

## CHAPTER 1

### SOURCES OF CRIMINAL LAW IN SOLOMON ISLANDS, KIRIBATI AND TUVALU

**1.1** Solomon Islands, Kiribati and Tuvalu share a central core of criminal law, embodied in two codes, most provisions of which are identical: a Penal Code which creates criminal offences and prescribes penal liability, and a Criminal Procedure Code which regulates how offences will be processed through the criminal justice system. These Codes were first enacted before the countries became independent, in the British colonial era. They were based on models developed by the British Colonial Office in the 1930s and introduced some years later into the British dependencies in the Pacific.

- the Penal Code and the Criminal Procedure Code of Solomon Islands in 1963;
- the Penal Code of the then Gilbert and Ellice Islands (now separately Kiribati and Tuvalu) in 1965, preceded by the Criminal Procedure Code in 1963.

Although there have been some subsequent amendments, these Codes are still remarkably similar. The same Codes were introduced in Fiji in 1945 but replaced there with new legislation in 2009.

**1.2** Criminal offences are found in a range of statutes, not only the Penal Codes. The most serious offences are generally included in the Codes: for example, murder and manslaughter, assault, rape, theft, robbery and burglary. Yet s 2(a) provides that, unless otherwise expressly provided, nothing in the Code shall affect 'the liability, trial or punishment of a person for an offence against the common law or any other law in force in ... [Solomon Islands, Kiribati, Tuvalu] other than this Code'. Other pieces of legislation containing offences include statutes relating to customs and immigration, fisheries, drugs, taxation, and road traffic. Nevertheless, these other offences are governed by the provisions of the Penal Codes on criminal responsibility: these are general provisions which are not limited to offences in the Codes themselves.

**1.3** The Criminal Procedure Codes apply to all offences, not just those in the Penal Codes: s 3. The Codes are supplemented as a source for the law of criminal procedure by the Constitutions of Solomon Islands, Kiribati and Tuvalu. All three constitutions contain provisions on fundamental rights and freedoms in similar language, including guarantees of a range of rights respecting the criminal process. Moreover, in modern times all three countries have enacted legislation on police powers for investigating crime: Police Powers and Duties Act 2008 (Kiribati); Police Powers and Duties Act 2009 (Tuvalu); Police Act 2013 (Solomon Islands).

#### *The Codes*

**1.4** The Penal Codes are based on the model of the Queensland Criminal Code: Criminal Code (Qld), Schedule to the Criminal Code Act 1899 (Qld). The Queensland Code, often called 'the Griffith Code', was originally drafted at the end of the nineteenth century by the then Chief Justice of Queensland, Sir Samuel Griffith. In revised form, it was later adopted as a model by the British Colonial Office and exported to many parts of the world, including to British territories in the Pacific.

**1.5** The Griffith Code was a product of its time and incorporated features which have arguably become out-of-step with later developments in common law principles of criminal responsibility. In particular, it allows responsibility for many serious offences against the person to be based on an offender's negligence, even where the proscribed conduct was committed inadvertently. In contrast, the predominant view which emerged in the course of the twentieth century has been that criminal responsibility should generally require certain subjective states of mind, such as intention to engage in the conduct or awareness of its risks. In other words, objective principles of responsibility have generally been replaced by subjective principles.

**1.6** However, the differences between the two approaches can be over-emphasised. Although Griffith-model codes and the modern common law diverge in some of their general principles of responsibility, this divergence of principles rarely translates into differences in the scope of particular offences. Indeed, the practical impact of the differences between the objective principles of the Griffith-model code and the subjective principles of the common law is remarkably narrow. There are several reasons for this convergence. One is that Griffith-model codes largely abandon objective principles for offences against property. For these offences, specific mental elements of a subjective kind are generally prescribed. Another reason is that criminal statutes everywhere, even those based on the modern common law, generally contain at least some negligence-based offences against persons. The divergence of general principles impacts mainly where a mistake of fact is raised as a defence to an offence against the person, in particular where a mistaken belief in consent is raised as a defence to rape or another sexual offence. The Griffith model requires a mistaken belief to be reasonable whereas the common law does not. Even in this context, however, specific statutory provisions or common law doctrines often eliminate the differences which would follow from applying general principles. For example, Solomon Islands recently recast its law of sexual offences on subjective principles, so that an offender must now have known consent was lacking or been reckless as to its absence: Penal Code (Amendment)(Sexual Offences) Act 2016 ss 136F(1)(b), 136G(b), 138(1)(b).

**1.7** The British Colonial Office also developed a standard model for a procedural statute and introduced it into the former British territories in the Pacific. This model is characterised by the range and specificity of its provisions, covering many matters which elsewhere have been left to the common law.

