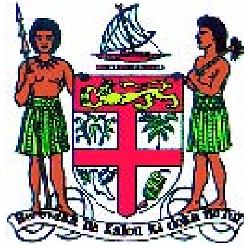

Fiji Law Reform Commission

Committal and Pre Trial Procedures Reference

Final Report on the Review of Committal and Pre-Trial Procedures

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The Commission is constituted pursuant to the Fiji Law Reform Commission Act, CAP. 26.

Commissioner in charge of this reference

Mr. Justice M.D. Scott
High Court
Suva.

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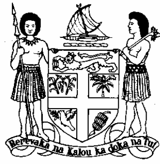
CONTENTS **PAGE**

Letter of Transmittal		
A1.	Terms of Reference	1
A2.	Acknowledgment	2
B	Introduction	3
C.	The study process	5
D.	The current position in Fiji	7
D-1	Magistrates' Courts	7
D-1-1	Committal to the High Court for sentence	7
D-1-2	Committal to the High Court for trial	11
D-1-3	Trial in the Magistrates' Courts	18
D-2	High Court	20
D-2-1	Sentencing in the High Court following committal for sentence	20
D-2-2	Trial in the High Court	20
E.	Proposals for change	21
E-1	Committal for sentence	21
E-2	Committal for trial to the High Court	22
E-3	Plea and directions hearings	24
E-4	Adjournments	26
G.	Summary of recommendations	27

Annexure A: Draft Criminal Procedure Code Amendment Bill 29

Annexure B: Chief Justice's Practice Direction – Plea and Directions Hearings [1995] 2 Cr. App. R 600 43

Annexure C: Criminal Code of Queensland – Section 592A. 49



FIJI LAW REFORM COMMISSION

FLRC 4/11

29th August 2002

The Honorable Senator Qoroniasi Bale
Attorney General and Minister for Justice
Suvavou House
Suva

Dear Mr. Attorney General,

RE : COMMITTAL AND PRE-TRIAL PROCEDURES REPORT 2002

The Fiji Law Reform Commission has pleasure in submitting to you the Committal and Pre-Trial Procedures Report 2002.

In doing so, the Commission wishes to thank the Commissioner, Justice Michael Scott and commends his role in the consolidation of information relevant to the reference and in the drafting of the Report.

The Committal and Pre-Trial Procedures Report is an analysis of the laws contained in the Criminal Procedure Code CAP 21 as applying to committal proceeding, both for sentencing and for trial in the High Court. It is the end product of analysis and comparisons of the laws in Fiji and those of other jurisdictions. The relevant stakeholders provided much assistance in the provision of valuable information and support. The Commission is grateful for their contribution.

The Report contains recommendation for legislative reforms. These recommendations take into consideration the laws and procedures that apply in other jurisdictions. It takes into account the need to ensure that cases before the courts are dealt with, and disposed of, as soon as practicable, as required by the Constitution, and reflecting and accommodating the terms and provisions of the Legal Aid Act 1996.

The Committal and Pre-Trial Procedures Report is hereby submitted for your consideration and direction.

Yours Sincerely,

Kiniviliame T. Keteca.
Acting Director, Fiji Law Reform Commission

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A1. TERMS OF REFERENCE

On 1st September 1999, Justice Michael Scott of the High Court of Fiji was appointed by the Attorney General as Commissioner for Review of the Law in relation to Committal and Pre Trial Procedures.

The following reference was received from the Attorney-General on 1 September 1999:

TO ENQUIRE INTO AND REPORT on pre-trial procedures both in the Magistrates' Courts and the High Court with particular regard to the desirability to continue or amend the present requirements for committal to the High Court.

AND TO REPORT thereon by September 2001.

In October 2001 the closing date for the reference was extended to June 2002.

A2. ACKNOWLEDGMENTS

The Commission notes with gratitude the particular assistance and advice on the preparation of this report given by:

Judiciary

The Hon. Sir T.U. Tuivaga, Chief Justice
The Hon. Mr. Justice S.N. Sadal
The Hon. Mr. Justice D.V. Fatiaki
The Hon. Madam Justice N. Shameem

Magistracy

The Acting Chief Magistrate Mr. Salesi Temo
Mr.Amar Singh, Officer in Charge, Suva Magistrates' Court

Office of the Director of Public Prosecutions

Mr. Josaia Naigulevu, Director of Public Prosecutions

Mr. Peter Ridgeway, Deputy Director of Public Prosecutions

The Fiji Police Force

ACP Moses Driver

The Fiji Prisons Department

Commissioner Aisea Taoka

An invitation to the Fiji Law Society to attend a presentation of tentative conclusions reached by the Commission and to offer the Society's views was unfortunately not taken up.

B. INTRODUCTION

Persons charged with criminal offences either plead guilty or plead not guilty. Where a guilty plea is offered and the facts are not disputed a conviction may be entered. The court will then usually proceed to sentence. When a not guilty plea is offered the court will not convict unless the facts and elements of the alleged offence are proved. No sentence can be passed without a conviction being entered. Some offences are too serious to be tried in a Magistrates' Court and other offences, though triable in a Magistrates' Court are so serious that they need to be sentenced in the High Court. The term "committal" in this Report means either an order by a Magistrate that a person be sent to the High Court for trial or, following conviction in the Magistrates' Court, for sentence.

In Fiji offences are broadly divided into four categories of seriousness. These are:

- (i) minor offences;
- (ii) summary offences usually triable only in the Magistrates' Court;
- (iii) "either way" offences which are triable either in the Magistrates' Court or in the High Court at the election of the accused; and
- (iv) indictable offences, which are the most serious offences, the trial and sentencing in respect of which may only take place in the High Court.

Minor Offences are those included in the Minor Offences Act (Cap 18 of the Laws of Fiji – 1985 Edition). The Court by which Penal Code offences may be tried is specified in the First Schedule to the Criminal Procedure Code (the CPC – Cap 21) as amended by the Electable Offences Decree 22/1988.

This report is not concerned with category (i) minor offences and neither does it consider proceedings at the trial proper. The matters under consideration are:

- (i) the committal of persons by the Magistrates' Court for sentence by the High Court;
- (ii) the committal of persons by the Magistrates' Court for trial by the High Court;

(iii) preparations for trial by the Magistrates' Court and the High Court.

The fundamental rights and freedoms of accused persons are protected by the Constitution. The procedures which govern the committal of persons for sentence or for trial are set out in the Criminal Procedure Code.

While the Criminal Procedure Code dates from 1 May 1945 (although several times amended) the present Constitution which dates from 27 July 1998 is the third since Fiji achieved its independence. The first was dated September 1970 (Cap. 1) while the second was promulgated in July 1990 (Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 22/1990).

The present Constitution (Constitution Amendment Act 13/1997) particularly by Sections 23, 27, 28 and 29 extends new protections to accused persons. The Constitution is the "supreme law" of Fiji (Section 2 (1)) and therefore the Criminal Procedure Code must be consistent with it.

The law is forever evolving and the attitude of society to criminal conduct has also changed in the last 60 years. The current procedures which govern committal for trial have been widely perceived to have become outdated and to be inimical to the constitutional rights of the accused. The current restrictions on the right to commit for sentence have become an encumbrance upon the due sentencing process. The absence of more formal pre-trial preparation procedures has resulted in avoidable cost and inconvenience.

This report recommends the adoption of modernised committal and pre-trial procedures designed especially for Fiji but in line with similar reforms adopted in other common law jurisdictions. They are fully consistent with the 1997 Constitution. They also reflect the further extension of legal aid to accused persons following the Legal Aid Act 10/1996.

A draft Bill to amend the Criminal Procedure Code is Appendix A.

C. THE STUDY PROCESS

The Criminal Procedure Code (the CPC – Cap 21) is closely related to English legislation. Unlike England however Fiji's laws are codified. The CPC therefore has no exact English equivalent. Some provisions similar to those found in the CPC may be found in the Criminal Justice Act 1925 and in the Magistrates' Courts Act 1925. Both of these statutes have now been repealed.

Most other jurisdictions within the Commonwealth have broadly similar procedures governing the trial of minor, less serious and serious criminal charges. In some jurisdictions the procedures are also codified. Well known examples are the Indian Codes of Criminal Procedure 1898 and 1973 and the Queensland Criminal Code 1901.

