

CHAPTER 5

INTENTIONAL HOMICIDE AND ASSAULT

The structure of offences against the person

5.1 The Vanuatu Penal Code adopts a simple scheme for attacks on a person that was first used in the Native Criminal Code of the New Hebrides: see **1.16**. There are three main offences, with gradations of penal liability according to the circumstances or consequences of the criminal conduct.

- Section 106 creates the offence of intentional homicide of another person, with liability to (a) 20 years' imprisonment if the homicide was not premediated or (b) life imprisonment if it was premediated.
- Section 107 creates the offence of intentional assault on the body of another person, with liability to (a) 3 months' imprisonment if no physical damage is caused, (b) 1 year if there is damage of a temporary nature, (c) 5 years if there is damage of a permanent nature, or (d) 10 years if death is caused.
- Section 108 creates the offence of unintentional harm to the body of another person through recklessness or negligence, or failure to observe a law, with liability to (a) 3 months' imprisonment if there is damage of a temporary nature, (b) 2 years if there is damage of a permanent nature, or (d) 5 years if death is caused.

The concern of this chapter is with the offences of intentional homicide and intentional assault. Unintentional harm is examined in Chapter 6. Robbery, which is a combination of theft and assault, is discussed together with other offences against property in Chapter 8.

5.2 The labels for the homicide offences depart from the common law terminology of murder and manslaughter which is still used in most jurisdictions:

- The offence of intentional homicide under s 106 is the functional equivalent of the offence of murder.
- The offence of intentional assault causing death under s 107(d) is the functional equivalent of one of the forms of manslaughter – 'unlawful act manslaughter'.
- The offence of unintentional harm causing death under s 108(c) is the functional equivalent of the other main form of manslaughter – 'criminal negligence manslaughter'.

5.3 In most jurisdictions, murder has historically carried a mandatory penalty (originally death but now usually life imprisonment) whereas manslaughter has carried a discretionary penalty of liability up to life imprisonment. In Vanuatu, however, the penalty for intentional homicide as well as intentional assault is discretionary. The various offences against the person all specify a

‘penalty’ for each offence. This has, however been interpreted to mean a maximum penalty, with liability up to that maximum: *Public Prosecutor v Manap* [2018] VUCA 7 at [26]-[30]. In recent years, some other jurisdictions have also introduced discretionary sentences for murder.

5.4 The Road Traffic (Control) Act s 12 creates an additional homicide offence: causing death by reckless driving. Despite the use of term ‘reckless’, the context of this offence, under general traffic legislation rather than the Penal Code, suggests that the offence is directed at dangerous driving: see **4.20**. The scope of the offence is similar to that of the Code offence of unintentional harm causing death and the maximum penalty of 5 years imprisonment is the same for the two offences.

5.5 Suicide (and therefore attempted suicide) is not an offence. However, aiding, counselling or procuring the suicide of another person can make a person liable for an offence of aiding suicide: Penal Code s 116. The offence carries liability to imprisonment for life. See **Chapter 14** on the law of complicity.

5.6 ‘Assault’ is not defined in the Code. Its meaning is derived from the common law: see **5.26-5.35**.

5.7 ‘Intentional’ is not defined in the Code. As discussed in **4.9**, two different types of intention have been recognised in the case-law of the common law world.

- A person is said to intend something if the purpose is to make it occur. The prospect of making it occur provides the *reason* for acting. This is sometimes called ‘purpose’ intention or ‘direct’ intention.
- A person is also said to intend something when it is known or foreseen that it will be a certain or virtually certain consequence of some action, even though the action may have another purpose. This is sometimes called ‘knowledge’ intention or ‘oblique’ intention.

5.8 ‘Intentional’ in the Code has been interpreted to include ‘reckless’ in the subjective form of the definition in the Code s 6(3):

A person shall be considered to be reckless if –

- (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and
- (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.

The Vanuatu Court of Appeal has given full force to the Code s 6(2) which provides, ‘recklessness in doing that act shall be equivalent to intention’. In *Kal v Public Prosecutor* [2018] VUCA 56 at [48], this was applied to the offence of intentional homicide despite the express use of the term ‘intentionally’ in s 106. It was said at [48]:

Mr Tevi's submissions appear to suggest that the appellants could not be convicted on the basis of recklessness. That is not what the law provides...Mr Tevi's submission that section 6(2) of the Penal Code cannot apply to section 106(1)(a) is simply incorrect.

