 2 – 8 years' imprisonment, and are not particularly severe by the standards of the Penal Code.
- (b) There is no marital exemption for failing to report offences listed in s 424 of the CPC. It is conceptually inconsistent that the preservation of marital harmony should require marital immunity for harbouring, but not for mandatory reporting of offences.

Many Penal Code offences attract mandatory reporting duty under s 424 CPC – examples include all offences affecting the human body, unlawful assembly, robbery offences, aggravated house trespass, corruption by public servants, and ironically, harbouring offences. Failure to report an offence listed in s 424 CPC is an offence, punishable by 6 months' imprisonment under s 176 Penal Code. There has never been marital immunity for s 424 CPC, although there is a defence of "reasonable excuse". There is no case law on what constitutes a "reasonable excuse".

In effect, s 424 CPC requires one spouse to make a Police report if the other spouse commits an offence which attracts mandatory reporting. However, the spouse is allowed to harbour the offending spouse. This is conceptually inconsistent.

- (c) There is no marital exemption for other offences that obstruct justice. Spouses are not exempt from prosecution for other acts of assisting their spouse in evading punishment. These acts include:
 - (i) Section 203 Penal Code (Giving false information respecting an offence committed);
 - (ii) Section 204 Penal Code (Destruction of document or electronic record to prevent its production as evidence);
 - (iii) Section 191 Penal Code (Giving false evidence); and
 - (iv) Sections 44(2), 63 ISA (Assisting another to prevent punishment or apprehension).

Egregious cases of active concealment by spouses cannot be prosecuted

28 In addition to being inconsistent, the marital exemption for spouses means that spouses cannot be prosecuted for the offence of harbouring, even if one has taken active steps to help the other evade punishment, such as by concealing him in a forest and supplying food to him. Where one spouse has committed serious crimes, there would be strong public interest in

prosecuting the other spouse for facilitating evasion of punishment by harbouring, but this is not possible today.

Recommendation 135: Repeal the marital exemption in ss 136 (Harbouring a deserter), 212 (Harbouring an offender), 216 (Harbouring an offender who has escaped from custody, or whose apprehension has been ordered), and 216A (Harbouring robbers or gang-robbers, etc.) of the Penal Code

29 The majority of the PCRC was of the view that the law should strike a consistent balance between the preservation of marital harmony and the administration of justice, and marital exemption for harbouring in ss 136, 212, 216 and 216A of the Penal Code should be abolished. Abolition of marital exemptions will also ensure that egregious cases of harbouring by spouses can be prosecuted.

30 Some Committee members expressed concerns about possible adverse effects of abolition on marital harmony, and preferred a partial repeal of marital exemption for harbouring of offenders who had committed serious crimes. The key concern was that abolishing marital exemptions for harbouring would lead to marital disharmony, as people would feel compelled to evict their spouse from the marital home upon discovering that their spouse had committed a crime, even if it was a relatively minor offence.

31 However, the PCRC noted that the mere act of providing food or shelter to an offender, without intention to help the offender escape punishment or apprehension or to commit other crimes, does not make out the harbouring offence, and most spouses who continued to do so while knowing that their spouses had committed some offence would not be guilty of a harbouring offence. As explained in paragraph 16, the offence of harbouring under ss 212, 216 and 216A, is made out when one supplies a person with “shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension”, with the intention of screening that person from legal punishment, or preventing apprehension of that person, or facilitating the commission of robbery.

Recommendation 136: Insert Illustrations in s 212 to clarify that spouses will not be guilty of the offence of harbouring if they provided food and shelter to an offender-spouse without the requisite intention to screen the offender-spouse from punishment

32 Nonetheless, to mitigate concerns about the impact of abolition of marital exemptions on marital harmony, the PCRC also recommends inserting two Illustrations to s 212, to clarify that spouses will not be guilty of the offence of harbouring simply by providing food or shelter to an offender-spouse. The recommended Illustrations are as follows:

- | |
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| <p>(a) <i>A and B are married, and live in the same home. A knows that B has committed an offence. A provides food and shelter to B, <u>with no intention to screen B from legal punishment</u>. A is not guilty of the offence of harbouring.</i></p> <p>(b) <i>A and B are married, and live in the same home. A knows that B has committed an offence. A provides food and shelter to B for the purposes of helping B evade detection from authorities. A is guilty of the offence of harbouring.</i></p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Conclusion

33 Marital exemptions for harbouring offences are an anomaly and an anachronism, and should be abolished.

Annex A – Harboursing offences which exempt spouses from criminal liability

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
136	<p>Harbouring a deserter</p> <p>Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer or a serviceman in the Singapore Armed Forces or any visiting forces lawfully present in Singapore has deserted, harbours such officer or serviceman shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.</p>	<p>This provision does not extend to the case in which the harbour is given by a wife to her husband.</p>	Desertion	<p>“Harbour”</p> <p>140A. In this Chapter, “harbour” includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension.</p>	<p>Abetment of the desertion of an officer or a serviceman</p> <p>135. Whoever abets the desertion of any officer or any serviceman in the Singapore Armed Forces or any visiting forces lawfully present in Singapore, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.</p>

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
212	<p>Harbouring an offender</p> <p>212. Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment, shall, if the offence is punishable with death, be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine; and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to 20 years, shall be punished with</p>	<p>This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.</p>	<p>“Offence”</p> <p>40.—(1) Except in the Chapters and sections mentioned in subsections (2) and (3), “offence” denotes a thing made punishable by this Code.</p> <p>(2) In Chapters IV, V and VA, and in sections 4, 187, 194, 195, 203, 204B, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, “offence” denotes a thing punishable under this Code or under any other law for the time being in force.</p> <p>(3) In sections 141, 176, 177, 201, 202, 212, 216</p>	<p>“Harbour”</p> <p>216B. In sections 212, 216 and 216A, “harbour” includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension.</p>	

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of "harbour"	Similar provision where no immunity exists
	<p>imprisonment for a term which may extend to 7 years, and shall also be liable to fine; and</p> <p>if the offence is punishable with imprisonment which may extend to one year and not to 20 years, shall be punished with imprisonment for a term which may extend to one- fourth part of the longest term of imprisonment provided for that offence, or with fine, or with both.</p> <p>In this section "offence" includes any act committed at any place out of Singapore which if committed in Singapore would be punishable under any of the following</p>		<p>and 441, "offence" has the same meaning when the thing punishable under any other law for the time being in force is punishable under such law with imprisonment for a term of 6 months or upwards, whether with or without fine.</p>		

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
	<p>sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460, and every such act shall for the purposes of this section be deemed to be punishable as if the accused person had been guilty of it in Singapore.</p> <p><i>Illustration</i></p> <p><i>A, knowing that B has committed gang-robbery, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to imprisonment for a term of not less than 5 years and not more than 20 years, A is liable to imprisonment for a term not exceeding 7 years, and is also liable to fine.</i></p>				
216	Harbouring an offender who has escaped from custody, or whose	This provision does not extend to the case in which	“Offence” 40.—(1) Except in the Chapters and sections	“Harbour” 216B. In sections 212, 216 and 216A,	

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
	<p>apprehension has been ordered</p> <p>216. Whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with</p>	<p>the harbour or concealment is by the husband or wife of the person to be apprehended.</p>	<p>mentioned in subsections (2) and (3), “offence” denotes a thing made punishable by this Code.</p> <p>(2) In Chapters IV, V and VA, and in sections 4, 187, 194, 195, 203, 204B, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, “offence” denotes a thing punishable under this Code or under any other law for the time being in force.</p> <p>(3) In sections 141, 176, 177, 201, 202, 212, 216 and 441, “offence” has the same meaning when the thing punishable under any other law for the time being in force is punishable under such law with imprisonment for a term of 6 months or</p>	<p>“harbour” includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension.</p>	

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
	<p>imprisonment for a term which may extend to 10 years, and shall also be liable to fine; if the offence is punishable with imprisonment for life, or imprisonment which may extend to 20 years, he shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine; and if the offence is punishable with imprisonment which may extend to one year and not to 20 years, he shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.</p> <p>In this section, “offence” includes also any act or omission of which a person</p>		<p>upwards, whether with or without fine.</p>		

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
	<p>is alleged to have been guilty out of Singapore which if he had been guilty of it in Singapore would have been punishable as an offence and for which he is under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in Singapore, and every such act or omission shall for the purpose of this section be deemed to be punishable as if the accused person had been guilty of it in Singapore.</p>				
216A	<p>Harbouring robbers or gang-robbers, etc.</p> <p>216A. Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or gang-robbery, harbours them or any of them with the intention of facilitating the</p>	<p>This provision does not extend to the case in which the harbouring is by the husband or wife of the offender.</p>	<p>“Offence”</p> <p>40.—(1) Except in the Chapters and sections mentioned in subsections (2) and (3), “offence” denotes a thing made punishable by this Code.</p> <p>(2) In Chapters IV, V and VA, and in sections 4, 187,</p>	<p>“Harbour”</p> <p>216B. In sections 212, 216 and 216A, “harbour” includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a</p>	

Section	Text of provision	Exception	Type of offence a husband/wife can harbour his or her spouse from	Definition of “harbour”	Similar provision where no immunity exists
	<p>commission of such robbery or gang-robbery or of screening them or any of them from punishment, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p><i>Explanation — For the purpose of this section it is immaterial whether the robbery or gang-robbery is intended to be committed or has been committed within or without Singapore.</i></p>		<p>194, 195, 203, 204B, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, “offence” denotes a thing punishable under this Code or under any other law for the time being in force.</p> <p>(3) In sections 141, 176, 177, 201, 202, 212, 216 and 441, “offence” has the same meaning when the thing punishable under any other law for the time being in force is punishable under such law with imprisonment for a term of 6 months or upwards, whether with or without fine.</p>	<p>person in any way to evade apprehension.</p>	

CHAPTER 6: HARMONISING PROVISIONS

SECTION 30: HARMONISING PROVISIONS WITHIN THE PENAL CODE

SUMMARY OF RECOMMENDATIONS

- (137) Repeal s 209 (fraudulently or dishonestly making a false claim before a court of justice)
- (138) Repeal s 369 (kidnapping or abducting child under 10 years with intent to steal movable property from the person of such child)
- (139) Repeal s 508 (act caused by inducing a person to believe that he will be rendered an object of divine displeasure)
- (140) Rationalise provisions relating to dangerous substance (ss 284 – 286) by:
- a. Removing the distinctions between poisonous substance, combustible materials, explosives under ss 284 – 286, and to collapse these provisions into one single provision concerning “dangerous or harmful substance”
 - i. Penalties for the new omnibus section for negligent conduct with respect to dangerous or harmful substance should be based on harm caused
 1. Where no harm is caused, punishment will remain the same at an imprisonment term of up to 1 year or a fine of \$5,000 or both
 2. Where the act endangers human life or causes property damage, maximum punishment will be up to 18 months’ imprisonment or fine or both
 - b. Providing for enhanced punishments for rash/negligent acts causing death, hurt or grievous hurt under ss 304A, 337, and 338 respectively, when dangerous or harmful substance are involved; and
 - c. Creating a new offence of causing or substantially contributing to the risk of causing a fire
- (141) Simplify provisions relating to wrongful confinement (ss 342 – 344) by removing the arbitrary number of three and ten days under ss 343 and 344, and collapsing the provisions dealing with wrongful confinement into a single provision. The punishment provision will be pegged to s 344
- (142) Simplify provisions relating to house trespass (ss 442 – 460) by removing the distinctions between house-trespass and lurking house-trespass and house-breaking by repealing ss 443 – 446; 449 – 458, and re-labelling “house-trespass” as “house-breaking” in ss 442; 448; 459 – 460. The punishment provisions for the various forms of house-breaking will be recalibrated
- (143) Simplify provisions relating to mischief (ss 426 – 434) by removing the arbitrary and outdated quantum of \$500 which distinguishes ss 426 and 427, and replace the scenarios covered by ss 430 to 434 with an offence covering “disruption to essential services or to the carrying out of governmental functions and duties”. The punishment will be pegged to the ten-year imprisonment term which is set out in s 430A
- (144) Simplify provisions relating to coin and currency (ss 230 – 254A)

Introduction

Under TORs 2(b)(i) and 2(b)(iv), the PCRC is to rationalise, recalibrate and modernise the substantive offences in the Penal Code, including proposals with respect to removing outmoded offences, and with respect to simplifying minute and overly-granular distinctions

between offences. In this section, the PCRC recommends the harmonisation of offences in the Penal Code, through the removal of three outmoded provisions, and the simplification of five clusters of offences.

2 With regard to the removal of outmoded provisions, the PCRC recommends repealing the selected provisions as they deal with a very narrow set of offences that are unlikely to occur in the modern context. Moreover, their modern variants are already criminalised under other sections of the Penal Code.

3 As regards the simplification of offences, the PCRC sought to remove distinctions between offences that appear arbitrary or are no longer relevant. Where there were meaningful differences between the offences, and penalties were accordingly differentiated, we kept the offences separate. The PCRC has also not combined separate offences into a single offence with sub-sections, if there would be no substantive changes to the law. Where the PCRC has recommended collapsing the distinctions between offences on the same ladder, the Committee has retained the highest level of punishment prescribed for that class of provisions. This ensures that the maximum penalty for existing offences is not diminished, while allowing the court flexibility to mete out lower sentences for less serious offences.

Recommendation 137: Repeal s 209 (fraudulently or dishonestly making a false claim before a court of justice)

Current law

4 Section 209 of the Penal Code is as follows:

Fraudulently or dishonestly making a false claim before a court of justice

209. Whoever fraudulently, or dishonestly, or with intent to injure or annoy any person, makes before a court of justice any claim which he knows to be false, shall be punished with imprisonment for a term which may extend to 2 years, and shall also be liable to fine.

Impetus for review

5 Section 209 was introduced by the Indian Law Commissioners with the intent of deterring the filing of false claims by the native population, whom they perceived to be lacking in morality. As then-Judge of Appeal V. K. Rajah noted in the judgment in *Bachoo Mohan Singh v PP*¹ (“*BMS*”), “there were very peculiar reasons for the English colonialists to have created this particular offence. A fundamental reason was the perceived lack of morality in the local population resulting in claims or defences with entirely no factual foundations being maintained in court. One might rightly ask how relevant some of these considerations should be in interpreting section 209 of the Penal Code in Singapore today.”²

6 The offence of making, in bad faith, a false claim before a court of justice can be prosecuted under other provisions in the Penal Code, such as s 204A.

¹ *Bachoo Mohan Singh v PP* [2010] 4 SLR 137 (“*BMS*”)

² *BMS* at [81]

Obstructing, preventing, perverting or defeating course of justice

204A. *Whoever intentionally obstructs, prevents, perverts or defeats the course of justice shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.*

Recommendation

7 The PCRC recommends repealing s 209. We agree that the historical reasons which gave rise to the enactment of s 209 do not apply in Singapore today. Furthermore, since the Court of Appeal in *BMS* defined the scope of s 209 narrowly,³ the offence is of little utility and will likely not be prosecuted in the future. Where claims are made before a court of justice in bad faith, other offences such as s 204A can be used.

Recommendation 138: Repeal s 369 (kidnapping or abducting child under 10 years with intent to steal movable property from the person of such child)

Current law

8 Section 369 of the Penal Code is as follows:

Kidnapping or abducting child under 10 years with intent to steal movable property from the person of such child

369. *Whoever kidnaps or abducts any child under the age of 10 years, with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning*

Impetus for review

9 Section 369 may have been more relevant in an age where persons kidnapped children primarily for taking from these children the valuable jewellery they were wearing. However, the provision is so narrowly scoped as to be of limited use in today's context.

10 In addition, an offence under s 369 would be covered under s 361 (Kidnapping from lawful guardianship; punishable under s 363), which carries the same punishment (maximum imprisonment of 10 years, and liability to fine or caning):

Kidnapping from lawful guardianship

361. *Whoever takes or entices any minor under 14 years of age if a male, or under 16 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

Explanation —The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

³ See *BMS* at para 137

Exception—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Punishment for kidnapping

363. Whoever kidnaps any person from Singapore or from lawful guardianship, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine or to caning.

Recommendation

11 The PCRC recommends repealing s 369. It is no longer relevant in today’s context, and modern forms of kidnapping are already criminalised under ss 361 and 363 of the Penal Code.

Recommendation 139: Repeal s 508 (act caused by inducing a person to believe that he will be rendered an object of divine displeasure)

Current law

12 Section 508 of the Penal Code is as follows:

Act caused by inducing a person to believe that he will be rendered an object of divine displeasure

508. Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he, or any person in whom he is interested, will become or will be rendered by some act of the offender an object of divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Impetus for review

13 The historical purpose of this provision was to prevent the practices of *dhurna* (sitting and fasting until one’s demand is granted) and *traga* (infliction of self-harm to compel another person to fulfil a demand), which were prevalent in India in the 1800s.

14 These practices are not carried out in Singapore today, and charges have not been preferred under this section. Persons who induce individuals to hand over valuable property by capitalising on religious or superstitious beliefs may be prosecuted under s 420 of the Penal Code (Cheating and dishonestly inducing a delivery of property). For cases where no valuable property is involved, the Prosecution may prefer charges under s 506 of the Penal Code (Punishment for criminal intimidation) or ss 3 and 4 of the POHA (Harassment, alarm or

distress) instead. Finally, the new Fraud offence⁴ will provide additional recourse for cases of fraud which prey on religious beliefs.

Recommendation

15 The PCRC recommends repealing s 508. It is no longer relevant in today's context, and modern forms of deception which capitalise on religious or superstitious beliefs are already criminalised under ss 420 and 506 of the Penal Code.

Recommendation 140: Rationalise provisions relating to dangerous substance (ss 284 – 286)

Current law

16 Sections 284 – 286, 304A, 337 and 338 of the Penal Code are as follows:

Negligent conduct with respect to any poisonous substance

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.

Negligent conduct with respect to any fire or combustible matter

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.

Negligent conduct with respect to any explosive substance

286. Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from such substance, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.

Causing death by rash or negligent act

304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished —

- (a) in the case of a rash act, with imprisonment for a term which may extend to 5 years, or with fine, or with both; or*

⁴ See section 7 of this report

(b) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine, or with both

Causing hurt by an act which endangers life or the personal safety of others

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished —

(a) in the case of a rash act, with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both; or

(b) in the case of a negligent act, with imprisonment for a term which may extend to 6 months, or with fine which may extend to \$2,500, or with both.

Explanation – In cases involving rash or negligent acts done with any dangerous or harmful substance, the person must have knowledge of the nature of the substance.

Causing grievous hurt by an act which endangers life or the personal safety of others

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished —

(a) in the case of a rash act, with imprisonment for a term which may extend to 4 years, or with fine which may extend to \$10,000, or with both; or

(b) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine which may extend to \$5,000, or with both.

Explanation – In cases involving rash or negligent acts done with any dangerous or harmful substance, the person must have knowledge of the nature of the substance.

Impetus for review

(a) Not all forms of negligent conduct with regard to dangerous substance are covered under current law

17 Sections 284 to 286 cover rash or negligent conduct with respect to different types of dangerous or harmful substances that have the possibility of endangering human life or that are likely to cause hurt or injury to any other person. The provisions also cover the knowing or negligent omission to take precautions in handling any dangerous or harmful substance to guard against probable danger to human life. The fact that a person has custody of a dangerous or harmful substance is in itself sufficient for the duty to take precaution to be imposed on him. Accordingly, he should be criminally responsible if he fails to take sufficient measures to guard against any probable danger to human life from such substance. These sections reflect the principle that negligence in handling such substance in and of itself is to be regarded as criminal, notwithstanding that it may not have occasioned hurt.

18 While ss 284 and 286 share a common principle, they are currently specific *only* to poisonous substances, fire or combustible matter, and explosives. This limited scope is insufficient to account for other types of substance which are equally or more dangerous, such as materials which are radioactive, corrosive, oxidising, asphyxiating, bio-hazardous or pathogenic.

19 In addition, while rash or negligent conduct with respect to dangerous substances is punishable under ss 284 – 286, the causing of death, hurt, or grievous hurt by a rash or negligent act is punishable under ss 304A, 337, and 338 respectively. However, although ss 304A, 337 and 338 all criminalise negligent or rash conduct, they do not consider whether any dangerous substance was involved.

(b) Negligent acts causing fire

20 A separate difficulty identified with the scope of ss 285, 304A, 337 and 338 pertains to the difficulty of establishing causation of fires resulting from negligent or rash disposal of materials containing embers, such as cigarette butts.

21 Fires caused by littering of materials containing embers are regular occurrences - from 2015 to 2017, there were around 350 roadside vegetation fires recorded each year. Many of these fires were caused by motorists who threw their cigarette butts indiscriminately along the roadside. These fires have resulted in damage to roadside vegetation, and required emergency responses. While roadside vegetation fires have been relatively minor thus far, causing no injury to persons or more serious damage to property, there is a real risk of such fires developing into a major fire if significant combustible material is present. A major roadside fire would pose a significant danger to motorists and cause traffic disruption.

22 Cigarette butts are not the only potential causes of major fires. Major fires can also result from negligent or rash disposal of other materials containing embers, such as cigars, match sticks, charcoal, or incense. As such, it is important to deter members of the public from littering materials containing embers, by taking firm action against persons who cause or substantially contribute to a major fire by negligent conduct with respect to materials containing embers.

23 Under current law, depending on the severity of consequences of littering of materials containing embers, prosecution can be pursued under several different offences. Where the littering of materials containing embers does not lead to fire, the National Environment Agency (“NEA”) will take action under s 17 of the Environmental Public Health Act. A person convicted of littering may be subjected to a corrective work order and a fine of up to \$2,000 upon first conviction, up to \$4,000 upon second conviction, and up to \$10,000 and/or imprisonment up to three months upon the third or subsequent convictions. NEA typically issues a \$300 composition fine to first-time offenders. NEA took action against more than 700 motorists from 2015 to 2017 for littering the roads with cigarette butts.

24 For rash or negligent disposal of materials containing embers which causes a fire, prosecution under the Penal Code would be more appropriate. If no harm is caused, prosecution under s 285 would be appropriate; if hurt, grievous hurt or death is caused, prosecution under ss 337, 338 and 304A respectively can be pursued.

25 However, there are significant evidentiary difficulties in prosecuting persons who cause or contribute to the risk of fires under ss 285, 304A, 337 and 338. Since embers from a lighted material can take between 20 minutes to over an hour to fully develop into a fire, a successful prosecution under ss 285, 304A, 337 or 338 will require proof of an unbroken causal chain between the initial act of negligent or rash disposal of a material containing embers, and the final fire which develops an hour later.

26 This is challenging. For example, while witnesses may be able to testify that a motorist had thrown a cigarette butt, these witnesses would not be able to testify whether the cigarette was lighted when it was thrown. In addition, unless these witnesses remained stationary at the same location to witness the development of the fire, they would not be able to testify that the cigarette butt actually led to the subsequent fire. Closed circuit cameras may not always be present at the location of the fire. Similar evidential difficulties present themselves for other combustible materials.

27 Given the difficulty of establishing causation of fires resulting from negligent or rash disposal of materials containing embers, there is scope to improve the deterrent effect of current Penal Code provisions against the littering of materials capable of causing fire.

Recommendations

Recommendation 140(a): Removing the distinctions between poisonous substance, combustible materials, explosives under ss 284 – 286, and to collapse these provisions into one single provision concerning “dangerous or harmful substance”

28 The PCRC recommends removing the distinctions between poisonous substances, combustible materials, and explosives, and collapsing these provisions into a single provision that deals with a broader range of dangerous or harmful substances. Specifically, the PCRC recommends replacing ss 284 – 286 with a new section (termed here as s 284A) which covers dangerous or harmful substances, to be retained in Chapter XIV.

29 The PCRC notes that rash or negligent conduct resulting in hurt, grievous hurt or death is covered under ss 337, 388 and 304A. Hence, the PCRC does not recommend that the new s 284A provide for penalties where hurt, grievous hurt, or death is caused. Instead, the PCRC recommends that the punishments for the new amalgamated s 284A be enhanced to imprisonment of up to 18 months or fine or both where property damage is caused, or where human life is endangered. In any other case, the punishment can be retained at the current level of imprisonment of up to a year, or fine up to \$5000, or both.

Draft new provision

30 A draft of the recommended new s 284A is appended.

[To replace current ss 284 – 286]

Negligent conduct with respect to dangerous or harmful substance

284A. (a) Whoever does, with any dangerous or harmful substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any dangerous or harmful substance, in his possession as is sufficient to guard against any probable danger to human life from such dangerous or harmful substance, shall be punished:

- (i) Where the act endangered human life, with imprisonment for a term which may extend to 18 months, or with fine, or with both,*
- (ii) Where the act caused damage to or diminished the value or utility of any property belonging to any person other than the offender, with imprisonment for a term which may extend to 18 months, or with fine, or with both,*

(iii) *In any other case, with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.*

(b) In this section, the words “dangerous or harmful substance” shall include fire or any thing that is likely to cause fire.

31 Under the recommended new s 284A, negligent handling of any dangerous or harmful substance which does not qualify as explosive, flammable or poisonous substance can be adequately dealt with. In particular, the new s 284A will allow the law to deal with negligent handling of any dangerous or harmful substance which may subsequently be discovered or developed in the future, which are not covered in any other legislation. Where there are additional regulations required for the handling of specific types of dangerous or harmful substances, these could be covered separately by more specific legislation.

32 For avoidance of doubt, the PCRC recommends clarifying in the new s 284A that the words “dangerous or harmful substance” include fire or anything that is likely to cause fire. The PCRC does not recommend introducing any additional definitions for the terms “dangerous” and “harmful”, since the intention is to provide for a provision of general application.

33 The PCRC notes the overlap between the above provisions and section 336, as both classes of provisions deal with acts that endanger human life without envisaging any actual hurt caused. However, the above provisions include acts that are likely to cause hurt or injury, including any form of harm illegally caused to any person, in body, mind, reputation or property. This is broader than s 336, which only deals with one specific form of harm, viz. endangering human life or personal safety. Consequently, the PCRC does not recommend any changes in respect of s 336.

34 In addition, the PCRC also does not recommend any changes in respect of ss 287 – 289. Sections 287 – 289 cover negligence in relation to machinery, building works, and animals. As these do not naturally lend themselves to categorisation as “dangerous or harmful substance”, we do not recommend subsuming them under the new s 284. In addition, unlike the original ss 284 – 286, ss 287 – 289 are sufficiently broad as provisions of general application. Finally, where there are risks associated with specific items in the categories covered by ss 287 – 289, these are already addressed by regulations outside the Penal Code.⁵

Recommendation 140(b): Providing for enhanced punishments for rash/negligent acts causing death, hurt or grievous hurt under ss 304A, 337, and 338 respectively, when dangerous or harmful substance are involved

⁵ The WSHA regulates the use of such industrial machinery, and imposes penalties which are higher than penalties in s 287. More specific regulation of building maintenance is provided in the BMSMA. Section 6 of the BMSMA empowers the Commissioner of Buildings to require repairs, work or alteration to a building, while s 9 of BMSMA makes it an offence to permit an unsafe exterior feature on a building. The penalties in the BMSMA are slightly higher than those in s 288 of the Penal Code. Under ss 8 – 10 of the MOA, owners of dogs are liable to fine if their dogs are found to be in the habit of running at persons or vehicles, without muzzles, cause injury to persons. Additional regulations are also imposed on dog owners under rules 8, 8A, and 16 of the Animals and Birds (Dog Licensing and Control) Rules (Cap 7, R 1, 2007 Rev Ed).

35 For the purposes of parity and ordinal proportionality, the PCRC also recommends enhancing the penalties under ss 304A, 337 and 338 (which deal with the offences of causing death and hurt by rash or negligent acts) if such death or hurt is caused by a dangerous or harmful substance. This is because the culpability of the offender should be higher given that the offender has knowledge of the dangerous or harmful nature of such substance. For avoidance of doubt, the PCRC recommends that there should be a need for the offender to know of the dangerous or harmful nature of the substance, to justify the increased penalty. This could be made clear by an *Explanation* included in ss 304A, 337 and 338.

Draft new provisions

36 A draft of the recommended amendments (in red) to ss 304A, 337, and 338 is appended.

Causing death by rash or negligent act

304A. *Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished —*

- (c) in the case of a rash act, with imprisonment for a term which may extend to 5 years, or with fine, or with both; or*
- (d) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine, or with both; or*
- (e) in the case of a rash act done with any dangerous or harmful substance, with imprisonment for a term which may extend to 7 years, or with fine, or with both; or*
- (f) in the case of a negligent act done with any dangerous or harmful substance, with imprisonment for a term which may extend to 3 years, or with fine, or with both.⁶*

Explanation – In cases involving rash or negligent acts done with any dangerous or harmful substance, the person must have knowledge of the nature of the substance.

