

SAMOA

LAW REFORM COMMISSION

CARE AND PROTECTION LEGISLATION TO PROTECT CHILDREN

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Preface

This is an in-house law reform project (“Project”) which aims at: (i) identifying existing Care and Protection Legislation in Samoa and (ii) examining their latest development in attempts to comply with Samoa’s obligations under the Convention on the Rights of a Child (“CRC”). The Samoa Law Reform Commission (“Commission”) has been mandated to undertake the review of existing care and protection laws in light of the obligations under CRC. In getting to this point, it is important to consider similar legislation in other jurisdictions, with the ultimate aim of making recommendations as to the way forward on care and protection legislation in Samoa.

We emphasize that we are not committed to the views indicated and any provisional conclusions should not be taken as precluding further consideration of the issues.

We are grateful for the assistance of the following people who provided comments on earlier drafts of this paper: Greg Blue, (Senior Staff Lawyer, British Columbia Law Institute), and Wayne Renke, (Professor & Vice Dean, Faculty of Law, University of Alberta).

We emphasize however that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us

Submissions or comments on this paper should be sent by the 19th of March 2010, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to lawreform@ag.gov.ws.

Introduction

This paper discusses existing legislation in Samoa that addresses care and protection issues relating to children in light of obligations under CRC. It will also make specific references to findings in a report by the Ministry of Women Community and Social Development on the *Legislative Compliance Review of Samoa with the Convention on the Rights of a Child* in 2006. Given the number of Acts involved, there will be a series of papers following this paper. This initial paper will focus on the Constitution of Samoa, the Infants Ordinance 1961 and the Young Offenders Act 2007. Comparisons will be drawn from relevant laws of New Zealand and the Northern Territory of Australia.

Whilst comparisons are made with other jurisdictions, it is accepted that law reform should not be a mere adoption of the favourable developments in other comparable jurisdictions but consideration should also be made of local circumstances including values and customs where relevant.

The content of the issues paper will be as follows:

1) INNOCENCE OR IRRESPONSIBILITY?	4
2) CONVENTION ON THE RIGHTS OF A CHILD AND ITS APPLICATION TO SAMOA	5
2.1) CRC Application in Domestic Laws	6
3) CARE AND PROTECTION LAWS IN SAMOA: LEGISLATIVE COMPLIANCE WITH CRC	8
3.1) Constitution of Samoa 1960	9
3.2) Infants Ordinance 1961	10
3.2.1) Definition of a child	11
3.2.2) Ill-treatment and neglect	12
3.3) Young Offenders Act 2007	14
3.3.1) Definition of a child	16

4) DISCUSSION OF COMPARABLE JURISDICTIONS	17
4.1) Northern Territory (Australia)	17
4.1.1) Definition of a child	18
4.1.2) Ill-treatment and neglect	18
4.2) New Zealand	20
4.2.1) Definition of a child	20
4.2.2) Ill-treatment	21
5) STATE INTERVENTION IN SAMOA	22
6) SUMMARY OF QUESTIONS	23
7) CALL FOR RESPONSES	25

1) INNOCENCE OR IRRESPONSIBILITY?

Existing legislation relating to the care and protection of children in Samoa can be grouped into two main categories, civil law and criminal law:

- i) Civil law is divided into public and private law. Public law puts in place systems and processes in order to minimise the risk of children coming to harm and lays out what actions should be taken if children are at risk.¹ Private law deals with family proceedings such as divorce and contract.²*
- ii) Criminal law deals with people that have offended or are at risk of offending against children or children who are offenders.³ In practice, some Acts may include both provisions that relate to civil law and provisions that relate to criminal law.⁴*

In the view of the Committee for the CRC, more effort is needed to make the laws of Samoa more children friendly.⁵ On that note, childhood needs to be understood as not just a stage of limited legal capacity when a person is under a certain age but also a social concept.⁶ The

¹ For example, *Labour and Employment Act 1972, Immigration Act 2004, Komesina o Sulufaiga (Ombudsman Act) 1988, Mental Health Act 2007, Marriage Ordinance 1961.*

² For example, *Divorce and Matrimonial Causes Ordinance 1961, Maintenance and Affiliation Act 1967.*

³ For example, *Crimes Ordinance 1961, Police Offences Ordinance 1961, Evidence Ordinance 1961, Criminal Procedure Act 1972, Indecent Publication Ordinance 1960.*

⁴ For example, *Infants Ordinance 1961, Film Control Act 1987, Immigration Act 2004, Citizenship Act 2004.*

⁵ Refer to Concluding observations by the Committee on the Convention for the Rights of a Child, *CRC/C/WSM/CO/1 16 October 2006.*

⁶ C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 133.

characteristics, which distinguish a child from an adult, can be influenced by politics, ideologies and economic environment.⁷ That is, in some societies, childhood is taken by some to be a period of innocence, during which a child needs protection and is not fully self-reliant.⁸ This representation of childhood has produced laws that make parents responsible for caring and protecting their children and rationalises state intervention in the family context when a child is neglected or abused. This view is in line with the principles of the CRC.

On the other hand, there is the view that childhood is a period of irresponsibility, during which children are in need of firm, often-coercive control.⁹ The proponents of this view support laws that allow for the reasonable physical disciplining of children and setting limits to prevent children from accessing locations or materials where they may be susceptible to adverse influences. Samoa's existing legislation seems to follow this view.