Because of our historical links with the English legal system and our relatively close proximity to Australia and New Zealand the Commission has found it convenient primarily to focus its study on developments in these three countries. They are somewhat more accessible than a number of other jurisdictions in the developing Commonwealth, even with the advent of the Internet.

Among other reports, papers, commentaries and articles the following were found to be especially relevant:

1. Report of the Royal Commission on Criminal Justice. London 1993
2. Law Commission of New Zealand Criminal Prosecution discussion paper 28, 1997
3. Law Commission of New Zealand Report 66 Criminal Prosecution, October 2000
4. New South Wales Committals Review Committee Report 1999.
5. Pre Trial Review in the Crown Court- Justice of the Peace 1982.
6. Review of the Criminal and Civil Justice System in Western Australia. Project '92 1997 – 1999.
7. A Survey of the Preliminary Enquiry in Canada. Pomerant & Gilmour 1993.

In its approach to developments overseas the Commission has borne in mind the following principles:

(i) Proposals for change must be preceded by an established need for change;

(ii) Proposals for change must be suitable for Fiji and for all of the Fiji Islands not merely the better endowed urban centres;

(iii) Proposals must be economically feasible;

(iv) Proposals should aim for simplicity, flexibility and ease of comprehension.

D. THE CURRENT POSITION IN FIJI

D-1. MAGISTRATES' COURTS

D-1-1 Committal to the High Court for Sentence

Section 206 (2) of the CPC provides that:

> "If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and the Court shall convict him and pass sentence upon him …"

When the accused person does not plead guilty but the offence is subsequently proved after a trial then Section 215 of the CPC provides that:

> "the Court ….. shall convict the accused and pass sentence upon … him …"

In the great majority of cases offenders are convicted and sentenced in Magistrates' Courts. In some cases however the degree of seriousness of the offence as committed by the particular accused being tried does not become fully clear to the Court until the trial has been concluded, a conviction entered and the accused's antecedent history has been placed before the Court.

Section 222 (1) provides that:

> "where a person … is tried (and) convicted … then, if on obtaining information as to his character and antecedents the magistrate is of the opinion that they are such that greater punishment should be inflicted in respect of the offence than the magistrate has power to inflict, the magistrate may, in lieu of dealing with him in any manner in which the magistrate has power to deal with him, commit him in custody or on bail to the High Court for sentence …."

A resident magistrate may impose a maximum term of 5 years imprisonment for any one offence (CPC – Section 7). Where convictions are entered for two or more offences the maximum term is 10 years (CPC-Section 12 (2) (b)).

The High Court may impose the same sentence upon a person committed to it for sentence by the Magistrates' Court as it could have imposed upon that person had he been tried and convicted in the High Court (CPC – Section 222 (2) (a)).

Section 222 (1) is closely related to Section 29 of the English Magistrates' Courts Act 1952 but it is wider in the scope of its application than the English Section in an important respect. Whereas Section 222 (1) applies to "any offence", Section 29 only applies to indictable offences being tried summarily, in other words only to "either way" offences.

As was made clear by R v. Lymm J.J. ex parte Brown [1973] 1 All ER 716; 137 J.P. 269 and R v. Hartlepool J.J. ex parte King (1973) 137 J.P. Jo. 341; [1973] Crim. L.R. 637 the "information" justifying committal for sentence must be additional to the information known to the Court when it decides that the case is fit for summary trial. Section 29 does not empower a Magistrates' Court to commit for sentence where it is only the circumstances of the offence, as distinct from the circumstances of the offender, which could be held to justify a heavy sentence.

The Criminal Procedure Code contains two sections which enable a Magistrates' Court to order that an offence which is triable by it should instead be dealt with by way of committal to the High Court: the first, Section 224 applies before the trial in the Magistrates' Court has begun. The second, Section 220 applies even after the trial in the Magistrates' Court has commenced.

Section 224 provides that:

> "Whenever any charge has been brought against any person of an offence … as to which the magistrate is of the opinion that it ought to be tried the High Court or where an application in that behalf has been made by a public prosecutor a preliminary enquiry shall be held …"

Section 220 provides that:

> "If before or during the course of a trial before a magistrates' court it appears to the magistrate that the case is one which ought to be tried by the High Court or if before the commencement of the trial an application in that behalf is made by the public prosecutor that it shall be so tried the magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary enquiry…"

A preliminary enquiry (D-1-2 post) is a proceeding held to decide whether an accused should be committed for trial by the High Court.

Sections 220 and 224 are closely related to Sections 18 (5) and 18 (1) of the Magistrates' Courts Act 1952, however like Section 29 they do not extend beyond "either way" offences. Furthermore, there is another important difference in that whereas Sections 220 and 224 will not operate as a first step towards sending an accused for trial in the High Court unless the Magistrate decides that they should do so in the particular circumstances of a case the English Sections operate as an automatic first step towards committal unless the Court decides that they should not. Put shortly, the default effect of the two sets of Sections is reversed.

The draftsman of Sections 220 and 224 probably did not foresee that the consequence of reversing the default effect of the Sections would be that it would only be extremely seldom that the prosecution would exercise the right given to it by the Sections to invite the Court to consider committal proceedings with a view to trial and sentence in the High Court of a serious summary or "either way" offence rather than dealing with the offence summarily. Instead, the practice grew up whereby Magistrates relied on Section 222 (1) and committed convicted offenders to the High Court for sentence when it appeared to them either that the circumstances of the offender, or the circumstances of the offence or a combination of both warranted the imposition of a sentence which exceeded the maximum available to them.

In 1995 the use of Section 222 (1) in this way was ended by the Fiji Court of Appeal which, in Timoci Momotu v. State (1995) 41 FLR 50 followed R v. Lymm JJ (supra) and held that only Sections 220 and 224 allow an offender to be committed to the High Court on the ground of the seriousness of the offence and that Section 222 is exclusively concerned with the character of the offender. The Court of Appeal said (at 58B):

> "the decision as to whether, because of the gravity of the circumstances a case should go to the High Court rather than be dealt with summarily is one which should be made at the outset or during the trial".

In the Commission's view while the Court of Appeal's reading of Sections 220, 222 (1) and 224 is undoubtedly correct serious practical difficulties flow from these provisions. Most prosecutions, even for quite serious offences, are handled not by fully legally trained prosecutors from the office of the Director of Public Prosecutions but by police officers. These officers quite naturally have a strong incentive to secure a conviction as soon as possible. By pleading guilty in the Magistrates' Court accused persons save court time and additional trauma to the victims of crime. Magistrates do not become aware of the full facts alleged until a plea has been taken or until the trial has taken place. The antecedent history of the accused is not made available until a conviction has been entered. Since the "gravity of the circumstances of the case" may well include the fact that the accused is a repeat offender, a fact only known to the Magistrate at the conclusion of the trial, it is not easy to see how Sections 220 and 224 can successfully be made to operate as envisaged by the Court of Appeal.

The situation in regard to first offenders committing serious "each way" offences was also complicated by two further decisions of the Court of Appeal namely Jonati Cama v. The State (1995) 41 FLR 121 and Kasim v. The State (Cr. App. 21/93).
In Kasim the Court of Appeal laid down that the starting point for a person convicted of rape without mitigating circumstances should be 7 years imprisonment. It held that where the conviction is entered in the Magistrates' Court the Court should commit for sentence using Section 222 (1) of the CPC.

In Cama the Court of Appeal ruled that the committal envisaged by Kasim can only take place if Section 222 (1), as construed in Momotu applies. The effect of Momotu

and Cama taken together is that a person who pleads guilty to a serious "either way" offence such as rape in the Magistrates' Court or who elects trial in that Court and is there tried and convicted cannot then be committed for sentence to the High Court if he is a first offender.

In a further development the High Court in Rarawa Taqa v. The State (1996) 42 FLR 38 again affirmed that a first offender who pleads guilty to a serious "either way" offence in the Magistrates' Court must be given credit for his guilty plea. This decision has the effect of further reducing the maximum sentence properly available to a magistrate to a term of imprisonment significantly less than 5 years. Such a sentence in the case of rape, to take but one example, is plainly far short of the 7 years which the Court of Appeal has laid down as the starting point.

