



THE CAYMAN ISLANDS LAW REFORM COMMISSION



FINAL REPORT

THE PENAL CODE: IS IT COMPATIBLE WITH THE BILL OF RIGHTS?

3rd OCTOBER, 2022

THE CAYMAN ISLANDS LAW REFORM COMMISSION

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The Law Reform Commission extends thanks to all stakeholders and the general public for the valued contribution leading up to the conclusion of this Final Report.

FINAL REPORT

PART 1

THE PENAL CODE: IS IT COMPATIBLE WITH THE BILL OF RIGHTS?

INTRODUCTION

1. In accordance with section 12 of the *Law Reform Commission Act (2019 Revision)*, the Law Reform Commission (“the Commission”) submits for the consideration of the Honourable Attorney General its Final Report titled “**The Penal Code: Is It Compatible With Human Rights?**”.
2. This Final Report contains recommendations to amend those provisions in the *Penal (2019 Revision)* (“the Penal Code”) that are incompatible with the Bill of Rights, Freedoms and Responsibilities (“the Bill of Rights”) contained in Part I to Schedule 2 of the *Cayman Islands Constitution Order, 2009* (“the Constitution”). The provisions identified in the first instance are those relating to immature age (minimum age of criminal responsibility), compulsion by spouse, insulting the modesty of a woman, procuring abortion, unnatural offences and indecent assault. The proposed *Penal Code (Amendment) Bill, 2022* for consideration is attached as *Appendix 1*.

SUMMARY OF RECOMMENDATIONS

- (a) The Commission recommends that the minimum age of criminal responsibility as provided under section 12 of the Penal Code be increased from ten years of age to twelve years. This would afford protection to children who otherwise would have been subject to the criminal law had they committed a criminal act at age ten. (*paras. 12 – 23*)
- (b) The Commission recommends that the defence of compulsion by spouse in section 16 of the Penal Code be repealed as the offence only covers married persons and excludes persons in common law unions and civil partnerships. (*paras. 24 - 32*)
- (c) The Commission recommends the repeal of the offence of insulting the modesty of a woman as provided under section 133 of the Penal Code and the deletion of the reference to the word “insulting” in sections 88A and 88B of the Penal Code. The offence of insulting the modesty of a woman is applicable only in relation to a woman and therefore prohibits a man from being the complainant or victim in relation to the offence (*paras. 33 - 42*)
- (d) The Commission recommends that the provisions in sections 144 of the Penal Code dealing with unnatural offences and which prohibit sexual activity between consenting same sex adults be repealed on the grounds that it is discriminatory. (*paras. 43 - 54*)

- (e) The Commission recommends, on the grounds that it is discriminatory, the repeal of sections 132 and 145 of the Penal Code which deal respectively with indecent assault on a woman and indecent assault on a man and recommend the enactment of a general offence of indecent assault which defines the concept, removes any gender distinction and identifies the circumstances that must be taken into account to constitute the offence. (*paras. 56 - 61*)
- (f) For purposes of this Final Report, the Commission makes no recommendation on sections 141, 142 and 143 of the Penal Code, all of which deal with the issue of abortion. The Commission will examine the issue in a discrete discussion paper. (*paras. 76 - 98*)

BACKGROUND

- 3. The examination into this issue was based on a referral by the Honourable Attorney General in 2017 requesting that the Commission review the Penal Code to assess its compatibility with the Bill of Rights as contained in Part I to Schedule 2 of the the Constitution and to update the obsolete and archaic provisions contained therein.
- 4. The Commission noted that since its introduction in 1975, the Penal Code had not undergone a comprehensive review and that with the adoption of the Constitution, it was imperative that the Penal Code be reviewed to ensure its compatibility with the fundamental human rights principles enshrined in the Bill of Rights as well as with the similar rights in Conventions and treaties that have been extended to the Cayman Islands.
- 5. As such, the Commission determined that the review of the Penal Code would be carried out in phases with the first phase placing focus on those provisions in the Penal Code which are incompatible with the Bill of Rights.

RESEARCH AND CONSULTATION PROCESS

- 6. The research of the Commission included an examination of the provisions in the Penal Code dealing with the following areas –
 - (a) the immature age (minimum age of criminal responsibility);
 - (b) compulsion by spouse;
 - (c) insulting the modesty of a woman;
 - (d) abortion;
 - (e) unnatural offences; and
 - (f) indecent assault.
- 7. The research findings of the Commission resulted in the formulation, for public consultation, of Part 1 of a Discussion Paper titled – **“The Penal Code: Is It Compatible With The Bill Of Rights.”**¹ The Paper is attached as *Appendix 2*.

