PAPUA NEW GUINEA
CONSTITUTIONAL AND LAW REFORM COMMISSION

ISSUES PAPER 1: Committal Proceedings

Terms of Reference

CLRC Reference No 1: Committal Proceedings

I, Bire Kimisopa, Minister for Justice, by virtue of the power conferred on me by Section 12 of the *Constitutional and Law Reform Commission Act* 2004 (the Act) refer and direct as follows.

(1) I refer to the Constitutional and Law Reform Commission (the Commission) for enquiry and report on their systematic development and reform, in accordance with s.12 of the Act:

a) whether and how the provisions for committal proceedings under the *PNG Criminal Code* 1975 should be modified or abolished so as to better serve the interests of justice, having particular regard to the impact on the persons, and the State, that are subject of, or subject to, the laws under review; and

b) to the extent necessary to secure the reforms proposed in relation to (a), whether and how any relevant associated laws and practices should also be modified or abolished.

(2) I direct that in undertaking the investigation and report, the Commission shall:

a) consider any relevant research or developments, whether in this or other jurisdictions on the matter for inquiry; and

b) consult widely within the community and the legal profession including and without limiting other consultation, regularly (whether separately or in a group or groups) with each of the Supreme Court, the National Court, the District Court and the Magistrates Court, the PNG Royal Constabulary, the Public Prosecutor, the Public Solicitor, the PNG Corrections Service, the Law Society of PNG, the Ombudsman Commission and the Department of Justice and Attorney General.

(3) The Commission shall report to me within 8 months of the date of publication of this reference in the Government Gazette.

(4) This reference shall be referred to as: *CLRC Reference No. 1: Committal Proceedings*

Dated this ***2nd*** day of ***November*** 2006.

Hon. Bire Kimisopa MP
Minister for Justice

Making a submission

The CLRC is seeking any form of submission from a broad cross-section of the community, as well as those with a special interest in the inquiry.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred.

It would be helpful if comments addressed specific proposals or numbered paragraphs in this Issues Paper.

Open inquiry policy

In the interests of informed public debate, the CLRC is committed to open access to information. As submissions provide important evidence to each inquiry, the CLRC may draw upon the contents of submission and quote from them or refer to them in publications.
Submissions should be sent to:

The Secretary
Constitutional & Law Reform Commission
P O Box 3439
BOROKO
National Capital District

Email: lawrence_kalinoe@clrc.gov.pg

The closing date for submissions in response to IP 1 is Friday, 4th May, 2007

Participants

The Commissioners of the Constitutional and Law Reform Commission (CLRC) are:

- Hon. Dr. Allan Marat, Chairman
- Mr Gerhard Linge, Deputy Chairman
- Dr. Betty Lovai
- Mr Tom Anayabere

The Commissioners appointed Dr. Betty Lovai to supervise this reference. The CLRC then established a Working Committee comprising representatives from key organizations who are involved in the criminal justice system to guide and supervise the work in these two and related references on committal proceedings and indictable offences triable summarily. The Working Committee thus comprises:

- Mr Iova Geita, Senior Provincial Magistrate - Chairman
- Mr Frazer Pitpit, Public Solicitor - Stand in Chairman in the absence of the Chairman
- Mr Jack Pambel, Acting Public Prosecutor
- Mr Allan Kopi, Waigani Committal Court Senior Magistrate
- Ms Nialin Kiteap, Waigani Committal Court Senior Magistrate

- Mr Jimmy Tapat, Central Provincial Committal Court Senior Magistrate
- Mr Jim Wan, ACP Police
- Mr Robert Ali, Police Officer
- Ms Negil Kauvu, Director, Community Based Corrections
- Rev. Steven Pirina, Deputy Director, Community Based Corrections
- Mr Collin McKenzie, Adviser, Community Based Corrections
- Mr Solomon Kai, Correctional Services
- Mrs Ume Waineti, Program Co-ordinator, Family & Sexual Violence Action Committee as Civil Society Representative
- Ms Lydia Polomon, Clerk of Court, Waigani Grade 5 Court
- Ms Elsie Gaius, Clerk of Court, Waigani Committal Court

Contents

1.1 The Constitutional and Law Reform Commission
1.2 Background of this Inquiry
1.3 Objectives of this Reference: CLRC Reference No. 1: Committal Proceedings
1.4 Consultations
1.5 Purposes of this Issues Paper
1.6 Structure of this Report
2.1 Introduction
2.2 Essence and Nature of Committal Proceedings
2.3 Purpose and Functions of Committal Proceedings
2.4 Role of Committal Court Magistrates
2.5 Committal Proceedings in Papua New Guinea
3.1 Introduction
3.2 Indictable Offences and Committal Proceedings
3.3 Hand Up Brief
3.4 Commencement of Committal Proceedings
3.5 Duties, Roles and Responsibilities of the Committal Court Magistrate at Committal Proceedings
3.6 Committal for Trial Without Consideration of the Evidence
3.7 Admission of Guilt by the Defendant at Committal
4.1 Introduction
4.2 Should Committal Proceedings be abolished?
4.3 Committals and Delays
4.4 Delays in Committals and Associated Costs
4.5 Modification of the Committal Proceedings
4.6 Involvement of Defence Lawyers at Committal Proceedings
4.6.2 Sitting days
4.6.3 Adjournments
4.6.4 Remand and Bail
4.6.5 Rulings
4.6.6 Total number of days in the disposal of the files

1. Introduction to the Inquiry

Contents

Constitutional and Law Reform Commission
Background of this Inquiry
Objectives of this Reference: CLRC Reference No. 1: Committal
Consultations
Purposes of this Issues Paper
Structure of this Report

1.1 The Constitutional and Law Reform Commission

The Constitutional and Law Reform Commission (CLRC) is an amalgam of the former Constitutional Development Commission (CDC) and the Law Reform Commission (LRC). It came into being on March, 4, 2005. It is established under the *Constitutional and Law Reform Commission Act* 2004. As stipulated under Section 12 of its enabling legislation, the CLRC:

- receives reference from the Minister for Justice to conduct its review and propose legislative change where appropriate concerning laws other than constitutional laws; or
- receives reference from the Head of State acting on advice from the executive government to conduct its enquiry and review into any parts of the Constitution and the Organic Laws and then propose appropriate constitutional law reform where and when considered appropriate.

1.2 Background of this Inquiry

About one month before Independence, on 21st August, 1975, the then Minister for Justice – now Sir Ebia Olewale, issued a reference to the then Law Reform Commission to review the criminal laws of Papua New Guinea. Pursuant to this reference, the Law Reform Commission then reviewed criminal law practice and procedure relating to committal proceedings and indictable offences and produced the following working papers and reports:

- Indictable Offences Triable Summarily – Joint Working Paper No. 1 (Law Reform Commission and Acting Chief Magistrate) February 1977;
- Committal Proceedings (Preliminary Examinations – Joint Working Paper No. 2 (Law Reform commission and The Chief Magistrate) July 1977;
- Report on Summary Offences – Report No. 1 September 1975;
- Indictable Offences Triable Summarily – Report No. 8 August 1978; and
- Committal Proceedings - Report No. 10 July 1980

As a result of these reviews and reports, the following legislation were introduced:

- District Courts (Hearing of Indictable Offences) Act 1980 (No. 32 of 1980); and
- District Courts (Committal Proceedings in Cases of Indictable Offences) Act 1980 (No. 31 of 1980).

Generally, these legislative reforms introduced the paper based committal proceedings system we now have where committal proceedings are now done through a police prepared witness file called a hand-up brief. These reforms also saw the introduction of the new Magistrate Grade 5 Courts with requisite jurisdiction to summarily hear and dispose

of those group of criminal offences called Indictable Offences Triable Summarily – originally they were referred to as Schedule 2 1A Offences but now Schedule 2 Offences – referring to Schedule 2 of the *Criminal Code Act* where these offences are listed.

Generally this review did cause an improvement in the criminal justice system relating to committal proceedings and indictable offences triable summarily since its introduction in 1980. Twenty six years on, with increase in the work load of committal matters both for the committal courts and the police investigators and prosecutors, the committal process is now under stress. Hence, this reference.

The former Law Reform Commission in its report on committal Proceedings[1] expressed an opinion that ultimately, the holding of committal proceedings and preliminary hearings should be abolished and the Public Prosecutor should receive the completed police files and peruse the file and decide on whether or not to indict the accused to stand trial. However, the Law Reform Commission was evenly concerned that at that stage of the development of the courts and the training of lawyers, magistrates and police prosecutors and investigators, particularly the staff strengths of the office of the Public Prosecutor and the Public Solicitor, the proposal to abolish committal proceedings should be delayed. It is really as an interim measure that the Law Reform Commission recommended for the introduction of the Police hand-up brief system of committal proceedings which we now have.