The Commission trusts that it will not in any way be seen to be disrespectful to the Court of Appeal if it reports that the practical consequences of Momotu and Cama have attracted widespread criticism and calls for the law, especially Section 222 (1), to be changed (see e.g. Sailosi Naulinibou v. The State Lautoka Cr. App. 50 of 2000).

The Commission agrees that the present situation is far from satisfactory.

D-1-2 Committal to the High Court for trial

At present persons accused either of the most serious offences triable only in the High Court or of less serious offences which carry a right to trial in the High Court (see Electable Offences Decree 22/1988) must first appear in the Magistrates' Court (CPC Section 59 proviso) before being committed to the High Court for trial.

Provisions relating to the committal of accused persons by the Magistrates' Courts for trial by the High Court are contained in Parts VII and VIII of the CPC.

The Part VII procedure commonly called an "old style committal" was the only procedure available until the insertion of the Part VIII procedure, commonly known as a "paper committal" in 1972 (see Criminal Procedure Code (Amendment) Act 11/72 Section 6). The new Part VIII procedure closely followed the English Criminal Justice Act 1967.

The main purpose of the Part VII procedure was to establish, by holding a preliminary enquiry, whether there was "evidence sufficient to put the accused person on his trial" before the High Court (CPC – Section 233 and see also W v. Attorney-General [1993] 1 NZLR 1, 6). If the prosecution was unable to make out a *prima facie* case against the accused then he was entitled to be discharged (CPC – Section 231 and see also R v. Epping and Harlow JJ ex parte Massaro [1973] 1 All ER 1011; [1973] 1 QB 433).

In 1989 the High Court of Australia explained in Grassby v. the Queen (1989) 168 CLR 1, 15 that committal proceedings enable:

> "a person charged to hear the evidence against him and to examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form."

As will be seen from Part VII the "old style" committal procedure requires the physical presence of witnesses, their examination and possible cross-examination and the recording of their evidence (Section 226).

Given that many witnesses in Fiji do not have English as their first language and that electronic recording devices are not available in the Magistrates' Courts the procedure is cumbersome lengthy and expensive. A heavy burden is imposed on witnesses whose cross-examined evidence (sometimes of a painful personal nature) would have to be repeated in the High Court trial following committal. Evidence given to the English Royal Commission on Criminal Justice (Chapter 6 para. 24) suggested that the defence "often deliberately tested key prosecution witnesses in this way in the hope that they would either change their stories under pressure of the ordeal or refuse to go through the experience again in the [High] Court". Such an approach is not unknown in Fiji. Where the intention of the accused is to plead guilty the procedure appears to offer no benefits at all.

By 1957 (see Supreme Court Registrar's Circular 2/1957) it was already obvious that the existing Part VII procedure was leading to lengthy and unacceptable delays in the transmission of the records of the proceedings by the Magistrates' Courts to the High Court required by Section 244 of the CPC (as amended by Act 37/98). Without transmission of these records the prosecution is unable to file the information against the accused in the High Court and the trial cannot begin (Section 248). As a step towards speeding up and simplifying the process of committing to the High Court the new Part VIII procedure was introduced in 1972.

The two major innovations introduced by the Part VIII procedure were first, that the presiding Magistrate is no longer required, unless specifically requested by the defence, to consider whether the evidence placed before the court by the prosecution establishes a *prima facie* case and secondly, that the evidence may be tendered in statement form unless the oral evidence of a particular witness is required either by the defence or by the court (Sections 256 (1) and 256 (4)).

With the introduction of the Part VIII procedure the Part VII procedure has largely fallen into disuse. Significant problems however remain.

The first difficulty is that the application of the Part VIII procedure to unrepresented accused is limited by Section 255 (1) (a); however the extent of the limitation is not clear. Until about 1990 both the Office of the D.P.P. and the Courts accepted that the

procedure was not available at all when accused persons were unrepresented. In 1992 however the Chief Registrar at the direction of the Chief Justice issued Circular Memorandum 1 of 1992 which suggested that so long as the presiding magistrate satisfied himself that the written statements presented a *prima facie* case then the procedure was available.

In 1996 however in Shiu Sami & Anr v. the State (AAU 7/1995) the Fiji Court of Appeal declined to accept the authority of the Circular Memorandum and held that the Part VIII procedure alone did not authorise the committal of an unrepresented accused by a magistrate who had satisfied himself that a *prima facie* case had been disclosed. The Court of Appeal, while stressing that the Part VII procedure and the Part VIII procedure are alternatives, proposed a hybrid procedure in the case of an unrepresented accused with the court having concurrent recourse to the provisions of both procedures.

With the greatest respect to the Court of Appeal the Commission views this conflation of the two discrete parts of the Criminal Procedure Code as introducing an unfortunate degree of complexity into what should ideally be a simple and straightforward process. The consequences of procedural error in committal proceedings may be dire. In Kitione Koroilagilagi v. the State (ABU 14/94) it was held that procedural errors involving an unrepresented accused rendered the whole proceedings a nullity with the result that the convictions had to be quashed.

The second difficulty is that despite the increased use of the Part VIII procedure severe delays in transmitting depositions to the High Court have continued. By definition the matters being committed to the High Court are among the most serious coming before the courts. Many of the accused will have been remanded in custody and delay in forwarding the depositions to the High Court will usually result in a prolonged period of pre-trial incarceration. This is obviously undesirable and a breach of the accused's rights under Sections 23 and 29 of the Constitution.

In the State v. the Chief Magistrate ex parte the Director of Public Prosecutions (HBJ 7/1997S) the DPP was finally driven to seek an order of mandamus directed to the then Chief Magistrate to enforce transmission of 17 records of committal proceedings

to the High Court. Several of the accused had been remanded in custody. Examination of the files revealed delays ranging between 3 and 31 months with an average delay of almost 12 months. These periods were obviously inconsistent with the requirement that records be transmitted to the High Court "without delay" or within 28 days following committal (see CPC Section 244 as amended).

As pointed out by the High Court in Henry Ingivald v. DPP (HAM 22/96):

> "If an accused has a constitutional right to be tried within a reasonable time he has the right not to be tried beyond that point in time and no court has the jurisdiction to try him or order him to be tried in violation of that right ….. A person facing [even] the most serious charges will escape trial altogether if he is not brought to trial within a reasonable time". (see also Martin v. Tauranga District Court [1995] 2 NZLR 419)

The third difficulty is that it is not clear what remedies may be available to an accused person aggrieved either by the decision to commit him or by another decision taken during the course of the committal proceedings.

On the face of it, sections 308(1) and 308(8) of the CPC taken together do not exclude a right of appeal either against a final order to commit or an interlocutory decision taken during the committal proceedings. That the High Court should however have a dual jurisdiction to try a matter committed on the one hand and to hear an appeal against the same committal appears to make little sense.

Whether or not judicial review is available to challenge decisions to commit or interlocutory decisions taken during committal proceedings is an even more complex and as yet finally undecided question which has not infrequently troubled the Courts.

The availability of judicial review to challenge the decision to commit was considered in G.P. Lala v. Suva Magistrates Court (C.A. 862/1983), in re Tony Udesh Bidesi (HBJ 20/1997) and in Visanti Makrava v. DPP & Attorney-General (HBJ 8/1998). In all three cases the High Court held that judicial review might be available but only in

the most exceptional cases. In Mark Lawrence Mutch (FCA 25/98) an appeal against the High Court's dismissal of an application judicially to review a decision to commit was itself dismissed with the Court's observation that:

> "it is time now for the trial to be held without further delay".

While it is not in doubt that applications for judicial review of interlocutory decisions in committal proceeding will rarely be successful (see e.g. R v. Greater Manchester JJ ex parte Aldi (The Times Dec 28 1994); DPP v. His Honour Judge Lewis [1997] 1 V.R. 387 and also Chief Justice's Practice Note No. 1 of 1993 "Judicial Review of Interlocutory Orders") this does not of course prevent such applications being made.