¹ 1st November, 2021

8. The Discussion Paper was subsequently published for general public review and also forwarded to the following stakeholders –
- Ben Tonner, of McGrath & Tonner;
 - Bishop Nicholas Sykes, of the Cayman Ministers Association;
 - Erik Bodden, of the Cayman Islands Legal Practitioners Association;
 - Derek Byrne, Commissioner of Police, of the Royal Cayman Islands Police Service;
 - Hon. Anthony Smellie, Chief Justice;
 - Michael Bromby, of the Truman Bodden Law School;
 - Chairman of the Cayman Islands Medical and Dental Council;
 - Dale Crowley, of the Human Rights Commission;
 - Paulinda Mendoza-Williams, of the Department of Children and Family Services;
 - Judith Seymour, of the Department of Counseling Services; and
 - Chairman of the Gender Equality Tribunal.
9. Stakeholders were accordingly invited to respond to the issues and a range of questions posed in the Discussion Paper. The consultation period for the Discussion Paper commenced on 29th December, 2021 and concluded on 15th March, 2022. By the end of the consultation period, the Commission received responses from the following respondents -

Organisations	
Royal Cayman Islands Police Service	Ministry of Youth, Sports, Culture & Heritage – Cayman Islands Youth Assembly
Department of Counseling Services	Ministry of Youth, Sports, Culture & Heritage – Youth Services Unit
Human Rights Commission	Samson Law
Truman Bodden Law School	Church of God Chapel
Cayman Ministers Association	British Pregnancy Advisory Service
Ministry of Home Affairs	St. Ignatius Catholic Church

Individuals	
Dr. Charlotte Dobson	Suzanne Howden
Philippa Ball	Rev. Joseph Kirkconnell
Jevaughnie Ebanks	Stephen Ryan
Georgia Bromby	John-Michael Kirkconnell
Alex Henk	Deborah Kirkconnell
Mikana Scott	William and Deborah Ryan
Richard Coles	Simone Middleton
Michael and Mary Bowerman	Jason Eastman
Susana and David Bowerman	Lisa Scott
Joseph Westin	Corey Christian
Timothy Adam	

10. The responses from all stakeholders are to be found in *Appendix 3*.

PENAL CODE PROVISIONS EXAMINED

11. In the Discussion Paper, the Commission examined the provisions in the Penal Code relating to the following –

- (a) the immature age (minimum age of criminal responsibility);
- (b) compulsion by spouse;
- (c) insulting the modesty of a woman;
- (d) abortion;
- (e) unnatural offences; and
- (f) indecent assault.

IMMATURE AGE (THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY)

Section 12 - Immature age

- (1) *A person under the age of ten years is not criminally responsible for any act or omission.*
- (2) *A person under the age of fourteen years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.*
- (3) *A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.*

12. The Commission explained that the immature age, otherwise referred to as the minimum age of criminal responsibility, is the minimum age below which a person is presumed not to have the capacity to infringe the criminal law. This means that children below the minimum age of criminal responsibility cannot be arrested or charged, but those above are presumed to be sufficiently mature to stand trial, and in the eyes of the law, held accountable as adults.
13. The Commission pointed out that the Cayman Islands currently has a minimum age of criminal responsibility of ten years. Section 12(1) of the Penal Code provides that a person under the age of ten years is not criminally responsible for any act or omission.
14. However, under section 12(2), a person under the age of fourteen (14) years is not criminally responsible for an act or omission unless it is proved that, at the time of doing the act or making the omission, the person had capacity to know that the person ought not to do the act or make the omission.
15. In addition, under section 12(3), if the child is a male person under the age of twelve (12) years, the child will be presumed to be incapable of having carnal knowledge.
16. The Commission observed that section 17 of the Constitution affords fundamental human rights protection for children and requires that the Legislature to enact laws to provide every person under the age of eighteen (18) years (a “child”) with such facilities as would aid the child’s growth and development.

17. The Commission also took note that the United Nations Convention on the Rights of the Child² (the “UNCRC”) established an international standard for the recognition and support of the rights of the child and highlighted the need for appropriate legal protection and special safeguards for children. The UNCRC requires States parties to establish a minimum age of criminal responsibility that reflects the physical and mental immaturity of children and promotes non-judicial measures for dealing with children in conflict with the law.³
18. The Commission pointed out that in 2007, the UNCRC⁴ recognised that reports submitted by States parties showed the existence of a wide range of minimum ages of criminal responsibility ranging from a very low level of age seven (7) or eight (8) years to the high level of age fourteen (14) or sixteen (16) years.⁵
19. The Commission discussed the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”)⁶ which accompanied the UNCRC as a supplemental guide, and observed that the “modern approach to consider was whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child can be held responsible for essentially antisocial behavior.”⁷ The UNCRC has stated that it increased its recommended age to reflect current research in child development and neuroscience, which says that abstract reasoning skills are not fully developed in children aged twelve (12) and thirteen (13) years.⁸ The critical point that Commission highlighted is that states parties are encouraged to increase their minimum age to at least fourteen (14) years of age.
20. In informing the recommendations, the Commission examined the relevant laws in a number of jurisdictions. These included jurisdictions with minimum age of criminal responsibility that is 10 or under such as Australia and the United Kingdom (England and Wales and Northern Ireland). Countries with a minimum age of criminal responsibility that is ten years of age or older such as Jamaica, most European Countries and Scotland.
21. The Commission took note of the age requirements in these jurisdictions and is of the view that children must be protected from the harmful effects of early criminalisation while ensuring that incidents of harmful behaviour by those who are under the minimum age may be effectively investigated to ascertain the facts surrounding the behaviour. The best interests of the child must be protected as well as the interests of victims and other persons that are affected by such harmful behaviour.
22. The Commission’s view is that an increase in the minimum age of criminal responsibility to age twelve (12) should be considered by amending section 12 of the Penal Code to reflect the protections afforded in the Bill of Rights and the international standards and obligations that have been extended to the Cayman Islands. This view is consistent with those of the stakeholders who,

² Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entry into force 2 September 1990, in accordance with article 49. <<https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>>.