Presumably the same applies to intentional assault.

Persons

5.9 For a criminal offence to occur, both the offender and the victim must be a person. This is how the offences under ss 106-107 are framed. A 'person' in the eyes of the law is a human being. This is well established as a matter of common law. Thus, neither offence is committed when an animal kills a human being; nor when a human being kills an animal.

5.10 At common law, a human being comes into existence as a person only when it is fully born. This is reflected in the Penal Code s 110, which states:

A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother whether it has breathed or not, and whether it has an independent circulation or not, and whether the umbilical cord is severed or not.

Nevertheless, homicide can presumably be committed when a child dies after birth as a consequence of injuries inflicted before or during birth.

5.11 At earlier stages of life, the termination of a pregnancy can constitute separate offences:

- The offence of 'abortion' involves unlawfully procuring a miscarriage and carries liability to 2 years' imprisonment, under the Code s 117(1) if committed by the pregnant woman or under s 117(2) if committed by another person. However, it is a defence if it is 'shown' that the pregnancy was terminated for 'good medical reasons': s 117(3). The term 'shown' suggests that the defence must be proved. Any prosecution requires the consent of the Public Prosecutor: s 117(4).
- 'Killing an unborn child' is a more serious offence carrying liability to life imprisonment under s 113. It is committed when a woman is about to give birth ('about to be delivered of a child') and the birth is prevented by an act or omission that, if the child had been born alive and had then died, would have constituted the unlawful killing of a child.

Causation

5.12 For discussion of the general principles of causation and some specific rules respecting the causation of death, see **3.13-3.23**. The general principles are that a person has caused a death if

the person made a substantial contribution to its occurrence, unless there is an independent later actor whose contribution is also substantial and who can be held criminally liable. The specific provisions of the Penal Code s 109 largely reflect these principles.

5.13 The Penal Code follows the common law in requiring that a death occur within a year and a day from the last unlawful act contributing to the death: s 111. The origins of this rule may lie in the increasing difficulties of diagnosing of a cause of death as time passes. The rule has been abolished in many jurisdictions, following advances in medical diagnosis, but has survived in Vanuatu and some other Pacific jurisdictions.

Consent to death or harm

5.14 It is a long-established rule of common law, now enshrined in the Penal Code s 7, that the consent of a person to their own death or bodily harm does not affect the criminal responsibility of a person who causes it. Section 7(1) attaches some restrictive conditions to liability:

It shall be no defence to any charge that the victim prior to the criminal act has expressed his consent to it, if the purpose of the act was to inflict serious physical or mental injury incompatible with the well-being of the victim.

Presumably consent can be a defence if the restrictive conditions are not present. However, it is unclear whether this would provide a defence to ‘mercy-killing’. Despite the restriction of liability to cases where the purpose was to inflict serious injury, a court might hold that the ‘purpose’ requirement does not extend to the assessment of compatibility with the well-being of the person consenting. Compatibility is a matter of value-judgment and such matters have tended to be treated objectively in the common law world. A court might therefore impose an objective test. In other words, the defence might not be available if a court took the view that the action was incompatible with the well-being of the person consenting, even if the actor thought that it was compatible.

5.15 Section 7(2) clarifies the meaning of consent in for the purposes of a defence:

In other cases, the victim shall not be taken to have consented to a criminal act if by reason of his age or infirmity, or of fraud, he was incapable of or was prevented from forming the necessary consent.

This is in line with modern conceptions of consent in criminal law. It is a state of mind to be distinguished from outward expressions of consent. Words or gestures of consent might be evidence of the state of mind but are not conclusive.

5.16 Despite the exclusion of consent as a general defence, there is no liability for omitting to maintain the life of another unless there is a breach of a duty of care: see **3.2-3.7**. Whether or not a person has requested to die is a relevant consideration in deciding whether an omission to maintain life breached a duty of care. This was recognised by the House of Lords in *Airedale National Health Service Trust v Bland* [1993] AC 789 at 864, [1993] 1 All ER 82, where it was said that, if a patient is capable of expressing his or her wishes, the principle of self-determination should prevail over the principle of the sanctity of human life.

Elements of intentional homicide

5.17 The conduct elements of the offence of intentional homicide under the Code s 106 are:

- A person
- causing
- the death
- of another person.

On personhood, see **5.9-5.11**. On causation, see **3.13-3.23, 5-12-5-13**.

