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Foreword

I have the privilege to launch the first edition of the Attorney General's Law Journal.

Our intention is for the Journal to be an annual publication where Government lawyers and law practitioners in the public law space can publish on developing trends in the law.

The Office of the Attorney General and the Department of Justice can use the Journal to connect with legal fraternity, government and stakeholders on legal policy and trends in our sector.

In encouraging lawyers to publish articles, I hope fundamental skills in legal research and critical analysis can be maintained amongst government lawyers and all our lawyers in the jurisdiction.

The lawyer who has no time or appetite for writing well researched and articulated articles or arguments can be likened to the salt that has lost its taste.

This Journal is intended to cause a stirring of a culture of publishing by lawyers in our jurisdiction.

I recall a time when it was the ambition of budding lawyers and academics to publish papers especially in the Melanesian Law Journal (MLJ).

Latest editions of PNG Law Reports were eagerly awaited and Judge's case digests containing analysis of court decisions were not scarce.

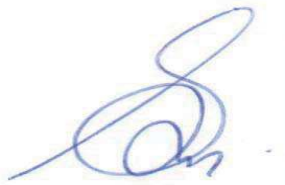
I have not sighted the MLJ for many years and I have no idea what the next volume of the PNG Law Report will be. Pardon my ignorance.

So if you, like me and many others, see the challenge to rekindle literary flame in our profession then this first edition begins the bigger challenge to maintain the Journal and to expand the readership over time.

I thank the Editorial Board under the leadership of Dr Kwa, Secretary of Department of Justice and Attorney General for turning an idea into this first edition of the Attorney General's Law Journal.

I also commend those who have contributed to this first edition. I dedicate the Journal to government lawyers in our country who remain true to our noble calling to defend the rule of law and uphold our Constitution and laws, always, without fear or favour.

With God's help we can be part of the change that our nation deserves in this hour.



HON. DAVIS STEVEN, LL.B, MP

Deputy Prime Minister and Minister for Justice and Attorney General

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Strengthening Gender Equality Through the Law*

Dr. Eric Kwa, PhD**

Introduction

Papua New Guinea (PNG) is under a dark cloud of violence and particularly gender-based violence. Gender based-violence (GBV) and gender inequality have become a hallmark of PNG. Although there is not much data collected in PNG, the existing data is alarming enough to call for action to bring about gender balance and elimination of all forms of violence against women.

There are many factors that affect the achievement of gender balance and GBV is one of those main factors. According to a study in 2015, GBV highly affects women's participation in the economy. Sixty-eight percent of survey participants experienced GBV with 47% experiencing more severe forms of GBV. The courts in PNG have also observed the increase in severity of GBV and have imposed stiffer penalties on perpetrators.[1]

It has been debated over the last two decades that, despite a wide range of laws on rights and freedoms, inequality in PNG is not addressed in reality. Based on international assessments and reports, PNG has not fared well when it comes to gender inequality. In 2012, PNG was ranked at 134 out of 145 countries using the Gender Inequality Index (GII).[2]In 2014 PNG was ranked 140 out of 155 countries on the GII indicating huge gender disparities. When compared to other countries, similar indicators did not show too well for PNG.

In the country's 2010 CEDAW Shadow Report, the late Scholla Kakas, President of the National Council of Women (NCW), in her "Forward" address stated that "the progress of women in Papua New Guinea has not kept pace with the overall efforts of successive governments to achieve economic and political of the country".[3]

How can PNG reverse this negative trend? In 2012, a study by the Secretariat of the Pacific Community (SPC) observed that mainstreaming gender would help improve gender inequality in the country. The SPC identified six strategic areas that the Government of PNG had to focus on to promote and strengthen gender mainstreaming in the country.[4] This enabling environment included:

1. Legal and Policy Framework
2. Political Will
3. Organisational structure

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* This is an updated version of the paper presented at the Gender Parity Symposium in Sydney and Brisbane in October 2015 and also at the Men's Forum (Crowne Plaza, Port Moresby 10-11 October 2017).

** Dr. Kwa is the Secretary for the Department of Justice and Attorney General. He was recognized for his work in supporting women by the Government when he was awarded the Scholla Kakas Award for 2015. The Scholla Kakas Award is given by the Government to an outstanding man or a woman annually in recognition for services to women and their cause.

1 *State v Roth* (2019) N7770; *Keoa v Keoa* (2017) N6941 and *State v Markus* (2015) N5944.

2 "Human Development Report," United Nations Development Programme 2013, accessed January 15, 2015. http://hdrstats.undp.org/images/explanations/PNG.pdf.

3 UNIFEM, 2010. The CEDAW Shadow Report on the Status of Women in Papua New Guinea and the Autonomous Region of Bougainville.

4 Braun, T., *Stocktake of the Gender Mainstreaming Capacity of Pacific Islands Government- Papua New Guinea* (Noumea: Secretariat of the Pacific Community, 2012).

4. Accountability Mechanisms
5. Technical Capacity
6. Funding Adequacy

The SPC suggested that by addressing these six key areas, PNG would adequately address gender mainstreaming in the country. These and other reports both in PNG and outside the country provides an array of suggestions for improving gender inequality in PNG.

The Government and its agencies can easily adopt some of these suggestions and make a real effort in tackling and improving gender inequality in PNG. In this paper, I present the legislative reforms initiative of the government, which seek to reduce gender inequality. The ongoing reform work of the government will hopefully address three of the main concerns raised by the SPC – that is: Legal and Policy Reform, Political Will and Organisational structure. The aim of the paper is to show that, despite the negative reports on gender inequality in PNG, the Government is working positively and progressively to arrest gender inequality through a number of policy and legislative reforms.

Status of Gender in PNG

Gender Studies
A series of studies and Government reports show that PNG lags in many areas of gender inequality. Multilateral and regional partners have also commissioned a study on gender inequality in 2012 to provide up-to-date data on gender inequality for the Government and its partners. The study focused on the three themes of the Government's policy on gender and development: (1) access to resources through education, health and entrepreneurship; (2) access to rights through legal and social empowerment (including power to address gender-based family and sexual violence); and (3) access to voice through participation in decision-making.[5]

The study revealed some of the following shortcomings of the country in the three thematic areas.

1. Access to resources through education, health and entrepreneurship
   - There is a persistent gap in the percentage of girls and boys of eligible age enrolled in secondary school, tertiary education and training institutions. At primary school level, the gender gap has narrowed in the last 15 years.
   - Concerns for girls' safety are a significant barrier to their school attendance.
   - Violence (and the threat or fear of it) significantly reduces the range of actions a woman can take to support her family and enhance her health and education, as well as that of her children.
   - There has been little improvement in key health indicators (e.g., maternal mortality, access to reproductive health care, malnutrition among women and children) especially for the majority rural population.
   - Health services have declined in rural areas, and the impact of this is larger for women who face greater obstacles to accessing such care than men. For example, when women need to travel to health care centres they face greater security risks and bear greater opportunity costs than men.
   - Gender relations and gender inequality are significant drivers of the HIV and AIDS epidemic in Papua New Guinea.
   - Women and girls are more vulnerable to HIV infection and other STIs. Women's lack of power and rights in sexual relations and the high risk of gender-based violence increase the likelihood of HIV transmission.
   - Fear of violence, abandonment, stigma and discrimination hinder women's willingness to negotiate for safer sex and to seek HIV testing or treatment.
2. Access to rights through legal and social empowerment (including power to address gender-based family and sexual violence)

[5] PNG Government., *Papua New Guinea Country Gender Assessment* (Port Moresby: PNG Government, ADB, UNDP, Australian Aid, 2012) xvi.

- There are inequalities in men's and women's economic opportunities in the agriculture sector that lead to inefficient use of the country's labour resources.
- Women farmers do not receive the level and type of training and extension support that they need to contribute their full potential to the agricultural economy.
- Women traders are more disadvantaged than men by unsafe and insanitary markets, and poor transport infrastructure.
- There are continuing differences and inequality between women and men in formal labour force participation, occupations and wages.
- In general, women and girls work longer hours than men and boys.
- The Constitution provides for gender equity and equality, but customary law, recognised by the Constitution, discriminates against women in relation to rights and property.
- The Law Reform Commission has examined and made recommendations on gender issues in laws relating to adultery, prostitution, polygamy, succession and inheritance, marriage and divorce, and maintenance. Some laws, based on gender considerations, have been amended or passed. But law reform has had limited beneficial impacts for women so far.
- The police and prosecution authorities continue to have difficulties in applying and enforcing the law. The justice and law enforcement systems are weak, and there is insufficient policing and inadequate application of the law.

3. Access to voice through participation in decision-making
   - Papua New Guinea remains close to the bottom of the world's scale for women's parliamentary representation and participation.
   - Of the 111 members of parliament, only three are women as of November 2012. In the previous parliament there was only one woman.
   - Only two private corporate entities in Papua New Guinea have women on their boards.
   - Although laws allow women's representatives to be nominated to provincial and local governments, their representation is often tokenistic and their participation appears to be very limited.
   - Mainstreaming of gender across government has resulted in some sound policies and strategies, but few of these are budgeted and implemented.

The proponents of the study made four major recommendations. First, allocate specific budget resources to the Department for Community Development, Youth and Religion (DCDYR) to enable the Department to monitor the implementation of Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and report on this. Second, the Department of National Planning and Monitoring (DNPM) to give greater prominence to gender in the review of the Medium-Term Development Plan. Third, disseminate the National Policy on Women and Gender Equality. Fourth, convene a joint task force of the Department of Treasury, DNPM and DCDYR to map gender budget annually.[6]

The 2012 study by the Government and its partners basically confirmed most of the data that the World Bank identified in its study. The World Bank concluded that globally the status of women did improve markedly but a number of areas still needed improvements. The World Bank said: "Gender disparities still remain in many areas, and even in rich countries. The most persistent and egregious gaps include"[7]:

- *Excess deaths of girls and women.* Females are more likely to die, relative to males, in many low- and middle-income countries than their counterparts in rich countries. These deaths are estimated at about 3.9 million women and girls under the age of 60 each year. About two-

6 Id, at xviii-xix.
7 Note 1, at p xx1.

fifths of them are never born, one-sixth die in early childhood, and over one-third die in their reproductive years. And this number is growing in Sub-Saharan Africa, especially in childhood and the reproductive years and in the countries hardest hit by the HIV/AIDS epidemic.

- *Disparities in girls' schooling.* Despite the overall progress, primary and secondary school enrolments for girls remain much lower than for boys for disadvantaged populations in many Sub-Saharan countries and some parts of South Asia.
- *Unequal access to economic opportunities.* Women are more likely than men to work as unpaid family laborers or in the informal sector. Women farmers tend to farm smaller plots and less profitable crops than men. Women entrepreneurs operate in smaller firms and less profitable sectors. As a result, women everywhere tend to earn less than men.
- *Differences in voice in households and in society.* In many countries, women— especially poor women—have less say over decisions and less control over resources in their households. And in most countries, women participate less in formal politics than men and are underrepresented in its upper echelons.

The World Bank identified the following areas for reform:

- Addressing excess deaths of girls and women and eliminating gender disadvantage in education where these remain entrenched.
- Closing differences in access to economic opportunities and the ensuing earnings and productivity gaps between women and men.
- Shrinking gender differences in voice within households and societies.
- Limiting the reproduction of gender inequality across generations.[8]

When these two studies are compared, the message for PNG is loud and clear – a lot remains to be done in addressing gender inequality in the country. This however does not mean that PNG has not done much in this field. On the contrary, PNG has made positive strides in many areas, particularly in the area of policy and legislative reform, to combat gender inequality. This new approach has been evident in the last 10 years. In this paper we look at the Government's efforts in this new move by PNG to reduce gender inequality.

Gender and Economy

In 2012, the World Bank's 'World Development Report' declared that, "Gender equality is a core development objective in its own right. It is also smart economics. Greater gender equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative."[9]

It has been reported that the global economy would grow by $28 trillion by 2025 if women participated in the labour force to the same degree as men - a 26% increase and almost equivalent to the combined GDPs of the U.S. and China. The report, titled "The Power of Parity: How Advancing Women's Equality Can Add $12 Trillion to Global Growth" also found that even incremental progress on gender equality could have a big payoff. If every country matched the participation rates of the highest-performing countries in their region, global activity would increase by $12 billion - equivalent to the GDPs of Japan, Germany, and the UK combined.

According to the report, the three major factors holding women back are lower work force participation, fewer hours worked, and the fact that women are disproportionately represented in low-productivity sectors like agriculture.[10]

If the global community agrees that gender equality leads to better outcomes for a country, then how has PNG, as a member of the global village, responded to this challenge?

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8 Id, at pxxii.

9 World Bank., *World Development Report 2012: Gender Equality and Development* (Washington DC: World Bank, 2012) xx.

10 Report by McKinsey Global Institute, at http://time.com/4045115/gender-inequality-economy/ (accessed 8 March 2019).

A profiling study by Japan International Cooperation Agency (JICA) in 2010 found that formal employment opportunities for women are limited. Only 5% of women in PNG are in formal employment. On average employees experienced a total of 7.8% incidents of GBV in the past 12 months, of which 2.4% incidents were of severe GBV. On average, each staff member loses 11.1 days of work per year as a result of the impacts of GBV. For a firm in this survey, estimated 26,200 staff hours are lost per year.

The cost of staff time lost due to GBV is huge. For one of the firms concerned, it is estimated to total K300, 000.00. For another firm almost K3, 000,000.00 representing 2% and 9% respectively of those companies' total salary bills.

The Benefits of Gender Equality

The government must have an all-inclusive approach to ensuring social and economic rights of women and girls. Workplaces must design policies that prohibit and prevent direct and indirect discrimination and recognize that equality and rights, opportunities and treatment at work is about ensuring that all persons are treated with respect and encouraged to reach their full potential.

The benefits of gender equality are many. In a society-

- when girls are educated it lowers fertility rates, reduces maternal mortality and improves the health of their children;
- when all members of the community have access to economic opportunity it helps their families prosper and the country's economy grows; and
- when the safety and security of women at work and girls is guaranteed, they can more effectively contribute to better outcomes for their families, communities and the country.

And in the workplace:

- when women, men, people living with disabilities and representatives from disadvantaged groups participate in policy formulation and decision-making it leads to more responsive policies and decisions and improved distribution of services;
- a diverse workplace will have positive and effective communication with its clients based on a deep understanding of the community's interests;
- when the safety and security of women at work and girls is guaranteed, they can more effectively contribute to better outcomes for their families, communities and the country; and
- a gender equitable and socially inclusive workforce that reflects the PNG community demographics will also support the public service, to understand and assist, the various needs of everyone in our community, leading to improved service delivery.

The Government's Policy and Legislative Reform Program on Gender Equality

The *Constitution* of PNG, like constitutions of many other countries, provides for the protection of fundamental rights and freedoms of individuals regardless of their race, tribe, place of origin, political opinion, colour, creed or sex.[11]It is important to observe that the *Constitutio*n is the supreme law of PNG. It is therefore very encouraging that the fundamental rights and freedoms of individuals are recognised and guaranteed by the *Constitution*.

It is however, one thing to make legal declarations and another to implement them. A quick scan of the PNG legal system will show that there is sufficient legal protection for every citizen of the country, yet as shown above in the previous section, there are still glaring inequalities between men and women in the country. This is where the role of policy and law reform becomes critical.

The Government has been progressively dealing with the issue of GBV through policy and law reform since the early 2000s. In undertaking this policy and legislative reform program, the Government is mindful of the country's obligations under relevant international treaties and other legal instruments.

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[11] Sections 32 to 56 of the *Constitution*. See Kwa, E, "The Enforcement of Human Rights in Papua New Guinea: Tru O Giaman" in Kwa EL, Bhalla S, Muroa G, Linge, G, Tennent D and Yapao G (ed), *Development of Administrative Law in Papua New Guinea* (New Delhi: School of Law and Business Studies & UBSPD, 2000).

The government has sought to synergise its policies and laws to the following international conventions and instruments: the Beijing Declaration and Platform for Action; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the Convention on the Rights of Children (CRC); and theInternational Covenant on Economic, Social and Cultural Rights (ICESCR).[12]

In this section of the paper, three major national policies that promote gender equality are identified and reviewed. A set of legislative reforms targeting gender equality are also identified and discussed.

Policy Reform

In the area of policy, PNG did not do much after the Beijing Conference until 2011 when the Government adopted the 2011–2015 National Policy for Women and Gender Equality. This policy was to guide the work of the Office of Development for Women (ODW) which was set up by Government in 2005.

In the last seven years however, the Government has made significant inroads in the area of gender equality policy reform. The Government began its intervention in the public sector with the adoption of the Gender Equity and Social Inclusion (GESI) Policy in 2013. The Government also adopted the Lukautim Pikinini Policy in 2015 and the Gender Based Violence Strategy in 2016. Some of these critical policy imperatives are briefly highlighted below.

In its Vision 2050, an overarching development platform adopted in 2009, one of the seven pillars are gender. Pillar 1 of Vision 2050 is on 'Human Capital Development, Gender, Youth, and People Empowerment' towards a healthy, and wealthy society by 2050. All Government agencies are directed to implement the Vision 2050.

To support the implementation of Vision 2050, the Government adopted the action plan for Vision 2050 called the Development Strategic Plan 2010-2030 (DSP) in the following year (2010). This document sets out the roadmap for implementing the Vision 2050. A key statement of the DSP 2030 is that by 2030 there should be "zero tolerance for violence against women and children."[13]

One of the recent milestones achieved by the Government on gender equality is its adoption in 2013 of the GESI Policy. The main objective of GESI is to promote and strengthen fairness and equity across and within the public service. The mainstreaming of this policy is to enable agencies to create safer working environments for both men and women, at the same time encouraging career advancement especially for women.

The GESI Policy which was promulgated by the Department of Personnel Management makes it mandatory for the creation of a Gender Desk in all government departments, agencies and statutory bodies. This is a major breakthrough by the Government because for the first time, it has acknowledged and accepted its responsibility in tackling gender inequality right where it matters – the Government and its instrumentalities!

In 2015, it was reported by the Department of Personnel Management that two years after the GESI Policy, gender disparity in the higher echelons of the public service was not improving.

SENIOR PUBLIC SERVANTS CONTRACT OFFICERS		
Department/Agency Grouping	*Female*	*Male*
Key Central Government Departments	34	66
National Departments	23	77

[12] Sliviak-Kidu, J, "Cross-cutting Issues at Provincial Levels in Papua New Guinea" in Kwa, E, Stanley, L, Kesenga, D, Fairio, M, Winnia, X and Kwa, V (ed), *Decentralisation for an Integrated, Strong and Prosperous Papua New Guinea* (Port Moresby: Constitutional and Law Reform Commission, 2016) 166.

[13] PNG Government., *Papua New Guinea Development Strategic Plan 2010-2030* (Port Moresby: PNG Government, 2010) 112.

Provincial Administrations	8	92
Hospitals and Provincial Health Authorities	24	73

The figures in the above table give an overview of how well the various groupings of government are handling gender equality in terms of employment statistics at the Senior Contract Officer Grade levels.

When the figures in the above table are compared with specific key government agencies, the picture is different. This is shown in the table below.

CENTRAL GOVERNMENT AGENCIES- SENIOR PUBLIC SERVANTS CONTRACT OFFICERS		
Agency	**Female**	**Male**
Finance	28	72
Treasury	31	69
Department of Personnel Management	40	33
Prime Minister &National Executive Council	33	67
National Planning & Monitoring	33	67
Internal Revenue Commission	38	62

The table above deals with percentage comparisons of senior male and female contract officers in the key Central Government Agencies mentioned above. Taken together, this group has the best ratio of females (34%) to males (66%).

To expedite the implementation of the GESI Policy in the public service, the Government took a bold decision in 2016 that required every government department and agency to establish a GESI Desk in their departments and agencies before any restructure to their departments and agencies was approved by the Department of Personnel Management. This intervention by the Government is slowly gaining momentum in the public service with the creation of Gender Desks in several government departments and agencies.

The Lukautim Pikinini Policy 2015 provides the policy framework for protecting children. The policy sets out the mechanisms for dealing with children. An important aspect of the policy is the establishment of a dedicated government agency called the Child and Family Services that is primarily responsible for all matters relating to children.

The Child and Family Services is managed by a Director who reports to the Child and Family Services Council. The Council was established only in 2018 and is currently setting up the Child and Family Services secretariat. The Child and Family Services fall under the auspices of the DCDYR.

A major breakthrough on GBV came about in 2016 when the Government of Prime Minister Hon. Peter O'Neill approved the GBV strategy titled 'Papua New Guinea National Strategy to prevent and Respond to Gender Based Violence 2016-2025'.[14] This is a milestone which PNG can be proud of. For the first time, PNG now has a holistic roadmap for dealing with GBV. The DCDYR is responsible for spearheading the implementation of this policy.

[14] Government of Papua New Guinea, *Papua New Guinea National Strategy to Prevent and Respond to Gender Based Violence 2016-2025* (Port Moresby, Department for Community Development, Youth and Religion, 2016).

The vision of the policy is: "An inclusive, peaceful society where government, in partnership with its citizens, embraces diversity, equality and equity, recognizes, respects and promotes the rights of all citizens, and secures just and sustainable development for all". The goal of the policy is:

> The Government of Papua New Guinea, in partnership with all its key stakeholders, will prioritize the prevention of and response to Gender Based Violence to enable a quality of life without fear of violence.[15]

There are four objectives of the Government in dealing with GBV. These are:

1. To ensure that by 2025 the Government of PNG has a functioning GBV governance and institutional structure supporting the achievement of zero tolerance towards GBV, aligned with the PNG Development Plan, Papua New Guinea Vision 2050 and with the Sustainable Development Goals 2016-2030,
2. To standardize and institutionalize data collection, and facilitate ongoing in-depth research to support evidence-based planning, budgeting and programming to end gender-based violence,
3. To ensure quality, continuity and sustainability of coordinated responses, referrals and service delivery for survivors of gender-based violence, and
4. To scale-up, decentralize, and standardize inclusive, quality initiatives and messaging for prevention of gender-based violence at all levels and in all sectors of society.[16]

A national secretariat is envisioned by the policy to coordinate the Government's effort in preventing and responding to GBV in the country. Unfortunately, at the time of writing, the DCDYR is yet to establish the secretariat. The Government is mindful of this delay and has recently instructed the Department to expedite the establishment of the secretariat so that it can fully implement the GBV Policy.