³ Children in conflict with the law: children alleged as, accused of, or recognised as having infringed the penal law see page 3 of the UNCRC General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children’s rights in juvenile justice.

⁴ To assist in the interpretation of the rights under the Convention, the UN Committee on the Rights of the Child, a body of independent experts which monitors implementation of the UNCRC, issues documents known as General Comments. These have dealt with such issues as adolescent health (General Comment 4) and the right of children to be heard (General Comment 12). 14. States Parties are also required to report periodically to the Committee. After consideration of a State party’s report the Committee issues observations and recommendations. Concluding observations refer both to positive aspects of a State’s implementation of the UNCRC and areas where the Committee recommends that further action needs to be taken by the State.

⁵ General Comment No. 10 (2007), Children’s rights in juvenile justice CRC/C/GC/10, 25 April 2007, p 10.

⁶ General Assembly Resolution 40/333, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), A/RES/40/33 (29 November 1985) <<https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf>>.

⁷ Ibid, p 3.

⁸ <<https://www.theguardian.com/law/2019/sep/26/australia-urged-to-follow-un-advice-and-raise-age-of-criminal-responsibility-by-four-years>>.

during the consultation on the question of increasing the minimum agreed that the age of criminal responsibility should be increased to either twelve or fourteen years of age.

Recommendation

23. Accordingly, it is recommended that the minimum age of criminal responsibility as provided under section 12 of the Penal Code be increased from ten years of age to twelve years of age. This is aimed at protecting children and affirming the commitment of the Cayman Islands to comply with the Constitution and the UNCRC.

COMPULSION BY SPOUSE

Section 16 – Compulsion by spouse

A person is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of that person's spouse, but on a charge against a person other than for treason or murder, it shall be a defence for the accused person to prove that the offence was committed in the presence of and under the coercion of that person's spouse.

24. The Commission explained that the defence of compulsion by spouse derives from the old English common law rule of marital coercion that if a wife committed a crime in her husband's presence she was presumed, *prima facie*, to have committed it under such compulsion as to entitle her to be acquitted. The mere fact of the presence of the husband at the time of commission of the offence was sufficient to raise the presumption.
25. The Commission further explained that in the absence of evidence that the wife was principally responsible for the commission of the crime (or at least that she was acting independently) she would be acquitted, even though there is no evidence that she was acting under threats, pressure, or instructions from her husband.⁹
26. The Commission pointed out that section 16 of the Penal Code provides that a person is not free from criminal responsibility for something that they did or did not do on the grounds that the act or omission was in the presence of their spouse. However, except on a charge of murder or treason, a defence of compulsion by spouse may be used when an individual is charged with an offence if the accused can prove that their act or failure to act was in the presence of and under coercion from the person's spouse.
27. The Commission noted that neither the Penal Code nor the *Interpretation Act (1995 Revision)*¹⁰ defines the term "spouse" and found the defence of compulsion to be restrictive as it is available only in the case of persons of the opposite sex who are married. Further, it is to be noted that section 2 of the *Marriage Act (2010 Revision)*¹¹ defines "marriage" as the union between a man and a woman as husband and wife.¹²

⁹ Report of Avory Committee (1922)-Cmd. 1677, and Peel Case there referred to; R. v. Whelan (1937) S.A.S.R. 237; Glanville Williams, *The Criminal Law-The General Part*, Section 249. See <<https://www.ojp.gov/pdffiles1/Digitization/57842NCJRS.pdf>>.

¹⁰ Interpretation Act (1995 Revision).

¹¹ Marriage Act (2010 Revision).

¹² Ibid, s 2.

28. The Commission is of the view that the restrictions in the defence of compulsion by spouse raise human rights compatibility issues in particular in relation to section 16 of the Bill of Rights¹³ which prohibits treating any person in a discriminatory manner. “Discriminatory” includes discrimination on any ground including grounds of sex, birth and other status. This means that discrimination on the basis of the status of not being married may fall well within the scope of section 16 of the Bill of Rights. Further, with the enactment of the *Civil Partnership Act, 2020*,¹⁴ civil partnerships are recognised as a union between two persons.¹⁵
29. The Commission noted that in 1925, attempts were made in England and Wales to abolish the common law presumption of compulsion by spouse that permitted the mere presence of a husband to be sufficient to raise the defence for an offence committed by his wife. Although section 47 of the *Criminal Justice Act 1925*¹⁶ abolished the presumption, that section also provided a defence on a charge against a wife for any offence other than treason or murder if a wife proved that the offence was committed in the presence of, and under the coercion of, the husband.
30. The Commission found that as there was little authority for the correct test to be applied where the defence of compulsion by spouse was raised the use of the defence led to unfavourable decisions.¹⁷ In 1977,¹⁸ the Law Commission Criminal Law Report on Defences of General Application (Law Commission No. 83)¹⁹ took the view that the defence was not appropriate to modern conditions and recommended that the defence should be abolished and that the limit of the general defence of duress was to be considered instead.²⁰ The Commission is of the view that the Cayman Islands should also abolish the defence and place reliance on the defence of duress.
31. During the consultation with respect to the question of the defence of compulsion by spouse the Commission found that there was general agreement amongst stakeholders that the defence should be repealed.