Causing hurt by an act which endangers life or the personal safety of others

337. *Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished —*

- (a) in the case of a rash act, with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both; or*
- (b) in the case of a negligent act, with imprisonment for a term which may extend to 6 months, or with fine which may extend to \$2,500, or with both; or*
- (c) in the case of a rash act done with any dangerous or harmful substance, with imprisonment for a term which may extend to 3 years or with fine, or both; or*
- (d) in the case of a negligent act done with any dangerous or harmful substance, with imprisonment for a term which may extend to 18 months or with fine, or both.⁷*

⁶ An act done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death under s 304(b), is punished with imprisonment for a term which may extend to 10 years. Given that a rash act causing death is punishable with imprisonment for a term which may extend to 5 years, we recommend using 7 years as a mid-point between a normal rash act causing death and culpable homicide not amounting to murder. The penalties for a negligent act under s 304A itself is currently 40% of that for a rash act. Applying approximately the same proportionate increase (to avoid the use of a fraction of a year), the Committee recommends that the maximum punishment for a negligent act causing death through dangerous or harmful substance be pegged at 3 years.

⁷ The penalty for rash act causing hurt is 50% of the maximum sentence of VCH (see ss 323 and 337(a)). Taking a similar approach for a rash act causing hurt with dangerous or harmful substance, the PCRC recommends that the penalty be pegged at 3 years (approximately 50% of 7 years for s 324 (voluntarily causing hurt by dangerous

Explanation – In cases involving rash or negligent acts done with any dangerous or harmful substance, the person must have knowledge of the nature of the substance.

Causing grievous hurt by an act which endangers life or the personal safety of others

338. *Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished —*

- (a) in the case of a rash act, with imprisonment for a term which may extend to 4 years, or with fine which may extend to \$10,000, or with both; or*
- (b) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine which may extend to \$5,000, or with both; or*
- (c) in the case of a rash act done with any dangerous or harmful substance, with imprisonment for a term which may extend to 6 years, or with fine, or both; or*
- (d) in the case of a negligent act done with any dangerous or harmful substance, with imprisonment for a term which may extend to 3 years, or with fine, or both.⁸*

Explanation – In cases involving rash or negligent acts done with any dangerous or harmful substance, the person must have knowledge of the nature of the substance.

Recommendation 140(c): Creating a new offence of causing or substantially contributing to the risk of causing a fire

37 To address the evidentiary difficulties involved in proving a direct causal relationship between a major fire and a preceding rash or negligent act with respect to fire or things likely to cause fire, the PCRC recommends the creation of a new offence of causing or contributing to the risk of dangerous fires. The key features of this new offence are:

- (a) Two admissible *actus reus*: causing the fire, or substantially contributing to the risk of causing a fire.
- (b) The following presumption: When a person throws a cigarette butt, cigar, match stick, charcoal, incense, or any form of embers in a certain place, and a fire occurs at that place within 60 minutes from the time of that act, that person shall be presumed to have substantially contributed to the risk of causing that fire until the contrary is proved.
- (c) Tiered penalties based on the harm caused by the fire.

38 Since element (a) of the proposed offence includes the possibility that the negligent or rash act *did not*, in fact, cause the fire, the proposed penalties for the new offence will be lower than those for ss 337 and 338, where causation can be proven beyond reasonable doubt.

weapons or means)). In respect of the quantum of the prescribed fine, the current provision for voluntarily causing hurt by dangerous weapons or means (s 324) states “or with fine” (unspecified). We recommend retaining this formulation. Likewise, for a negligent act causing hurt, we applied the same calculation based on the difference in punishments prescribed in subsections (a) and (b) in s 337 itself.

⁸ The penalty for a rash act causing grievous hurt is 40% of the maximum sentence of VCGH (see ss 325 and 338(a)). Taking a similar approach for a rash act causing grievous hurt with dangerous or harmful substance, the PCRC recommends that the penalty be pegged at 6 years (approximately 40% of 15 years for s 326 (VCGH by dangerous weapons or means)). In respect of the quantum of fine, the current provision for s 326 (VCGH by dangerous weapons or means) states “or with fine” (unspecified). We recommend retaining this formulation. Likewise, for a negligent act causing hurt, we applied the same calculation based on difference in punishments prescribed in subsections (a) and (b) in s 338 itself.

39 The PCRC is of the view that the presumption at paragraph 37(b) is necessary to overcome the evidentiary challenges set out in paragraphs 25 - 26. The presumption has been scoped tightly, such that there is a strong logical nexus between the act (throwing a cigarette butt, cigar, match stick, charcoal, incense or embers at a certain place) and the fact presumed (that the person substantially contributed to the risk of causing the fire at that same place).

40 A draft of the proposed new offence is appended for reference.

Causing or contributing to the risk of a dangerous fire (new proposed offence)

284B.

(a) *Whoever, with any fire or any thing that is likely to cause fire, rashly or negligently causes or substantially contributes to the risk of causing a fire, shall be guilty of an offence if such fire occurs and any of the following apply:*

- (i) *That fire is likely to cause hurt or injury to any other person;*
- (ii) *That fire endangers human life;*
- (iii) *That fire causes damage to or diminishes the value or utility of any property belonging to any other person [including any property belonging to the Government];*
- (iv) *That fire causes hurt to any other person;*
- (v) *That fire causes grievous hurt to any other person.*

(b) *The offence under sub-section (a) shall be punished with:*

- (i) *In the case of an offence falling under (a)(i), imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both,*
- (ii) *In the case of an offence falling under (a)(ii) or (a)(iii), imprisonment for a term which may extend to 18 months, or with fine, or with both,*
- (iii) *In the case of an offence falling under (a)(iv), imprisonment for a term which may extend to 2 years, or with fine, or with both,*
- (iv) *In the case of an offence falling under (a)(v), imprisonment for a term which may extend to 4 years, or with fine, or with both.*

(c) *Where any person throws a cigarette butt, cigar, match stick, charcoal, incense, or any form of embers in a certain place, and a fire occurs at that place within 60 minutes from the time of that act, that person shall be presumed to have substantially contributed to the risk of causing that fire until the contrary is proved.*

Recommendation 141: Simplify provisions relating to wrongful confinement (ss 342 – 344) by removing the arbitrary number of three and ten days under ss 343 and 344, and collapsing the provisions dealing with wrongful confinement into a single provision. The punishment provision will be pegged to s 344

Current law

41 Sections 342 – 344 deal with wrongful confinement. Section 342 prescribes the punishment for wrongful confinement *simpliciter*, whereas ss 343 and 344 deal with wrongful confinement for certain durations.

Wrongful confinement

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said “wrongfully to confine” that person.

Illustrations

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall.

A wrongfully confines Z.

(b) A places men with firearms at the outlets of a building and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

...

Punishment for wrongful confinement

342. Whoever wrongfully confines any person shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$3,000, or with both.

Wrongful confinement for 3 or more days

343. Whoever wrongfully confines any person for 3 days or more, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

Wrongful confinement for 10 or more days

344. Whoever wrongfully confines any person for 10 days or more, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.

43 The law was drafted to reflect that wrongful confinement for a few hours as compared to a few days is different in terms of severity. Differentiating the levels of punishment according to duration provides the offender with a strong motive for abridging the detention of the prisoner. Furthermore, the longer the term of confinement, the more fear and anguish is likely to be caused to the person himself and his family. It will also result in the need for more resources to be deployed in the search.

Impetus for review

44 The Law Commission of India in its 42nd Report (1971) stated that the two gradations present in ss 343 and 344 are not necessary.⁹ Instead, the Commission proposed that one section for this aggravated form of wrongful confinement, *ie* wrongful confinement for five days or more, would be sufficient. The report did not indicate why five days was used as the threshold to determine when wrongful confinement was aggravated in nature.

Recommendation

45 The PCRC agrees with the Law Commission that the current gradations present in ss 343 and 344 are not necessary. However, the PCRC is of the view that there is no need to introduce another arbitrary number of five days, after combining the provisions, as the Law Commission suggested, to cater for aggravated forms of wrongful confinement as the

⁹ Law Commission of India, *Forty-second report, Indian Penal Code* (1971) at para 16.76

aggravating factor in respect of the length of time of confinement can be taken into account by the judge during sentencing.

46 The PCRC recommends removing the arbitrary number of three and ten days, and collapsing ss 342 to 344 into a single provision. The court will have the flexibility to calibrate the sentence according to the length of confinement. The longer the period of confinement, the heavier the punishment. The PCRC further recommends that the maximum prescribed punishment for the new section be 3 years' imprisonment with optional fine, drawn from the maximum punishment of s 344.

Draft new provision

47 A draft of the recommended new s 342 is appended.

[To replace current ss 342 – 344]

Punishment for wrongful confinement

342. Whoever wrongfully confines any person shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.

Recommendation 142: Simplify provisions relating to house trespass (ss 442 – 460) by removing the distinctions between house-trespass and lurking house-trespass and house-breaking by repealing ss 443 – 446; 449 – 458, and re-labelling “house-trespass” as “house-breaking” in sections 442; 448; 459 – 460. The punishment provisions for the various forms of house-breaking will be recalibrated

Current law

48 Sections 441 – 460 deal with various forms of house trespass. A summary of these provisions is appended.

Section	Provision	Punishment
441.	<i>Criminal Trespass</i>	<i>NA: These provisions define terms.</i>
442.	<i>House-Trespass</i>	
443.	<i>Lurking House-Trespass</i>	
444.	<i>Lurking House-Trespass by night</i>	
445.	<i>House-breaking</i>	
446.	<i>House-breaking by night</i>	
447.	<i>Punishment for criminal trespass</i>	<i>Imprisonment for a term which may extend to 3 months or with fine which may extend to \$1,500, or with both.</i>
448.	<i>Punishment for house trespass</i>	<i>Imprisonment for a term which may extend to one year or with fine which may extend to \$3,000, or with both.</i>
449.	<i>House trespass in order to commit an offence punishable with death</i>	<i>Imprisonment for life, or with imprisonment for a term not exceeding 10 years, and shall also be liable to fine.</i>

450.	<i>House trespass in order to commit an offence punishable with imprisonment for life</i>	<i>Imprisonment for life, or with imprisonment for a term not exceeding 10 years, and shall also be liable to fine.</i>
451.	<i>House trespass in order to commit an offence punishable with imprisonment</i>	<i>Imprisonment for a term which may extend to 2 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment may be extended to 7 years.</i>
452.	<i>House trespass after preparation made for causing hurt etc.</i>	<i>Imprisonment for a term which may extend to 7 years, and shall also be liable to fine</i>
453.	<i>Punishment for lurking house-trespass or house-breaking</i>	<i>Imprisonment for a term which may extend to 2 years, and shall also be liable to fine</i>
454.	<i>Lurking house-trespass or house-breaking in order to commit an offence punishable with imprisonment</i>	<i>Imprisonment for a term which may extend to 3 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment may be extended to 10 years.</i>
455.	<i>Lurking house-trespass or house-breaking after preparation made for causing hurt etc.</i>	<i>Imprisonment for a term not less than 2 years and not more than 10 years and with caning</i>
456.	<i>Punishment for lurking house-trespass by night or house-breaking by night</i>	<i>Imprisonment for a term which may extend to 3 years, and shall also be liable to fine</i>
457.	<i>Lurking house-trespass by night or house-breaking by night in order to commit an offence punishable with imprisonment</i>	<i>Imprisonment for a term which may extend to 5 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment shall not be less than 2 years and not more than 14 years.</i>
458.	<i>Lurking house-trespass by night or house-breaking by night after preparation made for causing hurt etc.</i>	<i>Imprisonment for a term not less than 2 years and not more than 14 years and with caning</i>
458A.	<i>Punishment for subsequent offence under section 454 or 457</i>	<i>Shall be punished with caning in addition to the punishment prescribed for that offence</i>
459.	<i>Grievous hurt caused while committing lurking house-trespass or house-breaking</i>	<i>Imprisonment for a term not less than 3 years and not more than 20 years and with caning</i>
460.	<i>Lurking house-trespass by night or house-breaking by night when death or grievous hurt is caused</i>	<i>Imprisonment for a term not less than 3 years and not more than 20 years</i>

49 The authors of the Indian Penal Code initially proposed not to make trespass an offence except when it was committed for the commission of an offence injurious to the person interested in the property or annoyance to such a person. Even then, the authors proposed that

a light punishment be sufficient unless the offence was committed with aggravating circumstances.¹⁰

50 The offence of criminal trespass is aggravated based on the following factors, with the punishments calibrated accordingly for ss 449 - 460:

- (a) The location at which the trespass took place. In defining house-trespass under s 442, the consideration was that the home and buildings in which persons kept goods deserved the most protection. Accordingly, trespass committed in these places is treated as an aggravated form of criminal trespass.¹¹
- (b) The manner in which the trespass was committed. House-trespass may be aggravated by being committed in a surreptitious or in a violent manner (*ie* entry or departure of a forcible nature).¹² The former aggravated form of house-trespass is designated as lurking house-trespass, and the latter designated as house-breaking.
- (c) The time during which the trespass was committed.¹³ Trespass, for obvious reasons, has always been considered a more serious offence when committed by night than when committed by day. This is because darkness offers some form of cover or concealment for the perpetrators. Furthermore, the level of watchfulness is generally lower at night given it is the period when majority of the people are asleep.
- (d) The purpose for which the trespass was committed.¹⁴ Criminal trespass may be committed for a frolic or in order to commit murder.

International comparisons

51 There are no distinct provisions for criminal trespass, house-trespass and lurking house-trespass in other jurisdictions, except in the Indian Penal Code. Malaysia has the offences of lurking house-trespass and house-breaking offences, but has done away with separate offences of such acts by night.¹⁵ Some jurisdictions, such as England and Wales and Ireland, make clear distinctions between trespass and burglary. Canada retains the distinction by the time of day.

Impetus for review

52 On simplifying these provisions, the Law Commission of India¹⁶ stated:

“We do not, however, see much need for distinguishing between lurking house-trespass during day and lurking house-trespass by night. Nor indeed does there seem any need

¹⁰ Lord Thomas Babington Macaulay, *Miscellaneous Works of Lord Macaulay* Vol IV (Harper & Brothers, 1880) at p 299

¹¹ *Ratanlal* at p 2811

¹² *Ratanlal* at p 2816

¹³ *Ratanlal* at p 2816

¹⁴ *Ratanlal* at p 2817

¹⁵ The maximum penalties for lurking house-trespass and house-breaking offences were increased accordingly, to that of the repealed offences where such acts were committed at night.

¹⁶ Law Commission of India, *Forty-second report, Indian Penal Code* (1971) at para 17.75. The recommendations on burglary from the report were not adopted.

for evolving these different ideas, when plainly all that we wish to do is to severely punish what is commonly understood as “burglary”. *We think this part of the Code could be considerably simplified by dropping the notions of lurking house-trespass and house-breaking and introducing, instead, the idea of burglary which should, in substance, mean house-trespass for committing theft or any serious offence.*”

Recommendation

53 The PCRC agrees with the comment made by the Law Commission of India in their 42nd Report. While the current distinctions serve their intended purposes of providing a calibrated punishment to reflect the different levels of culpability based on the circumstances under which the trespass was committed, the PCRC is of the view that the distinction for lurking house-trespass and house-breaking is unnecessary if the intention in fact is to punish those who commit burglary more severely.

54 The PCRC also considered adopting the provisions on burglary under the English and Irish legislation. In both pieces of legislation, in order to make out the offence of burglary, there must be an intention to commit a serious offence. A serious offence is defined as either theft, causing grievous bodily harm, committing unlawful damage or committing any offence which warrants a punishment of not less than 5 years.

55 However, the PCRC notes that the concept of burglary based on the seriousness of the offence being intended may not be intuitive to the layperson, who would typically associate burglary only with theft. Furthermore, there are already distinct offences in respect of house-trespass committed with the intention to commit different types of offences – the punishment for these different offences is calibrated in accordance with the severity of the offence for which house-trespass is committed. For instance, if house-trespass is committed for an offence punishable by imprisonment (*eg* criminal intimidation or hurt), enhanced penalties would already apply. A higher tier of punishment applies if house-trespass is committed for an offence punishable by life imprisonment. The PCRC hence takes the view that there is no need to create a new offence of burglary where the intended offence is punishable by an imprisonment term of a certain length.

56 For the aforementioned reasons, the PCRC recommends repealing the provisions relating to lurking house-trespass (ss 443,444, 453 – 458) and house-ss (sections 445, 446, 453 – 458) as the circumstances spelt out in these provisions are already covered in the corresponding provisions for house trespass in ss 449 – 452. The PCRC also recommends re-labelling the term “house-trespass” in the remaining provisions (*ie* ss 442, 448, 459, 460) to “house-breaking” as this signals the severity that is associated with the house-breaking offence. As such, there is no longer a need for the offender’s entry or exit from the house to be via the specified six ways for the “house trespass” offence to be considered “house-breaking”, because a trespass into a person’s house should be punished in the same manner no matter whether the six ways of entry or exit was used or not. More than 80% of the house trespass or house-breaking reports made in 2015 – 2016 were those of “house-breaking”. While there would be a removal of mandatory minimum sentences (including for caning), and some potential loss of sentencing precedents or legislative guidance on sentences, the PCRC is of the view that the Courts can consider the relevant factors in sentencing, including whether the offender has taken any precaution to conceal himself in order to commit the offences, or whether it was committed at night.

57 In general, to ensure no diminution of the maximum penalties which apply, the PCRC recommends increasing the punishments for house-trespass provisions (ss 448, 451, 452, 459, 460), to the maximum penalties for house-breaking provisions of a similar nature. In addition, the PCRC has sought to rationalise the penalties in accordance with the severity of the offences. The PCRC recommends removing the enhanced penalty specifically for house-trespass, if theft is intended (s 457). This is because the enhanced penalty is arbitrary and the punishment is not commensurate with the severity of the offence committed. If the perpetrator commits house-trespass with the intention to commit rape instead of theft, he is only subject to a maximum punishment of 2 years' imprisonment instead of 7 years, even though rape, if committed, warrants a longer imprisonment of up to 20 years as compared to 3 years for theft.

58 Given that ss 454 – 455 and 457 – 458 will be repealed, s 458A (which deals with repeat offending) will also have to be updated. The PCRC recommends including the requisite transitional provisions relating to s 458A.

59 For the avoidance of doubt, no changes are recommended to ss 441 and 447, which deal with criminal trespass.

60 A comparison of the current framework of house trespass offences with the recommended new framework is set out in brief below. A detailed explanation is provided in Annex A.

The end for which the act was committed	House-trespass (HT)	Lurking HT or House-breaking (HB)	Lurking HT or HB by night	Recommended Punishment after Distinction is removed
Simpliciter	448. Imprisonment for a term which may extend to one year or with fine which may extend to \$3,000, or with both.	453. Imprisonment for a term which may extend to 2 years, and shall also be liable to fine.	456. Imprisonment for a term which may extend to 3 years, and shall also be liable to fine.	448(a). Imprisonment for a term which may extend to 3 years, or with a fine, or with both.
In order to commit an offence punishable with death	449. Imprisonment for life, or with imprisonment for a term not exceeding 10 years, and shall also be liable to fine.			448(b). Imprisonment for life, or with imprisonment for a term not exceeding 15 years, and shall also be liable to fine.
In order to commit an offence punishable	450. Imprisonment for a term not exceeding 10			448(c). Imprisonment for a term not exceeding 15

The end for which the act was committed	House-trespass (HT)	Lurking HT or House-breaking (HB)	Lurking HT or HB by night	Recommended Punishment after Distinction is removed
with imprisonment for life	years, and shall also be liable to fine.			years, and shall also be liable to fine.
In order to commit an offence punishable with imprisonment	451. Imprisonment for a term which may extend to 2 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment may be extended to 7 years.	454. Imprisonment for a term which may extend to 3 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment may be extended to 10 years.	457. Imprisonment for a term which may extend to 5 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment shall not be less than 2 years and not more than 14 years.	448(d). Imprisonment for a term which may extend to 10 years, and shall also be liable to fine.
After preparation made for causing hurt	452. Imprisonment for a term which may extend to 7 years, and shall also be liable to fine.	455. Imprisonment for a term not less than 2 years and not more than 10 years and with caning.	458. Imprisonment for a term not less than 2 years and not more than 14 years and with caning.	448(e). Imprisonment for a term which may extend to 10 years and shall also be liable to caning.

Recommendation 143: Simplify provisions relating to mischief (ss 426 – 434) by removing the arbitrary and outdated quantum of \$500 which distinguishes ss 426 and 427, and replace the scenarios covered by ss 430 to 434 with an offence covering “disruption to essential services or to the carrying out of governmental functions and duties”. The punishment will be pegged to the ten-year imprisonment term which is set out in s 430A

Current law

61 Sections 426 – 434 of the Penal Code deal with mischief. A summary of these provisions is appended.

Section	Offence	Punishment
426.	<i>Punishment for committing mischief</i>	<i>Imprisonment for a term which may extend to one year, or with fine, or with both</i>
427.	<i>Committing mischief and thereby causing loss or damage to the amount of \$500</i>	<i>Imprisonment for a term which may extend to 2 years, or with fine, or with both</i>

Section	Offence	Punishment
430.	<i>Mischief by injury to works of irrigation or by wrongfully diverting water</i>	<i>Imprisonment for a term which may extend to 5 years, or with fine, or with both</i>
430A.	<i>Mischief affecting railway engine, train etc.</i>	<i>Imprisonment for life or imprisonment for a term which may extend to 10 years, and shall also be liable to fine</i>
431.	<i>Mischief by injury to public road, bridge or river</i>	<i>Imprisonment for a term which may extend to 5 years, or with fine, or with both</i>
431A.	<i>Mischief by injury to telegraph cable, wire etc.</i>	<i>Imprisonment for a term which may extend to 2 years, or with fine, or with both</i>
432.	<i>Mischief by causing inundation or obstruction to public drainage, attended with damage</i>	<i>Imprisonment for a term which may extend to 5 years, or with fine, or with both</i>
433.	<i>Mischief by destroying or moving or rendering less useful a lighthouse or sea-mark</i>	<i>Imprisonment for a term which may extend to 7 years, or with fine, or with both</i>
434.	<i>Mischief by destroying or moving, etc. a landmark fixed by public authority</i>	<i>Imprisonment for a term which may extend to 1 years, or with fine, or with both</i>

62 Sections 426 – 434 deal with the offence of mischief. In prescribing the punishment when the Penal Code was drafted, the following were taken into consideration:¹⁷

- (a) value of the property;
- (b) mode of mischief;
- (c) subject matter; and
- (d) probable consequences.

63 Section 426 prescribes the punishment for mischief *simpliciter*, and s 427 provides for enhanced sentences where the loss or damage caused is \$500 or more. The law was drafted to peg the punishment according to the cost of the damage.

64 Sections 430 to 434 deal with the offence of mischief to essential services such as water supply, transportation infrastructure, communications, and maritime navigation.

International comparisons

65 Other jurisdictions do not distinguish between different types of mischief in the same way as the Indian, Malaysian and the Singapore Penal Codes. The Criminal Code in Canada distinguishes between the different types of mischief by the classes of property (*ie* cultural, religious, war memorial, or in relation to computer data). However, there are some similarities such as explicitly providing for the offence of mischief by fire and also prescribing higher penalties if the damage is intended to endanger the life of another person.

Impetus for review

¹⁷ *Ratanlal* at p 2749

66 The quantum of \$500 which distinguishes between ss 426 and 427 is outdated and arbitrary. The distinctions between ss 428 – 434 are overly minute and granular.

Recommendation

Mischief simpliciter

67 The PCRC recommends removing the arbitrary and outdated quantum of \$500 which distinguishes ss 426 and 427. When the Penal Code was amended in 2007, s 429 (Mischief by killing or maiming cattle, etc., or any animal of the value of \$25) was consolidated into a new s 428 (Mischief by killing or maiming any animal). The PCRC recommends a similar amendment (*ie* the repeal of s 427 and an amendment of s 426 to prescribe for a higher punishment). The court will have the flexibility to calibrate the sentence according to various relevant factors such as the cost of the damage caused, the degree of deliberation, the number of offences committed, the degree of risk to life and safety of others and the offender’s prior record.¹⁸

Mischief causing serious harm in Singapore

68 The PCRC also recommends replacing the scenarios covered by ss 430 to 434 with an offence criminalising mischief that causes serious harm in Singapore. The PCRC recommends taking reference from the definition of “serious harm in Singapore” from the CMCA, where it includes “a disruption of the provision of any essential service”¹⁹ or “a disruption of the performance of any duty or function of, or the exercise of any by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board”^{20 21}.

69 The definition of “essential services” in the CMCA is “services directly related to communications infrastructure, banking and finance, public utilities, public transportation, land transport infrastructure, aviation, shipping, or public key infrastructure, or emergency services such as police, civil defence or health services”.²² The PCRC recommends inserting this definition into the Penal Code.

70 The new offence covering disruption to the carrying out of governmental duties and functions will capture the types of activities currently prohibited under s 434 (Mischief by destroying or moving, etc., a landmark fixed by public authority), as the “landmarks” mentioned in s 434 refers to stones used for demarcating land boundaries (*eg* for surveys). The prohibition against mischief that causes serious harm in Singapore will cover the more pertinent subject matters in the existing provisions (*eg* communications or public drainage), while other provisions (*eg* relating to irrigation) may not be necessary in today’s context.

¹⁸ *Sentencing Practice* at p 948

¹⁹ Section 11(4), CMCA

²⁰ Section 11(4), CMCA

²¹ We recommend that either a definition section or illustrations be included in the new provision to provide guidance on the understanding of “disruption to the carrying out of governmental duties and functions”. An example will be the damage of parking enforcement cameras installed by HDB and LTA.

²² Section 15A(12), CMCA

71 Given that damage or destruction to these services may lead to severe consequences, higher punishments should be prescribed for acts of mischief that disrupt essential services, or the carrying out of governmental duties and functions. The PCRC recommends that the punishment for mischief causing serious harm in Singapore be imprisonment for up to 10 years, or fine, or both, with the court having the flexibility to prescribe punishments based on the considerations stated in para 62.²³ The PCRC recommends removing the punishment for life imprisonment that is currently provided in s 430A, because the PCRC considers the magnitude of the consequence of the mischief in s 430A (Mischief affecting railway engine, train, etc) to be the same as the consequence of the mischief in s 437 (Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden), which carries an imprisonment term of 10 years.

Draft new provision

72 A draft of the recommended new mischief offence is set out below. A fuller explanation of the recommended revised framework for mischief is set out in Annex B.

[to replace ss 426 – 434]

Mischief

426. Whoever commits mischief shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both; and if the act causes, or is likely to cause, a disruption to the provision of any essential service or the performance of any duty or function of, or the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board, he shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

Recommendation 144: Simplify provisions relating to coin and currency (ss 230 – 254A)

Summary of proposals

73 A summary of the proposals is set out below.

- (a) Remove distinction between “coin” and “current coin”, and adopt the definition of “currency” from the Currency Act (Cap 69, 2002 Rev Ed);
- (b) Port over offences relating to “coins” (including “current coins”) in Chapter XII of the Penal Code to Chapter XVII of the Penal Code to consolidate offences relating to currency;
- (c) Combine offences relating to “coins” (including “current coins”) in Chapter XII with provisions relating to bank notes and currency notes in ss 489A-489D of the Penal Code;
- (d) Remove the distinctions pertaining to when the offender became aware that the coin was altered or counterfeit.

74 A summary of table of proposals is set out below.

²³ We recommend that the punishment for this offence be pegged to the highest for this class of provisions (s 430A) so that the maximum penalty for existing offences is not diminished, while allowing the court flexibility to mete out lower sentences for less serious offences.