Law Reform

Gender-based violence is a serious ongoing problem for PNG. This phenomenon has also attracted the attention of the Courts. In 2001, Kandakasi J (as he then was) made these observations in *State v Joe Butema Arua* (2001) N2076:

> *Wife beating is now an offence in our country. This has been brought about because of husbands beating up wives as if they are not more than just mere beings fit only to be their wives. Even after the enactment of the laws against wife beating, many men are continuing to beat up their wives. Some of the beatings are ending up in deaths. Currently, the women in our country are continuing to call for violence against women and girls to stop. Yet a few men like the Defendant are continuing to beat up and even kill their wives. These men fail to appreciate the fact that their wives are human beings like them and have the right to live and to be treated with human dignity and respect. They do not appreciate the fact that women are inherently weaker than men are and as such they need to be treated with care and respect. Men need to show the women or their wives that they truly love them. If they do not love their wives, they should not have married them at the first place, or if their love has grown cold, they should let them go their own way rather than killing them.*

The courts have taken a very firm position against GBV, particularly violence against women and girls. In 2015, commenting on the passage of the *Family Protection Act* 2013, *State v Simba (No2)* (2015) N6015, the National Court (Geita J) observed that "[D]espite courts attempts in trying to stop wife beating in their stern judgments menfolk continue to offend. The crime appears to escalate every year instead of decreasing".

The Government has been proactive in the area of policy and legal reform in addressing GBV. Since 2000, the Government has undertaken some major legislative reforms relating to gender equality and continues to review laws and engage in activities to promote and protect women. Some of the notable examples include: The *Criminal Code (Sexual Offences Against Children Act)* 2000; the

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15 Ibid, p13.
16 Ibid.

Constitutional Amendment No 32. Equality and Participation Law 2011; the *National Council of Women Act* 2013; the *Family Protection Act* 2013; and the *Lukautim Pikinini Act* 2015.

These pieces of legislation are significant milestones in addressing women's issues in PNG, particularly to promote equal participation and to increase women's participation in the development of the country. A summary of these and other related legislation and proposed Bills dealing with gender equality are presented below.

The first major reform was the amendment to the *Criminal Code Act* 1974 relating to sexual violence. The *Criminal Code (Sexual Offences Against Children Act)* 2000 was enacted to protect the interest of children against sexual exploitation.[17] In *Stanley Sabiu v The State* (2007) SC866, the Supreme Court, in support of the Government's fight against GBV, stressed strongly that the Parliament was opposed to crimes of sexual violence against children.

To complement the amendment to the *Criminal Code Act* in 2000, the Government also amended the *Evidence (Amendment) Act* 2000 to strengthen the legal framework to protect women and children against sexual violence. This amendment now enables a spouse to be a compellable witness in sexual offence cases.

In 2009, the Parliament enacted the *Land Registration (Customary Land) (Amendment) Act*.[18]This legislation was developed by the Constitutional and Law Reform Commission (CLRC) and successfully enacted by Parliament. This law provides for the registration of customary land with the view to opening up the land for economic activities. For the first time, the law specifically provides that the leadership of the customary land group (incorporated land groups (ILG)) must include two women. The law also enables women to have equal access to customary land.

The push for a temporary special measure for equal women's participation in Parliament almost became a reality with the *Constitutional (Amendment No 32) - Equality and Participation Law* in 2011, when Parliament amended the *Constitution* to create 22 Reserve Electorates for Women. Although the *Constitution* was amended, the enabling law, the *Organic Law on National and Local Government Elections* was not amended to complement the Constitutional amendment. The Equality and Participation Law was to give effect to the Second Goal of the *National Goals and Directive Principles* which provides for equality and participation of all citizens to enable them to participate either directly or through a representative in consideration of any matter affecting his or her interests or the interest of the community. It was certified on the 28th December 2011 to come into operation on the issue of writs for the 2012 General Elections.

In 2013, the Government enacted the *National Council of Women Act* and repealed the *National Council of Women Incorporation Act* (Chapter 1041) 1979. The new law creates a single national women's peak body. It was certified on 5th December 2013. The new Act provides for a clear, transparent administrative structure, powers and functions, with a system of checks and balances and very clear linkages between the National Council of Women and government and other agencies.[19] It calls for a separation of powers and functions between the political and administrative leadership, and enables the National Council of Women to fulfil obligations under international obligations.

In the same year the Government also enacted four pieces of legislation that impacted on the status of women in PNG. These were the repeal of the *Sorcery Act* 2013; the *Criminal Code (Amendment) Act* 2013; and the *Family Protection Act* 2013. The repeal of the *Sorcery Act* 1971 was to remove the belief in sorcery as an excuse to assault and sometimes kill innocent people, particularly vulnerable women.[20]As one of the consequences to the repeal of the *Sorcery Act*, the *Criminal Code Act* 1974 was amended to include two additional offences that would attract the death penalty: (1) sorcery-

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17 See *State v Kankan* (2017) N6630.

18 See brief comments on this legislation in Reference by *Igo Namona Oala* (2011) SC1129.

19 See *State v Laina* (2008) N3344 (stealing of NCW funds).

20 Constitutional and Law Reform Commission. *Review of the Law on Sorcery and Sorcery Related Killings* (Port Moresby: CLRC, 2012).

related killing, and (2) the rape and killing of a child under the age of 10 years. The *Criminal Code Act* was amended again in the same year to cater for human trafficking.[21]

The *Family Protection Act* was enacted to address domestic violence in the country. The legislation is a new law that responds to the escalating incidence relating to gender-based violence. This Act is aimed at addressing gender-based violence and abusive partners. This law makes domestic violence a criminal offence which carries a penalty of two years imprisonment. Recently in *State v Simba (No2)* (2015) N6015, Justice Geita sadly observed that, even with the enactment of the *Family Protection Act* in 2013, domestic violence appears to be on the increase.

In 2014, the Government quietly enacted another law that gave greater protection to customary marriage. The *Civil Registration (Amendment) Act* 2014 was crafted by the CLRC with the full support of the DCDYR and other sister agencies. With this law, all births, deaths and marriages will now be compulsorily registered. This new law also provides for the issuance of a National Identification Number to every citizen. It also provides that a customary marriage can now, for the first time since Independence in 1975, be registered as a legal marriage. This means that women who married under custom can now seek protection in terms of their husband's assets and properties if there was a divorce or death.

The *Lukautim Pikinini Act* 2015 was enacted to protect children and especially women and the girl child. This legislation addresses issues relating to child welfare, with a particular focus on the protection of children. Issues involving custody, maintenance, adoption, child protection services, pregnant women in contact with the law (e.g prison) and their children are now covered by this law. The *Infants Act*, the *Deserted Wives and Children's Act* and the *Lukautim Pikinini Act* 2009 were repealed by this new Act. The *Lukautim Pikinini Act* 2015 provides a one-stop-shop for all matters relating to the welfare of a child. In addition, the law provides for clear administrative structures at the national, provincial and district levels.

The Government has through the CLRC, been spearheading a number of legislative reforms with relevant government and other stakeholders, to reform the laws to reduce gender inequality in the country. Some of these Bills are now before the relevant regulatory bodies for approval while work is continuing on others. The Bills that are awaiting regulatory approvals include: (1) Marriage (Amendment) Bill 2015; Matrimonial Causes (Amendment) Bill 2015; and Censorship Bill 2015. The CLRC has also been working on the Women's Health Protection Bill and the Women's Protection Law for Bougainville.

The Marriage (Amendment) Bill is aimed at defining marriage as a union between a consenting man and a woman. The law will complement the *Lukautim Pikinini Act* 2015 which now outlaw's child marriages (under 18 years).[22] The Matrimonial Causes (Amendment) Bill seeks to provide equality of parents to children in divorce proceedings and also the equal apportioning of properties between the spouses. The Censorship Bill introduces new offences relating to the abuse of women and girls.

The proposed Women's Health Protection Bill deals with screening, vaccination, treatment and management of breast and cervical cancer. Cervical cancer is the biggest killer of women in PNG and the developing world. According to Professor Emeritus Khunying Kobchitt Limpaphayom, globally, more than 500,000 new cases and more than 275,000 deaths annually relate to cervical cancer; and 85% of cervical cancer cases and deaths occur in developing countries.[23] In PNG, over 1000 new cases of cervical cancer are diagnosed annually and kill about 663 women a year.[24] This data shows how increasing and widespread cancer is among the women. Therefore, CLRC has proposed a Women's Protection Bill, which was presented for the first time at the Medical Symposium on the 2nd of September 2015, at the Gateway Hotel, Port Moresby, PNG.

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21 See *Konori v Jant Ltd* (2015) N5868 for a brief statement on this legislation.

22 Section 86, *Lukautim Pikinini Act* 2015.

23 Guest Speaker at the Medical Symposium, Caritas Technical School, Port Moresby, Papua New Guinea, September 2015.

24 Human Papillomavirus and Related Diseases Report 2019 at www.hpvcentre.net (accessed on 14 July 2019).

The Women's Health Protection Bill is aimed towards protecting women from cancer, particularly cervical and breast cancer; providing services for vaccination, screening and treatment. Given the sensitivity and the technicalities involved in the processes, the CLRC worked closely with the PNG Women Doctors Association to draft the Bill.[25]

In 2016, the Government again through the CLRC collaborated with the UN Women in PNG to develop a Women's Protection Bill for Bougainville. The aim of the proposed law is to develop a one-stop-shop law covering various issues relating to women. There are already examples of this type of law in the Asia Pacific region which PNG wants to emulate. The CLRC was also, through this partnership, developing a Bill to statutorily establish the Bougainville Women's Federation (BWF). This activity has progressed rapidly with the presentation of the draft Bill to the BWF Annual General Meeting in October 2016.[26]

Implementing CEDAW

The CEDAW is the key international instrument to measure gender parity. CEDAW is an important human rights tool that promotes equality between men and women. PNG ratified the CEDAW in 1995. After thirteen years, it presented its first and only periodic report in 2010 under the leadership of the then Minister for Community Development, Dame Carol Kidu. The next periodic review was scheduled for 1 July 2014 (4th periodic report), but the report is yet to be submitted.

Since the 2010 CEDAW observation report, the Government has through its different agencies undertaken various activities to comply with CEDAW. However, these efforts have been sporadic and uncoordinated. For instance, in the area of law, the country amended its law on Decentralisation in 1997 to require the participation of women in political leadership at the provincial and local levels of Government.[27] Then in 2000, it amended the *Criminal Code* to address sexual violence against women and girls.[28] The Government also amended the *Evidence Act* to make a spouse in sexual offence cases not only competent but also a compellable witness. No further law reform was undertaken until in the last seven years as indicated by the table below. The increase in legislative reforms is attributed largely to the work of the Government through its law reform agency – the CLRC.

The Table below shows a summary of the principal areas of concern and recommendations that came out of the Forty-sixth Session, on 30 July 2010 by the Committee on the Elimination of Discrimination against Women for PNG and the efforts of the Government in addressing these concerns.

	Principal areas of concern	**Recommendations**	**Status**
1.	Recommendation 24: Temporary Special Measures	State party consider applying various types of temporary special measures in areas in which women are underrepresented or disadvantaged.	Proposed Organic Law on Decentralisation 2019 to create a seat for women in the 22 Provincial Assemblies

25 The Bill is being finalized by CLRC for presentation to stakeholders before a final draft is submitted to regulatory authorities for endorsement and enactment.

26 The draft Bill was completed and presented to the Bougainville Government in 2017 for enactment by the ABG Parliament.

27 In 1995 the Government introduced the *Organic Law on Provincial Governments and Local-level Governments* 1995 to usher in a two-tier system of government at the sub-national level. Two important provisions in the Organic Law now enables 22 women to participate in the 22 Provincial Governments and two women in each of the rural local-level Governments and one woman in every urban local-level government.

28 The amendments to the Criminal Code increased penalties for sexual offences against women and girls and also banned child prostitution and pornography.

2.	Recommendation 26: customary practices and stereotypes	The State party to put in place without delay a comprehensive strategy, including legislation, to modify or eliminate customary practices and stereotypes that discriminate against women in conformity with articles 2, 2 (f) and 5 (a) of the Convention.	Proposed Organic Law on Gender Equity being developed by CLRC
3.	Recommendation 28: torture and killings of women and girls	State party to take immediate and effective measures to investigate the incidences of torture and killings of women and girls, especially old women, based on accusations of witchcraft or sorcery, to prosecute and punish the perpetrators of such acts and to prevent their reoccurrence in the future.	(a) Repeal of *Sorcery Act* 1971 (b) Amendments to *Criminal Code* 2013 to impose death penalty for rape of girl under 10 years and sorcery related killings
4.	Recommendation 30: violence against women	State party to undertake in-depth study on all forms of violence against women and report to the Secretary-General (A/61/122/Add.1 and Corr.1).	(a) *Family Protection Act* 2013 (b) Amendments to Criminal Code 2000 (sexual violence) (c) Proposed Organic Law on Gender Equity
5.	Recommendation 32: on trafficking in human beings	State party to prepare and adopt a legislative framework on trafficking in human beings, including the prevention of trafficking, the timely prosecution and punishment of traffickers, the provision of protection from traffickers/agents and quality support and programmes for victims.	Amendments to *Criminal Code* 2015 (human trafficking)
6.	Recommendation 34: Equality and Participation Bill with 22 reserved seats for women in Parliament.	State party to expeditiously adopt, through its Parliament, the Equality and Participation Bill with 22 reserved seats for women in Parliament.	Constitution amended in 2011 to provide for 22 Women Electorates. Still waiting for amendments to Organic Law on National and Local Government Elections to provide election procedure
7.	Recommendation 36: registration of all births and marriages	The State party take effective measures to achieve timely registration of all births and marriages and undertake awareness raising measures, throughout the country, particularly in rural and remote areas, on the importance of registering births for the equal status of women.	(a) Amendments to Civil Registration Act 2014 (provides for registration of all Papua New Guineans and marriages) (b) Proposed amendments to Marriage Act 2015 to protect marriages
8.	Recommendation 38 Bougainville Education Plan	The Committee recommends that the State party continue to strengthen its efforts under article 10 of the Convention through implementation of	(a) Free Education Policy of national Government covering ABG

		its 10-year education plan and the Bougainville Education Plan in order to achieve the equal access of all girls to all levels of education in line with the Millennium Development Goals.	(b) Proposal for Bougainville Women's Protection Law
9.	Recommendation 40: women in the labour market	The State party to ensure equal opportunities for women in the labour market, in accordance with article 11 of the Convention	(a) Proposed amendments to the labour laws 2016-17 (b) Review of the Workers Compensation Act 2015-18
10	Recommendation 42: health care	The State party to take concrete measures to enhance all aspects of health care for women in accordance with article 12 of the Convention and the Committee's general recommendation No. 24 on women and health in order to effectively address differential needs in the area of general health and the specific health needs of women, including those with special needs.	Proposed Women's Health Protection Bill 2015
11.	Recommendation 44: HIV/AIDS	The Committee recommends that the State party take continued and sustained measures to address the impact of HIV/AIDS on women and girls, as well as its social and family consequences.	Ongoing liaison with Aids Council to review HIV/AIDS Management and Prevention Act
12.	Recommendation 46: poverty alleviation and sustainable development.	State party to make the promotion of gender equality an explicit component of its national development plans and policies, in particular those aimed at poverty alleviation and sustainable development.	Responsible Sustainable Development 2014 (national policy to supplement Development Strategic Plan 2030)
13	Recommendation 48: de facto situation	State party to provide in its next report a comprehensive picture of the de facto situation of disadvantaged groups of women, including older women, women with disabilities and migrant women, in all areas covered by the Convention, as well as information on specific programmes and achievements.	(a)Disability Bill completed and before State Solicitor for clearance to go to Parliament in 2019 (b) Proposed Organic Law on Decentralisation 2015provides seat for people with disability on 22 Provincial Assemblies
14	Recommendation 48: marriage and family relations	The State party to harmonize its civil, religious and customary law with article 16 of the Convention and to accelerate reform in respect of the laws relating to marriage and family relations in order to bring its legislative framework into compliance	(a) Proposed Marriage (Amendment) Bill 2015 to protect marriages (b) Proposed Matrimonial Causes (Amendment) Bill

		with articles 15 and 16 of the Convention.	2015 to protect married women's property and enable registered customary marriages to fall under this law **(c)***Lukautim Pikinini Act* 2015 (provides safeguards for children and families)
15	Recommendation 52: Autonomous Region of Bougainville: equal opportunity and participation in the decision-making processes	Autonomous Region of Bougainville: The State party to take the necessary measures to ensure women's involvement in the establishment of peace and reconciliation in Bougainville, including through their equal opportunity and participation in the decision-making processes in all spheres of development.	Work on proposed Bougainville Women's Protection Law (CLRC and UN Women 2017)

The Government has provided strong support to the CLRC to progress legislative reforms to ensure the government achieves the aims of CEDAW. It is promising to note that since 2013, the CLRC has been actively promoting this agenda through the CEDAW Compliance Legislative Reform Program. The aim of the program is to consult partners and stakeholders to implement the findings and recommendations contained in the 2007 'CEDAW Legislative Compliance Review' Report of UNIFEM. Since the publication of this report, little has been done by the Government to implement the recommendations of that study which identified a number of laws that needed to be repealed or amended to enable the country's compliance with CEDAW. The CLRC approved this program because it realised that the Commission needed to contribute to the Government's effort in arresting gender inequality in the country.

The CEDAW Compliance Legislative Reform Program therefore follows from the Government's commitment and assurance that it was moving forward to ensure that the provisions of CEDAW were fully complied with. The CEDAW Compliance Legislative Reform Program is managed by the CEDAW Legislative Review Committee established by the CLRC 'to review, assess and propose changes to laws relating to the welfare of women'. The Working Committee is made up of UN Women, Department of Justice and Attorney General, Consultative Implementation and Monitoring Council (CIMC), the Office of the Legislative Counsel, Teachers Association Welfare Fund, PNG Women Doctors Association and the Civil Registry Office. It has expanded in recent meetings with representatives from other agencies joining the Working Committee- Welfare Office, Office of the Development of Women, the Department of Community Development, National Council of Women, YWCA and the UNDP.

Through the coordination of the CEDAW Legislative Review Committee, proposed amendments to two laws relating to women have been workshopped, finalised and submitted to the relevant regulatory bodies for approval to be presented to the Parliament for enactment. These two laws are the Matrimonial Causes (Amendment) Bill, and the Marriage (Amendment) Bill. They are in compliance to CEDAW and particularly address the gaps identified in the 'CEDAW Legislative Compliance Review' report.

The Working Committee has been working on a comparative study project towards compiling a Report on CEDAW Compliance in PNG. The project was started in October 2016 and suspended in the early part of 2017, and was reactivated with funding from UN Women. The aim of the project is to engage stakeholder organisations, identify, and compile relevant data. The project will shed some light on the different activities that organisations are doing to address inequality, particularly on CEDAW compliance in PNG.

The Fight Back against Gender Inequality by Non-State Actors

The issue of GBV and gender inequality is not only being tackled by the Government but also the private sector, including NGOs. There is a strong fight back against this evil that ravages families and communities in the country by non-State actors. Examples include the breakthrough work of Femili PNG Inc; the Digicel Foundation's 'Man of Honor Program'; Westpac Bank's 'Outstanding Women Award'; and the City Pharmacy Limited's 'Pride of PNG Awards for Women'. These positive interventions by non-State actors add value to the efforts of Government in the policy and legal spaces.

For instance, in a 2017 report by Femili PNG Inc, an NGO based in Lae that deals with survivors of family and sexual violence, the organisation recorded that:

> 257 men signed a pledge to end family and sexual violence in their homes and communities during the 2016 Morobe Show held on October 15 and 16. 46 women also signed the pledge. They traced their palm on a piece of coloured paper and signed their name to show their support to end family and sexual violence in Lae and around the country.
>
> "I will not use this palm to hit my wife or daughter or even my children… I promise. This is my commitment during this 2016 Morobe Show," said a father of four from Bulolo, as he signed the pledge against FSV. More and more male teenagers, including school children signed up to support the call to end FSV issues in their families, in Lae city and in PNG.
>
> "I just do not want to see or hear women and children becoming victims to FSV in my neighbourhood," said Jacky Hiob, an 18-year-old student. "We boys should respect girls and celebrate them because they are very special", Patt Mais, another male teenager said. "We will say NO to family and sexual violence. We want change… we do not want to see our mothers and sisters affected by this," a group of boys from Bayun High School said.
>
> These boys were part of a group of enthusiastic show-goers who made these decisions after learning of the plight of female FSV survivors.[29]

This is a small but a powerful story about change. A change in attitude and behaviour that goes unnoticed by local and international observers of gender-based violence in PNG. Another powerful story is that of Digicel Foundation's Man of Honour Program that seeks to recognise and promote men of integrity who stand up to violence within their communities.[30]

The Westpac Bank's 'Outstanding Women Award' and the City Pharmacy Limited's 'Pride of PNG Awards for Women' are programs designed to identify and celebrate outstanding women across the country. These outstanding women are nominated by individuals and communities according to various categories and are put through a rigid screening process before winners are announced. These two award programs are very successful and encourage more women to stand up and take leadership roles in their communities to promote gender equality.

These positive developments by the non-State actors and the push by the Government to reverse gender inequality is a fight back that must be recognised and applauded by everyone who is interested in the fight against gender-based violence and gender inequality.

In the international arena, these stories do not get mentioned appropriately. I would like to posit that, although PNG does have a serious problem with gender-based violence, positive and serious steps have been taken by the Government of PNG and the private sector and the NGO community to reverse the trend. This shift is an acknowledgement by the people and the Government that gender-based violence does negatively impact on the development of PNG.

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29 http://www.femilipng.org/png-men-pledge-to-stop-violence/ (accessed 9/10/17).

30 See the October 2017 Digicel Foundation Newsletter.

Conclusion

The picture is clear – PNG has made a marked improvement in its effort in addressing gender inequality through both law and policy. PNG has made major inroads in the last 10 years in promoting gender equality and protecting women and children through policy and legal reforms. The challenge for PNG is sustaining its efforts over the long term. There is hope that the Government will continue to push for more legislative and policy reform to align with CEDAW.

The 2012 reports by the Government of PNG and its partners and the World Bank and the report by SPC highlighted a number of strategic approaches that PNG needed to take to tackle gender inequality. One of these is through policy and law reform. The work of the Government in reforming the policy and law on gender is a positive step and shows the Government's commitment to reducing gender inequality in the country. The policy and law reforms will, over time, positively influence changes in societal behaviour and attitudes towards the women of Papua New Guinea.

The work of the non-State actors as partners to Government in this space is encouraging and commendable. This partnership highlights the importance of working together as friends to ensure that the Government systems and processes are equitable and inclusive to achieve gender balance.

Admissibility of Claims under the National Land Registration Act 1977

Molean Kilepak, LLB, LLM*

Introduction

Between 1999–2000, the National Lands Commission admitted a number of claims for settlement payment over land declared as 'national land' pursuant to the *National Land Registration Act* 1977 (NLR Act). The then Commissioner admitted such claims, where in most instances, he issued a second award to replace an existing award which was contrary to the statutory threshold provided for under Schedule 2 of the Act. The State then sought judicial review of 52 cases in *Sao Gabi v Kasup Nate & Ors* (Unreported) N4020, challenging the powers of the Commissioner in awarding excessive amounts contrary to the statutory limit. The National Court quashed the decisions of the Commissioner and remitted all matters back to the National Lands Commission for re-hearing.

