Terms of Reference

CLRC Reference No. 2: Indictable Offences Triable Summarily

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) the extent to which (if any) and how the specification of offences provided under Schedule 2 of the *PNG Criminal Code* 1975 listing indictable offences that may be tried summarily, should be modified so as to better serve the interests 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; and

b) to the extent necessary to secure the reforms proposed in relation to (1) whether and how any relevant associated laws and procedures associated with the determination of such decisions 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. 2: Indictable Offences Triable Summarily*.

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 is in response to Issues Paper 2 is Friday, 4th May, 2007.

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1. Introduction to the Inquiry

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1.1 The Constitutional & Law Reform Commission

The Constitutional and Law Reform Commission (the CLRC) was established after the enactment by the National Parliament of the *Constitutional and Law Reform Commission Act 2004 (No. 24 of 2004)* (the CLRC Act). The CLRC Act came into operation on March 4, 2005.

The *CLRC Act* repealed the *Constitutional Development Commission Act 1997* and the *Law Reform Commission Act (Chapter 18)* and merged the two institutions. Therefore, the CLRC by law succeeded the Constitutional Development Commission and the Law Reform Commission.

The CLRC is a constitutional office to which Part IX (Constitutional Office-Holders and Constitutional Institutions) of the *Constitution* applies.

The CLRC is comprised of one (1) Chairman and six (6) part-time members as Commissioners. Only the Chairman's office is a fulltime office. The part-time members consist of two (2) serving members of Parliament, an expert in Constitutional Law, in anthropology, sociology and political science, a representative of Papua New Guinea Council of Churches, and the Executive Dean of the School of Law, the University of Papua New Guinea as *ex officio*.

Under the *CLRC Act*, the Minister for Justice (the Minister) is empowered under Section 12 to issue 'Terms of Reference' (Reference) to the CLRC for it to do its work. Hence, the Minister, by virtue of this power issued two (2) separate but related Terms of Reference relating to the Review of the Criminal Justice System . The specific references are on Committal Proceedings and Indictable Offences triable Summarily. Hence, this Issues Paper discusses issues relating to the second reference. The second reference is referred to as CLRC Reference No.2.

1.2 Objectives of Reference No. 2

The main objectives of CLRC Reference No. 2:

- Report on how the specification of offences provided under Schedule 2 of the PNG *Criminal Code Act (Chapter 262)* listing indictable offences that may be tried summarily, should be modified so as to better serve the interests 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; and
- Report on the necessity to secure the reforms proposed above and, whether and how any relevant associated laws and procedures associated with the determination of such decisions should also be modified or abolished.

At the conclusion of this review, the CLRC intends to make recommendations on the appropriate actions that may be taken to address the issues and concerns associated with the processes and procedures relating to CLRC Reference No. 2.

1.3 Conduct of the review

For the purpose of identifying the issues and developing this Issues Paper, the CLRC has initially conducted consultations within the National Capital District with relevant stakeholders. Those we consulted are the Public Prosecutor, the Public Solicitor, the Grade 5 and Committal Magistrates and Court Clerks of the Grade 5 and the Committal Court, Police Prosecutors and some remandees kept at Bomana Correctional Services.

In April 2007, the CLRC will engage in a nationwide consultation with other major stakeholders. The CLRC will consider all matters arising in response to this Issues Paper and after this national consultation a Draft Report will be issued for further discussion. The CLRC will then consider comments from the Draft Report before releasing its final report on the CLRC Reference No.2 in June 2007.

The Timetable for the 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

1.4 Structure of this Report

This issues paper is meant to identify the problems associated with Schedule 2 offences (indictable offences triable summarily), of the *Criminal Code Act (Chapter 262).* It provides background and context to the law and will ask a series of questions designed to identify concerns of stakeholders.

These questions are merely designed to raise issues and concerns for this review. Further, they should not be seen as determining the scope of the review. Rather, the CLRC welcomes submissions on other matters stakeholders believe should be addressed.

This Paper is structured as follows:

- Part 2 provides a brief description of the different categories of offences. It also discusses the background to the previous Law Reform Commission work on 'indictable offences triable summarily'
- Part 3 provides the existing law on the Reference;
- Part 4 analyses the issues about the Reference.

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2.1 Introduction

In here we briefly discuss the nature of 'Indictable Offences Triable Summarily' and their application under our criminal justice system.

We also review the previous work undertaken by the Law Reform Commission on 'Indictable Offences Triable Summarily', calling for review of the criminal justice system on related court procedures and processes.

The part concludes with an insight into the amendments which gave effect to some of the recommendations of the previous work of the Law Reform Commission.

2.2 What are Indictable Offences Triable Summarily?

The *Criminal Code Act (Chapter 262*), at Schedule 2, lists 75 indictable offences which may be tried summarily', by a Principal Magistrate at the District Courts level. These indictable offences are less serious in nature whereby either a Principal Magistrate is able to try them summarily or they may be tried at the National Court by an indictment. As provided under

Schedule 2, these indictable offences triable summarily (or Schedule 2 offences) are:

SCHEDULE 2.—INDICTABLE OFFENCES TRIABLE SUMMARILY. Sec. 420.

Code Section No.	Brief description of offence.
64	Unlawful assembly
138	Aiding prisoners to escape
140	Permitting escape
141	Harbouring escaped prisoners
143	Removing, etc., property under lawful seizure
170	Intercepting things sent by post or telegraph
171	Tampering with things sent by post or telegraph
172	Wilful misdelivery of things sent by post or telegraph
173	Obtaining letters by false pretences
174	Secreting letters
175	Fraudulent issue of money orders and postal notes
176	Fraudulent messages respecting money orders
177	Sending dangerous or obscene things by post
207	Offering violence to officiating ministers of religion
216	Defilement of girls under 16 and of idiots
217	Indecent treatment of girls under 16 if girl under 12
227	Indecent acts
228	Obscene publications and exhibitions
230	Common nuisances
231	Bawdy houses
232	Gaming houses
233	Betting houses
234	Lotteries
237	False information as to health on foreign ships
238	Exposing for sale things unfit for food
239	Dealing in diseased meat
240	Adulterating liquor
322	Wounding and similar acts
328(5)	Dangerous driving of a motor vehicle causing death
335	Common assault
337	Indecent assault on males