In 1995, the Court Restructure Committee established by the Chief Justice and the Chief Magistrate headed by Justice Hinchliffe[2] considered the issue of abolition of committal proceedings and the recommendations of the Law Reform Commission for the Public Prosecutor to then receive the police file and then upon his perusal of the file and his satisfaction of the evidence, indict the accused and commence trial in the National Court. This report refuted the Law Reform Commission's views on abolition of committal proceedings but instead recommended for the committal proceedings to be retained and made various recommendations to enhance efficiency and attack the dreaded problem of delay.

It is against this background that the Justice Minister, Hon. Bire Kimisopa, issued to us this reference.

1.3 Objectives of this Reference: CLRC Reference No. 1: Committal Proceedings

The primary objective of this Reference is to inquire into and review the system of committal proceedings of the criminal justice system and assess and determine:

- whether and how the provisions for committal proceedings under the *District Courts Act*, and to a limited extent, the *Criminal Code Act* Chapter 262, and other related laws should be modified or abolished to better serve the interest of justice, having particular regard to the impact on the persons, and the State, that are the subject of, or subject to, the laws under review;

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[1] Law Reform Commission (1980) *Committal Proceedings* (Report No. 10) (Port Moresby: Law Reform Commission).

[2] Final Report of the Court Restructure Committee to the Chief Justice and Chief Magistrate on Committal Proceedings (Unpublished) (copy available on file) 24 pp. We are grateful to Justice Panuel Mogish for alerting us of the existence of this report and then supplying us a copy.

- if the committal proceedings system is to be modified, what should be done and how best should that be achieved;
- if the committal proceedings system is to be abolished, propose and recommend its replacement system;
- to the extent necessary to secure the reforms proposed above, whether and how any relevant associated laws and practices should be modified or abolished.

1.4 Consultations

For purposes of achieving the above objectives, the CLRC has been directed to consult widely within the country and outside the country. Within the country, we have been directed to consult with the judges, magistrates, court clerks and other officials, police personnel, Public Prosecutor, Public Solicitor, Correctional Services and their jails, the PNG Law Society, Ombudsman Commission, the Department of Justice and Attorney General and the general public. Outside of the country, we have been directed to consider any relevant research or developments of comparative value to this inquiry.

For purposes of producing this Issues Paper, we have conducted initial inquiry within the National Capital District and Central Province. In this context, we have had consultations with the Waigani Committal Court and the Waigani Grade 5 Magistrates Court, the Public Prosecutors's Office, the Public Solicitor's Office, all the NCD Police Prosecutors and the Kupiano-Moruguina District Court. Our consultations have assisted us to identify the issue of concern to then raise in this Issues Paper.

After the release of this Issues Paper, we will then engage in national consultation. From this national consultation, we shall then proceed to issue a Draft Report.

Our timetable for the conduct of this review is as follows:

Deliverables	**Deadlines**
Launch of Issues Paper	Friday, 30th March, 2007
Launch of Draft Report	Monday, 21st May, 2007
Presentation of Report to Minister	Monday, 2nd July, 2007

1.5 Purposes of this Issues Paper

The primary purpose of this Issues paper is to provide background information and context on the subject matter of the Reference and then to focus and state the issues which, at the outset are envisaged. As indicated above, the Issues Paper also state the time frame for this review and then invites submissions on any aspects or issues pertinent to this Reference. After providing background and context to the subject of the Reference, this Issues Paper then asks series of questions designed to stimulate discussion and response from stakeholders and the general public. We caution that these questions should not be seen as dictating the issues and indicative of the final outcome of this Reference. Accordingly, the CLRC welcomes submissions on other issues or matters which stakeholders consider to be of pertinence and therefore be addressed.

1.6 Structure of this Report

This paper is structured as follows:

- Chapter 2 provides a background to general conceptual issues on the essence, nature and purpose and functions of committal proceedings;
- Chapter 3 provides an overview of the current law, practice and procedure governing committal proceedings; and
- Chapter 4 discusses the preliminary issues for this Reference to address and eventually make conclusions on which shall then be elaborated upon in the Draft Report. The Draft Report will be produced after the national consultations.

2. Background

Contents

Introduction
Essence and Nature of Committal Proceedings
Purpose and Functions of Committal Proceedings
Role of Committal Court Magistrates
Committal Proceedings in Papua New Guinea

2.1 Introduction

In here we will first explain the nature and purpose of committal proceedings for the information of the public. This is done in the hope that the public can then be better informed and may in turn make informed comments, suggestions and recommendations to the issues raised in this Issues Paper.

This Chapter will conclude with a review and summary of previous work which has been done in this area so that we can then put things into perspective and in turn3 better appreciate the issues now raised in this Issues Paper.

2.2 Essence and Nature of Committal Proceedings

Essentially, committal proceedings are preliminary investigations conducted by a Committal Court to assess and determine the sufficiency of evidence before an accused person is made to stand trial in the National Court. Committal proceedings are required to be conduced under our laws when a person commits a crime that is known as an indictable

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1. Per Jordan C.J. in Ex Parte Cousens: Re Blacket and Another (Pg. 946) 47 S.R. (N.S.) 145 at 146 where his honor said: "In relation to charges of offences which they (the Magistrates) have no jurisdiction to try and dispose of, their authority is not judicial; they do not determine whether the accused is guilty or not guilty; they consider the evidence adduced against him, and if they think that there is enough to justify putting him upon his trial, they direct that he be held, or bailed, for trial by a court which has jurisdiction to try him. This essentially an executive and not a judicial function".
Note however that to the extent that the District Court Magistrate sitting as Committal Court in Committal Proceedings, to the extent they bring with them their judicial approaches and minds inherent to them as judicial officer; they do exercise some judicial power when they take a decision on the sufficiency of evidence and correctness of the witness statements. See *Royal Acquorium and Summer and Winter Gorden Society v Parkinson* (1892) 1.Q.B. 431 at Pg. 452, "The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind that is a mind to determine what is fair and just in respect of the matters under consideration."

offence. Generally most, if not all of the crimes under the *Criminal Code Act* Chapter 262 (Criminal Code) are indictable offences and therefore when a person is arrested and charged for any of the offences under the Criminal Code, it is most likely that committal proceedings will be conducted as a first step before the actual trial in the National Court. The offences under the Criminal Code are known as indictable offences because they are serious crimes and that eventually (after committal) they will be prosecuted by the Public Prosecutor in the National Court by way of an indictment.

Committal proceedings in their essence are rather administrative in nature than judicial. They are administrative because committal proceedings do not "determine whether the accused person is guilty or not"2 but merely consider the evidence assembled by police in the completed police file and seek to ascertain the correctness, completeness and compliance of the various witness statements with applicable legal requirements and then upon being satisfied of the adequacy of the evidence and the other compliance issues, commits the accused to stand trial in the National Court.

In other words, committal proceedings enquire into the strengthens and weakness of the charges brought by the State against the accused by scrutinizing the evidence available on the police file and considering those against the elements of the crime/offence for which the accused is charged under. The following observations by Ted Hill and Guy Powles is therefore pertinent:

> "A committal proceeding is an investigation into the strength of the case being mounted by the prosecution, and it is not an act of adjudication. Its function is not to determine whether or not the person accused is guilty of the offence charged. The proceedings are of an investigatory, tentative and non-conclusive nature. The statutory test to be applied by the Magistrate asks whether the evidence is sufficient to put the defendant on trial for an indictable offence"4

2.3 Purpose and Functions of Committal Proceedings

The primary purpose of conducting these preliminary examinations of the evidence against an accused person at committal proceedings stage is to determine the sufficiency and strength of the case against the accused before he/she is committed to stand trial. The purpose here therefore is to screen and filter weak, unjustified and unmeritorious charges and to ensure that only those criminal charges which are justified, meritorious and deserving are put to the process of criminal trial. The following often quoted statement by Lord Widgery C.J. in *R-v-Epping and Horlow Justices; Ex parte Massaro* (1973) Q.B. 433 at p.435 has been cited in this context for as stating the basic purpose of committals:

> "For my part I think it is clear that the function of the committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out."

In the 1922 American State of Wisconsin case of *Thies v The State* 178 Wis. 98, 103; 189 N.W. 593, 541 the purpose of committals is elaborated upon and further explained in these terms:

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2. Hill T and G Powles (2001) *Magistrates Manual of Papua New Guinea* (Sydney: Law Book Company) at pg. 193-194.

> "The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."