As a result of this judicial review, the Act was amended in 2006. While the policy intention is clear, it has also created some ambiguity in the administration of the Act when applying the admissibility test. Issues related to the requirement to give notice under the *Claims By and Against the State Act* 1996 (CBASA), the definition of a prescribed time to make a claim, and the discretion provided to the Commissioners, and ex gratia payments, are but some issues that require discussion in the context of admissibility of claims for settlement payments.

In addition to the above policy issues, there is also the need to understand the underlying concept of "settlement payments" as opposed to 'compensation' when claims are submitted. Ideally, claims for settlement payments are submitted by "former customary landowners" and claims for compensation are submitted by customary landowners.

This paper focuses on the issue of 'admissibility of claims' under Part VI of the NLR Act. The intention is to discuss how claims were and are being admitted, the total number of claims admitted since 1978, and a discussion on a few recent cases on how the admissibility test has been applied by the Commission. In discussing such cases, I will also consider in brief some possible way forward. I am also mindful that this is a matter that is best covered through the proposed merger of the National Land Commission and the Land Titles Commission. This paper is therefore focused primarily on creating awareness on the admissibility of claims for settlement payments under the NLR Act.

The Historical Legal Context

The need to address customary land matters in Papua New Guinea (PNG) goes way back before PNG achieved independence in 1975 as can be noted from several land related legislation. In 1952 the *Native Land Registration Ordinance* established the Native Land Commission with authority to determine ownership of customary land if disputes arose during the registration process. This mechanism is important for the purposes of this paper as one would assume that a proper registration process would have been completed before an acquisition was made by the colonial administration over the respective customary land.

The Native Land Commission was replaced by the Land Titles Commission (LTC) in 1963. In its early years the Land Titles Commission, had exclusive jurisdiction to hear disputes over customary land and applications for ownership of that land, but over the years, the jurisdiction of the Land Titles Commission was reduced.

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The Commission of Inquiry Into Land Matters (CILM) of 1973 concluded that the introduced system of deciding land disputes under the Native Land Commission and later the Land Titles Commission had not worked effectively and it recommended replacing it with a '*decentralized system of village-based courts with powers to dispense justice based on local customs and sanctions'* and with support from the government. The LTC has had a long history of having amendments made to it but it is not my intention to discuss this aspect other than to note that it would have had a part to play in the colonial acquisitions made prior to Independence.

The Commission of Inquiry into Land Matters 1973

Land issues featured prominently in Papua New Guinea's legislature during the period leading up to independence. Oliver and Fingleton noted that four administration-sponsored Land bills were rejected by the House of Assembly from 1968 to 1972.[1] This rejection was considered by many as a turning point in the nation's history as an early expression of growing independence. The CILM was established by the subsequent House of Assembly (1972–75), which was the first Parliamentary Committee fully constituted by elected members, to inquire into an increase in tribal fighting in the early 1970s. It was strongly suggested by the CILM members in 1973 that most fights were connected with land disputes and that pressures on land, created by population increases and the planting of permanent cash crops (coffee in particular), had produced high levels of anxiety about land and undermined traditional authority.[2] The undermining of traditional authority has become one of the main grounds of argument relied upon by present day former customary landowners when submitting claims for settlement payments under the NLR Act.

The CILM Report of 1973 made numerous recommendations, including recommendations on basic principles of land policy, customary land, rural land, urban land, dispute settlement, land administration, surveying and forestry. The CILM's guiding philosophy was that land policy *'should be an evolution from a customary base, not a sweeping agrarian revolution'*. It recommended an entirely new system for settling land disputes, based on the principles that:

- people should settle their own disputes (and not pass that responsibility on to officials);
- the process of dispute settlement should be brought much closer to the people;
- hearings should not be confined solely to who owns the land, but should also consider the rights of others to use the land and the needs of the parties in dispute.

The CILM Report recommended the abolishment of the Land Titles Commission as an agency for settling disputes over customary land and be replaced by a three-tiered system of mediation, arbitration and appeal that was a part of the national judiciary and was decentralized to the provinces and the districts. The current *Land Disputes Settlement Act* 1975 therefore was drafted in accordance with these recommendations and is one of the earliest pieces of legislation to result from this inquiry. As a result, the Local Land Courts now have jurisdiction to hear land ownership disputes under the *Land Disputes Settlement Act* over matters emanating from the Land Titles Commission and the National Land Commission.

Titles to Pre-Independence Acquisitions

Pre-Independence acquisitions over customary land made by the colonial administration were also subject to some challenges. The State's ownership over such colonial acquisitions was confirmed by the *Evidence (Land Titles) Act* 1969. This legislation was enacted to provide clarity on those titles which were not registered under the Torrens system but were the subject of an acquisition through some method of payment. Under this legislation, the existence of a purchase document was adequate to establish ownership of title by the State. The *Evidence (Land Titles) Act* was repealed by the NLR

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1 Oliver, N and Fingleton, J, "Settling customary land disputes in Papua New Guinea", MLW, Vol 2, p.227 at http://dfat.gov.au/about-us/publications/Documents/MLW_VolumeTwo_CaseStudy_11.pdf.

2 Fingleton, JS, "Policy-making on lands", in Ballard, AJ, (ed.), *Policy-making in a new state: Papua New Guinea 1972–77*, (Brisbane, University of Queensland Press, 1981) 225.

Act. The provision of purchase documents by former customary landowners is still being considered by the Commission as evidence that the subject land was purchased by the colonial administration.

As noted above, the NLR Act and the *Land Disputes Settlement Act* were a direct result of the recommendations from the CILM Report. The CILM provided the policy rationale for most of the provisions under the *National Land Registration Act*.[3]

Overview of the National Land Commission

The National Land Commission (the Commission) is established under Section 25 of the NLR Act. It was established as a result of the CILM to act as a mechanism to address indigenous peoples' concerns on the inadequacy of payments by the colonial administration upon the acquisition of their land for State use and other public purposes. The primary purpose of the Commission is set out in the preamble to the Act. The preamble reads:

> *Being an Act to–*
>
> *(a) establish a Register of National Land; and*
>
> *(b) make provision for the registration in the Register of National Land of all land acquired or to be acquired by the State on or after Independence Day; and*
>
> *(c) make provision for the registration in the Register of National Land of land acquired before Independence Day by a pre-Independence Administration in Papua New Guinea and which is now required for a public purpose; and*
>
> *(d) give effect to Section 54(a) (special provision in respect of certain lands) of the Constitution by providing for the recognition of the title of the State to certain land that is required for public purposes, the title to which may be, or may appear to be, in doubt; and*
>
> *(e) settle grievances in relation to the land described in Paragraph (d) by providing for certain settlement payments; and*
>
> *(f) declare and describe, for the purposes of Section 53(1) (protection from unjust deprivation of property) of the Constitution, certain matters as public purposes and justified reasons for the acquisition of property,*
>
> *(g) give effect to Section 53(2) of the Constitution that just compensation must be paid by the expropriating authority, giving full weight to the National Goals and Directive Principles and taking into account the interests of the State as well as the person or persons affected,*
>
> *and make provision for those and related purposes.*

Paragraph (g) was inserted as an amendment in 2006, probably as a result of arguments raised before the courts on the issue of just compensation under the *Constitution*. What was paid in exchange for the acquisition of land at that material time may amount to just compensation and it must be viewed differently to settlement payments awarded under the NLR Act. The intention of the NLR Act and the primary focus of the Commission therefore will attract differing views.

Lawrence Kalinoe argued that the primary focus of the Commission is to establish a Register of National Land and provide for the registration in the Register of National Land of all land acquired or to be acquired by the State on or before Independence Day, and that are intended to be retained by the government and or its instrumentalities. He further argues that the settlement of grievances by aggrieved Papua New Guineans as former customary landowners is secondary to the need to keep a Register - which indicates State ownership over such acquired land.[4] There is merit in this argument when one looks at the rationale behind having an admissibility test before settlement awards are issued. It can be argued that land has already been acquired and the need for such a declaration is to preserve the State's ownership and title over the said land. The focus should be in keeping a Register of all such acquisitions.

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3 The CILM Report of 1973 is a great read for those who wanting to know more about the policy rationale for the country's customary and national land administration.

4 Kalinoe, L, "Compensating Alienated Customary Landowners in Papua New Guinea: Rethinking the rationale and the regime" [2005-06] MLJ 63 (1 January 2005). http://www.paclii.org/journals/MLJ/200513.html.

Functions and Procedures of the Commission

Section 33 of the NLR Act provides for the functions of the Commission. It states that the Commission has such jurisdiction, privileges, powers, functions, duties and responsibilities as are conferred or imposed on it by or under this or any other Act.

Section 34 of the NLR Act deals with the procedures of the Commission. It provides that subject to this and any other Act, the procedures of the Commission are as determined by it. It also states that the Commission shall comply with the principles of natural justice and that all hearings of the Commission shall be conducted in public and heard before one Commissioner.

It also provides that the Commission is not bound by technical rules of procedure and shall–

1. investigate, and inform itself on, any matter before it in such manner as it thinks proper; and
2. admit and consider such relevant information as is available.

In the absence of any set of guidelines or the development of practice directions[5] by the Commission in the conduct of its proceedings, it is always difficult to ascertain the extent to which a Commissioner would conduct the proceedings. However, in the absence of such guidelines and or practice directions, it is envisaged that Commissioners would look towards similar quasi judicial entities or tribunals to seek guidance from.

The Commission would only have jurisdiction to settle a grievance when such an acquisition has been declared as national land under Section 9 or Section 13 of the NLR Act. Section 9 of the NLR Act follows on from a Notice of Intention issued under Section 7. Similarly, Section 13 declarations follow on from a Notice of Intention issued under Section 11.

Sections 7 and 9 relate to acquisitions made prior to Independence Day whereas Sections 11 and 13 relate to acquisitions made on or after Independence Day. The required processes and procedures are similar in nature for both types of acquisitions.

Acquisitions Prior to Independence Day

All land acquired before Independence Day are dealt with under Division 2 of the NLR Act which comprises Sections 5 to 10. Section 5 deals with the application of Division 2 and provides that it does not apply to rights in respect of land that–

1. were acquired by the State on or after Independence Day; or
2. are the subject of a decision as to title the effect of which is that the land is customary land.

Section 7 is the trigger mechanism for declarations over acquisitions made prior to Independence Day. It provides that where the Minister is of the opinion that (1) any land was acquired before Independence Day by a Pre-Independence Administration in Papua New Guinea, or the land is required for a purpose or a reason that is declared or described by Section 3 or by an Organic Law or another Act to be a public purpose; or a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, the Minister may, by notice in the National Gazette, intimate his intention to declare, not earlier than the expiry of three months following the date of publication of the notice, that the land is National Land.

A pre-Independence administration in PNG is defined under Section 1 of the NLR Act to mean:

1. the Administration or Government of a former Territory or the Government of Australia acting in relation to any such Territory; or
2. the British Military Administration of the former colony of German New Guinea (also known as the Territory of New Guinea); or
3. the Administration or Government of the former Possession of British New Guinea; or
4. in relation to the former Colony of German New Guinea–the German Imperial Government or the German Government or the Fiscus of that Colony.

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5 Section 34(6) of the *National Land Registration Act.*

Section 7(2) further requires that such a notice shall:

(*a*) contain a description of the land; and
(*b*) where the Minister is of the opinion that there may be a genuine dispute[6] as to whether the land was acquired validly, or at all, from the customary owners–refer to the fact that there may be a genuine dispute as to the acquisition of the land, but the omission of such a reference shall not be deemed to imply that such a genuine dispute does not exist; and
(*c*) state that any person aggrieved by the notice may make representation to the Minister within 60 days of–
  (i) the date of publication of the notice in the National Gazette; and
  (ii) compliance by the Minister with the requirements of Section 52; and
(*d*) specify the estate acquired in the land.

Section 8 of the NLR Act provides an avenue for persons aggrieved by such notice to make a representation to the Minister. It provides that any person aggrieved by a notice under Section 7(1) may, within 60 days of the date of publication of the notice in the National Gazette, and compliance by the Minister with the requirements of Section 52, make representation to the Minister. Where the Minister has published a notice under Section 7 in respect of any land, he may, pursuant to Section 9(1), declare, by notice in the National Gazette, that the land, or any part of the land, is National Land. Section 9(2) further provides that a declaration made under Subsection (1) shall contain a description of the land and specify the estate in the land acquired by the State.

Section 10 allows for an appeal against a declaration of National Land. Subsection (1) provides that subject to Sections 57 and 155 of the *Constitution*, and to Section 6, a declaration under Section 9 is not subject to appeal or review, and shall not be called in question in any legal proceedings; and compensation is not payable in respect of or arising out of any such declaration, except as provided in the section. Subsection (2) provides that a person aggrieved by a declaration under Section 9, may in accordance with and subject to Part VI, make a claim for a settlement payment.

What is not clear is the process and procedures by which any representations can be made to the Minister by aggrieved person(s) within the 60 days period. While the rationale for such a representation is not clearly spelt out, one would think issues relating to the demarcation of boundaries, and whether the acquired land is still customary land would be grounds for such representations. It is also interesting to note that aggrieved persons are still allowed to make claims for settlement payments after the three months period – even raising the same representations that would otherwise have been raised with the Minister prior to a declaration. While there is reference to a prescribed time to make a claim, it is not defined, and as such, claimants have submitted claims even after a year. These issues will be discussed below.

Acquisitions on or after Independence Day

All land acquired on or after Independence are dealt with under Sections 11 to 13 of the NLR Act. Similar to acquisitions made prior to Independence Day, Section 11 provides that where for any purpose the State has acquired land on or after Independence Day, the Minister shall, by notice in the National Gazette, intimate his intention to declare, not earlier than the expiry of three months following the date of publication of the notice, that the land is National Land.

Section 11(2) provides that such a notice shall contain the following:

1. a description of the land;
2. state that any person aggrieved by the notice may make representation to the Minister within 60 days of the date of publication of the notice in the National Gazette;
3. compliance by the Minister with the requirements of Section 52; and
4. specify the estate acquired in the land.

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[6] Section 6 provides that, a genuine dispute concerning any land may exist notwithstanding the fact that the land is, as a matter of law, vested in one or more of the parties to the dispute.

Similar to Section 8, Section 12 does allow for a person aggrieved, to make representations to the Minister by notice. It provides that any person aggrieved by a notice under Section 11 may, within 60 days of the date of publication of the notice in the National Gazette and compliance by the Minister with the requirements of Section 52, make representation to the Minister.

Where the Minister has published a notice under Section 11 in respect of any land he may after three months declare, by notice in the National Gazette, that the land, or any part of the land, is National Land. Such a declaration shall contain a description of the land and specify the estate in the land acquired by the State.

Effect of Ownership of National Land and Title to Land

A National Land granted by the State or a pre-Independence Administration vests in the State on the date of a declaration under Section 9 or 13 to the extent of the estate declared, and may be dealt with in the same way as other land the property of the State.[7] Section 16 requires the Minister to advise the Registrar[8] of such declarations he makes. It provides that where the Minister makes a declaration of National Land under Section 9 or 13, he shall immediately send to the Registrar a copy of the declaration. Section 18 also provides that where a copy of the declaration is received by the Registrar under Section 16, he shall register the land as National Land.

Section 19 further provides that an entry in the Register is conclusive evidence that the State has title to the land the subject of the entry. Therefore, the combined effect of Sections 14, 16 and 19 is that State only needs a declaration under Section 9 or 13 to effect ownership and title to the land so acquired. The keeping of a Register is conclusive evidence of State's ownership and title to the respective land.

The Commission's Registrar therefore does not have the mandate to keep records of the declarations as it is supposed to be kept by the Registrar of Titles appointed pursuant to the *Land Registration Act* 1981.

Admissibility of Claims

Once a declaration has been made by the Minister pursuant to Sections 9 or 13 of the NLR Act, the process for settlement hearing pursuant to Section 39 commences. Section 39 (1) provides that within the prescribed time after the publication of a declaration under Section 9, or within such further time as the Commission, in special and unusual circumstances, allows, a person who is aggrieved by the declaration under Section 9 or Section 13[9] may make a claim to the Commission for a settlement payment in respect of the land the subject of the declaration. Section 39(2) further provides that a claim under Subsection (1) shall be made in the prescribed manner, but this subsection does not prevent the Commission from accepting, on such conditions as to notice or further particulars or otherwise as it thinks proper, a claim made in any manner. Section 39(3) further provides that 'a copy of the notice of claim under Subsection (1) shall be served on the Attorney General or Solicitor General'.[10]

However, before proceeding any further with a claim under Section 39, Section 41 requires the preliminary issue of admissibility to be satisfied first. It provides that before proceeding further in the matter of a claim under Section 39, the Commission shall decide whether the claim is admissible in accordance with Section 40.

It is in this context that claims are admitted pursuant to Section 40 requirements. This provision therefore acts as a filtering mechanism to screen such claims. It starts off by defining who a 'prescribed person' is for the purposes of submitting a claim. It provides that a prescribed person means:

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7 See s14 of the NLR Act.

8 Registrar is defined to mean Registrar of Titles appointed in terms of the *Land Registration Act* 1981.

9 Amendment No 25 of 2006.

10 Section 39(3) is a new inclusion pursuant to Amendment No. 25 of 2006.

1. A claimant; or
2. A customary group which the claimant represents or by virtue of his membership of which he makes the claim; or
3. A person or customary group who or which is the predecessor in title of the claimant or of the group; or
4. A person or group acting on behalf of, or claiming as co-owner of a right with any such person or group.

A 'claimant' is defined under Section 1 to mean a person making a claim under Section 39 to a settlement payment under this Act, and includes a person who is joined as a claimant under Section 42, or is deemed by Section 47(2) or 49(2) to have made a claim under Section 39.

These definitions need to be understood in the context of admitting claims for settlement payments. In particular, Section 40 (2) provides that a claim under Section 39 is admissible only if a prescribed person had made, before Independence Day, a previous claim to the land or to the right the subject of the claim, under a law by virtue of which a claim to the land might have been made, and no payment (including *ex gratia* payment) for the land or for the right was made to the prescribed person in respect of a purported acquisition by a pre-Independence Administration in PNG. Subsection (3) also provides that where, in the opinion of the Commission, there were special reasons which made it reasonable that no previous claim referred to in Subsection (2) was made, and in the circumstances of the particular case, it would not be just to enforce the provision, the Commission may admit a claim which is otherwise inadmissible under Subsection (2).

Section 40 therefore establishes three fundamental principles in admitting a claim for settlement. It provides that for a claim to be worthy of being awarded settlement payment, it must be made:

1. By a prescribed person;
2. No payments, whether ex gratia or not were made at the time of acquisition of the land; and
3. There were special circumstances that made it reasonable to say that no claims were made previously, and in the circumstances, it would not be proper or just to enforce those special circumstances.

While reference is made to the need for a prescribed person to make a claim prior to Independence Day, the Commission has been given wide discretion to disregard the need for a claim to be made prior to Independence Day due to special reasons or circumstances. This discretion has been used widely by Commissioners when admitting claims for settlement payments.

To improve the process, the Commission has developed a Guideline (or an Information Brochure)[11] that summarizes the issues for consideration during hearing. This Brochure assists claimants to ensure their submissions reflect such requirements. The issues identified for consideration by the Commission include but are not restricted to the following:

1. Requirement to give Section 5 Notice under the Claims By and Against the State Act.
2. Requirement to make a claim within a reasonable time.
3. Claim must be made by a Prescribed Person.
4. Claim must be admissible in accordance with Section 40.
5. Whether or not any person or group could be joined in the Proceedings.
6. Conflicting Claims.

The development of the Guideline has greatly assisted the Commission to concentrate on these pertinent issues when attempting to decide whether or not a claim can be admitted. However, as we shall see, some of the issues, though equally important are not considered by the Commission for admissibility purposes.

The Commission also conducts awareness on the requirements of the Act through Pre-Hearing Conferences. It is emphasized that the claimants must understand that if there were some kind of payments made at the time of acquisition of the land, it is not good enough or relevant to say that the

[11] The Information Brochure was developed in 2016.

payment was not made in cash, but in some other form. For these kinds of claims, any payment, whether it was made in cash, or not, is sufficient payment. It is also irrelevant for the claimants to say that the value of payment was too small at the time of the purchase.

The Commission has applied the admissibility test in cases it has presided over. However, while most claims do not strictly meet the admissibility test, the discretion allowed under Section 40(3) has enabled the Commission to admit such claims, using the Constitutional provisions as a guide.

Application of the Admissibility Test: An analysis of some recently decided cases and options on the way forward

Since 1978, there had been a total of 251 Declarations with 232 relating to acquisitions made prior to Independence Day (Section 9) and 19 relating to acquisitions made on or after Independence Day (Section 13). Out of the 251 Declarations, the Commission had conducted 162 hearings where 110 claims were admitted while 51 claims were rejected. According to the Commission's records, the total amount of awards it made since 1978 is K2,245,992.92. A further recommendation for 50% top up by the Minister amounts to K854,550.95. The total amount payable by the State (with the 50% top up) is K3,182,021.35. However, the Commission is unable to verify if the State has honored all settlement awards by the Commission and whether or not the respective Ministers had approved the recommended 50% top up.

It should also be noted that the above figures do not include the excessive awards made by Commissioner Marum. These include a total of 52 matters that were subject of a judicial review application by the State that resulted in the awards being quashed and the matter referred back to the Commission for re-hearing.[12] Interestingly, there are some matters that were deliberated by Commissioner Marum but were not included in the 52 matters listed for judicial review. Whether the State honours those awards or take further action before the Courts is a matter for the State to decide. The Commission does not have any powers of review or appeal and can only guide the State in honouring such awards. It therefore calls for an appeal process to be included within the existing legislative regime for such excessive awards to be reassessed prior to payments being made. Different Commissioners have had different approaches in admitting claims for settlement awards.

One of the issues emanating from the cases is the definition of a 'claimant'. The problem with the definition provided under Section 1 of the NLR Act is that it does not make reference to a person who had some connections, directly or indirectly to the customary rights to ownership or interest over the said acquired land. It only makes reference to a claim being submitted for settlement awards and a claimant is one of the prescribed persons as defined under Section 40(1). There is a need to expand the definition of 'a prescribed person' to have some connection or interest to the ownership of, or interests, in relation to an acquired land. At the moment individuals have come forward to make claims as a descendant of the person who initially dealt with the colonial administration during the acquisition. In some cases, claimants have argued that the person who dealt with the colonial administration was not a landowner but was someone who had close association with the colonial administration or was someone who could speak and understand English at that time resulting in him representing the former landowners during the transaction.