Given that the Court of Appeal is only the penultimate appellate court in Fiji and that the Supreme Court only infrequently sits it is quite possible to conceive of appeals and applications arising from committals seriously delaying the commencement or even forcing the abandonment of the trial proper. This is clearly contrary to the wider interests of the administration of justice as well as the requirements of the Constitution.

As has been seen the primary purpose of "old style" committal proceedings was to establish that the prosecution did indeed have a *prima facie* case warranting trial. The secondary purpose of the proceedings was to enable the accused to discover the nature of the case against him.

With the introduction of the Part VIII procedure the primary purpose was effectively abandoned save only on the very rare occasions when the court was invited to consider a submission under the provisions of Section 255 (1) (b).

The secondary purpose was routinely only partly served following decisions such as R v Epping and Harlow JJ ex parte Massaro (supra) which allowed the prosecution to avoid calling any particular evidence, even a principal witness, if it was otherwise able to present a *prima facie* case. Although followed by such authorities as R v Haig [1996] 1 NZLR 184, demands for the law to provide for the full disclosure of the prosecution case grew.

In Fiji there were three important developments.

The first was the adoption by the Director of Public Prosecutions in 1995 of "Uniform Guidelines on Disclosure of Prosecution Evidence" issued pursuant to Section 76 of the CPC. Those guidelines which may be compared with the New Zealand Solicitor General's Guidelines 1992 and with the statutory requirements of the English Criminal Procedure and Investigations Act 1996 which require the prosecution to provide accused persons with a summary of the case against them together with names and addresses of all witnesses and full witness statements of all witnesses whom it is intended to call at a trial.

The second development was the promulgation of the 1997 Constitution. Under the provisions of Section 28 (1) (b) an accused is entitled:

> "to be given details in legible writing in a language that he or she understands of the nature of and reasons for the charge;"

while Section 28 (1) (c) entitles the accused:

> "to be given adequate time and facilities to prepare a defence including, if he or she so requests, a right of access to witness statements;"

The third important development was the passage of the Legal Aid Act (10/96) which greatly expanded the availability of legal aid to accused persons in Fiji.

The result of this legislation is that almost all persons facing committal to the High Court are now legally represented as is required by Section 27 (1) (c) of the Constitution.

These three developments taken together which now ensure than an accused is fully apprised of the nature of the prosecution case well before the trial commences have rendered the secondary purpose of committals redundant.

In the Commission's view proceedings for committal for trial no longer serve any useful purpose which cannot more efficiently and fairly be served without them. They are however costly and seriously productive of delay. They are hugely unpopular with Resident Magistrates. The question is whether there is any good reason to retain them at all.

D-1-3. Trial in the Magistrates' Courts

Part VI of the Criminal Procedure Code contains the principal provisions governing procedure in trials before Magistrates' Courts.

As appears from Part VI the term "trial" includes the steps leading to the conviction of an accused person who has offered a guilty plea as well as those proceedings (more commonly referred to as "a trial") held to determine the guilt or otherwise of an accused person who has not admitted the charge.

When a person pleads guilty to an offence triable in the Magistrates' Court the Court is required to proceed to conviction and sentence (CPC Section 206 (2)).
At present the Magistrates' Court is unable to accept a guilty plea from a person charged with an offence which is only triable in the High Court (CPC Sections 224 and 225). As already noted (page 21 above) committal proceedings in the case of a person intending in any event to plead guilty appear to serve no useful purpose at all.

In a separate reference the Commission is considering criminal sentencing. Neither the sentencing process not the principles of sentencing are within the scope of the present reference. It may however be recorded that while occasionally problems have arisen in connection with delays in proceeding to the imposition of sentence (see e.g. Commissioner of Inland Revenue v. Druavesi HAA 12 of 1997S) such problems do not appear to be systemic.

The main area of difficulty is in the process of bringing contested trials to hearing and disposal.

As will be seen from Sections 198 and 200 of the CPC the Code envisages that the Court shall "proceed to hear the case" "at the time appointed for the hearing". In fact however even the simplest trials quite frequently fail to commence on the date set for hearing and are seldom brought to completion without several and sometimes many part-heard adjournments. These procrastinations which are endemic in the Magistrates' Courts not only breach the constitutional right to trial within a reasonable time (Constitution – Section 29 (3) but are also enormously costly and wasteful. They are seriously damaging to the due administration of justice.

The causes of delay and adjournment in the Courts are complex. Some are unavoidable, however a more managerial approach by magistrates and more careful pre-trial planning has been found in similar overseas jurisdictions to yield valuable results.

In 1998 a beginning was made to the attempt to reduce the incidence of adjournments in Magistrates' Courts with the passage of the Criminal Procedure Code (Amendment) Act 37 of 1998. Section 6 of the new Act replaced Section 202 of the Criminal Procedure Code with a new section prohibiting adjournments save for "good cause". While the new provision has had a moderately beneficial effect adjournments for less than good cause are unfortunately still routine.

In Part E-1-3 of this Report the Commission recommends the introduction of pre-trial directions hearings in the Magistrates' Courts. It also recommends expansion and greater use of the award of costs.

D-2 HIGH COURT

D-2-1 Sentencing in the High Court following Committal for Sentence

The study and consultation process did not reveal any serious systemic shortcomings in the procedure for sentencing in the High Court following committal. All three

High Court Criminal Registries reported that this area of their work was relatively up to date.

D-2-2 Trial in the High Court

In a series of strongly worded rulings (HAC 1,2,3,12, 13 & 14 of 2000L; 5,6 & 7 of 2001L) delivered in July and August 2001 the High Court at Lautoka granted bail to 14 men charged with murder. The principal grounds for granting bail were the long delays in bringing the men to trial and what were found to be grossly unsatisfactory living conditions in the remand block at Natabua Prison. The Court found that the prisoners' constitutional "rights to be treated with humanity and respect to (their) inherent dignity" (Constitution-Section 27 (I) (f)) had been violated and that the length of their period of detention had been excessive.

The Court described the backlog of cases at Lautoka High Court as having "reached crisis proportions" (State v. Jai Ram HAC 002 of 2000L) but did not attempt a detailed investigation into the causes of the delays beyond referring to a shortage of judges and problems in the fabric of the Courthouse. Neither of these factors is within the scope of this report. What however is clear is that even in Suva and Labasa where the lists are relatively up to date this comparatively healthy state of affairs reflects the initiative of individual judges rather than the acceptance of a more managerial role by the bench of judges as a whole.

A small start towards streamlining procedures has been made with Section 5 of the Criminal Procedure Code (Amendment) Act 37 of 1998 which for the first time permitted facts to be admitted in contested criminal proceedings as an alternative to their proof. Further steps designed to speed up the eventual trial were recommended by the Commission in its Report on reforms to the law of criminal evidence (January 1999) but unfortunately the required legislation has as yet not been forthcoming.

The Commission believes that in common with other similar jurisdictions overseas it is now desirable by legislation more closely and formally to involve the trial judge in

the pre-trial process. While such involvement will not solve the problem of the backlog of cases at Lautoka it will have a significant effect on the efficiency with which individual trials are disposed of. Detailed recommendations are set out in Section E-3 post.

E. PROPOSALS FOR CHANGE

E-1 Committal for sentence

In the Commission's view Magistrates' Courts should have the power to commit a person convicted of any offence triable in a Magistrates' Court (either summary or "either way") whether on the ground of the seriousness of the offence or the previous history of the convicted person or a combination of both factors. This power should be exercisable whether the accused has been convicted on his own plea or following trial. Whether or not the High Court in fact imposes a sentence exceeding the maximum available in the Magistrates' Court is of course for the High Court to decide following a full sentencing hearing.