2) CONVENTION ON THE RIGHTS OF A CHILD AND ITS APPLICATION IN SAMOA.

Samoa ratified the CRC on the 29 November 1994. The CRC is an international convention that deals with specific needs and rights of children. The aim of the CRC is to set standards for the defence of children against the neglect and abuse they face to varying degrees in all countries everyday.¹⁰ It also ensures that children grow up in a healthy environment that is full of happiness, love and understanding. This guarantees that they are prepared to live freely in a society with dignity and peace.¹¹ The most important consideration is the best interest of the child.

The CRC is specific about the obligations of member parties to give priority to key principles of the Convention over national laws in the case of a conflict.¹² Samoa is required to set and

⁷ C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 133.

⁸ C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 133.

⁹ C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 133.

¹⁰ Convention on Rights of a Child (www.hrea.org/feature-events/simplified) Accessed 11/08/2009.

¹¹ *Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, preamble (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹² *Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, art 4 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

monitor operating standards of particular institutions dealing with children¹³ and to encourage the distribution of appropriate and valuable information to children.¹⁴

The CRC is also explicit on issues of children in alternative care,¹⁵ child refugees,¹⁶ juvenile offenders¹⁷ and mentally or physically disabled children.¹⁸ The CRC also requires member states to commit to providing children, within their families, with an adequate standard of living¹⁹ and with rights to social security²⁰ and education.²¹

These standards however are not new creations by the CRC. The CRC only operates to recognise and reemphasise the applicability to children of their previously existing inalienable rights.

It is also important to note that the CRC does not limit the rights of parents or prescribe conditions on the relationship between parents and children but it recognises the need to treat children in accordance with their fundamental human rights both inside and outside of the family context.

2.1) CRC Application in Domestic Laws

The Constitution of Samoa does not recognise international law as part of the law of Samoa. Consequently, the CRC is not automatically adopted as part of the domestic legal framework. However, Samoa as a party to CRC has a duty to incorporate its obligations under the Convention into its domestic legislation. In doing so, Samoa will be assuming the dualist

¹³*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, art 3(3) (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹⁴*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, arts 13 and 17 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹⁵*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, arts 3(2), (3), 20, 25 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹⁶*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, art 22 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹⁷*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, arts 37 and 40 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹⁸*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, art 23 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹⁹*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, arts 18 and 27 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

²⁰*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, art 4 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*') CRC art 26.

²¹*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, arts 28 and 29 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

approach. That is, appropriate domestic legislation needs to be enacted to give a convention full domestic force.²² Once such enactment is in force, Samoa will need to amend existing laws to recognise its international obligations. These international obligations will need to be considered in any enactment of laws in Samoa by Parliament but perhaps within the limits of the supreme law given the existing hierarchy of sources of laws in Samoa.²³ Samoa is compelled to promote the development of children and their protection from their families or legal guardians when necessary.

The Courts in Samoa are applying the principles of CRC without its proper inception into domestic laws.²⁴ In the recent case of *Police v Faiga*,²⁵ the defendant, a 31-year-old male, was charged with one count of indecently assaulting an 8-year-old girl. In sentencing the defendant, the Court considered the principles of the Convention particularly articles 19(1) and 34.²⁶ Justice Nelson in Samoa in this case pointed out that ‘*it is a clear mandate to the courts of this country to have regard to the provisions of the Convention in sexual abuse cases involving young children given the increasing prevalence of sexual offending involving young children...*’²⁷

In general, Samoa has been implementing treaties and conventions through applying the principles of such conventions domestically in court cases in Samoa without either ratification or a legislative framework. In the case of *Wagner v Radke*²⁸ in 1997, the Supreme Court of Samoa eventually allowed the Hague Convention on the Civil Aspects of International Child Abduction to apply to Samoa as principle guidelines as there is no law in Samoa covering the issue of child abduction. The Chief Justice of Samoa highlighted that the Court must have regard to the purpose and philosophy of the Hague Convention in applying common law principles and conventions could be used as tools to provide guidance. The principles of the Hague Convention were applicable as international customary law as many

²² For example, *Convention on the Rights of Child (Ratification) Act 1992* (VU). *Chemical Weapons Convention Act 2005* (Samoa).

²³ In the order of supremacy: The Constitution of Samoa > Acts of Parliament > Common law and Equity > Customary law of Samoa.

²⁴ *Sarai Ripine*, Samoa Observer, (2 May 2009). (Sarai Ripine reported that a 65 year old grand father was jailed for indecent assault. The mother tried to withdraw the charges but Justice Vui Clarence said no because Samoa signed on to the CRC.

²⁵ [2008] WSSC 96 (19 November 2008).

²⁶ Article 19- State Parties shall take all appropriate legislative administrative social and educational measures to protect the child from all forms of physical or mental abuse including sexual abuse. Article 15- State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.’

²⁷ *Police v Faiga* [2008] WSSC 96 (19 November 2008).

²⁸ (1997) Supreme Court of Samoa (Misc) 20701.

of these rules existed long before they became codified in conventions. This case, highlighted that the welfare of the child was the first and paramount consideration in questions of custody under Samoa and international law.

Question:	<ol style="list-style-type: none">1. <i>Should Samoa amend its laws to give CRC full domestic force?</i>2. <i>Is it enough that the courts apply CRC even without its proper implementation into domestic legislation?</i>
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3) CURRENT CARE AND PROTECTION LAWS IN SAMOA: LEGISLATIVE COMPLIANCE WITH CRC.