340	Assault occasioning bodily harm
341	Serious assaults
349	Indecent assaults on females
359	Threats
362	Desertion of children
372(1)	Punishment of stealing
	Punishment in Special Cases:
372(2)	Stealing wills
372(3)	Stealing things sent by post
372(5)	Stealing from the person
372(5)	Stealing goods in transit
372(6)	Stealing by persons in the Public Service
372(7)	Stealing by clerks and servants
372(8)	Stealing by directors and officers of companies
372(9)	Stealing by agents, etc.
372(10)	Stealing property of value of K1,000.00
372(11)	Stealing by tenants and lodgers
372(12)	Stealing after previous conviction
376	Killing with intent to steal skin or carcass of animal
377	Making anything movable with intent to steal
383	Unlawful using motor vehicles
390A	Demands for compensation or other payment
395	House-breaking; burglary
396	Unlawful breaking and entering
397	Entering dwelling-house with intent to commit crime
398	Breaking into buildings and committing crime
399	Breaking into buildings with intent to commit crime
400	Breaking into place of worship and committing crime
401	Breaking into place of worship with intent to commit crime
404(1)	Obtaining or procuring anything by false pretence-Chattel, money or valuable security
404(3)	Obtaining or procuring anything by false pretence-Credit
406	Obtaining anything by fraudulent trick
409	Pretending to exercise witchcraft or tell fortunes
410	Receiving stolen property, etc. means by which obtained: if a crime

	in other cases
438	Setting fire to crops and growing plants
439	Attempting to set fire to crops, etc.
443	Injuring animals
444(1)	Malicious injuries in general; punishment in special cases
451	Travelling with infected animals
467	Obliterating crossing on cheques
468	Making documents without authority
472	Falsifying warrants for money payable under public authority
473	Falsification of registers
474	Sending false certificate of marriage to Registrar
475	False statement for purposes of Registers of Births, Deaths and Marriages
476	Attempts to procure an unauthorized status

The Public Prosecutor is vested with the power to decide (elect) whether an 'Indictable Offence Triable Summarily' could be tried by a Principal Magistrate or should proceed by way of committal for trial in the National Court. Hence, a Schedule 2 offence would have to go through the committal hearing process unless the Public Prosecutor decides otherwise.

2.3 Previous Law Reform Commission Work

The Law Reform Commission (the Commission) undertook a major project to review the Criminal Justice System between 1977 and 1980. During that period there was a huge work-load on the committal courts and the Commission felt that the court processes and procedures needed to be changed to alleviate the problems.

It was evident then that accused persons suffered seriously through protracted delays. The task of administering all the indictable offences at the committal courts was very agonizing. Thus, the Commission released working papers calling for changes to the system.

2.3.1 Law Reform Commission and the Chief Magistrate Joint Working Paper No.1 of February 1977

The first major work on the Criminal Justice System Review undertaken by the Law Reform Commission is the Working Paper No.1, published in February 1977 (Paper No.1), in conjunction with the Office of the Chief Magistrate. In Paper No.1, it was recommended then that some of the less

serious indictable offences found in the *Criminal Code* become triable summarily by a Senior Magistrate, who were then Magistrate Grade 4. During that period all indictable offences were tried by a Judge of the National Court. The trial at the National Court usually follows after an accused (or a defendant), charged with an indictable offence, had his or her case considered through a preliminary hearing commonly known as committal proceedings.

The perception at that time was that the whole process was very expensive and that for some smaller cases it was a waste of the country's limited resources. An example given, was; "if someone breaks into a house and steals some beer and some food, that person would have been tried at the National Court, and hence go through a very lengthy procedure, even though that person pleaded guilty to the charge".[1]

The Law Reform Commission also noted that the process was not only expensive, it was also taking a long time. Some studies conducted during that time indicated that it took from 2 to 4 months for a person charged with a less serious indictable offence to be committed for trial and a further 2 to 4 months from committal until the end of trial. The Commission was of the view that a person arrested for a less serious indictable offence would normally be waiting between 4 to 8 months before his or her case was completed. The said delays, as was noted, were compounded by the fact that about 70% of those charged with less serious indictable offences were held in custody from their initial arrest until the completion of their cases.[2]

In the light of these delays and expenses, the Commission proposed in the 1977 Working Paper No.1 that the jurisdiction of the senior magistrates, which was then Magistrates Grade 4, be increased to enable them to deal summarily with fourteen more indictable offences. The Commission also proposed that the senior magistrates be given powers to impose a maximum sentence of 2 years to offenders for these new categories of indictable offences.

The Commission in that 1977 Working Paper No.1 suggested the following offences to be triable summarily:-[3]

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1. Law Reform Commission and Acting Chief Magistrate, Indictable Offences Triable Summarily, Joint Working Paper No. 1, February 1977, at p.2

2. Ibid

3. Ibid at p.3

1. Offences relating to letters, telegrams and etc.;
2. Homosexual offences;
3. Indecent dealing and assaults on women and girls;
4. Pornography and gambling offences;
5. Assaults up to and including assaults occasioning bodily harm;
6. Stealing money or things up to the value of K1,000.00;
7. Most false pretence offences;
8. Breaking and entering offences;
9. Robbery (stealing with violence or threat of violence) money or things up to the value of K1,000.00;
10. Lesser forms of arson;
11. Forging and uttering offences;
12. Health and quarantine offences;
13. Miscellaneous offences such as unlawful assembly and unlawfully using a motor vehicle; and
14. Attempts to commit any of these offences.

The Commission was of the view that if the said proposals were implemented, then it would reduce the work load of the National Court criminal jurisdiction by between 30% and 40%. In support of its proposals, the Commission contended that "in the period 1st July 1975 to 31st July 1976, the National Court dealt with 907 criminal charges. The Commission held the view that approximately 599 cases or 66% of these were for offences which could have been tried summarily had these proposals been in force.[4]

The Commission observed that saving in District Courts and police time was difficult to estimate, but it would be significant. The Commission opined that should a defendant wishes to plead guilty to a less serious indictable offence, a Magistrate Grade 4 could hear his or her plea and sentence him without the prosecution witness being called. It was noted that this would save the District Court all the time wasted in a committal proceeding and it would also save the police the time and resources in preparing and presenting the case and in gathering the witness. The Commission was of the view that should a defendant decided to plead not guilty, the duration of his trial, in hearing all the prosecution and defence evidence would have been about the same as the duration of a committal proceeding. It was obvious that the saving in here would be the police

4. Ibid

obtaining further evidence at the request of the Public Prosecutor, organizing and gathering the witnesses again for the National Court hearing. Another advantage was that limited resources allocated to committal court staff would be utilized in far fewer cases. [5]

2.3.2 Law Reform Commission of Papua New Guinea: Indictable Offences Triable Summarily - (Report No.8) of August 1978

In its Report No. 8 of August 1978, the Law Reform Commission proposed amendments whereby 68 indictable offences that were only triable at the National Court through an indictment, could be tried summarily at the District Court. It was evident then that Committal Proceedings in the District Courts were time consuming. The Commission's view was that the adoption of the proposals in Report No. 8, Indictable Offences Triable Summarily, and eventually passing them into law would allow the District Courts to summarily hear many indictable offences which were then only triable at the National Court.[6]

This meant that there would not be any committal proceedings (preliminary hearing) for such offences. They would be disposed of summarily at the District Court by a senior magistrate. The senior magistrates, in determining these cases, could apply the general provisions of the Criminal Code as to matters of law, penalty, justification and other matters which are coincidental to a criminal trial.