Recommendation

32. Accordingly, the Commission recommends that the defence of compulsion by spouse in section 16 of the Penal Code be repealed on the ground that the defence is discriminatory and raises issues regarding compatibility with section 16 of the Bill of Rights. The rights that are available to a married person should also be available to any individual whether they be civil partners, common law partners, siblings or parents. Further, a spouse who commits an offence under pressure from their spouse can avail themselves of the common law defence of duress.

¹³ Cayman Islands Constitution Order 2009, No. 1379, Part I, Bill of Rights, Freedoms and Responsibilities, s 16.

¹⁴ Civil Partnership Act, 2020.

¹⁵ Ibid, s 2.

¹⁶ Criminal Justice Act 1925, 925 Chapter 86 15 and 16 Geo 5, s 47.

¹⁷ *R v Bourne* [1952]36 Cr App R. 125. A husband forced his wife to have a connection with a dog. She raised the defence arguing that she was coerced. He was charged with, and convicted of, abetting the offence of his wife. However, it was shown that the wife was coerced and was therefore found not guilty of the offence herself.

¹⁸ Law Commission (Law Com No. 83) Criminal Law Report on Defences of General Application. See Edwards, (1953) 69 L.Q.R. 226 and Cross (1953) 69 L.Q.R. 354. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228595/0556.pdf>.

¹⁹ Criminal Law: Defences of General Application Report. See <<https://www.lawcom.gov.uk/project/criminal-law-report-on-defences-of-general-application/>>.

²⁰ Ibid, p 19.

INSULTING THE MODESTY OF A WOMAN

Section 133 – Insulting the modesty of a woman

A person who, with intent 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, commits an offence and is liable to imprisonment for three years.

33. In examining this offence, the Commission found the expression “insulting the modesty of a woman” to mean the state of being free from undue familiarities and indecency, and being pure in thought and conduct.²¹ A woman’s modesty may therefore be attributable to her womanhood and to her sense of decency and dignity. The offence of insulting the modesty of a woman presumes that women possess those qualities of modesty that are capable of being insulted and that anyone who insults a woman’s decency without her consent commits an offence that is punishable.
34. The Commission stated that under section 133 of the Penal Code, a person commits the offence of insulting the modesty of a woman when they utter any word, make any sound or gesture or exhibit any object intending that such word or sound shall be heard, or that such gesture or object be seen by such woman, or intrudes upon the privacy of such woman, and is liable to imprisonment for 3 years.²²
35. The intent is to punish offenders who intentionally conduct acts of lewd behaviour directed at females. The section expresses the illegal act of a sexual assault on women where the perpetrator has stopped short of causing physical harm. This means that society will not condone whatever method was used to insult the dignity of a woman’s modesty.
36. The Commission referred to section 88A of the Penal Code which makes it an offence for a person to intentionally harass, alarm or distress another person by using threatening, abusive or insulting words or behaviour, by using disorderly behaviour, or by displaying any writing, sign or other visible representation which is threatening, abusive or insulting.²³ In this provision, the use of the word “insulting” was questioned by the Commission in terms of whether it was necessary to include the word given its subjectivity.
37. The Commission noted that the offence of insulting the modesty of a woman is applicable only in relation to a woman and therefore prohibits a man from being the complainant or victim in relation to that offence.²⁴ As such, the Commission felt that the offence of insulting the modesty of a woman raises human rights compatibility issues with respect to the fundamental right to be free from discrimination enshrined in section 16 of the Bill of Rights.
38. The Commission further noted that the offence of insulting the modesty of a woman fails to specify where the insult must occur before it can amount to an offence. Therefore, insults exchanged during an argument in a private dwelling can amount to a criminal offence. In such an instance, the Commission determined that this presumption conflicts with a person’s right to private and family life as well as their right to expression enshrined in sections 9 and 11 of the Bill and Rights.

²¹ See the Oxford English Dictionary.

²² Penal Code (2019 Revision), s 133.

²³ Penal Code (2019 Revision), s. 88A.

²⁴ See for example, report in Cayman Compass March 27, 2015: <<https://www.caymancompass.com/2015/03/27/modesty-charge-archaic-attorney-says/>>.

39. The Commission considered the legislation of Canada and England and Wales and pointed out that in England and Wales, the offence of harassment, alarm or distress is found in the *Public Order Act 1986*²⁵ which provides that a person is guilty of this offence if they use threatening or abusive words or behaviour, or disorderly behaviour²⁶ in a public place²⁷ within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. Previously, the *Public Order Act 1986*²⁸ included the word “insulting”.²⁹ However, in 2009 the Joint Committee on Human Rights (JCHR) felt that language or behaviour which is merely ‘insulting’ should ever be criminalised”.³⁰ As a result, the “Reform Section 5” Campaign sought to delete the word “insulting” to avoid frivolous arrests.
40. The Commission supports the approach followed in England and Wales due to the fact that it defends a person’s right to freedom of expression enshrined in section 11 of the Bill of Rights. That approach, the Commission noted, would not raise any compatibility issues with the right to protection from discrimination enshrined in section 16 of the Bill of Rights. The Commission also agrees that the approach taken in England and Wales in relation to the removal of the word “insult” from section 5(1) of the *Public Order Act 1986* should be followed.
41. During the consultation on the question of the repeal the offence of insulting the modesty of a woman, the Commission found that there was general agreement amongst stakeholders that the offence should be repealed.