Provision	Offence	Proposal
230	Definition of “coin” and “current coin”	<ul style="list-style-type: none"> – Removal of definitions of “coin” and “current coin” – Port over definition of “coin” to s 489A(3) – Remove distinction between coin and notes, and adopt definition of “currency” in Currency Act.
231-232	Counterfeiting coin and current coin	<ul style="list-style-type: none"> – Repeal – Expand offence in s 489A to include coins
233-234	Making or selling instrument for counterfeiting coin and current coin	<ul style="list-style-type: none"> – Repeal – Expand offence in s 489D to include coins
236	Abetment of counterfeiting of coin and current coin	<ul style="list-style-type: none"> – Port over offence to s 489E and include currency notes within offence
237-238	Import and export of counterfeit coin and current coin	<ul style="list-style-type: none"> – Repeal – Expand offence in s 489B to include coins
239-241A	Delivery of counterfeit coin and current coin, with deliver knowing or not knowing that it was counterfeit at the time he took possession of the coin	<ul style="list-style-type: none"> – Repeal – Remove distinction between when the deliver became aware that the coin was counterfeit – Expand offence in s 489B to include coins
242-243	Knowing possession of counterfeit coin	<ul style="list-style-type: none"> – Repeal – Remove distinction between coin and current coin – Expand offence in s 489C to include coins
246-247	Fraudulently or dishonestly diminishing weight or altering composition of coin and current coin	<ul style="list-style-type: none"> – Retain, since these offences are specific only to coins. – Remove distinction between coin and current coin – Port over offences to new s 489F.
248-249	Altering appearance of coin and current coin	<ul style="list-style-type: none"> – Retain and port over offences to new s 489G. – Remove distinction between coin and current coin – Expand offence to include currency notes.

Provision	Offence	Proposal
250-251, 254-254A	Delivery to another of altered coin and current coin	<ul style="list-style-type: none"> – Retain and port over offences to new s 489H – Remove distinction between coin and current coin – Expand offence to include currency notes
252-253	Possession of altered coin and current coin	<ul style="list-style-type: none"> – Retain and port over offences to new s 489I – Remove distinction between coin and current coin – Expand offence to include currency notes

Removal of distinction between “coin” and “current coin”, and adopt the definition used in the Currency Act

Current law

75 Section 230 of the Penal Code is as follows:

Definition of “coin” and “current coin”

“Coin” is metal used as money stamped and issued by the authority of the Government or by the authority of the government of any foreign country in order to be so used.

...

“Current coin” means coin which is legal tender in Singapore or in any foreign country.

Impetus for review

76 The definitions were adapted from the Indian Penal Code. At that time, it was not necessary for a coin to be legal tender receivable at a value fixed by law. There was a practice of using “gold mohurs”, which although did not pass at an absolutely fixed value, could be used as money. The PCRC is of the view that the distinction between “coin” and “current coin” is now obsolete.

Recommendation

77 The test of whether a particular piece of metal is money or not, is the possibility of taking it into the market and obtaining goods of any kind in exchange for it. The value must be ascertainable, open, and obvious. Currently, other pieces of metal, besides coins that are legal tender, would not typically meet this test.

78 The Currency Act, which is an Act to “establish the national currency of Singapore, and to provide for matters connected therewith”, defines “currency” to mean “currency notes and coins which are legal tender in Singapore”. There is no distinction drawn between “coins” and “current coins” in the Currency Act.

79 The PCRC proposes to remove the definitions of “coin” and “current coin”, to be consistent with the definition of “currency” under the Currency Act.

Port over currency offences to Chapter XVIII of the Penal Code, and combine offences relating to “coins” and “current coins” with provisions relating to bank notes and currency notes in ss 489A-489D of the Penal Code

Current law

80 Offences relating to “coins” and “current coins” are dealt with under ss 230-254A of the Penal Code, whilst offences relating to currency notes are dealt with under ss 489A-489D of the Penal Code. This distinction between offences relating to coins and currency notes was adapted from the Indian Penal Code, and punishments for offences relating to coins are generally lower than those relating to currency notes.

Impetus for review

81 It is likely that the distinction made between coins and currency notes was due to the difference in value. This would account for the higher penalties for offences involving currency notes, since the counterfeit value would likely be much higher. Coins would also be more difficult to counterfeit due to the need to obtain, mould, and stamp the metal in question.

82 There is no distinction made between coins and currency notes for Currency Act offences, and they are subject to the same penalties (*ie* a fine not exceeding \$2,000).

Recommendation

83 The PCRC is of the view that this distinction between coins and currency notes is no longer relevant. The culpability of the offender should chiefly be determined based on the *value* of the currency counterfeited, and not the *type* of currency counterfeited. As such, offences relating to currency notes and coins should be sited within the same chapter of the Penal Code – Chapter XVIII.

84 The PCRC further recommends that similar offences relating to coins and currency notes should be combined, with higher maximum penalties retained to ensure that judges continue to have the discretion to mete out appropriate sentences for egregious cases. As such, ss 231-245 would be combined with similar offences in ss 489A-489D. Offences that are specific to the nature of coins, such as diminishing the weight or altering the composition of a coin, will continue to be retained as specific offence provisions, since there are no similar offences for currency notes. These will be ported over to new sections in Chapter XVIII.

Remove distinctions pertaining to when the offender became aware that the coin was altered or counterfeit in ss 239-243, 250-254A

Current law

85 For offences involving fraudulent delivery and possession of counterfeit or altered coins, the Penal Code currently makes distinctions pertaining to *when* the offender became aware that the coin was altered or counterfeit. Lower punishments apply if the offender was not aware that the coin was altered or counterfeit when he took the coin into possession, even

though he had fraudulent intent at the time of committing the offence of possession or delivery. An example from ss 239, 241 of the Penal Code is as follows.

Delivery to another of coin, possessed with the knowledge that it is counterfeit

239. Whoever, having any counterfeit coin which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment for a term which may extend to 5 years, and shall so be liable to fine.

...

Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be counterfeit

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment for a term which may extend to 2 years, or with fine to an amount which may extend to 10 times the value of the coin counterfeited, or with both.

Impetus for review

86 The authors of the Code had included a distinction between when the offender first came to know that the coin was counterfeit to deal with “habitual utterers”, who were agents employed by counterfeit coiners to bring counterfeit coins into circulation.

Recommendation

87 The PCRC proposes to remove the distinction between when the offender became aware that the coin in question was counterfeit. At the time of committing the offences (*ie* delivering the counterfeit coin as if it was genuine), the offender *knew* that the coin was counterfeit. As such, the fraudulent intent of the offender is clear at the point where he commits the offence. Any motivations for doing so (*eg* he is a habitual circulator of counterfeit coins or he accidentally came into possession of these coins and wanted to take advantage of them), should be taken into account as factors in sentencing. Habitual offenders could also be dealt with by bringing multiple charges against them. Hence, there is no need to set out separate offences with lower punishments for persons who at the point of coming into possession of the counterfeit coins, did not know that they were counterfeit.

88 Furthermore, similar offences in ss 489A-489D of the Penal Code relating to counterfeit currency notes do not draw the same distinctions based on when the offender came to know that the currency notes were counterfeit.

89 A full detailed table of amendments to offences relating to coins and currency is enclosed in [Annex C](#).

Conclusion

90 In this chapter, the PCRC has endeavoured to rationalise current Penal Code offences, remove offences which are archaic, and simplify distinctions which are no longer relevant. This ensures that the Penal Code is kept up-to-date, with offences that are relevant and applicable today.

Annex A – Current and recommended punishment provisions for trespass-related offences

Offence name	Offence	Recommended action	Explanation for changes to penalties
Criminal trespass	441. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit “criminal trespass”.	Retain	
House trespass House-breaking	442. Whoever commits criminal trespass by entering into, or remaining in, any building, tent, or container or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property, is said to commit “ house trespass house-breaking”. <i>Explanation .—The introduction of any part of the criminal trespasser’s body is entering sufficient to constitute house trespass house-breaking.</i>	Retain, but relabelled to “house-breaking”	
Lurking house trespass	443. Whoever commits house trespass, having taken precautions to conceal such house trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of	Repeal	

Offence name	Offence	Recommended action	Explanation for changes to penalties
	the trespass, is said to commit “lurking house-trespass”.		
Lurking house trespass by night	444. Whoever commits lurking house trespass after 7 p.m. and before 7 a.m., is said to commit “lurking house trespass by night”.	Repeal	
House breaking	<p>445. A person is said to commit “house-breaking”, who commits house trespass if he effects his entrance into the house or any part of it in any of the 6 ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such 6 ways:</p> <p>(a) if he enters or quits through a passage made by himself, or by any abettor of the house trespass, in order to the committing of the house trespass;</p> <p>(b) if he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by sealing or climbing over any wall or building;</p> <p>(c) if he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass, by any</p>	Repeal	

Offence name	Offence	Recommended action	Explanation for changes to penalties
	<p>means by which that passage was not intended by the occupier of the house to be opened;</p> <p>(d) if he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass;</p> <p>(e) if he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault;</p> <p>(f) if he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.</p> <p><i>Explanation .— Any outhouse or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.</i></p> <p><i>Illustrations</i></p> <p><i>(a) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.</i></p>		

Offence name	Offence	Recommended action	Explanation for changes to penalties
	<p>(b)A commits house trespass by creeping into a ship at a porthole between decks, although found open. This is house breaking.</p> <p>(c)A commits house trespass by entering Z's house through a window, although found open. This is house breaking.</p> <p>(d)A commits house trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.</p> <p>(e)A commits house trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.</p> <p>(f)A finds the key of Z's house door, which Z had lost, and commits house trespass by entering Z's house, having opened the door with that key. This is house breaking.</p> <p>(g)Z is standing in his doorway. A forces a passage by knocking Z down, and commits house trespass by entering the house. This is house-breaking.</p> <p>(h)Z, the door-keeper of Y, is standing in Y's doorway. A commits house trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.</p>		

Offence name	Offence	Recommended action	Explanation for changes to penalties
House-breaking by night	446. Whoever commits house-breaking after 7 p.m. and before 7 a.m., is said to commit “house-breaking by night”.	Repeal	
Punishment for criminal trespass	447. Whoever commits criminal trespass shall be punished with imprisonment for a term which may extend to 3 months, or with fine which may extend to \$1,500, or with both.	Retain	
Punishment for house-trespass house-breaking	<p>448. Whoever commits:</p> <p>(a) house-trespass house-breaking shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$3,000, or with both.</p> <p>(b) house-trespass house-breaking in order to commit any offence punishable with death, shall be punished with imprisonment for life, or with imprisonment for a term not exceeding 10 15 years, and shall also be liable to fine.</p> <p>(c) house-trespass house-breaking in order to commit any offence punishable with imprisonment for life, shall be punished with imprisonment for a term not exceeding 10 15 years, and shall also be liable to fine.</p> <p>(d) house-trespass house-breaking in order to commit any offence punishable with imprisonment, shall be punished with imprisonment for a term which may extend to 2 10 years, and shall also be liable to fine; and</p>	Amend	<p>448(a): We recommend enhancing the punishment to that of the existing s 456, given that s 448(a) is intended to cover what was previously dealt with under s 456. This ensures that the maximum penalty for existing offences is not diminished, while allowing the court flexibility to mete out lower sentences for less serious offences. However, instead of a mandatory fine, we recommend keeping the fine as an option to give flexibility to the offence of house-trespass <i>simpliciter</i>.</p> <p>448(b): Currently, there are no punishment provisions for lurking house-trespass by night or house-breaking by night in order to commit an offence punishable with death. This is only present for house-trespass. However, for attempt to murder (punishable with death) under s 307, the penalty is imprisonment for a term which may extend to 15 years. The penalty is the same for attempted kidnapping in order to murder. The</p>

Offence name	Offence	Recommended action	Explanation for changes to penalties
	<p>if the offence intended to be committed is theft, the term of the imprisonment may be extended to 7 years.</p> <p>(e) house-trespass house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault, or of wrongful restraint, shall be punished with imprisonment for a term which may extend to 7 10 years, and shall also be liable to fine to caning.</p>		<p>same intent and thus culpability apply to s 448(b).</p> <p>448(c): Currently, there are no punishment provisions for lurking house-trespass by night or house-breaking by night in order to commit an offence punishable with imprisonment for life. However, s 511 states a maximum penalty of 15 years for attempts to commit offences punishable with life imprisonment. The same intent and thus culpability apply to s 448(c).</p> <p>448(d): We recommend setting the penalty to be lower than that of ss 449 and 450, given that it is less severe. However, it cannot be set too low as the maximum penalty currently prescribed under s 457 is 14 years.</p> <p>448(e): The terms of imprisonment currently prescribed under ss 452, 455 and 458 are the same as the corresponding ss 451, 454 and 457. As such, we recommend to peg the term of imprisonment for the new s 448(e) to be the same as the new s 448(d).</p>
<p>Punishment for lurking house-trespass or house-breaking</p>	<p>453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment for a term which may extend to 2 years, and shall also be liable to fine.</p>	<p>Repeal</p>	
<p>Lurking house-trespass or house-breaking in</p>	<p>454. Whoever commits lurking house-trespass or house-breaking in order to commit any</p>	<p>Repeal</p>	

Offence name	Offence	Recommended action	Explanation for changes to penalties
order to commit an offence punishable with imprisonment	offence punishable with imprisonment, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine; and if the offence intended to be committed is theft, shall be punished with imprisonment for a term which may extend to 10 years.		
Lurking house trespass or house breaking after preparation made for causing hurt, etc.	455. Whoever commits lurking house trespass or house breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment for a term of not less than 2 years and not more than 10 years and with fine.	Repeal	
Punishment for lurking house trespass by night or house breaking by night	456. Whoever commits lurking house trespass by night or house breaking by night, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.	Repeal	
Lurking house trespass by night or house breaking by night in order to commit an offence punishable with imprisonment	457. Whoever commits lurking house trespass by night or house breaking by night, in order to commit any offence punishable with imprisonment, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine; and if the offence intended to be committed is theft,	Repeal	

Offence name	Offence	Recommended action	Explanation for changes to penalties
	the term of the imprisonment shall be not less than 2 years and not more than 14 years.		
Lurking house trespass by night or house-breaking by night after preparation made for causing hurt, etc.	458. Whoever commits lurking house trespass by night or house-breaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment for a term of not less than 2 years and not more than 14 years and with caning.	Repeal	
Punishment for subsequent offence under section 454 or 457 448(d) or (e)	458A. Whoever, having been convicted of an offence under section 454, 455, 457 or 458 448(d) or 448(e), commits an offence under section 454 or 457 448(d) or 448(e) shall be punished with caning in addition to the punishment prescribed for that offence.	Amend	
Grievous hurt caused while committing lurking house trespass or house-breaking	459. Whoever, while committing lurking house trespass or house-breaking, causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, shall be punished with imprisonment for a term of not less than 3 years and not more than 20 years and with caning.	Amend	
Lurking house trespass by night or house-breaking by night House-breaking when	460. If, at the time of the committing of lurking house trespass by night or house-breaking by night , any person guilty of such offence voluntarily causes or attempts to cause death or grievous hurt to any person, every	Amend	

Offence name	Offence	Recommended action	Explanation for changes to penalties
death or grievous hurt is caused	person jointly concerned in committing such lurking house-trespass by night or house-breaking by night , shall be punished with imprisonment for a term of not less than 3 years and not more than 20 years.		

Annex B – Revised framework for mischief offences

Current	Recommended
<p>Punishment for committing mischief 426. Whoever commits mischief shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.</p>	<p>Whoever commits mischief shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both; and if the act causes, or which he knows likely to cause, a disruption to the provision of any essential service or the performance of any duty or function of, or the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.</p>
<p>Committing mischief and thereby causing loss or damage to the amount of \$500 427. Whoever commits mischief and thereby causes loss or damage to the amount of \$500 or upwards, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.</p>	
<p>Mischief by injury to works of irrigation or by wrongfully diverting water 430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural or industrial purposes, or for food or drink for human beings or for animals which are property, or for cleanliness, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p>	
<p>Mischief affecting railway engine, train, etc. 430A. Whoever commits mischief by doing any act with intent or with the knowledge that such act is likely to obstruct, upset, overthrow, injure or destroy any railway engine, train, tender, carriage or truck, shall be punished with imprisonment for life or imprisonment for a term which may extend to 10 years, and shall also be liable to fine.</p>	

Current	Recommended
<p>Mischief by injury to public road, bridge or river</p> <p>431. Whoever commits mischief by doing any act which renders, or which he knows to be likely to render, any public road, bridge, navigable river, or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p>	
<p>Mischief by injury to telegraph cable, wire, etc.</p> <p>431A. Whoever commits mischief by cutting or injuring any electric telegraph cable, wire, line, post, instrument or apparatus for signalling, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.</p> <p><i>Explanation .—The injuring here must be of such a nature as to prevent the use of the electric telegraph cable, wire or line, for telegraphing, otherwise the offence will be punishable under section 426.</i></p>	
<p>Mischief by causing inundation or obstruction to public drainage, attended with damage</p> <p>432. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p>	

Current	Recommended
<p>Mischief by destroying or moving or rendering less useful a lighthouse or sea-mark</p> <p>433. Whoever commits mischief by destroying or moving any lighthouse or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such lighthouse, sea-mark, buoy, or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.</p>	
<p>Mischief by destroying or moving, etc., a landmark fixed by public authority</p> <p>434. Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such landmark less useful as such, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both</p>	

Annex C - Detailed Proposals and Amendments to Legislation for Coins and Currency Offences

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
Proposal: Repeal definitions relating to “coin” and “current coin”,		
1	<p style="text-align: center;">CHAPTER XII</p> <p style="text-align: center;">OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS</p> <p>“Coin” and “current coin”</p> <p>230. “Coin” is metal used as money stamped and issued by the authority of the Government or by the authority of the government of any foreign country in order to be so used.</p> <p>“Current coin” means coin which is legal tender in Singapore or in any foreign country.</p>	<p style="text-align: center;">CHAPTER XII</p> <p style="text-align: center;">OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS</p> <p>“Coin” and “current coin”</p> <p>230. “Coin” is metal used as money stamped and issued by the authority of the Government or by the authority of the government of any foreign country in order to be so used.</p> <p>“Current coin” means coin which is legal tender in Singapore or in any foreign country.</p> <p style="text-align: center;">CHAPTER XVIII</p> <p style="text-align: center;">DOCUMENTS RELATING TO DOCUMENTS OR ELECTRONIC RECORDS, FALSE INSTRUMENTS, AND TO CURRENCY NOTES AND BANK NOTES</p> <p style="text-align: center;"><i>Currency note and bank notes</i></p> <p>489A. (2) For the purposes of this section and sections 489B, 489C and 489D, “currency note” includes any currency note or coin (by whatever name called) which is legal tender in the country in which it is issued.</p> <p>489A. (3) For the purposes of this Chapter, “coin” is metal used as money stamped and issued by the authority of the Government or by the authority of the government of any foreign country which is legal tender in the country in which it is issued.</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
Proposal: Port over currency offences to Chapter XVIII of the Penal Code, and combine offences relating to “coins” and “current coins” with provisions relating to bank notes and currency notes in SS 489A-489D of the Penal Code.		
2	<p>Counterfeiting coin 231. Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p><i>Explanation —A person commits this offence, who, intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.</i></p> <p>Counterfeiting current coin 232. Whoever counterfeits or knowingly performs any part of the process of counterfeiting current coin, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.</p>	<p>Counterfeiting coin 231. Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p><i>Explanation —A person commits this offence, who, intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.</i></p> <p>Counterfeiting current coin 232. Whoever counterfeits or knowingly performs any part of the process of counterfeiting current coin, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.</p> <p>Forging or counterfeiting currency or bank notes 489A.—(1) Whoever forges or counterfeits, or knowingly performs any part of the process of forging or counterfeiting on, any currency note or bank note shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine.</p>
3	<p>Making or selling instrument for counterfeiting coin 233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of</p>	<p>Making or selling instrument for counterfeiting coin 233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p>counterfeiting coin, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Making or selling instrument for counterfeiting current coin 234. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting current coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p>Possession of instrument or material for the purpose of using the same for counterfeiting coin 235. Whoever is in possession of any instrument or material for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine; and if the coin to be counterfeited is current coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p>	<p>counterfeiting coin, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Making or selling instrument for counterfeiting current coin 234. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting current coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p>Possession of instrument or material for the purpose of using the same for counterfeiting coin 235. Whoever is in possession of any instrument or material for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine; and if the coin to be counterfeited is current coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p>Making, selling or possessing instruments or materials for forging or counterfeiting currency notes or bank notes 489D. Whoever makes or mends or performs any part of the process of making or mending, or buys, or sells or disposes of, or has in his possession, any die, machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of forging or counterfeiting any currency note or bank note, shall be punished with</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
		<p>imprisonment for a term which may extend to 20 years, and shall also be liable to fine.</p> <p><i>Note: This would make the making, mending, buying, selling, disposing of, possessing of any die, machine, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used for the purpose of forging or counterfeiting any currency notes and bank notes an offence, when it is not currently so.</i></p>
4	<p>Abetting in Singapore the counterfeiting out of Singapore of coin or current coin 236. Whoever, being within Singapore, abets the counterfeiting of coin or current coin out of Singapore, shall be punished in the same manner as if he abetted the counterfeiting of such coin or current coin within Singapore.</p>	<p>Abetting in Singapore the counterfeiting out of Singapore of coin or current coin 236. Whoever, being within Singapore, abets the counterfeiting of coin or current coin out of Singapore, shall be punished in the same manner as if he abetted the counterfeiting of such coin or current coin within Singapore.</p> <p>[NEW] Abetting in Singapore the counterfeiting out of Singapore of currency 489E. Whoever, being within Singapore, abets the counterfeiting of currency out of Singapore, shall be punished in the same manner as if he abetted the counterfeiting of such currency within Singapore.</p> <p><i>Note: This would make the abetting in Singapore of currency notes out of Singapore an offence, when it is not currently so.</i></p>
5	<p>Import or export of counterfeit coin 237. Whoever imports into Singapore, or exports therefrom, any counterfeit coin, knowing or having reason to believe that the same</p>	<p>Import or export of counterfeit coin 237. Whoever imports into Singapore, or exports therefrom, any counterfeit coin, knowing or having reason to believe that the same</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p>is counterfeit, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Import or export of counterfeits of current coin 238. Whoever imports into Singapore, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of current coin, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.</p>	<p>is counterfeit, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Import or export of counterfeits of current coin 238. Whoever imports into Singapore, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of current coin, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.</p> <p>Using as genuine forged or counterfeit currency notes or bank notes 489B. Whoever delivers to, sells to, or buys or receives from, any other person, imports into Singapore, or exports therefrom, or otherwise traffics in or uses as genuine, any forged or counterfeit currency note or bank note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine.</p> <p><i>Note: This would make the importing into and exporting from Singapore of currency notes and bank notes an offence, when it is not currently so.</i></p>
6	<p>Fraudulently or dishonestly diminishing the weight or altering the composition of any coin 246. Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p>	<p>[NEW] Fraudulently or dishonestly diminishing the weight or altering the composition of any coin 246. 489F. Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin shall be punished with imprisonment for a term which may extend to 3 7 years, and shall also be liable to fine.</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p><i>Explanation</i> —A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.</p> <p>Fraudulently or dishonestly diminishing the weight or altering the composition of current coin</p> <p>247. Whoever fraudulently or dishonestly performs on any current coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p>	<p><i>Explanation</i> —A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.</p> <p>Fraudulently or dishonestly diminishing the weight or altering the composition of current coin</p> <p>247. Whoever fraudulently or dishonestly performs on any current coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p>
7	<p>Altering appearance of any coin with intent that it shall pass as a coin of a different description</p> <p>248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that that coin shall pass as a coin of a different description, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Altering appearance of current coin with intent that it shall pass as a coin of a different description</p> <p>249. Whoever performs on any current coin any operation which alters the appearance of that coin, with the intention that that coin shall pass as a coin of a different description, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p>	<p>[NEW]</p> <p>Altering appearance of any coin currency with intent that it shall pass as currency a coin of a different description</p> <p>248. 489G. Whoever performs on any coin currency any operation which alters the appearance of that coin currency, with the intention that that coin currency shall pass as a coin currency of a different description, shall be punished with imprisonment for a term which may extend to 3 7 years, and shall also be liable to fine.</p> <p><i>Note: This would make the alteration of any currency note with intent that it shall pass as a currency note of different description an offence, when it is not currently so.</i></p> <p>Altering appearance of current coin with intent that it shall pass as a coin of a different description</p> <p>249. Whoever performs on any current coin any operation which alters the appearance of that coin, with the intention that that coin shall pass as a coin of a different description, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
8	<p>Proposal: Remove distinction between when the offender became aware that the coin was altered or counterfeit in ss 239-243, 250-254</p> <p>Delivery to another of coin, possessed with the knowledge that it is counterfeit 239. Whoever, having any counterfeit coin which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Delivery of current coin, possessed with the knowledge that it is counterfeit 240. Whoever, having any counterfeit coin which is a counterfeit of current coin, and which at the time when he became possessed of it he knew to be a counterfeit of current coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p>Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be counterfeit 241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment for a term which may extend to 2 years, or with fine to an amount which may extend to 10 times the value of the coin counterfeited, or with both.</p>	<p>Delivery to another of coin, possessed with the knowledge that it is counterfeit 239. Whoever, having any counterfeit coin which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Delivery of current coin, possessed with the knowledge that it is counterfeit 240. Whoever, having any counterfeit coin which is a counterfeit of current coin, and which at the time when he became possessed of it he knew to be a counterfeit of current coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.</p> <p>Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be counterfeit 241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment for a term which may extend to 2 years, or with fine to an amount which may extend to 10 times the value of the coin counterfeited, or with both.</p> <p><i>Illustration</i></p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p><i>Illustration</i></p> <p>A, a coiner, delivers counterfeit Hong Kong dollars to his accomplice B, for the purpose of uttering them. B sells the dollars to C, another utterer, who buys them knowing them to be counterfeit. C pays away the dollars for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the dollars, discovers that they are counterfeit, and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240 as the case may be.</p> <p>Delivery to another of current coin as genuine, which when first possessed the deliverer did not know to be counterfeit</p> <p>241A. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which is a counterfeit of current coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p> <p>Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof</p> <p>242. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed of it that the coin was counterfeit, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Possession of current coin by a person who knew it to be counterfeit when he became possessed thereof</p>	<p>A, a coiner, delivers counterfeit Hong Kong dollars to his accomplice B, for the purpose of uttering them. B sells the dollars to C, another utterer, who buys them knowing them to be counterfeit. C pays away the dollars for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the dollars, discovers that they are counterfeit, and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240 as the case may be.</p> <p>Delivery to another of current coin as genuine, which when first possessed the deliverer did not know to be counterfeit</p> <p>241A. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which is a counterfeit of current coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p> <p>Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof</p> <p>242. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed of it that the coin was counterfeit, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Possession of current coin by a person who knew it to be counterfeit when he became possessed thereof</p> <p>243. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p>243. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of current coin, having known at the time when he became possessed of it that it was a counterfeit, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p>	<p>counterfeit of current coin, having known at the time when he became possessed of it that it was a counterfeit, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Using as genuine forged or counterfeit currency notes or bank notes</p> <p>489B. Whoever delivers to, sells to, or buys or receives from, any other person, imports into Singapore, or exports therefrom, or otherwise traffics in or uses as genuine, or attempts to induce any other person to receive as genuine, any forged or counterfeit currency note or bank note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine.</p> <p>Possession of forged or counterfeit currency notes or bank notes</p> <p>489C. Whoever has in his possession any forged or counterfeit currency note or bank note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment for a term which may extend to 15 years, and shall also be liable to fine.</p>
9	<p>Delivery to another of coin possessed with the knowledge that it is altered</p> <p>250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of the coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers the coin to any other person, or attempts to induce any other person</p>	<p>Delivery to another of coin possessed with the knowledge that it is altered</p> <p>250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of the coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers the coin to any other person, or attempts to induce any other person to receive the</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p>to receive the coin, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Delivery of current coin possessed with the knowledge that it is altered</p> <p>251. Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of the coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers the coin to any other person, or attempts to induce any other person to receive the coin, shall be punished with imprisonment for a term which may extend to years, and shall also be liable to fine.</p> <p>Possession of altered coin by a person who knew it to be altered when he became possessed thereof</p> <p>252. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in section 246 or 248 has been committed, having known at the time of becoming possessed thereof that that offence had been committed with respect to such coin, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Possession of current coin by a person who knew it to be altered when he became possessed thereof</p> <p>253. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in section 247 or 249 has been committed, having known at the time of becoming possessed thereof that that offence had been committed with respect to such coin, shall be punished</p>	<p>coin, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Delivery of current coin possessed with the knowledge that it is altered</p> <p>251. Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of the coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers the coin to any other person, or attempts to induce any other person to receive the coin, shall be punished with imprisonment for a term which may extend to years, and shall also be liable to fine.</p> <p>Possession of altered coin by a person who knew it to be altered when he became possessed thereof</p> <p>252. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in section 246 or 248 has been committed, having known at the time of becoming possessed thereof that that offence had been committed with respect to such coin, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine.</p> <p>Possession of current coin by a person who knew it to be altered when he became possessed thereof</p> <p>253. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in section 247 or 249 has been committed, having known at the time of becoming possessed thereof that that offence had been committed with respect to such coin, shall be punished with</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
	<p>with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be altered</p> <p>254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in section 246 or 248 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment for a term which may extend to 2 years, or with fine to an amount which may extend to 10 times the value of the coin for which the altered coin is passed or attempted to be passed.</p> <p>Delivery to another of current coin as genuine, which when first possessed the deliverer did not know to be altered</p> <p>254A. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in section 247 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p>	<p>imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p>Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be altered</p> <p>254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in section 246 or 248 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment for a term which may extend to 2 years, or with fine to an amount which may extend to 10 times the value of the coin for which the altered coin is passed or attempted to be passed.</p> <p>Delivery to another of current coin as genuine, which when first possessed the deliverer did not know to be altered</p> <p>254A. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in section 247 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.</p> <p>[NEW]</p> <p>Delivery to another of altered currency</p>

S/N	Current Penal Code offence(s)	Proposals (Proposed amendments in red font)
		<p>489H. Whoever delivers to any other person as genuine, or as currency of a different description from what it is, or attempts to induce any person to receive as genuine or as a currency of a different description from what it is, any currency in respect of which he knows or has reason to believe that any operation as that mentioned in section 489F or 489G has been performed, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.</p> <p>Possession of altered currency</p> <p>489I. Whoever has in his possession any currency with respect to which he knows or has reason to believe that any offence defined in section 489F or 489G has been committed and intending to use the same as genuine or that it may be used as genuine, fraudulently, or with intent that fraud will be committed, is in possession of currency with respect to which he knows or has reason to believe that any offence defined in section 489F or 489G has been committed, shall be punished with imprisonment for a term which may extend to 5 years, and shall also be liable to fine.</p> <p><i>Note: This would make the delivery and possession of altered currency note in the circumstances described above an offence, when it is not currently so.</i></p>

SECTION 31: REVIEW OF HOMICIDE PROVISIONS

SUMMARY OF RECOMMENDATIONS

- (145) To preserve the definitions of culpable homicide and murder as they appear in s 299 and s 300
- (146) To increase the maximum imprisonment term prescribed for s 304(b) from 10 years to 15 years
- (147) To create a new provision dealing with violent group crime resulting in death
- (148) Create a specific provision that deals with concealing or otherwise disposing of a corpse which is punishable with imprisonment of up to seven years

Introduction and current law

The Penal Code contains three primary homicide offences. These are murder, culpable homicide not amounting to murder, and rash or negligent act causing death. The provisions relating to the two offences set out in this section of the report – murder and culpable homicide not amounting to murder – are set out below:

Culpable homicide

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Murder

300. Except in the cases hereinafter excepted culpable homicide is murder —

- (a) if the act by which the death is caused is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

2 The Penal Code has a distinct approach towards laying down the law of homicide. It begins by prescribing the meaning of culpable homicide and follows by defining murder. This approach stems from the notion held by the framers of the Penal Code that culpable homicide is the genus with murder as a specie of that genus. Therefore, all cases of murder are cases of culpable homicide but not vice versa. Culpable homicide consists of two categories of offences,

that is, (a) culpable homicide not amounting to murder and (b) murder.