However, it was also proposed that the District Court could refer to the National Court matters of law that were difficult and serious in nature.[7]

5. However, the most frequent criticism of the proposal was lack of legal representation in the District Court. Bearing in mind that the majority of the cases proposed be tried summarily would have been dealt with the National Court where legal representation would have been available, it should not be impossible to provide sufficient representation in the lower court to provide the same coverage. This would no doubt require close cooperation between the senior magistrates and the Public Solicitor and his staff". Per the Law Reform Commission of Papua New Guinea, Indictable Offences Triable Summarily, (Report No. 8) August 1978, at Chapter 3.
6. Law Reform Commission of Papua New Guinea, Indictable Offences Triable Summarily, (Report No. 8), August 1978, at p. 1.
7. See a full discussion of the issue at p.15 (infra).

2.3.3 Law Reform Commission of Papua New Guinea: Committal Proceedings - (Report No. 10) of July 1980

The Law Reform Commission again, in its Report No.10 of July 1980, called for the implementation of the proposals it made earlier in (Report No. 8), published in August 1978. The Commission reiterated that the recommendations on a number of indictable offences, which were then tried by indictment at the National Court, should be tried summarily in the District Courts by Senior Magistrates as part of the overall review of the criminal justice system and in order to simplify criminal procedures and fast tract the hearings of criminal trials.

Further to its earlier reports, the Commission again held the view that the holding of committal proceedings in the District Courts was very time-consuming. It stated that if the proposals in Report No. 8, 'Indictable Offences Triable Summarily', were adopted and passed into law, the District Courts would greatly assist in summarily hearing many more indictable offences which were then only heard at the National Court.

In referring again to Report No. 8 of 1978, the Commission noted the other advantages of implementing its recommendation for 68 less serious offences be made triable summarily. However, it was also noted that the work of the District Courts and that of the Senior Magistrates would also increase accordingly in dealing with the anticipated work load.[8]

2.3.4 Intention of the Law Reform Commission Reports of 1977 to 1980.

Clearly the recommendations contained in the Reports were purposely to achieve an enlargement of jurisdiction of the District Court.

To quite a considerable degree, the implementation of the Commission's Reports would have the effect of reducing the number of committal proceedings to be held. Reduction in committal hearings would also mean considerable reduction on costs. Likewise, there would also be savings on the length of time taken in dealing with the proposed recommendations.

8. Law Reform Commission of Papua New Guinea, Committal Proceedings, Report No. 10, July 1980, at p. 3

2.4. Amendments Incorporating Previous Law Reform Commission Recommendations.

The Law Reform Commission's Reports of 1977 to 1980 were gradually implemented between 1980 and 1991.

Schedule 2 of the *Criminal Code*, which replaced the old Sch 1A, through *Criminal Code (Amendment No 2) Act 1991* (Act No 18 of 1991) s 2, lists the various indictable offences triable summarily. This amendment also gave jurisdiction to Grade V Magistrates to try seventy-five (75) different indictable offences listed in Schedule 2. These offences are sometimes referred to as "Schedule 2 offences".

On 15 August 1981, by *Criminal Code (Indictable Offences) Act 1980 (Act No 28 of 1980),* the District Court was given a greatly increased criminal jurisdiction under the control of the then newly created judicial officer known as the Magistrate Grade V. A large number of serious offences (indictable offences) could be dealt with either summarily by such officer, or on indictment by the National Court. Maximum periods of up to 4 years could be imposed summarily, although in a number of instances, these maximum sentences were considerably less than could be imposed under indictment. Observations were made that 'prior to this a more restricted area of minor offences could be dealt with summarily with a maximum sentence of 6 months or a fine of K200. Further, in order to overcome the procedural difficulty, whereby the more serious matters have to be commenced by information and not indictment, further amendments to the *Criminal Code Act (Chapter 262)* were brought down on 12 October 1982, *(Act No 12 of 1982).* The most prevalent section was Section 420. In 1983 Parliament started to introduce a large number of sentences under the *Criminal Code* which carried minimum penalties. The Schedule introduced by Act No. 28 of 1980, giving the heavier sentencing powers to the Grade V Magistrates was not repealed however.

Act No. 28 of 1980, is not strictly a penal statute. It does not create any new offences or impose any new penalties. It is a jurisdiction conferring statute giving the Grade V Magistrate power to try certain offences which formerly could only be tried by judges. [9]

[9] Per Bredmeyer J., in *Kau Kepi v Micah Kaua (N378 (M*)) at p.3 (Access to Law CD).

3. Existing Law and Process Concerning the Handling of Indictable Offences Triable Summarily

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3.1 Introduction

This part begins by highlighting the different categories of offences under the common law and the *Criminal Code Act (Ch 262).*

It concludes by stating the existing law and processes on 'Indictable Offences Triable Summarily', under the relevant legislations. However, it must be noted that some of these relevant provisions of the said legislation are quite confusing in their application.

3.2 Classification of Crimes Generally

Generally at common law (which we have adopted) crimes are classified into three categories:

(a) Summary only offences,
(b) Indictable offences triable either way,
(c) Indictable offences tried on indictment.

Under Section 3 of the *Criminal Code Act*, this common law classification of offences is codified and adopted. Section 3 thus states:

(1) Offences are of three kinds-
  (a) crimes; and
  (b) misdemeanours; and
  (c) simple offences.

(2) Crimes and Misdemeanours are indictable offences for which offenders, unless otherwise expressly stated, shall be prosecuted or convicted-

(a) on indictment; or
(b) in accordance with Section 420; or
(c) in accordance with any other law.

(3) An offence not otherwise designated is a simple offence.

(4) Subject to any other law, a person guilty of a simple offence maybe summarily convicted before a court of summary jurisdiction.

The crucial distinction between the different categories is a procedural one.[10] Under the common law system, summary only offences are triable in the magistrates' court; whereas the indictable-only offences are tried by a judge and jury. The offences that fall under category (b) above are classified as triable either way. They may either be tried by a magistrate or by a judge and jury. Broadly speaking, the fact that an offence is to be found in a particular category is an indication of the seriousness with which it is to be regarded.[11]

The proceedings at the District Court for simple offences and for indictable offences triable summarily are commenced by an information and summons upon information. The information is usually laid by a police officer and the trial is then conducted and completed by a police prosecutor.[12]

Indictable offences normally proceed to trial at National Court, after consideration of evidence at a preliminary hearing in the District Court called committal proceedings. Only upon committal, indictable offences are then prosecuted in the National Court through presentation of an indictment by the Public Prosecutor or a State Prosecutor.