In *Matter of Land Called Manpolka, Portion 905 (UAL 1307), Milinch Hagen, Fourmil Ramu, WHP* (2017), (Manpolka case) concerning a land area of 21.03 hectares, the Commission noted that there was only one claimant who submitted the claim on behalf of his father although his application made reference to him representing the Kauglapka clan. However, the Commission accepted his claim noting that the definition of a "prescribed person" under Section 40 was wide enough to cover him as a claimant as a prescribed person. The Commission also accepted the payment of one spade as sufficient payment for the land and found that no previous claim was made pursuant to Section 40(2). Two requirements were not met but yet the Commission admitted the claim under Section 40(3).

[12] *Gabi v Nate et al* (2006) N4020.

It is also interesting to note in this matter that the Commission discussed at length the application of the *Claims By And Against the State Act* (CBASA) by making references to *Daniel Hewali v PNGDF*,[13] *Laime v MVIL*, [14] and *Niule No.16 Ltd v NHC*[15] and held that although there was no notice given to the State, it was not a requirement under Section 40 and could not affect the claim being admitted. It also discussed the issue of a reasonable time to lodge the claim, making reference to 60 days as the ideal period to make a claim after the declaration of a national land. Although the claim was submitted after three months it could not dismiss the claim because the prescribed time is not defined under Section 39 and is not a requirement under Section 40 for admissibility purposes.

In *The Matter of Hunja, Portion 1 and 2, Milinch Mendi, Fourmil Kutubu* (2017), the Commission tried to define the issue of a prescribed time to lodge a claim under Section 39 and was of the view that six months from the date of the declaration of a national land is reasonable for such purposes. It held that although there was no Section 5 notice required under the CBASA, it was not a requirement under Section 40 and therefore was not relevant for admissibility purposes. However, the Commission discussed the implications of not adhering to the requirements to give notice under the CBASA. It stated that there is a big difference between claiming for damages for portions of land generally and claiming for settlement payment under the NLR Act because in the case of the former the plaintiff would have claimed damages for the value of the land whereas in the case of the latter the amount claimable is very much restricted by the NLR Act, particularly Schedule 2. The Commission concluded that in such circumstances, the claimant could not enforce his claim as damages under any law other than as settlement payments under the NLR Act.

On the issue of whether or not payments were made during the initial acquisition, there were two alleged payments. One was a payment of 300 pounds by the State agents and the other a payment of 10 pounds by the London Missionary Society who initially settled on the land. With no supporting evidence provided by the State, the Commission accepted the 10 pounds paid by the LMS and held that no payments were made by the State or its agencies. Having being satisfied that the claimant is a prescribed person and no previous payments were made, the claim was admitted even though no previous claims were made under Section 40(2)(a). Although it is not specifically stated, such a decision would have been made by the Commissioner pursuant to Section 40(3) of the Act.

In *The Matter Re Portion 317, Milinch Kukipi, Fourmil, Yule, Gulf Province* (2018), the matter was remitted to the Commission for rehearing by the National Court. The case commenced in May 2015, and after a long adjournment for submissions, the hearing re-continued in July 2018. A preliminary issue for consideration by the Commission, involved the joining of two parties, but having being accorded the opportunity, they failed to file submissions, and as such their claims were struck out. The Commission was satisfied that the claimant was a prescribed person and the claim was made within the prescribed time of six months under the CBASA. It was satisfied that the claims were initially made to the colonial administration in Kerema and no payments were made. The claim was therefore admitted on that basis. An important issue for consideration by the Commission was that relating to the issue of 'prescribed time' under Section 39. In this case, reference was made to the six months time limitation required by the CBASA, but the State took no issue with the fact that the claim was made two years after the declaration. Whether or not the claim would still be admissible even if the State objected, is anyone's guess, noting also the discretion accorded to Commissioners under Section 40 of the Act.

However, in the *Matter of Madan and Kora, Portions 3057 and 1434, Milinch Hagen, Fourmil, Ramu (WHP) (UAL 331 and 332)* (2017), the Commission did not admit the claim on the basis that there was sufficient payment of 102 pounds and 8 pence and that no claims were made previously over the same land. The Commission noted that the claim was made more than a year after the declaration, and it was not satisfied that special and unusual circumstances existed, to warrant an extension of time under Section 39 of the Act. The Commission stated that being unaware of the procedure is not good enough a reason that would be considered as a special or unusual circumstance, to grant an extension.

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13 [2002] PNGLR 146.
14 [1995] PNGLR 224.
15 [2015] PNGLR 246.

The Commission was of the view that 60 days would be the ideal time to make a claim after it was declared in March 2014 and not in April 2015.

Similarly, in the *Mt Ambra*[16] matter, the Commission did not admit the claim because sufficient payment was made to a value of $25,410.00 and a further $6702.00 for improvements. This case initially involved four claims which were later consolidated into one claim of which two claims were outside of the 60 days prescribed time, one claim was within the prescribed time and another was made well before the declaration. Although the Commission accepted the consolidated claim as having being made within the prescribed time and having being satisfied claimants were prescribed persons, it was of the view that the payments were sufficient at the time of the acquisition.

A similar approach was also taken in the *Poroma Government Station*[17] matter where the Commission was satisfied that there was a payment made during the initial acquisition for an amount of $1995.00 in 1968 for an area of 141 hectares and therefore did not admit the claim. However, in this case the prescribed time within which to lodge a claim for settlement payment was held to be within six months from the date of the declaration of the land as national land. The claim was held to be made within the prescribed time (6months), that it was made by a prescribed person, and that although no claims were previously made, the amount paid was a big amount of money which was sufficient for it to be inadmissible.

In all these cases, although claimants were prescribed persons and had made a claim within the prescribed time, the fact that they had received some payment during the initial acquisition rendered their claims inadmissible and therefore not subject to further settlement awards. This admissibility test should also be extended to cover ex gratia payments made by the government over certain national land matters. The University of Goroka (UOG) matter is a classic example of interference by the government over the jurisdiction of the Commission. While the matter was pending before the Commission, disgruntled former landowners threatened the government to shut down the University, and were paid an ex gratia payment. The land area for UOG is a small percentage of the Goroka township land area, but since they were paid quite a substantial amount by the State, other claimants who have a bigger percentage of Goroka township are now demanding similar payment for the land area equivalent to that of UOG. This is a matter that is before the commission and a decision is yet to be made, but it should address the issues relating to ex gratia payments.

Most claims have not met the requirements for admissibility other than claimants being prescribed persons, yet these claims were admitted based on the discretion of the Commissioner under Section 40 of the NLR Act. Commissioners have used this discretion to determine each claim on a case by case basis. However, there seems to be no reference to case precedents used by Commissioners over similar issues faced in previous hearings and as such, it is difficult to identify some best practices.

The discretion has been used sparingly. In one matter even a spade was considered to be sufficient payment for 21.03 hectares in the *Manpolka case*, yet the claim was admitted for settlement payment. While the Commissioner cannot make an opinion as to whether or not a payment was insignificant under Section 40 of the Act, there should be some clarity on how such a discretion can be invoked to deal with a case. Ideally, payment should have been held to be insufficient for it to be admitted to warrant award of a settlement payment. However, it is suggested that the restriction placed under the Act compelled the Commissioner to exercise the discretion under Section 40 of the Act. Legally, if payment was considered to have been made, then the claim should not have been admissible.

Generally, the grounds for admissibility must be further reviewed to include issues such as:

1. The requirement to give Section 5 Notice under the CBASA.
2. The requirement to make a claim within a defined period (reasonable time).
3. Clarity on the definition of a prescribed person with linkage to the ownership or interests in relation to the former customary land (now declared as national land).

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16 *In the Matter of Mt Ambra, Portions 391, 864-871,894-895, 906, Milinch Hagen, Fourmil Ramu, WHP* (2017).

17 *In the Matter of Poroma Government Station, Portion 67, Milinch Mendi, Fourmil Kutubu, SHP, (NLD 1233)* (2017).

The application of the CBASA was part of an amendment in 2006 but it plays no part in the admissibility of claims for settlement payments. While Commissioners have written lengthy decisions on the application of the CBASA, the end result has been that since it is not a matter identified under Section 40 of the Act, it could not be used as part of the admissibility test. A similar approach has been made on what is the prescribed time to make a claim. There had been references to 60 days and six months in the matters discussed so far and while six months would be the ideal period under the CBASA, it must be reflected in the legislative regime for purposes of claims for settlement payments.

While the application of the CBASA has had some positive effect on determination of claims for settlement payments, what is further required is a provision to clarify that such a claim is targeted towards settlement payment as opposed to a claim for general compensation (damages). This is further supported by the need to define a prescribed person to have some linkage to the ownership or interests in relation to the former customary land (now declared as national land). The fact that customary land is communally owned in PNG cannot be claimed to be owned by one person through the immediate relative of the person to whom payment was made during colonial acquisition. Such a person must have some direct relationship as to ownership or interests over the said land. This would hopefully address the generational pursuit of compensation frenzy claims as alluded to by some critics.

Finally, the State through its representation must vigorously defend its ownership to national land pursuant to Sections 14 and 19 of the NLR Act and insist the claim should not be admitted if payment was made during acquisition. This would ultimately address the CILM concerns on State land – to secure and safeguard the State's interest over acquisitions declared as national land.

Conclusion

Section 40 of the NLR Act is a significant vetting process, designed to separate spurious claims from genuine outstanding claims to be properly and fairly handled by the Commission. Sections 40 establishes three fundamental principles in admitting a claim for settlement. It provides that for a claim to be worthy of being awarded settlement payment, it must be made:

1. By a prescribed person.
2. No payments, whether ex gratia or not were made at the time of acquisition of the land.
3. There were special circumstances that made it reasonable to say that no claims were made previously, and in the circumstances, it would not be proper or just to enforce those special circumstances.

The Commission has also introduced certain additional issues to assist in the determination of claims for settlement payments. These include:

1. Requirement to give Section 5 Notice under the CBASA;
2. Requirement to make a claim within a reasonable time;
3. Whether or not any person or group could be joined in the proceedings; and
4. Whether or not there are conflicting claims.

These additional issues are equally important and must be considered as part of the admissibility test. While the Commission has considered these additional issues in recent cases, it has stopped short of applying these as part of the admissibility test since these are strictly outside of Section 40 of the NLR Act. Perhaps these can be considered as part of the policy reforms under the merger of both the Land Titles Commission and the National Lands Commission. But until such issues are addressed, we will still face the same difficulties in the administration of the NLR Act.

Defining Trafficking in Persons and Exploitation in Papua New Guinea

Ms Limawali Yalapan, LLB*

Trafficking in persons or human trafficking[1] as it is more commonly known, has been described as a grave violation of human's rights or modern day slavery, a phenomenon that effects every country in the world, including Papua New Guinea (PNG). Human trafficking is also a relatively new crime, although exploitative practices described as human trafficking and forms of slavery have existed for hundreds of years in Melanesian cultural practices and throughout other cultures worldwide.

One of the earliest international documents that makes reference to Trafficking in Persons and Slavery like conditions and treatment of human beings is the Paris Convention against White Slavery 1904. Until very recently, major initiatives on identifying and preventing cases of trafficking in persons have focused on women and girls and sexual exploitation in the form of forced prostitution. In PNG as well, the exploitation of women and girls into forced prostitution and other forms of sexual exploitation has also been the main concern until recently, where reported cases have indicated that there has been an increase in labour exploitation cases concerning male victims of varying ages. The recent trend in reported cases in PNG, changes the stereotype that all victims of human trafficking are female who are forced into prostitution.

International Definition of Human Trafficking

The issue of trafficking in persons was not on the international agenda until the mid-1990 when it was noted that there has been an increase in the cross-border exploitation of young women and girls within South East Asia and Europe. Both the Charter of the United Nations and the Universal Declaration of Human Rights declare that rights are universal, in that they apply to everyone, irrespective of race, sex, ethnic origin or other distinction.

The earliest recognised international agreements on human trafficking or slavery and slave like conditions include; the *Paris Convention against White Slavery* 1904*,* the *International Convention for the Suppression of the Traffic in Women and Children* 1921, and the *Convention to Suppress the Slave Trade and Slavery* 1926 promulgated by the League of Nations.

The current recognised international definition of trafficking in persons is provided for under the United Nations *United Nations Transnational Organised Crime Convention* 2000 (UNTOC) or Palermo Convention and its supplementary protocols.

The United Nation's Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children (UN TIP Protocol) which supplements the UNTOC, was officially adopted by the United Nations Member States and the broader international community in December 2000.

The UNTIP Protocol defines the term 'trafficking in persons' as follows:

> …the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose

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1 Throughout the paper the terms 'Trafficking in Persons' and 'Human Trafficking' will be used interchangeably.

of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Key Concepts contained in the International Definition

The international definition under the UNTOC and UNTIP Protocol contain certain features which have been adopted by most countries (that are party to the UNTOC), which have developed legislation aimed at combating human trafficking. These key features in the UNTIP Protocol are summarised below.

Elements of Trafficking in Persons	Under the UNTIP Protocol all three elements; Act, Means, and Purpose must be established for there to be an identifiable offence.
Act (*What the trafficking/offender does*)	Recruitment, transportation, transfer, harboring or receipt of persons
Means (*How the act is done*)	Threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person
Purpose (*Why the act is done*)	Exploitation (which includes at a minimum- • the exploitation of the prostitution of others or other forms of sexual exploitation, • forced labour or services, slavery or practices similar to slavery, servitude or • the removal of organs) The UNTIP Protocol provides a list of the forms of criminal acts deemed to be a type of exploitation (Article 3A)
Consent	The consent of a trafficked person or victim is irrelevant if any of the means listed in Article 3A were used to as a means to obtain the consent of the victim. There are cases where a victim's right to consent and make a decision to leave an exploitative situation is lost during the process of exploitation. Consent can also be obtained through force, by deception of when an offender takes advantage of a victim's position of vulnerability (Article 3B).
Age of Majority	A child in anyone under the age of 18 years. Any child that is recruited, transported, harboured or any person in receipt of a child in order to exploit the child has committed offence, regardless of the means (listed in Article 3A) used (Article 3C and D).
Movement / Internal / Cross Border	Trafficking in persons is an offence that involves movement, however at times the movement does not occur over an international border. There are instances where trafficking in persons occurs internally or within a locality.

	This is the main difference when comparing trafficking in persons to people smuggling which always occurs across international border.

Indicators of Trafficking in Persons

In addition to elements of trafficking in persons there are also internationally recognised indicators as listed in the Operational Indicators of Trafficking in Human Beings 2009.[2] These indicators are useful as a guide to identifying potential cases or instances of human trafficking. The Operational Indicators of Trafficking in Human Beings is a comprehensive list of indicators developed jointly by the International Labour Organisation (ILO) and the European Commission to be used by preventing human trafficking stakeholders in identifying potential human trafficking cases.

However, it must also be noted that not all indicators are definitive, because each case of human trafficking is unique and the behaviour of victims and offenders vary according to each case. Also the context of the exploitation and location where the offence has been committed may influence the sets of circumstances one would identify as an indicator of human trafficking. The presence of an indicator of human trafficking in any case should be treated with caution, as all cases should be properly reported to a government law enforcement agency for further investigation and referral.

The Government's Legislative efforts in Counter Trafficking in Persons

Although trafficking in persons has been around for hundreds of years, a coordinated response to preventing trafficking in persons only began to materialise and gain momentum internationally in the early 2000's.

PNG's response has been equally slow; this is due in part to the response by government in creating an offence and the lack of awareness amongst government law enforcement agencies in identifying cases. Another issue is the 'observed' lack of political will. However, things changed in early 2009 when assistance from the international community, particularly the United Nations (UN) and the International Organisation for Migration entered into a support arrangement with the PNG Government (through the Department of Justice and Attorney General) to provide technical assistance in the development of legislation to criminalise the transnational crimes of trafficking in persons and people smuggling.

The PNG Counter Trafficking in Persons Project was initiated in 2010 as a means for the country to develop an effective response to identifying trafficking in persons cases, preventing exploitation of victims, creating awareness on counter trafficking in persons issues and prosecution of offenders. The approach in preventing incidences of trafficking in persons commenced with the development of amendments to the *Criminal Code Act* 1974 (CCA) to create the offence of trafficking in persons in 2013.

Definition of Human Trafficking in PNG

The CCA was amended by the *Criminal Code (Amendment) Act* 2013[3] to create human trafficking and people smuggling offences. Upon the gazettal of the amendment on 24th July, 2014 the following offences shown in the table below came into effect.

Division 10 – People Smuggling	**Division 1A - Trafficking in Persons**
Section 206D *People Smuggling*	Section 208C *Trafficking in Persons*

2 https://www.ilo.org/global/topics/forced-labour/publications/WCMS_105023/lang--en/index.htm.
3 No.13 of 2013.

Section 206E *Falsifying Travel and approval Documents or Approval to Travel or Stay Documents*	Section 208D *Trafficking in Persons with Knowledge or Recklessness*
Section 206F *Consent of Smuggled Person not a Defence*	Section 208E *Consent of Trafficking Person not a Defence*
Section 206G *Immunity from Criminal Prosecution*	Section 208F *Immunity from Criminal Prosecution*
Section 206H *Orders for Expense*	Section 208G *Assistance to and Protection of Trafficked Persons*
Section 206 I *Assistance to and Protection of Smuggled Persons*	

People smuggling and human trafficking are separate crimes in the CCA which are often confused. There is a distinct difference between the crimes of people smuggling under Sections 206D and 206E compared to the trafficking in persons crimes under Section 208C and 208D of the CCA. People smuggling under Section 206D and 208E are offences against the State, unlike human trafficking under Sections 208C and 208D which are offences against an individual.

The nature of the human trafficking offence under Sections 208C and 208D allow victims, the avenue to initiate, a human rights application against an offender where there are potential human right violations which may have occurred, when a victim has been exploited in circumstances set forth in Section 208B of the CCA.

Relationship between Human Trafficking and People Smuggling

Another key distinction between people smuggling and human trafficking is the fact that people smuggling always take place over an international border, unlike human trafficking which can occur internationally (over an international border) or internally (within country).

A key element of both people smuggling and human trafficking is the 'movement of people for an exploitative or smuggling purpose which benefits the offender'. In human trafficking, this movement does not need to occur over an international border. This important fact can be inferred from PNG's first reported case of trafficking in persons - the 2015 Chimbu Human Trafficking Case[4], which occurred internally, and resulted in the movement of victims from a coastal area to the highlands region within PNG where the sexual exploitation and forced prostitution of the victims took place. Although this case is currently before the National Court, the outcome of this case will set a precedent in PNG on the application of Section 208C and 208D of the CCA.[5]

The final distinction between human trafficking and people smuggling is the intent of both offences. People smuggling is an offence and a crime committed against the State, while human trafficking is a crime against the individual and can also been seen a breach of a person human rights to the Basic Rights provided under Division 3 of the *Constitution.*

Features and Issues with the Application of the Trafficking in Persons Offence Provision under the Criminal Code Act 1974

A close examination of Sections 208B, 208C, 208D and section 208E CCA reveals that they are very similar to the international definition and standards set by the UNTIP Protocol. However, there are

4 'Sexual Slavery Victims Rescued' *The National* newspaper, 15th September 2015, page 7.

5 The trial has been completed and the National Court will hand down it's decision hopefully before the end of this year.

some unique features of the 2013 amendment which sets PNG apart from other jurisdictions. These differences are highlighted below.

1. **What is Exploitation defined as in the PNG Human Trafficking context?**

   Exploitation is defined under Section 208B to cover the following criminal acts:

   …the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

   From the definition above it can be inferred that there are three general categories of exploitative behaviours described by Section 208B and these forms of exploitation are:

   a) Forms of Sexual Exploitation

   Forced Prostitution

Sexual forms of exploitation include 'forced prostitution' which is the act of forcing or coercing a person through the use of some forms or means to subject a person into forced prostitution. This is especially the case where minors are involved, because by law, minors do not have the capacity to consent to any form of prostitution which is the main inference drawn from Section 2 of the *Lukautim Pikinini Act* 2015 (LPA). This ability to freely consent is different from an adult who willingly chooses to engage in prostitution. However, in some cases, such as the Chimbu Human Trafficking Case of 2015, adults were threatened with violence and made to offer sexual services for money.

Forced prosecution remains the main form of exploitation in the human trafficking context. Forced prostitution is also the most common method of exploitation of female victims.

Sexual Exploitation

Section 208B uses the phrase 'other forms of sexual exploitation' which is an undefined term under the CCA. Unfortunately, this phrase is not defined under other related legislation and case law. Although the term 'sexual exploitation' remains undefined, there is a suit of provisions that criminalise the sexual exploitation of minors such as Division 2B of the CCA.

The key sexual exploitation offences under Division 2B of the CCA include:

Section 229K - CCA	Obtaining the Services of Child Prostitute
Section 229L - CCA	Offering or Engaging a child for Prostitution
Section 229M	Facilitation or Allowing Child Prostitution
Section 229N	Receiving a Benefit from Child Prostitution
Section 229O	Permitting Premises to be used for Child Prostitution
Section 229R	Children not to be used for Pornographic Purposes
Section 229S	Producing and Distributing Child Pornography

These provisions were introduced in 2005 and have been effective in combating the commercial sexual exploitation of minors. However, only the conduct of child commercial exploitation is defined, and not the term 'sexual exploitation'. Sexual exploitation is however defined by the UN in its document 'the United Nations Glossary on Sexual Exploitation and Abuse. The document defines sexual exploitation as: [A]ny actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of

another'.[6]This definition can be adopted by PNG in combating sexual exploitation in the country.

Although not directly making a reference to the definition provided by the UN, the PNG courts have embraced this wide definition. For instance, in *The State v Minjihau,*[7] the court established that, the offender, a 47 year old male, who had sex with a 14 year old female on four different occasions and on each occasion the offender gave the victim money, knowing that the victim needed that money. In effect the offender exploited the victim sexually by taking advantage of the victims need for money.

The case of *The State v Thomas*[8] also shows how exploitation can occur in the country. The victim who was a 15 year old female, at the time when the offence was committed, deposed that, "there was sexual intercourse on more than one occasion, and that on each occasion the accused would trip her up so that she fell to the ground, have sexual intercourse then give her money." This evidence was corroborated by the accused who admitted that, "he had sex with the victim 44 times during 2003 and on each occasion the victim asked for money beforehand."

Although sexual exploitation is not defined by legislation, there are several examples in case law where offenders have taken advantage of a perceived need by the victim. Therefore, there is an inferred definition of sexual exploitation, and this definition can be taken into account when understanding and defining what sexual exploitation is in the human trafficking context.

b) Forms of Labour Exploitation

Section 208B of the CCA defines human trafficking for the purposes of exploiting a person for their labour as 'the exploitation of…forced labour or services, slavery or practices similar to slavery, servitude.' The keys concepts in this definition are 'forced labour or services', 'slavery or practices similar to slavery', and 'servitude'. These terms are taken broadly as forms of labour exploitation.