Recommendation

42. Accordingly, the Commission recommends the repeal of the offence of insulting the modesty of a woman (section 133) and the removal of the reference to the word “insulting” in relation to words or behaviour in sections 88, 88A and 88B of the Penal Code.

UNNATURAL OFFENCES

Section 144 – Unnatural Offences

- (1) *A person who has carnal knowledge of any person against the order of nature, or has carnal knowledge of any animal or who permits a male person so to have carnal knowledge of him or her commits an offence and is liable to imprisonment for ten years.*
- (2) *A person who attempts to commit an offence under subsection (1) commits an offence.*

43. The Commission pointed out that the term “unnatural offence” is used to describe the prohibition of a sexual act which is against the “order of nature” such as sex with a person of the same sex. Other terms used to describe the offence include “sodomy” and “buggery”.

²⁵ Public Order Act 1986 c. 64, s 5(1).

²⁶ Ibid, s 5(1)(a).

²⁷ Ibid, s 5(2). No offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

²⁸ Public Order Act 1986, s 5(1).

²⁹ Reform Section 5 Campaign <<http://reformsection5.org.uk/>; House of Lords voted by 150 to 54, a majority of 96, to remove the word insulting.

³⁰ UK Parliament Publication, Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest, Joint Committee on Human Rights, HC 320-1 and HL Paper 47-1 Vol.1 paras 80-85.

44. The Commission found that the laws of those countries that criminalise sexual activity between persons of the same sex typically prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In many cases, the language used refers to “carnal knowledge against the order of nature” or “gross indecency”. These are usually known as moral offences and are justified by reference to tradition, popular opinion, and public morality. The Commission made the point that these various expressions and terms all make private sexual activity between consenting same sex adults illegal.
45. The Commission highlighted that several Commonwealth countries, including Australia, Canada, India and the United Kingdom, have repealed the prohibition.
46. In the discussion of the Penal Code provisions, the Commission noted that sections 144 and 145(5) of the Penal Code restricts a male person’s right to engage in sexual relations with a person of their choice and that the Penal Code does not create a similar offence in relation to female persons. The Commission determined that the term “unnatural offence” used to describe sexual activity between persons of the same sex is discriminatory against persons who engage in this type of relationship and that it is incompatible with the *Civil Partnership Act, 2020* which allows persons involved in same-sex relationships to formalise and register their union in the Cayman Islands.
47. Further, sections 144 and 145(5) of the Penal Code raise human rights compatibility issues with the fundamental right to be free from discrimination enshrined in section 16 of the Bill of Rights, Articles 2 and 7 of the Universal Declaration, Articles 2 and 26 of the International Covenant on Civil and Political Rights as well as other core international human rights treaties.
48. Also, sections 144 and 145(5) raise compatibility issues with an individual’s right to private and family life enshrined in section 9 of the Bill of Rights, Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights.
49. The Commission found it critical to bring to attention that though these offences remain in the Penal Code, by an Order in Council made on 13th December, 2000 it is provided, *inter alia*, that “a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen years.”³¹
50. However, the Commission noted that further discrimination occurs with the provision in the Order in Council in that the age of consent to engage in a homosexual relationship under the Penal Code is eighteen years whereas the age of consent to engage in a heterosexual relationship under the Penal Code is sixteen years.³²
51. The Commission examined legislation in other jurisdictions. For example, in Canada, the offence of buggery carried a maximum punishment of 10 years’ imprisonment but was subsequently declared unconstitutional because it discriminated on the grounds of age as well as sexual orientation and marital status, which violated section 15 of the Canadian Charter of Rights and Freedoms.
52. In England and Wales, the offence of sodomy was found to discriminate against persons who even acknowledge being involved in a same-sex relationship. The United Kingdom followed its recommendations by passing the *Sexual Offences Act 1967* to legalise homosexual acts, on the

³¹ *A.D.T. v The United Kingdom* (Application no. 35765/97).

³² Penal Code (2019 Revision), s 132(2), 134, and 145(2).

condition that they were consensual, in private and between two men who had attained the age of 21.

53. During the consultation on the question of the repeal of the offence of insulting the modesty of a woman, the Commission found that there was general agreement amongst stakeholders who responded that the offence should be repealed.

Recommendation

54. Accordingly, the Commission recommends that the provisions in sections 144 and 145(5) of the Penal Code that prohibit sexual activity between consenting same sex adults should be repealed as the criminalisation of sexual practices between consenting adults of the same sex raises human rights compatibility issues with the fundamental right to be free from discrimination, an individual's right to private and family life and the right to personal liberty.