3 Section 300 contains four definitions of murder.

Definition of murder under s 300(a)

4 Section 300(a) applies in cases where the offender caused death with the "intention" of doing so. Intention is normally inferred from the conduct of the offender.

Definition of murder under s 300(b)

5 Section 300(b) applies in cases where the offender caused death with the intention of causing the bodily injury which he "knows to be likely" to cause death. There are no reported judgments involving convictions under s 300(b) in Singapore. Indian cases suggest that s 300(b) requires both a subjective intention to inflict grievous bodily harm and a subjective knowledge of the physical condition of the victim which would make him succumb to the harm that is inflicted.¹ The purpose of the clause was to provide for a case where the accused had some special knowledge of the condition of the victim which would lead to his death where some injury was caused to him. Therefore, if the accused knew that the accused was a haemophiliac and that the causing of grievous hurt would necessarily result in his succumbing to the injuries because of his peculiar condition, he would be guilty of murder under this clause because of his awareness of the special conditions.²

Definition of murder under s 300(c)

6 Section 300(c) comprises a subjective and an objective component. The subjective component is an intention to cause the bodily injury which caused death. The objective component requires the bodily injury intended to be one which was, in the ordinary course of nature, sufficient to cause death. Section 300(c) is different from the other types of fault for murder recognised under s 300 in that the accused may be convicted of murder where death was neither intended nor known to be highly probable.

Definition of murder under s 300(d)

7 Section 300(d) is based on knowledge whereas the other three clauses are primarily based on intention. Section 300(d) is very rarely invoked in practice and there is no known case of a conviction based on this provision in Singapore.³ The most recent judicial pronouncement on this provision would be the case of *PP v Govindasamy s/o Nallaiah* [2016] 3 SLR 374 ("*Govindasamy*"), where the High Court held (at [40]) that four cumulative elements have to be proved by the prosecution in order to sustain a charge under s 300(d):

¹ *Ratanlal* at p 1458. For completeness, it should be noted that Singapore does not seem to adopt this interpretation of s 300(b). For instance, in *PP v Lim Wee Thong* (CC 5 of 2014) (Unreported), the offender was convicted of a charge under s 300(b) of the Penal Code. The offender inflicted multiple stab wounds to the chest of the deceased (his ex-girlfriend) with a knife and took her belongings and subsequently made withdrawals from her bank accounts amounting to S\$14,500/-. The ex-girlfriend did not suffer from any special physical condition which would make her more susceptible to death but the judge nonetheless convicted the offender under s 300(b).

² M Sornarajah, "The Definition of Murder Under the Penal Code" [1994] SJLS 1.

³ *Govindasamy* at [41]: "s 300(d) of the Penal Code is very rarely invoked, and there is no known case of a conviction based on this provision in Singapore".

- (a) First, the offender must have performed an act which caused death;
- (b) Second, the act must have been so imminently dangerous that it must in all probability cause death;
- (c) Third, the offender must know that this act must have been so imminently dangerous that it must in all probability cause death; and
- (d) Fourth, this act must have been performed without any excuse for incurring the risk of causing death.

8 Since intention is a generally more culpable form of fault compared to knowledge, s 300(d) imposes several requirements to ensure that the requisite knowledge is comparable in degree of culpability with the types of intentional murder recognised under s 300. These requirements are that:

- (a) The accused must have known that his conduct would in “all probability cause death”. Actual knowledge is needed; negligence is insufficient. Without proof of subjective awareness of the dangerousness of the act, there is no liability under s 300(d);
- (b) The type of bodily injury risked must be of death or bodily injury which is likely to cause death. The first type of harm of causing death is not controversial since it aligns this form of fault with an intention to cause death (which is the paradigm fault for murder). However, the second type of harm of causing bodily injury which is likely to cause death is problematic; and
- (c) The Prosecution must establish that the accused ‘was without excuse for incurring the risk’ of causing the prescribed injury.

Punishments prescribed for murder and culpable homicide act

9 An offence of murder is punishable under s 302. Section 302(1) provides that whoever commits murder within the meaning of s 300(a) shall be punished with death. Section 302(2) provides that whoever commits murder within the meaning of s 300(b), (c), or (d) shall be punished with death or imprisonment for life and shall, if he is not punished with death, also be liable to caning.

10 An offence of culpable homicide not amounting to murder is punishable under s 304. Where the act by which death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, the offence is punishable with (i) imprisonment for life and discretionary caning; or (ii) imprisonment for a term which may extend to 20 years and to a discretionary fine or caning.⁴ However, if the act is done with the knowledge that it is likely to cause death, the offence is punishable with imprisonment for a term which may extend to 10 years, or with fine, or with caning, or with any combination of such punishments.⁵

⁴ Section 304(a), PC

⁵ Section 304(b), PC

Impetus for review

11 As far back as 1883, Sir James Stephen had described the definitions of culpable homicide and murder as “the weakest part of the Code” and “obscure”. He asserted that it was “obvious ... that the subject had not been fully thought out when they were drawn”. Stephen lamented that culpable homicide and murder were “defined in terms so closely resembling each other that it is difficult to distinguish them” and the “difficulty of these sections is that the definitions of culpable homicide and murder all but repeat each other; but not quite, or at least, not explicitly”.

12 Nearly a century later, the Malaysian Federal Court of Criminal Appeal made the same lamentation in *Tham Kai Yau v PP*.⁶ There, the court commented that the Malaysian Penal Code provisions relating to culpable homicide and murder (which are *in pari materia* with the Singapore provisions) are “probably the most tricky in the Code and are so technical as frequently to lead to confusion”.

Recommendation 145: To preserve the definitions of culpable homicide and murder as they appear in s 299 and s 300

13 First, the PCRC considered if the boundaries between s 299 and s 300 could be made clearer. The PCRC is of the view that criticisms that the distinction between ss 299 and 300 is vague and confusing are not on strong footing.

14 The choice of words in these sections had to be carefully selected to accommodate the approach of placing the definition of murder in the context of culpable homicide generally. This was considered important because it enabled culpable homicide not amounting to murder to be readily compared and contrasted with murder. Collectively, the sections prescribe a range of fault elements for culpable homicide and to demarcate the points on this range when the case is sufficiently culpable to attract a conviction for murder. Inevitably, this involves degrees of intention, knowledge, risks and types of injury. It has been argued that the drafters could hardly have been more precise or made themselves more readily understood than to differentiate the type of harm intended according to the concepts of “likely” and “sufficient in the ordinary course of nature” when comparing the second limb of s 299 and s 300(d) for example.⁷

15 Second, the PCRC considered the definition of murder under s 300(a). Causing the death of another with the intent to kill is the paradigm example of murder. Its application has been straightforward and does not pose any significant theoretical or interpretational difficulties.

16 There have, however, been some concerns that “intention” is statutorily undefined. The lack of a statutory definition has resulted in a situation where a number of possible meanings may potentially be ascribed to the definition of “intention” (not just within the homicide provisions but also within the Penal Code and other penal statutes). The PCRC has recommended that “intention” be statutorily defined. This definition would apply to s 300(a).

17 Third, the PCRC considered the definition of murder under s 300(b). There are no

⁶ [1977] 1 MLJ 174.

⁷ Stanley Yeo, *Fault in Homicide: Towards a Schematic Approach to the Fault Elements for Murder and Involuntary Manslaughter in England, Australia and India* (The Federation Press, 1997) at p 106.

reported instances of the use of s 300(b) in Singapore. The PCRC considered the argument that causing a bodily injury with the knowledge that it is likely to cause death involves a high degree of culpability, and it would lead to the inference that the accused actually *intended to kill* or the accused knew that his act would *in all probability cause death*, thereby enabling the Prosecution to prefer a charge under s 300(a) or (d).⁸

18 The PCRC disagrees as the scenarios envisaged by s 300(b) may not always fall under s 300(a) or (d) easily. The PCRC notes that s 300(b) has the advantage of dealing with the issue of a victim's unusual physical susceptibility under the fault element for murder rather than under the concept of causation. This is a clearer approach to the determination of criminal responsibility as it avoids having to rely on the contentious causal principle that an accused must take the victim as he finds him. Therefore, the PCRC recommends retaining s 300(b) as it currently appears.

19 Fourth, the PCRC considered the definition of murder under s 300(c). The PCRC studied all the cases involving convictions under s 300(c) following the abolition of the mandatory death penalty in 2012. The PCRC acknowledges that the provision has served an important purpose in the maintenance of law and order and capturing heinous killings which cannot be embraced by the alternative limbs of murder.

20 Some PCRC members were of the view that s 300(c) remains inherently incompatible with the other limbs of murder. They were of the view that while the harshness of the effect of s 300(c) had been ameliorated by the abolition of the mandatory death penalty, the provision could nonetheless be used in a case where someone had merely inflicted an injury without the intention to kill another but where the injury turned out to be sufficient in the ordinary course of nature to cause death. The PCRC recommends retaining s 300(c) as it appears presently. However, some members expressed the hope that while the PCRC had recommended retaining the provision, there would continue to be ongoing engagement with the legal fraternity as case law involving s 300(c) develops.

21 Lastly, the PCRC considered the definition of murder under s 300(d). The PCRC noted that there are no known convictions under s 300(d) so far. Some PCRC members questioned the requirement for "imminence" in the provision. They were of the view that so long as an accused acted with the requisite level of knowledge that death would result, it should not matter whether the danger is "imminent" or latent. By way of illustration, a terrorist places an explosive in a crowded MRT station which would explode if anyone presses a mechanism found on it. However, should no one eventually press the mechanism, it may well not explode. One week after the explosive was placed in the MRT station, a child comes across the explosive and presses the mechanism, resulting in a massive explosion causing multiple deaths. It could be possible that the terrorist would not be liable under s 300(d) (or any other limbs of murder) as the danger caused by the explosive is a latent danger, as opposed to an imminent danger.

22 The PCRC deliberated the application of the "imminence" requirement and concluded that the word was meant to apply as an adverb to describe the danger committed by a person's act. Specifically, in relation to the hypothetical situation described above, the act would still be covered under s 300(d). This is because while the act was not *immediately* dangerous, it nonetheless remained dangerous. One PCRC member pointed out that what "imminent" harm

⁸ *YMC 2nd Ed* at paras 9.40 and 10.71.

constitutes in tort law is well-established; imminent harm does not necessarily mean immediate. Having considered this, the PCRC takes the view that no amendments to s 300(d) are required.

Recommendation 146: To increase the maximum imprisonment term prescribed for s 304(b) from 10 years to 15 years

Impetus for review

23 The PCRC considered whether the maximum punishment for the third limb of s 299 (“knowledge that he is likely by such act to cause death”) should be limited to imprisonment for a term of 10 years. In principle, this limb can encompass serious cases including cases which fall just short of murder under s 300(d). One example of such a case is *Govindasamy* where the High Court acquitted the accused of the charge under s 300(d) and convicted him of a charge of culpable homicide not amounting to murder under s 299. The accused was sentenced to the maximum imprisonment term of 10 years. It is anomalous that 10 years' imprisonment is the maximum punishment available for a person whose deeds fall just short of murder under s 300(d) which is punishable by death or imprisonment for life.

24 Described in another way, the definitions of murder and culpable homicide describe a spectrum of culpability – the latter begins when the former ends. The punishments available ought to reflect this. This is already the case for the second limb of s 299 (“intention of causing such bodily injury as is likely to cause death”) for which the maximum punishment is imprisonment for life (which is the minimum punishment for murder). This ought to be the case for the third limb of s 299 (“knowledge that he is likely by such act to cause death”) as well.

25 Also, the lower punishment for the third limb of s 299 (“knowledge that he is likely by such act to cause death”) creates a disparity in the effect of a partial defence. If an offender falls under s 300(a), (b) or (c), the application of a partial defence would reduce murder to culpable homicide punishable under s 304(a) which carries a maximum sentence of life imprisonment. However, if an offender falls under s 300(d), the application of a partial defence would reduce murder to culpable homicide punishable under s 304(b) with a maximum of 10 years' imprisonment. This is a steep reduction.

Recommendation

26 Some PCRC members were of the view that since the different limbs of murder are supposed to be equally or comparably serious, it is unnecessary for a partial defence to have a different outcome depending on the limb of murder it is applied to. Other members were of the view that there should be a distinction between the punishments prescribed for someone who intended to kill and someone who had the knowledge that his act was likely to cause death.

27 The PCRC recommends increasing the maximum imprisonment prescribed for s 304(a) from 10 years to 15 years. This will enable the court to impose a higher sentence in cases where the culpability of the offender approaches that of murder under s 300(d). At the same time, the distinction between someone who *intends* to kill and someone who does an act with the *knowledge* that it is likely to cause death will be preserved.

Recommendation 147: To create a new provision dealing with violent group crime resulting in death

Impetus for review

28 The PCRC is of the view that there is no strong response in the law where a person becomes involved in a group crime knowing that serious violence or death is likely to occur, and for which death is actually caused.

29 First, a murder charge can be preferred against the primary offender (*ie* the person who has caused the death of the victim) if he can be identified and if it can be proven that he has the requisite *mens rea*. However, identifying the primary offender can be difficult if not impossible when death is caused by a group.

30 Second, the secondary offenders (*ie* members of the group who did not cause the death of the victim) can be held complicit in the death of the victim and liable for murder under the various complicity concepts in the Penal Code. The complicity concepts refer to the various forms of abetment under Chapter V, and the concept of common intention under s 34 of the Penal Code. Generally, for these complicity concepts to apply, the secondary offender must have a high degree of *mens rea* in relation to the death of the victim.

31 Third, the current alternative responses in law are inadequate to address this lacuna. The offences relating to unlawful assembly under Chapter VIII apply only to groups consisting of five people or more. Further, the maximum prescribed punishments for these offences where death is caused are considerably inadequate. For example, an offence of rioting while armed with a deadly weapon under s 148 of the Penal Code carries a maximum punishment of 10 years' imprisonment and optional caning.

Recommendation

32 The PCRC agreed that it will be wrong in principle to change the substantive law of murder to accommodate such cases and recommends no changes in the existing law of complicity as it will be confusing. In addition, the PCRC does not recommend any changes in the complicity concepts under the Penal Code to address the evidential difficulties normally presented by such crimes. These concepts apply generally and should not be changed simply because of difficulties in one area of the law.

33 The PCRC recommends the creation of a specific offence to deal with violent group crime that results in death. Some PCRC members stressed that the offence must be appropriately scoped to ensure that it is not one of strict liability. The basic idea behind the new offence is to deter a person from joining, or remaining, in a group engaged in a criminal enterprise if he knows that death or serious violence is likely to result. If he continues to be in the group, he would face serious consequences if death results, even if he did not personally cause the death and even if there was no common intention to cause death or serious violence from the outset.

34 The PCRC further recommends that this offence be punishable with imprisonment for life or for a term not exceeding 20 years with the option of caning. This is justified given that the offence may cover cases where the culpability of the offender falls just short of murder. The PCRC recommends against prescribing a mandatory minimum sentence. The offence may

apply to offenders who are relatively less culpable and a mandatory minimum sentence, in such circumstances, will not be appropriate.

Recommendation: To create a specific provision that deals with concealing or otherwise disposing of a corpse which is punishable with imprisonment of up to seven years

Impetus for review

35 The PCRC considered whether the law currently provides for an adequate response to deal with the deliberate and unauthorised disposal of dead bodies. It is of the view that the law does not provide an adequate response. The options that are currently available and their inadequacies are set out below:

- (a) Section 201 deals only with the very specific scenario where the offender assists another person who has committed an offence to cause evidence of that offence to disappear. It would therefore not cover a situation where an offender, for example, causes hurt to a person who later dies, and thereafter disposes of the body.
- (b) Section 17 of the MOA, which deals with depositing a corpse or a dying person, appears to be aimed at protecting the public or the rights of owners of private places, and carries a trifling punishment of a fine not exceeding \$2,000 or imprisonment of up to six months, or both.
- (c) While such conduct may, in some cases, fall under s 204A (an offence of perverting the course of justice), this provision is untested in this regard and may not ultimately be useful. This is because it may be difficult to prove what exactly the course of justice is in cases where no examination can even be carried out on the body because of the steps taken to conceal or dispose of the body.

36 The PCRC noted that there have been previous local cases in which persons who have been aware of deaths have taken steps to dispose of dead bodies such that the bodies are either not available for forensic examination or in such a state of decomposition when discovered that forensic examination cannot determine the cause of death. Needless to say, the disposal of bodies in such fashion also potentially results in the loss of evidence that may be relevant to determining the cause of death and the identity of any person who may be responsible. This issue is especially acute in cases where there is evidence that the person who disposed of the dead body had used violence against the person shortly before death occurred or before the body was disposed of.

Recommendation

37 The PCRC recommends creating a specific provision that deals with the unauthorised concealing or otherwise disposing of a corpse. It should also be made clear that the taking of steps to conceal or dispose of a corpse would satisfy the *actus reus* of the offence. To deter such conduct, this offence should be punishable with mandatory imprisonment. Taking reference from s 204A of the Penal Code, the PCRC further recommends setting the maximum imprisonment term for the offence at seven years.

SECTION 32: HARMONISING PENAL CODE PROVISIONS WITH OTHER LEGISLATION

SUMMARY OF RECOMMENDATIONS

- (149) *Repeal ss 264-267 on offences relating to weights and measures*
- (150) *Port over the following provisions to the WC*
- d. *Section 493 (Cohabitation caused by a man deceitfully inducing a belief of lawful marriage)*
 - e. *Section 494 (Marrying again during the lifetime of husband or wife)*
 - f. *Section 495 (Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted)*
 - g. *Section 496 (Marriage ceremony gone through with fraudulent intent without lawful marriage)*
- (151) *Port over the following offences from the MOA to the Penal Code*
- h. *Section 17 (Penalty for depositing corpse or dying person)*
 - i. *Section 22 (Possession of housebreaking implements or offensive weapons)*

Introduction

Under TOR 2(b)(iii), the PCRC is to “rationalise, recalibrate and modernise the substantive offences in the Penal Code, including proposals with respect to removing offences already or better dealt with under dedicated legislation”.

2 In undertaking this exercise, the PCRC considered whether there was a need to keep certain provisions in the Penal Code, or if these could either be repealed, or ported over to other legislation. The PCRC focused on those provisions where there were other dedicated laws which had intents similar to those of Penal Code offences, and where there was no need to retain the ability to use the Penal Code to deal with egregious cases.

Summary of Recommendations

3 A summary of the recommendations made by the PCRC is as follows:

S/N	Provision	Offence	Other legislation	Proposal
1	Sections 264-267	Offences relating to weights and measures	WMA	Repeal
2	Sections 493-496	Offences relating to marriage	WC	Port over to WC

4 The PCRC further recommends to port two offences from the MOA to the Penal Code, due to the seriousness of these offences. These offences are:

Provision	MOA
Section 17	Penalty for depositing corpse or dying person
Section 22	Possession of housebreaking implements or offensive weapons

Recommendation 149: Repeal ss 264-267 on offences relating to weights and measures

Offences

- 264. *Fraudulent use of false instrument for weighing*
- 265. *Fraudulent use of false weight or measure*
- 266. *Being in possession of false weights or measures*
- 267. *Making or selling false weights or measures*

5 The PCRC notes that there are overlaps between ss 264-267 and the intent of the WMA. The WMA was enacted in 1976 “to safeguard fair trade by preventing unfair trading due to short-weights of measures”.¹

6 There are provisions in the WMA which criminalise the use of false weights, measures and instruments. These provisions include:

- (a) Using for trade or supplying a weighing/measuring instrument which (a) bears a stamp/Accuracy Label which is a forgery or counterfeit, or which has been transferred from another instrument, or which has been altered or defaced; or (b) is false and unjust as a result of an alteration made in the instrument after it has been affixed with a stamp/Accuracy Label) (s 11(3) WMA);
- (b) Using for trade any weighing/measuring instrument which is false or unjust (s 14(1) WMA); and
- (c) Committing fraud in the using of any weighing/measuring instrument for trade (s 14(3) WMA).

7 Sections 264-267 of the Penal Code carry a higher penalty of imprisonment for a term which may extend to one year, or with fine, or with both. The offences in the WMA carry a fine not exceeding \$5,000, or imprisonment for a term not exceeding 3 months, or both. One possible reason why the penalties might be higher in the Penal Code is that the fault element in ss 264-267 is fraud.

Recommendation

8 The WMA covers situations where the weights or measures are used for trade purposes, and does not include situations where a person may fraudulently use a weight or measure in a private, non-trade context. For example, a person may use a false weighing machine to distribute the jewellery of a deceased relative in order to distribute less jewellery to his family members.

9 Sections 264-267 of the Penal Code criminalise the entire spectrum of offences concerning the fraudulent use of weights and measures in trade and non-trade contexts, including the making, selling, possession, and use of the false weights and measures in all circumstances.

¹ *Singapore Parliamentary Debates, Official Report* (15 August 2005) vol 80 at cols 1279 (Heng Chee How, Minister of State for Trade and Industry)

10 The circumstances in ss 264-267 may also be covered by s 415 (Cheating) of the Penal Code and the proposed new offence of Fraud².

11 The PCRC thus recommends repealing ss 264-267 of the Penal Code, since the circumstances in which the offences would be made out would be covered by the WMA, s 415 (Cheating) in the Penal Code, and the proposed new offence of Fraud.

Recommendation 150: Port over the following provisions to the WC (a) Section 493 (Cohabitation caused by a man deceitfully inducing a belief of lawful marriage); (b) Section 494 (Marrying again during the lifetime of husband or wife); (c) Section 495 (Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted); (d) Section 496 (Marriage ceremony gone through with fraudulent intent without lawful marriage)

Offences

493. *Cohabitation caused by a man deceitfully inducing a belief of lawful marriage*

494. *Marrying again during the lifetime of husband and wife*

495. *Same offence (s 494) with concealment of the former marriage from the person with whom subsequent marriage is contracted*

496. *Marriage ceremony gone through with fraudulent intent without lawful marriage*

12 The intent of the WC is to “provide for monogamous marriages and for the solemnization and registration of such marriages...”. Sections 493-496 of the Penal Code which deal specifically with marriage offences, fall within the ambit of the WC. Apart from s 11 of the WC which voids marriages solemnised between persons who are already married to other persons at the time of the solemnisation, there are no WC offences similar to ss 493-496 of the Penal Code.

Recommendation

13 Given that the intent of the WC is to provide for monogamous marriages, the offences in ss 493-496 are squarely within the intent of the WC. As such, the PCRC is of the view that ss 493-496 should be ported over to the WC. It would then be clear that the regulation and enforcement of offences relating to marriages are carried out under the WC, instead of the Penal Code.

Recommendation 151: Port over the following offences from the MOA to the Penal Code: (a) Section 17 (Penalty for depositing corpse or dying person); (b) Section 22 (Possession of housebreaking implements or offensive weapons)

Offences in the MOA

17. *Penalty for depositing corpse or dying person*

22. *Possession of housebreaking implements or offensive weapons*

14 The MOA, formerly known as the Minor Offences Act, was intended to “control a variety of misdemeanours and nuisances of a minor character”.

² See section 7 of this report.

Recommendation

15 The PCRC is of the view that ss 17 and 22 of the MOA are more penal in nature should be ported over to the Penal Code. Recommendations for the specific offences are as follows:

- (a) Section 17 (Penalty for depositing corpse or dying person): While there are no similar offences in the Penal Code, this is a grave offence. The PCRC has separately recommended to enhance penalties for this offence by creating a more serious offence of concealing or disposing of a corpse, punishable with mandatory imprisonment.³ Section 17 would be subsumed under the new offence.
- (b) Section 22 (Possession of housebreaking implements or offensive weapons): This offence is closely linked to the Penal Code offence of house-breaking (s 445). Section 22(4) (Loitering with intent and being found in a dwelling-house or other building without being able to satisfactorily account for his presence therein) is also similar to the offence of criminal trespass under s 447 of the Penal Code.

Conclusion

16 With a view to harmonise offence-creating legislation in the Penal Code and other legislation, the PCRC has endeavoured to review the intents of various regulatory legislation which overlap with the Penal Code. Where the PCRC has recommended to repeal or port over offences, effort has been made to ensure that all circumstances in which offences could be committed continue to be covered by law.

³ See section 31 of this report.

CHAPTER 7: UPDATING THE SENTENCING FRAMEWORK

SECTION 33: PRESUMPTIVE MINIMUM SENTENCES

SUMMARY OF RECOMMENDATIONS

- (152) Introduce presumptive minimum sentences in lieu of mandatory minimum sentences in the following circumstances:
- a. First-time offenders who have committed certain offences which currently attract a mandatory minimum sentence of 3 years' imprisonment or less, and which do not attract a mandatory minimum sentence of caning; and
 - b. There are exceptional circumstances relating to the offence of the offender which would make it unjust to impose the prescribed minimum sentence

Introduction

The PCRC's recommendations in this section refer only to mandatory minimum sentences of imprisonment, and not to sentences which render an offender liable to mandatory minimum fines, or mandatory minimum sentences of caning.