Forced Labour and Services

Forced labour is defined by section 208B to mean, 'all work or services which are extracted from any person under the menace of any penalty and for which the person has not offered himself voluntarily'. This definition is clear for the purposes of understanding human trafficking in the forced labour context. The other concepts conveyed by the definition of exploitation are undefined by PNG legislation.

Slavery and Practices Similar to Slavery and Servitude

Slavery or practices similar to slavery is also defined by Section 208B. It means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised and includes, but is not limited to, the following:

1. the selling, bartering or buying of a person without that person's consent for value received or other consideration; or
2. the selling, bartering or buying of a person under the age of 18 against the best interest of that person, for value received or other consideration; or
3. the status of debt bondage intended as the condition of a person who has no real or acceptable alternative but to provide labour or personal services or those of a person under his control to repay a debt, if the value of those services or labour, as reasonably assessed, is not applied towards the liquidation of the debt or the length and nature of those services or labour are not limited and proportionate to the debt; or

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6 United Nations Glossary on Sexual Exploitation and Abuse, [Prepared by the Task Team on the SEA Glossary for the Special Coordinator on improving the United Nations response to sexual exploitation and abuse] 05th October 2016.

7 (2002) N2243.

8 (2005) N2828.

4. the status of domestic servitude intended as the condition of a person who is forced, by physical or psychological coercion, to work without any real financial reward, deprived of liberty and in a situation contrary to human dignity.

This definition of slavery or practices similar to slavery is similar to Article 1 of the Slavery Convention 1926 and Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

Slavery is also expressly prohibited by the *Constitution* under Section 253, which provides that, 'slavery, and the slave trade in all their form, and all similar institutions and practices, are strictly prohibited.'

A case that discusses the nexus between slavery, practices similar to slavery, servitude and human trafficking is the human rights case of *Konori v Jant*.[9] In this case, the plaintiffs made an application against their former employer, the defendant, alleging that the defendant company had infringed their human rights by placing them in 'slavery like' working conditions. The plaintiffs alleged that they had been forced to carry logs without safety gear, underpaid, not fed, not equipped, exploited as cheap labour, treated as slaves inhumanely, under the guise of a contract. They claimed that the defendant breached their right to protection from inhuman treatment under Section 36(1) of the *Constitution*, and sought compensation under Sections 57 and 58 of the *Constitution*.

After the trial, the court rejected the plaintiffs' application and threw out the case. Although the ruling of the National Court was not in favor of the plaintiffs, this was the first case in PNG dealing with slavery and human trafficking under the 2013 amendments to the CCA. The court considered the 2013 amendment and accepted the definition of key terms such as, slavery, slavery like conditions.

Servitude is another practice closely associated with human trafficking. However, the term servitude is not defined by legislation. Nevertheless, the concept of servitude is conveyed through Section 208B.

c) The Removal of an Organ

The removal of organs is an undefined term in section 208B. Although it is clearly stated as a form of exploitation that is prohibited by the CCA, there is no clear definition of some of the following aspects of organ removal:

1. What an organ is for the purposes of Sections 208C and 208D?
2. Whether a contractual relationship between the donor of the organ and the trafficker, or offender and the recipient of the organ has an impact on the outcomes of a human trafficking (for the purposes of organ removal) case.
3. Whether there is a difference between organ donation (for medical purposes) and the organ removal in the human trafficking and criminal context, and what those main differences are.
4. Other issues related to organ donation for medical purposes, such as a policy or medical practice or standards, and if these factors can be used as determinants or criminal elements in a human trafficking (for the purposes of organ removal) case.

From March to May 2019, there was increased hysteria created by reports and allegation of criminal networks operating organ trafficking and kidnapping in the National Capital District.[10] This has necessitated the focus on what organ removal is and how arrests and charges can be laid for human trafficking for the purposes of organ removal.

There is a 2017 reported case[11] of a woman that had provided her ovaries to her mother who resided in Australia to assist her mother and her step father for use in Intravenous Fertilization

9 (2015) N5868.
10 'Women and Girls warned of Abduction', *The National* newspaper, 14 March 2019.
11 Department of Justice and Attorney General – Trafficking in Persons Case Database.

Treatment (IVF). The victim in this matter was a minor at the time and claimed that her health has suffered as a result of the IVF procedure. The victim was unable to make a claim against her mother because of a time bar, since the IVF procedure took place when the woman was a teenager.

There were issues in progressing this matter, as there is no legislation dealing with IVF treatment, and the rights of donors. Although the victim felt that she had been exploited by her mother and had parts of her body extracted without her consent, she was unable to lay a complaint under any legislation. The only avenue available to her currently is a human rights enforcement application in the National Court.

These issues were also compounded by the fact that Section 208B is not clear on whether 'an organ' for the purposes of organ removal can also include 'ovaries' which are a 'collection of human reproductive cells' and not an organ in the strict sense. There is also the additional issue of what constitutes removal of an organ, and how must these organs be removed from the human body, for an offence to be committed, and whether 'voluntarily donating' an organ can eventually be a criminal offence, if the terms of the organ donation agreement are not fair to the donor.

More work is required around this area of the law. However, case law or the development of further government policy or legal reform can provide clarity on the application of the law to organ removal cases.

d) Other Forms of Exploitation undefined by Section 208B

Forced Marriage

Forced marriage is considered by many jurisdictions to be a type of exploitation for the purposes of human trafficking. Section 208B is very clear on what exploitation is in the strict human trafficking context. At present, it may be difficult to classify cases of forced marriage as human trafficking cases, unless the complainant is able to clearly prove all the elements of the offence of human trafficking under Sections 208C and 208D.[12]

Informal Adoption and Billeting

A broad array of 'cultural practices that support a range of living arrangements for children, including billeting of children within familial networks' expose children to the risk of being trafficked and exploited within the family unit.[13]

In PNG this has been observed in children being sent between family members from a rural to an urban area to provide an opportunity for education or employment. Customary practices that allow for informal adoption or fostering and billeting has the potential to expose children to the risk of being trafficked and exploited by family members, especially in the area of forced labour or services.[14]

However, in all cases, the complainant and the State must be able to prove that the elements of the human trafficking offence under Section 208C and 208D are present in the case.

2. Consent in PNG Law

Section 208E provides that the consent of a victim cannot be used as a defence by the offender or trafficker.

It is generally accepted that any adult of sound mind has the capacity to consent and contract. The age of adulthood being 18 years and over. Many have argued that in numerous cases of human

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12 Under the *Lukautim Pikinini Act* (LPA), child marriages is prohibited in PNG. Under the LPA, the age of marriage is 18 years.

13 "The Trafficking of children in the Asia-Pacific", *Trends and Issues in Crime and Criminal Justice* (No. 415 –April 2011) Australian Institute of Criminology,

14 Kwa, E and Onom, N, "The Law of Adoption in Papua New Guinea" in Corrin, J and Farran, S, (ed), *The Plural Practice of Adoption in Pacific Island States* (New York: Springer, 2018) pp67-86.

trafficking, the victims do agree to be placed in a position that ultimately leads to their exploitation. However, the inverse is also true and there are occasions where victims have been forced, coerced, deceived or in extreme situations even prevented from leaving an exploitative situation that they had initially consented too.

At present there is no definitive case law in PNG which discusses the issue of consent in the human trafficking context.

3. Children and Consent under the LPA versus CCA age of Consent

Age, consent and criminal liability are all different but related issues. In PNG legislation provides the differences on age of majority, age of consent (for sexual offences) and age of criminal liability. These three issues are important because in 2014 through an amendment to the CCA[15], the age of criminal liability under Section 30 of the CCA was changed from seven to 10 years.

Another significant change was made earlier in 2002 through an amendment to the CCA[16] which created a scheme of sexual offences against children. Under the amendment, a child is defined under Section 229J as anyone under the age of 18 years.

There are different standards set by legislation with regard to the age of majority and the age of consent. For the CCA and the LPA, the provisions are highlighted in the table below.

	Legislation	**Provision and Standard**
Age of Majority (General)	*Lukautim Pikinini Act* (LPA) 2015	**Child** means a person including a boy or girl under 18 years (Section 2)
Age of Majority and Consent (Sexual Offences) (Criminal)	CCA	**Child or Children** means a person under the age of 18 years (Section 229J) For the purposes of Division 2A and 2B a child does not have the capacity to consent to sexual relations with an adult.
Age of Criminal Liability	CCA	A person under the age of 10 years is not criminally responsible for any act or omission (Section 30)

The definition of 'child' in the CCA and LPA are consistent with those provided by international law through the UNTIP Protocol and the United Nations Declaration on the Rights of the Child. Both treaties recognise that a child is someone aged 18 years or younger, and 'children are incapable of providing informed consent' to sexual relations as well as any form of exploitative practice.

The distinction between the age of consent and the age of criminal liability is also important considering that in human trafficking cases victims can also be charged for criminal conduct.

4. How does Immunity from Criminal Prosecutions apply to a victim of Human Trafficking?

There is a general confusion that exists with stakeholders working in the area of preventing human trafficking, that once a person has been identified as a victim, by some sort of assessment, that he or she by default is a victim and should be immune from prosecution. There is a danger in declaring that, someone is prima facie, is a victim of human trafficking without first going through the investigation and committal process, because declaring a victim and excluding that victim from prosecution grossly undermines the principle of burden of proof and the role of the State in prosecution.

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15 No.25 of 2014.
16 No.27 of 2002.

Stakeholders working in the area of preventing human trafficking should recognise that in common law jurisdictions such as PNG, only a court of competent jurisdiction can decide whether a person charged under Section 208C or 208D, is a victim of human trafficking that should be afforded immunity under Section 208F. At present no other agency has the power to make such a determination, unless a decision to make special measures available to a person, is made by the Minister for Justice, using his powers under Section 208G. However, using this process to make special measures for victims may be open to challenge in court by the Public Prosecutor, or in some in instances of private prosecutions by another agency or law firm.

Current Application of Trafficking in Persons Offence Provision in Case Law

The first case in PNG to make reference to the offence of trafficking in persons and the definition of trafficking in persons under Section 208B is the National Court case of *Konori v Jant.* Apart from this case, the courts have yet to elucidate the concept of human trafficking in PNG and set out what exploitation is, and how it must be identified and treated by law enforcement agencies.

Elements required to prove the offence of Trafficking in Persons

A human trafficking crime is a criminal offence, therefore police have jurisdiction over this matter, even where cases involve foreign nationals. The matter commences when a complaint is laid with police. The complaint is investigated by the police and processed through the Committal Court to the National Court.

The elements of human trafficking are divided into three broad categories depending on who is prosecuted:

1. The first category are principal offenders (Section 7 of the CCA).
2. The second category are persons who assisted in the commission of an offence (Section 10 of the CCA).
3. The third category are victims of the crime that have been arrested and charged for committing another offence, but have committed the offence as a direct result of being trafficking and exploited.

These are shown in the table below.

Element	**Section in CCA and Category of Offender**	**Standard**
	Actus Reus	
Use of the following '**Actions**' to place a victim in a position where they can be easily trafficked and exploited	Section 208C(1) of the CCA **(Category 1)** Section 208D(1) of the CCA **(Category 2)**	• Recruitment (of a person) • Transportation (of a person) • Transfer (of a person) • Concealing (a person) • Harbouring (a person) • Receiving (a person)
Use of the following '**Means'** or 'methods'	section 208C(1)(a)-(j) of the CCA **(Category 1)** section 208D(1)(a)-(j) of the CCA**(Category 2)**	The use of- • threats; or • force or other forms of coercion; or abduction; or • fraud; or • deception; or • use of drugs or intoxicating liquors; or • the abuse of office; or • the abuse of a relationship of trust, authority or dependency; or the abuse

		of a position of vulnerability; or • the giving or receiving of payment or benefits to achieve the consent of a person having control over another person.
Types of '**Exploitation**' that must exist in a set of circumstances in order for a case to be considered a Human Trafficking case.	section 208C(1) of the CCA **(Category 1)** Section 208D(1) of the CCA **(Category 2)**	The act of exploiting a victim through- • forced prostitution; other forms of sexual exploitation • forced labour or services; slavery or similar practices; Servitude • removal of organs.
Men's Rea		
Intention	Section 208C(1) of the CCA **(Category 1)**	The person has the intent to exploit and benefit from the exploitation of another person.
Knowledge or Recklessness	section 208D(1) of the CCA **(Category 2)**	The person assisted in the exploitation of another person.
Offences committed as result of being trafficked and exploited		
Knowledge or Recklessness	Section 208D(1) of the CCA **(Category 3)**	For victims who participate in the commission of a human trafficking offence as defined by Section 208c and 208D.
Commission of a criminal offence under the CCA or another legislation	Section 208F(1) (2) of the CCA **(Category 3)**	Victim are required to satisfy the National Court on 'Reasonable Grounds'; 1. they are a victim of human trafficking 2. the offence they have committed is a direct consequence of being trafficked and exploited. Both requirements under Section 208F(1) (2) must be satisfied, for the court to rule that a person is Immune from criminal prosecutions.

The elements outlined above can be proved through relevant evidence, whether it is a statement or other form of evidence that is dependent on the circumstances of the case.

Summary

In examining the definition of human trafficking in PNG, it is clear that human trafficking is a new crime and the law around the offence as a transnational organised crime (pursuant to Section 208A of the CCA) or the breach of human rights is underdeveloped. This situation will change once the Chimbu Human Trafficking Case and other landmark cases are decided by the courts.

When dealing with reported or alleged incidences of human trafficking, it is crucial that lawyers, government law enforcement agencies, and Non-Government Organisations, providing psychosocial assistance (for victims), consider the strict definition of human trafficking under the CCA. It is equally important to consider the rights of victims and consider each case on its merits, as there is a danger in straying away from the strict definition of human trafficking and exploitation (under the CCA), which can result in an error in the application of the law.

CASE NOTES

The Impacts of Re: Faith Barton-Keene v Hon. Davis Steven and Dr Eric Kwa and Ors ((2019) N7780) on Judicial Review of Administrative Decisions

Lillian Ipu, LLB*

Introduction

This case relates to an application for leave for judicial review of the decision of the Attorney General, Hon. Davis Steven to revoke the acting appointment of the then Acting Solicitor General, Ms Faith Barton-Keene. The issue raised in this case is whether the decision by the Attorney General, which was the subject of a previous judicial review proceeding, is amenable to another judicial review.

Facts of the case

The plaintiff, Ms Faith Barton-Keene applied to the National Court (the Court) seeking leave for a judicial review of the decision of the first defendant, Attorney General, Honourable Davis Steven to revoke her acting appointment as Acting Solicitor General. Ms Keene was appointed acting Solicitor General on 15th December 2017 when her tenure as Solicitor General lapsed. On 6th December 2018, the Attorney General wrote to Ms Keene in a Memorandum advising her of his decision to retire her as Acting Solicitor General and the appointment of Mr. Tanuvasa Tauvasa as Acting Solicitor General.

In early December 2018, Ms Barton-Keene filed an application for leave for judicial review of the decision by the Attorney General in *Faith Barton Keene v Hon. Davis Steven, Dr Kwa and The State* (2019) N7780. Ms Barton-Keene argued that there was no gazettal notice giving effect to the Attorney General's decision and therefore, she remained Acting Solicitor General. The court in that matter refused leave and dismissed the leave application on the basis that available administrative remedies were not exhausted – particularly, that Ms Barton-Keene had not appealed to the Public Service Commission.

The plaintiff applied to seek leave of the National Court for judicial review based on the same decision of the Attorney General on the grounds that the Attorney General's decision, pursuant to the *Attorney General Act*, is an administrative decision made by a public authority therefore, subject to judicial review. On the other hand, the defendants argued that the decision of the Attorney General is not subject to judicial review as the issues raised by the plaintiff were *res judicata* in that the court had already determined the previous application by the plaintiff based on the same decision.

Whether the decision of the Attorney General, which was subject of a previous judicial review proceeding, is amenable to judicial review?

This was the threshold issue the court had to determine before considering whether the application satisfied the principles for leave to be granted. The court relied on the principles set out in *Felix Alai* v

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Nakot Waina & Ors[1] and *Zachery Gelu v Maurice Sheehan*[2] and refused leave for the following reasons:

1. the decision to revoke the acting appointment was the subject of the previous application for judicial review by the plaintiff. That matter was considered by the Court and leave was refused thus, the plaintiff cannot apply to the same Court for leave to review the same decision; and
2. the decision by the Court in the previous matter is final - the plaintiff cannot reargue that primary decision. The previous decision was that all administrative remedies were not exhausted, particularly, appeal to the Public Service Commission therefore, the application for leave should be for leave to review the decision of the Public Service Commission rather than the Attorney General's decision.

The Principle in Felix Alai case

In this matter, the court held that the decision by the court to grant leave for judicial review is interlocutory in nature however, if the court refuses leave then that decision is final which in effect brings the whole proceeding to an end. The court stated that:

> If leave to apply is refused, there is no question that the decision is final because the decision brings to an end those proceedings.[3]

Thus, in this case, the previous application was considered and leave was refused. In effect, the decision of the court was final.

The Principle in Zachery Gelu case

The court in this matter discussed factors to consider in deciding whether to grant or refuse leave for review. One of these factors is that 'judicial review process is available in respect of a decision once only'.[4] The court stated:

> ..if application for leave or the substantive application is determined and disposed off, the same decision should not be subject to another round of judicial review proceedings.[5]

In this case, the decision of the Attorney General was subject of the previous judicial proceeding. That proceeding was determined and disposed off when the court refused to grant leave. Therefore, the plaintiff cannot apply to the same court based on the same facts. Rather, as a general rule, the proper decision to challenge, is the decision of the Public Service Commission, as the appellate body and not the primary decision.[6] As stated by Justice Nablu:

> The National Court only has jurisdiction to review the decision of the appellate body and does not have jurisdiction to consider the scope of matters or new issues which were not before the appellate body.[7]

Conclusion

This case sets out the principle that the decision of the court to refuse leave in an application seeking leave for judicial review based on an administrative decision is final and therefore, the same administrative decision cannot be subject to another round of judicial review proceeding. This case also clarifies that a person who holds public office on an acting or temporary basis cannot claim the same rights to legal redress as would a substantive office holder.

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1 (2015) SC1615.
2 (2013) N5498.
3 *Felix Alai v Nakot Waina* (2015) SC1615.
4 *Zachery Gelu v Maurice Sheehan* (2013) N5498.
5 Ibid.
6 *Martin Kenehe v Allan Jogioba & Ors* (2008) N4025.
7 *Faith Barton-Keene v Hon. Davis Steven and ors* (2019) N7780.

Claims Against the State: The Legal Soundness and Implications of the Nare v State

George Akia, LLB*

Introduction

The case of *Nare v State* (2017) SC1584 *(*Nare case*)* was a landmark decision by the Supreme Court, consisting of 5 judges 2017. It was an appeal against the decision of the National Court which dismissed the entire proceeding for failure to name the principle tortfeasor or wrongdoer as parties to the proceeding in a police raid matter. The trial judge had dismissed the proceedings based on the principles enunciated in the Supreme Court case of *Kewakali v State* (2011) SC1091 (Kewakali case). The main ground of appeal in the Nare case was that the trial judge wrongly applied the Kewakali case as the principle was inconsistent with the *Constitution*, other existing laws and legal principles.

This paper will consider the legal soundness and implication of the Nare case on claims against the State by contrasting it with the Kewakali case, the case of *Pinda v Inguba* (2012) SC1181 (the Pinda case) and other related cases.

The Nare Case

The Nare case was an appeal from a decision of Poole, J, dismissing the proceedings on procedural grounds. The substantive claim was in respect of damage caused by a group of people in police uniforms driving police vehicles accompanied by a police helicopter who raided Teremanda Village in Enga Province. The residents of the village who suffered loss sued the State, claiming the cause of the loss was the wrongful acts of police officers acting for and on behalf of the State, as its servants and agents. The plaintiffs only named the commanding officers in the Statement of Claim. The defendants raised the defence that the primary tortfeasors were not named. The State also requested for further and better particulars. However, in its reply to the defendant's request for further and better particulars, the plaintiff repeated the names of the police officers who commanded the raid that were supplied in the amended Statement of Claim. During the trial, the State raised the argument that the primary tortfeasors should have been named and joined as parties to the proceedings by relying on the Kewakali case. Justice Poole, in this decision, noted that the raid was a well organised operation which did not bring into play the issue of police officers acting in the frolic of their own, refused to enter liability against the State based on the principle established in the Kewakali case which he found that the plaintiffs breached.

The plaintiffs appealed the decision of Poole J, challenging the legal soundness of the Kewakali case. The Supreme Court heard the appeal and subsequently overruled the Kewakali case and established that:

1. It is not necessary to name the principal tortfeasor or wrongdoer in a claim or suit against the State as it is sufficient to only name the State as the defendant.
2. It is sufficient to name only the State as a defendant and that it is otiose and contrary to principle to name senior officers in the event that a principal tortfeasor or wrongdoer cannot be identified and named in the suit as;
    a) the State is in a better position to know all its servants and agents unlike senior officers who may have had no knowledge of their junior officers' activities;
    b) senior officers can only be named as defendants if they are alleged to be a tortfeasor or a person or body vicariously liable for the acts of a principal tortfeasor;
    c) a senior officer is not vicariously liable for the acts of his or her subordinates; and

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d) a senior officer can only be liable if directing or authorising the tortuous conduct.

3. The onus to identify and name principal tortfeasors or wrongdoers in the pleadings is upon the State if they want to shift liability upon that principal tortfeasor, i.e;

   a) State should identify and then apply for the name principal tortfeasors or wrongdoers to be joined as parties to the proceeding; and
   b) the State has to request particulars through interrogatories for the plaintiff to disclose knowledge of the identity of the relevant tortfeasor/officer.

4. The 'independent discretion rule'[1] no longer applies.

5. A cause of action against the State is made out if;
   a) the tortuous conduct is perpetrated by;
   b) the officers of the State, including police; and
   c) were acting or purporting to act in the course of their duties.

So what was the Kewakali case? This was an appeal against a decision of the National Court refusing an application by the appellant for default judgement in a police raid matter. The trial judge refused the application on the basis that the plaintiff had failed to name the principal tortfeasor**.** The main ground of appeal was that the trial judge erred in dismissing the application for default judgement on the basis that the alleged policemen tortfeasors were not named as defendants. The Supreme Court ruled in favour of the State. The Supreme Court held that:

1. It is mandatory to name principle tortfeasor when vicarious liability is claimed. It is not sufficient to only name the State.