E-2 Committal for trial

The Commission agrees with the English Royal Commission on Criminal Justice that the only advantage now offered by "old style" committal proceedings is the opportunity to submit that the prosecution have not presented a *prima facie* case. It also agrees that with the exception of the rarely used Section 255 (1) (b) procedure "the present system of paper committals (the Part VIII procedure) has no useful purpose". It was with similar considerations in mind that following the Law Commission of India's 41st Report committal for trial by the Court of Session following enquiry by magistrates was abolished in India (Code of Criminal Procedure 1973 – Section 209). In Australia and New Zealand the clear trend is also towards the abolition of the preliminary enquiry. Examples include the 1999 recommendation by the Law Reform Commission of Western Australia that "preliminary hearings should be abolished" (Project 92 – recommendation 302) and the 1986 contemplation by the Criminal Law Reform Committee of New Zealand that committal hearings would eventually be abolished (Law

Commission Report No. 14 – paragraph 160). In some jurisdictions committal proceedings in truncated form have been retained in order to secure prosecution

disclosure but as already noted disclosure is now independently required by Fiji's Constitution (Section 28 (1) (c)).

(While Fiji's rules as to alibi (Section 234) and the provisions governing the reporting of committal proceedings (section 257) are clearly worth retaining their retention does not depend on the continuation of the present procedures for committal).

The functions of Magistrates' Courts as examining justices were abolished in England in 1994. The Criminal Justice and Public Order Act 1994 repealed sections 4 to 8 of the Magistrates' Courts Act 1980 which had themselves replaced the corresponding sections in the Magistrates' Courts Act 1952. In the place of committal proceedings there was substituted a new system of "transfer for trial" (see Schedule 4 to the 1994 Act).

Under the new system where persons were charged with offences triable only on indictment (the English equivalent of our "information" see CPC – Section 248) the Magistrates' Court had to proceed to transfer the proceedings to the Crown Court (the English equivalent of our High Court) for trial.

When a person was charged with an "either way" offence which the Court had decided should be tried in the Crown Court or which the accused had not consented to have tried in the Magistrates' Court then the Magistrates' Court also had to transfer the proceedings to the Crown Court. In the event these provisions proved only to be transitional and they were replaced by simpler but similar provisions in section 51 of the Crime and Disorder Act 1998.

Under Section 1 of Schedule 3 to the 1998 Act a person sent by the Magistrates' Court for trial by the Crown Court must be served with copies of the evidence upon which the charge or charges are based not more than 6 weeks after being sent for trial.

Under Section 2 of Schedule 3 of the 1998 Act a person who has been sent to the Crown Court for trial under Section 51 of the Act may apply to that court for the charge or charges against him to be dismissed on the ground that the evidence would not be sufficient for him properly to be convicted. A successful application will result

in discharge (Section 2 (6)). This provision is similar to Section 347 of the New Zealand Crimes Act 1961 however in the case of the New Zealand Act a successful application will result in acquittal (Section 347 (4)).

Under Section 6 of Schedule 3 to the 1998 Act the Crown Court may deal with a summary offence sent to the Crown Court together with the indictable offence but only in the manner in which the Magistrates' Court could have dealt with the offence had it not been sent to the Crown Court. Under Section 7 (7) the Crown Court may remit a summary offence to which an accused pleads not guilty to the Magistrates' Court for trial.

In the Commission's view the English provisions provide the most practical scheme upon which to model amendments to the Criminal Procedure Code.

The advantages of replacing Parts VII and VIII of the CPC by a new procedure for sending persons charged with serious offences to the High Court include:

- (i) Delays resulting from current procedures will be eliminated;
- (ii) The Court which will dispose of the charges will become seized of them at the earliest possible date;
- (iii) The prosecution will have an incentive to prepare for an early trial;
- (iv) Accused persons will have an opportunity to apply to have the charges dismissed at a much earlier date;
- (v) Trials in the High Court will take place much more quickly after charging than is presently the case;
- (vi) Following transfer to the High Court any application for bail by the accused person will be considered by that Court; and
- (vii) Magistrates will be relieved of the troublesome obligation to adjudicate in matters which, by definition, are within the sole jurisdiction of the High Court.

The Commission recommends that Part VII and VIII of the Criminal Procedure Code be repealed and replaced.

E-3 Plea and directions hearings

In his Interim Report "Access to Justice" (June 1995 – Chapter 5 paragraph 2) Lord Woolf explained that the overall aim of his enquiry was "to improve access to justice by reducing the inequalities, cost, delay and complexity of civil litigation."

In order to achieve this aim he had:

> "come to the conclusion [that] … there is no alternative to a fundamental shift in the responsibility for the management of civil litigation … from litigants and their legal advisers to the courts".

While these observations relate particularly to civil litigation the need for management by the Courts of the work of their criminal jurisdiction has also been widely recognised.

As already noted the courts of Fiji are required by the supreme law of Fiji, the Constitution, to ensure that criminal proceedings are disposed of in a timely and fair manner. They can only do so if the limited resources of the courts are deployed with the greatest possible efficiency. This requires active intervention or management by the presiding judge or magistrate.

In England and Wales "Plea and Directions Hearings" were established in Crown Courts (the equivalent of the criminal division of our High Court) in 1994. A copy of the Lord Chief Justice's Practice Direction [1995] 2 Cr. App R 600 is Annexure B to this report.

A similar provision in a jurisdiction with a criminal procedure code similar to our own was introduced in Queensland by the insertion of a new section 592A into the

Criminal Code by the Criminal Law Amendment Act 1997. A copy of the new section is Annexure C to this report.

The Commission believes that in Fiji's circumstances amendment of the Criminal Procedure Code is likely to be more effective than issuing a practice direction.

The Commission is of the view that all contested trials both in the Magistrates' Court and in the High Court should be preceded by a pre-trial directions hearing held by the court of trial. In the High Court this hearing would also provide an opportunity for an accused person to challenge the information on the ground of insufficiency of evidence with a view to part or all of the information being quashed (see New Zealand Crimes Act 1961 – Section 347 as amended).

E-4 Adjournments

In his August 1994 Report of the Commission of Inquiry on the Courts Sir David Beattie disclosed (page 301) that the Commission had received:

> "From many quarters .. submissions about inordinate delays and many unnecessary adjournments for frivolous reasons".

As part of the solution to the problem of adjournments, which was admitted to be complex, Sir David recommended the greater use of awards of costs against the party in default (page 307).

This Commission is of the opinion that while the greater use of costs orders would certainly contribute to a solution to the problem of adjournments such orders can only be partly effective if only because orders are frequently not enforced by the payees and because they do nothing to deter wastage of court time as opposed to the time of legal practitioners and lay clients.

In May 1998 (LN 72/98) the Chief Justice amended the High Court Rules (Civil) to make provision for a wasted hearing fee to be ordered against a party whose default occasions an unnecessary adjournment or wasted hearing. While the Commission does not believe that hearing fees should be introduced in Magistrates' Courts at this time it recommends that the present provisions governing awards of costs (CPC Sections 158 and 159) should be broadened to include provision for an award of costs, including a sum payable to the Court, as opposed to another party, wasted through unnecessary adjournment.

F. SUMMARY OF RECOMMENDATIONS

1. Magistrates' Courts should have the jurisdiction to take a plea and enter a conviction in respect of any criminal offence committed in Fiji, not merely summary offences or offences triable either way.

2. Magistrates' Courts should have the power to commit to the High Court for sentence following conviction whether that conviction was entered after plea or after trial and whenever the Court is of the opinion that the circumstances of the offence or the circumstances of the offender or a combination of both circumstances justify committal to the High Court.

3. Committal proceedings as presently constituted under Parts VII and VIII of the Criminal Procedure Code should be abolished. They should be replaced by a simple system of transfer to the High Court for trial or sentence.

4. Plea and Direction hearings should be held both in the Magistrates' Courts and the High Court before any matter is set down for contested trial.

5. The existing costs provisions should be expanded to allow for awards of costs consequent upon adjournment of criminal proceedings. A wasted hearing fee order payable to the Court should be introduced into Magistrates' Courts.

ANNEXURES

ANNEXURE A

"Draft Criminal Procedure Code Amendment Bill"

ANNEXURE A

BILL NO.   OF 2002

A BILL

FOR AN ACT TO AMEND THE CRIMINAL PROCEDURE CODE

ENACTED by the Parliament of the Fiji Islands:-

Short title etc.

1-(1) This Act may be cited as the Criminal Procedure Code (Amendment) Act 2002 and comes into force on the day it is published in the *Gazette.*

(2) In this Act, the Criminal Procedure Code (Cap. 21) is referred to as the Code.