In the Papua New Guinean context, the following comments by Sheehan J. in the case of *Robert Lak v Daisy Magaru (Presiding Magistrate at Waigani District (Grade V) Committal Court) and the State* [1999] PNGLR 572 at p.576 aptly explain the purpose and function of the Committal Courts in our criminal justice system:

> "Notwithstanding that committal proceedings do make determination effecting a person's rights thus enabling courts to consider applications for review, the fact is that a committal nonetheless making no determination of liability or penalty. It is a preliminary process in the system of criminal justice where the prosecutor makes public disclosure to a committal court for trial of a charge. The National Court is where that evidence is to be tried, where it is to be tested".

From these statements, we can restate the basic purposes of conducting preliminary examinations of a case against a person in committal proceedings being to:

- prevent hasty, malicious, oppressive or unjustified prosecutions;
- protect the accused from open and public accusation of crime;
- to save the defendant from the humiliation and anxiety involved in public prosecution;
- to avoid both for the defendant and the public expense of a public trial;
- to discover whether or not there are substantial grounds upon which a prosecution may be based; and
- to disclose to the accused the details and extent of the charges against him or her so that he or she can then prepare their defense accordingly.[5]

Committal proceedings have become an important part of the criminal justice system in the common law jurisdictions for the processing of indictable offences. From the point of view of the accused, committal proceedings gives the accused an opportunity to challenge the State case on issues of sufficiency of evidence and the correctness of the form of the evidence such as witness statements and to obtain an acquittal and discharge there and then.

To abrogate committal proceedings would be to abrogate that every opportunity available in our criminal justice system.[6]

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[5] "… committal proceedings gives the accused person an opportunity to obtain more precise details of the charges laid and the supporting evidence. It compels the pre-trial disclosure or discovery of the essence of the case for the prosecution. This assists in the formulation of defence strategy for those committed to stand trial".: Supra n.2 at pg. 194.

[6] "It is now accepted in England and Australia that Committal Proceedings are an important element in our system of Criminal Justice. They constitute such an important element in the protection of the accused that a trial held without antecedent Committal Proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.. To deny an accused the benefit of a Committal

To summarize this part of the discussions on the purposes and functions of committal proceedings, we refer to the commentary by Ted Hill and Guy Powel from their book *Magistrates Manual of Papua New Guinea7* where they first explain that because of the serious nature of criminal trials in the National Court for indictable offences, it is necessary that preliminary examinations be conducted at committal proceedings stage to assess the strength of the charges against the accused. That these preliminary investigations serves both the interest of the accused and the State in ensuring that "weak" or "misconceived" charges do not proceed to trial.

Therefore, the "primary objective of the committal proceeding is to determine whether there is sufficient evidence to warrant a person accused of an indictable crime being sent for trial before a judge for the offence charged (or any other indictable offences)."8 This is best explained by Akuram AJ (as he then was) in *Buckley Yanrume v-Sylvester Euga* (1996) Unreported National Court Judgment N1476 where his honor explains that the whole purpose of conducting committal proceedings in the District Courts, sitting as Committal Courts, is: "to gather evidence and assess it to see whether it is sufficient to commit the accused for trial… This requires proper and reasonable assessment of the evidence with a view to seeing whether all the elements or ingredients of the offence are present".

2.4 Role of Committal Court Magistrates

As stated above, since committal proceedings are, by their very nature, preliminary investigations into the adequacy and strength of the evidence against an accused person relating to the charges which have been brought against him/her, the role that the Magistrate plays in committal proceedings is restricted to conducting an investigation into the adequacy of the evidence.9 Therefore, in committal proceedings: "The duty and province of the Magistrate … is to determine … whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case."10

In other words: "In substance, a Committal Magistrate determines nothing, except that in his opinion, a prima facie case has been made out for committing the 11accused for trial." 9

2.5 Committal Proceedings in Papua New Guinea

Any person who has been charged for any indictable offence either under the criminal code or other laws which have indictable offences prescribed in them10 is first dealt with

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Proceedings is to deprive him of a valuable protection uniformly available to other accused persons which is of great advantage to him, whether in terminating the proceedings before trial or at trial". Per Gibs ACJ & Mason J, Arkin J concurring in *Barton v.R* (1980) 147 CLR 77b at pg. 100.

7 Hill T and G. Powel 2001 *Magistrates Manual of Papua New Guinea* (Sydney: Law Book Company) at pg. 193.

8 Ibid

9 "A Magistrate … does not act as a Court of Justice; he is only an officer deputed by the law to enter into a preliminary inquiry": *Cox v.Coleridge* (1822) 107 E.R. 15, 20.

10 *R v.Carden* (1879) S Q.B.D. 1, 6.

9. *Ex Parte Cousens; Re Blacket and Another* (1946) 47 S.R. (N.S.W) 145 at p. 147.

10. For example, the crime of mutiny under Section 55 of the *Defence Act* Ch No. 74 and the case of the *The State -v-Captain Bola Renagi & Others* (2000) PNGLR 34.

by a Committal Court. Committal Courts are District Courts exercising criminal jurisdiction and are presided over by Senior Magistrates Grade 4.

Since the enactment of the *District Courts (Committal Proceedings in Cases of Indictable Offences) Act* 1980 (No. 31 of 1980), committal proceedings in Papua New Guinea are now conducted through hand-up briefs. Hand-up briefs are essentially the complete files which the Police assemble on the alleged crime which the accused is alleged to have committed. The hand-up briefs or files contain the Information and Summons relating to the charge laid against the accused and all the relevant police witness statements. Under this system, State or Police witnesses are not required to appear at the committal courts and give oral evidence. However, those State or Police witnesses who have given written witness statements are subject to cross examination by the accused at the committal proceedings.

Prior to the introduction of the police hand-up brief (or paper based committal) when committal proceedings were conducted by the courts, the State or Police witnesses appeared in open court and gave oral evidence and their statements were taken and transcribed and then considered by the committal court. The State or Police witnesses were subject to full cross-examination by the accused. Having heard the evidence, the committal magistrate was then required to commit or discharge the accused depending on the strength and weight of the evidence. If the magistrate found that the State or Police evidence was uncontradicted and hence strong, then he was bound to commit the accused to stand trial in the National Court. In a study conducted by the former Law Reform Commission and the Chief Magistrate in July 197711, it was found that because of the need to have State/Police witnesses appearing in person and giving evidence and being further subjected to cross examination, the system then was inefficient and time consuming resulting in long delays. The former Law Reform Commission then in its report in July 198012, 12recommended for the introduction of committal by hand-up brief and this resulted in the enactment of the relevant legislation in 1980 and the subsequent introduction of the current system of police hand-up brief. This system has now been in operation for a little over a quarter of a century and there has been some concerns raised that there are still delays. Hence this reference.

3. Current Law and Practice on the Conduct of Committal Proceedings

Contents

Introduction
Indictable Offences and Committal Proceedings
Hand Up Brief
Commencement of Committal Proceedings
Duties, Roles and Responsibilities of the Committal Court Magistrate at Committal Proceedings
Committal for Trial Without Consideration of Evidence
Admission of Guilt by the Defendant at Committal

11. Law Reform Commission and Chief Magistrate *Committal Proceedings (Preliminary Examinations) Joint Working Paper No. 2* July, 1977.
12. Law Reform Commission (1980) *Committal Proceedings Report No. 10* (Port Moresby: Government Printer)

3.1 Introduction

Currently, committal proceedings are conducted by Magistrates Grade 4 and above in the District Courts sitting as Committal Courts. The law and procedure which these Committal Courts must follow when conducting these proceedings is set out under Part VI of the *District Courts Act* Chapter 40 (as amended). In this part of the Issues Paper, we set out the law, process and procedure, primarily to help us to inform ourselves better and enhance our understanding of how the current system operates.

3.2 Indictable Offences and Committal Proceedings

In the criminal justice system that Papua New Guinea has adopted, when a person is accused to have committed a serious crime falling in the category known as indictable offence, it is mandatory that upon arrest, the accused must be taken to the District Court sitting as a Committal Court. As stated above, committal proceedings are preliminary investigations conducted to assess and determine the sufficiency or strength of the evidence against the accused. If the committal court finds that there is evidence against the accused to warrant him or her to stand trial, then the accused is committed to stand trial in the National Court.

Speaking from the point of jurisdiction, it is the National Court that has exclusive jurisdiction to try a person who has committed an indictable offence (other than a Schedule 2 Offence). The role of the District Court sitting as a Committal Court is restricted to conducting a preliminary investigation to determine the sufficiency or strength of the evidence.