2. Senior officers can be named if principal tortfeasor cannot be identified.

The principles in the Kewakali case were reaffirmed by the Supreme Court in the Pinda case. This was an appeal against a decision of the National Court dismissing the entire proceeding. It was also a police raid matter. Trial judge refused the application for the plaintiff's failure to disclose a reasonable cause of action**.** The main ground of appeal was that the trial judge erred in revisiting the issue of liability by reviewing the pleadings and dismissing the proceeding when the issue of liability was already established by default judgment. Supreme Court ruled in favour of the State. The Supreme Court held that to succeed in establishing vicarious liability against the State for tort of negligence, the National Court has to be satisfied that:

1. The policemen as servants or agents of the State committed the tort of negligence during the course and within the scope of their employment (Section 1(1)(a) of the *Wrongs (Miscellaneous Provisions) Act,* Ch 297).

2. The policemen as officers of the State committed the tort of negligence while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law (Section 1(4) of the *Wrongs (Miscellaneous Provisions) Act,* Ch 297).

Key Issues arising out of the Nare Case. Is the Judgment in the Nare Case Legally Sound?

The questions that arise from the Nare case in light of the Kewakali case and the Pinda case are:

1. Is the judgement in Nare case legally sound?
2. Will there be any serious implication to the State in light of the principles established by Nare case?
3. Can the Nare case be challenged?

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[1] This rule implies that if employees or servants of the State exercised their own discretion in the performance of their duties without authority from their superiors and also not in accordance with set laws, process and procedure; they will be held personally liable for their own actions in the event a wrong is committed.

Each of these questions are considered below

1. Is the Decision in the Nare Case Legally Sound?

In order to answer this particular question, the following additional questions need to be answered first. These are:

a) Is the Nare case consistent with Parliament's intention expressed in the *Claims By and Against the State Act* 1996 (CBASA)?

b) Is the Nare case consistent with the principle of vicarious liability?

c) Is the Nare case consistent with the rules of proper pleadings in regards to the principle of vicarious liability?

d) Is Nare case consistent with other case law regarding vicarious liability of the State?

e) Whether the Nare case failed to take into consideration the prevailing situation in PNG with regards to State's liability?

Inconsistent with Parliament's intention as expressed in the CBASA.

Firstly, it is submitted that the principles established in the Nare case are inconsistent with the legislative intention of the CBASA. When the Bill was first introduced in Parliament on 20 November 1996, the then Minister for Justice, Hon Arnold Marsipal MP, said:

> Mr Speaker, I take great pleasure in introducing this Bill which will safeguard the interests and the finances of the State.
>
> In recent years, a large number of civil claims and other claims for compensation on infringement of human rights have been made against the State in respect of alleged unlawful actions by public servants. These claims often included compensation claims of police brutality against the people.
>
> There are set procedures laid down by the law governing and regulating the bringing of such claims to court. Under the present circumstances, it is difficult for the State lawyers to comply with time limits and other court restrictions. The numbers of claims are increasing alarmingly.
>
> At the same time, lawyers for claimants seem determined to try every possible avenue to press their clients' cases, using every loophole they can find. This frequently results in unwarranted payouts, thereby putting increased unnecessary pressure on the State resources.
>
> In order to overcome the problems being encountered and to ensure that the law deals fairly with both the State and its citizens, various measures will be put in place by this Bill. This include a scheme of prior notice of making a claim against the State. It will be similar to the scheme of notifying the Motor Vehicle Insurance Trust of proposed claims. Service on the State cannot be done by mail. It must be personally served on the Attorney-General or the Solicitor-General or left personally at his office. However, lawyers operating outside Port Moresby can still accomplish personal service through their city agents. …
>
> The Bill … will go a long way towards remedying the impossible situation the Government lawyers find themselves in when trying to protect the interests of the State.

It is my view that the Nare case runs contrary to the legislative intent of the CBASA. The CBASA was enacted to reduce the pressure faced by State agencies especially State lawyers' compliance with previous time limits and other court restrictions, to prevent claimants' lawyers using loopholes to benefit their clients interest, and to prevent unwarranted payouts which usually put unnecessary pressure on the State resources. The Nare case has establishes has set a very bad precedent and opens the floodgate for frivolous and unmeritous claims against the State.

Secondly the Nare Case has established that that it is the responsibility of the State to cause its own enquiry to, ascertain whether the alleged incident did happen, and whether the employee or

servants of the State were involved. And if employees, agent and servant of the State are identified, who are these servants or agents, and lastly what was the legal justification for the employees' actions.

The Nare case has now increased the pressure faced by State lawyers in embarking on an enquiry that does not have parameters and markers to ascertain an allegation. The main parameter that assists the State in its enquiry into a particular allegation is the name of the servant or agent of the State that is alleged to have been involved in the alleged tort or breach. This is the main information that puts the State in a position where it can verify the claim and either defend itself or settle the claim. Also, the Nare case has now created a loophole were claimants or lawyers can only name the State in cases where:

1. They are of the opinion that the tortfeasor is an agent or employee of the State.
2. A private person is responsible for the breach or tortuous action however the claimant is of the opinion that he or she will not benefit by instituting an action against that private person but may see if profitable to institute an action against the State.
3. An agent or employee of the State was acting in the frolic of his own when the tortuous action or breach happen however the claimant is of the opinion that he or she cannot recover anything if they instituted an action against the tortfeasor in his or her private capacity but may see if profitable to institute an action against the State.

Based on the foregoing, if in the event that judgment is entered against the State in one of those scenarios above, the court would be sanctioning unwarranted payouts which will put unnecessary pressure on State resources. Also a closer look at Section 5 of the CBASA and how the courts have applied it begs the question of whether or not, the Nare case took into consideration the legal requirements stipulated under Section 5.

In the case of *Kami v Department of Works* (2010) N4144 (Kami case), the court stated that in order to comply with Section 5 of the CBASA, a notice has to fulfil the requirements of that provision. The requirements for notice were outlined as follows:

1. It must be written.
2. It must contain sufficient particulars.
3. It must be personally served.
4. It must be served on one of the specified persons.
5. It must be given within six months.
6. The claim to which the notice relates should not be statute-barred.

In the Kami case the court addressed the requirement that the notice must contain sufficient particulars. The court said:

> The CBASA does not specify or state the particulars to be included in a s 5 Notice. However, the purpose of a s 5 Notice is clear and that is to put the State on notice of a proposed claim so that inquiries may be undertaken and instructions obtained. Fortunately, it is well settled that a purposive interpretation will be given to s 5. The leading case on this point is *Hewali v Papua New Guinea Police Force* (2002) N2233. The commonly cited passage in that judgment;
>
> It follows therefore, that notice must be given within the extended period. Such notice must give sufficient details about the impending claim so that the State can carry out its investigations and gather its evidence to properly address the claim once lodged against it. Such details should include dates, time, name of people and places, copies of any correspondence or such other information that could enable the State to carry out its own investigations. Only when notice is given with such details or information, can one safely say that notice of his or her intended claim has been given to the State.

The underlined sentence suggests that a purported notice which does not provide sufficient particulars is not good notice under s 5 of the CBASA.

Therefore, it can be concluded from the Kami case and the case of Hewali that a notice must contain 'sufficient particulars', which would include:

1. Name of the tortfeasors.
2. Place alleged action took place.
3. Date or time.
4. What actions or omissions the alleged tortfeasor committed.
5. What injuries the claimant suffered.

As mentioned above, in my view the Nare case goes against the intent of the CBASA.

Inconsistent with the Principle of Vicarious Liability

My second proposition is that, the Nare case deviates from the common law principle of vicarious liability. 'Vicarious liability' is a form of a strict, secondary liability that arises under the common law doctrine of agency, *respondeat superior*[2], the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the 'right, ability or duty to control' the activities of a violator. It can be distinguished from contributory liability, another form of secondary liability, which is rooted in the tort theory of enterprise liability because, unlike contributory infringement, knowledge is not an element of vicarious liability.[3] Employers are vicariously liable, under the *respondeat superior* doctrine, for negligent acts or omissions by their employees in the course of employment (sometimes referred to as 'scope and course of employment').[4]

In the case of *Paliwa v Kombul* (2008) N3499, the National Court stated that:

> In Papua New Guinea, the Parliament legislated the common law principles of vicarious liability through an Act of Parliament called the Wrongs (Miscellaneous) Provisions Act, Ch 297 (WMP Act).

Section 1 of the WMP Act is set out in full:

> 1. General liability of the State in Tort
>
> (1) Subject to this Division, the State is subject to all liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-
>
> (a) in respect of torts committed by its servants and agents; and
>
> (b) in respect of any breach of the duties that a person owes to his servants or agents under the underlying law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching under the underlying law to the ownership, occupation, possession or control of property.
>
> (2) Proceedings do not lie against the State by virtue of Subsection (1)(a) in respect of an act or omission of a servant or agent of the State unless the act or omission would, apart from this Division, have given rise to a cause of action in tort against the servant or agent or his estate.
>
> (3) Where the State is bound by a statutory duty that is binding also on persons other than the State and its officers, then, subject to this Division, the State is, in respect of a failure

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2 In Latin it means 'let the master answer'; plural: *respondeant superiores*) is a doctrine that a party is responsible for the acts of his agent (vicarious liability). This rule is also called the 'master-servant rule', recognized in both common law and civil jurisdictions.

3 *Religious Tech Center v Netcom On-Line Comm*., 907F.Supp.1361 (N.D.Cal 1995) GoogleScholar, (Retrieved 6 Sept 2017).

4 Sykes, Alan O, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" *Harvard Law Review* (1988) 101 (3): 563–609.

to comply with that duty, subject to all liabilities in tort (if any) to which it would be subject if it were a private person of full age and capacity.

(4) Where functions are conferred or imposed on an officer of the State as such either by a rule of the underlying law or by statute, and the officer commits a tort while performing or purporting to perform the functions, the liabilities of the State in respect of the tort are such as they would have been if the functions had been conferred or imposed solely by virtue of instructions lawfully given by the Government.

(5) An Act or subordinate enactment that negatives or limits the amount of the liability of a Department of the Government or officer of the State in respect of a tort committed by the Department or officer applies, in the case of proceedings against the State under this section in respect of a tort committed by the Department or officer, in relation to the State as it would have applied in relation to the Department or officer if the proceedings against the State had been proceedings against the Department or officer.

(6) Proceedings do not lie against the State by virtue of this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in him, or responsibilities that he has in connection with the execution of judicial process.

Also in *Vincent Kerry v The State* (2007) N3127, Justice Cannings stated that:

> Vicarious liability is a common law principle by which one legal person (such as the State) is held liable for the acts or omissions of another person or group of persons over whom the first person has control or responsibility. The principles of vicarious liability have been codified by Section 1 (general liability of the State in tort) of the *Wrongs (Miscellaneous Provisions) Act*.

From the above, the law dictates that in order to establish vicarious liability of the State, the plaintiffs must prove the following:

1. The perpetrator of the tort is a servant or agent of the State.
2. The particular act or omission would have given rise to a cause of action in tort against the servant or agent.
3. The tort was committed by the servant or agent in the course of his employment.

The first element is crucial for the purposes of this paper. In any proceedings against the State, the principle of vicarious liability will come into play if the perpetrator of the tort is a servant or agent of the State. Without ascertaining whether a perpetrator is a servant or agent of the State, it is impossible to find the State liable for a tortuous action. In the case of *Huaimbukie v Baugen* (2004) N2589, (Huaimbukie case) the National Court after considering the Supreme Court cases of *The Independent State of Papua New Guinea v David Wari Kofowei & Ors* [1987] PNGLR 5 (Kofowei case) and the subsequent judgment of the Supreme Court in *Abel Tomba v The Independent State of Papua New Guinea* (1997) SC518 (Tomba case) stated that:

> I find persuasion in these observations and add on my part that the Supreme Court judgments in *The Independent State of Papua New Guinea v. David Wari Kofowei & Ors* [1987] PNGLR 5 and *Abel Tomba v The Independent State of Papua New Guinea* (1997) SC518 did not say that, vicarious liability automatically follows against the State as soon as the wrong doer is found as an employee of the State. That is only one-half of the consideration. The Court must also consider whether the circumstances giving rise to the action against the State are such that they give rise to vicarious liability.

In the Kofowei case, the Supreme Court said:

> There is indeed a distinction between the liability of the State under s 1(1) and s 1(4) of the Wrongs Act.
>
> The provision in s 1(1) applies where a servant or an agent of the State commits a tort during the course and within the scope of his employment and s 1(4) is applicable in cases where an

officer of the State performs functions or purports to perform functions conferred or imposed on him by statute or the underlying law. It is also to be noted that s 1(1) is made subject to s 1(4) so that the State's liability for an officer's tort committed whilst the officer is performing functions under a statute or the underlying law must be considered under s 1(4). The importance of the distinction between s 1(1) and s 1(4) is that not all officers of the State are its agents or servants nor are all its agents or servants also its officers. Because of this distinction the State's liability under s 1 of the Wrongs Act must be properly considered under either the provisions of s 1(1) or s 1(4) and whether one provision or the other applies would be dependent on the facts of the case."

In the Huaimbukie case, the National Court observed that:

> The Supreme Court decisions made it clear that, the liability of the State in an unlawful police raid, arrest and or any breach of a person's Constitutional right is dependent on two considerations. The first is whether the wrong doer was an employee or servant of the State at the time of the conduct of action in question. Secondly, if the first question is answered in the affirmative, then the next consideration is whether the circumstances render the State vicariously liable. They did not displace the common law requirements for a plaintiff to show against an employer that his offending employee was in the course of his or her employment pursing the employer's interest.

It follows that to identify whether a perpetrator is a servant or agent of the State, the State must first identify who the perpetrator is? Whether he is in fact a servant or agent or officer of the State. What job he does, which office or branch of the State he or she is attached to. As stated in the Kofowi case, *not all officers of the State are its agents or servants nor are all its agents or servants also its officers*. If the State fails to put a name to a character, it would be impossible for the State to verify whether that nameless character is in fact a servant, or agent, or an officer of the State. I am therefore of the view that the Kewakali judgment was sound in law:

> In addition, we view the provisions of s 1(2) of the Wrongs Act provides by necessary inference that a servant or agent of the State who has been alleged to have committed the wrong, must be named as a party or a co-defendant. In our view, if a plaintiff does not name the alleged principal tortfeasor there is a no nexus or connection so there will not be a cause of action against the nominal defendant (the State). Thus, it is our opinion that to do justice to all parties, the Plaintiff must name the servant or agent of the State or the alleged tortfeasor and must also plead in the Statement of Claim the nexus or connection between the principal tortfeasor and the nominal defendant. This is because to succeed in having the State held liable for the tort of a policeman, the Court has to be satisfied that*:*
>
> (a) The policeman as a servant or agent of the State, committed the tort during the course and within the scope of his employment (s 1(1)(a) Wrongs Act); and
>
> (b) The policeman as an officer of the State, committed the tort while performing or purporting to perform functions conferred or imposed upon him by statute or the underlying law (s.1(4) Wrongs Act; *The Independent State of Papua New Guinea v David Wari Kofowei and Ors* [1987] PNGLR 5, and *Abel Tomba v The Independent State of Papua New Guinea* (1997) SC518 did not say that vicarious liability automatically follows against the State as soon as the wrong doer is found as an employee of the State. That is only one-half of the consideration. They must have been found to have been acting within the scope of their employment.

There has therefore got to be a nexus or connection between the tortfeasor and the State in terms of servant-employer relationship to bring into play the principle of vicarious liability.

The Kewakali case also considered the instances were the primary tortfeasors cannot be identified by the claimant, and has provided an exception as follows:

> In saying so, we do not for the moment suggest that, for instance, if there is a police raid that all the policemen involved should be named. On the contrary it would be sufficient to name at least one or two of the policemen involved as co-defendants or follow what was done in Pyali's case, that is, name the immediate commander, so as to bring into play the principles of vicarious liability between the principal tortfeasor and the nominal defendant.
>
> Even where the plaintiff is unable to identify the principal tortfeasor, for example, if such a raid occurred in the dark and middle of the night, it would still be necessary to establish the nexus by naming the commander as in Pyali's case. The plaintiff may need to investigate to satisfy himself which station, unit or division the policemen came from to identify the commander of the station, unit or division and name him as a defendant. Otherwise a pleading claiming unlawful conduct by policemen not named as parties to the proceedings, could well be struck out as general and vague.

I am of the view that the Kewakali case was not unreasonable in stating the principle of naming the principal tortfeasor was the only option to establish the principle of vicarious liability. The Supreme Court also provided the exception to that rule where tortfeasors are impossible to identify, a co-defendant as identified with the tortfeasor or the commander may be named as parties. The Kewakali case is in my view consistent with the principle of vicarious liability.

> *Inconsistent with the rules of proper pleadings in regards to the Principle of Vicarious Liability*

Thirdly, my view is that the Nare case is inconsistent with the rules of proper pleadings in regards to the principle of vicarious liability. In the Nare case, the Supreme Court stated that:

> It is not part of the cause of action that the offending officers be identified or be parties to the cause pleaded against the State. Indeed, there may be good industrial relations reasons why the State would not seek indemnity against an employee or agent who committed such a tort.

First, in regards to the law of pleadings, the Supreme Court case of *Papua New Guinea Banking Corporation (PNGBC) v Tole* (2002) SC694, stated as follows:

> The law on pleadings in our jurisdiction is well settled. The principles governing pleadings can easily be summarized in terms of, unless there is foundation in the pleadings of a party, no evidence and damages or relieves of matters, not pleaded can be allowed. This is the effect of the judgements of this Court in *Motor Vehicles Insurance (PNG) Trust v John Etape* [1995] PNGLR 214 at p221 and *Motor Vehicles Insurance (PNG) Trust v James Pupune* [1993] PNGLR 370 at pp 373 –374. These judgements re-affirmed what was always the position at common law and consistently applied in a large number of cases in our country. The list of such cases is long but reference need only be made to cases like that of *Repas Waima v Motor Vehicles Insurance Trust* [1992] PNGLR 254 and *Carmelita Mary Collins v Motor Vehicles (PNG) Insurance Trust* [1990] PNGLR 580 for examples only.

The Supreme Court went further and stated that:

> This position follows on from the objects behind the requirements for pleadings. As the judgement in *Motor Vehicles Insurance (PNG) Trust v James Pupune* [1993] PNGLR 370 at p 374 said in summary, pleadings and particulars have the object or functions of:
>
> 1. They furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it;
> 2. They define the issues for decision in the litigation and, thereby, enable the relevance and admissibility of evidence to be determined at the trial; and
> 3. They give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court.

From the above, it can be noted that, proper pleadings play a vital role in placing the foundation of a claim which would allow the opposing parties to answer to the allegations. Therefore, in a

case based on the principles of vicarious liability, proper pleadings plays a very vital role in allowing the State a fair opportunity to meet it, define the issues for decision in the litigation and, thereby, enable the relevance and admissibility of evidence to be determined at the trial and lastly it gives the State an understanding of a plaintiff's claim in aid of the State's right to make a payment into court.

In the Pinda case, the court observed that:

> In this case, the cause of action was based on the tort of negligence. To succeed in having the second respondent held liable for the negligent actions or omissions of the policemen, the National Court has to be satisfied that:
>
> (a) the policemen as servant or agents of the second respondent committed the tort of negligence during the course and within the scope of their employment (Section 1(1)(a) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297); and
>
> (b) the policemen as officers of the second respondent committed the tort of negligence while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law (Section 1(4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297).

The Supreme Court then held that:

> In a case of illegal police raid, for the second respondent (the State) to be held vicariously liable in damages for the negligent acts or omissions of policemen, the appellant must plead that the policemen were acting in the course and within the scope of their employment or while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law when they conducted the raid (Section 1(1) & (4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297).
>
> The failure to plead that the policemen were acting in the course and within the scope of their employment or while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law when they conducted the raid is a point of law and it was open to the trial judge to consider it, notwithstanding the entry of default judgment and trial on assessment of damages. *Coecon Limited v National Fisheries Authority & The State* (2002) N2182; *William Mel v Coleman Pakalia, The Police & The State* (2005) SC790 and *Rupundi Maku v Steven Maliwolo & The State* (2012) SC1171 referred to.
>
> Further, the Nare case suggested that if the State wishes to pursue a case against its employee or agent, the State could apply to join officers known to it, who committed or were responsible for the commission of the tortuous acts because the State is better placed than the hapless victims to identify such persons. Moreover, the State is also not precluded from demanding by request for particulars or interrogatories that the plaintiffs disclose such knowledge as they had of the identity of the relevant officers.
>
> Those two suggestions are more or less impractical and have reversed the burden of proof from the party alleging, to the party defending. As to the first suggestion, the State does not exist on its own. The State is an in animated being which only derives its nature from its servants and agents. The State is neither an abstract human being nor an artificial intelligence who would know the conduct of its and every one of its servants and agents. That is why, Parliament saw it fit to enact the CBASA which amongst other things provides a condition precedent of giving notice to the State. This notice requirement includes giving sufficient particulars to the State to enable it to cause its own enquires to ascertain the validity of the case. For these reasons, the State is very much hapless if a victim cannot provide the name of the employee or agent responsible or name of its commanding officer.

The court seems to contradict itself when it said:

> The court in Kewakali did acknowledge the difficulty of naming the perpetrators, particularly as they might well wish to avoid detection. Nevertheless, the naming of senior officers who may well have had no knowledge of their junior officers' activities is not only otiose but contrary to principle. To be named as a defendant a person must be alleged to be a tortfeasor or a person or body vicariously liable for the acts of a principal tortfeasor. A senior officer is not vicariously liable for the acts of his or her subordinates. He or she can only be liable if directing or authorising the tortious conduct.

The contradiction is that, the State cannot be separated and seen in a different light than its employees; especially the senior officers, superiors and managers in a particular branch, office or established government institution. The superiors and managers are in actual fact the eyes and ears of the State. The State as an abstract entity does not have the human personality to know the conduct of junior officers. The senior officers, the superiors and the managers are the appropriate persons who can answer for the conduct of their subordinates or even cause an inquiry as to allegations raised against his or her subordinates.

In regards to the second suggestion, the State cannot be burden by what has already been sanctioned by Section 5 of the CBASA**.** The State should not be burdened to file applications requesting for particulars or interrogatories that the plaintiff disclose such knowledge as they had of the identity of the relevant officers. For that reason, the claimant ought to name the principal tortfeasor or its superiors to enable the State to answer the allegations raised against the State's servants or agents.

Considering what has been stated in the Nare case in light of the law of pleadings outlined above, naming the principal tortfeasor in the pleadings pays a vital role in giving a fair opportunity to the State to answer the allegations raised against it through the actions or omissions of its servants or agents.

Inconsistent with other case laws regarding Vicarious Liability as against the State

The Nare case in its endeavour to pronounce the Kewakali case bad law has made the cardinal error of not addressing all Supreme Court cases that deal with the issue of vicarious liability against the State. A significant judgment that was not considered is the Pinda case.