INDECENT ASSAULT

Section 132 – Indecent assault of females

- (1) It is an offence for a person to make an indecent assault on a woman.*
- (2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.*
- (3) Where a marriage is invalid under the Marriage Law (2010 Revision) (the wife being under the age of sixteen), the invalidity does not make the husband an offender under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief.*
- (4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as having committed indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be defective.*

Section 145 - Indecent assault on a man

- (1) A person who makes an indecent assault on a man commits an offence.*
- (2) A boy under the age of sixteen cannot in law give any consent which would prevent an act from being an assault for the purpose of this section.*
- (3) A man who is a defective cannot in law give any consent which would prevent an act being an assault for the purpose of this section, but a person is only to be treated as having committed an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect him to be defective.*
- (4) A person who commits an indecent assault on a man is liable on conviction on indictment to imprisonment for ten years.*

55. The Commission discussed the offences of indecent assault of a woman (section 132) and indecent assault of a man (section 145). These offences prohibit non-consensual sexual acts which do not involve penetration.
56. The Commission referred to the the Grand Court case of *CT v R*³³ in which a disparity was found between an indecent assault committed on a male contrary to section 145 of the Penal Code, which is a Category A offence triable only on indictment and on the other hand, indecent assault committed on a female contrary to section 132 of the Penal Code, which is a Category B offence triable in either the Summary or Grand Court.³⁴
57. The Commission is of the view that due to the fact that the offences deal with a general offence of indecent assault, there is no justifiable reason why there should be a difference in the mode of trial. This difference amounts to discrimination on the grounds of sex.
58. The Commission concluded that reform is needed by replacing the two different offences with a general offence of indecent assault. This would enable the offence to be clear about the nature of the offence and be gender neutral.
59. During the consultation on the question of repeal of the offences of indecent assault on an woman and indecent assault on a man, the Commission found that there was general agreement amongst stakeholders that the offences should be repealed.

Recommendation

60. Accordingly, the Commission recommends the repeal of section 132 (indecent assault on a woman) and section 145 (indecent assault on a man) and the enactment of a general offence of indecent assault which defines the concept and identifies the circumstances that must be taken into account to constitute the offence.

ABORTION

Section 141 - Attempts to procure abortion

- (1) *A person who with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her any poison or other noxious thing, or uses any force of any kind, or other means whatsoever to that purpose commits an offence.*
- (2) *Notwithstanding subsection (1) no person commits such offence unless it is proved that the act alleged to constitute the offence was not done in good faith for the purpose only of preserving the life of the mother.*
- (3) *Notwithstanding subsections (1) and (2) a health practitioner registered to practise medicine under the Health Practice Law (2017 Revision) has not committed of an offence under subsection (1) in respect of any act if such act is first certified in writing by two such registered health practitioners acting in good faith, one of whom is registered by the Medical and Dental Council as an obstetrician, a gynaecologist or is employed as a Government Medical Officer in either capacity, as being necessary for the purpose of preserving the life of the mother.*

³³ *CT v R* [2016 (2) CILR 376].

³⁴ *Ibid.* See <<https://cilr.judicial.ky/Judgments/Cayman-Islands-Law-Reports/Cases/CILR2016/CILR162376.aspx>>.

Section 142 - Attempt by woman with child to procure abortion

Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever to that purpose, or permits any such thing or means to be administered to her commits an offence.

Section 143 - Supplying drugs or instruments to procure abortion

A person who unlawfully procures for or supplies to any person any thing whatsoever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits an offence.

61. The Commission, in its examination of the issue of abortion, indicated that abortion is the commonly used term for the deliberate termination of an established pregnancy, where “established” is taken to mean that the embryo has implanted in the uterus.³⁵
62. The Commission referred to statistics which show a woman’s ability to access safe and legal abortions is restricted in law or in practice in most countries. In instances where abortion is permitted by law, the Commission noted that women often have severely limited access to safe abortion services because of lack of proper regulation, health services, or political will.
63. Whilst the grounds to allow abortion may vary considerably, the Commission found that the common elements covered in the legislation are usually centered on the grounds for abortion, gestational limits, who can provide abortion services, conscientious objection and notification requirements. In most jurisdictions, abortion is allowed at least to save the pregnant woman’s life, or where the pregnancy is the result of rape or incest.³⁶
64. The Commission noted that the Cayman Islands falls amongst the countries that only allow an abortion to save the life of a woman. Section 141 of the Penal Code prohibits the procurement of the miscarriage of a woman (abortion)³⁷ unless it is done in good faith for the purpose of only preserving the life of the mother.³⁸ Therefore, any person who attempts to procure an abortion, or supply drugs or an instrument to assist with the procurement of an abortion³⁹ commits a criminal offence.
65. Under section 141(3) of the Penal Code,⁴⁰ a health practitioner registered to practice medicine under the *Health Practice Act (2021 Revision)*⁴¹ does not commit the offence of procuring an abortion in respect of any act if such act is first certified in writing by two such registered health practitioners acting in good faith, as being necessary for the purpose of preserving the life of the mother. One of the registered health practitioners must be registered by the Medical and Dental Council as an obstetrician or a gynecologist or must be employed as a Government Medical Officer in either capacity.⁴²

³⁵ See the Oxford English Dictionary.

³⁶ Women’s human rights, Abortion found at <<https://www.hrw.org/legacy/women/abortion.html>>.

³⁷ Penal Code (2019 Revision), s 141.

³⁸ Ibid, s 141(2).

³⁹ Ibid, ss 141, 142, and 143.

⁴⁰ Ibid, s 141(3).