5.18 'Death' is not defined in s 106 of the Code, so that the common law applies. The traditional definition of death at common law was the irreversible cessation of all vital functions, including those of the heart and lungs. This definition has failed to keep pace with the development of technological means for keeping organs functioning artificially. Life support machines can sometimes be used to keep the heart and lungs functioning for sufficient time to allow medical diagnosis or organ transplantation. In circumstances where vital functions are being artificially maintained, switching off the machine raises difficult questions about the point at which death occurs. A modern medical conception of death has evolved in response. A person is considered to be dead when there is either irreversible cessation of blood circulation or irreversible cessation of all brain function, including that of the brain stem. When 'brain stem death' occurs, the body cannot function without assistance.

5.19 The fault element for the offence of intentional homicide is either intention or recklessness with respect to the causation of death:

- 'Intentionally' causing death is the express fault element in s 106 itself.
- The Code s 6(2) deems recklessness to be the equivalent of intention. The Vanuatu Court of Appeal has held that this applies to the offence of intentional homicide: *Kal v Public Prosecutor* [2018] VUCA 56 at [48]. See **5.8**.

5.20 Intentional homicide in Vanuatu is the functional equivalent of the offence of murder in many other jurisdictions. The scope of the offence of murder varies between jurisdictions, depending on which states of mind will satisfy the fault elements of the offence. Some jurisdictions give the offence broader scope than Vanuatu does. So that it encompasses intention or reckless with respect to the causation of grievous bodily harm as well as the causation of death. In addition, some jurisdictions broaden the fault elements for murder in cases where a death is caused during the commission of certain serious offences such as robbery. This form of murder is sometimes called ‘felony murder’ or ‘constructive murder’. It is not included in the Vanuatu Penal Code.

5.21 As was discussed in **4.9** and **5.7**, two different types of intention have been recognised in the case-law of the common law world. First, a person is said to intend something if the purpose is to make it occur. A person is also said to intend something when it is known or foreseen that it will be a certain or virtually certain consequence of some action, even though the action may have another purpose. In the context of homicide, intention has generally been understood to encompass both forms of intention: not only purpose to bring about a result but also knowledge (or foresight or awareness) that a result will follow as a matter of virtual certainty. See the decision of the House of Lords in *R v Woollin* [1999] 1 AC 82; [1998] 4 All ER 103 on the common law of murder. Thus, someone who shoots at another person in order to kill, or with the purpose of killing, intends to cause death, even if there is no more than a hope of hitting the target. On the other hand, a person who sets fire to a house in order to collect insurance money, knowing that people happen to be inside and will inevitably be killed, is said to intend to cause the death even if the deaths formed no part of the person’s reasons for setting the fire.

5.22 Intention can be impulsive. It need not involve premeditation. However, premeditation is an aggravating factor in Vanuatu which increases penal liability from 20 years to life imprisonment. Premeditation is defined in the Code s 106(2):

(2) For the purpose of subsection (1), premeditation consists of a decision made before the act to make a homicidal attack on a particular person or on any person who may be found or encountered.

This is a broad definition of premeditation. It does not require that the attack be carefully planned or that the decision be made substantially in advance of the attack as long as the decision was made beforehand. See *Pakoa v Public Prosecutor* [2019] VUCA 51 at [8], where the Court of Appeal said:

The trial judge went on to state, correctly, that premeditation is not the same as planning. Although he accepted, if there was evidence of planning, it would be compelling evidence of premeditation.

5.23 Recklessness respecting causing death can also constitute the fault element of intentional homicide. For this purpose, the definition in the Code s 6(3) applies. The person must know that there is a risk of causing death and take the risk, and it must be unreasonable to take the risk 'having regard to the degree and nature of the risk which he knows to be present': see **4.22**. The perception of the risk is a subjective matter; the reasonableness of taking the risk is an objective matter to be determined by the court.

5.24 There is a difference between, on the one hand, recklessness respecting causing death and, on the other hand, intention in the form of knowledge that death will be caused. Intention requires knowledge that death will occur as a virtual or practical certainty: something that will occur 'in the ordinary course of events'. In contrast, recklessness merely requires knowledge of a risk that death will occur. Knowledge that death is probable or even highly probable does not qualify as intention to cause death; it amounts just to recklessness respecting causing death.