The Pinda case is significant as the Supreme Court clearly set out the parameters and requirements of pleading a cause of action of tort of negligence as against the State. As outlined earlier, the Pinda case established the rule that, '*for the State to be held vicariously liable in damages for the negligent acts or omissions of policemen, the appellant must plead that the policemen were acting in the course and within the scope of their employment or while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law when they conducted the raid.* The court further ruled that:

In this case, the cause of action was based on the tort of negligence. To succeed in having the second respondent held liable for the negligent actions or omissions of the policemen, the National Court has to be satisfied that:

(a) the policemen as servant or agents of the second respondent committed the tort of negligence during the course and within the scope of their employment (Section 1(1)(a) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297); and

(b) the policemen as officers of the second respondent committed the tort of negligence while performing or purporting to perform functions conferred or imposed upon them by statute or the underlying law (Section 1(4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297).

Without considering the Pinda case, the Nare case concluded its judgment that:

> It follows that the cause of action against the State is established if:
>
> - Tortuous conduct is perpetrated by; and
> - Officers of the State, including police; and

- Acting or purporting to act in the course of their duties.

Even though the Nare case briefly considered the term 'purporting to act' in brief terms, it failed to consider what it means to be 'acting in the course and within the scope of duties.' In considering the term 'purporting to act', the Nare case stated that the wording is of great significance. The Supreme Court further stated that, it is not part of the cause of action that, the offending officers be identified or be parties to the cause, pleaded against the State, and that there may be good industrial relations reasons why the State would not seek indemnity against an employee or agent who committed such a tort.

If the Nare case had taken into account the Pinda case, the Supreme Court would have noted that the Pinda case specifically stated and used the words; '*committed the tort of negligence during the course and within the scope of their employment*'. The terms 'scope of employment' and 'course of employment' are sometimes used interchangeably[5]. Also if the Supreme Court had considered the above wording in detail, it would have noted the factors in determining whether the act was committed in the course of employment and would have expounded on when exactly can a cause of action be established against the State. These factors are as follows[6]:

1. The mode of doing the work that an employee is employed to do.
2. Authorised limits of time and space.
3. Express prohibition.
4. Connection with employer's work.
5. Deliberate criminal conduct.

There are several important points that need to be made about vicarious liability that stand out in this case. First, if the servant of the State undertakes a mode of doing the work that he is not employed to do than the State would not be vicariously liable.[7] There are however certain exceptions to this particular rule.

Second, the conduct of an employee is within the scope of his employment only during his authorised period of work (or a period which is not reasonably disconnected from the authorised period). However, in the case of *Stanley v Kawa* (2005) N2865, the court held that although the police officers were off-duty, they remained police officers 24 hours a day and, using a public road, they owed a duty of care to fellow road users.

I am of the view that, it would be contrary to the principle of vicarious liability and also public policy for the State to be held liable for every single tortuous actions of a policeman. My argument is based on the proposition in *Joel v Morision*[8] that:

> If he was going out of his own way, against his master's implied commands when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

Third, most or all employers expressly prohibit certain acts or conduct to safeguard them. Nonetheless, there are issues whether defiance of the prohibition is thereby place outside the scope of employment. In the case of *Plumb v Cobden Flour Mills Co Ltd*[9]**,** the House of Lords laid down the rules as follows:

> there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent

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5 Peel. W. E. & Goudkam. J, *Tort* (London: Thomson Reuters (Professional) UK Limited,2014) 652.
6 Brazier. M., *Street on Torts* (London: Butterworth & Co (Publishers) Ltd, 1993) 498.
7 *Ricketts v Thos Tilling Ltd* [1915] 1 KB 644, CA. See also *Ilkiw v Samuels* [1963] 2 All ER 879, CA.
8 (1834) 6 C & P 501 at 503.
9 [1914] AC 62 at 67 (per Lord Dunedin) HL; (a workmen's compensation case, but the principles are still the same).

recovery of compensation. A transgression of the former class carries with it the results that the man has gone outside the sphere.

Having considered the above and also the case of *Twine v Bean's Express Ltd*[10], I am of the view that if employees or agents of the State act contrary to express prohibitions which most of them are prescribe by law, then they will be deemed to be acting outside the scope of their employment.

Fourth, the issue of whether the acts were connected to the employer's work, determines whether an employee is acting in the course of his employment. On most occasions, employees do tasks which have no express authority, but with the intention to further their employer's objectives. If the means of accomplishing this objective is so outrageous that no employer could reasonably be taken to have contemplated such an act as being within the scope of employment, the employer would be liable for torts that are committed. The case of *Makanjuola v Metropolitan Police Comr*[11] is a classical example of a case were a conduct was unconnected with the employer's work. In that case, a police officer extracted sexual favours from the plaintiff in return for a promise not to report her to the immigration authorities. It was held that his act was entirely for his own purposes, and not an act his employer, in any sense authorised. The PNG example is the case of *More v The State* [1998] PNGLR 290. In that particular case, a police squad, headed by the second defendants, entered the plaintiff's village pursuant to a valid search warrant. The warrant entitled the policemen to search houses and recover unlicensed firearms and ammunition. In the process of their search two unidentified policemen assaulted and raped the plaintiff, an adult female. The court held that whilst a policeman's title and uniform is no shield against criminal prosecution for criminal offences, the State as their employer cannot be held liable for the crimes, including rape, committed by the policemen in the course of performing their duties.

Lastly, the issue of whether it was a deliberate criminal conduct of the employee and agent determines whether an employee is acting in the course of his employment. There are cases which the wrongful conduct is in no way in the employer's interests, if it is so much part and parcel of the job, the employee is engaged to do, then the employer remain liable for that conduct.[12] When a criminal conduct happens which is in no sense in the employer's interest and also was not in any way related to the job the employee was engaged to do, the employer would not be liable.

Because of that pertinent omission in not considering what the wording 'in the course and within the scope of employment' means and whether or not it was appropriately used in the Pinda case, but more importantly, the omission in not considering the whole of the Pinda case, I am of the view that the Pinda case is still good law.

Failure take into consideration the prevailing situation in PNG with regards to State's liability

A close examination of the Nare case reveals that the Supreme Court failed to take into consideration the prevailing situation in PNG where most employees and servants of the State are abusing their powers and acting out of the frolic of their own. If the Supreme Court had considered the line of cases that deal with the State's liability, then it would have noted that the majority of these cases stem out from the unruly behaviour and conduct of the servants and agents of the State which have resulted in the State forking out millions of kina as damages.

In the case of *Application by Kunzi Waso* [1996] PNGLR 218, Justice Jalina stated at page 224 that:

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10 (1946) 175 LT 131, CA, (This was a case were the employer had a contract to employ his vans on Post Office business. Contrary to his express instruction, his driver gave a lift to a third party. It was held that giving the lift was outside the scope of employment. Operating what was in effect a 'free taxi service' was not the job the driver was employed to do.

11 [1992] 3 All ER 617, CA.

12 *Bracebridge Enginneering Ltd v Barby* [1990] IRLR 3.

> In the past the courts have been ordering the State to bear the financial burden on the principle of vicarious liability. This has resulted in the ordinary tax-payer footing the bills. It has resulted in moneys that could have been used on development projects such as health and education being used to pay damages. I am therefore going to differ from my brethren. I am of the opinion that when a member of the disciplined forces, be he a soldier, policeman or warder goes beyond the bounds of the law and ends up breaching someone's constitutional rights, then he should be made to personally bear the consequences of his actions. The reason for this is simple. The State does not say to the officers on duty 'you go and beat up that person badly, you go and burn houses and kill pigs and chickens and rape women'. Not at all. Officers are not only told but expected to go and carry out their duties within the bounds of the law. What happens in the field of operation and how far one should go in carrying it out is in the hands of the individual. I believe that by awarding damages against officers individually will result in not only the amount paid by the State in damages being reduced but may also reduce the frequency of unruly behaviour by policemen and warders and others.

This case goes to point out that the courts, have observed that a lot of money has been paid out by the State because of the bad conduct of its employees and that the State has observed that, ordinary tax-payers are footing the bills which such monies could have been used on development projects. Jalina J, also stated that by awarding damages against the officers of the State individually, this will achieve two outcomes for the State;

1. Reduction in the amount of damages paid by the State; and
2. Reduction of the frequency of unruly behaviour by servants of the State.

The case of *Desmond Huaimbakie v James Baugen & The State* (2004) N2589 and *Peter Aigilo v The Independent State of Papua New Guinea & Ors (No1)* (2001) N2102 also supports this position.

The second line of case includes the case of *Koi v Anseni* (2014) N5580. In that judgement, Justice Cannings noted the above cases, but made these remarks:

> If these decisions stand for the proposition that as soon as it can be established that a police officer, such as the first defendant, has done something obviously unlawful, it follows that he has acted outside the scope of his employment, therefore excusing the State from liability, I respectfully decline to follow them. I have a different view entirely.

Since there are two lines of cases regarding this position, the Nare case should have considered both lines of cases. The omission by the Supreme Court goes to the core of the soundness of the judgment itself.

2. Are there Serious Implications for the State in light of the Nare Case?

There are serious implications for the State in light of principles established in the Nare case. An immediate implication will be the high tendency of opportunist fabricating claims against the State based on the fact that they cannot be able to identify the principal tortfeasor.

As I have outlined above, the Nare case opens the floodgate to claimants or lawyers who will merely name the State in cases where:

1. They are of the opinion that the tortfeasor is an agent or employee of the State.
2. A private person is responsible for the breach or tortuous action however, the claimant is of the opinion that he will not benefit by instituting an action against that private person, but may see it profitable to institute an action against the State.
3. An agent or employee of the State was acting in the frolic of his own when the tortuous action or breach happen however the claimant is of the opinion that he or she cannot recover anything if they instituted an action against the tortfeasor in his private capacity but may see if profitable to institute an action against the State.

Since the Nare case, a couple of cases, including those cases that have adopted and relied on the

Nare case, have held the State liable and also order damages against the State. These include; *Lyanga v Independent State of Papua New Guinea* (2017) SC1635; *Pade v Nangas* (2018) N7073; *Gaian v Yawing* (2018) N7099; *Munvi v Takai* (2018) N7100; and *Pote v Smith* (2018) N7117.

If the principles in the Nare case remain in effect, it will cause the State millions of money in cases where the State cannot be able to identify the primary tortfeasors and also in cases which are totally baseless and bogus altogether.

3. Can the Nare Case be Challenged?

I am of the view that based on the inconsistencies discussed above, the Nare case is *per in curiam* and can be challenged by applying the principles set out in the case of *Christian v Namaliu* (1996) SC1583 (Christian case).

In the Christian case, the Premier of Morobe Provincial Government applied to the Supreme Court for declarations that the repeal and replacement of the *Organic Law on Provincial Governments* made by the Parliament were invalid. He relied on the grounds that the passage of the amendments through Parliament had not observed procedural requirements of the *Constitution,* in particular Section 14 which required a proposed amendment to the *Constitution* to be distributed to Members of Parliament at least one month before the Bill is to introduced into Parliament.

The Supreme Court refused the application. The court also ruled that the application was *res judicata* and the application incompetent for want of right to apply. The court held that:

1. A prior judgement is *per in curiam* if the earlier decision was given in inadvertence of some well established principle, or some other decision of a court apparently binding on the court giving such judgement, which if the court were adverted to, it would have affected the decision given, such that the Court would have decided otherwise than it did, if in fact the Court had applied the authority or principle; and

2. The Supreme Court should only depart from an earlier statement it had made on the law:
   a) in the most exceptional circumstances; and
   b) when the Chief Justice is presiding, unless the Chief Justice is being asked to reverse one of his own decisions;-
      (i) after the most careful scrutiny of the precedent authority in question and after a full consideration of what may be the consequences of doing so;
      (ii) where the earlier decision can be said to be clearly and manifestly wrong, or in conflict with some other decision of the Court or well established principle, and that its maintenance is injurious to the public interest.

Conclusion

After the Nare case was decided, it has caused a lot of issues in regards to the defence the State is entitled to raise. It has resulted in an uphill climb for the State in terms of conducting investigations to verify the allegations raised, putting a defence that would safeguard the State's interest and also exonerating the State from bearing liability. The Nare case has also increased the hardship on the part of the State in ascertaining whether a claim against it is actually genuine or another attempt to defraud the State.

Nevertheless, this paper was purposed to set out the inconsistencies in the Nare case and suggest the way forward for the State and that is to challenged the Nare case as a decision ***per in curiam.*** If and when the Nare case is challenged, the Supreme Court can address the issues raised in this paper and can make a determination on the issue on whether or not it is manifestly wrong, or in conflict with some other decision of the court or well established principle, and that its maintenance is injurious to the public interest.

State Contracts - The importance of a valid Contract

Milfred Wangatau, LLB*

Introduction

The Independent State of Papua New Guinea (State) through its institutions such as the provincial and local-level governments, national government departments and statutory bodies, commonly procure goods and services through contracts. Like any other organization, in order to function, the State is required by law to procure its goods and services from service providers through contractual arrangements. In such instances, some contracts are verbal - for minor contracts, and some are written, for major contracts.

The legal basis for the State to enter into a contract, either domestically or overseas is provided for under Section 247 of the *Constitution. It reads:*

> *(1) Papua New Guinea has power to acquire, hold and dispose of property of any kind, and to make contracts, in accordance with an Act of the Parliament; and*
> *(2) Papua New Guinea may sue and be sued, in accordance with an Act of the Parliament.*

While there are other subordinate laws giving effect to Section 247(1) of the *Constitution*, the primary legislation governing State contracts is the *Public Finance (Management) Act* 1995 (PFMA). This legislation provides the overarching framework for the governance of public funds.

The necessity of entering into a well compliant and lawfully valid contract with the State is imperative. The courts have held that, a person dealing with the State or any of its arm or instrumentality or a public institution, to which the PFMA applies, is bound to comply with the requirements of the Act, and any person deemed to be dealing with such institutions or bodies is deemed to be aware of these requirements.[1]

This paper provides a cursory discussion on State contracts and the implications of non-compliance with the requirements of the PFMA. The supplies and tenders board process, the distinction between a major and a minor contract, and an examination of the importance of an Authority to Pre-Commit (APC), and an Integrated Local Purchase Order (ILPOC or Form 4A) under the PFMA will also be presented. A number of relevant and recent case laws will be discussed to demonstrate the present position and the attitude taken by the Courts in clarifying these processes.

The Supply and Tenders Board

The PFMA provides that before a contract is entered into with the State for all major contracts (that is, contract value above K100,000.00), a public tender must be called for the public to bid through the tender process.[2] Bids are submitted to the Central Supply and Tenders Board (CSTB) for the national Government and Provincial Supplies and Tenders Board (PSTB) for provinces. The CSTB and PSTB are established under Sections 39 and 39B of the PFMA respectively. The Minister of Finance may also establish specialized national supply and tenders boards under Section 39A of the PFMA.

Public tenders involve the widespread advertising of opportunities to supply the government with the required goods or services. The public tender process promotes the principle of competition. This process must be differentiated from selective tenders, expressions of interest and other procurement

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1 See *Fly River Provincial Government v Pioneer Health Services Ltd* (2003) SC705.

2 Section 61 PFMA. See also Part 13 of the Financial Management Manual (2006).

mechanisms. Selective tenders are not allowed under the PFMA as they restrict the level of competition.

The processes available for procurement must also be used for the disposal of items no longer required by the government. In circumstances where a supply and tenders board issues a certificate of inexpediency (CoI), the public tendering process will not apply. A CoI may only be issued in exceptional circumstances as outlined in Part 13, Division 4 of the *Financial Management Manual*.

The role of a supply and tenders board is to ensure that major procurements conducted under its authority; (1) have been carried out in accordance with the PFMA, the Regulations, and Financial Instructions; and (2) represent "value for money" for the government of Papua New Guinea (PNG).

In carrying out this role supply and tenders boards must adhere to the principles of transparency, effective competition, fair and ethical dealing and efficient and effective operation as outlined in Part 11 of the Financial Management Manual. In addition, the CSTB has an additional role to 'control and regulate' procurement in relation to 'minor procurements', major procurements and PSTB, in accordance with Section 39 of the PFMA. This supervisory role does *not* extend to specialized national supply and tenders boards.

Responsibilities of Departmental Heads in relation to Procurement

To avoid corrupt and illegal dealings, departmental heads are responsible for ensuring compliance with the new changes to the PFMA and the Financial Instructions. Failure to comply with these new provisions could result in serious disciplinary actions against the departmental heads. The head of each spending department or province must ensure that all pre-commitments made by their department or province are included in the annual bids or estimates for the following year (and any subsequent years).

Purchases, Claims and Contracts under K100,000

The Secretary for Finance is not required to approve an APC for amounts less than K100,000 (even though the amendments to the PFMA does make allowance for this). If there are insufficient funds available in a vote to make the purchase using an ILPOC in the current year, the relevant department should make use of available capacity, or seek to have the purchase funded through estimates for the following year. The relevant department or province should not enter into a contract with a supplier if there are insufficient funds available. The relevant department cannot anticipate that funds will be available in the following year (without an APC). These are the cases that Sections 47B, 47C and 47D of PFMA are intended to eliminate (that is, unauthorised officers ordering goods or services without an ILPOC when there are no funds or insufficient funds available).

An ILPOC is the only legitimate evidence that funds are immediately available in the current year. An APC (for amounts over K100,000) is the only legitimate evidence that funds will be made available later in the current year or in a following year. Public officials who deal with suppliers and contractors without an ILPOC or an APC are not acting on behalf of their department or the government. Authorised departmental officers are responsible for obtaining quotations on material or services that are valued up to K100,000 in accordance with the table below:[3]

Value	***Process***	***Detailed Reference***
Less than K5,000	Verbal Quotation	Part 12, Division 2, Financial Management Manual
K5,000 up to K100,000	Written Quotation	Part 12, Division 3, Financial Management Manual

[3] Part 12, Financial Management Manual (2006).

Verbal Quotations (for Purchases less than K5,000)
Three verbal quotations are obtained for purchases valued at less thanK5000. Quotations are to be recorded in a Quotations Register that includes the following (minimum) information:

(1) Date of quotation.
(2) Brief description of the goods, services or works required.
(3) Price quoted.
(4) Name of each company providing quote.
(5) Name of each company's representative from whom the quotation is obtained.
(6) Name of departmental officer obtaining the quotation.
(7) Company selected to supply the goods, works or services.
(8) Reason for selection of the successful company.
(9) General comments – relating to the quotation.

Each minor purchase is to be ruled off, so that anyone inspecting the Quotations Register can easily determine which quotation relate to a particular purchase. The Quotations Register is to be legible and is to be made available for auditing purposes. Where three suppliers are unable to provide a quote, for example, when proprietary brand items are required, and there is only one supplier, the reason for this is to be recorded in the 'General Comments' section of the Quotations Register. The departmental officer should provide answers to technical questions from suppliers arising during the quotation period. All potential suppliers should be provided with the same information. The departmental officer is to ensure that the goods or services proposed by potential suppliers will meet all relevant technical, delivery and other legitimate requirements of the department.

A contract is to be awarded to the company that meets the relevant technical, delivery and other legitimate requirements of the department, and provides the lowest cost arrangement. Once a supplier is selected, the appropriate requisitions are raised for processing accordingly.

Written Quotations (for purchase valued from K5,000 and less than K100,000)
According to the PFMA, three written quotations are usually obtained for purchases valued between K5000and under K100,000. Quotations are to be requested from potential suppliers in writing. The department is to provide the potential suppliers a complete 'Description of Requirement', including, but not limited to, quantity, description, delivery requirement, timings, specifications, standards, drawings, special conditions, and any additional information required by the department.

Prices are to be recorded on the Quotations Register, that includes the following (minimum) information:[4]

(1) Date of quotation.
(2) Brief description of the goods, services or works required.
(3) Price quoted.
(4) Name of each company providing quote.
(5) Name of each company's representative from whom the quotation is obtained.
(6) Name of departmental officer obtaining the quotation.
(7) Company selected to supply the goods, works or services.
(8) Reason for selection of the successful company.
(9) General comments – relating to the quotation.

All three written quotations received, and the detailed 'Description of Requirement' are to be attached to the relevant page in the Quotation Register.

Each major purchase is to be ruled off, so that anyone inspecting the Quotations Register can easily determine which quotations relate to a particular purchase. The Quotations Register is to be legible and be made available for auditing purposes. Where three suppliers are unable to provide a quote, for example, when proprietary brand items are required, and there is only one supplier, the reason for this is to be recorded in the 'General Comments' section of the Quotations Register. The departmental officer should provide answers to technical questions arising during the quotation period. All potential

4 Part 12, Division 3, Financial Management Manual.

suppliers should be provided with the same information. The departmental officer is to ensure that the goods or services proposed by potential suppliers will meet any relevant technical, delivery and other legitimate requirements of the department.[5]

Purchases, Claims and Contracts over K100,000

Where a department wishes to enter into contracts for amounts of K100,000 or above, and there will be funds available to meet the schedule of payments under the contract (either in the current or subsequent financial years), that department will be able to apply to the Secretary for Finance for an APC. It will be the head of that department's responsibility to ensure that funds are secured in subsequent year's estimates and appropriations through their budget negotiations with the Department of National Planning and Monitoring and with the Department of Treasury.

An application for an APC should be completed by the officials of the relevant department, and signed by the head of that department. All relevant parts of the application form should be completed. The APC must be applied for and obtained by the relevant spending department prior to inviting any tender including applying for a CoI. All other requirements of any relevant supply and tenders board must be complied with after an APC has been obtained. An APC is not required for utility payments.

The application should be delivered to the First Assistant Secretary (Expenditure and Cash Management Division) of the Department of Finance, where it will be registered. If the application form is not complete, the application will not be registered or accepted and will be returned to the relevant department if such omissions are subsequently discovered. The First Assistant Secretary will evaluate the application according to the established criteria.

The results of this evaluation are then considered at the weekly APC Committee meeting. The committee include heads of the relevant divisions of the Treasury Department and the Department of National Planning and Monitoring in order to jointly ascertain the merits of the APC request and the likelihood of funds becoming available to fund payments under the contract. The First Assistant Secretary, in his capacity as Chairman of the APC Committee, makes recommendations to the Secretary for Finance as to whether an APC should be approved, together with a recommended maximum amount of pre-commitment.

If approved by the Secretary, the First Assistant Secretary will allocate an APC number, and the APC details will be entered into the register accordingly. The APC will be in triplicate – white (original for the supplier or contractor); blue - Department of Finance copy, and green - implementing department's copy. For all APCs the Department of Finance will make and retain a photocopy of the APC form.[6] The entire APC form is then passed on to the nominated contact officer of the implementing department.

This officer will then make a photocopy of the form and forward the entire APC form, together with any requisition (FF3), to the relevant supply and tenders board. The relevant supply and tenders board will not proceed to tender or grant a CoI unless an APC has first been obtained from and approved by the Secretary for Finance. The relevant supply and tenders board will write their file number on the original of the APC, and place their stamp and date over the top of that file number.