3.3 Public Prosecutor's Power to Elect on Method.

The power given to Principal Magistrates to summarily hear Schedule 2 Offences, upon the passage *of Criminal Code (Indictable Offences) Act 1980 (No. 28 of 1980)*, is not automatic.

The amendment through Act No. 12 of 1982, (which introduced Section 420 of the *Criminal Code*) is significant. It states:-

> "Where a person is charged before a District Court constituted by a Magistrate Grade V with an offence specified in Schedule 2, the

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10 See Stephen Seabrooke & John Sprack, *Criminal Evidence & Procedure: The Essential Framework*, (Second Edition) (London: Blackstone Press Limited) at p. 211.

11 Ibid

12 See Section 28 of the *District Courts Act 1963*.

> Court may deal with the charge summarily according to the procedure set out in Section 421".

Section 421 of the *Criminal Code Act (Chapter 262*), then says that the procedure to be follow by the Magistrate Grade V is as set out under *Part VII of the District Courts Act 1963*. Sections 122 and 128 are of pertinence. Section 122 (5) in particular states:

> "An indictable offence triable summarily under Section 420 of the *Criminal Code* shall be heard and determined in a District Court constituted by a Principal Magistrate."

Subsection (6) goes on to state that the sittings of the District Court for the hearing and determination of indictable offences triable summarily may be held at such time and place as determined by the Court.

Section 128 (1) of the *District Courts Act* states:

> "At the time appointed for the hearing of an information of a simple offence or an indictable offence traible summarily, the defendant shall be informed in open court of the offence with which he is charged as set out in the information, and shall be called on to say if he is guilty or not guilty of the charge".

Subsection 128 (2) then provides when the defendant is called under Subsection (1), the hearing is deemed to commence.

The powers of the Principal Magistrate provided under s. 420 of the *Criminal Code Act (Chapter 262),* which are supplemented by the enactment of *Act No. 31 of 1981* (now Section 122 (5) *of the District Courts Act 1963),* are merely aimed at stating the new practice and procedure of hearing Schedule 2 offences summarily. This point is made by the Supreme Court in *The State v The Principal Magistrate, District Court, Port Moresby; Ex Parte The Public Prosecutor* [*1983] PNGLR 43*, at p.45 :-

> "To accommodate the new procedure it was necessary to rebuild the old rooms quite extensively. It is imperative however to bear in mind that Acts 31 and 32 and the parts they amended, have nothing to do with the decision as to which person is to walk in through which door, that is the door to summary procedure or the door to procedure by committal. The Acts have achieved considerable structural change to the furniture and fittings within the courtroom but, they are procedural and organizational changes only and do not affect the ultimate decision as to who shall or

> shall not walk in which particular door. **The crucial question is then who decides whether the person charged is to enter through one door or the other**". (Emphasis added).

If a person is to be dealt with by way of committal, the procedure to be followed is set down in *Part VI* of the *District Courts Act 1963*, which deals exclusively with persons who are to be processed by way of committal for trial by indictment at the National Court. On the other hand, *Part VII* of the *District Courts Act* deals with those persons whose cases will be heard summarily and details the procedures which will be followed at such hearings.[13]

Amendment No. 44 of 1980, which amended Section 4 of the *Public Prosecutor (Office and Functions) Act 1977*, subjects the powers of Magistrates Grade V to deal with 'Indictable Offences triable Summarily' to the decision of the Public Prosecutor to make an election on either to channel the crime concerned to the Grade 5 Court or to the National Court. This amendment added a clause "(ga)", giving absolute discretionary powers to the Public Prosecutor to decide "(or elect)" on the method of proceeding, whether to proceed under Section 420 of the *Criminal Code* and Section 122 (5) of the *District Courts Act* or to allow the matter to proceed with committal. In other words, a Magistrate Grade V shall not summarily hear a 'Schedule 2 Offence' unless the Public Prosecutor elects for that process.[14]

The Supreme Court case of *Ex Parte The Public Prosecutor (supra)*, confirms the above statement of the law. In that case, the Public Prosecutor contended that a District Court may not proceed to hear summarily those offences listed under the then Schedule 1A (now Schedule 2) of the Criminal Code, until he has elected to proceed with that method. The presiding magistrate at the committal court took the opposite view that he need not await such election but, since the matter had been brought before him, he should proceed to hear the case.

The factual background to this case is as follows. Two separate defendants had come before the Principal Magistrate in Port Moresby, separately charged with independent offences of break and enter. One of them originally appeared first before the Magistrate on 19 April and was subsequently dealt with by way of plea of guilty on 3 August. The other

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13 Per Pratt J. in *The State v The Principal Magistrate, District Court, Port Moresby; Ex Parte The Public Prosecutor [1983] PNGLR 43*, at p.46.

14 Ibid.

originally came before the Magistrate on 6 May and after pleading guilty on 3 August was remanded until 4 August for sentence. On that day, following discussions between the police prosecutor and the Public Prosecutor, the police made an application for adjournment of both cases to 9 August to allow the Public Prosecutor to examine the files and decide whether he should elect to proceed in a summary fashion or allow the matter to be pursued by way of committal and subsequently made subject of an indictment before the National Court.

The Magistrate pointed out to the police prosecutor that he had already dealt with one of the cases and on that basis refused the adjournment. In respect of the other matter, he refused the adjournment on the basis that it was not exclusively a question for the Public Prosecutor whether such cases proceed summarily, and again refused the adjournment. The Magistrate then proceeded to sentence both of the defendants.

The Public Prosecutor applied to the National Court to quash the decisions of the Magistrate on the basis of lack of jurisdiction.

Pratt J, in handing down an unanimous decision of the Supreme Court, made the following observations, at p.48:-

> "In all these matters it can be seen that the discretion is the Public Prosecutor's absolutely. It is not given to one of his staff, it is not given to the Minister or to the Secretary for Justice or to the Police Commissioner or to a magistrate grade V. It may well be that should the Public Prosecutor wish to delegate his discretion under this section, he may do so but, that is not of concern in this case.
>
> It may well be that the wording of s. 4 (ga) could have been more felicitously and lucidly expressed. But nevertheless its purpose is to vest a discretion in the Public Prosecutor to decide whether or not he shall have the matters listed in 1A (now 2) of the Schedule dealt with in a summary manner or permit them to proceed by way of committal. It is in him absolutely that the discretion to act in accordance with s. 4 (f), (g), (ga), and (h) vests. In my view the wording and the existence of paragraph "(ga)" is crucial to one's approach in endeavouring to interpret the entire composite of amendments".