The following are some of the laws in Samoa addressing issues related to CRC:

- 3.1) *Constitution of Samoa 1960;*
- 3.2) *Infants Ordinance 1961;*
- 3.3) *Youth Offenders Act 2007.*

In some cases, new laws are enacted to address areas that have not been covered by any Acts of Parliament. For example, the recent enactment in 2007 of the Young Offenders Act addresses youth justice issues which are part of Samoa's obligations under the CRC. Such obligation under Article 19 of the CRC states that parties to the CRC '*...shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of abuse* (own emphasis).

The newly enacted Education Act 2009 forbids the employment of 'compulsory school aged children' as stated in sections 20 and 21 of the Act. In this Act, compulsory school-aged children means '*a child who is between five (5) years of age and fourteen (14) years of age who has not completed the work of Year 8 of school.*' The Education Act forbids the employment of compulsory school aged children. This is during school hours or at any time if the work would interfere with the child's attendance and participation at school ²⁹ The Act

²⁹ Education Act 2009 s. 20. **Employment of compulsory school-aged child-** (1) Subject to subsection (3) it is an offence for a person to arrange for a compulsory school-aged child to engage in street trading or to carry out other work of any kind, whether for reward or not::
(a) at any time during school hours; or

complies with Article 32 of the CRC, which recognizes the rights of the child to be protected from economic exploitation and from performing any work that is likely to interfere with the child's education.

There are also laws in Samoa that have undergone amendment to be consistent with provisions of the CRC such as the Infants Ordinance 1961 ("the Ordinance") and Youth Offenders Act 2007, which will be discussed later in this paper.

Question:	<i>3. Should Samoa extend the prohibiting of employment of compulsory school aged children to hours after school?</i>
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3.1) Supreme Law- Constitution of Samoa 1960

The Constitution is the supreme law of Samoa. It only recognises a few other sources of law. It recognises, Acts of Parliament and any proclamation, regulation, order, by-law or other related act of authority, English common law and equity, which is not contrary to any other law in force in Samoa, and any custom or usage, which has acquired the force of law in Samoa.³⁰

The Constitution also guarantees the protection of fundamental rights and freedoms. These are: right to life;³¹ right to personal liberty;³² freedom from inhumane treatment;³³ freedom from forced labour;³⁴ right to a fair trial;³⁵ rights concerning criminal law;³⁶ freedom of religion;³⁷ rights concerning religious instructions;³⁸ rights regarding freedom of speech, assembly, association, movement and residence;³⁹ rights regarding property;⁴⁰ and freedom

(b) at any time if the work would prevent or interfere with the child's attendance at school, active participation in school activities or the child's educational development..

(2) Any person who commits an offence under subsection (1) is liable to a fine not exceeding 100 penalty units in the case of a natural person, and in the case of a company or other entities, a fine not exceeding 500 penalty units.

³⁰ Constitution Art 111.

³¹ Constitution Art 5.

³² Constitution Art 6.

³³ Constitution Art 7.

³⁴ Constitution Art 8.

³⁵ Constitution Art 9.

³⁶ Constitution Art 10.

³⁷ Constitution Art 11.

³⁸ Constitution Art 12.

³⁹ Constitution Art 13.

⁴⁰ Constitution Art 14.

from discriminatory legislation.⁴¹ The scope of these rights, entrenched in the Constitution, is wide enough to address some of Samoa’s obligations under the CRC.⁴² However, where obligations are specific, the extent of these rights is ambiguous and limited. For example, Article 15(2) of the Constitution provides for the protection of any person from grounds of discrimination stated thereto but it does not make specific reference to children.⁴³ Article 15(2) also does not make express reference to non-discrimination on the grounds of race or colour of a child.⁴⁴

The reference to ‘person’ in the Constitution is not defined, however, the Acts Interpretation Act 1974 defines ‘person’ as to include ‘body of persons’. The definition in the Acts Interpretation Act is too general and does not specify an age.

Question:	<i>4. Should Samoa address CRC related issues in the Constitution and provide child specific provisions?</i>
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3.2) Infants Ordinance 1961

The Ordinance addresses issues on: guardianship and custody of children,⁴⁵ adoption of infants,⁴⁶ protection of children,⁴⁷ appointment of officers to care for destitute and delinquent children,⁴⁸ contracts and claims involving children,⁴⁹ legitimacy of a child and claims he or she can make.⁵⁰ The Ordinance also gives the Head of State the power to make regulations on the advice of cabinet to ensure its proper administration.⁵¹

Part 1 of the Ordinance provides for guardianship and custody of children. The fundamental principle here is the welfare of the child. Part II of the Ordinance provides for legal requirements for adoption of infants (‘infant’ is defined as any person under the age of

⁴¹ Constitution Art 15.

⁴² For example: *Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, Art 4 (entered into force 2 September 1990) (‘*Convention on the Rights of a Child*’)CRC Art. 4,6, 13.

⁴³ Legislation Compliance Review of Samoa with the CRC p. 1.

⁴⁴ Legislation Compliance Review of Samoa with the CRC p. 2.

⁴⁵ *Infants Ordinance* ss 3-6.

⁴⁶ *Infants Ordinance* ss 7-11.

⁴⁷ *Infants Ordinance* ss 12-14.

⁴⁸ *Infants Ordinance* ss 15-20.

⁴⁹ *Infants Ordinance* ss 21-23.