The committal proceeding are commenced in the District Court sitting as a Committal Court by summons and information issued pursuant to Sections 39 and 94 respectively under the *District Courts Act*. In this regard, Section 94 is significant. It says:

> "(1) Subject to Subsection (6), where a person is charged with—
>
> (a) an indictable offence that shall not be tried summarily; or
>
> (b) an offence against Section 420 of the Criminal Code 1974 where the offence is not to be tried summarily,
>
> the informant shall serve or caused to be served, in accordance with Subsection (3), on the defendant or his legal representative—
>
> (c) a copy of the information; and
>
> (d) a copy of each statement that the informant intends to tender at the committal hearing; and
>
> (e) a list of documents and exhibits referred to in a statement referred to in Paragraph (d) that the informant intends to tender at the committal hearing; and
>
> (f) a copy of each document referred to in Paragraph (e).
>
> (1A) A statement referred to in Subsection (1)(d) shall contain the following

warning to the maker of the statement and shall be signed by the maker of the statement:—

'I...certify that this statement is true to the best of my knowledge and belief. I make it knowing that if it is tendered in evidence I will be liable to prosecution if I have knowingly stated anything that is false or misleading in any particular.
Signed'.

(1B) A statement referred to in Subsection (1)(d) shall, for the purposes of Division III.2 of the Evidence Act 1975, be treated as an affidavit."

Although Section 94(1) as quoted above implies that when the information is served on the accused, other documents such as all witness statements together with a list of documents and exhibits which the State intends to rely on as evidence on trial are required to be served on the accused simultaneously. Nevertheless, what happens in practice now is that upon arrest and the laying of charges, it is the Information and the Summons Upon Information which are first served on the accused to compel the accused to appear in the Committal Court. All the relevant witness statements, exhibits and a full list of all the documents comprising the State evidence against the accused are then organized and assembled in a police file and served on the accused, usually two or three weeks after the first or second mention in the Committal Court. The police file that is served on the accused and the Committal Court is then used by the presiding Magistrate to scrutinize and assess the sufficiency and strength of the evidence against the accused.

3.3 Hand Up Brief

The police file that is completed by the police investigator (and the arresting officer) that is served on the accused and the court is also served on the police prosecutor. If the crime for which the accused is charged is an indictable offence triable summarily commonly referred to as Schedule 2 offences,[13] the Public Prosecutor is also served with a copy of the police file to enable him to make an election as to whether the matter should be sent to a Grade 5 District Court to be tried and disposed off summarily or proceed with committal in the District Court sitting as a Committal Court.[14] The completed police file that contains all the relevant witness statements appropriately taken and signed by the witness with the statutorily required notations together with a full list of documentary evidence and exhibits constitutes a police Hand-Up Brief. It is based on the strength of this hand-up brief that:

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[13] See Schedule 2 of the *Criminal Code Act* Chapter 262. Indictable Offences Triable Summarily or Schedule 2 Offences as they are commonly referred to, are serious indictable offences in the Criminal Code but a Grade 5 Magistrate sitting in the District Court has been given jurisdiction or power to hear them and determine the guilt or innocence of the accused and respectively sentence or a acquit the accused. But in order to enable the Grade 5 District Court to have jurisdiction, it is mandatory that the Public Prosecutor must also be served with the completed police file and on the basis of what is on the Police file, make an election either to refer the matter to the Grade 5 Court to be tried and disposed of summarily or for the matter to proceed through committal and then, if committed, for trial in the National Court. This topic is separately considered as a separate reference in our Reference No. 2 – Reference on Indictable Offences Triable Summarily.

[14] The Public Prosecutor is given these powers to make an election under Section 4(1) (ga) of the *Public Prosecutor (Office and Functions) Act* Chapter 338.

- the Public Prosecutor can make an election under Section 4(1) (ga) of the *Public Prosecutor (Office and Functions) Act* (Chapter 388 (as amended) to either allow the matter to proceed on with committal or send it to the Grade 5 District Court for the matter to be tried summarily where the Offence is a Schedule 2 Offence;
- the presiding Committal Magistrate scrutinizes the witnesses statements and other enclosed evidentiary material and then decides to commit or not to commit the defendant to stand trial in the National Court;
- a defence counsel or the defendant assess the strength and weakness of the evidence against the accused/defendant and then if he forms the view that the evidence is not sufficient, makes a no-case-to-answer submission to the committal court seeking to have the matter dismissed and the accused discharged; and
- if the accused is committed to stand trial in the National Court, copies of this hand-up-brief are then forwarded to the Public Prosecutor and the National Court to enable them to prepare for the eventual trial;
- the Public Prosecutor carefully peruses the witness statements and all the other evidentiary material contained in the hand-up brief and then considers the appropriateness of the charges laid by police. The Public Prosecutor is at liberty to substitute the charge for another that is well supported by the available evidentiary material on the hand-up brief. The Public Prosecutor then uses the witness statements and other evidentiary material on the hand-up brief to prepare for the trial by liaising with the police Investigating Officer and ensuring that those witnesses are available to give evidence based on their statements on the hand-up brief. The Public Prosecutor is at liberty to interview the witnesses at this pre-trial stage to ensure that there is no material change or substantial deviation from their statements contained in the hand-up brief.

3.4 Commencement of Committal Proceedings

As stated above at Paragraph 3.2, committal proceedings are commenced in the District Court sitting as a Committal Court under a police Information and a Summons Upon Information. The Information and the Summons Upon Information are basic initiating legal documents required under the *District Courts Act* to commence any criminal proceedings, of course including committal proceedings.15 The Information contains the charges which has been laid on the accused by the police together with brief facts upon which the charges are based. The Summons Upon Information is served on the accused together with the Information to compel the accused to answer the summons and appear in court.

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[15] In relation to commencement of proceedings in the District Court, Section 28 of the *District Courts Act* says that criminal proceedings shall commence by Information. Section 29 of the District Courts Act then goes onto say that:
"An information shall be for one matter only, except that –
in the case of indictable offences, if the matters of the information are such that they may be charged in one indictment; and
in other cases, if the matters of the information are substantially of the same act or omission on the part of the defendant".
Note also the requirements of Section 35 of the *District Courts Act* which instructs:
"(1) Where it is intended to issue a warrant in the first instance against the party charged, the information shall be in writing and on oath either by the informant or some other person.
(2) Where it is intended to issue a summons instead of a warrant in the first instance, the information need not be in writing or on oath, but may be verbal only and without oath, whether the law under which the information is laid requires it to be in writing or not."

In some instances, the particular provision of the Criminal Code or such other law which states the indictable offence for which the accused is charged may require that the accused be arrested and charged only on a warrant of arrest issued in the first instance by the District Court. An example of such an offence is unlawful wounding under Section 128 of the Criminal Code where Section 128(2) goes onto instruct that any person that is charged under this section for unlawful wounding "shall not be arrested without warrant." In such a situation, the arrest of the accused without a warrant will render the committal proceedings illegal and therefore invalid. The National Court has made this clear in the cases of *Bonga v The State* [1988-89] PNGLR 360 and *State v Natpalau Tulong* [1995] PNGLR 329. Doherty J in the *Natpalau Tulong case* has made it clear that the Committal Court is duty bound to ensure that an accused person is lawfully arrested and charged and brought before the court.[16]

3.5 Duties, Roles and Responsibilities of the Committal Court Magistrate at Committal Proceedings

Pursuant to the various requirement under the *District Courts Act* and case law, the following are duties, roles and responsibilities which the law imposes on the Magistrate sitting in the Committal Court.

3.5.1 First, a Committal Court Magistrate must ensure that the police have properly served the information and summons upon information on the accused compelling the accused to appear in court. This is a requirement under s 94(1) of the *District Courts Act*. In satisfying himself or herself as to the requirements of service, the Magistrate must have regard to Sub-sections (3), (4) and (5) of Section 94 of the *District Courts Act* where these provisions require that service of the relevant court processes and documents must be effected as follows:

- in the case of a natural person – on the person to whom they are directed by serving them on the accused personally (ie, personal service);[17]
- in the case of a company incorporated under the *Companies Act* – on the company as stipulated under that Act;[18]
- in the case of any other corporation – by serving the documents on either the Secretary, Chief Executive Officer or public officer personally or by post to the last know postal address;[19]

at least 14 days before the date fixed for the hearing. The person (usually a policeman) who carries out service on the persons as stated above is then required:

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[16] In this case, the accused was committed to stand trial in the National Court by the Committal Court on a charge for unlawful wounding under Section 128 of the *Criminal Code*. At the commencement of his trial Doherty J found that when he was arrested and charged he was arrested without a warrant of arrest inspite of the clear terms of Section 128(2) which stated that "a person shall not be arrested without a warrant" for an offence under s.182(1). Therefore the failure to obtain a warrant before the arrest rendered the arrest unlawful. Accordingly, at commencement of trial, Doherty J refused to accept the indictment present by the State Prosecutor and discharged the accused.