His Honour, further states, at p.53:

> "The election in my view is essential to creating the jurisdiction of the grade V magistrate. Until that election is made, there is no jurisdiction because a person is not charged with a s. 432 (now s. 420) offence until such election is made. He is only charged with an offence under the *Criminal Code*.

The Court was unanimously in agreement that the learned magistrate did not have jurisdiction in dealing with the charges before him in a summary manner. Despite his status, no election had been made and that the Magistrate should have proceeded by way of committal.

This case clearly illustrates that the method of trying Schedule 2 offences is entirely dependent on the decision of the Public Prosecutor. As to criteria the Public Prosecutor uses to decide the appropriate method is entirely at his discretion.

3.4 At What Stage does the Public Prosecutor makes the Election?

The entire amendments to the *Criminal Code* and the *District Courts Act*, discussed above do not provide anything that otherwise suggests the time or stage at which the Public Prosecutor makes the anticipated election on the offences that may be triable summarily.

However, this issue has been discussed at length by the Supreme Court in *Ex parte; Public Prosecutor (supra)* The Court stated: "From a practical point of view, it is quite obvious that some means of bringing to the attention of the Public Prosecutor all matters listed in Schedule 2 must be worked out between himself and the prosecution's branch of the Police Department. In finding a solution to this problem the authorities must bear in mind s. 37 (3) of the *Constitution*, which directs, inter alia: **That a person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time…".** (Emphasis added)**.**

The Supreme Court, also in *Ex Parte; Public Prosecutor (supra),* stated the procedure regarding the interval at which the Public Prosecutor may elect on a Schedule 2 Offence. Hence, the observations of Pratt J., who is speaking unanimously for the Court, at pp.53-54.:-

> "This leads me to the final problem, namely at what point must the Public Prosecutor make his election so that all parties, not least of whom are the defendant and the presiding magistrate, may know what cause they have to follow. If a person is to be dealt

> with summarily something must clearly occur before a stage is reached where documents are served under s. 101 (now s. 94) *(District Courts Act)* as amended. Once those documents have been drafted and served on the defendant it seems to me reasonable that both the prosecution and the defence would be entitled to believe that the matter was to be dealt with in the ordinary way of committal. Once the documents are served, in pursuance of s. 101 (now s. 94), committal proceedings have been commenced and the law must take its course. It would obviously be most unsatisfactory for the parties to be uncertain as to whether the matter was to be dealt with summarily or by way of committal once they had arrived at court. Admittedly that situation did exist under the pre-amended Code but, the great saving there was that the matter could not be dealt with summarily unless the defence agreed to such course. Consequently, any defendant being charged under the old s. 432 (now s. 420) would have a fair idea before the witnesses even commenced to give there own evidence as to whether he intended to take the course of a summary proceeding or whether he was going to approach the matter as a committal, and consequently leave his major submissions and evidence for a subsequent trial. I also consider that s. 101 (now 94) is the cut-off point because at the time when a defendant appears before the court …, certain procedures must be followed and I cannot see anything in these sections which would allow the Public Prosecutor to then interfere with the course which the law laid down and suddenly convert a matter which the court, the defendant and the police considered was a committal proceeding to a case triable summarily, especially when all the evidence is tendered by affidavit".

The "suggestions by the Supreme Court overcome the inconsistencies between the *Distict Courts Act* and the *Criminal Code* and give effect to s 4 (ga) of the *Public Prosecutor (Office and Functions) Act"*.[15] They resolved the apparently conflicting statutory provisions in a sensible way giving effect to the intent of the legislature and could be summarized in the following:-[16]

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15 Hill T and G Powes (2001) *Magistrates Manual of Papua New Guinea* (Sydney: Law Book Company) at p. 195.

16 *Ex Parte Public Prosecutor (supra*) at p. 54.

- When an information is laid in the District Court for an offence listed in Schedule 2 of the *Criminal Code*, the case is to be heard as a committal unless the Public Prosecutor elects to proceed by way of summary trial.
- If the Public Prosecutor elects for a summary trial he must make that election before the committal papers – the information, witnesses affidavits etc.- are served on the defendant under s. 94 of the *District Courts Act.*
- When a case is being heard as a committal the information may be withdrawn at any time by the informant in his discretion.
- Where a Schedule 2 offence is being heard summarily the information can only be withdrawn by the Public Prosecutor.

3.5. Penalties for Indictable Offences Triable Summarily.

The purported election by the Public Prosecutor for a Schedule 2 offence to be tried summarily also entails some jurisdictional issues regarding the appropriateness of penalties that may be imposed by a Principal Magistrate. A Principal Magistrate would proceed to hear a Schedule 2 matter by an information filed by a police officer. If a conviction is recorded, then the penalty for that offence must also be derived from Schedule 2 itself, and not from the relevant *Criminal Code* penalty provision.

However, a situation may arise whereby a Principal Magistrate may refer a Schedule 2 matter to the National Court for greater penalty. This procedure is provided for under Section 421 (4) of the *Criminal Code Act (Chapter 262)*:

> "Where the Court considers that the seriousness of the offence warrants a penalty for indictable offences triable summarily under this Subdivision, the Court shall **commit the offender** to the National Court for sentence". (Emphasis added)

Section 421 (7) of the *Criminal Code*, goes onto to state:

> "Where an offender is committed to the National Court under Subsection (4), the Court shall inquire into the circumstances of the case and shall deal with the offender in any manner in which the Court may deal with an offender convicted of an offence **on indictment** by it". (Emphasis added)

In hindsight, Subsections 421 (4) and (7), above, imply that a Principal Magistrate lacks the powers to impose a greater penalty other than those provided under Schedule 2. Subsections 421 (4) and (7), do not in any way authorize the Principal Magistrate to impose a greater penalty under the *Criminal Code Act*. The Principal Magistrate cannot legitimately invoke the relevant penalty provisions provided under the *Criminal Code Act* when dealing with a Schedule 2 offence. The only legitimate manner through which a relevant *Criminal Code* penalty provision may be invoked on an 'indictable offence triable summarily', is by **indictment** at the National Court. This would mean that the Principal Magistrate shall **commit the matter for sentence** to the National Court for that purpose. In other words, "if there are reasons which indicate that the National Court should more properly deal with penalty then the magistrate should commit for sentence. If, on the other hand, he considers that the powers of sentence available to him are adequate then he will proceed to determine the question in accordance with the law".[17]

The case of *The State v. Kenny Lau [1990] PNGLR 191*, confirms the jurisdictional issue on penalties on the above propositions. This case involved a decision of a Grade V Magistrate, sitting as a District Court in Port Moresby. The appellant was convicted, having pleaded guilty, of the offence of dangerous driving causing grievous bodily harm, contrary to section 328 (5) of the *Criminal Code Act (Ch 262)*. The court imposed penalties including imprisonment for a period of 8 months (suspended). In addition, the court further ordered that the appellant's driving license be suspended for a period of 11 months as from 25 October 1989 and he was disqualified from holding or obtaining any driving license or permit for that period.