⁵⁰ *Infants Ordinance* ss 24-27.

⁵¹ *Infants Ordinance* s 28.

twenty one (21) years) applicable in Samoa and overseas. This provision also requires that persons adopting any infant must be fit and proper in caring for the infant. Part III of the Ordinance states that it is an offence to mistreat, neglect or abuse children. Any person who commits such an offence is prosecuted accordingly.

Part IV appoints a Child Welfare Officer who is responsible for caring for a child whom the Court finds in the course of a proceeding, has been neglected, not under proper control or is living in an environment that is unfavourable. The Child Welfare Officer is treated as the guardian of such child.⁵²

Where the Court makes an order to commit a child under the care of a Child Welfare Officer, it can vary or discharge such orders when a child reaches the age of sixteen (16) years.⁵³ The Ordinance provides that anyone who interferes with the currency of such an order is guilty of an offence and is liable to imprisonment of one year or a fine not exceeding five (5) penalty units.⁵⁴

3.2.1) Definition of a Child

Article 1 of CRC defines ‘child’ as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. In contrast, the Ordinance defines a ‘child’ as any infant under the age of sixteen (16) years.⁵⁵

The definition of ‘child’ can also be found in the Fatal Accidents Act 1974 which is an Act relating to actions for damages on behalf of families of persons killed by accident. The term ‘child’ is generally defined as to include a son, daughter, grandson, granddaughter, stepson, stepdaughter and it includes a child out of wedlock, which is most commonly known as an illegitimate child.⁵⁶ This Act does not provide for a specific age of a child but rather provides the above list of persons who are regarded as children.

⁵² *Infants Ordinance 1961* s 16.

⁵³ *Infants Ordinance 1961* s 19.

⁵⁴ *Infants Ordinance 1961* s 20.

⁵⁵ *Infants Ordinance 1961* s 2.

⁵⁶ *Fatal Accident Act 1974* s 2.

The Ordinance also uses other related terms such as ‘infant’, which is any person under the age of 21 years.⁵⁷ The Acts Interpretation Act defines a ‘minor’ as a person under the age of 21.⁵⁸

- **SLRC Observation**

The definition of ‘child’ in the Ordinance is inconsistent with the definition of ‘child’ under Article 1 of the CRC. The definition of ‘child’ under the Fatal Accidents Act is also too general. Samoa has yet to conform to the CRC definition of ‘child’, which is every human being below the age of eighteen (18) years.

Question:	5. <i>Should the age of a child in Samoa be 18 years and under?</i> 6. <i>Should a child be defined consistently in all Acts of Parliament in Samoa?</i>
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3.2.2) Ill-treating and neglecting of children

The relevant Articles of CRC protecting children from ill-treatment and neglect are Articles 19, 20, 32, 33, 34, 36, 37, and 38. Similarly, Part III of the Ordinance creates an offence against causing unnecessary suffering or injury to a child under the age of fourteen (14) years through wilfully ill-treating, neglecting, abandoning or even exposing him/her to any such acts. A person convicted under this section is guilty of an offence and is liable to a fine not exceeding five (5) penalty units or imprisonment for a period not exceeding 1 year.

The Ordinance does not have any provision dealing with the sale and trafficking of children.⁵⁹ There are Articles of CRC protecting children from sale and trafficking. For instance, Article 35 states that state parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

⁵⁷ *Infants Ordinance 1961* s 2.

⁵⁸ *Acts Interpretation Act 1974* s 4.

⁵⁹ *Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, Art 35 (entered into force 2 September 1990) (*‘Convention on the Rights of a Child’*).

Section 14 of the Ordinance recognises the right of parents, teachers or other persons having lawful control or charge of a child to administer reasonable punishment to a child under their charge.⁶⁰ It is unclear from the Ordinance what ‘reasonable punishment to a child’ means. Article 2 of CRC ensures the protection of children from all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

- **SLRC Observation**

The Ordinance does not provide sufficient protection against the sale and trafficking of children as specified in the CRC.

Section 14 of the Ordinance is contrary to Article 2 of CRC,⁶¹ which discourages threat and use of corporal punishment in homes, schools (public and private) and other institutions that are usually in charge of children. The Ordinance fails to define what amounts to ‘reasonable punishment’. Article 37 of the CRC is clear that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment including capital punishment. In such a case, the law in Samoa takes a reactive stance rather being proactive. Section 14 of the Ordinance appears to allow parents and legal guardians to impose reasonable punishment on children and the young. When the punishment gets out of hand, the Courts step in to determine whether such punishment imposed was reasonable.

Questions:	<p>7. <i>Should the Ordinance expressly provide protection against the sale and the trafficking of children?</i></p> <p>8. <i>Should the Ordinance define reasonable punishment?</i></p> <p>9. <i>Should the list of people who have the right to punish children under section 14 be reviewed?</i></p> <p>10. <i>Should Samoa forbid all forms of punishment of children to comply with the Articles of CRC?</i></p>
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⁶⁰ *Infants Ordinance 1961* s. 14.

⁶¹ *Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, Art 19 (entered into force 2 September 1990) (*‘Convention on the Rights of a Child’*).