⁴¹ Health Practice Act (2021 Revision).

⁴² Penal Code (2019 Revision), s 141(3).

66. Section 142 of the Penal Code makes it an offence for a woman with child to intentionally procure abortion.⁴³ Section 143 goes further by making it an offence for a person to unlawfully procure or supply drugs or instruments to procure abortion.⁴⁴
67. The Commission viewed that the procurement of abortion in sections 141, 142 and 143 of the Penal Code raises compatibility issues with the fundamental right to life protected in section 2 of the Bill of Rights which provides that everyone's right to life shall be protected by law and that no person shall intentionally be deprived of his or her life. The right to life is also protected by the International Covenant on Civil and Political Rights and the Convention on the Elimination of Discrimination against Women,⁴⁵ which are both extended to the Cayman Islands⁴⁶.
68. The Commission examined the positions of England and Wales, Northern Ireland and Scotland, Canada, Jamaica and Australia. Under the *Offences Against the Person Act, 1861*⁴⁷ which applies in England and Wales, Northern Ireland and Scotland, it is a criminal offence for any woman or girl, being with child, unlawfully to do any act with intent to procure a miscarriage. It is also an offence for any person, unlawfully with intention to do an act, to procure a miscarriage of any woman or girl or to unlawfully supply or procure drugs or instruments to cause an abortion.
69. At common law, if a doctor is of the reasonable opinion that the probable consequence of the continuation of the pregnancy is to make a woman or girl a "physical or mental wreck" that will have "real and serious" effects that would be "permanent or long term" it can be construed that the doctor is "operating for the purpose of preserving the life of the woman".⁴⁸
70. The *Abortion Act, 1967*⁴⁹ which was later amended by the *Human Fertilisation and Embryology Act, 1990*⁵⁰ liberalised the rules on abortion in England, Scotland and Wales but not in Northern Ireland. The *Abortion Act, 1967* does not make all abortions legal but it makes exceptions to the *Offences Against the Person Act, 1861*⁵¹ which made abortion an offence punishable by life in prison.
71. Under the *Abortion Act, 1967*, a doctor can legally perform an abortion, which has been authorised by two doctors, up to the 24th week of pregnancy if continuing the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family⁵².
72. In Canada, this offence was called "procuring miscarriage".⁵³ It defended the common law position that a person should be punished for destroying infants in the mother's womb.⁵⁴

⁴³ Ibid, s 142.

⁴⁴ Ibid, s 143

⁴⁵ The Convention on the Elimination of Discrimination against Women (CEDAW) adopted in 1979 by the UN General Assembly.

⁴⁶ The UK ratified the International Covenant on Civil and Political Rights on 20 May 1976. The ratification extends to the CDs and the following OTs: Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena and its dependencies (Ascension Island and Tristan da Cunha), and the Turks and Caicos Islands.

⁴⁷ Offences Against the Person Act, 1861

⁴⁸ *R v Bourne* [1939] 1 KB 687 and subsequent cases.

⁴⁹ Abortion Act, 1967; UK Public General Acts 1967, c.87.

⁵⁰ Human Fertilisation and Embryology Act, 1990.

⁵¹ UK Public General Acts 1861, c.100.

⁵² Abortion Act, 1967, s 1(1).

⁵³ Criminal Code (R.S.C., 1985, c. C-46), s 287, previously s 251, which became law in 1969.

⁵⁴ William Russell, 'A Treatise on Crimes and Misdemeanors', Philadelphia: T & JW Johnson & Co., 1857, p 671.

73. However, the offence of “procuring miscarriage” was repealed by *Bill C-39*⁵⁵ on the basis that it was “unconstitutional.”⁵⁶ In *R v Morgentaler*⁵⁷ the Supreme Court of Canada struck down the offence of procuring a miscarriage because it violated the woman’s right to life, liberty and security of the person as stipulated in Article 7 of the Canadian Charter of Rights and Freedoms.⁵⁸
74. In Jamaica, this offence is captured partly under the English common law, which follows the holding of the English case *Rex v. Bourne*⁵⁹, and partly by statute, in section 72 of the *Offences Against the Person Act of 1864*⁶⁰ (as amended in 2005), which is based on the 1862 English Act of the same title. That Act provides that every woman with the intent to procure her own miscarriage or whosoever with intent to procure the miscarriage of any woman, is guilty of a felony and is liable to life imprisonment except where the mother’s actual life is at risk.⁶¹
75. In the Northern Territory of Australia, procuring an abortion is prohibited.⁶² However, a woman may acquire consent⁶³ to procure an abortion, if a medical practitioner reasonably believes that she is not more than 14 weeks to 23 weeks pregnant.⁶⁴ Pregnancies over 23 weeks may only be terminated to prevent serious harm to the woman’s physical or mental health⁶⁵ or for the sole purpose of preserving life.⁶⁶ Furthermore, the abortion must take place at a hospital.
76. To improve a woman’s access to terminate a pregnancy safely, the Government repealed the offence of procuring an abortion in its entirety by passing the *Termination of Pregnancy Law Reform Act 2017*.⁶⁷
77. The *Termination of Pregnancy Law Reform Act 2017* removed the procedural requirement that abortions could only be done in a hospital by enabling the procedure to be done in any place termed as a “safe access zone”.⁶⁸ It also amended the consent requirement in order for it to be uniform with the age of consent to acquire a medical procedure.⁶⁹
78. The Commission noted that the effect of the Act is to decriminalise the conduct of a woman seeking an abortion and uphold the Government objective to ensure that she has access to safe health care. In particular, the Act requires that only a suitably qualified medical practitioner can terminate a pregnancy when having regard to all relevant medical circumstances, and current and future physical, psychological and social circumstances of the woman and when they are in compliance with professional standards and guidelines.⁷⁰

⁵⁵ Justice Minister Jody Wilson-Raybould proposed the Charter Statement - Bill C-39. An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts. See

<<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c39-e.pdf>>.