5.25 The intention or recklessness need only relate to 'another person'. Thus, if a shot fired at one person misses and kills another person, the offence of intentional homicide can be committed against the person who is actually killed. It is irrelevant that the death of this particular person was never contemplated. Such cases are sometimes called cases of 'transferred intent' or 'transferred *mens rea*': see **4.34**. The *mens rea* for the contemplated death is transferred to the *actus reus* of the death which occurred.

Elements of intentional assault

5.26 The Penal Code s 107 provides that a person commits an offence if he or she assaults another person, with gradations of penal liability depending on whether and how much physical damage was caused. However, assault is not defined in the Code, so that its definition remains a matter of common law.

5.27 Two forms of assault are recognised in the common law world:

1. unlawful application of force;
2. an act causing the victim to apprehend an imminent application of force.

See, for example, *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, 444D-E; *R v Ireland* [1998] AC 147 at 161 (HL). The common law historically distinguished between 'assault' as a threat of force and 'battery' as an application of force. Like most criminal statutes, however, the Penal Code does not use the term 'battery' and the term has also fallen into disuse in the modern common law of crime. Under the Code, the term 'assault' covers applied force as well as

threatened force.

5.28 'Force' carries a broad meaning in this context and covers any non-consensual physical contact. In the Criminal Codes of Queensland and Western Australia, force is statutorily defined as 'strikes, touches, or moves, or otherwise applies force': Criminal Codes s 245(1) (Qld)/s 222 (WA). The position at common law is the same. In *Popoe v R* [2015] SBCA 20 at [50], there was held to be an assault where one person sat upon another. The force used may be as light as a mere touch, as in some sexual assaults. The force may also be direct or indirect, so that it may be applied by way of a third party, agent, device or instrument. See, for example, *DPP v K* [1990] 1 All ER 331 (DC), where acid was poured into a hand drier so that it would spray onto a person using the drier. The Criminal Codes (Qld)/s 222 (WA) indicate that the application of force may even be incorporeal; the application of 'heat, light, electrical fault, gas, odour, or any other substance or thing whatever' is an application of force if the degree is such as to cause 'injury, or personal discomfort'. It is to be expected that the same scope would be given to the term 'force' at common law and hence to offences of assault under the Vanuatu Penal Code.

5.29 In *Hall v Fonseca* [1983] WAR 309, it was suggested that a threat would have to create an actual apprehension of the use of force on the part of the victim. In other words, there could not be an assault by threat without the victim being aware that the threat was made. A threat may be by gesture or by words. Moreover, the utterance of threatening words may be what gives a bodily movement the character of a threatening gesture. It has even been held that under some circumstances silence can constitute a threat. For example, someone who repeatedly telephones another person but remains silent when the telephone is picked up may be held to be making a threat: *R v Ireland* [1998] AC 147 at 162 (HL).

5.30 In *R v Secretary* (1996) 5 NTLR 96, it was held that a person who makes a threat of future violence and then falls asleep may continue to commit the assault while asleep. The question of continuing assaults has been important because of its bearing on rights of self-defence. Some jurisdictions require an assault to be occurring when defensive force is used. Vanuatu effectively imposes the same condition because an act of self-defence must be 'dictated by the immediate necessity of defence of the person': Code s 23(1). The accused in *Secretary* had shot and killed her husband while he was asleep. Her defence to a charge of murder was that he had threatened to kill her when he awoke and that this assault was continuing when she shot him in self-defence. The court ruled that an assault may continue to be committed by a person who falls asleep after making a threat, if the ability to put the threat into effect upon awakening is evident.

5.31 Much physical contact between people is consensual. It is settled that for an assault the contact must occur without the consent of the victim (or with an expression of consent which the law does not recognise, for example an expression of consent obtained by coercion or fraud): see, for example, the discussion in Ormerod, Smith and Hogan: *Criminal Law* (12 ed 2008) pp 589-596. However, there has been some disagreement over whether lack of consent is an

element of the unlawfulness of an assault or whether consent is an exculpatory defence: see *R v Lee* [2006] 3 NZLR 42 at [160]-[161]. See also the divergence of opinion in this matter in *R v Brown* [1994] AC 212. If consent is merely an exculpatory defence, the accused may carry an evidential burden to put the matter of consent in issue.