[17] See s.94(3)(a) *District Courts Act*.

[18] See s.94(3)(b) *District Courts Act*.

[19] See s.94(3)(c) *District Courts Act*.

- within seven days after service to make an affidavit of service stating the day and place at which service was effect; and
- at least within 72 hours before the date fixed for hearing – transmit the affidavit to the Clerk of Court before which the hearing is to take place.[20]

For purposes of the Committal Court, the affidavit of service then becomes a prima facie conclusive evidence of service on the accused.[21]

In the case of *The State-v-Rush: Ex parte Rush* [1984] PNGLR 124 the National Court has emphasized that where a person is charged with an indictable offence that cannot be tried summarily and the necessary documents relating to the charge have not been served on the accused within the time limits specified under Sections 94(3) (then s.101) of the *District Courts Act* as specified above, an order in the nature of certiorari should go to quash the committal of the accused. From this decision, it is important to point out that if committal court magistrates do not scrutinize and ensure that the compliance of the requirements of service as stated above, including the specified time limits for service, the entire committal proceedings stands to be quashed by the National Court on application by the accused.

3.5.2 The second matter for the committal magistrate to be satisfied with relates to the requirements of Section 35 which deals with two situation:[22]

> 1) that which involves an offence for which arrest and the laying of charge can only be done upon the prior issuance of a warrant of arrest; and
>
> 2) that which does not require the prior obtaining of a warrant before arrest and that compliance for appearance in court can only be secured by a summons upon information only.

Under the first situation (situation 1),[23] it is a requirement that the information must be in writing and on oath either by the informant or some other person. Under the second situation (situation 2),[24] neither the information need be in writing nor on oath. It however has been the practice and good practice too, that all information under this category have always been in writing and that should continue.[25] Apart from the specific requirements of these two situations, the following general requirements concerning the form of the information are also important considerations to which the committal court magistrate must be satisfied:

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[20] See s.94(4) *District Courts Act*.

[21] See s.94(5) *District Courts Act*.

[22] "35. Form of Information.
(1) where it is intended to issue a warrant in the first instance against the party charged, the information shall be in writing and on oath either by the informant or some other person."
(2) where it is intended to issue a summons instead of a warrant in the first instance, the information need not be in writing or on oath, but may be verbal only and without oath, whether the law under which the information is laid requires it to be in writing or not."

[23] See s.35(1) *District Courts Act* as cited above in n.10.

[24] See s.35(2) *District Courts Act* as cited above in n.10.

[25] Akuram J in *Backley Yarume-v-Sylvester Euga* (1996) N1476 (unreported) National Court Judgment of September 6, 1996) generally considered these matters at p.10 of his judgement.

- that the information must be in writing;
- that the information must relate to all the elements of the offence for which the accused is charged as reflected in the provision of the applicable law that defines the offence and states the charge;
- the description of the offence on the information must be in accordance with the words which appear in the legislation which contain and state the charge;
- for offences which require the absence of justification or excuse to constitute the offence, the information must allege the absence or lack of such justification or excuse.[26]

3.5.3 The third set of matters which the committal magistrate must consider and be satisfied with relates to the contents of the completed police file also known as the hand-up brief. Upon receiving the completed police file, the committal magistrate must peruse the file to ensure that the files do contain the following set of material:

- a copy of the Information; Summons Upon Information; and or were applicable, a copy of a warrant of arrest for those offences which require arrest to be effect on warrant;
- a copy of each and every witness statements intended for evidence and tendered by the police;
- copies of all documents and exhibits (ie. Photographs, etc) referred to in the various witness statements which the police intends to rely on to establish a prima facie case at committal;
- a complete and full list of all documents and exhibits which the police have put together in the hand-up brief.[27]

All these evidentiary material must be relevant and go towards sustaining the charges laid against the accused. All the various witness statements which the police investigator(s) have obtained and which they intend to rely on to sustain the charge must be personally signed by the person who has made the statement and must contain the following statement:

"I …….. certify that his statement is true to the best of my knowledge and belief. I make it knowing that if it is tendered in evidence I will be liable to prosecution if I have knowingly stated anything that is false or misleading in any particular.

Signed: ……"

Such a statement is deemed to be an affidavit under Section 94(1B) of the *District Courts Act*.

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[26] Generally, see Hill T and G Powles (2001) *Magistrates Manual of Papua New Guinea* (Sydney: Law Book Company) pp.155-156.

[27] These are set out under Section 94(1) of the *District Courts Act*. Note Section 94 (2) which says: "Where an exhibit…. cannot be copied or adequately described, the defendant shall be notified of the place nominated by the informant where the exhibit may be inspected."

3.5.4 The fourth task which the committal court magistrate must attend to is to conduct an inquiry into all the various witness statements including confessional statements if any, and record of interview statements from the accused and any other related documents and exhibits, and ensure that all such evidentiary material have been obtained lawfully. This is a requirement under Section 94C of the *District Courts Act*. The committal court magistrate is required to conduct this inquiry first before he or she can admit into evidence or reject the particular evidentiary material concerned. Hill and Powles (2001) explain that: "Here, the court's task is to consider the witness statements, documents and exhibits which have been served on the defendant for the purpose of admitting then as evidence."28 For example if a confessional statement of a co-accused has been illegally obtained (in breach of Section 35 of the *Evidence Act* and Section 49(1)(a) of the *District Courts Act*) then the committal court must reject such evidence: *Hami Yawari-v-Tolimo English* [1996] PNGLR 446.

Apart from the general issues of lawfulness or otherwise of processes and procedures in obtaining witness statements or confessional statements, Section 94C(2) of the *District Courts Act* lays down the following mandatory test:

> "Before admitting a written statement, the court shall be satisfied that the person who made the statement had read and understood it, or if unable to read, had had it read to him in a language that he understood".

In *The State-v-Kai Wabu* [1994] PNGLR 498, Injia AJ (as he then was) came across a situation where when the accused was committed to stand trial in the National Court for one count of attempted rape by the Committal Court, the committal magistrate did not satisfy himself/herself that, the accused an illiterate villager, understood the statement because there was no evidence on the hand-up brief that some one has read to the accused in a language he understood the content of the written statements attributed to him. It is against this background, that His Honor laid down the following judge made law:

- the combined effect of ss94(1A) and 94C(2) of the *District Courts Act* is that the Committal Court must conduct an enquiry to ensure that the makers of statements had full knowledge of the contents, correctness, and truth of written statements they are responsible for signing;
- the requirement is mandatory and requires strict compliance. This enquiry is an independent one, which the court must conduct in the exercise of its judicial function;
- after having conducted the enquiry, the court has a discretion to admit or reject the written statement. The court must then record the nature and extent of the enquiry conducted and record its findings; and
- failure to conduct such enquiry and record its finding may result in voiding the committal.

3.5.5 The fifth task which the court has is the onerous duty imposed by Section 95 of the *District Courts Act* where it must now after scrutinizing and admitting the

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[28] See n.14 at pg.198.

evidence, consider the sufficiency of the evidence and decide whether or not a prima facie case has been established to commit the accused to stand trial or not:

- if the court is of the opinion that the evidence is not sufficient to put the accused on trial for an indictable offence, it shall immediately order the release (if in custody) and discharge the accused;
- if the court is of the opinion that the evidence is sufficient to put the accused upon his trial for an indictable offence, the court shall then proceed further with the committal proceedings.

3.5.6 The sixth responsibility that the committal court magistrate has after the s.95 consideration and upon deciding that there is sufficient evidence, then is to ask the accused whether he/she desires to give any evidence at this committal stage. This is a requirement imposed by Section 96 of the *District Courts Act*. It states:

> "(1) Where a Court proceeds with the examination of a defendant in accordance with this Division, the Court shall read the charge to the accused and explain its nature in ordinary language and shall say to him these words, or words to the same effect—
>
> "Having heard the evidence for the prosecution do you wish to be sworn and give evidence on your own behalf, or do you desire to say anything in answer to the charge? You are not obliged to be sworn and give evidence, nor are you required to say anything, unless you desire to do so; but whatever evidence you may give on oath, or anything you may say, will be taken down in writing, and may be given in evidence on your trial. You are clearly to understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat, which may have been held out to you to induce you to make any admission or confession of your guilt; but whatever you now say may be given in evidence on your trial, notwithstanding any such promise or threat.".
>
> (2) Anything that the defendant says in answer to a statement made in accordance with Subsection (1) shall be—
>
> (a) taken down in writing in the English language and read to him; and
>
> (b) signed by the Magistrates constituting the Court and by the defendant if he so desires; and
>
> (c) kept with the depositions of the witnesses and transmitted with them to the Public Prosecutor.
>
> (3) In an examination of a defendant in accordance with this Division neither the defendant nor his legal representative shall be permitted to subject any witness to cross-examination."