**1.8** The provisions relating to judgments provide an example of the systematic detail of the Criminal Procedure Codes. Judgments receive little attention in most legislation on criminal procedure. In the Criminal Procedure Codes, however, there are express requirements respecting the content of a judgment and the mode of delivering it. The judgment must be given in open court, and it must contain the point or points for determination, the decision thereon and the reasons for the decision: SI s 150, 151; Ki/Tu ss 149, 150.

### ***The Constitutions***

**1.9** The Constitutions of Solomon Islands, Kiribati and Tuvalu contain Bills of Rights which incorporate various provisions affecting the criminal process.

**1.10** The Bills of Rights include general declarations of freedom from torture and inhumane or degrading punishment' (SI s 7; Ki s 7(1); Tu s 19(c)-(d)); statements of the justifications for depriving a person of liberty and of the rights of a person who is arrested or detained (SI ss 5, 19; Ki ss 5, 10; Tu ss 17, 22); a prohibition on searches of persons or property except under specified circumstances (SI s 9; Ki s 9; Tu s 21); a declaration of the right to be presumed innocent until proved guilty (SI s 10(2)(a); Ki s 10(2)(a); Tu s 22(3)(a)); and a series of specific rights respecting the trial process such as a right to information about the charge and to adequate time and facilities for the preparation of a defence (SI s 10(2)(b)-(c); Ki s 10(2)(b)-(c); Tu s 22(b)-(c)).

**1.11** Decisions about whether the Constitution has been contravened and what redress would be appropriate are made by the High Court (SI s 18; Ki s 18; Tu ss 17, 38-40). An application can be made by a person alleging a contravention in relation to himself or herself, or a lower court can refer a question to the High Court.

### ***Judicial decisions***

**1.12** The Penal Codes s 2(a) have notionally preserved judge-made common law offences. However, the coverage of the statutory offences leaves little if any scope for traditional common-law offences to survive and it is difficult to imagine any new offences being created by common law rather than legislation. Nevertheless, there is

nothing in the Codes to prevent the recognition of common law defences additional to those which are expressly included. Moreover, the common law still plays an important role in the interpretation of legislative provisions and in filling gaps in the legislative scheme.

**1.13** The Penal Codes direct that, in the interpretation of their provisions, reference should be made to general principles of criminal law. Solomon Islands Penal Code s 3 provides:

This Code shall be interpreted in accordance with the Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

See also Kiribati s 3 and Tuvalu s 3, which are in similar terms. The laws of England, and of other jurisdictions based on English law such as Australia and New Zealand, are in substantial measure the product of judicial decisions developing the common law or interpreting legislation in light of common law principles.

**1.14** Judicial decisions from elsewhere can therefore be a potentially important element in the interpretation of the Codes. Consider, for example, the interpretation of SI s 205, Ki/Tu s 198 on when a defence of loss of self-control due to provocation will reduce a homicide from murder to manslaughter. The provision requires that the degree of provocation be 'enough to make a reasonable man do as he did'. It may be thought implausible that a *reasonable* man (or woman) would ever lose their self-control. However, English decisions have held that a reasonable person in this context is to be equated with an *ordinary* person. In England, the statutory formulation of the defence refers to a 'reasonable' person: see Homicide Act 1957 (Eng) s 3. Nevertheless, the House of Lords has said that 'ordinary' is a more appropriate term and can be used in jury directions: *R v Morhall* [1996] AC 90, 98. The same interpretation of the Penal Codes would be appropriate.

**1.15** The Penal Codes s 3 expresses a different approach to interpretation from that in the orthodox Australian view of how the Griffith Code is to be interpreted. The orthodox Australian view holds that the language of the Code should be interpreted in accordance with ordinary meanings and without any presumption that the previous common law was intended to be maintained. The classic statement is a passage by Dixon and Evatt JJ from *Brennan v R* (1936) 55 CLR 253 at 263; [1936] ALR 318, quoted in *Stuart v R* (1974) 134 CLR 426 at 437; 4 ALR 545:

... it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.

The orthodox theory affirms that the language of the code should not be distorted to fit common law principles. Where these principles conflict with the language of the code, the code must prevail. Nevertheless, there are many instances in Australian law where the courts have invoked common law as a guide to the interpretation of statutory language: see, for example the treatment of the concept of criminal negligence discussed at **5.28-5.34**. In effect, the Australian courts have sometimes adopted the principle of interpretation that is articulated in the Penal Codes of SI/Ki/Tu s 3.

**1.16** The other role of the common law is in filling gaps in the legislative scheme. The Penal Codes are near to comprehensive documents. Yet they make no mention of certain matters: for example, the general principle excluding liability for causing harm by omitting to prevent it occurring. Moreover, there are major gaps in the Criminal Procedure Codes. For example, there are no provisions on abuse of process in the prosecution of cases. This matter is left to common law remedies.