Interpretation

2. Section 2 of the Code is amended –

(a) by deleting the words and definition of "preliminary investigation";

(b) by adding the words: " "charge" means an official notification to an individual by a competent authority that he is accused of committing a criminal offence and that he is required to appear in a magistrates' court to answer the charge";

(c) by adding the words: " "information" means a request by the Director of Public Prosecutions to the Chief Registrar of the High Court that a charge be enquired into by the High Court."

"Supreme Court" replaced

3. The words "Supreme Court" wherever occurring in the Code are replaced by the words "High Court".

"Barrister and Solicitor" replaced

4. The words "barrister and solicitor" wherever occurring in the Code are replaced by the words "legal practitioner".

References to preliminary enquiries deleted

5. The words:
   (a) "enquiry"
   (b) "or enquiry"
   (c) "enquiry or"
   (d) "enquire into or"
   (e) "enquiring into or"
   (f) "enquired into"
   (g) "enquired into or"
   (h) "other than a preliminary enquiry"
   (i) "preliminary investigation or"
   (j) "enquiries and"

   wherever occurring in Sections 3(1), 3(2), 61, 62, 63, 65, 66, 69, 70(1), 74, 75, 79, 135, 138, 143, 148(1), 151, 189, 190, 191, 192, 196 and the title to Part V of the Code are deleted.

Section 128 repealed

6. Section 128 (2) (a) of the Code is repealed.

Sections 148 and 150 amended

7. Sections 148 and 150 of the Code are amended by deleting the words "Governor-General" wherever occurring and substituting the word "President".

Section 149 repealed

8. Section 149 of the Code is repealed.

Section 153 amended

9. Section 153 is amended:-

   (a) by deleting the words "Governor-General" wherever occurring and substituting the word "President";

   (b) by deleting the words: "in cases which are the subject of a preliminary investigation by a Magistrate's Court and of trial by the Supreme Court" in Section 153 (1) (b) and substituting the words: "in cases which have been transferred to the High Court by a Magistrates' Court";

(c) By deleting sub-sections 153 (1) (b) (i) and 153 (1) (b) (iii).

Section 158 amended

10. Section 158 is amended by adding the following subsection (5): -

"Wasted hearing fee

(5) Where a Judge of the High Court or a Magistrate is of the opinion that a hearing or part of a hearing of any matter proceeding in court has been wasted as a result of the default of an accused person, a prosecutor, a legal practitioner, an assessor or a witness it shall be lawful for the Judge or Magistrate to order the person in default or in the case of a prosecutor the Office of the Director of Public Prosecutions to pay to the Chief Registrar of the High Court or the Officer-in-charge of the Magistrates' Court such wasted hearing fee not exceeding $500 as the Judge or Magistrate shall deem fair and reasonable in all the circumstances. A wasted hearing fee shall be enforceable in the same manner as a fine".

Section 159 replaced

11. Section 159 of the Code is replaced with the following new section:

"Appeal against order for costs or wasted hearing fee

An appeal shall lie to the High Court from any order for the payment of a wasted hearing fee or costs made by a Magistrate. With the leave of the Court of Appeal an appeal shall lie to the Court of Appeal from any order of the High Court awarding costs or payment of a wasted hearing fee. The appellate court shall have power to give such costs of the appeal as it shall deem reasonable."

Section 163 amended

12. Section 163 of the Code is amended:

(a) by adding the words: "subsection (4) of Section 154 and" after the word "subsection" first occurring;

(b) by adding the words: "or of section 259" after the words "section 245".

Section 202 amended

13. Section 202 of the Code is amended by adding the following new subsections:-

"(8) When a case is adjourned for trial or the continuation of a trial the Magistrate adjourning the case shall conduct a pre-trial hearing.

(9) Where a pre-trial hearing is held all facts and matters relevant to the case as are set out in the Second Schedule to this Code shall be taken into account and be the subject of such orders and directions as the Magistrate deems just and appropriate for the proper, efficient and speedy disposal of the trial.

(10) A direction or ruling made at a pre-trial hearing shall not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence."

Section 220 replaced

14. Section 220 of the Code is replaced with the following new section:

"*Power to stop summary trial*

If before or during the course of a trial before a Magistrates' Court it appears to the Magistrate that the case is one which ought to be tried by the High Court or if before the commencement of the trial an application in that behalf is made by the public prosecutor that it shall be so tried, the Magistrate shall not proceed with the trial but shall transfer the case to the High Court under the provisions of Part VII."

Section 222 replaced

15. Section 222 of the Code is replaced with the following new section:

"Transfer to High Court for sentence

222-(1) Where a person being not less than seventeen years of age is tried by a Resident Magistrate for any offence and such person is convicted by such magistrate of that offence, or of any other offence of which he is liable to conviction under the provisions of this Code then if the Magistrate is of the opinion, whether by reason of the nature of the offence or the previous history of the offender or both, that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the Magistrate

has power to impose, the Magistrate may transfer him to the High Court for sentence under the provisions of Part VII.

(2) Where the offender is transferred to the High Court as aforesaid:-

(a) A copy of the charge in respect of which the offender was convicted shall be sent to the Chief Registrar of the High Court together with a copy of the order for transfer.

(b) the High Court shall enquire into the circumstances of the case and shall have power to deal with the offender in any manner in which he could be dealt with if he had been convicted by the High Court; and

(c) if dealt with by the High Court the offender shall have the same right of appeal to the Court of Appeal as if he had been convicted and sentenced by the High Court;

(d) the High Court, after hearing state counsel if he desires to be heard may remit the offender transferred for sentence in custody or on bail to the Magistrates' Court which originally transferred the offender to the High Court and thereafter the offender shall be dealt with by such court and shall have the same right of appeal as if no transfer to the High Court had taken place."

Part VII replaced

16. Part VII of the Code is repealed and replaced by the following new Part VII:

"PART VII – PROVISIONS RELATING TO THE TRANSFER OF ACCUSED PERSONS TO THE HIGH COURT

Power to transfer to the High Court

223. Any Resident Magistrate may transfer any accused person to the High Court.

Preliminary enquiry and committal proceedings abolished

224. An accused person shall not be subject to a preliminary enquiry or to committal proceedings prior to transfer to the High Court for trial.

Guilty plea to offence triable in the High Court

225. A Magistrates' Court shall have jurisdiction to accept a guilty plea and to record a conviction for any offence including an electable offence or an offence only triable in the High Court:

Provided that a person who has been charged with an offence only triable by the High Court or who has elected trial by the High Court in respect of an electable offence may reserve his plea until arraignment by the High Court.

Transfer to the High Court following plea

226. When an accused person has:

(a) pleaded guilty and been convicted; or
(b) pleaded not guilty

to an electable offence in respect of which he has elected trial in the High Court or with an offence triable only in the High Court the Magistrates' court shall forthwith order the transfer of the accused person to the High Court for sentence or for trial.

Particulars of order for transfer

227. When a Magistrates' Court makes an order for transfer to the High Court:

(a) A copy of the Order for transfer shall forthwith be sent by the Magistrates' Court to the Chief Registrar of the High Court.
(b) the accused person shall be remanded to appear in the High Court on a fixed date not exceeding 28 days after the date of the order for transfer;
(c) the accused person shall be remanded either on bail or in custody.
(d) In the case of an order for transfer made following a plea of guilty under Section 226 (a) a copy of the charge in respect of which a conviction has been entered by the Magistrates' Court shall be sent to the Chief Registrar of the High Court together with a copy of the order for transfer.

Rules as to alibi

228. (1) On a trial before the High Court the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, within 21

days of an order for transfer to the High Court he gives notice of particulars of the alibi.

(2) Without prejudice to subsection (1), on any such trial the defendant shall not without the leave of the Court call any other person to give such evidence unless -

(a) the notice under that subsection includes the name and address of the witness, or, if the name or address is not known to the defendant at the time he gives the notice, any information in his possession which might be of material assistance in finding the witness;

(b) if the name or the address is not included in that notice, the Court is satisfied that the defendant, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained;

(c) if the name or the address is not included in that notice, but the defendant subsequently discovers the name or address or receives other information which might be of material assistance in finding the witness, he forthwith gives notice of the name, address or other information, as the case may be; and

(d) if the defendant is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, he forthwith gives notice of any such information which is then in his possession or, on subsequently receiving any such information, forthwith gives notice of it.