The appeal was against the magistrate's order in relation to his driving license.

In that case the Grade V Magistrate dealt with the offence under the enabling provisions of s 420 of the *Criminal Code*.

The National Court (the Court) confirmed that the Grade V Magistrate was within his powers in relation to penalty, when he imposed the sentence of 8 months imprisonment since the penalty is within the maximum provided by

[17] Per Pratt J., *InThe Matter of an Application Pursuant to S. 42 (9) of the Criminal Code Act* (Ch. 262); *Sai Isara v Jonathan Klei* [1983] PNGLR 217, at p. 219.

the last column of Schedule 2 and, did not exceed the ceiling prescribed by s 420 (2).[18]

The question however, was whether the Magistrate had the power to impose a penalty of suspension when he disqualified the appellant from holding or obtaining any driving license for a period of 11 months.

In trying to rationalize its findings, the Court cited the penalty provision for the "offence of dangerous driving causing grievous bodily harm" (s 328 (5)) of the *Criminal Code Act*. Hence, s 330 (2) of the *Criminal Code Act* provides:

> "Where a person is convicted on indictment of an offence in connexion with or arising out of the driving of a motor vehicle by him, the court may, in addition to any sentence it may pass, order that the offender be, from the date of conviction, disqualified –
>
> (a) absolutely; or
>
> (b) for such period as the court shall specify in its order, from holding or obtaining a driver's license to operate a motor vehicle. (Emphasis added)

The Court made the following observations:[19]

> "Clearly this is a 'penalty' provision. As such the magistrate may only impose such penalty if so provided for by s 420, his only source of power to deal with this offence of 'dangerous driving'. Schedule 2 prescribes the penalty. … But there is no other penalty prescribed by the Schedule 2 and consequently, as a matter of law, the Grade V magistrate cannot impose any other. That part of the sentence purporting to disqualify the appellant from holding a license is void ab initio".

The Court also noted that "there has been **no conviction on indictment**, a prerequisite in s 330 (2) before further penalty can be imposed. The magistrate's power to embark on the hearing of an indictable offence is found only in s 420.

Having convicted the only penalty available is that prescribed by Sch 2. The Court observed that it was "erroneous to consider, as has happened here, the power to embark on the hearing carries with it the power to apply penalties

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18 Per Brown J., *The State v Kenny Lau [1990] PNGLR 191*, at p. 193.

19 Ibid.

generally available. The statutory limitation on Grade V magistrates is found in s 420 read with Sch 2".[20] (Emphasis added)

There was also another important observation made by Court in *Kenny Lau's case (supra)*. The Court stated, at p 194.:

> "That disposes of the argument but I sound a cautionary note. If pursuant to s 420 (4) (procedure) the Grade V magistrate commits an offender to the National Court for sentence, there has been a conviction recorded. In that case, again, there has been no conviction "on indictment" and it will not be available to the National Court to apply the provisions of s 330 (2) and disqualify the offender from driving, although the National Court may exercise greater powers of imprisonment. In such a case, an offender should be committed for trial in the National Court, if disqualification from driving on conviction under s 328 (5) were considered appropriate".

The Court allowed the appeal, and the order suspending the appellant's license for a period of 11 months and, disqualifying him from holding or obtaining any driving license or permit for that period was quashed.[21]

This case clearly illustrates the powers of a Principal Magistrate on imposing penalties for an 'indictable offence triable summarily'. The penalties must be derived from Schedule 2 itself because the matter proceeded by way of information. On the other hand, should a Principal Magistrate, during the course of summary trial, realizes that the particular offence requires a greater penalty other than that provided under Schedule 2, then the Magistrate must immediately commit the matter to the National Courts whereby the matter could be presented by indictment at the National Court. A greater penalty under the relevant penalty provisions of the *Criminal Code Act (Ch 262*) could then be legitimately imposed.

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[20] Ibid.

[21] *The State v Kenny Lau [1990] PNGLR 191* at pp. 193-194.

4. Issues

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4.1 Public Prosecutor's power to Elect on Method.

As stated above, the Public Prosecutor, may, in his absolute discretion, elect the method of proceeding under Section 420 of the *Criminal Code Act (Ch. 262),* including the withdrawal of an information. [22]

The Public Prosecutor has reiterated that this function remains with him. He thinks that vesting the power with another entity may not be in the best interest of justice. For instance, an accused person may be charged for a lesser offence and that an injustice may be done to victims or, that that lesser offence may be contrary to public policy.

The question then remains whether the Public Prosecutor is efficient in executing the election process on 'Indictable Offences Triable Summarily'.

The CLRC in its enquiry with the Public Prosecutor obtained some statistics which indicate the period it takes the Public Prosecutor to make the purported election. These statistics are for the years 1997 to 2006, and they are mainly for the National Capital District and Central Province, Committal Courts.

The statistics are shown in the form of line-graphs and these graphs indicate the number of matters referred and the number of days it takes, for the Public Prosecutor to make the anticipated election.

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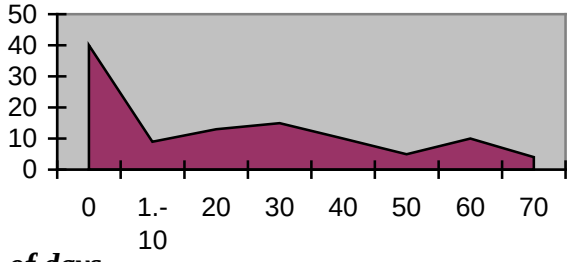
[22] See Section 4 (ga) of the *Public Prosecutor (Office and Functions) Act 1977*

Fig 4.1.1- 2006 Election Files

No of cases



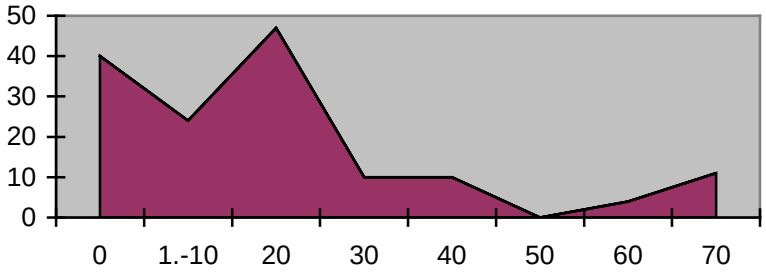
No of days

In 2006, a total of 105 matters were referred to the Public Prosecutor for election on method. Two quarters of those referred took an average of 20 to 30 days for the purported election to be made wherein the Public Prosecutor elected for these matters to be tried at the National Court by indictment. One quarter of the files took less than 10 days to be elected on. Only a few were delayed for 60 to 75 days because the offences were serious in nature and that the police needed sufficient time to complete a brief. Another quarter of the files do not indicate anything, which reflects that the matters may have been heard by way of committal and hence, committed to the National Court.