3.3) Young Offenders Act 2007

In 2006, the Committee in its concluding observations on the country report presented by Samoa,⁶² urged Samoa to fully implement juvenile standards underlined in the following Articles 37(b), 39 and 40 of the CRC:

Articles 37(b) - No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

Article 39- State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of; any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40- This Article ensures that every child alleged as, accused of, or recognised as having infringed the penal law is treated in a manner consistent with basic human rights principles considering the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society

The Committee specifically recommended Samoa to establish a functioning juvenile justice system and accelerate the enactment of the Young Persons Bill and Criminal and Community Justice Bill. The Committee recommended that the local minimum age of criminal responsibility be increased to an internationally accepted level. The Committee also proposed that Samoa ensures that the deprivation of liberty is used as a last resort and for the detained children to be separated from adults.

In 2007, the Young Offenders Act commenced. This is part of Samoa's effort to implement Article 39 of the CRC into a national framework. It established a criminal justice system for offenders under the age of seventeen (17) years. The Act sets up a division of the District Court as a Youth Court, to be presided over by District Court Judges.⁶³ It further specifies the jurisdiction and the procedure of the Youth Court.⁶⁴ For example, the Act specifically

⁶²Committee on the Convention on the Rights of a Child, *CRC/C/WSM/CO/1 16 October 2006*
Para 58-60.

⁶³*Young Offenders Act 2007* s 4.

⁶⁴*Young Offenders Act 2007* ss 5-9.

provides that all matters relating to the Youth Court be closed to the public and media unless the Court is of the opinion that public interest requires it and the name and identifying details of the young offender are not published.⁶⁵ Anyone who commits an offence under this section by publication is liable to a fine not exceeding one hundred (100) penalty units.

The Young Offenders Act also recognises the rights of a young person to receive independent legal advice, attendance of parents and/or caregiver or any member of his/her family where practical, and the right to apply for legal aid.⁶⁶ This is in accordance with Article 40 of the CRC. Furthermore, it provides for pre-sentencing meetings⁶⁷ where a young person acknowledges committing the offence or where the offence has been proven against the young person. The purpose of such a meeting is to discuss the circumstances of the offending, seek views of those in attendance and to consider whether the parties affected may arrive at reconciliation or other outcomes.⁶⁸ A guideline for the sentencing of young persons is also given under the Act.⁶⁹

There are also provisions under the Act that give police officers the discretion to warn a young offender rather than to charge but this is subject to the seriousness, nature of the offence and the number of previous offences committed by the young person,⁷⁰ and the power of the Police Commissioner to cancel such warnings.⁷¹ Again, the provisions of the Act seem to be consistent with Article 40 of the CRC.

- **SLRC Observation**

It is the opinion of the Commission that the Young Offenders Act on its own satisfies Samoa's obligation under Articles 37(b), 39 and 40 of the CRC in establishing a functioning juvenile justice system for young offenders. The Act also caters for most of the recommendations made by the Committee on the Rights of a Child in its report in 2006. The

⁶⁵*Young Offenders Act 2007* subs 8(2) and (3).

⁶⁶*Young Offenders Act 2007* s 9.

⁶⁷*Young Offenders Act 2007* s 11.

⁶⁸*Young Offenders Act 2007* s 12.

⁶⁹*Young Offenders Act 2007* Pt V.

⁷⁰*Young Offenders Act 2007* s 17.

⁷¹*Young Offenders Act 2007* s 20.

sentencing of young persons addresses the Committee's recommendation for deprivation of liberty to be the last resort and the detaining of children to be separate from adults.⁷²

On the other hand, the Act does not satisfy the Committee's proposal to raise the minimum age of criminal responsibility to an internationally acceptable level. The Committee considered that a minimum age of criminal responsibility below the age of 12 years is not internationally acceptable.⁷³ It is noted that, the minimum age of criminal responsibility under the Young Offenders Act has been increased from under 8 years old to 10 years.⁷⁴

Question:	<p><i>11. Should Samoa define an age where a child may be criminally liable?</i></p> <p><i>12. Should there be a minimum age and a maximum age for which a child will be held criminally liable for a crime committed?</i></p> <p><i>13. Should the exception for 'reasonable disciplining' of children by parents, teachers and other persons in charge of the care of children be protected by the law?</i></p>
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3.3.1) Definition of a child

In relation to the definition of a 'child', the Young Offenders Act uses the term "young person" to define persons with ages ranging from 10 to 17 years old and an "adult" as a person over the age of 17 years.⁷⁵

The usage of various terms to describe a child and the range of ages referred to in various legislation allows for discrimination against children. For example, under the Act, a 17 year old is said to be an adult but his/her civil right to vote is only recognised at the age of 21 years old under the Electoral Act 1963.⁷⁶ The lower age accorded to an adult in Samoa, which is 17 years, affects the age of criminal responsibility in that criminal responsibility attaches to persons who fall under the definition of 'child' under Article 1 of the CRC.

⁷² *Young Offenders Act 2007* ss 15 and 16.

⁷³ Committee on the Convention on the Rights of a Child, *CRC/C/GC/10 25 April 2007* Para 32, p 11.

⁷⁴ Previously in section 11 of the *Crimes Ordinance 1961* recently repealed by section 25 of the *Young Offenders Act 2007*.

⁷⁵ *Young Offenders Act 2007* s 2.

⁷⁶ *Electoral Act 1963* s 2.

- **SLRC Observation**

It is the opinion of the Commission that all relevant laws defining child should be amended accordingly to be consistent with Article 1 of CRC. The corresponding age of a child in Samoa under the Act is lower than that of the CRC.