(3) Any evidence tendered to disprove an alibi may subject to any directions by the Court as to the time it is to be given, be given before or after evidence is given in support of the alibi.

(4) Any notice purporting to be given under this section on behalf of the defendant by his legal practitioner shall unless the contrary is proved be deemed to be given with the authority of the defendant.

(5) A notice under subsection (1) shall either be given in court prior to an order for transfer to the High Court or shall be given in writing to the prosecution and a notice under paragraph (c) or (d) or subsection (2) shall be given in writing to the prosecution.

(6) A Magistrates' Court making an order for transfer to the High Court whether for trial or for sentence shall inform the defendant of the provisions of subsection (1) of this section. The High Court shall not refuse leave under this

section if it appears to the Court that the defendant was not informed of the requirements of this section.

Taking statement from persons dangerously ill

229. Whenever it appears to any Magistrate that any person dangerously ill or hurt and not likely to recover is able and willing to give material evidence relating to any offence to be tried in the High Court such Magistrate may take in writing the statement on oath or affirmation of such person and shall subscribe the same and certify that it contains accurately the whole of the statement made by such person and shall add a statement of his reasons for taking the same, and of the date and place where the same was taken.

Notice to be given

230. If the statement relates or is expected to relate to an offence for which any person has been charged, reasonable notice of the intention to take the same shall be served upon the prosecutor and the accused person, and if the accused person is in custody he shall be brought by the person in whose charge he is, under an order in writing of the Magistrate, to the place where the statement is to be taken.

Transmission of statements

231. If the statement relates to an offence for which any person is then or subsequently transferred for trial or sentence. It shall be transmitted to the Chief Registrar of the High Court, and a copy thereof shall be transmitted to the Director of Public Prosecutions.

232. Such statement so taken may afterwards be used in evidence on the trial of any person accused of an offence to which the same relates, if the person who made the statement be dead, or if the court is satisfied that for any sufficient cause his attendance cannot be procured, and if reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused person) against whom it is proposed to be read in evidence, and he had or might have had, if he had chosen to be present, full opportunity of cross-examining the person making same.

Filing of an information

233-(1) An information charging the accused person with the offence with which he is accused shall be filed by the Director of Public Prosecutions with the Chief Registrar of the High Court within 21 days of the order for transfer:

Provided that the time for filing the information may be extended by the High Court for good cause.

(2) In any such information the Director of Public Prosecutions may charge the accused person with any offence which in his opinion is disclosed by witness statements either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial.

Service of information

234. On the date on which the information is filed a copy of the information shall be served by the Director of Public Prosecutions on the accused persons legal practitioner or where the accused person is unrepresented on the Director of the Legal Aid Commission.

Form of information

235-(1) All informations drawn up in pursuance of Section 233 shall be in the name of and (subject to the provisions of Section 72) signed by the Director of Public Prosecutions.

(2) Every information shall bear the date of the day when the same is signed and with such modifications as shall be necessary to adapt in to the circumstances of each case may commence in the following form:-

THE STATE *v.* A.B.

IN THE HIGH COURT OF FIJI
AT SUVA

INFORMATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS

A.B is charged with the following offence (s)

Reports of order of transfer

236-(1) Except as provided by Subsection (2) it shall not be lawful to publish a written report or to broadcast in Fiji a report of any proceedings preparatory to an order for transfer to the High Court containing any matter other than that permitted by subsection (3).

(2) It shall not be unlawful under this section to publish or broadcast a report of transfer proceedings containing any matter other than that permitted by subsection (3) after the conclusion of the trial in respect of which the transfer was ordered.

(3) The following matters may be contained in a report of transfer proceedings:

(a) the identity of the court and the name of the Magistrate;
(b) the name, age and occupation of the accused person;
(c) summary of the offence or offences with which the accused person has been charged;
(d) a summary of the offence or offences in respect of which an order for transfer to the High Court was made;
(e) the name of the legal practitioner representing the accused person;
(f) whether the accused person whose transfer was ordered was remanded in custody or on bail;

(4) If a report is published or broadcast in contravention of the section the following persons, that is to say –

(a) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical;
(b) in the case of publication of a written report otherwise than as part of a newspaper or periodical but including publication on the internet the original publisher;
(c) in the case of a broadcast of a report by radio or television any body corporate which transmits or provides the programmes in which the report is broadcast and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical;

shall be liable on conviction to a fine not exceeding ten thousand dollars.

(5) Proceedings for an offence under this section shall not be instituted otherwise than by or with the consent of the Director of Public Prosecutions".

Part VIII repealed

17. Part VIII of the Code is repealed.

Section 266 amended

18. Section 266 of the Code is amended:

(a) by deleting the words "Governor-General" and substituting the word "President";
(b) by deleting the words "Crown Law Office" and substituting the words "Attorney-General's Chambers";
(c) by deleting the words "members of Her Majesty's military or air forces" and substituting the words "members of the Republic of the Fiji Islands Military Forces";
(d) by deleting the word "Royal".

Insertion of Section 272A

19. The Code is amended by inserting the following section 272A immediately after Section 272:

"*First appearance of accused person at High Court*

272A-(1) An accused person transferred to the High Court pursuant to Section 226 shall be brought before the High Court not later than 28 days after the order of transfer is made.

(2) Upon first appearance before the High Court an accused person who has pleaded guilty in the Magistrates' Court and been convicted under the provisions of Section 226(a) the Court shall proceed to sentence.

(3) Upon first appearance before the High Court of an accused person who has pleaded not guilty pursuant to Section 226 (b) or who has reserved his plea under Section 225 the High Court shall proceed to arraignment."

Amendment of Section 273 (1)

20. Section 273(1) of the Code is amended by deleting the words following the word "thereto".

Insertion of Section 275A

21. The Code is amended by inserting the following section 275A immediately after Section 275:

"*Preliminary submission of no case to answer*

275A (1) An accused person may at any time before arraignment apply to the Court to quash any count in the information on the ground that it is not founded on the evidence disclosed in the witness statements served on him pursuant to Section 28(1)(c) of the Constitution; and the Court shall quash that count if satisfied that it is not so founded."

Section 282 replaced

22. Section 282 of the Code is replaced by the following new section:

"*Proceedings after plea of "not guilty"*

282-(1)If an accused person pleads "not guilty" or if a plea of "not guilty" is entered in accordance with section 273 or 280 the Court shall proceed to hold a pre-trial hearing.

(2)When a pre-trial hearing is held all facts and matters relevant to the case as are set out in the Second Schedule to this Code shall be taken into account and be the subject of such orders and directions as the Court deems just and appropriate for the proper, efficient and speedy disposal of the trial.

(3)A direction or ruling made or a pre-trial hearing shall not be subject to interlocutory appeal without the leave of the Court or the Court of Appeal but may be raised as a ground of appeal against conviction or sentence".

Section 283 amended

23. Section 283 of the Code is amended by adding the words "or pre-trial hearing" following the word "trial".

Second Schedule added

24. The following Second Schedule is added to the Code:

“SECOND SCHEDULE:

<u>Pre-trial hearing (Sections 202 and 282</u>)

The Court shall endeavour to identify all significant matters which might affect the proper convenient and prompt trial of the case including:

(a) The joinder of accused or joinder of charges;
(b) Postponement of the trial to enable representations to be made to the Director of Public Prosecutions;
(c) Legal and factual issues arising in the case;
(d) The number and availability of witnesses;
(e) Facts which are admitted pursuant to Section 192A of the Code;
(f) Any issue relating to the mental or medical condition of an accused person or witness;
(g) Any special requirement for any witness e.g. screens for vulnerable witnesses;
(h) Whether any video, tape recorder or other technical equipment will be required;
(i) Any special arrangements regarding assessors;
(j) The estimated length of the trial;
(k) The availability of counsel; and
(l) Any other administrative arrangements which appear desirable.”