Recommendation 152: Introduce presumptive minimum sentences in lieu of mandatory minimum sentences in the following circumstances: (a) First-time offenders who have committed certain offences which currently attract a mandatory minimum sentence of 3 years' imprisonment or less, and which do not attract a mandatory minimum sentence of caning; and (b) There are exceptional circumstances relating to the offence of the offender which would make it unjust to impose the prescribed minimum sentence

Current law

2 A mandatory minimum sentence ("MMS") means a sentence where (i) a minimum quantum for a particular type of sentence is prescribed, and (ii) the imposition of that type of sentence is mandatory.¹

3 A MMS enhances deterrence by imposing certain, predictable and generally severe punishment on offenders, and sends a clear signal to would-be offenders of the consequences of committing certain offences. MMS was first introduced in the Penal Code on 26 July 1984, for offences of robbery, housebreaking and theft, vehicle theft, snatch theft, extortion, rape and outraging of modesty. MMS was introduced to deal with a rapidly increasing crime rate for these offences, accompanied by a downward trend in sentences imposed for those offences.²

Impetus for review

4 Since the introduction of the MMS, society has become safer, less violent, and more mature. The public also now has higher expectations of the courts being able to more finely calibrate sentences according to the circumstances of the case, to achieve individualised justice.

¹ *Mohamad Fairuuz bin Saleh v PP* [2015] 1 SLR 1145 at [17].

² *Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 (Chua Sian Chin, Minister for Home Affairs).

This emphasis on individualised justice has led to various initiatives to give judges more sentencing options.³ The PCRC is of the view that it is timely to review whether it continues to be necessary to impose MMSes to meet the sentencing objectives of deterrence, retribution and rehabilitation, given that the criminal justice system now operates in a different context from the time when the MMS was first introduced to the Penal Code in 1984.

Recommendation

5 The PCRC recommends introducing presumptive minimum sentences in lieu of MMS for (a) first offenders; (b) who commit an offence of a less severe nature; (c) in exceptional circumstances where it would be unjust to impose a MMS. For a start, the PCRC recommends that presumptive minimum sentences will apply to a tightly scoped list of nine offences. (see Annex). In addition, presumptive minimum sentences will not apply to offences under the MDA.

6 Given that the MMS has served well to secure law and order, the introduction of presumptive minimum sentences is not intended to displace the focus on deterrence, but to allow the courts to exercise mercy in appropriate cases.

7 Presumptive minimum sentences will ameliorate the harshness of the “cliff” effect, where persons who commit slightly more serious versions of similar offences are immediately subject to a significantly harsher MMS. The increase in sentences may sometimes be disproportionate to the increased culpability of the accused persons in particular cases.

8 Presumptive minimum sentences allow for individualised justice in exceptional cases, without compromising the deterrent signal for serious offences. In this regard, the PCRC recognises that removing the MMS entirely may inadvertently send a signal that the Government is softening its stance on these offences. Instead, the Government should monitor crime trends following the introduction of presumptive minimum sentences to consider, in the future, whether to remove the mandatory minimum sentences for certain offences altogether.

9 Where presumptive minimum sentences are introduced, such offences should still be treated the same way as the MMS for the purposes of Community Sentences under the CPC, and probation under the Probation of Offenders Act (Cap 252, 1985 Rev Ed).

First offenders

10 The definition of “first offender” for the purposes of eligibility for a presumptive minimum sentence should be set out clearly in legislation. The definition can be modelled on the criteria by which repeat offenders are *currently* excluded from Community Sentences under the CPC. Offenders who meet any one of the following criteria will not be eligible for presumptive minimum sentences.

- (a) A person who had previously been sentenced to a term of imprisonment, other than a term of imprisonment served by him in default of payment of a fine (modelled on s 337(d) of the CPC);

³ The two most prominent being the introduction of Community Sentences in 2010, and the changes to the mandatory death penalty regime in 2012.

- (b) A person who had previously been sentenced to reformatory training, corrective training or preventive detention (modelled on s 337(e) of the CPC);
- (c) A person who had previously been detained or subject to police supervision under s 30 of the Criminal Law (Temporary Provisions) Act (modelled on s 337(f) of the CPC);
- (d) A person who had previously been admitted to an approved institution under s 34 of the MDA or to an approved centre under s 17 of the Intoxicating Substances Act (modelled on s 337 (g) of the CPC).

11 The eligibility criteria for Community Sentences have recently been expanded, via amendments to the CPC that were passed by Parliament through the Criminal Justice Reform Act in March 2018, to allow more offenders to qualify for such sentences. However, the PCRC recommends aligning the criteria for presumptive minimum sentences to the pre-amendment criteria for Community Sentences. This is because only minor offences qualify for Community Sentences under the CPC. There is therefore significantly less need for deterrence relative to offences which currently attract a MMS (*ie* generally serious offences).

Offences of a less severe nature

12 For a start, the PCRC recommends that presumptive minimum sentences be introduced in lieu of mandatory minimum sentences for a tightly scoped list of nine offences which (a) are not in the Penal Code, (b) currently attract a mandatory minimum sentence of 3 years' imprisonment or less, and (c) do not attract a mandatory minimum sentence of caning.

13 The PCRC proposes to exclude the following offences which meet the criteria in para. 12:

- (a) Section 354A, Penal Code (Aggravated outrage of modesty in certain circumstances)
- (b) Section 356, Penal Code (Assault during theft of property carried by person)
- (c) Sections 384-387, Penal Code (Extortion)
- (d) Sections 459-460, Penal Code (Causing grievous hurt or death during housebreaking)
- (e) Section 28B(1)(b), Moneylenders Act (Causing person below 16 to engage in Unlicensed Moneylending Harassment)

14 The PCRC is of the view that the abovementioned proposals are more egregious and involve elements of violence and physical confrontation. As such, there continues to be a need to send a strong deterrent signal for such crimes. It would be prudent to apply presumptive minimum sentences to a tightly scoped list of offences at the start, and for the Government to monitor the effect of the introduction of presumptive minimum sentences on crime statistics to determine if there is scope for a wider implementation of presumptive minimum sentences in the future.

15 Presumptive minimum sentences will also not apply to the MDA, given the strong need for the zero-tolerance policy towards the harms caused by drugs.

16 Offences relating to non-compliance with supervision orders under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) (“CLTPA”) – ss 33, 34 and 36 – are also excluded from presumptive minimum sentences. This is by virtue of the fact that only first offenders can qualify for presumptive minimum sentences, and someone who was previously detained or subject to police supervision under s 30 of the CLTPA is no longer regarded as a first offender (see para 10(c) above). Moreover, a person who has been detained or placed under a supervision order under the CLTPA is someone who has been involved in serious criminal activity – presumptive minimum sentences are not suitable for such persons.

Exceptional circumstances in which the court may depart from the prescribed MMS

17 The court should only be allowed to depart from the prescribed MMS where there are exceptional circumstances relating to the offence or the offender which make it unjust to impose the MMS in all the circumstances. Today, the Public Prosecutor takes a multitude of factors relating to the offence and the offender into account in deciding whether a particular case is exceptional enough to warrant a reduction in the charge, even if the facts are sufficient to charge the person with an offence attracting a MMS. The introduction of presumptive minimum sentences will allow the Court to take similar factors into account during sentencing, to give a sentence that is below the prescribed MMS.

18 To determine what could constitute “exceptional circumstances”, reference could be taken from the current doctrine of “judicial mercy”. The concept of “exceptional circumstances” is similar to the threshold that must be met for courts to exercise judicial mercy. The High Court had previously observed in *Chew Soo Chun v PP*⁴ that

Judicial mercy is an *exceptional jurisdiction*. The effect of the mercy is that the court displaces the culpability of the offender as one of the central considerations in its determination of the appropriate sentence by considerations of humanity and where benchmark sentences will effectively play no part. For the court to exercise mercy, there must be *exceptional circumstances from which humanitarian considerations arise*, outweighing the public interests in having the offender punished for what he had done wrong against the law.” (emphasis added)

19 This is similar to the English experience with the doctrine, where the English Court of Appeal has clearly stated that it is only in rare cases that “exceptional circumstances” should be held to be present.⁵

20 In light of the above, the PCRC proposes that the scope of “exceptional circumstances” should be left open for judicial development, as opposed to prescribing a closed list of such circumstances. Determining whether to depart from the prescribed MMS in any case would be a fact-sensitive exercise. At the same time, the PCRC recommends that an *Explanation* be inserted into the law to guide the courts’ application of the test of “exceptional circumstances”. The *Explanation* should state that the court must not find that there are “exceptional circumstances relating to the offence or the offender which make it unjust to impose the prescribed MMS” *merely because* any of the following circumstances are present:

⁴ *Chew Soo Chun v PP* [2016] 2 SLR(R) at [23]

⁵ *Attorney General’s Reference No. 23 of 2009 (Desmond Peter Merrion)* [2010] 1 Cr. App. R. (S.) 70.

- (a) The offender pleaded guilty to the offence;
- (b) The offender is a first-time offender; or
- (c) The offender is of previous good character.

21 The PCRC is of the view that this *Explanation*, taken together with clear statements that the policy intent underlying presumptive minimum sentences is to allow mercy to be exercised in *truly exceptional cases* (where there are so many mitigating factors that the strong focus on deterrence is displaced), would be sufficient to ensure that the scope of “exceptional circumstances” is developed sensitively by the courts.

Scope of discretion when departing from the prescribed MMS

22 The PCRC recommends that the sentencing court be allowed discretion only within the same type of sentence. In other words, where the prescribed MMS is a term of imprisonment, the court cannot impose a fine only.

Conclusion

23 The PCRC is of the view that the introduction of presumptive minimum sentences would strengthen the current sentencing framework to provide for more nuanced sentencing options for selected offences in truly exceptional circumstances.

ANNEX

Proposed offences to which presumptive minimum sentences would apply

S/ N	Offence	Section	Imprisonment		Caning	
			Min (yrs)	Max (yrs)	Min.	Max.
Passports Act (Cap 220, 2008 Rev Ed)						
1.	Engaging in the business of selling Singapore passports	42(2)	2	15	No caning	
Immigration Act						
2.	Unlawfully returning to Singapore after having been removed	36	1	3	No caning	
3.	Entering Singapore in contravention of order prohibiting entry	9(5)	2	4	No caning	
4.	Miscellaneous immigration offences	57	0.5/2	2/5	No caning	
5.	Assisting or encouraging harbouring of immigration offender	57B	0.5	2	No caning	
Fisheries Act (Cap 111, 2002 Rev Ed)						
6.	Using trawl-net in Singapore waters	12	3 mths	3	No caning	
Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed)						
7.	Obtaining work pass for foreign employee for non-existent business, and failing to employ the foreign employee	22B(1)	0.5	2	No caning	
Dangerous Fireworks Act (Cap 72, 2014 Rev Ed)						
8.	Selling, transporting, importing dangerous fireworks	4	0.5	2	No mandatory minimum	
RTA						
9.	Driving heavy motor vehicle without police escort	79	1/2	3/5	No caning	

SECTION 34: CLARIFYING WHETHER PUNISHMENTS ARE MANDATORY OR DISCRETIONARY

SUMMARY OF RECOMMENDATIONS

- (153) Clarify ss 115 (Abetment of an offence punishable with death or imprisonment for life), 137 (Deserter concealed on board merchant vessel through negligence of master), 307 (Attempt to murder), 376C (Commercial sex with minor under 18 outside Singapore) as to whether punishments are mandatory or discretionary
- (154) Recommend that new legislation and amendments to existing legislation should use the phrases “shall be punished with” and “may be punished with” to prescribe mandatory and discretionary punishments respectively

Introduction

Punishments in the Penal Code are prescribed using the phrases “shall be punished with” and “shall be liable to”, which conventionally have mandatory and discretionary connotations respectively. The phrase “shall be punished with” has an undisputed mandatory connotation. However, although it is generally accepted that the expression “shall be liable to” prescribes discretionary sentences, the phrase has been shown to have a mandatory connotation in certain circumstances.

Current law

2 The meaning of the phrases “shall be liable to” and “shall be punished with” is unambiguous for the following types of provisions:

S/N	Type	Sample Structure	Explanation
1.	Single- or multiple-limbed provisions in which punishments are prescribed using only the phrase “shall be punished with”	[The offender] shall be punished with [X], or with [Y], or with [Z], or to any combination of these punishments.	It has been held in several judgements, most notably in <i>PP v Mahat</i> ¹ , that the phrase “shall be punished” carries a mandatory connotation.
2.	Single-limbed provisions in which punishments are prescribed using both the phrases “shall be punished with” and “shall be liable to”	[The offender] shall be punished with [X] and shall also be liable to [Y].	Where both the phrases “shall be punished” and “shall be liable” are used in the same provision, “shall be punished” denotes a mandatory punishment while “shall be liable” denotes a discretionary punishment.
3.	Multiple-limbed provisions where every limb prescribes punishments using both the phrases	For [<i>Limb 1 offence</i>], [the offender] shall be punished with [W] and shall also be liable to [X]; for [<i>Limb 2 offence</i>],	This was held in two separate judgements: <i>PP v Mahat</i> in relation to ss 356 and 380 of the Penal Code, and <i>Lim Li Ling v PP</i>

¹ *PP v Mahat bin Salim* [2005] 3 SLR 104 at [30]-[31]

S/N	Type	Sample Structure	Explanation
	“shall be punished with” and “shall be liable to”	[the offender] shall be punished with [Y], and shall also be liable to [Z].	² regarding s 5(a) of the Common Gaming Houses Act. In the latter, the court noted that the usage of divergent terms within the same provision necessitates that different meanings be given to them. <i>Lim Li Ling v PP</i> was also considered and distinguished in <i>Poh Boon Kiat vs PP</i> ³ .
4.	Multiple-limbed provisions where each limb either: (a) Prescribes punishments using both the phrases “shall be punished with” and “shall be liable to”; or (b) Prescribes punishments using only the phrase “shall be punished with”.	For [<i>Limb 1 offence</i>], [the offender] shall be punished with [W] and shall also be liable to [X]; for [<i>Limb 2 offence</i>], [the offender] shall be punished with [Y], or with [Z].	Combination of explanations for S/N 1 & 2.

Recommendation 153: Clarify ss 115 (Abetment of an offence punishable with death or imprisonment for life), 137 (Deserter concealed on board merchant vessel through negligence of master), 307 (Attempt to murder), 376C (Commercial sex with minor under 18 outside Singapore) as to whether punishments are mandatory or discretionary

Impetus for review

3 The meaning of the phrase “shall be liable to” is ambiguous when only the phrase “shall be liable to” is used in (a) the entire provision, whether single- or multiple- limbed; or (b) at least one limb of a multiple-limbed provision.

4 The ambiguity of the phrase “shall be liable to” can complicate sentencing decisions. Chief Justice Yong Pung How remarked in a 1998 decision in *PP v Lee Soon Lee Vincent*⁴ that

“bearing in mind the general usage of the words “shall be liable” and taking into account their usual effect, I would have thought that to avoid confusion, future provision might be worded differently if a mandatory effect was so desired. The court does not always have the benefit of the full legislative history of a provision. It must frequently simply rely on the wording of relevant sections as they appear in the statutes for the regular disposal of its cases”.

² *Lim Li Ling v PP* [2007] 1 SLR 165

³ *Poh Boon Kiat v PP* [2014] SGHC 186

⁴ *PP v Lee Soon Lee Vincent* [1998] 3 SLR 552 at [27]

Recommendation

5 The PCRC proposes that the terms “shall be punished with” and “may be punished with” be used to prescribe mandatory and discretionary punishments respectively. Within the Penal Code, we have proposed amendments in ambiguous provisions where the mandatory and discretionary nature of punishments prescribed is unclear.

6 Within the Penal Code, where only the phrase “shall be liable” is used in a provision, it cannot be assumed that the phrase “shall be liable” confers discretion upon the court. Instead, the meaning must be determined based on the textual and legislative context of the provision.⁵

Legislative Context

7 In *Poh Boon Kiat v PP*, based on the legislative history of the provision, Chief Justice Sundaresh Menon found that a proper reading of the punishment provision under Sections 140(1) and 146 of the WC mandated the imposition of a term of imprisonment, in spite of the apparent discretionary nature of the phrase “shall be liable on conviction to imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding \$10,000”.

8 Following *Poh Boon Kiat v PP*, the Women’s Charter (Amendment) Act 2016 amended Sections 39, 40(1), 40(2), 140(1), 141(1), 142 and 146 to delete the words “be liable on conviction to imprisonment”, and replace them with “on conviction be punished with imprisonment”. The amendment thus brought the usage of the phrases “shall be liable” and “shall be punished” in WC in alignment with the conventional understanding of both phrases.

Textual Context

9 Where there is only one sentence imposed on the offender by the provision, the phrase “shall be liable” must necessarily carry a mandatory connotation, in order to avoid the absurd result that no sentence may be imposed on the offender at all. This was held in *Chng Gim Huat v PP* at para. 100-101⁶, and affirmed in *PP v Mahat* at para. 28.

Provisions where “shall be liable to” is exclusively used – ss 137, 376C

10 There are two provisions in the Penal Code which make exclusive use of the phrase “shall be liable to”: ss 137 and 376C. Where there is only one sentence imposed on the offender by the provision, the phrase “shall be liable to” must necessarily carry a mandatory connotation. This avoids the absurd result that no sentence may be imposed on the offender at all. It is clear from the textual contexts of both ss 137 and 376C that the punishments are clearly *mandatory*. The proposed amendments are set out in red font below.

Deserter concealed on board merchant vessel through negligence of master

137. The master or person in charge of a merchant vessel, on board of which any deserter from the Singapore Armed Forces or any visiting forces lawfully present in Singapore is concealed, shall, though ignorant of such concealment, be ~~liable to~~ punished with a penalty not exceeding \$1,500, if he might have known of such concealment, but for some neglect of

⁵ *Poh Boon Kiat v PP* [2014] SGHC 186 and *PP v Lee Soon Lee Vincent* [1998] 3 SLR 552

⁶ *Chng Gim Huat v PP* [2000] SGHC 127

his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

Commercial sex with minor under 18 outside Singapore

367C.- (1) Any person, being a citizen or a permanent resident of Singapore, who does, outside Singapore, any act that would, if done in Singapore, constitute an offence under section 376B, shall be guilty of an offence.

(2) A person who is guilty of an offence under this section shall be ~~liable to~~ **punished with the same punishment to which he would have been liable had he been convicted of an offence under section 376B.**

Provisions where “shall be liable to” is exclusively used in one or more limbs of a multiple-limbed provision – ss 115, 307(1)

11 Where any limb of a multiple-limbed provision contains only the phrase “shall be liable to”, the meaning of “shall be liable” depends on the textual and legislative contexts. There are two provisions in the Penal Code which satisfy this condition: ss 115 and 307(1).

12 In ss 115 and 307(1), the first limb prescribes a mandatory imprisonment sentence (underlined) and a discretionary fine (in bold). In both provision, the second limb prescribes the punishment for a *more aggravated* form of the offence in the first limb. However, in both cases, the second limb uses the phrase “shall be liable” for the imprisonment sentence and fine. It is therefore ambiguous as to whether the imprisonment sentence in the second limb is mandatory or discretionary.

13 Since the first limb for both provisions carries a mandatory imprisonment sentence, it is illogical for the second limb – which addresses an aggravated form of the offence in the first limb – to only carry a discretionary imprisonment sentence. Consequently, in the second limb, based on textual context, the correct interpretation of the phrase “shall be liable” used to prescribe imprisonment is a *mandatory* connotation, while the phrase “shall be liable” used to prescribe the fine has a *discretionary* connotation.

14 The proposed amendments to both provisions for clarity is hence as follows:

Abetment of an offence punishable with death or imprisonment for life

115. Whoever abets the commission of an offence punishable with death or imprisonment for life, shall, if that offence is not committed in consequence of the abetment, and no express provision is made by the Code for the punishment of such abetment, be punished with imprisonment for a term which may extend to 7 years, and ~~may also be punished with a shall also be liable to~~ **fine**; and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be ~~liable to punished with~~ **imprisonment for a term which may extend to 14 years, and shall also be liable to may also be punished with a fine.**

Attempt to murder

307.(1) Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment for a term which may extend to 15 years, and ~~shall also be liable to may also be punished with a~~ **fine**; and if hurt is caused to any person by such act, the

offender shall be ~~liable~~ punished with either ~~to~~ imprisonment for life, or ~~to~~ imprisonment for a term which may extend to 20 years, and ~~shall also be liable to~~ may also be punished with caning or fine or both.

Recommendation 154: Recommend that new legislation and amendments to existing legislation should use the phrases “shall be punished with” and “may be punished with” to prescribe mandatory and discretionary punishments respectively

Impetus for review

15 The current use of the terms “shall be punished with” and “shall be liable to” may continue to pose some confusion. On plain reading, the use of the term “shall” may inadvertently connote a mandatory nature to the punishment provided for.

Recommendation

16 As such, to eliminate ambiguity of interpretation, the PCRC proposes to use the terms “*shall* be punished with” and “*may* be punished with” to clearly denote mandatory and discretionary punishments respectively. Henceforth, this should be done for all legislation.

Conclusion

17 The PCRC is of the view that the amendment to the language prescribing mandatory or discretionary punishments for offences would greatly clarify the Penal Code and future legislation.

SECTION 35: HURT AND GRIEVOUS HURT

SUMMARY OF RECOMMENDATIONS

- (155) Increase maximum imprisonment term for s 323 (Voluntarily causing hurt) to 3 years' imprisonment, while keeping this a non-arrestable offence
- (156) Increase maximum imprisonment term for s 334 (Voluntarily causing hurt on grave and sudden provocation) to 6 months' imprisonment
- (157) Introduce a new offence of voluntarily causing hurt resulting in grievous hurt, with a maximum penalty of 5 years' imprisonment

Introduction

Under the TOR of the PCRC, para 2(b)(v), the PCRC is to rationalise, recalibrate, and modernise the substantive offences in the Penal Code, including proposals with respect to reviewing punishment provisions to ensure proportionality to seriousness of the offence, as well as bail and arrest powers. The PCRC reviewed the offences in the Penal Code to ensure that the punishments meted out continue to be commensurate with the seriousness of the offences committed.

2 In this section, the PCRC considered the adequacy of the current sentencing framework relating to hurt offences to determine if the current sentencing ranges led to outcomes that were proportionate to the harm caused.

Current Law

3 The offences relating to voluntarily causing of hurt by a person are found in ss 319-335. Broadly, this class of offences is classified into two degrees of hurt – hurt *simpliciter* and grievous hurt.¹ There are further sub-classifications into the means by which the hurt is caused, and the purpose for which the hurt is caused.

Section	Nature of offence	Prescribed Maximum sentence
323	Voluntarily causing hurt <i>If the accused can prove grave and sudden provocation under s 334, the maximum sentence is 3 months' imprisonment and/or \$2,500 fine.</i>	2 years' imprisonment and/or \$5,000 fine
324	Voluntarily causing hurt by dangerous weapons or means	7 years, and/or fine, and/or caning
330	Voluntarily causing hurt to extort confession or to compel restoration of property	

¹ "Grievous hurt" is defined in s 320 of the Penal Code as (a) emasculation; (aa) death; (b) permanent privation of the sight of either eye; (c) permanent privation of the hearing of either ear; (d) privation of any member or joint; (e) destruction or permanent impairing of the powers of any member or joint; (f) permanent disfiguration of the head or face; (g) fracture or dislocation of a bone; (h) any hurt which endangers life, or which causes the sufferer to be, during the space of 20 days, in severe bodily pain, or unable to follow his ordinary pursuits; (i) penetration of the vagina or anus, as the case may be, of a person without that person's consent, which causes severe bodily pain.

332	Voluntarily causing hurt to deter public servant from his duty	
327	Voluntarily causing hurt to extort property or to constrain to an illegal act	10 years, and/or fine, and/or caning
328	Causing hurt by poison, with intent to commit an offence	
325	Voluntarily causing grievous hurt <i>If the accused can prove grave and sudden provocation under s 335, the maximum sentence is 6 years' imprisonment and/or \$10,000 fine.</i>	10 years, and/or fine, and/or caning
331	Voluntarily causing grievous hurt to extort confession or to compel restoration of property	
326	Voluntarily causing grievous hurt by dangerous weapons or means	15 years, and/or fine, and/or caning
333	Voluntarily causing grievous hurt to deter public servant from his duty	
329	Voluntarily causing grievous hurt to extort property or to constrain to an illegal act	Life imprisonment, and/or fine, and/or caning

Recommendation 155: Increase maximum imprisonment term for s 323 (Voluntarily causing hurt) to 3 years' imprisonment, while keeping this a non-arrestable offence

Current law

4 Section 323 of the Penal Code criminalises the act of voluntarily causing hurt to another person, and prescribes a maximum sentence of up to 2 years' imprisonment and/or fine of up to \$5,000.

5 Where minor injury is caused, s 323 offences tend to be punished by the imposition of fine. In appropriate cases, a probation order may also be made. By contrast, s 324 offences are punishable with mandatory imprisonment.

Impetus for review

6 The narrow and relatively low sentencing range for s 323 offences has led to depressed sentences being meted out for most s 323 offences, as the range does not sufficiently take into account the full spectrum of aggravating factors which include:

- (a) Especially serious injuries that do not qualify as grievous hurt: In *PP v Ong Chee Heng*², the accused had punched the victim multiple times in a brutal and sustained attack after they got into an argument. The victim suffered permanent damage to his eye structures as a result, and there was a chance that the victim would be permanently blinded in one eye. The Prosecution sought a sentence of 6 months' imprisonment for the charge under s 323. As the precedents for s 323 involving

² *PP v Ong Chee Heng* [2016] SGMC 58

punching that had resulted in eye injuries and facial fractures ranged from one to three months' imprisonment, and did not support the sentence sought, the Prosecution cited some s 325 precedents where injuries of similar gravity were punished with 6 – 9 months' imprisonment. The District Judge agreed that the severity of the attack and injuries were more aggravated than a s 325 precedent where the offender had been sentenced to 9 months' imprisonment, but declined to take the s 325 precedent into account. The accused was sentenced to 20 weeks' imprisonment.

- (b) Group attacks by less than 5 attackers: Group attacks involving 5 or more assailants can be prosecuted as rioting under s 147 of the Penal Code, which attracts a maximum punishment of 7 years' imprisonment and mandatory caning. Even where the victim suffers minor injuries, the sentencing precedents show that the usual range of sentences is 15 – 24 months' imprisonment³. In contrast, group attacks involving less than 5 attackers, which are prosecuted as s 323 offences, tend to be punished with 1 – 4 months' imprisonment, even when the injuries to the victims are on par with those sustained by victims in rioting cases. A difference in the number of assailants (which could be merely a difference of one) should not account for the drastic disparity in sentencing, when the hurt caused is similar.
- (c) Prolonged aggravated assault: In *PP v Casey Sabrina Ng @ Asha d/o Verma* (unreported), the victim was assaulted viciously and in a sustained manner for 18 minutes⁴. However, as the injuries she sustained (bruises and lacerations on her eyes, face, chest and neck, head injuries, dental trauma and post-traumatic stress disorder) did not qualify as grievous hurt, the Prosecution could only proceed against the victim on 5 charges under s 323, and 2 charges under s 337(a) (for throwing various objects at the victim). As the accused had relevant antecedents, she was sentenced to corrective training ("CT") of 5.5 years. But for the suitability of CT in this case, there was a good chance that the global sentence imposed would not have exceeded 9 – 12 months' imprisonment, because the particular injuries would have only attracted 3 – 4 months' imprisonment, and the operation of the one transaction rule and totality principle would have resulted in at most three of the sentences running consecutively.

7 The problem of depressed sentences for s 323 offences is compounded by the fact that the courts have taken the view that the maximum sentence for any offence should only be imposed if the conduct in question falls within the range of the worst cases of the type: *Sim Gek Yong v PP*⁵. As s 323 factual scenarios are highly varied, judges tend to be reluctant to classify cases as being the worst of the type, which can explain why sentences usually do not go beyond 12 months' imprisonment.

Recommendations

³ *Sentencing Practice* at pp 379 – 403.

⁴ The accused had choked the victim at the 12th floor of a lift lobby, pushed her against a wall, and punched her on her face numerous times. Even after the victim had fallen to the ground, the accused stomped on the victim's head at least 10 times, before returning to her HDB unit. About 30 seconds later, the accused came out of her unit and stamped the victim on her face, and attacked her with various objects. This carried on until the victim crawled away from the lift lobby and laid down on the ground in exhaustion. When the victim tried to get up after a while, the accused kicked and stamped the victim's head, and punched and slapped her repeatedly.

⁵ *Sim Gek Yong v PP* [1995] 1 SLR(R) 185 at [10] – [14].

8 The PCRC proposes to increase the maximum sentence for s 323 offences from 2 years' imprisonment to 3 years' imprisonment, and retain the current fine quantum of \$5,000. An uplift of the maximum imprisonment from 2 to 3 years' imprisonment would signal legislative intent for general benchmarks for s 323 offences to be increased across the board, to allow for the full spectrum of aggravating factors to be taken into account across the entire sentencing range.