4) DISCUSSIONS OF COMPARABLE JURISDICTIONS

4.1) Northern Territory (Australia)

The Northern Territory recently enacted a Care and Protection of Children Act 2007 (“NT Act”). The NT Act operates to safeguard the wellbeing of children⁷⁷ through mandatory reporting requirements for children at risk of harm and exploitation,⁷⁸ giving powers to the Minister, CEO and other officers to take actions for the wellbeing of children,⁷⁹ and powers to the Court to make orders for the welfare of children.⁸⁰

The NT Act also provides for measures to prevent harm and the exploiting of children.⁸¹ This is done through the screening of child-related employment,⁸² restriction of child employment⁸³ and prevention of child death.⁸⁴

The NT Act also deals with the regulating of children’s services⁸⁵ and establishment of the office of Children’s Commissioner. The Children’s Commissioner deals with cases concerning protected children or children placed under protection.⁸⁶

The Infants Ordinance (Samoa) specifically provides for the protection of children⁸⁷ and appointment of officers to care for destitute and delinquent children.⁸⁸ However, these specific parts are quite brief and very limited compared to the NT Act. For instance, the NT Act provides a comprehensive view on the issue of child protection, as opposed to the

⁷⁷ *Care and Protection of Children Act 2007* (NT) ch. 2.

⁷⁸ *Care and Protection of Children Act 2007* (NT) Pt 2, 1, Div 3.

⁷⁹ *Care and Protection of Children Act 2007* (NT) Pts 2.1 and 2.2.

⁸⁰ *Care and Protection of Children Act 2007* (NT) Pts 2.3 and 2.4.

⁸¹ *Care and Protection of Children Act 2007* (NT) ch 3.

⁸² *Care and Protection of Children Act 2007* (NT) Pt 3.1.

⁸³ *Care and Protection of Children Act 2007* (NT) Pt 3.2.

⁸⁴ *Care and Protection of Children Act 2007* (NT) Pt 3.3.

⁸⁵ *Care and Protection of Children Act 2007* (NT) ch 4.

⁸⁶ *Care and Protection of Children Act 2007* (NT) ch 5.

⁸⁷ *Infants Ordinance 1961* ss 12-14.

⁸⁸ *Infants Ordinance 1961* ss 15-20.

Ordinance. Part III relating to the protection of children in the Ordinance is limited in the sense that it does not encompass all forms of abuses and mistreatment of children as opposed to the comprehensive NT Act, which appears to be enacted recently to conform to Articles of CRC. There are still provisions of the Ordinance that are not consistent with CRC as previously discussed in this paper. Section 14 of the Ordinance exposes children to corporal punishment and potential abuse from parents and legal guardians.

4.1.1) Definition of a child

The Northern Territory of Australia seems to have adopted the age given under Article 1 of the CRC. The NT Act defines child as a person less than 18 years of age.⁸⁹ In addition, it provides that where there is a person whose age cannot be proven but it is apparent that he/she is less than eighteen (18) years old, that person shall be presumed to be less than eighteen (18) years of age.⁹⁰

4.1.2) Ill treatment and neglecting of children

The NT Act uses the terms ‘harm’ and ‘exploitation’ to characterise any adverse actions that can affect a child. Harm is defined as, significant detrimental effect caused by any act, omission or circumstance on the physical, psychological or emotional wellbeing or development of a child.⁹¹ This is consistent with Articles 19, 32 and 37(a) of the CRC, which requires member states to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical and mental violence including sexual abuse and inhumane punishment. The NT Act has done this by defining ‘harm’ and ‘exploitation’ and its effect on a child. On the other hand, section 12 of the Infants Ordinance (Samoa) is general and limited in defining the forms of ill-treatment and neglect of a child as compared to the relevant Articles of CRC and provisions of the NT Act.

The NT Act goes further to define what causes harm. That is, physical, psychological or emotional abuse, sexual abuse or other exploitation of the child, and exposure of child to

⁸⁹ *Care and Protection of Children Act 2007* (NT) s 13.

⁹⁰ *Care and Protection of Children Act 2007* (NT) s 13.

⁹¹ *Care and Protection of Children Act 2007* (NT) s 15.

physical violence such as a child witnessing violence between his/her parents at home.⁹² Exploitation is defined as including sexual and other forms of exploitation of the child. It includes sexual abuse or involving a child as a participant or a spectator in certain acts such as acts of sexual nature,⁹³ prostitution,⁹⁴ or a pornographic performance.⁹⁵ This provision in the NT Act relating to exploitation is consistent with Articles 34, 36 and 39 of the CRC, which protects children from all forms of sexual exploitation and sexual abuse. On the other hand, the Infants Ordinance is general in defining exploitation in that it only states child exploitation but not in detail as compared to the NT Act and the relevant Articles of the CRC.

The NT Act prohibits employers and parents from permitting or requiring a child to perform any work that is harmful or involves exploitation. Any employer or parent found guilty of exposing a child to harm is guilty of an offence and liable to a maximum penalty of 100 penalty units or imprisonment for twelve (12) months. Any employer or parent who requires or permits a child to perform any work involving exploitation, is guilty of an offence and is liable to a maximum penalty of 800 penalty units or imprisonment for 4 years.⁹⁶ Similarly in Samoa, a person having the custody or control of any child under the age or apparent age of fourteen (14) years who exposes a child in a manner stated in section 14 of the Ordinance, commits an offence and is liable to a fine not exceeding 5 penalty units or to imprisonment not exceeding one year.