The above 2006 graph shows that the Public Prosecutor is quite efficient in the election process in the National Capital District and Central Province. Most of the files are elected upon, within an average of 20 days, of reaching the Public Prosecutor's Office.

Fig 4.1.2- 2005 Election Files

No of cases



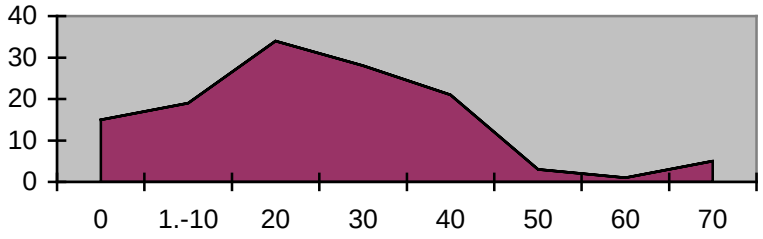
No of days

In 2005, about 145 matters were referred to the Public Prosecutor for election. Two thirds of these took an average of 1 to 20 days for election and the matters were committed for trial at the National Court. One third of the matters took more than 40 days but, less than 50 days for election. Only a few matters were delayed for 60 to 75 days - the reason being that the matters were serious in nature. However, a large number of files, about 45, do not indicate anything which means that the matters were heard by the Committal Court despite the referral for election.

This graph also shows that the Public Prosecutor is efficient in the election process. Almost all the files would have taken less than 20 days for election.

Fig 4.1.3- 2004 Election Files

No of cases



No of days

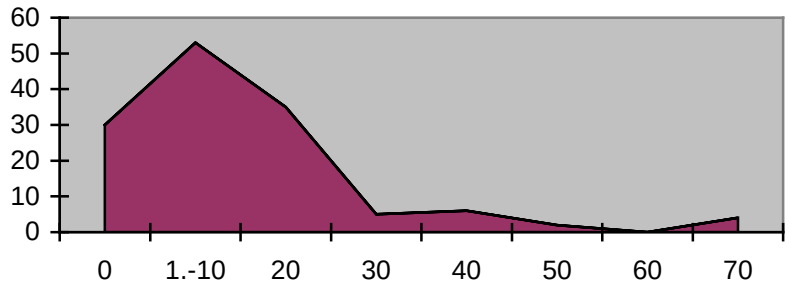
In 2004, 127 matters were referred to the Public Prosecutor for election. Almost half of those matters referred took an average of 11 to 30 days for

election and were committed for trial at the National Courts. One quarter of the files took more than 40 days and less than 50 days to elect and, only a few were delayed for 60 to 75 days. However, less than a quarter files, about 15, did not indicate anything and, this reflects that the matters were heard by the Committal Court despite the anticipated election.

This graph also shows that the Public Prosecutor is efficient in the election process.

4.1.4- 2003 Election Files

No of cases



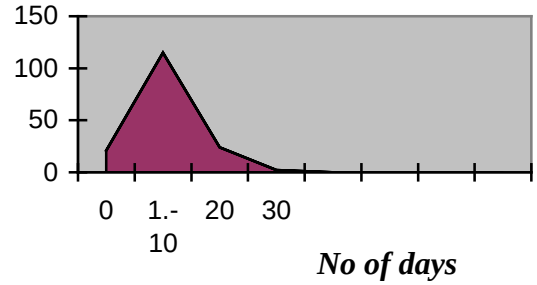
No of days

In 2003, 138 matters were referred to Public Prosecutor for election. About 85 percent of these took an average of 1 to 20 days for election and these matters were committed for trial at the National Court. Almost 5 percent of the matters took more than 20 days to elect and a further 5 percent were delayed for 60 to 70days - the reason being that they were considered as serious offences in nature. However, the other 5 percent of the matters referred have no indication which reflects that the matters were heard by the Committal Court despite the referral for election.

The graph also shows that the matters that were sent to the Public Prosecutor were dealt with efficiently.

4.1.5- 2002 Election Files

No of cases

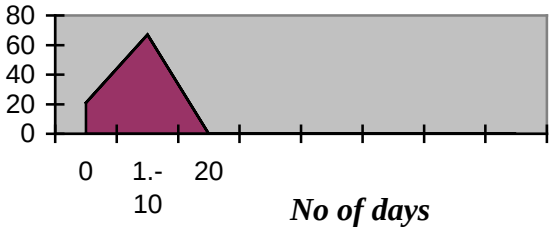


In 2002, 162 matters were referred to Public Prosecutor for election. About 90 percent of them took an average of 1 to 10 days for election. The other 5 percent took less than 25 days and the other 5 percent had no indications. That shows that the matters were dealt with by way of committal despite the referral for election.

This graph shows that the Public Prosecutor is quite efficient in doing the election.

4.1.6- 2001 Election Files

No of cases

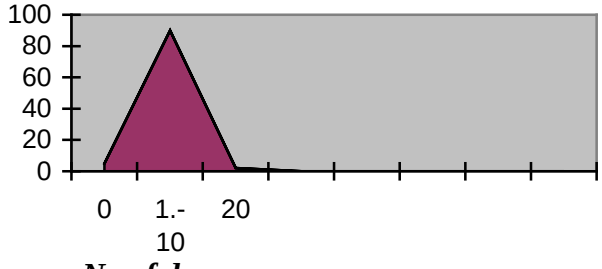


In 2001, 88 matters were referred to the Public Prosecutor for election. Almost 95 percent of them took an average of 10 days to elect. The other 5 percent do not indicate anything which may mean that such matters were dealt with by way of committal.

Thus, in 2001 the Public Prosecutor was very efficient in making the election.