9 The PCRC had considered other options such as expanding the definition of "grievous hurt" to take into account the seriousness of the outcome, such that s 323 offences where serious injuries resulted could be taken under s 325 instead, and subject to the higher sentencing range for that offence. However, the PCRC was of the view that it would not be possible to exhaustively list all forms of serious injuries. There may also be factors other than seriousness of outcome, such as group attacks of less than 5 persons, and prolonged assault, which would not be taken into account. Group attacks of 5 or more persons can be prosecuted as Rioting under s 147 of the Penal Code, which attracts higher maximum punishments of 7 years' imprisonment and mandatory caning. In contrast, group attacks involving less than 5 attackers tend to be prosecuted under s 323, with lower punishments. For prolonged assault that does not result in grievous hurt, these cases can only be prosecuted as multiple charges of VCH under s 323. As such, the PCRC was of the view that a general increase in the maximum imprisonment terms would be preferable.

10 The PCRC further considered whether s 323 should remain non-arrestable. Currently, complainants file Magistrate's complaints before Police commence investigation. For egregious cases, Police retains and actively exercises the discretion to investigate these cases, even without the complainant filing a Magistrate's Complaint. On balance, the PCRC recommends that s 323 should continue to be a non-arrestable offence, as this would retain the current mechanism where only meritorious cases are escalated through the Magistrate's Complaints process for Police to follow up on. The Police can continue to effect arrests in cases involving hurt, if other arrestable Penal Code offences such as disorderly behaviour or public nuisance are disclosed.

Recommendation 156: Increase maximum punishments for s 334 (Voluntarily causing hurt on grave and sudden provocation) to 6 months' imprisonment

11 The PCRC further recommends a consequential amendment to cater for a corresponding increase in the maximum sentence for s 334 (Voluntarily causing hurt on grave and sudden provocation) from the current maximum sentence of 3 months' imprisonment and/or fine of up to \$2,500, to 6 months' imprisonment and/or fine of up to \$2,500.

Recommendation 157: Introduce a new offence of voluntarily causing hurt resulting in grievous hurt, with a maximum penalty of 5 years' imprisonment

Impetus for review

12 Currently, if an offender intends to only cause hurt, but death or other forms of grievous hurt (eg paralysis) result instead, he would be charged under s 323, punishable with a maximum of 2 years' imprisonment and/or \$5,000 fine. The PCRC is of the view that the current punishments for such cases are unsatisfactory, and the law should cater to cases where an offender intends to cause hurt, but death or other forms of grievous hurt resulted instead. Due

to the seriousness of the outcome caused, the offence should carry a more serious punishment than the current s 323 offence.

Recommendation

13 The PCRC is of the view that the law should cater to circumstances where the offender intends to cause hurt, but death or grievous hurt resulted instead (*eg* paralysis). This offence would be punishable with a maximum of 5 years' imprisonment and/or maximum fine of \$10,000. Where such instances occur, the public feels a sense of injustice when it learns that the accused was charged under s 323. The new offence would provide for more proportionate punishments when severe injuries are caused to the victim. In sentencing persons convicted of this new offence, the courts should take into account the consequences caused, even though the accused person might not have intended for them to occur.

14 This offence would be arrestable, and there would be variants of it in circumstances where provocation is involved (like ss 334 and 335), which would be punishable by a maximum of one years' imprisonment and/or fine of \$7,500.

Conclusion

15 With the amendments to the sentencing framework for voluntarily causing hurt cases, the PCRC is of the view that the law will be better able to provide for proportionate sentencing outcomes, especially in serious cases of voluntarily causing hurt, and where the offender did not intend to cause grievous hurt, but grievous hurt resulted.

SECTION 36: ASSAULT OF PUBLIC SERVANTS

SUMMARY OF RECOMMENDATIONS

(158) Amend s 332 (Voluntarily causing hurt to a public servant) to state that an imprisonment term should generally be imposed, unless the accused can show that there were exceptional circumstances

Introduction

While assault and other acts of force are criminalised in the Penal Code, the assault of public servants is criminalised under separate provisions with enhanced punishments. This affords public servants, and law enforcement officers in particular, extra protection against the use or threat of violence by persons who intend to deter them from performing their duties, and signals society's severe disapproval of such actions. In this section, the PCRC considered whether the current sentencing outcomes were adequate and proportionate.

Current law

2 A comparison of the provisions for (a) assault in general, and (b) assault of public servants is provided below:

Offence	General provision		Provision for public servants	
	Section	Maximum punishment	Section	Maximum punishment
Threat of <u>injury</u> to public servant		NA	189	Imprisonment up to 2 years or fine or both
Using <u>criminal force</u>	352	Imprisonment up to 3 months or fine up to \$1,500 or both	353	Imprisonment up to 4 years or fine or both
<u>Assaulting</u> or obstructing public servant suppressing <u>riot</u> or <u>affray</u> , dispersing <u>unlawful assembly</u> , etc.		NA	152	Imprisonment up to 8 years or fine, or both
Voluntarily causing <u>hurt</u> ("VCH")	323	Imprisonment up to 2 years, or fine up to \$5,000, or both	332	Imprisonment up to 7 years, or fine, or caning, or any combination
Voluntarily causing <u>grievous hurt</u> ("VCGH")	325	Imprisonment up to 10 years, or fine, or caning, or any combination	333	Imprisonment up to 15 years, or fine, or caning, or any combination

3 The definitions of terms underlined in the table above are provided in ss 44 (injury), 350 (criminal force), 351 (assault), 146 (riot), 267A (affray), 141 (unlawful assembly), 319 (hurt) and 320 (grievous hurt) of the Penal Code. The full definitions of these terms are in the Annex.

4 In practice, most persons who assault public servants are charged under s 332 and 353. The prevailing sentencing practices are as follows:

Section	Offence	Maximum Punishment	Sentencing practice												
353	Using criminal force	Imprisonment up to 4 years or fine or both	<ul style="list-style-type: none"> In <i>PP v Walter Marcel Christoph</i>¹, District Judge Lim Keng Yeow concluded from past cases that the use of criminal force against law enforcement officers should attract a sentence of 3 – 5 weeks’ imprisonment. 												
332	VCH	Imprisonment up to 7 years, or fine, or caning, or any combination	<ul style="list-style-type: none"> In <i>Jeffrey Yeo</i>, the High Court introduced a three-category framework for cases of causing hurt to police officers and public servants who are performing duties akin to police duties: <table border="1" data-bbox="715 763 1385 1176"> <thead> <tr> <th>Cat.</th> <th>Circumstances</th> <th>Sentencing band</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Lesser harm and lower culpability</td> <td>Fine or up to one year’s imprisonment</td> </tr> <tr> <td>2</td> <td>Greater harm and lower culpability <u>OR</u> Lesser harm and higher culpability</td> <td>One to three years’ imprisonment</td> </tr> <tr> <td>3</td> <td>Greater harm and higher culpability</td> <td>Three to seven years’ imprisonment</td> </tr> </tbody> </table> <p>For Category 1, the High Court further added that a custodial sentence of two to nine months’ imprisonment would generally be imposed for cases involving causing hurt to police officers, and that “fines should be meted out only in very exceptional cases”, such as a very young offender shoving a police officer lightly in a one-off incident away from the public’s eyes and hearing, and pleading guilty early.</p>	Cat.	Circumstances	Sentencing band	1	Lesser harm and lower culpability	Fine or up to one year’s imprisonment	2	Greater harm and lower culpability <u>OR</u> Lesser harm and higher culpability	One to three years’ imprisonment	3	Greater harm and higher culpability	Three to seven years’ imprisonment
Cat.	Circumstances	Sentencing band													
1	Lesser harm and lower culpability	Fine or up to one year’s imprisonment													
2	Greater harm and lower culpability <u>OR</u> Lesser harm and higher culpability	One to three years’ imprisonment													
3	Greater harm and higher culpability	Three to seven years’ imprisonment													

Impetus for review

5 The PCRC notes that there has been an increasing trend of physical and verbal abuse against Police officers and other Home Team officers, *ie* officers from the SCDF, the CNB, the ICA, and the SPS. The statistics submitted by the Prosecution in *Jeffrey Yeo* show a steady increase in the total number of cases of physical hurt and verbal abuse against Police and Home Team officers.

6 Under the sentencing framework set out in *Jeffrey Yeo*, the lowest sentencing band is for less serious cases of causing hurt to a Police officer and public servants performing duties

¹ *PP v Walter Marcel Christoph* [2013] SGDC 305

akin to police duties includes a fine. However, the High Court agreed that the sentencing norm of 2 – 9 months’ imprisonment would still generally be imposed for cases involving hurt to police officers and public servants performing duties akin to police duties (eg auxiliary police officers, Commercial Affairs Officers appointed under section 64 of the PFA, intelligence officers appointed under section 65 of the PFA, and officers of the Special Constabulary appointed under sections 66 – 68 of the PFA).²

7 Notwithstanding that the lowest band of sentencing encompasses fines, the High Court noted in the same judgement that “the custodial threshold is generally crossed for offences under s 332 of the Penal Code. Fines would only be appropriate at the lowest end of the harm-and-culpability spectrum. This sentencing option should generally be available only to young offenders or offenders with some mental disorder.”³

8 While the sentencing framework in *Jeffrey Yeo* applies to police officers and public servants performing duties akin to police duties, the PCRC is of the view that other uniformed officers are also vulnerable to assault by the public, and are deserving of greater protection from assault. Assaults of any uniformed officer, if widespread, will undermine the perceived authority of that uniformed service, and potentially, the rule of law. Moreover, police officers are not the only victims of assault by members of the public. In *PP v Theyvasigamani*⁴ for example, the offender was sentenced to an aggregate of 15 months’ imprisonment for spitting, punching and verbally abusing three paramedics from the SCDF.⁵ The District Judge identified a “pattern of reoffending in that the accused would get himself drunk, receive or demand medical attention and then assaulted the medical professionals who attend to him.”⁶

Recommendation 158: Amend s 332 (Voluntarily causing hurt to a public servant) to state that an imprisonment term should generally be imposed, unless the accused can show that there were exceptional circumstances

9 Considering the persistence of assault against public servants in general and uniformed officers in particular, the PCRC considered if mandatory imprisonment would be appropriate for offences under s 332 (Voluntarily causing hurt to a public servant). This would signify a more deterrent stance against all such offences committed against public servants, and lead to a general increase in sentencing benchmarks.

10 However, the PCRC acknowledges that there would be a small number of cases where mandatory imprisonment would not be appropriate, such as where young offenders were involved, the incident took place in a non-public place, and where the offender showed genuine remorse for his actions. As such, the court should be given flexibility to mete out punishments that are commensurate with the offender’s culpability and circumstances. To balance the need for proportionate punishments and the need to signal society’s strong disapprobation for offenders who cause hurt to public servants, the PCRC recommends that the current sentencing benchmarks in *Jeffrey Yeo* should be codified for all public servants. This would mean that for

² *PP v Yeo Ek Boon Jeffrey* [2017] SGHC 306, at [54]

³ *Id.*, at [67].

⁴ *PP v Theyvasigamani* [2015] SGDC 344

⁵ The high sentence for the three charges under ss 332, 353 Penal Code and s 8(d) of the POHA was primarily due to the consideration that the offender had 24 criminal antecedents for assaulting and abusing public servants.

⁶ *Id.*, at 26

offences under s 332, the punishment should be a term of imprisonment, but the court could depart from this where the accused was able to show that there were exceptional circumstances.

Conclusion

11 On balance, the recommendation seeks to protect public servants and retain the flexibility for the courts to consider the circumstances of each case. Given the public-facing nature of their duties, public servants are vulnerable to assault by the public, and are deserving of greater protection.

ANNEX

Definition of Terms

Section	Term	Definition
44	Injury	The word “injury” denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.
350	Criminal force	Whoever intentionally uses force to any person, without that person’s consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.
141	Unlawful assembly	An assembly of 5 or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is — (a) to overawe by criminal force, or show of criminal force, the Legislative or Executive Government, or any public servant in the exercise of the lawful power of such public servant; (b) to resist the execution of any law, or of any legal process; (c) to commit any offence; (d) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or (e) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
267A	Affray	Where 2 or more persons disturb the public peace by fighting in a public place, they are said to “commit an affray”.
146	Riot	Whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.
319	Hurt	Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.
320	Grievous hurt	The following kinds of hurt only are designated as “grievous”: (a) emasculation; (aa) death; (b) permanent privation of the sight of either eye; (c) permanent privation of the hearing of either ear; (d) privation of any member or joint; (e) destruction or permanent impairing of the powers of any member or joint;

		<p>(f) permanent disfiguration of the head or face;</p> <p>(g) fracture or dislocation of a bone;</p> <p>(h) any hurt which endangers life, or which causes the sufferer to be, during the space of 20 days, in severe bodily pain, or unable to follow his ordinary pursuits;</p> <p>(i) penetration of the vagina or anus, as the case may be, of a person without that person's consent, which causes severe bodily pain.</p>
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SECTION 37: USE OF LIFE IMPRISONMENT

SUMMARY OF RECOMMENDATIONS

- (159) Removal of life imprisonment for ss 75 (Punishment of persons convicted, after a previous conviction, of an offence punishable with 3 years' imprisonment), 195 (Giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment), 409 (Criminal breach of trust by public servant, or by banker, merchant, or agent)
- (160) Removal of life imprisonment for s 412 (Dishonestly receiving property stolen in the commission of a gang-robbery) and rationalise remaining punishments

Introduction

In this section, the PCRC sought to examine the rationale and criteria for life imprisonment sentences, especially in relation to non-violent offences. The PCRC considered if life imprisonment sentences should be removed, especially for non-violent offences. Research was focused on the local context, to determine if there had been any statements made concerning the policy approach taken in Singapore for the use of life imprisonment as a sentencing option. A comparison was also done between Singapore and other Commonwealth jurisdictions to determine general approaches to life imprisonment as a sentencing option.

Current law

2 A list of all offences in Singapore for which life imprisonment is a sentencing option is set out in the Annex. This list includes offences in other statutes, to provide a comprehensive overview of offences for which life imprisonment is a sentencing option. However, in determining if life imprisonment should be removed or included for certain offences, the PCRC's recommendations are focused exclusively on offences within the Penal Code.

3 Since 1997, a sentence of life imprisonment has been interpreted as the duration of the offender's natural life.¹ This position was codified in s 54 of the Penal Code, which states that "imprisonment for life" means "imprisonment for the duration of the person's natural life." Section 50P of the Prisons Act provides that inmates who have been sentenced to life imprisonment would be reviewed after 20 years' imprisonment to assess his suitability for release.

4 In general, the sentence of life imprisonment in the Penal Code is reserved for crimes against the State, piracy, serious crimes enacted pursuant to international treaty obligations, and serious violent crimes. There are, however, the following notable exceptions:

- (a) Enhanced punishments for repeat offenders who commit offences relating to coins and government stamps and offences relating to property (s 75);
- (b) Offences associated with the giving of false evidence (ss 194-200);
- (c) Dishonestly receiving property stolen in the commission of a gang robbery (s 412); and

¹ *Abdul Nasir bin Amer Hamsah v PP* [1997] SGCA 38

- (d) Criminal breach of trust by public servant, or by banker, merchant, or agent (s 409)

Rationale for use of life imprisonment as a sentencing option

5 In the previous review of the Penal Code in 2007, the sentence of life imprisonment was included for two offences, and removed for 13 offences.² The 13 offences for which life imprisonment was removed as a sentencing option related to the counterfeiting of coins and Government stamps, and forgery offences. The rationale for this removal was that these offences were neither prevalent nor serious. The two offences for which the sentencing option was included as an optional sentence related to offences against the President's person (s 121A), and assaulting the President, Cabinet Member or Member of Parliament, with intent to compel or restrain the exercise of any lawful power (s 124). The rationale provided was that these were serious offences that required that the punishment reflect the severity of the offences.

6 In the same review, the new offence of genocide was included in s 130E of the Penal Code, which included an optional sentence of life imprisonment. The reason for this inclusion was to give greater effect to the Convention on the Prevention and Punishment of the Crime of Genocide, which Singapore acceded to in 1995.

Use of life imprisonment in other Commonwealth jurisdictions

7 A comparison of Singapore with the surveyed Commonwealth jurisdictions³ reveals that there are certain types of offences for which life imprisonment is frequently imposed:

- (a) Murder, and other offences related to murder;
- (b) Aggravated sexual offences;
- (c) Offences against the State;
- (d) Terrorist acts and piracy;
- (e) Drug offences; and
- (f) Serious crimes enacted pursuant to international treaty obligations (*eg* offences relating to genocide and nuclear weapons).

8 Across the jurisdictions surveyed, the consistent general principle that applied was that life imprisonment is reserved for the most severe of offences, and is intended to serve the sentencing objectives of prevention, retribution, and deterrence (both general and specific).⁴

Impetus for Review

² *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 at col 2175 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs)

³ The PCRC studied the use of life imprisonment in the United Kingdom, Australia, and Hong Kong.

⁴ There is unfortunately little authority/ legislative reference to support this policy intent, but it may be inferred from the nature of the offences for which life imprisonment is used as a sentencing option.

9 The use of life imprisonment as a sentencing option for the offences mentioned at paras. 24(a) to (d) is unique to Singapore. The PCRC considered whether life imprisonment should be removed for the offences, given their seriousness and harm caused.

Recommendation 159: Removal of life imprisonment for ss 75 (Punishment of persons convicted, after a previous conviction, of an offence punishable with 3 years' imprisonment), 195 (Giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment), 409 (Criminal breach of trust by public servant, or by banker, merchant, or agent)

10 The PCRC recommends the removal of life imprisonment for the following offences, since they are less serious than other offences which have life imprisonment as a sentencing option.

- (a) Enhanced punishments for repeat offenders who commit offences relating to coins and government stamps and offences relating to property (s 75);
- (b) Punishment for giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment (s 195); and
- (c) Criminal breach of trust by public servant, or by banker, merchant, or agent (s 409)

11 When considering the abovementioned offences on the spectrum of all offences, the PCRC is of the view that it cannot be said that these are offences of such severity as to warrant the same type of punishment as offences such as culpable homicide, genocide, or offences against the State.

12 Furthermore, it is notable that there are no cases where life imprisonment was actually imposed for these offences. The lack of use of life imprisonment as a sentencing option for these offences, despite the long existence of life imprisonment as a sentencing option for such cases, is indicative of the courts' reluctance to impose life imprisonment for these offences, even when they are particularly aggravated.⁵ The courts' reluctance to impose life imprisonment for this class of offences may also be seen as an indication of the lower degree of severity of these offences, relative to offences such as murder, offences against the State, piracy, etc. These property-related offences and offences of giving false evidence are not met with a comparable level of disapprobation.

13 The PCRC had considered whether it would be appropriate to remove life imprisonment as a sentencing option as well under s 194 (Giving or fabricating false evidence with intent to procure conviction of a capital offence. However, there could be immense psychological and economic harm caused by a s 194 offence, as a result of causing the accused person to face capital punishment. Hence, the PCRC is of the view that life imprisonment should be retained as a punishment for s 194, which can be compared with the second limb of s 307 (Attempted murder where hurt is caused).

⁵ See *PP v Lam Chen Fong* [2002] 2 SLR(R) 599 at [29], which shows the High Court's reluctance to consider life imprisonment as a sentencing option for these aggravated financial offences, even though it was clear that the case involved severe offences under s 409.

14 With the amendment to s 195, the punishments for offences set out in ss 196-200⁶ would also be amended, since these offences are punishable under s 195.

Recommendation 160: Removal of life imprisonment for s 412 (Dishonestly receiving property stolen in the commission of a gang-robbery) and rationalise remaining punishments

15 Section 412 is set out as follows:

412. Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of gang-robbery, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to gang-robbers, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.”

16 Section 412 is a double-limbed punishment, where the first limb prescribes a punishment of life imprisonment, whilst the second limb prescribes punishment of imprisonment for up to 10 years. The PCRC recommends removing the punishment of life imprisonment, and increasing the maximum punishment to 20 years’ imprisonment.

17 The removal of the option of life imprisonment would result in a drastic reduction in the maximum available punishment for s 412 from life imprisonment to 10 years’ imprisonment. In order to ensure that s 412 can continue to account for the most egregious offences of this nature, the PCRC recommends increasing the maximum punishment to 20 years’ imprisonment.

Conclusion

18 The PCRC had examined the use of life imprisonment as a sentencing option in the Penal Code, and proposed amendments to rationalise its use as a sentencing option. The PCRC considered that the current definition of life imprisonment was for the offender’s natural life (with review for release after 20 years’ imprisonment), and as such should be reserved only for particularly serious offences which are deserving of such a severe penalty.

⁶ The offences are s 196 (Using evidence known to be false), s 197 (Issuing or signing a false certificate), s 198 (Using as a true certificate one known to be false in a material point), s 199 (False statement made in any declaration which is by law receivable as evidence, s 200 (Using as true any such declaration known to be false).

ANNEX

OFFENCES WITH LIFE IMPRISONMENT IN SINGAPORE LAW

Offence	Section	Limb(s)	Policy reasons for life imprisonment
INCHOATE OFFENCES			
Abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment	115	Same punishment as act abetted	
Criminal conspiracy	120B	Same punishment as if the offence was abetted	
OFFENCES AGAINST THE STATE			
Waging or attempting to wage war or abetting the waging of war against the Government	121	Death	Life imprisonment with liability to fine
Offences against the President's person	121A	Death	Life imprisonment with liability to fine <i>Penal Code ((Amendment) Bill 2007, Singapore Parliamentary Debates vol 83 at col 2175 (22 October 2007))</i>
Offences against authority	121B	Life imprisonment with liability to fine	
Abetting offences under section 121A or 121B	121C	Same punishment as offence abetted	
Collecting arms, etc., with the intention of	122	Life imprisonment with liability to fine	Imprisonment for up to 20 years with liability to fine

Offence	Section	Limb(s)			Policy reasons for life imprisonment
waging war against the Government					
Concealing with intent to facilitate a design to wage war	123	Life imprisonment with liability to fine	Imprisonment for up to 15 years with liability to fine		
Assaulting President, etc., with intent to compel or restrain the exercise of any lawful power	124	Life imprisonment with liability to fine	Imprisonment for up to 20 years with liability to fine		Punishment reflecting the seriousness of the offence <i>Penal Code ((Amendment) Bill 2007, Singapore Parliamentary Debates vol 83 at col 2175 (22 October 2007))</i>
Waging war against any power in alliance or at peace with Singapore	125	Life imprisonment with liability to fine	Imprisonment for up to 15 years with liability to fine	Fine only	
Public servant voluntarily allowing prisoner of State or war in his custody to escape	128	Life imprisonment with liability to fine	Imprisonment for up to 15 years with liability to fine		
Aiding escape of, rescuing, or harbouring such prisoner	130	Life imprisonment with liability to fine	Imprisonment for up to 15 years with liability to fine		
PIRACY BY LAW OF NATIONS					
Piracy by law of nations (if offender does not murder or attempt to murder or endanger the life of any person in the course of piratical act)	130B	Life imprisonment and minimum 12 strokes of the cane			

Offence	Section	Limb(s)			Policy reasons for life imprisonment
GENOCIDE					
Punishment for genocide (if offence does not consist of the killing of any person)	130E	Death	Life imprisonment, or imprisonment for a term which may extend to 20 years		Giving greater effect to the Convention on the Prevention and Punishment of the Crime of Genocide, which Singapore acceded to in 1995 <i>Penal Code ((Amendment) Bill 2007, Singapore Parliamentary Debates vol 83 at col 2175 (22 October 2007))</i>
OFFENCES RELATING TO THE ARMED FORCES (MUTINY / ABETMENT OF DERELICTION OF DUTY)					
Abetting mutiny, or attempting to seduce an officer or a serviceman from his duty	131	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine		
Abetment of mutiny, if mutiny is committed in consequence thereof	132	Death	Life imprisonment with liability to fine	Imprisonment for up to 20 years with liability to fine	
GIVING OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE					
Giving or fabricating false evidence with intent to procure conviction of a capital offence	194	Life imprisonment with liability to fine	Imprisonment for up to 20 years with liability to fine	Death (only if victim was convicted and executed on the strength of the evidence)	
Giving or fabricating false evidence with intent to procure conviction of an offence	195	Same punishment as the offence in question			

Offence	Section	Limb(s)		Policy reasons for life imprisonment
Using evidence known to be false	196	Same punishment as if he had given the false evidence		
Issuing or signing a false certificate	197	Same punishment as if he had given the false evidence		
Using as a true certificate one known to be false in a material point	198	Same punishment as if he had given the false evidence		
False statement made in any declaration which is by law receivable as evidence	199	Same punishment as if he had given the false evidence		
Using as true any such declaration known to be false	200	Same punishment as if he had given the false evidence		
Resistance or obstruction to the lawful apprehension of another person, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death	225(e)	Life imprisonment with liability for fine	Imprisonment for up to 15 years with liability to fine	
HOMICIDE OFFENCES				
Murder under s 300(b), (c) or (d)	302(2)	Death	Life imprisonment with liability to caning	
Culpable homicide not amounting to murder – if done with intention of causing death, or causing	304(a)	Life imprisonment with liability to caning	Imprisonment for up to 20 years with liability to fine or caning	

Offence	Section	Limb(s)			Policy reasons for life imprisonment
bodily injury likely to cause death					
Attempt to murder, if hurt is caused	307	Life imprisonment with liability to caning or fine or both	Imprisonment for up to 20 years with liability to caning or fine or both		
ABETMENT OF SUICIDE OF CHILD OR INSANE PERSON					
Abetment of suicide of child or insane person	305	Death	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
CAUSING DEATH OF YOUNG CHILD OR UNBORN CHILD					
Infanticide	311	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine		
Causing miscarriage without woman's consent	313	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine		
Death caused by act with intent to cause miscarriage (without consent of woman)	314	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine		
VOLUNTARILY CAUSING GRIEVOUS HURT IN AGGRAVATED CIRCUMSTANCES					
Voluntarily causing grievous hurt by	326	Life imprisonment	Imprisonment for up to 20 years with liability to fine or caning		

Offence	Section	Limb(s)		Policy reasons for life imprisonment
dangerous weapons or means		with liability to fine or caning		
Voluntarily causing grievous hurt to extort property or to constrain to an illegal act	329	Life imprisonment with liability to fine or caning	Imprisonment for up to 10 years with liability to fine or caning	
KIDNAPPING / ABDUCTING IN ORDER TO MURDER				
Kidnapping / abducting in order to murder	364	Death	Life imprisonment with liability to caning	
HABITUAL DEALING IN SLAVES				
Habitual dealing in slaves	371	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
GANG ROBBERY				
Gang robbery with murder	396	Death	Life imprisonment with minimum 12 strokes of the cane	Deterring violent crime Reduce threat to public and police officers from injury caused by violent crime <i>Penal Code (Amendment) Bill, 1973, Singapore Parliamentary Debates vol 32 at col 1351 (30 Nov 1973)</i>
Belonging to gang robbers	400	Life imprisonment with minimum 6	Imprisonment for up to 10 years with minimum 6 strokes of the cane	

Offence	Section	Limb(s)		Policy reasons for life imprisonment
		strokes of the cane		
Dishonestly receiving property stolen in the commission of a gang-robbery	412	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
CRIMINAL BREACH OF TRUST BY PUBLIC SERVANT, OR BY BANKER, MERCHANT OR AGENT				
Criminal breach of trust by public servant, or by banker, merchant, or agent	409	Life imprisonment with liability to fine	Imprisonment for up to 20 years with liability to fine	
MISCHIEF IN AGGRAVATED CIRCUMSTANCES				
Mischief affecting railway engine, train, etc.	430A	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
Mischief by fire or explosive substance with intent to destroy a house, etc.	436	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
Mischief described in section 437 when committed by fire or any explosive substance	438	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
HOUSE-TRESPASS IN ORDER TO COMMIT AN OFFENCE PUNISHABLE WITH DEATH				
House-trespass in order to commit an offence punishable with death	449	Life imprisonment with liability to fine	Imprisonment for up to 10 years with liability to fine	
ARMS OFFENCES (ARMS OFFENCES ACT)				