It is unlawful for an employer or a parent to require a child who is less than 15 years old to perform any work at any time between 10pm at night and 6am in the morning.⁹⁷ Any employer who is convicted under this provision is liable to a maximum penalty of 400 units.⁹⁸ Where the offender is a parent, he/she is liable to a fine of 50 penalty units or imprisonment for 6 months.⁹⁹ This provision of the NT Act is consistent with Article 32 of the CRC, which recognizes rights of the child to be protected from economic exploitation and

⁹²*Care and Protection of Children Act 2007* (NT) s 15.

⁹³*Care and Protection of Children Act 2007* (NT) s 16(2)(b)(i).

⁹⁴*Care and Protection of Children Act 2007* (NT) s 16(2)(b)(ii).

⁹⁵*Care and Protection of Children Act 2007* (NT) s 16(2)(b)(iii).

⁹⁶*Care and Protection of Children Act 2007* (NT) s 203(2), (3), (5) and (6).

⁹⁷*Care and Protection of Children Act 2007* (NT) s 203.

⁹⁸*Care and Protection of Children Act 2007* (NT) s 203.

⁹⁹*Care and Protection of Children Act 2007* (NT) s 203.

from performing any work that is likely to be hazardous or to interfere with the child's education or child's health or physical, mental, spiritual, moral or social development.

Similarly, in Samoa, the recent enactment of the Education Act 2009 prohibits the employment of compulsory school aged children at any time during school hours or at any time if the work performed by the child interferes with the child's attendance and participation in school. Overall, the Education Act 2009 ensures that children in Samoa are protected from child labour and is consistent with Article 32 of the CRC.

Questions:	<i>14. Should Samoa adopt legislation for the Care and Protection of children similar to the Northern Territory?</i> <i>15. Should Samoa have a Children's Commissioner?</i>
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4.2) New Zealand ("NZ")

In New Zealand, the Care of Children Act 2004 and the Children, Young Persons and their Families Act 1989 both operate to promote wellbeing of children and young persons.¹⁰⁰ These Acts also help facilitate children's development by ensuring that appropriate arrangements are in place for their care and guardianship and the recognition of their rights.

Despite the fact that the Infants Ordinance specifically provides for the protection of children¹⁰¹ and appointment of officers to care for destitute and delinquent children,¹⁰² these specific parts are quite brief and very limited in comparison to comparable legislation in New Zealand. The Care of Children Act 2004 and the Children, Young Persons and their Families Act 1989 are more comprehensive on the issue of child protection as opposed to the Ordinance.

4.2.1) Definition of a child

The Children, Young Persons and their Families 1989 Act defines 'child' as a boy or girl under the age of 14 years. It also defines a 'young person' as a boy or girl of or over the age

¹⁰⁰ *Care of Children Act 2004* (NZ) s 3; *Children, Young Persons and their Families Act 1989* (NZ) s 4.

¹⁰¹ *Infants Ordinance 1961* ss 12-14.

¹⁰² *Infants Ordinance 1961* ss 15-20.

of 14 years but under 17 years but does not include any person who is or has been married or in a civil union. The probable explanation is that the commencement date of the latter Act (1 November 1989) was prior to ratification by New Zealand of CRC which was on 6 April 1993 and the necessary changes have never been made. Subsequently, the Care of Children Act 2004 commenced and defines a child as a person under the age of 18 years. This definition is consistent with Article 1 of the CRC.

4.2.2) Ill-treatment and neglecting of children

In New Zealand, the Children, Young Persons and their Families Act 1989, provides care and protection for children and young persons who need it. Section 14 lists specific circumstances where a child or a young person may need care and protection.¹⁰³ That is, when they are exposed or at the risk of being exposed to harm (whether physically or emotionally or sexually), ill-treatment, abuse, or serious depravity,¹⁰⁴ and it affects or has the risk of affecting their development or physical, mental or emotional wellbeing.¹⁰⁵ This is consistent with Articles 19, 34 and 37 of the CRC which require state parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of abuse and mistreatment.

The Children, Young Persons and their Families Act 1989 also guarantees care and protection for a child or any young person who is affected physically, mentally or emotionally by any existing differences between them and their parents or other persons in charge,¹⁰⁶ or between the parents or persons in charge themselves.¹⁰⁷ This is consistent with Articles 2, 9, and 18 of the CRC.

Care and protection is also given to a child or a young person whose harmful behaviour is or is likely to be injurious to himself/herself or others and the parents, custodian or a person in charge is unable or unwilling to control them.¹⁰⁸ In addition, care and protection is also accorded to a child aged between ten (10) and fourteen (14) years old who commits an

¹⁰³Children, Young Persons and their Families Act 1989 (NZ) s 14.

¹⁰⁴Children, Young Persons and their Families Act 1989 (NZ) s 14(a).

¹⁰⁵Children, Young Persons and their Families Act 1989 (NZ) s 14(b).

¹⁰⁶Children, Young Persons and their Families Act 1989 (NZ) s 14(c).

¹⁰⁷Children, Young Persons and their Families Act 1989 (NZ) s 14(h).

¹⁰⁸Children, Young Persons and their Families Act 1989 (NZ) s 14(d).

offence that may cause serious concern for his/her wellbeing.¹⁰⁹ This is consistent with Article 25 of the CRC, which requires special care for children for the purpose of treatment of his or her physical or mental health. Article 33 of the CRC further requires state parties to take all appropriate measures to protect children from illicit use of narcotic drugs and psychotropic substances which are harmful to children.