5.32 Problems about the meaning of consent have mainly arisen in relation to offences of sexual violence: see **Chapter 7**. In that specific context, legislation in many jurisdictions now expressly provides that consent means ‘free and voluntary agreement’ and excludes an expression of consent obtained by such means as threat or fear: see, for example, Solomon Islands Code s 136A. It is to be expected that courts, including those of Vanuatu, would adopt a similar interpretation of coerced expressions of consent for assault generally. There is some uncertainty as to whether any fraud will invalidate an expression of consent or only certain specific forms of fraud. See **Chapter 7** for discussion of this issue in the context of sexual assault.

5.33 Consent can be implied as well as expressed: see *Collins v Wilcock* (1984) 1 WLR 1172; *Horan v Ferguson* [1994] QCA 375. For example, a person who moves into a heavily crowded area can be taken to have consented to the inevitable jostling which will occur. Similarly, a person who plays in a sporting game, the rules of which permit physical contact, may be taken to have consented to the application of some measure of force, even though there has been no express statement to this effect. Of course, even where there is consent to some degree of force, a greater degree of force may actually be used. The assailant is then liable for the force used just as if there had been no consent at all.

5.34 Section 107 requires that an assault be ‘intentional’. As has been discussed previously, intention can take either of two forms: purpose or knowledge: see **4.9, 5.7**. In the context of assault, this means that there must be either the purpose to apply or threaten force or knowledge that the action will apply or threaten force. In addition, the fault element for the offence can be recklessness in the sense of unreasonably taking a known risk of applying force or appearing to threaten it: Code s 6(2)-(3). The extension to recklessness is in line with the common law: see *R v Venna* [1976] QB 421; [1975] 3 All ER 788. However, there cannot be an accidental or negligent assault. Liability for the unintentional infliction of harm is covered by the Code s 108.

5.35 Although the application or threat of force must have been intentional or reckless, a conviction of assault does not require knowledge that consent was absent or awareness of the risk of absence of consent. A mistaken belief in consent can be a defence, but generally only when the terms of the excusing defence under the Code s 12 are met: there must be a positively mistaken belief and the mistake must be an objectively reasonable one: see **4.38-4.42**.

Aggravated assaults

5.36 There is criminal liability under s 107 for a common or simple assault, even where no harm is caused. However, aggravating consequences increase penal liability:

- Penalty: (a) if no physical damage is caused, imprisonment for 3 months;
(b) if damage of a temporary nature is caused, imprisonment for 1 year;
(c) if damage of a permanent nature is caused, imprisonment for 5 years;
(d) if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 10 years.

In effect, these provisions create three compound assault offences: assault causing temporary damage; assault causing permanent damage; and assault causing death.

5.37 'Physical damage' in s 107 is not defined in the Penal Code. 'Harm' or 'bodily harm' are terms more widely used in other jurisdictions. 'Harm' is defined in the Solomon Islands Penal Code s 4 in broad terms. The provision reads:

'harm' means any bodily hurt, disease or disorder whether permanent or temporary

Under this definition, a physical injury is not required for actual bodily harm: physical pain or infection will suffice.

5.38 On the current conception of 'death' at common law, see **5.18**. The traditional conception of the cessation of all vital functions has been supplemented by that of 'brain stem death'. A person is now considered to be dead when there is either irreversible cessation of blood circulation or irreversible cessation of all brain function, including that of the brain stem.

5.39 In a compound assault, the underlying assault must be intentional or reckless. However, no fault element attaches to the causation of damage or death. The outcome need not be foreseen. Even if it is fortuitous, this will not affect liability. It can only be a mitigating factor in sentencing. Several considerations compel this conclusion:

- Although there is general requirement for intention under the Code s 6(2), this attaches to 'the very act which the law prohibits'. Section 6(2) is satisfied by the requirement that an assault be intentional. Section 6(2) therefore does not demand intention for the aggravating consequences of damage or death.
- Section 107 expressly requires that the assault be intentional but includes no such requirement for the causation of damage or death.
- Assault intentionally causing death would amount to the offence of intentional homicide under s 106. Requiring intention to cause death for s 107(d) would make the provision redundant.

5.40 Differentiating between the assault and its consequences reflects what might be called ‘the predicate offence principle’. This is a principle of common law that, for offences in which an underlying lesser offence is coupled with aggravating features to create a more serious offence, a fault element is required only for the predicate offence: see particularly, the articulation of the principle in the Canadian case of *R v De Sousa* [1992] 2 SCR 944 at [37].