4.1.7- 2000 Election Files

No of cases



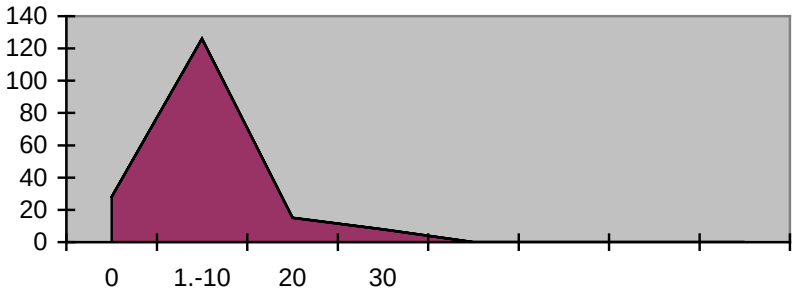
No of days

In 2000, 98 matters were referred to the Public Prosecutor for election. Almost 95 percent of the files took an average of 10 days to elect. The other 5 percent do not indicate anything which means that the matters may have been dealt with by way of committal despite the referral for election.

It can then be stated that in 2000, the Public Prosecutor was very efficient in the election process.

4.1.8- 1999 Election Files

No of cases



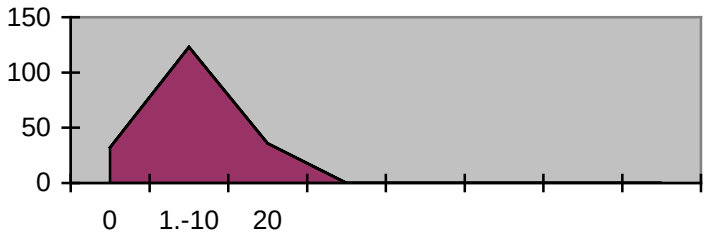
No of days

In 1999, 175 matters were referred to Public Prosecutor for election. About 85 percent of these matters took less than 10 days, and 5 percent took less than 20 days for the purported election. 5 percent of the matters took almost 30 days for the election. The other 5 percent do not indicate anything which may mean that the matters were dealt with by way of committal despite the referral for election.

The graph also shows that the Public Prosecutor is efficient in doing the elections.

4.1.9- 1998 Election Files

No of cases



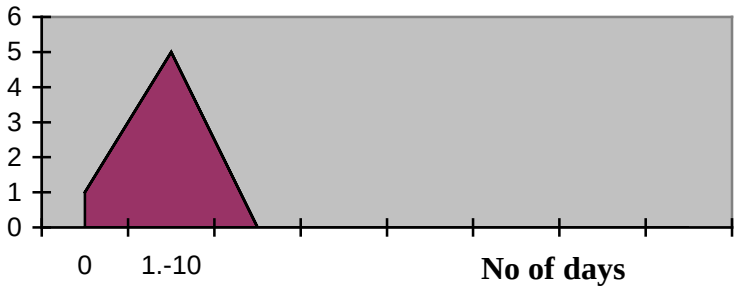
No of days

In 1998, 195 matters were referred to the Public Prosecutor for election. 80 percent of these matters took less than 10 days, and 10 percent took less than 20 days to elect, and 2 percent took almost 25 days. The other 8 percent had no indication which suggests that the matters were dealt with by way of committal despite the referral for election.

This graph also shows that the Public Prosecutor is quite efficient in the election process.

4.1.10 1997 Election Files

No of cases



In 1997, only 9 matters were referred to Public Prosecutor for election and it took less than 10 days to elect. Perhaps those 9 are the only ones that are recorded. About 7 of these matters took less than 10 days, and 2 are not recorded and it is assumed that they were dealt with by way of committal.

This final graph also confirms that the Public Prosecutor is efficient in his handling of the elections.

Summary

The National Capital District and Central Province Committal Courts statistics from the Office of Public Prosecutor for the last 10 years, i.e., 1997 to 2006, clearly show that the Public Prosecutor, on average, is quite efficient in his handling of Schedule 2 offences that are referred to him for election.

The statistics indicate that the there is less delay in the election process. This may, quite obviously, be attributed to the fact that the Public Prosecutor is located within the National Capital District and the Schedule 2 matters referred to him are determined and sent back to the District Courts within a reasonable time.

The CLRC is seeking comments from stakeholders on the current practice by the Public Prosecutor on the elections on 'Indictable Offences Triable Summarily.' The CLRC is particularly interested in knowing whether the Public Prosecutor is also efficient in his statutory duty on the elections from other centres or towns within the country. The CLRC would also like to know whether the offences referred herein, that are committed in other centres and towns, also go through this election process by the Public Prosecutor.

4.2. Time of the Election by the Public Prosecutor.

During the course of consultations with the Public Prosecutor within the National Capital District, it was revealed that the purported election on Schedule 2 offences is carried out as soon as the 'Hand-up Brief' is fully completed by the police and sent to the Public Prosecutor. The 'Hand-up Brief' is normally completed after 3 months of investigations and compilation of evidence by the police.

The CLRC would like comments from stakeholders on whether the purported election should be done prior to the completion of the 'Hand-up Brief.'

4.3. Appropriate Penalties for Indictable Offences Triable Summarily.

As discussed above, should the Public Prosecutor elects for a Schedule 2 offence to be tried summarily, then upon conviction, the Grade V Court must impose a penalty that is provided under Schedule 2 itself. The Grade V Court will fall into error should it invoke a penalty under the relevant *Criminal Code Act* provision. In the other words, the Grade V Court lacks jurisdiction to impose a penalty provided for under the *Criminal Code Act*.

The CLRC invites comments from stakeholders regarding the imposition of penalties on Schedule 2 offences that are tried by Grade V Courts. The CLRC further invites stakeholders to comment whether Grade V Courts should be given powers to invoke relevant *Criminal Code Act* provisions to apply as penalties.

4.4.- Whether the Schedule 2 offences should be vacated and transferred to the *Summary Offences Act* and then be simply tried summarily by the District Courts.

An opinion has been expressed during our initial National Capital District consultation in February 2007 that perhaps we should look at the 'indictable offences triable summarily' ascontained in Schedule 2 of the *Criminal Code* (see paragraph 2.2 above) and remove them from the *Criminal Code* and house them under the *Summary Offences Act* or some new and separate crimes law and make them triable summarily only. If we do this the following consequences will follow:

- that the current District Court Grade V jurisdiction will be affected in so far as it relates to its current role in the trials of the Schedule 2 Offences to the point where its current necessity in the criminal jurisdiction may even be negated;
- the need for the Public Prosecutor to conduct elections under s 4 (ga) of the *Public Prosecutors (Office and Functions) Act* 1997 will be negated. This would then take care of the issue of delay in the election process;

- there will be a reduction in committal matters and trial matters in the National Court since the opportunity for these Schedule 2 Offences to be processed through the committal process and eventual trial in the National Court will be negated.

The CLRC is seeking your views on whether or not the current Schedule 2 Offences should be removed from the *Criminal Code* **and housed either under the** *Summary Offences Act* **or a separate legislation and be prosecuted summarily in the District Court Grade V jurisdiction.**