ANNEXURES

ANNEXURE B

"Chiefs Justice's Practice Direction – Plea and Directions Hearings"

ANNEXURE B

PLEA AND DIRECTIONS HEARINGS IN THE CROWN COURT

These Rules establish Plea and Directions Hearings (PDHs) in the Crown Court and will apply to all cases (other than serious fraud) in the Crown Court Centres which have notified the magistrates' courts that PDHs have been introduced.

At the PDH, pleas will be taken and, in contested cases, prosecution and defence will be expected to assist the judge in identifying the key issues, and to provide any additional information required for the proper listing of the case.

The detailed operation of the rules will be a matter for the judiciary at each Crown Court centre, taking the views of other agencies, and the legal profession, into account.

1. In every case, other than serious fraud cases in relation to which a notice of transfer to the Crown Court is given under section 4 of the Criminal Justice Act 1987, and child abuse cases transferred under section 53 of the Criminal Justice Act 1991, the magistrates' court should commit the defendant to appear in the Crown Court on a specific date fixed in liaison with the Crown Court listing officer for an initial plea and directions hearing (PDH). The PDH provisions will apply equally to child abuse cases, for which special arrangements will need to be made for the Crown Court to fix a PDH date on receipt of the case papers.

2. The purpose of the PDH will be to ensure that all necessary steps have been taken in preparation for trial and to provide sufficient information for a trial date to be arranged. It is expected that the advocate briefed in the case will appear in the PDH wherever practicable.

3. At least 14 days notice of the PDH shall be given unless the parties agree to shorter notice. The PDH shall be given unless the parties agree to shorter notice.
   The PDH should be within six weeks of committal in cases where the defendant is on bail, and four weeks where the defendant is in custody.

PREPARATION FOR THE PDH

4. Where the defendant intends to plead guilty to all or part of the indictment, the defence must notify the Probation Service, the prosecution and the Court as soon as this is known.

5. The defence must supply the Court and the prosecution with a full list of the prosecution witnesses they require to attend at the trial. This must be provided at least 14 days prior to the PDH or within three working days of the notice of the hearing where the PDH is fixed less than 17 days ahead.

6. For all class 1 offences, and for lengthy and complex cases, a case summary should be prepared by the prosecution for use by the judge at the PDH. All class 2 cases should be scrutinised by the prosecution to determine whether the provision of a summary is appropriate in any particular case. The summary will assist the judge by indicating the nature of the case, and focusing on the issues of fact and/or law likely to be involved. The summary should also assist the judge in estimating the trial length.

FORM OF HEARING

7. The PDH should normally be held, and orders made, in open court and all defendants should be present (except with the leave of the court). It shall be conducted:

   (a) in all cases other than those in class 1 or class 2 and serious sexual offences of any class against a child, by the trial judge or such judge as the presiding judge or resident judge shall appoint;
   (b) in cases in class 1 or class 2 and serious sexual offences of any class against a child, by a High Court judge, or by a circuit judge or Recorder to whom the case has been specifically released in accordance with the Directions for the Allocation of Business within the Crown Court, or by a Directions judge authorised by the presiding judges to conduct such hearing, but

(i) pleas of guilty when entered before a Directions judge in such cases will be adjourned for sentencing by a High Court judge, circuit judge or Recorder to whom the case has been specifically released; and

(ii) a Directions judge will deal only with those matters necessary to see that such cases are prepared conveniently for trial, including identifying any issues suitable for a preliminary hearing before the trial judge, and making such necessary directions as may facilitate the conduct of such a preliminary hearing.

CONDUCT OF THE HEARING

8. At the PDH arraignment will normally take place.

9. If the defendant pleads guilty, the judge should proceed to sentencing whenever possible.

10. Following a not guilty plea, and where part of alternative pleas have not been accepted, the prosecution and defence will be expected to inform the Court of:

(a) the issues in the case;

(b) issues, if any, as to the mental or medical condition of any defendant or witness;

(c) the number of witnesses whose evidence will be placed before the Court either orally or in writing;

(d) the defence witnesses in (c) above whose statements have been served and whose evidence the prosecution will agree and accept in writing;

(e) any additional witnesses who may be called by the prosecution and the evidence that they are expected to give;

(f) facts which are to be admitted and which can be reduced into writing in accordance with section 10(2)(b) Criminal Justice Act 1967, within such time as may be directed at the hearing, and of the witnesses whose attendance will not be required at trial;

(g) exhibits and schedules which are to be admitted;

(h) the order and pagination of the papers to be used by the prosecution at the trial;

(i) any alibi which should already have been disclosed in accordance with the Criminal Justice Act 1967;

(j) any point of law which it is anticipated will arise at trial, any questions as to the admissibility of evidence which appear on the face of the papers, and of any authority on which the party intends to rely;

(k) any applications to be made for evidence to be given through live television links by child witnesses, as defined by section 32 of the Criminal Justice Act 1988 amended by section 55 of the Criminal Justice Act 1991, in cases involving violent or sexual offences, particulars of which should already have been lodged with the court in writing on the form at Schedule 5 to the Crown Court (Amendment) (No. 5) Rules 1988 (within 28 days after the date of committal of the defendant, or the referral of a bill of indictment in relation to the case);

(l) any applications to submit pre-recorded interviews with a child witness as evidence in chief;

(m) any applications for screens, for use by witnesses seeking a visual break between themselves and any relevant parties; whether any video, tape recorder or other technical equipment will be required during a trial. Where tape recorded interviews hve taken place, of any dispute or agreement as to the accuracy of any transcript or summary;

(n) any other significant matter which might affect the proper and convenient trial of the case, and whether any additional work needs to be done by the parties;

(o) the estimated length of the trial, to be agreed more precisely taking account of any views expressed by the judge and the other parties;

(p) witness availability and the approximate length of witness evidence so that attendance can be staggered during lengthy trials, agreeing likely dates and times of attendance, taking into consideration real hardship and inconvenience to a witness where applicable;

(q) availability of advocate;

(r) whether there is a need for any further directions.

11. Subject to the provisions of section 9 and 10 of the Criminal Justice Act 1967, admissions under paragraph 10(f), above, may be used at the trial.

12. The judge may make such order or orders as lie within his or her powers as appear to be necessary to secure the proper and efficient trial of the case. Each party shall, at least 14 days before the date of trial, confirm to the court in writing that all such orders have been fully complied with.

13. The questionnaire annexed to these rules provided a recommended structure for use by the judiciary in conducting a PDH. A single copy of the questionnaire, completed as far as possible with the agreement of both advocates, is to be handed in to the court prior to the commencement of the PDH.

14. The defence shall apply to the court for the case to be listed for mention if they are unable to obtain instructions from the defendant. If the defendant fails to attend court, the judge will wish to consider whether a warrant of arrest should be issued.

July 25, 1994 Lord Taylor C.J.

Note: for a comparable Practice Direction concerning civil litigation see [1995] 1 WLR 508.

ANNEXURES

ANNEXURE C

“Criminal Procedure Code of Queensland – Section 592A”

ANNEXURE C

QUEENSLAND CRIMINAL CODE: PRE-TRIAL DIRECTIONS AND RULINGS

Section 592A (1): If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial.

(2) Without limiting subsection (1) a direction or ruling may be given in relation to-

(a) the quashing or staying of the indictment; or

(b) the joinder of accused or joinder of charges; or

(c) the provision of a statement, report, proof of evidence or other information; or

(d) noting of admissions and issues the parties agree are relevant to the trial or sentence; or

(e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted; or

(f) ascertaining whether a defence of insanity or diminished responsibility of any other question of a psychiatric nature is to be raised; or

(g) the psychiatric or other medical examination of the accused; or

(h) the exchange of medical, psychiatric and other expert reports; or

(i) the reference of the accused to the Mental Health Tribunal; or

(j) the date of trial and directing that a date for trial is not to be fixed until it is known whether the accused proposes to rely -

(k) on a defence of insanity or diminished responsibility or any other question of a psychiatric nature; or

(l) the return of subpoenas and notices to Crown witnesses; or

(m) the Evidence Act 1977, part 2, division 6; or

(n) encouraging the parties to narrow the issues and any other administrative arrangements to assist the speedy disposition of the trial.

(3) A direction or ruling is binding unless the trial judge, for special reason, gives leave to re-open the direction or ruling.

(4) A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.