Note that Section 96 of the *District Courts Act* (as cited above) gives the accused/defendant an opportunity to give evidence in his defence at this committal stage. The rationale behind this opportunity given by s.96 to the accused is that since the committal magistrate has found earlier under s.95 that there is sufficient evidence to put the accused on trial, the accused must now be given the

opportunity to give evidence on his defence and spare himself or herself from the pending decision to commit. If the accused/defendant does give strong and convincing evidence in his/her own defence at this stage, then the committal court will have to reconsider its earlier decision taken under Section 95 and then discharge the defendant. Whilst this stands an hope and promise to the accused/defendant, note however that any incriminating evidence given by the accused/defendant at this s.96 opportunity can be legitimately used by the State against him or her at trial in the National Court. At this Section 96 opportunity to respond to the state/police case presented in the hand-up brief, the defendant is given an opportunity to give either a sworn or unsworn statement. If he/she elects to give an unsworn statement, then he/she will not be subject to cross-examination by the police prosecutor and any self serving statements made by the defendant may be relied upon in his/her favour at trial.[29]

Conversely, if the defendant/accused elects to give a sworn statement, then he/she will be subject to cross examination by the police prosecutor and the State is entitled to rely on the defendant's statement at trial.[30]

Realising the double edge sword nature of this s.96 opportunity statement, Kapi J (as he then was) in *The State-v-Nagiri Topoma* [1980] PNGLR 18 has issued the following caution and also a reminder to committal court magistrates:

> "It will only do justice to defendants who are either uneducated or who are not represented by legal counsel, for the presiding magistrate to explain to the defendant the legal consequences of whether or not the defendant should say anything at all at this point or, if choosing to say anything, whether the defendant should make a sworn statement or an unsworn statement and make specific mention of the right of the police prosecutor to cross-examine if the choice is made to give sworn evidence. If the defendant is not advised of the legal consequences of the options, the National Court may, in its discretionary power, reject such statements if it feels that, in all the circumstances, it was unfair to admit answers in response to cross-examination."

The above statement must now be read subject to Section 97 of the *District Courts Act*[31] which states:

> "On the trial of a defendant for an offence for which he has been committed for trial or for any other offence arising out of the same transaction or set of circumstances as that offence, a statement made by him under Section 96 may be given in evidence without further proof, notwithstanding that the statement may be exculpatory or self-serving, if the statement purports to

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[29] "Facts, including self-serving statements related by an accused in a signed statement to the police put in evidence the Crown and in a statement … and subjected to cross-examination, are evidence in favour of the accused but must be considered along with all other evidence in the trial…." *R v Joseph Haihai Sarufa* [1974] PNGLR 173.

[30] "Where an accused chooses to give sworn evidence, such evidence … is subject to cross-examination by the police prosecutor and any questions by the magistrate, and answers to such cross-examination are available as evidence at trial.": per Kapi J (as he then was) in *The State v Nagiri Topoma* [1980] PNGLR 18.

[31] Introduced by *District Courts (Committal Proceedings in Cases of Indictable Offences) Act* 1980.

be signed by the Magistrates by or before whom it purports to have been taken, unless it is proved that it was not in fact signed by those Magistrates."

Thus this provision now accommodates some of the concerns raised by judges in their comments as cited above. Particularly in relation to the concerns by Kapi J (as he then was) in the Nagiri Topoma judgment as cited above, Section 97 of the *District Courts Act*, now makes it clear that:

- a statement made by the accused/defendant under s.96 may be tendered as evidence at trial without further proof irrespective of whether the statement is self serving or exculpatory;
- for the s.96 statement to be admitted into evidence at trial, the statement must be signed by the Magistrate before whom the statement was made and taken down in writing. As a matter of practice, it must also be counter signed and dated by the accused/defendant.

It is clear from the dictates of Section 97 of the *District Courts Act* that when a Section 96 statement is made by the accused/defendant, it must be taken and signed by the presiding magistrate if the statement is to be admitted as evidence at trial in the National Court. Failure to do that will render the s.96 statement inadmissible.

3.5.7 The seventh and ultimate responsibility that the Committal Magistrate has in these sequential flow of the committal proceedings is to then eventually discharge or commit the defendant/accused to stand trial in the National Court pursuant to Section 100 of the *District Courts Act*. This provision accordingly directs:

> "(1) When an examination [in these committal proceedings] is completed, the Court shall consider whether the evidence is sufficient to put the defendant on trial.
>
> (2) If, in the opinion of the Court, the evidence is not sufficient to put the defendant on trial, it shall immediately order the defendant, if in custody, to be discharged as to the information then under inquiry.
>
> (3) Where—
>
> > (a) in the opinion of the Court, the evidence is sufficient to put the defendant on trial; or
> >
> > (b) the Court commits the defendant for trial under Section 94B(1)—
> > the Court shall—
> >
> > (c) by warrant commit the defendant to a correctional institution, police lock-up or other place of security to be kept there safely until the sitting of the National Court before which he is to be tried, or until he is delivered by due course of law; or

(d) admit him to bail in accordance with Division 2."

Pursuant to this provision, the matters which the Committal Court Magistrate must satisfy himself or herself on, before taking the decision to commit or discharge are:

- if the magistrate forms the opinion that the evidence is sufficient and all witness statements and such other evidentiary materials have been properly and legally obtained as required by various laws as reviewed above – than the court must commit the defendant/accused to stand trial; or
- if the magistrate forms the opinion that the evidence is insufficient etc, he or she must discharge the defendant/accused.

The consideration that the Magistrate makes here in relation to the sufficiency of the evidence is same as that he/she has earlier had to when the stage of s.95 of the *District Courts Act* was reached – that of deciding whether there is sufficient evidence or a prima facie case for the defendant/accused to answer.

3.6 Committal for Trial Without Consideration of the Evidence

With the primary intention to expedite the processing of committals and introduce a speedier procedure of committal proceedings and address the problem of delay, a procedure of committal without hearing was introduced in 1980 by the *District Courts (Committal Proceedings in Cases of Indictable Offences) Act* 1980 (No. 31 of 1980). This procedure is now contained in Section 94B of the *District Courts Act*. It states:

"(1) Subject to Subsection (2), a Court inquiring into an offence may, if it is satisfied that all the evidence, whether for the prosecution or the defence, consists of written statements, with or without exhibits, tendered to the Court after service in accordance with Section 94, commit the defendant for trial for the offence without consideration of the contents of the statements.

(2) Committal for trial in accordance with Subsection (1) shall not occur where—
(a) the defendant or one of the defendants does not have legal representation; or
(b) the legal representative of the defendant or one of the defendants, as the case may be, requests the Court to consider a submission that the statements referred to in Subsection (1) do not disclose sufficient evidence to put the defendant on trial for the offence.

It is important to point out that the Section 94B committal procedure is only available for invocation by the Committal Court only if the defendant is represented by a lawyer (ie. has legal representation at the committal court). When the defendant/accused is represented by counsel and if counsel at the outset upon receiving the completed police hand-up brief forms an opinion that the evidence as presented to the court in the police hand-up brief does not disclose sufficient evidence to commit the defendant to stand trial and submits accordingly to the committal court, then the Section 94B procedure of committal without hearing must be vacated. In other words, under those circumstances, the Section 94B procedure is not available as that is precluded by Section 94B(2)(c) of the *District Courts Act* as cited above. When this happens, then the normal committal procedure as

represented above in paragraph 3.5 applies.

Where the Section 94B procedure of committal without hearing is involved, the Committal Court Magistrate must still satisfy himself or herself of the matters stated above in Paragraphs 3.5.1 to 3.5.5. Briefly, that is to say that the Committal Court Magistrate must satisfy himself or herself that:

- service as been properly effected as required under s.94(1) and ss.94(3)-(5) of the *District Courts Act*;
- if the offence for which the accused is charged requires a warrant of arrest to effect arrest, then that must be complied with as required by Section 35 of the *District Courts Act*;
- all witness statements etc. are properly taken and presented as required under Section 94 1A of the *District Courts Act*;
- conduct an inquiry into the various witness statements and then either admit into evidence or reject as required under Section 94C of the *District Courts Act*; and
- consider the evidence and decide whether or not the evidence is sufficient to warrant a committal or acquittal.