Offence	Section	Limb(s)		Policy reasons for life imprisonment
Being in possession of an arm while committing or apprehended for a scheduled offence	3(3)	Life imprisonment and minimum 6 strokes of the cane		Deter armed robbery; protect on-duty police officers from the threat of armed criminals <i>(Arms Offences Bill, 1973, Singapore Parliamentary Debates vol 32 at col 1344 (30 Nov 1973))</i>
Trafficking in arms	6	Death	Life imprisonment with minimum 6 strokes of the cane	Deter arms trafficking; reduce usage of arms in the commission of crimes such as robbery <i>(Arms Offences Bill, 1973, Singapore Parliamentary Debates vol 32 at col 1344 (30 Nov 1973))</i>
ABDUCTION FOR RANSOM (KIDNAPPING ACT)				
Abduction, wrongful restraint or wrongful confinement for ransom	3	Death	Life imprisonment with liability to caning	Provide for kidnapping for ransom to be treated as an aggravated form of kidnapping (compared to kidnapping under the <i>Penal Code</i>); deter criminally-minded kidnappers from kidnapping for ransom <i>(Punishment of Kidnapping Bill, 1961, Singapore Parliamentary Debates vol 14 at col 1504 (24 May 1961))</i>
DRUGS OFFENCES (MDA)				

Offence	Section	Limb(s)	Policy reasons for life imprisonment
Unauthorized traffic in controlled drugs in certain circumstances	5 read with Second Schedule	Imprisonment ranging from 20 years to imprisonment for life, minimum 15 strokes of the cane depending on type and quantity of drug	
Unauthorized of import or export in controlled drugs in certain circumstances	7 read with Second Schedule	Imprisonment ranging from 20 years to imprisonment for life, minimum 15 strokes of the cane depending on type and quantity of drug	
Unauthorized trafficking or import or export in controlled drugs in certain circumstances with certificate of substantive assistance	5(1) and 7 read with 33B(2)	Imprisonment for life and minimum 15 strokes of the cane	Enhance operational effectiveness of CNB by allowing them to reach higher up in the hierarchy of drug syndicates <i>(Misuse of Drugs (Amendment) Bill 2012)</i>
Unauthorized trafficking or import or export in controlled drugs in certain circumstances while accused suffering from an abnormality of mind	5(1) and 7 read with 33B(3)	Imprisonment for life	Give courts the discretion to spare a courier with an abnormality of mind from the mandatory death penalty <i>(Enhancing our drug control framework and review of the death penalty (Statement by the Deputy Prime Minister and Minister for Home Affairs))</i>
CORROSIVE AND EXPLOSIVE SUBSTANCES (CORROSIVE AND EXPLOSIVE SUBSTANCES AND OFFENSIVE WEAPONS) ACT			

Offence	Section	Limb(s)	Policy reasons for life imprisonment
Unlawfully and maliciously using (or attempt to use) corrosive or explosive substance or offensive weapon for the purpose of causing hurt	4	Imprisonment for life with minimum 6 strokes of the cane	<p>Severe punishment for a most cowardly and revolting kind of assault</p> <p><i>(Corrosive Substances Bill, 1955, Singapore Parliamentary Debates vol 1 at col 772 (22 September 1955))</i></p> <p>Deter people from using such acts of violence, thus protecting the public</p> <p><i>(Corrosive and Explosive Substances and Offensive Weapons (Amendment) Bill, 1966, Singapore Parliamentary Debates vol 25 at col 67 (21 April 1966))</i></p>
HIJACKING OF AIRCRAFT (HIJACKING OF AIRCRAFT AND PROTECTION OF AIRCRAFT AND INTERNATIONAL AIRPORTS) ACT			
Hijacking of aircraft	3 read with 9	Imprisonment for life	To enable Singapore to discharge its' obligations under two conventions which it was going to ratify: The Hague Convention for the Suppression of Unlawful Seizure of Aircraft; The Montreal Convention for the Suppression of Acts against the Safety of Civil Aviation
Violence against passengers or crew	4 read with 9	Imprisonment for life	
Destroying, damaging or endangering safety of aircraft	5 read with 9	Imprisonment for life	
Other acts endangering or likely to endanger safety of aircraft	6 read with 9	Imprisonment for life	

Offence	Section	Limb(s)	Policy reasons for life imprisonment
Endangering safety at aerodromes	7 read with 9	Imprisonment for life	<i>(Hijacking and Protection of Aircraft Bill, 1978, Singapore Parliamentary Debates vol 37 at col 334 (17 Feb 1978))</i>
Abetting the commission of acts outside Singapore (specific acts mentioned in the provision)	8 read with 9	Imprisonment for life	
OFFENCES RELATING TO RADIOACTIVE MATERIAL (RADIATION PROTECTION) ACT			
Use, etc. of nuclear material	26B	Imprisonment for a term which may extend to life imprisonment	To enable Singapore to fulfil its' obligations under the International Atomic Energy Agency's Convention on the Physical Protection of Nuclear Material and its' 2005 Amendment, which it had acceded to; enhance domestic regulations to protect Singapore from the risk of exposure <i>(Radiation Protection (Amendment) Bill 2014 (7 Jul 2014))</i>
Use, etc., of nuclear material to cause damage to environment	26DA	Imprisonment for a term which may extend to life imprisonment	
Acts against nuclear facilities (no intention to cause serious injury or death to any person and causing death as a result)	26DB	Imprisonment for a term which may extend to life imprisonment	
OFFENCES RELATING TO BIOLOGICAL AGENTS AND TOXINS (BIOLOGICAL AGENTS AND TOXINS) ACT			
Prohibition against use of biological agents for non-peaceful purpose, etc.	5	Imprisonment for a term which may extend to life imprisonment, or fine not exceeding \$1 million, or both	Regulate biological agents and toxins that are of public health concern; prevent terrorist attacks that use biological agents or toxins <i>(Biological Agents and Toxins Bill, 2005, Singapore Parliamentary</i>

Offence	Section	Limb(s)	Policy reasons for life imprisonment
			Debates vol 80 at col 1717 (18 October 2005))

SECTION 38: USE OF FINES

SUMMARY OF RECOMMENDATIONS

- (161) Removal of fines as sentencing option in conjunction with sentences of death
- (162) Removal of fines as sentencing option in conjunction with sentences of life imprisonment, except when there is an inherent element of profitability in the offence
- (163) Include fine as a sentencing option for s 489C (Possession of forged or counterfeit currency notes or bank notes)

Introduction

The use of fines in the criminal justice system rarely attracts attention, because fines are generally regarded as one of the least severe and onerous penalties that can be imposed for a criminal offence. At the extremes, however, the use of fines gives rise to pertinent questions. Where the fine is a sole sentencing option for an offence, questions may be asked about whether it sufficiently punishes the full range of acts targeted by that offence. On the other hand, where a fine is a sentencing option in addition to a sentence of the highest order (*ie* life imprisonment or death), it may be asked whether a fine has particular utility or function in such a case.

2 The PCRC sought to review and rationalise the use of fines in the Penal Code by first articulating the general principles of when fines should be prescribed as a sentencing option, before making recommendations to specific provisions in the Penal Code.

General Principles

3 In Singapore, a fine is the usual sentence for minor offences, regulatory offences and non-serious road traffic offences. A fine would be inappropriate where the seriousness of the offence requires a term of imprisonment to be imposed.¹

Fines as a punitive and deterrent measure

4 Fines have a retributive and deterrent effect. This has been recognised in the High Court in *Chia Kah Boon v PP*², where in sentencing the accused for offences of importing uncustomed goods into Singapore, noted that there were two competing considerations: On the one hand, the fine has to be of an amount which the offender could reasonably pay given his financial means. On the other hand, the fine has to be fixed at a level which would be sufficiently high to achieve the dual objectives of deterrence [in both its personal and general application], and retribution, in the sense of reflecting society's abhorrence of the offence."

5 There are also situations where it would be appropriate to impose an additional fine in rare cases where even the maximum permitted custodial sentence is considered to be inadequate.³

¹ *Sentencing Practice* at p 48.

² *Chia Kah Boon v PP* [1999] 4 SLR 72 at [15]

³ *Ho Sheng Yu Gareth v PP* [2012] 2 SLR 375 at [125].

6 However, where the offender is unable to pay the fine which is commensurate to the offence, a short custodial term should be imposed instead, as default terms of imprisonment are intended to prevent evasion of fines imposed, not to punish those who are genuinely unable to pay.⁴

Fines as a means of disgorging profits

7 It is appropriate to impose a fine in addition to a term of imprisonment where as a result of the crime, the accused has received a financial benefit, and there is reason to suppose that some of that financial benefit is still available to him.⁵

8 However, when a sentence of imprisonment is paired with a fine, and an imprisonment term is set in default, the court should consider the overall sentence to which the accused would be subject to.⁶ The court should ensure that in the event of default, the total sentence to be served will not be disproportionate to the offence.⁷

9 In Singapore, the confiscation of the benefits of crime is usually achieved through the following means:

(a) Disposal order under s 364 of the CPC: Under s 364 of the CPC, during or at the conclusion of any inquiry or trial under the CPC, the court may make a disposal order as it thinks fit in respect of any property produced before it, in respect of which an offence is alleged to have been committed, or which has been used or is intended to have been used for the commission of any offence, or which constitutes evidence of an offence. Possible disposal orders include an order for forfeiture, confiscation, destruction or the delivery of property to any person. The phrase “property in respect of which an offence has been committed” has been judicially interpreted to encompass property that is the fruit or proceeds of a crime. As such, the benefits of offences under the Penal Code can be seized under s 35 of the CPC, and forfeited/confiscated under s 364 of the CPC. As the benefits of crime are frequently seized during the investigative stage, this would be the most straightforward way of confiscating the benefits of crime.

(b) Confiscation order for benefits derived from criminal conduct under the CDSA: Under s 5 of the CDSA, where a person has been convicted of a serious offence as specified in the Second Schedule of the CDSA, the court shall, on the application of the Public Prosecutor, make a confiscation order against the person in respect of benefits derived by him from criminal conduct if the court is satisfied on the balance of probabilities that such benefits have been so derived. If the person holds property or interests in property that is disproportionate to his known sources of income, the holding of which cannot be explained to the satisfaction of the court, he will be presumed until the contrary is proven, to have derived the benefits from criminal

⁴ *Low Meng Chay v PP* [1993] 1 SLR(R) 46 at [13].

⁵ *Ho Sheng Yu Gareth v PP* [2012] 2 SLR 375 at [127], citing *R v Jonathan Russell Green and John Green* (1984) 6 Cr App R (S) 329 with approval.

⁶ *Ho Sheng Yu Gareth v PP* [2012] 2 SLR 375 at [127], citing *R v Emil Savundra, Stuart de Quincy Walker* (1968) 52 Cr App R 637 with approval.

⁷ *Ho Sheng Yu Gareth v PP* [2012] 2 SLR 375 at [127], citing *R v Jonathan Russell Green and John Green* (1984) 6 Cr App R (S) 329 with approval.

conduct.⁸ Notably, many of the offences attracting life imprisonment as a sentencing option are specified in the Second Schedule of the CDSA, *ie* benefits of these offences can be confiscated pursuant to the CDSA.

10 The PCRC is of the view that based on the sentencing objectives of fines, it would be appropriate to impose a fine in conjunction with an imprisonment sentence in two situations: (i) when the maximum prescribed imprisonment term is inadequate, and (ii) as a means of disgorging the available profits of the offence(s).

Recommendation 161: Removal of fines as sentencing option in conjunction with sentences of death

Recommendation 162: Removal of fines as sentencing option in conjunction with sentences of life imprisonment, except when there is an inherent element of profitability in the offence

Current Law

11 The provisions in the Penal Code that allow a fine to be imposed in addition to a sentence of life imprisonment or death are mostly received from the Indian Penal Code. The drafters of the Indian Penal Code had noted that the “fine is one of the most common punishments in the world, and it is a punishment the advantages of which are so great and obvious that we propose to authorise the Court to inflict it in every case, except where forfeiture of all property is necessarily part of the punishment.”⁹

12 In more recent times, there have been piecemeal efforts to remove the use of discretionary fines in addition to a sentence of life imprisonment or death in the Penal Code. Some examples are as follows:

- (a) In 2007, s 121 (Waging or attempting to wage war or abetting the waging of war against the Government) and s 121A (Offences against the President’s person) was amended to remove the option of fine when a sentence of death was imposed, although fine continued to be a sentencing option in addition to a sentence of life imprisonment.
- (b) During the amendments to the mandatory death penalty regime in 2012, discretionary fines were removed as a sentencing option when life imprisonment is imposed for culpable homicide not amounting to murder under s 304(a)(i).

Impetus for Review

13 Yet, fines continue to be a discretionary sentencing option in addition to a sentence of life imprisonment for offences like s 125 (Waging war against any power in alliance with Singapore), s 305 (Abetment of the suicide of a child or insane person), and s 409 (Criminal

⁸ Sections 5(6) – 5(8) of the CDSA.

⁹ Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners* (London: Pelham Richardson, 1838) (“*A Penal Code prepared by the Indian Law Commissioners*”), Note A, p 72.

breach of trust by an agent). A fine also continues to be a discretionary sentencing option in addition to a sentence of death for two offences in the Penal Code: s 132 (Abetment of the mutiny of an officer of an Armed Force, if mutiny is committed in consequence thereof), and s 305 (Abetment of the suicide of a child or insane person). The Annex sets out a full listing of the Penal Code offences punishable with life imprisonment/death *and* discretionary fine.

14 There are several inconsistencies within the Penal Code between offences when a fine is an additional sentencing option to life imprisonment or death. Some examples are as follows:

- (a) A person who wages war against the Government can be punished with death but is not also liable to a fine. In contrast, a person who abets the committing of mutiny by an officer in the Singapore Armed Forces, if mutiny is committed in consequence under s 132, can be punished with death *and* discretionary fine.
- (b) A person who commits murder under ss 300 (b), (c) or (d) can be punished with life imprisonment and discretionary caning, but not fine. In contrast, one who attempts murder under s 307 can be punished with life imprisonment, discretionary caning, *and* discretionary fine.

15 In other legislation, fines are not prescribed as a discretionary sentencing option in addition to sentences of death. Fines are only prescribed as a discretionary sentencing option in addition to life imprisonment in one instance – offences under s 5, s 16, and s 30 of the Biological Agents and Toxins Act¹⁰ are punishable with fine not exceeding \$1 million or to imprisonment for a term which may extend to life imprisonment, or to both. Notably, there is a clear element of commercial profitability inherent in these offences.

16 In case law, there are no reported cases locally where a fine was imposed in addition to a sentence of death or life imprisonment. It is telling that in the only case where life imprisonment was imposed for offences of criminal breach of trust as an agent under s 409, no fine was imposed.¹¹

17 Where the offender is sentenced to life imprisonment and a fine is further imposed on him, the PCRC considered whether default sentences for fines could be served for such cases.¹² Section 50Q of the Prisons Act states that when a remission order is made in respect of a prisoner serving a term of life imprisonment, any default sentence to which he was sentenced shall be remitted, making it clear that a default sentence can run consecutively to a life imprisonment term. However, there is no utility to this because life imprisonment already

¹⁰ The offences are: s 5 (prohibition against use, development, production, stockpiling, transfer of biological agents for non-peaceful purposes), s 16 (contravening the Director's order pertaining to the large-scale production of scheduled biological agents) and s 30 (prohibition against use, development, production, stockpiling, transfer of toxins for non-peaceful purposes).

¹¹ This was the Gemini Chit Fund case, described by the sentencing judge Choor Singh J as “the swindle of the century”. Gemini Chit Fund Corporation Ltd was set up by Abdul Gaffar Mohamed Ibrahim in 1964. The chit fund, a form of micro-financing, attracted many subscribers as it promised unusually high returns on investment. Eventually, the fund collapsed and resulted in a loss estimated at \$50m. Abdul Gaffar was charged with three counts under s 409, amounting to \$3.2m. Unfortunately, this was an unreported case, and the PCRC was not aware if a fine was considered. However, it would suffice to say that the court could have imposed a fine and enforced it by issuing a warrant for the levy of the amount by distress and sale of property belonging to the accused, but it did not.

¹² Pursuant to s 319(1)(b)(v) of the CPC, imprisonment terms in default of fines must be run consecutively with any other any imprisonment term to which the offender is sentenced.

means imprisonment for the duration of a person’s natural life.¹³ Although a person may be released from life imprisonment on remission while he is still alive, the sentence of life imprisonment is merely suspended, and will be remitted fully only when he dies (see s 50R, Prisons Act). Therefore, in theory, any default sentence cannot operate until after the offender’s death. In any event, when a person is released from life imprisonment on remission, any default term is automatically remitted by virtue of s 50Q. In short, this would mean that where an offender was unable or unwilling to pay a fine imposed in conjunction with a sentence of life imprisonment, he would not be able to complete the default sentence for the unpaid fine.

Recommendations

18 The PCRC is of the view that when it comes to a sentence of death, the finality and severity of the sentence means that it is not appropriate to impose an additional fine. Where there are available profits of crime, these can be forfeited or confiscated through seeking a disposal order under s 364 of the CPC or a confiscation order under CDSA, so that no one can be unjustly enriched by these profits.

19 Where there are sentences of life imprisonment, the PCRC proposes to balance the dual function of fines – as a punitive measure, and as a means of disgorgement of profits of crime – by scoping the use of discretionary fines in addition to life imprisonment only to the narrow class of offences where there is a clear element of profitability inherent in the offence. In the Penal Code, there are only two such offences – s 371 (Habitual dealing in slaves) and s 409 (Criminal breach of trust by public servant, or by banker, merchant, or agent)¹⁴.

20 The full list of amendments to penalties are in the table below¹⁵. For punishments involving death or life imprisonment, the discretionary fine (highlighted in red text) will be removed under Recommendations 1 and 2. For the offence of s 371, the PCRC recommends retaining the discretionary fine, as there is a clear element of profitability in this offence:

Section	Offence	Punishments (Proposed sentencing options to be removed in red font)
Offences punishable with death and discretionary fine, and life imprisonment and discretionary fine		
132	Abetment of mutiny, if mutiny is committed in consequence thereof	– Death and discretionary fine , or – Imprisonment for life and discretionary fine , or Imprisonment for up to 10 years and discretionary fine
305	Abetment of suicide of child or insane person	– Death and discretionary fine , or – Imprisonment for life and discretionary fine , or

¹³ See s 54, PC

¹⁴ While s 409 (Criminal breach of trust by public servant, or by banker, merchant or agent) is currently punishable by life imprisonment and discretionary fine, the PCRC had earlier recommended to remove life imprisonment as a sentencing option.

¹⁵ Where the PCRC has recommended to remove life imprisonment as a sentencing option for current offences under the Penal Code, this has not been reflected in this table.

Section	Offence	Punishments (Proposed sentencing options to be removed in red font)
		– Imprisonment for up to 20 years and discretionary fine ¹⁶
Offences punishable with life imprisonment and discretionary fine		
121	Waging or attempting to wage war or abetting the waging of war against the Government	– Death or – Imprisonment for life and discretionary fine
121A	Offences against the President's person	– Death or Imprisonment for life and discretionary fine
121B	Offences against authority	– Imprisonment for life and discretionary fine
121C	Abetting offences against the President's person under s 121A or offences against authority under s 121B	Same punishment as that provided for s 121A and s 121B respectively
122	Collecting arms, etc., with the intention of waging war against the Government	– Imprisonment for life and discretionary fine or Imprisonment for up to 20 years and discretionary fine
124	Assaulting President, etc., with intent to compel or restrain the exercise of any lawful power	– Imprisonment for life and discretionary fine or – Imprisonment for up to 20 years and discretionary fine
125	Waging war against any power in alliance or at peace with Singapore	– Imprisonment for life and discretionary fine or – Imprisonment for up to 15 years and discretionary fine or – Fine
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape	– Imprisonment for life and discretionary fine or – Imprisonment for up to 15 years and discretionary fine
130	Aiding escape of, rescuing, or harbouring prisoner of State or war	– Imprisonment for life and discretionary fine or – Imprisonment for up to 15 years and discretionary fine
131	Abetting mutiny, or attempting to seduce an officer or a serviceman from his duty	– Imprisonment for life and discretionary fine or – Imprisonment for up to 10 years and discretionary fine
194	Giving or fabricating false evidence with intent to procure conviction of a capital offence	– Imprisonment for life and discretionary fine or

¹⁶ The PCRC had earlier proposed higher punishments for this offence in Chapter 5

Section	Offence	Punishments (Proposed sentencing options to be removed in red font)
		<ul style="list-style-type: none"> – Imprisonment for up to 20 years and discretionary fine <p>Where innocent person is convicted and sentenced in consequence of such false evidence:</p> <ul style="list-style-type: none"> – Death – Imprisonment for life and discretionary fine or – Imprisonment for up to 20 years and discretionary fine
307	Attempt to murder	<ul style="list-style-type: none"> – Imprisonment for up to 15 years and discretionary fine <p>Where hurt is caused to any person by such act:</p> <ul style="list-style-type: none"> – Imprisonment for life and discretionary fine and discretionary caning, or – Imprisonment for up to 20 years and discretionary fine and discretionary caning
311	Infanticide	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 10 years and discretionary fine
313	Causing miscarriage without woman's consent	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 10 years and discretionary fine
326	Voluntarily causing grievous hurt by dangerous weapons or means	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 15 years and discretionary fine
329	Voluntarily causing grievous hurt to extort property or to constrain to an illegal act	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 15 years and discretionary fine
371	Habitual dealing in slaves	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 10 years and discretionary fine <p><i>No change, since there is a clear element of profitability in this offence</i></p>

Section	Offence	Punishments (Proposed sentencing options to be removed in red font)
438	Mischief described in s 437 when committed by fire or any explosive substance	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 10 years and discretionary fine
449	House-trespass in order to commit an offence punishable with death	<ul style="list-style-type: none"> – Imprisonment for life and discretionary fine – Imprisonment for up to 10 years and discretionary fine¹⁷

Recommendation 163: Include fine as a sentencing option for s 489C (Possession of forged or counterfeit currency notes or bank notes)

21 Section 489C (Possession of forged or counterfeit currency notes or bank notes) is punishable with a term of imprisonment which may extend to 15 years. However, there is no option for a fine. Section 489C is the only section in Chapter XVII of the Penal Code (offences relating to documents or electronic records, false instruments, and to currency notes and bank notes) which does not carry with it the option of a discretionary fine.

22 The PCRC is of the view that it is entirely conceivable that offenders who fall afoul of s 489C of the Penal Code would profit as a result of their wrongdoing. Given that a function of fines is to disgorge profits, it would be appropriate to impose a fine in addition to a term of imprisonment. This would be a means not only to disgorge the benefits of crime, but also functions as a punitive measure. As such, the PCRC proposes to include the option of a discretionary fine for s 489C. This will provide courts with the sentencing flexibility to impose the appropriate fines in addition to a term of imprisonment, so as to disgorge any profits that an offender still has available, that were obtained as a result of his offending conduct.

Conclusion

23 The PCRC has reviewed the principles for which fines should be imposed in addition to severe penalties such as the death penalty and life imprisonment, and made recommendations accordingly. For sentences of death, the PCRC is of the view that it is not appropriate to impose an additional fine. For life imprisonment, fines should only be retained as a sentencing option in conjunction with life imprisonment when there is an inherent element of profitability in the offence.

¹⁷ In Chapter 6, the PCRC has recommended for the consolidation of house-trespass and house-breaking provisions currently set out in ss 448-458, to be punishable with life imprisonment, or imprisonment term of up to 15 years and discretionary fine.

ANNEX

PENAL CODE OFFENCES PUNISHABLE WITH LIFE IMPRISONMENT/DEATH AND DISCRETIONARY FINE

	S/ N	Offence	Section	Prescribed Punishment
Punishable with	1.	Abetment of mutiny, if mutiny is committed in consequence thereof	132	Death and discretionary fine, or Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	2.	Abetment of suicide of child or insane person	305	Death and discretionary fine, or Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
Punishable with life	1.	Waging or attempting to wage war or abetting the waging of war against the Government	121	Death, or Imprisonment for life and discretionary fine
	2.	Offences against the President's person ¹	121 A	Death, or Imprisonment for life and discretionary fine

¹ Compassing, imagining, inventing etc. the death of or hurt to or imprisonment or restraint of the President.

	S/ N	Offence	Section	Prescribed Punishment
Punishable with life imprisonment and discretionary fine	3.	Offences against authority ²	121 B	Imprisonment for life and discretionary fine
	4.	Abetting offences against the President's person under s 121A or offences against authority under s 121B	121 C	Same punishment as that for provided for s 121A and s 121B respectively
	5.	Collecting arms, etc., with the intention of waging war against the Government	122	Imprisonment for life and discretionary fine, or Imprisonment for up to 20 years and discretionary fine
	6.	Assaulting President, etc., with intent to compel or restrain the exercise of any lawful power	124	Imprisonment for life and discretionary fine, or Imprisonment for up to 20 years and discretionary fine
	7.	Waging war against any power in alliance or at peace with Singapore	125	Imprisonment for life and discretionary fine, or Imprisonment for up to 15 years and discretionary fine, or Fine

² Compassing, imagining, inventing etc. the deprivation or deposition of the President from the sovereignty of Singapore, or the overawing by criminal force of the Government.

	S/ N	Offence	Section	Prescribed Punishment
Punishable with life imprisonment and discretionary fine	8.	Public servant voluntarily allowing prisoner of State or war in his custody to escape	128	Imprisonment for life and discretionary fine, or Imprisonment for up to 15 years and discretionary fine
	9.	Aiding escape of, rescuing, or harbouring prisoner of State or war	130	Imprisonment for life and discretionary fine, or Imprisonment for up to 15 years and discretionary fine
	10.	Abetting mutiny, or attempting to seduce an officer or a serviceman from his duty	131	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	11.	Abetment of mutiny, if mutiny is committed in consequence thereof	132	Death and discretionary fine, or Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	12.	Giving or fabricating false evidence with intent to procure conviction of a capital offence	194	Imprisonment for life and discretionary fine, or Imprisonment for up to 20 years and discretionary fine Where an innocent person is convicted and sentenced in consequence of such false evidence: Death, or Imprisonment for life and discretionary fine, or Imprisonment for up to 20 years and discretionary fine

	S/ N	Offence	Section	Prescribed Punishment
Punishable with life imprisonment and discretionary fine	13	Abetment of suicide of child or insane person	305	Death and discretionary fine, or Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	14	Attempt to murder	307	Imprisonment for up to 15 years and discretionary fine Where hurt is caused to any person by such act: Imprisonment for life and discretionary fine and discretionary caning, or Imprisonment for up to 20 years and discretionary fine and discretionary caning
	15	Infanticide	311	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	16	Causing miscarriage without woman's consent	313	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	17	Voluntarily causing grievous hurt by dangerous weapons or means	326	Imprisonment for life and discretionary fine or discretionary caning, or Imprisonment for up to 15 years and discretionary fine or discretionary caning

	S/ N	Offence	Section	Prescribed Punishment
Punishable with life imprisonment and	18	Voluntarily causing grievous hurt to extort property or to constrain to an illegal act	329	Imprisonment for life and discretionary fine or discretionary caning, or Imprisonment for up to 15 years and discretionary fine or discretionary caning
	19	Habitual dealing in slaves	371	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	20	Criminal breach of trust by public servant, or by banker, merchant, or agent	409	Imprisonment for life and discretionary fine, or Imprisonment for up to 20 years and discretionary fine
	21	Dishonestly receiving property stolen in the commission of a gang-robbery	412	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	22	Mischief affecting railway engine, train, etc.	430 A	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
Punishable with life	23	Mischief by fire or explosive substance with intent to destroy a house, etc.	436	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	24	Mischief described in s 437 when committed by fire or any explosive substance	438	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine
	25	House-trespass in order to commit an offence punishable with death	449	Imprisonment for life and discretionary fine, or Imprisonment for up to 10 years and discretionary fine

SECTION 39: ENHANCEMENT OF PENALTIES TO ENSURE PROPORTIONATE OUTCOMES

SUMMARY OF RECOMMENDATIONS

- (164) Increase fine and introduce imprisonment sentence as punishment option for repeat offenders under s 290 (Public nuisance)*
- (165) Enhance penalties for ss 272-273 (Offences relating to adulterated food)*
- (166) Enhance penalties for ss 274-276 (Offences relating to adulterated drugs)*
- (167) Enhance penalties for s 277 (Fouling the water of a public spring or reservoir)*
- (168) Enhance penalties for s 278 (Making atmosphere noxious to health)*

Introduction

The PCRC undertook a review of penalties in the Penal Code, to determine if the penalties were proportionate to the potential harm that could be caused by the offences.

Recommendation 164: Increase fine and introduce imprisonment sentence as punishment option for repeat offenders under s 290 (Public nuisance)

Current Law

2 The offence of public nuisance is defined in s 268 and punishable under s 290 of the Penal Code with only a maximum fine of \$1,000.

268. A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Explanation—A common nuisance is not excused on the ground that it causes some convenience or advantage.

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to \$1,000.