⁵⁶ *Ibid*, para 1.

⁵⁷ [1988] 1 S.C.R. 30.

⁵⁸ (Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The Canada Act 1982, other than Schedules A and B).

⁵⁹ [1939] 1 K. B. 687 3 All E. R. 615 (1938).

⁶⁰ Offences Against the Person Act of 1864, Jamaica Cap 268 Law 43 of 1958, s 72.

⁶¹ *Ibid*.

⁶² Criminal Code Act 1983, s 208 A-C. Division 8, s 208 A-C. Criminalises the administration of drugs or an instrument to procure an abortion.

⁶³ The Discussion Paper, Termination of Pregnancy Law Reform; Improving access by Northern Territory women to safe termination of pregnancy services, was released by the Department of Health on 9 December 2016 and submissions closed on the 27 January 2017. See Medical Services Act 1982 (NT), s 11(5). The consent of each person having authority in law is required if the woman is under 16 years of age or is incapable in law of giving consent. See <<https://www.gotocourt.com.au/criminal-law/nt/the-age-of-consent/>>.

⁶⁴ Medical Services Act 1982 (NT) s 11(1)-(2) in relation to pregnancies not more than 14 weeks; s 11(3) in relation to pregnancies not more than 23 weeks.

⁶⁵ See <<https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf>>.

⁶⁶ Medical Services Act (NT) s 11(4). Abortion to save a woman’s life is permitted at any stage of pregnancy, but is the only circumstance in which it is permitted after 23 weeks gestation.

⁶⁷ Termination of Pregnancy Law Reform Act 2017.

⁶⁸ Termination of Pregnancy Law Reform Bill 2017 (Australia –NT), Clause 4.

⁶⁹ See <<https://legislation.nt.gov.au/en/Legislation/Termination-Of-Pregnancy-Law-Reform-Act-2017>>. Requirements where a female age sixteen or under had to first obtain both parents/legal guardians consent.

⁷⁰ Termination of Pregnancy Law Reform Bill 2017 (Australia-NT), clause 7.

79. The takes particular note of the Australian approach which focuses on the safety requirements needed to terminate a pregnancy, whether terminated surgically or by administering medication. The Commission recognises the profound opinions on abortion and that the subject of abortion is highly emotive, sensitive, complex and controversial.
80. As was anticipated by the Commission, the issue of abortion and in particular, the question of whether bespoke legislation should be introduced to provide for safe access to termination of pregnancy or whether the Penal Code should be amended to expand the grounds for legal abortion, solicited numerous comments during the consultation period.
81. The respondents who support providing access to legal abortions point to the benefit of abortion to the mother and the society at large as a veritable reason for the support of abortion. They view the criminalisation of abortion – either by punishing the women who choose to have abortions or by punishing the service providers that perform them – as violating women’s reproductive rights, leading to devastating health consequences, and having a disproportionately grave impact on the most vulnerable women. On the other hand, those respondents who are pro-life query the rationale behind the destruction of one individual (the fetus) for the survival of another individual (the mother). This view is grounded in a deep reverence for human life. These views have now taken on a renewed life against the background of the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health*⁷¹, which overturned *Roe v. Wade*.⁷²
82. It is in this regard that the Commission determined that the issue of abortion should be treated as a separate reform project to allow further consideration of all the complexities involved.

Recommendation

83. Accordingly, the Commission makes no recommendation on the issue of abortion for purposes of this Final Report.

CONCLUSION

85. The review by the Commission of the provisions of the Penal Code on the age of criminal responsibility, compulsion by spouse, insulting the modesty of a woman, abortion, unnatural offences, indecent assault and incest suggests that these offences need to be amended and in some cases repealed to remove issues of incompatibility between the Bill of Rights and the Penal Code. The Commission in each case recommends that the relevant provision of the Penal Code be amended or repealed as appropriate.

Accordingly, the Commission recommends for consideration, the *Penal Code (Amendment) Bill, 2022*.

⁷¹ Dobbs, State Health Officer of the Mississippi Department of Health, et al. V. Jackson Women's Health Organization et al.(2022), no. 19-1392.

⁷² 410 U.S. 113 (1973).

APPENDIX 1

THE PENAL CODE (AMENDMENT) BILL, 2022

APPENDIX 2

DISCUSSION PAPER

THE PENAL CODE: IS IT COMPATIBLE WITH THE BILL OF RIGHTS?

APPENDIX 3

STAKEHOLDER RESPONSES TO THE TO THE DISCUSSION PAPER

The Cayman Islands Law Reform Commission
3rd October, 2022

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