3.7 Admission of Guilt by the Defendant at Committal

After the committal court has found that there is sufficient evidence to warrant the defendant/accused to be committed to stand trial as required under Section 95 of the *District Courts Act*, 32 the defendant is then asked if he/she wishes to make a statement in his or her defence in the terms prescribed by Section 96. If at this opportunity given by the Section 96 statement,33 the defendant pleads guilty, the committal court magistrate is required to commit the defendant for sentencing by the National Court rather than for trial. This is a procedure provided for under Section 103 of the *District Courts Act* – which states:

> (1) If a defendant, on being asked in accordance with Section 96 whether he wishes to say anything in answer to the charge says that he is guilty of the charge, the Court shall further say to him these words, or words to the same effect—
>
> "You will now be committed for sentence instead of being committed for trial."
>
> (2) The statement by the defendant in accordance with Subsection (1) shall be—
>
> > (a) taken down in writing and read to him; and
> > (b) signed by the Magistrate constituting the Court and by the defendant if he so desires; and
> > (c) held with the statements of the witnesses and transmitted with them to the Public Prosecutor.
>
> (3) In a case referred to in Subsection (1), the Court, instead of committing the defendant for trial, shall order him to be committed for sentence before the

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[32] See paragraph 3.5.5 above.
[33] See paragraph 3.5.6 above.

National Court, and in the meantime, shall—

> (a) by warrant commit him to a correctional institution, police lock-up or other place of security to be kept safely until the sittings of the National Court, or until he is delivered by due course of law; or
> (b) admit him to bail to appear for sentence in accordance with Division 2.

There are however inherent practical problems associated with this 103 procedure which have been pointed out to us by our Working Committee:

- even when the committal court commits the accused/defendant for sentencing, the Public Prosecutor is not obliged to treat that matter as a sentencing only matter but can if in his judgment and professional opinion finds that there are evidence warranting trial, cause the matter for trial;
- because the matter will go before the National Court for sentencing only, the Public Prosecutor is still required to present an indictment in the National Court to commence the trial. There the accused/defendant would still be required to take a plea and the matter is then normally treated as a plea matter; and
- it is not practically and procedurally sound for the District Court to take a plea only and the National Court to sentence thereby treating the matter as a continuing matter from the District Court because the commencement processes in these two courts are different where the District Court matters commence on information and the National Court matters commence on indictment.

4. Issues

Contents

Introduction
Should Committal Proceedings be abolished
Committals and Delays
Delays in Committals and Associated Costs
Modification of the Committal Proceedings
Involvement of Defence Lawyers at Committal Proceedings
Pleas
Sitting Days
Adjournments
Remand and Bail
Rulings
Total number of days in the disposal of the files

4.1 Introduction

There are a number of issues and concerns which have compelled the Minister for Justice to issue this Reference. Some of the issues and concerns are generic whilst others are more pronounced or focused on the impact of the generic issues on particular law and justice sector agencies. This was apparent from the preliminary consultations we have had with the sector agencies in National Capital District and Central Province in February of 2007. We shall first look at those generic issues and shall then consider the other specific issues.

4.2 Should Committal Proceedings be abolished?

In many ways, this is the central issue to be determined in this Reference. The Law Reform Commission report on *Committal Proceedings* (Report No. 10) published in July 1980,[34] advocated for the abolition of committal proceedings citing the issue of delay as the main reason. With the abolition of committal proceedings it was presumed that criminal trials would be expediated so that the accused person's right to speedy trial as accorded under the Constitution can be realised.

In its report, the Law Reform Commission was critical of the effectiveness of committal proceedings saying that the system was inefficient and ineffective resulting in it not effectively functioning as a sound screening process. The following captures the gist of the former Law Reform Commission's views:

> "Comments have been divided fairly evenly between the two proposals and although the Commission is of the opinion that ultimately, the holding of committal or preliminary hearings should be abolished… As a short term measure the Commission is recommending that a system of hand up briefs be adopted for most indictable offences… In the longer term, the Commission recommends that preliminary hearings of indictable offences be abolished."[35]

However writing 15 year later in 1995, the Court Restructure Committee appointed by the Chief Justice and Chief Magistrate headed by Justice Hinchliffe[36] strongly refuted the Law Reform Commission recommendations and pointed out that:

- Committal is an extremely important part of the criminal justice system since it serves purposes other than just a process of filtering out weak cases – ie., it gives the accused person protection and opportunity to challenge the charges at the initial stages;
- The perennial problem of delay is largely related to logistics and issues of efficiency which could be addressed with adequate resourcing; and
- If committals are to be abolished, there was no viable and suitable alternative replacement system. The proposal to have the Public Prosecutor to handle the screening role has inherent weaknesses relating to the issue of fairness and impartiality since it is the Public Prosecutor who would eventually indict the accused person and prosecute.

Available comparative literature in our region whilst on the one hand bemoan the issue of delay and costs to the State, strongly argue that committals play a useful role in the criminal justice system because:

- committals are more effective at filtering-out weak case than their critics claim;
- are a potentially useful forum for the early identification of guilty pleas;
- provide a reasonably effective mechanism for disclosing the Prosecution's case against the accused to enable the accused to prepare himself/herself well and effectively and appropriately respond to the charge(s) against him/her;

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[34] Law Reform Commission of Papua New Guinea (1980) *Committal Proceedings (Report No. 10)* (Port Moresby Law Reform Commission).

[35] Supra at p.1. See also pp.13-14 generally on the views of the Law Reform Commission.

[36] Final Report of the Court Restructure Committee to the Chief Justice and Chief Magistrate on Committal Proceedings (Unpublished).

- particularly in large and complicated cases, perform a useful management function; and
- allows the defendant/accused the pretrial opportunity to evaluate and test the State case against him or her before the committal court which is a fair and independent judicial process and forum.37

Available comparative literate arguing for the abolition of committals argue that this pretrial assessment of the evidence for indictable offences should be handled by the Public Prosecutor because:

> "Police Prosecutors are, in effect, only care takers of those briefs and have no real control over them since they are ultimately decided in a different jurisdiction. By handling these cases earlier, the Crown Prosecutor can engage in more meaningful negotiations and effectively sort out the guilty pleas, the nole prosequis and the reduced charges and be allowed to concentrate on the cases which are really going to trial and which require some extra attention."38

Those proponents for the abolition of committal proceedings, argue that the vital screening and filteration role which the committal process provides can still be played effectively by the Public Prosecutor/Crown Prosecutor administratively because:

- effectively, the screening process requires dialogue between the counsel and the state prosecutor at pre trial stages. Though such dialogue with the involvement of the Public Prosecutor, at these very early stages, depending on the weakness of the case against the accused, charges can be withdrawn there and then; and
- under the current system, the Committal Court Magistrate's decision to commit the accused to stand trial in the National Court can be some what futile because ultimately it is the Public Prosecutor that still has to decide on whether or not to indict or which appropriate charge to indict the accused upon.39

The CLRC now seeks your views, comments or detailed written submissions on:

1. ***whether or not the current system of committal proceedings for indictable offences should be abolished or modified?;***
2. ***if abolished, what should be the alternative to replace the committal system?;***
3. ***if it is to be modified, how are we to modify it?***

4.3 Committals and Delays.

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37 See Brereton D and Wills J. "Evaluating Committals"; Weinberg M, "The Criminal Trial Process and the Problem of Delay"; and Coldrey J QC "Committal Proceedings; the Victorian Perspective" in Vernon J ed. (1991) *The Future of Committals* (Canberra: Australian Institute of Criminology) respectively pp.5; 139; 57.

38 Murray J "Committals – Time for Change" in Vernon J ed. (1991) *The Future of Committals* (Canberra: Australian Institute of Criminology) p. 151.

39 "The Crown Prosecutor can still decide not to prosecute or to prosecute on different charges. The same irony applies where the Crown Prosecutor decides to indict ex officio where there has been no case to answer"; Ibid.

A major criticism against committal proceedings is that they represent a productive source of delay in the efficient and effective disposal of criminal cases and thereby cause strain on the entire criminal justice system. The Court Restructure Committee appointed by the Chief Justice and the Chief Magistrate and chaired by Justice Hinchliffe,40 found that in the period from 1992 to 1994, on average it took about 3 months from the laying of information to completion of the committal proceedings. Most magistrates and court officials reported that there were indeed delays in the completion of committal proceedings and cited the following as the main cause of delays:

- Delay on the part of police in completion and service of the police hand-up brief on the accused, the court and the Public Prosecutor if the matter is a Schedule 2 Offence (indictable offences triable summarily) for election purposes;
- Lack of commitment, dedication and professionalism on the part of magistrates to diligently and efficiently attend to matters before them and have them completed efficiently;
- Shortage of magistrates in those committal courts which carry heavy loads such as Boroko (now Waigani);
- Unnecessary or necessary protracted cross examination of State witnesses by counsel for the defendant(s) when defendants are represented by private lawyers thereby resulting in prolonging of the committal proceedings;
- Plain logistical problems such as lack of or unavailability of office equipment, stationeries supplies etc., for the committal courts to work with and efficiently attend to their work.