Impetus for review

3 The PCRC considered whether the maximum fine for this offence should be increased, so as to allow the courts sufficient discretion to impose heavier fines for the most serious offences of this kind. A review of the reported cases indicates that sentences for most offences punished under s 209 of the Penal Code is a fine of \$800 or above. This shows that the courts are already sentencing within the upper range of the current sentencing remit, and the cap of \$1,000 would likely be a limiting factor when the most serious cases of public nuisance arise.

4 The PCRC is also of the view that the current maximum sentence of \$1,000 is not sufficient to deal with situations similar to the two recent cases where significant disruption of service to the public and waste of emergency resources occurred. In the first case, the offender left his blue suitcase unattended at Hougang MRT station while he went to run an errand. In the second case, the offender had left flour outside Woodleigh MRT station to mark a race

route.¹ Both these cases caused significant disruption to essential transport services to members of the public, and led to a waste of emergency resources expended to deal with these incidents. In the current heightened security climate, there is a need for more severe punitive measures to deal with these cases.

Recommendation

5 The PCRC hence recommends to increase the maximum fine for s 290 of the Penal Code to \$2,000. The potential range of cases under s 290 is broad, and increasing the maximum penalty will allow the courts to sentence in a manner that accounts for the severity of the offence. In addition, the PCRC recommends for a short imprisonment term of up to 3 months to be introduced for particularly egregious cases, and for repeat offenders. This would provide a greater sentencing range for the courts to deal with particularly serious cases of public nuisance.

Recommendation 165: Enhance penalties for ss 272-273 (Offences relating to adulterated food)

Recommendation 166: Enhance penalties for ss 274-276 (Offences relating to adulterated drugs)

Recommendation 167: Enhance penalties for s 277 (Fouling the water of a public spring or reservoir)

Recommendation 168: Enhance penalties for s 278 (Making atmosphere noxious to health)

Current Law

6 The following offences were identified by the PCRC as having penalties that are likely to be too low for the most serious forms of offences and harm that could result.

S/N	Provisions	Offence	Current Punishments
3	Sections 272-273	Offences relating to adulterated food	Maximum 6 month's imprisonment and/or fine up to \$1,500
4	Sections 274-276	Offences relating to adulterated drugs	Maximum 6 month's imprisonment and/or fine up to \$3,000
5	Section 277	Fouling the water of a public spring or reservoir	Maximum 1 year imprisonment and/or fine up to \$2,500
6	Section 278	Making atmosphere noxious to health	Maximum 1 year imprisonment and/or fine up to \$2,500

Recommendations

Sections 272-273 (Offences relating to adulterated food)

¹ "Police arrest man, 39, for leaving bag unattended at Hougang MRT station", *The Straits Times* (2 April 2017) <<http://www.straitstimes.com/singapore/trains-to-skip-hougang-station-due-to-security-incident> and [Straits Times](http://www.straitstimes.com/singapore/woodleigh-mrt-station-closed-due-to-security-incident-police-say-suspicious-substance)> (accessed 16 May 2017) (18 April 2017). "Woodleigh MRT incident: Man, 69, arrested for leaving substance, which turns out to be flour, at station", *The Straits Times* (18 April 2017) <<http://www.straitstimes.com/singapore/woodleigh-mrt-station-closed-due-to-security-incident-police-say-suspicious-substance>> (accessed 16 May 2017)

7 The current Penal Code offences require proof that the adulterated food or drink is necessarily noxious to health, and that the offender knows or has reason to believe that this is so. As such, the intent is not merely regulatory, but to cover and punish serious offences where the offenders are likely to have malicious motives to adulterate the food or drink.

8 Upon further review of the provisions and the potential circumstances in which these offences could occur, the PCRC proposes to increase the current penalties in ss 272-273 from the current maximum of 6 month's imprisonment and \$3,000 fine to maximum of 3 years' imprisonment and/or fine. Apart from increasing the maximum imprisonment term for this offence, the PCRC further proposes to remove the current fine ceiling of \$3,000, to ensure that penalties for such offences would be commensurate with the potential widespread serious harm that could be caused. This would allow the courts to account for egregious cases which could potentially cause widespread hurt or death to individuals, such as the tainted powdered formula milk scandal in China.

Sections 274-276 (Offences relating to adulterated drugs)

9 The current Penal Code offences relating to adulterated drugs have the potential to cause widespread poisoning and serious harm to the general public. The motives of the offender are also likely to be malicious, since he knew that these drugs were different from their descriptions for sale. The PCRC is hence of the view that the current penalties under ss 274-276 are too low, and not commensurate with the culpability of such offenders, and the potential for widespread and/or serious harm that could be caused. As such, the penalties for ss 274-276 should be increased from the current maximum of 6 months' imprisonment and \$3,000 fine to maximum of 3 years' imprisonment and/or fine. The fine ceiling of \$3,000 should be removed, to allow the courts to impose penalties that would be commensurate with potentially serious crimes committed with malicious motives.

Section 277 (Fouling the water of a public spring or reservoir)

10 Section 277 of the Penal Code has "direct relevance to environmental protection" as it seeks to prevent water pollution through a penal strategy.² In s 277 of the Penal Code, the offence of corrupting or fouling the water of any public spring or reservoir must render it less fit for the purpose for which it is ordinarily used, and must be done voluntarily. As such, the *mens rea* and outcome of the offenders' actions under s 277 are more serious than the strict liability offences in the Environmental Public Health Act (Cap 96, 2002 Rev Ed) ("EPHA").

11 Water is a scarce resource in Singapore, and reservoirs are potential targets for sabotage, which would have grave consequences for public health. As such, the PCRC is also of the view that penalties for s 277 should be increased from the current maximum of 1-year imprisonment and/or fine of \$2,500 to maximum 3 years' imprisonment and/or fine. The fine ceiling of \$2,500 should be removed, to ensure that courts have greater flexibility to mete out appropriate sentences for serious and egregious cases that cause widespread harm.

Section 278 (Making atmosphere noxious to health)

² Abraham, C.M., *Environmental Jurisprudence in India*. (The Hague: Kluwer Law International, 1999). Cases that have been prosecuted under s 277 of the Indian Penal Code include *Queen v Vitti Chokkan* in 1882, for having dirtied the waters of the Varaga River, the only drinking water in the locality, by washing bullocks therein.

12 Section 278 of the Penal Code requires that the vitiation of the atmosphere must make it “noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way.” There are no direct overlaps with air pollution regulatory offences under the Environmental Protection and Management Act (“EPMA”), which is intended to reduce the harm caused by the offender, and to provide for penalties should he not comply with orders to stop emitting pollutants into the air.

13 As such, s 278 in the Penal Code is meant to deal with cases where the air pollution by the offender has caused clear harm to the community. Given the densely populated nature of Singapore, there is potential for widespread and serious harm to result from irresponsible actions of the offender. Hence, the PCRC recommends that the penalties for s 278 should be increased from the current maximum of 1-year imprisonment and/or \$2,500 fine to a maximum of 3 years’ imprisonment and/or fine. The current fine ceiling of \$2,500 should be removed, to allow the courts to impose appropriate penalties in cases where the offence committed is particularly serious, and the offender has malicious motives or profited from the offence.

Conclusion

14 In its review of punishment provisions in the Penal Code, the PCRC considered whether current penalties were adequate to deter people from committing these offences, and whether current penalties would be commensurate with serious outcomes and widespread harm that could result from the offences. For the offence of Public Nuisance punishable under s 290, the current fine of \$1,000 was assessed to be insufficient in light of current sentencing outcomes and the need to deter repeat offenders. For offences in ss 272-278, the PCRC considered that these offences relate to basic needs and/or have the high potential for widespread harm, and hence penalties should be enhanced to sufficiently deter and punish persons who sabotage them.

**SECTION 40: RATIONALISE PUNISHMENT FOR CHAPTER X OFFENCES
(CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS)**

SUMMARY OF RECOMMENDATIONS

- (169) *Rationalise punishments for Chapter X offences by:*
- a. *Increasing the maximum imprisonment for s 182 (False information, with intent to cause a public servant to use his lawful power to the injury of another person) from 1 to 2 years, to account for a wide range of factual scenarios*
 - b. *Increasing the fines for:*
 - i. *sections 185 (Illegal purchase or bid for property offered for sale by authority of a public servant) and 187a (Omission to assist public servant when bound by law to give assistance) from \$1000 to \$1500*
 - ii. *sections 172b (Absconding to avoid arrest on warrant or service of summons, etc., proceeding from a public servant), 173b (Preventing service of summons, etc., or preventing publication thereof), 174b (Failure to attend in obedience to an order from a public servant), 175b (Omission to produce a document or an electronic record to a public servant by a person legally bound to produce such document or electronic record), 187b (Omission to assist public servant when bound by law to give assistance), and 188b (Disobedience to an order duly promulgated by a public servant) from \$2500 or \$3000 to \$5000;*
 - iii. *section 182 from \$5000 to unlimited*
 - c. *Introducing a fine of up to \$10,000 where Chapter X offences are committed by bodies corporate*
 - d. *Undertaking further study to rationalise penalties for offences relating to contempt of lawful authority of public servants across all Acts, including the Penal Code*

Introduction

In this Chapter, the PCRC considered how to rationalise Chapter X offences of the Penal Code (ss 172 – 190), to ensure proportionality of punishments within Chapter X, and with other legislation.

Current law

2 Chapter X of the Penal Code criminalises contempt of public servants' authority. In general, the mens *rea* element of Chapter X offences is intentional non-compliance with an order or request by a public servant. Chapter X offences include:

- (a) Failure to fulfil legal duties (to provide assistance, to attend in obedience with order, to provide information);
- (b) Obstructing public servant in discharge of his official duties (*eg* refusing oath when duly required to take oath, refusing to answer a public servant, refusing to sign statement, disobedience to order);
- (c) False representations to public servants (*eg* providing false information in various contexts); and
- (d) Threat of injury to prevent public servant from discharging official duties.

3 The penalties for Chapter X offences are amongst the lowest in the Penal Code. 14 of the 19 offences do not attract imprisonment of more than 6 months, and 15 of the 19 have a maximum fine of \$5000 or less. The most serious offences¹ are punishable by imprisonment of up to 3 years and/or fine.

4 While both Chapters X and XI of the Penal Code pertain to obstruction of justice, Chapter XI offences deal with more serious obstructions of justice, where there is *intention to evade legal punishment*, or to *cause wrongful punishment to another person*. Chapter XI offences include the provision of false evidence in court, destruction of evidence, harbouring of offenders, and offences relating to escape from confinement. All Chapter XI offences are punishable by unlimited fine, and/or imprisonment. The maximum terms of imprisonment vary, from 6 months (for failure to report an offence under s 202) to life imprisonment (for fabricating false evidence for capital crimes under s 195). As a whole, the penalties for Chapter XI offences are much more severe than those for Chapter X offences.

5 Prosecutions under most Chapter X offences have been rare. Of the 19 offences, only 3 are frequently prosecuted – ss 177 (furnishing false information), 182 (furnishing false information with intent to cause public servant to use his lawful power to the injury of another person), and 186 (obstructing public servant in discharge of his public functions).

Impetus for review

6 Contempt of the lawful authority of public servants is criminalised in numerous Acts apart from the Penal Code. Public servants are empowered under dedicated legislation to promulgate orders or otherwise enforce regulations in a wide variety of circumstances; most agencies have seen fit to ensure compliance with these orders by criminalising non-compliance in the same dedicated legislation. The Chapter X Penal Code offences are therefore replicated, in some form or other, across different Acts. The penalties for non-compliance vary significantly between Acts.

7 The PCRC therefore reviewed whether the penalties for non-compliance with public servants' directions are:

- (a) Proportionate to the severity of the offence;
- (b) Consistent within the Penal Code, and
- (c) Consistent across different legislation.

Recommendations

Recommendation 169 (a): Rationalise punishments for Chapter X offences by increasing the maximum imprisonment for s 182 (False information, with intent to cause a public servant to use his lawful power to the injury of another person) from 1 to 2 years, to account for a wide range of factual scenarios

Current Law

¹ Sections 177 (Furnishing false information respecting the commission of an offence, etc) and 181 (False statement on oath)

8 Section 182 is the provision in Chapter X most frequently used in prosecutions.

False information, with intent to cause a public servant to use his lawful power to the injury of another person

182. *Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to \$5,000, or with both.*

9 An offence under s 182 can be committed in a wide range of situations for a wide range of purposes. In *Koh Yong Chiah v PP*², the High Court identified six different categories of cases which may be prosecuted under s 182:

- (a) False reports about offences to the police;
- (b) False information given by offenders to shield *themselves* from investigation or prosecution;
- (c) False information given by offenders to shield *others* from investigation or prosecution;
- (d) False information given to public servants to facilitate fraud on a third party to gain some personal benefit;
- (e) Public servant giving false information to another public servant about matters relating to the offender's employment; and
- (f) False information given to subvert a public institution's screening process (for example, falsely declaring one's sexual history when donating blood, or falsely declaring one's home address when registering one's child for primary school).

10 The Penal Code Amendment Act of 2007 increased the maximum punishment for s 182 from 6 months' imprisonment and/or fine up to \$1,000 to 1 year's imprisonment and/or fine up to \$5,000. In *Koh Yong Chiah v PP*, the High Court noted that the 2007 amendments were intended to "afford the courts more flexibility to impose higher sentences when the facts justified it, rather than to signal that Parliament viewed the offence with increased severity."

Sentencing practice

11 In *Koh Yong Chiah v PP*, the High Court concluded that "while certain fact patterns stand out, and while the sentences imposed in cases bearing similar fact patterns may be rationalised, it is doubtful if a single sentencing framework would ever be adequate to cater to the full range of different factual scenarios." Nevertheless, in the grounds of its decision, the High Court set out the following sentencing considerations:

- (a) As a starting point, the custodial threshold is crossed when appreciable harm is caused by the false information.

² *Koh Yong Chiah v PP* [2017] 3 SLR 446

- (b) Harm must be more than *de minimis*; false information must have a causal connection to the harm, and harm can sometimes include potential harm.
- (c) The levels of culpability and harm are relevant for sentencing purposes. A non-exhaustive list of factors affecting the levels of culpability and harm was provided.

12 Based on a survey of past cases cited in *Koh Yong Chiah v PP*, and past cases listed in *Sentencing Practice*, the PCRC's analysis of the general range of past sentences for s 182 are as follows:

S/N	Type of Case	Analysis of sentencing range
1	False reports about offences to the police	<ul style="list-style-type: none"> Imprisonment terms tend to be the norm, as the provision of false information has a serious impact on both the victims of the false allegation as well as on the investigative process. The time the offender took to recant the false statement has a material impact on the sentence to be imposed.
2	False information given by offenders to shield <i>themselves</i> from investigation or prosecution	Varies widely. Relevant factors for sentencing include: <ul style="list-style-type: none"> Complexity of deceptive scheme employed, including whether it was premeditated; Seriousness of the offence which the offender sought to cover up; and Extent to which public resources were wasted due to false information.
3	False information given by offenders to shield <i>others</i> from investigation or prosecution	Similar considerations to (2), although offenders have been treated more lightly in some cases.
4	False information given to public servants to facilitate fraud on a third party, to gain some personal benefit	Sentences differ widely, depending on the type of fraudulent scheme. For example, a four month imprisonment term was meted out for a complex insurance fraud scheme involving foreign syndicates conspiring to stage traffic accidents in Singapore, as in <i>PP v Tew Yee Jeng</i> ³ , whereas a fine was given for a one-off false report about the country in which one's motorcycle was stolen in order to satisfy the conditions for an insurance payout, as in <i>PP v Alvin Chan Siew Hong</i> . ⁴
5	Public servant giving false information to another public servant about matters relating to the offender's employment	Ranges from fine to jail. These cases engage a unique type of public interest related to the integrity of the Public Service.

³ *PP v Tew Yee Jeng* [2016] SGDC 28

⁴ *PP v Alvin Chan Siew Hong* [2010] SGDC 411

S/N	Type of Case	Analysis of sentencing range
6	False information given to subvert a public institution's screening process	<p>Sentence varies widely depending on whether public interest is triggered, and if there is actual harm caused. Some cases are illustrative:</p> <ul style="list-style-type: none"> In <i>PP v Loo Way Yew</i>⁵, the offender was sentenced to 12 months' imprisonment, for falsely declaring his sexual history on six occasions when donating blood. Unbeknownst to him, his blood was HIV-positive, and two persons were infected with HIV as a result. In contrast, the offenders in <i>CLB and another v PP</i>⁶ were each sentenced to one months' imprisonment and a fine of \$800 for a single instance of false declaration of sexual history during blood donation, as nobody was infected with HIV as a result of their false declaration. In <i>Lai Oei Mui Jenny v PP</i>⁷, the offender was sentenced to two months' imprisonment for selling her passport for \$500, but declaring that she had lost it.

Impetus for review

13 Section 182 is unique among Chapter X offences for accommodating an exceptionally wide range of culpability and harm. This leads to two issues. First, given its wide scope, s 182 overlaps with several other offences in the Penal Code, as set out in the following table.

Section	Offence	Punishment
177 (limb 1)	Furnishing false information by person legally bound to furnish information on any subject to any public servant	Imprisonment up to 6 months or fine up to \$5000 or both.
203	Giving false information respecting an offence committed	Imprisonment up to 2 years or fine or both
211 (limb 1)	False charge of offence made with intent to injure	Imprisonment up to 2 years or fine or both
177 (limb 2)	Furnishing false information by person legally bound to furnish information on any subject to any public servant (where information respects the commission of an offence)	Imprisonment up to 3 years or fine or both
211 (limb 2)	False charge of offence made with intent to injure (offence punishable with death or imprisonment of at least 7 years)	Imprisonment up to 7 years or fine or both

⁵ PS 2278/97

⁶ *CLB and another v PP* [1993] 1 SLR 52

⁷ *Lai Oei Mui Jenny v PP* [1993] 2 SLR(R) 406

14 There is some degree of overlap between s 182 and ss 203 and 211, both of which allow for imprisonment up to 2 years:

- (a) False charges of offences with intent to injure may be charged under s 182 or 211. However, s 211 has the additional requirement that the false charge institutes or causes to be instituted any criminal proceeding against the falsely accused person.
- (b) False information to shield oneself or others from prosecution may be charged under ss 182 or 203.

15 Second, the range of sentencing available to the courts is narrow compared to the range of harm and culpability. Despite the 2007 amendments, the High Court noted in *Koh Yong Chiah vs PP* that a “narrow sentencing range is available to the courts under s 182”, particularly given the wide range of factual circumstances under which the offence may be committed. While this comment was an observation rather than a criticism, the PCRC is of the view that the sentencing options could be widened to reflect the wide range of culpability and harm.

Recommendation

16 The PCRC therefore recommends increasing the imprisonment term for s 182 from one year to two years.

17 The PCRC considered that the increase in maximum punishment to 2 years’ imprisonment will bring s 182 on par with ss 203 and 211, despite the higher requirements for s 211. However, the PCRC noted that s 182 accounts for a wider range of factual scenarios, some of which (*eg Loo Way Yew*) can cause more serious harms than the offences under s 203 and 211. Consequently, the proposed new punishment for s 182 is still reasonable.

Recommendation 169(b): Rationalise punishments for Chapter X offences by increasing the fines for: (i) sections 185 (Illegal purchase or bid for property offered for sale by authority of a public servant) and 187a (Omission to assist public servant when bound by law to give assistance) from \$1000 to \$1500; (ii) sections 172b (Absconding to avoid arrest on warrant or service of summons, etc., proceeding from a public servant), 173b (Preventing service of summons, etc., or preventing publication thereof), 174b (Failure to attend in obedience to an order from a public servant), 175b (Omission to produce a document or an electronic record to a public servant by a person legally bound to produce such document or electronic record), 187b (Omission to assist public servant when bound by law to give assistance), and 188b (Disobedience to an order duly promulgated by a public servant) from \$2500 or \$3000 to \$5000; (iii) section 182 from \$5000 to unlimited

18 Within the Penal Code, the PCRC’s assessment is that penalties for Chapter X offences are tiered appropriately according to severity. As set out in paragraph 122, there are four categories of Chapter X offences: failure to fulfil legal duty, obstructing public servant in discharging his functions, and false representations.

19 Across these four categories, the PCRC identified three aggravating factors:

- (a) Offence-related: Where non-compliance respects the commission of an offence, or is required for the purpose of preventing the commission of an offence or in order to the apprehension of an offender.

- (b) Court-related: Where non-compliance respects attendance before a court of justice, or information to be presented before a court of justice, or is provided on oath.
- (c) Threat of harm or actual harm: Where non-compliance involves threatening or desiring to cause harm to another person, or the causation of harm.

20 Within each category, offences with aggravating factors are generally punished more severely. However, there are several minor discrepancies in the tiering of punishments, such that offences punishable by the same maximum imprisonment term have different maximum fine quantum. Details of the discrepancies are at [Annex A](#).

21 The PCRC recommends to resolve these minor discrepancies by increasing the fine quantum for consistency, such that all offences punishable by the same maximum imprisonment term also share the same maximum fine quantum. Specifically, the PCRC recommends to increase the maximum fine(s) for:

- (a) Sections 185 and 187a from \$1000 to \$1500;
- (b) Sections 172b, 173b, 174b, 175b, 187b, and 188b from \$2500 or \$3000 to \$5000; and
- (c) Section 182 from \$5000 to unlimited.

Recommendation 169(c): Rationalise punishments for Chapter X offences by introducing a fine of up to \$10,000 where Chapter X offences are committed by bodies corporate

22 The PCRC notes that there are 15 offences in Chapter X for which the maximum punishment does not exceed 6 months' imprisonment and/or \$5000. In the PCRC's view, this is insufficient to achieve the desired deterrent effect when applied against corporations and other large organisations, which will only be liable for the fine.

23 Legislation such as the FAA⁸, HPA⁹, OCA¹⁰, PDPA¹¹, and CPC¹² all provide for two tiers of punishment for contempt of public servants' authority – imprisonment and/or fine for individuals, and a heftier fine for corporate bodies. Details are at [Annex B](#).

24 Consequently, for all Chapter X offences which carry a maximum fine of \$5,000 or less, the PCRC recommends introducing a separate punishment of fine up to \$10,000 for offences committed by a body corporate, a limited liability partnership, a partnership or an unincorporated association. The proposed maximum fine of \$10,000 for organisations is comparable to the penalties for similar offences in the Acts cited at paragraph 146.

Recommendation 169(d): Rationalise punishments for Chapter X offences by undertaking further study to rationalise penalties for offences relating to contempt of lawful authority of public servants across all Acts, including the Penal Code

⁸ Sections 29, 70 and 76(1)

⁹ Section 41(2), 41(3), 50 and 51

¹⁰ Section 74

¹¹ Section 51(3)

¹² Section 20

25 The PCRC is mindful that the resolution of discrepancies in penalties should be a Whole-of-Government exercise, given that there are non-compliance offences outside the Penal Code. To this end, the PCRC recommends that further study be undertaken by the relevant Ministries to rationalise penalties for offences relating to contempt of lawful authority of public servants across all Acts. The rationalisation exercise may consider the following:

- (a) Streamlining offences into the following categories, and inserting offences in these categories where they are absent. For example, categories can include:
 - (i) Failure to fulfil legal duty (*eg* to provide assistance, to furnish information, to attend meeting, etc.);
 - (ii) False representations (*eg* false information, false statement, falsifying documents, etc.);
 - (iii) Obstruction of authority (*eg* refusal to take oath, threat of injury, assault, etc.); and
 - (iv) Personation of authority;
- (b) Rationalising penalties based on common aggravating factors. For example, aggravating factors can include:
 - (i) Degree of harm caused (hurt, property loss, property damage, etc.);
 - (ii) Likelihood of miscarriage of justice resulting from offence (*eg* false statement is made to court, or to public servant in the context of investigating an offence); and
 - (iii) Intention to evade punishment or to screen another person from punishment; and
- (c) Rationalising types of penalties, for example, to consider:
 - (i) Whether bodies corporate are subject to separate penalties; and
 - (ii) Whether penalties for continuing offences are required.

Conclusion

26 The PCRC is of the view that amendments to the penalties for Chapter X of the Penal Code will ensure that punishments in the Penal Code will remain proportionate to the seriousness of the offence. It is recommended that a wider review of non-compliance offences be further undertaken in the future, to rationalise these punishments across all legislation.

ANNEX A

MINOR DISCREPANCIES IN CHAPTER X PUNISHMENTS

Note: As many of the offences in Chapter X have two limbs, each limb is indicated with an “a” or “b”, ie “s 187a” refers to the first limb of s 187.

1. The PCRC was satisfied that the tiering of punishments for Chapter X offences was generally sound, as within each category, offences with aggravating factors are punished more severely than offences without. The table below refers.

Offence type	Maximum punishments for:							
	<i>Simpliciter</i>		Aggravating factor (1): Offence-related		Aggravating factor (2): Court-related		Aggravating factor (3): Threat of harm or actual harm	
1. Failure to fulfil legal duty	1 month, \$1000	187a	6 months, \$2500	187b	6 months, \$3000	174b, 175b	-	
	1 month, \$1500	174a, 175a, 176a	6 months, \$3000	176b				
2. Obstructing public servant in discharge of his official duties	1 month, \$1500	172a, 173a, 184, 188a	-		6 months, \$3000	172b, 173b	6 months, \$3000 188b	
	3 months, \$2500	180, 186						
	6 months, \$3000	178, 183						
3. False representation	1 month, \$1000	185	3 years, unlimited	177b	3 years, unlimited	181	2 years ⁸¹⁰ , \$5000	182

⁸¹⁰ See recommendation (1).

	6 months, \$5000	177a						
4. Threat of injury	-						1 year, unlimited	190
							2 years, unlimited	189

2. Several minor discrepancies in punishments were identified from the table above:

- a. Discrepancy in fine – SS 172a, 173a, 174a, 175a, 176a, 184, 185, 187a and 188a are all punishable by up to 1 month’s imprisonment. However, the maximum fine quantum is either \$1000 or \$1500.
- b. Discrepancy in fine – SS 172b, 173b, 174b, 175b, 177a, 187b, and 188b are all punishable by up to 6 months’ imprisonment. However, the maximum fine quantum is either \$2500, \$3000, or \$5000.
- c. Discrepancy in fine – Offences punishable with 1 year’s imprisonment or more also attract unlimited fine (ss 181, 189, 190, 177b), with the exception of s 182 (\$5000 fine).
- d. High punishments for offences with no aggravating factors – SS 178 (Refusing oath when duly required) and 183 (Resistance to taking of property by public servant) attract 6 months’ imprisonment, although none of the three aggravating factors is present. However, the PCRC notes that these two offences have only one limb; the higher penalties are likely a result of not having any specified aggravating factors.

ANNEX B

SEPARATE PUNISHMENTS FOR NON-COMPLIANCE BY CORPORATE BODIES IN OTHER LEGISLATION

Act	Provision	Maximum punishment for individual	Maximum punishment for corporation
Section 29 FAA	Obligation to furnish information to Authority	12 months' imprisonment or \$25,000 fine or both Continuing offence: \$2,500 per day	\$50,000 fine Continuing offence: \$5,000 per day
Section 70 FAA	Offences relating to inspection by Authority	2 years' imprisonment or \$50,000 fine or both Continuing offence: \$5,000 per day	\$100,000 fine 3. Continuing offence: \$10,000 per day
Section 76(1) FAA	Offences relating to powers of Authority to obtain information	2 years' imprisonment or \$50,000 fine or both	\$100,000 fine
Section 41(2) HPA	Failure to furnish of information or document regarding health product	6 months' imprisonment or \$10,000 fine or both	\$20,000 fine
Section 41(3) HPA	Furnishing of false information or document regarding health product	12 months' imprisonment or \$20,000 fine or both	\$40,000 fine
Section 50 HPA	Unlawful alteration, destruction, etc., of documents	12 months' imprisonment or \$20,000 fine or both	\$40,000 fine
Section 51 HPA	Obstructing officers in execution of their duties	12 months' imprisonment or \$20,000 fine or both	\$40,000 fine
Section 74 OCA	Duty to give information of certain matters	12 months' imprisonment or \$5,000 fine or both	\$10,000 fine
Section 51(3)(a) PDPA	Offences and penalties relating to destruction of information to evade access or correction of personal data	\$5000 fine	\$50,000 fine
Section 51(3)(b, c)	Offences and penalties relating to false information and	12 months' imprisonment or	\$100,000 fine

PDPA	obstructing authority	\$10,000 fine or both	
Section 20 CPC (amended in Mar 2018)	Failure to comply with production order	6 months' imprisonment or \$5,000 fine or both	\$10,000 fine