Questions:	<p><i>16. Should Samoa extend the powers of appointment of officers to be similar to those of NZ officers?</i></p> <p><i>17. Should Samoa allow eyewitnesses to report the ill treatment of children?</i></p> <p><i>18. Should Samoa's Ordinance define a 'child in need of care and protection'?</i></p> <p><i>19. Should the Ordinance be more specific in defining what amounts to ill-treatment and neglect as is the position in Northern Territory and New Zealand?</i></p> <p><i>20. Should the Ordinance provide for a child or any young person whose harmful behaviour is likely to be injurious to himself/herself or others?</i></p>
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5) STATE OF INTERVENTION: SAMOA

- **SLRC Observation**

The provision for a Child Welfare Officer in the Infants Ordinance partially addresses an obligation under CRC, which is to provide alternative care for children deprived of a family environment.¹¹⁰ However, this specific provision does not satisfy the obligation for Samoa to provide explicitly in the Ordinance that the 'best interest' of a child is paramount when the Government of Samoa intervenes to separate a child from his or her parents.¹¹¹

¹⁰⁹*Children, Young Persons and their Families Act 1989* (NZ) s 14(e).

¹¹⁰*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, arts 20 and 36 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*').

¹¹¹*Convention on the Rights of a Child*, Adopted and opened for signatures, ratification and accession by the General Assembly, 20 November 1989, UNTS vol. 1577, art 9 (entered into force 2 September 1990) ('*Convention on the Rights of a Child*'). For example see *Care of Children Act 2004* (NZ) ss 4 and 5.

The Ordinance should clarify principles relevant to child's welfare and best interest as in New Zealand.¹¹²

The current position under the Ordinance, gives the Courts the discretion to determine grounds for such separation based on what is fit and just.¹¹³

In addition, the Ordinance also fails to impose a duty on other family members where possible to provide a child with the necessary care and protection as in the case in New Zealand.¹¹⁴ It does not cater for institutional care¹¹⁵ and neither does it make available an avenue for consideration and resolution of any complaints from children being placed under the care of the child welfare officer.¹¹⁶

Question:	<p><i>21. Should Samoa allow the courts to consider what is in the best interest of a child as provided under the CRC?</i></p> <p><i>22. Should more powers be given to a Child Welfare Officer?</i></p> <p><i>23. Should a duty be imposed on other family members to give a child care and protection rather than an institution?</i></p>
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6) SUMMARY OF QUESTIONS

- 1. Should Samoa amend its laws to give CRC full domestic force?*
- 2. Is it enough that the courts apply CRC without its proper implementation into domestic legislation?*
- 3. Should Samoa extend the prohibiting of employment of compulsory school aged children to hours after school?*
- 4. Should Samoa address CRC related issues in the Constitution and provide child specific provisions?*
- 5. Should the age of a child in Samoa be 18 years and under?*

¹¹²*Care of Children Act 2004 (NZ) s 5.*

¹¹³Legislation Compliance Review of Samoa with the *Convention on the Rights of a Child* p.14.

¹¹⁴*Care of Children Act 2004 (NZ) s 3(2)(b).*

¹¹⁵Perhaps this is a question of resources.

¹¹⁶The *Komesina o Sulufaiga (Ombudsman) Act 1988* provides for the office of Ombudsman but investigations are limited to public institutions listed and complaints must be in writing. As pointed out in the Report, there is a risk that children's complaints may be dismissed as frivolous because the Office of the Komesina o Sulufaiga is not a child specific institution.

6. *Should a child be defined consistently in all Acts of Parliament in Samoa?*
7. *Should the Ordinance expressly provide protection against the sale and the trafficking of children?*
8. *Should the Ordinance define what 'reasonable punishment'?*
9. *Should the list of people who have the right to punish children under section 14 be reviewed?*
10. *Should Samoa forbid all forms of punishment of children to comply with the Articles of CRC?*
11. *Should Samoa define an age where a child may be criminally liable?*
12. *Should there be a minimum age and a maximum age for which a child will be held criminally liable for a crime committed?*
13. *Should the exception for 'reasonable disciplining' of children by parents, teachers and other persons in charge of the care of children be protected by the law?*
14. *Should Samoa adopt legislation for the Care and Protection of children similar to Northern Territory?*
15. *Should Samoa have a Children's Commissioner?*
16. *Should Samoa extend the powers of appointment of officers to be similar to those of NZ officers?*
17. *Should Samoa allow eyewitnesses to report the ill treatment of children?*
18. *Should Samoa's Ordinance define a 'child in need of care and protection'?*
19. *Should the Ordinance be more specific in defining what amounts to ill-treatment and neglect as is the position in Northern Territory and New Zealand?*
20. *Should the Ordinance provide for a child or any young person whose harmful behaviour is likely to be injurious to himself/herself or others?*
21. *Should Samoa allow the courts to consider what is in the best interest of a child as provided under the CRC?*
22. *Should more powers be given to a Child Welfare Officer?*
23. *Should a duty be imposed on other family members to give a child care and protection rather than an Institution?*

7) CALL FOR RESPONSES

There are twenty-three (23) questions for consideration and response. It is not necessary however to respond to all questions. It is preferred that responses be in writing.

Responses on this paper should be sent by the 19th of March 2010, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to lawreform@ag.gov.ws.