In the preliminary inquiries we conducted through our consultations with the Waigani Committal Court and Central Province Committal Court Magistrates and court officials, similar views were also raised as the cause for delays in the committal court process.

What should be done to address the issue of delay in committals, should there be a statutory period imposed by which committal proceedings should be completed?

4.4 Delays in Committals and Associated Costs

For some sectors of the criminal justice system who are impacted by the delays in the completion of committal proceedings, they are concerned with the costs to them. The Correctional Service, in many ways carries huge costs in keeping remandees in its jails and has expressed concerns that their services are intended for prisoners and not remandees but huge numbers of remandees in their jails, diverts their attention and costs somewhat unnecessarily. It was therefore suggested that remandees should not be sent to and kept in jails but should be kept in police lock ups. In this way, there will be pressure on the police to expedite the completion of the police hand-up brief and their speedy disposal of committal matters. This will also make it convenient for the police investigators and police prosecutors to access accused persons for purposes of expeditiating the completion of the police hand up brief.

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[40] Final Report of the Court Restructure Committee to the Chief Justice and Chief Magistrate on Committal Proceedings (Unpublished) 1995 at pp.8-9.

The rationale behind this argument by the Correctional Services is that if remandees are kept by police in police lock ups, they will be in the face of police and this will cause police to make every effort to dispose off the committal in the quickest time possible. From the point of view of management of police, they would be concerned about the costs to them in keeping the remandees and therefore they will insist on their officers to complete the committals in the quickest time possible. As it is now since Correctional Services is carrying the costs of maintaining remandees, the issue of costs does not appear to be a concern to police.

4.5 Modification of the Committal Proceedings

The Court Restructure Committee established by the Chief Justice and the Chief Magistrate41 have recommended that the committal proceedings system be modified to enhance efficiency in the following manner:

- that the right of the accused to cross examine witness at committal hearings be abolished because it serves no useful and meaningful purpose given the position in law that the Committal Court is not a trial court and that the accused/defendant's rights are adequately protected by the Constitution and at trial in the National Court;
- however the accused/defendant should retain his/her right to make the Section 96 Statement (see above at paragraph 3.5.6);
- that a system separate from the Section 103 process (see paragraph 3.7 above) be developed to expedite early pleas of guilty directly to the National Court;
- a system of committal mention date procedure should be adopted with strict time limits imposed on the time between the laying of information and the date for hearing of the committal and restriction placed on the number of adjournments allowed;
- administratively, that the number of Magistrates conducting committal hearings be increased and their logistical problems be addressed reflective of the significance of this process to the criminal justice system.

4.6 Involvement of Defence Lawyers at Committal Proceedings.

As stated in discussions on the essence and nature of committal proceedings at paragraph 2.2 and the purpose and functions of committal proceedings at paragraph 2.3 above, committal proceedings are administrative preliminary hearings to verify and quantify the evidence by going through a check list as stipulated in the *District Courts Act* which we have detailed at paragraph 3.5 above. Committal hearings are not trials. Therefore, there is an argument that since committals are not trials but mere administrative preliminary hearings, defence counsel should not be involved at these early stages. The accused persons' right are adequately protected under the Constitution to seek redress should his or her rights be infringed at these early stages. The involvement of defence lawyers at these early stages has been identified in our preliminary consultations within the NCD and Central Province as one of the sources of delay in the expeditious discharge of the committal matters.

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41 Ibid at pp.19-20.

According to court files review we conducted on the first 100 files from the NCD and Central Committal Courts between 2004, 2005 and 2006, fifty four (54) legal representations were noted to have been made for various defendants.

The charges laid against the defendants in these cases involved:

Table 1: Charges defended by lawyers

Charge	Occurrences
Aiding a prisoner	1
Arm robbery	6
Arson	3
Attempt to kill	2
Bodily harm	2
Break, enter and stealing	1
Carnal knowledge	1
Conspiracy	3
Dangerous driving causing death	3
Dishonest application	4
Escaping from lawful custody	1
False accounting	1
False declaration	1
False pretence	2
Harbouring a prisoner	1
Have in premises under siezed Bech de Mer	1
Indecent act	1
Murder	4
Receipt of motor vehicle by indecent means	1
Received stolen property	2
Sexual penetration	3
Stealing	5
Storage of bech de mer without license	1
Unlawful and willful damage to properties	2
Unlawful assault causing bodily harm	1
Unlawful deprivation	1
Unlawful use of motor vehicle	6
Unlawfully wounding	2
Willful murder	1

Note: Some of the defendants have been charged with a multiple offences.

4.6.1 Pleas

In all the cases, the defendants have taken a ‘not guilty’ plea, thereby resulting in serious and prolonged attempts by the defence lawyers to discredit the information provided by the State witnesses.

4.6.2 Sitting days

The number of court sitting days were also assessed, and it was found that with the involvement of defence lawyers in the cases studied, the sitting days ranged

between (3) three and twenty seven (27), twenty two (22) of which were above ten (10) sitting days.

4.6.3 Adjournments

Our examination of the adjournments suggests there were varying reasons why adjournments were sought. Some have been requested by the defence counsels for them to have time to study the files; prepare and make 'no case' submissions; further adjournments for further preparations; and the unavailability of counsels. Other reasons for adjournments are covered under our other assessments of the prosecutions and defendants categories.

4.6.4 Remand and Bail

Twenty (20) successful applications have been made by defence counsels for their clients to be on bail while the other defendants have been remanded in custody awaiting rulings on their cases.

4.6.5 Rulings

Out of the fifty four (54) files where defence lawyers were engaged to represent defendants during committal proceedings, the rulings of the committal magistrates have been distributed in the following manner:

Table 2. Rulings of the committal magistrates in cases where defence lawyers have been involved

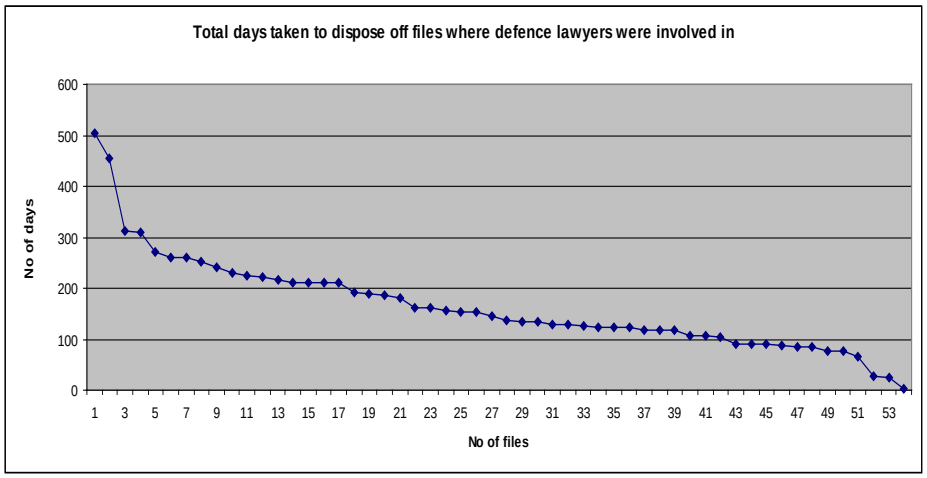
Rulings	**No. of cases**
Committed to stand trial in the National Court	15
sed	13
Struck out	12
Transferred to other courts	5
Withdrawn	3
Convicted and sentenced to imprisonment	3
Convicted and fined	2

4.6.6 Total number of days in the disposal of the files

With the involvement of defence lawyers, we note an extremely high number of days spent in the disposal of cases, the highest of which was five hundred and four (504) days or about sixteen (16) months. The graph below explains in the hundreds, the number of days taken to dispose the cases studied.

When applying the three months or an approximation of one hundred days considered the fair and just number of days to dispose office cases, a total of fourty two (42) files out of fifty four (54) have exceeded this requisite. This is about seventy nine percent (79 %) of the total cases that involved defence lawyers.

The following chart represents the length of committal trials when defence lawyers are involved.


Total days taken to dispose off files where defence lawyers were involved in
No of days
600
500
400
300
200
100
0
1 3 5 7 9 11 13 15 17 19 21 23 25 27 29 31 33 35 37 39 41 43 45 47 49 51 53
No of files