When a notice of successful tender or CoI has been issued by a supply and tenders board, it will fill in the name of the successful contractor or supplier. The board will make and retain a photocopy of the APC and return the blue copy to the Department of Finance, and the original (white) and the implementing department copy (green) to the nominated contact officer on the APC. The officer will then forward the original APC to the successful supplier or contractor.

An APC/ILPOC

Section 47D of the PFMA provides the definition of an APC and an ILPO. APC is defined as:

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5 Ibid.

6 At this stage the supplier or contractor has not filled out the form.

Authority to Pre-commit Expenditure means an Authority to Pre-commit Expenditure issued under Section 47B.

ILPOC is defined as:

Integrated Local Purchase Order or Claim (ILPOC) means Finance Form 4A – Integrated Local Purchase Order or Claim issued in accordance with the Financial Instructions.

The APC process was introduced to bring under control the problem of 'arrears.' The APC process is contained within Sections 47B, 47C, and 47D of the PFMA. The amendments to the PFMA in 2016 is aimed at limiting the validity of contracts with the government to:

1. Those that are authorised by a PGAS generated ILPOC or Form 4A. [The national Department of Works shall continue using its ORACLE based computer generated ILPOC], that is, where funds are available in the current year, or,
2. Where there is a need to commit expenditure in advance of funds becoming available, those that are authorised by the Secretary for Finance as evidenced by his signature on an APC or Form5A.

The 2016 amendments provided that unless contracts with the government are supported by one of these two forms of authority, those contracts will be null and void and will not be enforceable against the government.

The purpose of the APC process is to ensure proper accounting, management and reporting on the Pre-Commitment of Expenditure is maintained at all levels of the national, provincial and local-level governments.

Section 47B of the PFMA provides for the legal basis for APC. It is set out in full:

47B. Authority to pre-commit expenditure.

(1) The Departmental Head of the Department responsible for financial management may issue to a Departmental Head an Authority to Pre-commit Expenditure in relation to the purchase of property or stores or to the supply of goods or services where the Departmental Head of the Department responsible for financial management is satisfied that-

(a) in the case of proposed expenditure exceeding K100,000.00-

(i) in the provisions of this Part have been complied with in relation to the purchase or supply; and

(ii) funds will be available to meet the proposed schedule of payments for the purchases or supply; and

(b) in the case of proposed expenditure not exceeding K100,000.00, the circumstances of the proposed expenditure are such that it is appropriate to authorize the Department, to the Departmental Head of which the Authority to Pre-Commit Expenditure was granted, to enter into a contract for the purchase of property or stores or for the supply of goods or services notwithstanding that the full amount of funds to meet the payment required under the contract is not immediately available but it is within the appropriation for the year to which the Authority to Pre-commit Expenditure relates for the item to which it relates.

(2) An Authority to Pre-Commit Expenditure under Subsection (1) shall specify-

(a) the purchase of property or stores of the supply of goods or services to which it relates; and

(b) the maximum amount to which the Authority extends.

(3) Subject to Subsection (4), an Authority to Pre-commit expenditure under Subsection (1) authorizes the execution, in accordance with and subject to compliance with the procedures specified in this Part, of a contract for the purchase of property or stores or for the supply of goods and services specified in the Authority to the extent of an amount not exceeding the maximum amount specified in the Authority.

(4) A contract under Section 47 shall not be entered into unless –

(a) an Authority to Pre-commit Expenditure under Subsection (1) relating to the contract has been issued; and

(b) all other requirements of this Part relating to the contract have been complied with.

Section 47C and 47D PFMA make it clear that contracts which have not complied with the Act are null and void. Section 2A of the *Claims By and Against the State Act* 1996 (CBASA), reinforces this position.

The recently enacted *Public Money Management Regularization Act*, 2018 (PMMR) takes it one step further in its application by ensuring that the requirement of the APC and ILPOC is made applicable to all statutory bodies. Section 11 of the PMMR is in the following terms:

11. CLAIM AGAINST THE STATE AND STATUTORY BODIES NOT ENFORCEABLE IN CERTAIN CIRCUMSTANCES.

(1) A claim for payment, compensation, restitution, damages or any other form of relief, including injunctive or declaratory relief, against the State or a statutory body based on equity or equitable principles in respect of the value of works, goods or services rendered to the State or a statutory body shall not be enforceable through the Courts or otherwise, unless the seller of the property or stores or the supplier of the works, goods or services produces-

(a) a properly authorized ILPOC; or

(b) an Authority to Pre-commit Expenditure,

relating to the property or stores or works, goods or services, the subject of the claim, to the full amount of the claim.

(2) A claim for payment, compensation, restitution, damages or any other form of relief, including injunctive or declaratory relief, against the State or a statutory body based on the undertaking or promise of any person, whether or not that person had the actual, implied or ostensible authority of the State or statutory body to give or make that undertaking or promise, shall not be enforceable, through the courts or otherwise, unless the person making the claim produces -

(a) a properly authorized ILPOC; or

(b) an Authority to Pre-commit Expenditure,

relating to the undertaking or promise, the subject of the claim, to the full amount of the claim.

(3) The Court shall, on application by the State, stay a claim specified in Subsections (1) and (2), if the person making the claim cannot produce, on demand by the State -

(a) a properly authorized ILPOC; or

(b) an Authority to Pre-commit Expenditure,

relating to the subject of the claim, to the full amount of the claim.

The message is clear from the legislature. Any person doing business with the State must show that he or she has a valid APC and ILPOC to perform the contract. Without a valid APC or ILPOC, the purported contractual arrangement is invalid.

Suppliers and contractors cannot seek to be paid for any goods or services they have provided, where they did not first obtain an ILPOC or an APC. Departments are reminded that normal procurement procedures apply for amounts under K100,000. This includes obtaining three written quotes and the issuance of an ILPOC. The only exemption to the above will be the use of a FF4 for purchases in genuine emergency situations up to a maximum amount of K300. Examples could include purchase of food items for a large and unexpected police cell intake in a remote area. Fixing a dripping tap, purchase of stationery and other such examples cannot and do not constitute an emergency. This provision may not be used to substitute for poor planning and preparation by a department.

Implications of non-compliance - ILPOCs & APCs

The courts have taken an obstinate approach to safe guard the provisions of the PFMA (Sections 47B, 47C and 47D) for purported contracts with the State, particularly the requirement to produce a valid ILPOC for minor contracts and an APC for major contracts.[7] In the recent decision in *Ray (Trading as Bara Construction) v Numara* (2018) N7380, Hartshorn J, dismissed the proceedings for failing to comply with the requirements of Sections 47B, 47C and 47D of the PFMA and Section 2A of the CBASA. His honour made the following observations:

> In regards to the submissions by Jhelson that a General Expenses Form and a Requisition for Goods and Services were endorsed in support of the contract, that a Certificate of Completion was issued and therefore the contract is valid and enforceable, ss 47D PFMA and 2A Claims Act are quite clear. A contract purportedly entered into for and on behalf of the State without full compliance of the PFMA is null and void and shall not be enforced in any court and any property, goods or services supplied under such a contract may not be sued upon and no claim is enforceable in respect of them, in any court. Further such a claim shall not be enforceable through the court unless the supplier of the services produces the requisite Integrated Local Purchase Order and Claim (ILPOC) or Authority to Pre-Commit Expenditure (APC).
>
> Here there is not in evidence an APC or ILPOC issued under s 47B PFMA. There is no pleading in the statement of claim to the effect that either an APC or ILPOC were issued for the contract. The General Expenses form and Requisition for Goods and Services are not the necessary APC or ILPOC. I note further the General Expenses form and Requisition were both purportedly signed after services were purportedly provided. Jhelson has not produced the requisite APC or ILPOC. His claim is unenforceable under s 47D PFMA and s 2 Claims Act.
>
> As Jhelson has failed to meet the requirements of ss. 47B, 47C, 47D PFMA and s.2A Claims Act, a reasonable cause of action is not disclosed and his claim is frivolous as it is bound to fail. When a proceeding is bound to fail, it has been held to be frivolous: *Tonny Wabia v BP Exploration Operating Co Ltd* [1998] PNGLR 8, *Kiee Toap v The State* (2004) N2731, N2766, *Lerro v Stagg* (2006) N3050 and *Tompion v Anderson* [1973] VR 321. Consequently, the proceeding should be dismissed. Given that it is not necessary to consider the other submissions of counsel.

Her Honour Polume, J in a consolidated hearing on 9th November, 2018 in *WS No. 1119 of 2015, WS No. 1121 of 2015, WS No. 1120 of 2015, WS No. 1122 of 2015* and *WS No. 1188 of 2015* reinforced the ruling in *Ray v Numara* and dismissed the foregoing proceedings, for non-compliance with Sections 47B, 47C, and 47D of the PFMA and Section 2A of the CBASA for the plaintiff's failure to produce a valid APC and ILPOC.

His Honour Justice Hartshorn J, very recently on 31 July, 2019, in a number of 19 different education contractor claims further reaffirmed the position in *Ray v Numara* by dismissing the foregoing claims for non-compliance with Section s 47B, 47C, and 47D of the PFMA and Section 2A of the CBASA[8].

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7 A similar provision is reproduced as Section 2 in the *Claims By and Against the State Act* and Section 11 of the *Public Money Management Regularisation Act*.

8 (1) WS 1378 of 2015 – Onaga Kokoa trading as 3JS Construction & Ors; (2) WS 1434 of 2015 - Pana Bara trading as Bex Maintenance Services & Ors; (3) WS 1342 of 2015 - Oka Rau trading as Rakaru Construction & Ors; (4) WS 1345 of 2015 – Nima Baro trading as ENhay Construction & Ors; (5) WS 1382 of 2015 – Poini Waigi trading as Pik Construction & Ors; (6) WS 1504 of 2015 - LaksyVagi trading as Wanimaro Construction & Ors; (7) WS 1432 of 2015 – Boi Baro trading as BNK Construction & Ors; (8) WS 1433 of 2015 – Boi Baro trading as BNK Construction & Ors; (9) WS 1428 of 2015 - Beau Biau trading as Timothy Numara & Ors; (10) WS 1517 of 2015 - Wasco Levi trading as Barulu Construction Ltd & Ors; (11) WS 1405 of 2015 - Trasa Suki Trading as Amaka Construction & Ors; (12) WS 1407 of 2015 - Trasa Suki trading as Amaika Construction & Ors; (13) WS 1307 of 2015 – Rupuna Pikita trading as Creative Network Marketing & Ors; (14) WS 1372 of 2015 - Les Willie treading as LW Maintenance & Ors; (15) WS 1568 of 2015 - Kini Roy trading as Balavuali Construction & Ors; (16) WS 1390 of 2015 -

The cases highlighted so far are contractor claimants alleging to have done work for the Education Department in NCD through some purported contractual agreements. Even as some produced very strong evidence of work done and clear service rendered to the Education Department on behalf of the State, the mere fact that there was non-compliance with the PFMA, the proceedings were dismissed on those bases alone.

Conclusion

The consequences of contracting with the State without fulfilling the requisites of the law can be devastating. The celebrated Supreme Court case of *Fly River Provincial Government v Pioneer Health Services Ltd*[9] is on point which affirms that a failure to comply with the mandatory requirements of the PFMA will no doubt render such contract illegal, and therefore null and void and unenforceable in court.

The recent dismissal of more than 20 education contractor claims by the court clearly indicates the present approach by the courts that compliance of the law, particularly the PFMA and the CBASA is mandatory and therefore imperative. The onus is on the person dealing with the State or any of its arm or instrumentality or a public institution to which the PFMA applies, to ensure that there is full compliance of the requirements of the Act as the law demands that any person deemed to be dealing with such institutions or bodies are deemed to be aware of these requirements.

Kema Investments Ltd & Ors; (17) WS 1377 of 2015 - Kaina Investment Ltd & Ors; (18) WS 1519 of 2015 - Jhelson Ray trading as Bara Construction & Ors; and (19) WS 1166 of 2015 - Havaik Ltd & Ors.

9 Ibid.

Legal Costs: Review of Taxed Costs in Kambu v Mann (2018) N7126

Alice Nasu, LLB*

Introduction

Legal costs are costs ordered by the court against a losing party in a court proceeding. An order for costs is not for the party to make a profit but to recover costs incurred in either prosecuting or defending a legal proceeding.[1] The order for costs is usually made on a party-party basis. In the absence of anything, to indicate some other basis, it can be assumed that costs are to be dealt with on a party-party basis.[2]

Costs on Party-Party basis

When costs are awarded on a party-party basis, the party ordered to pay the costs is only required to pay those costs that were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party who received the benefit of the order for costs. This is often referred to as the "necessary or proper test".[3] An unnecessary cost may still be allowed provided that it is proper in the circumstances of the litigation to incur such cost.[4]

Costs that are calculated on a party-party basis are limited to the charges provided in the scale of costs published by the court in which the proceedings are conducted. In the National Court, Order 22, Rule 36, provides that the scale of costs set out in Schedule 2 of the *National Court Rules*1983 (NCR), shall apply to the calculation of party-party costs. Similarly, Order 12, Division 12 of the *Supreme Court Rules* 2012 (SCR), effectively provides the scale of costs which is set out in Schedule 4 of the SCR shall apply.

Costs on Solicitor-Client basis

Costs may also be awarded on a solicitor-client basis. This is sometimes referred to as the indemnity basis. In appropriate circumstances party-party costs may be ordered to be paid on a solicitor-client basis.[5]

If party-party costs are awarded on a solicitor-client basis, then the Taxing Officer must allow all costs unless they are unreasonable in amount or they are unreasonably incurred. However, in the National Court, costs that are unreasonable in amount or unreasonably incurred may be allowed provided that the client approved those unreasonable costs.[6] The inclusion of Sub-rules (2) and (3) in Rule 35 of the NCR, could possibly result in no costs whatsoever being disallowed by a Taxing Officer when the costs are taxed on a solicitor-client basis. This is because Sub-rule (4) provides that, the approval by the client, of unreasonable costs, may be express or implied.

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1 *Jacob Sanga Kumbu v Dr Nicholas Mann as Chairman Representing the UPNG Council Appeal Committee Members and The University of Papua New Guinea and the State* (2018) N7126.

2 Cost Manual by Graham Ellis SC (2008); see also Order 22, Rule 24(1) of the *National Court Rules* 1983.

3 Order 22, Rule 24(2) of the *National Court Rules*and Order 12, Division 19 of the *Supreme Court Rules* 2012.

4 Legal Costs Manual by Ron Travers (2014).

5 Travers, ibid. See also *Supreme Court Rules*, Order 12, Division 5(2)(e) and Order 22, Rule 6(2)(d) and Rule 35 of the *National Court Rules*.

6 See *National Court Rules* Order 22 Rule 35(2) and (3).

It is arguable that unreasonably incurred costs or costs of an unreasonable amount, should not be allowed by the Taxing Officer, unless the approval of the client was given prior to the costs order being made (and perhaps prior to those costs being incurred). Otherwise, there is no reason why a client, who has received the benefit of an indemnity costs order would ever refuse to approve such unreasonable costs.[7]The onus of proof, in establishing to the Taxing Officer's satisfaction, that the unreasonable costs were approved by the client, rests with the solicitor claiming the costs.[8] On a solicitor-client basis, higher costs may be allowed, than the scale charges, or even if they were not mentioned in the scale of costs.[9]

In the SCR there is no equivalent provision to Order 22, Rule 35, of the NCR. When the Supreme Court makes an order on a solicitor client basis, the costs must be assessed on reasonableness. However, Order 2, Division 1(1)(h) of the SCR provides that, if there is no provision in the SCR, but there is a relevant provision in the NCR, the Supreme Court may apply that provision as if it was a rule in the Supreme Court.[10]

Principles Governing Assessment of taxed Costs

As mentioned above, solicitor-client costs are governed by Order 22, Rules 34 and 35, of the NCR. All costs are allowed unless they are unreasonable or even if they are unreasonable, the client must have approved the amount claimed.[11] These principles have been applied in several cases.[12]

In the case of *Abai & Ors v The State*[13]*,* Woods J, considered the authority of the Taxing Officer on the concept of 'reasonableness' and held that the following principles may be applied in relation to solicitor-client costs:

1. A client cannot agree to unreasonable or unnecessary costs where the client knows that a third party is to bear those costs.
2. A lawyer cannot charge a client for work which is useless.
3. A lawyer is expected to have a reasonable knowledge of his work and cannot charge for learning his own business.
4. The allowance of time spent and charge out rate of a lawyer is also to cover the general expenses of running an office.
5. All costs are to be allowed but this is to be regulated by the principle of material evidence to support the costs and reasonableness.

These principles have been adopted and applied by the National and Supreme Courts.

Taxing Officer's Discretionary Powers

A scale of costs is a schedule which sets out the fees that a Taxing Officer is to allow on a taxation of costs for various items of work performed by solicitors, noting that some fees are within the discretion of the Taxing Officer. The Taxing Officer's power for National Court matters is set out under Order 22, Rules 39 and 40 of the NCR and for Supreme Court matters, it is set out under Order 12, Division 32, of the SCR. Within this legal framework, a Taxing Officer has a wide discretion, in deciding the extent to which costs ought to be allowed.[14]

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7 Travers, above, n4 at p12.
8 See Order 22 Rule 35 of the *National Court Rules*.
9 See *National Court Rules*, Order 22 Rule 36 (2) (d).
10 Travers, above, n4 at p13.
11 *Sankin v PNG Electricity Commission* (2002) N2257.
12 See *Canisius Karingu v PNG Law Society* (2001) SC674; *PNG Ports Cooperation Ltd v Canopus No71 Ltd* (2010) N4288; *Napoleon Canonizado v Kapu Rageau* (2001) N4382 *and Bank South Pacific Ltd v Thomas Serowa*(2014) SC1373 and *Salvation Army (PNG) Property Trust v Jorgenson* (1997) N1644.
13 (1998) N1726.
14 See Order 22 Rule 36 of the National Court Rules and Order 12 Division 21 of the Supreme Court Rules

A Taxing Officer's discretionary power is open for review by the court upon an application for review of the taxed costs by a party who is dissatisfied with the allowance or disallowance in whole or part of an item.

The Kumbu v Mann, UPNG and the State case and Reviewed Taxed Costs

Brief Facts
The plaintiff (Kumbu) was a law student at the University of Papua New Guinea (UPNG). He was suspended in 2008 and finally excluded from UPNG in the final year of his studies. Kumbu sought a judicial review of the decision of UPNG to terminate him from studies in *Kumbu v Mann*.[15]

On 20th July 2012, Cannings J, granted the relief sought by Kumbu and reinstated him to continue his studies at UPNG. On 14th September 2012, Cannings J, ordered costs in favour of Kumbu on a solicitor-client basis.[16]

On 28th April 2015, the first and second defendants filed a notice of motion seeking a review of the certified costs by the Taxing Officer on the grounds that it was excessive and unreasonable. On the same day, the plaintiff also filed his notice of motion seeking a review of the certified costs on the grounds that it was excessively and unreasonably reduced by the Taxing Officer.

The first and second defendants' grounds of objection were that:

1. the Taxing Officer allowed excessive amounts on various items;
2. the Taxing Officer failed to tax off excessive amounts on various items; and
3. the Taxing Officer failed to disallow excessive amounts of time spent by the plaintiff on various items.

In *Kumbu v Mann*[17], Makail J, pointed out that the Taxing Officer is guided by the prescribed scale of costs in Schedule 2 of the NCR and may apply different rates for each item or work performed by the lawyer subject to, amongst other things, that the costs are necessarily or reasonably incurred in connection to the legal proceedings.

Court's power to assess taxed costs
Makail, J, held that the court may exercise such powers under Order 22, Rules 60 and 61, of the NCR to review the decision of a Taxing Officer in relation to taxed costs. In this regard his honour stated that the court may consider all the work necessarily done, objections raised by the aggrieved party and decision of the Taxing Officer on each item.

In this case, the court in its' decision, sets out all the parts in Schedule 2 of the NCR (scale of costs), to assess the amount claimed by the plaintiff. The court's reasoning in each part is summarized as follows:

> Part 1 – Preparation of Documents including filing and service
> A large body of documentation was prepared for the case, whether they were necessary and relevant must be taken into account in assessing the costs.
>
> Part 2- Block allowance for preparation of documents
> Nil
>
> Part 3 – Counsel's fees
> The time spent in court in a day including the waiting time for lawyers should be 30 minutes and a further 1 hour to cater for waiting time. This time can cater for application for Judicial Review for leave, interlocutory applications, direction hearing, pre and post-trial matters and adjournments.
>
> For substantive hearing scheduled for half a day, should be 3 hours and 30 minutes. For attendance at the Registry, the onus was on the plaintiff to prove his claim on time and date.

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15 *Kumbu v Mann* (2012) N4746.
16 *Kumbu v Mann* (2012) N4784.
17 *Kumbu v Mann* (2018) N7126.

Part 4 – Travelling Expenses

Unnecessary cost incurred is not allowed, but reasonable amount of costs for the days schedule for hearing of the application for costs. Costs for hire car and accommodation are only for the day of hearing the application; other expenses incurred for other days are unnecessarily incurred.

Transport fee is K20 per trip to deliver letter to first and second defendants counsels.

Part 5 –Attendances

The costs incurred under this part are for counsel, who is a lawyer, who solely practices as a barrister. In this case the plaintiff was not a lawyer and did not practice solely as a barrister to be entitled to claim costs under this item. Seventeen Thousand Five Hundred awarded by Taxing Officer under this item was disallowed.

Part 6 – Allowance to Witnesses

Nil

Part 7 – Preparation for Trial

There is no fixed amount given under this part. All work necessarily or properly done in preparing for a trial or hearing of any cause or matter, whatever the mode of trial or hearing or for the hearing of any appeal, or not otherwise provided for under this part, cost is discretionary.

The plaintiff claimed K2, 000 per hour as his charge out rate. The Taxing Officer used K350 as the plaintiff's charge out rate to tax the costs. The court used K250 as the standard rate and clerk's rate is K25 per hour for reviewing the costs.

- Letters Out

  The court said drafting a letter even the lengthy one will not take more than 30 minutes. The cost of preparing a letter is K1.66 per minute. One Hundred Kina divide by 60 minutes = K1.66 per minute. The plaintiff is allowed 6 minutes to prepare a letter. So K1.66 x 6 minutes = K9.96 to the nearest kina is K10.00 per letter.

  For letter going out, the rate is K10.00 per letter.

- Letters In

  The court said K1.66 per minute by 2 minutes is K3.33. Perusing letters, the rate is K3.33 per 2 minutes.

- Preparing and perusal of court documents, the rate is K250 per hour.

Part 9 –Taxation of Costs

The application of one sixth rule applies under Order 22, Rule 56, of the NCR. According to this rule, where on taxation of any costs, one sixth or more of the amount of the bill of costs is taxed off, the costs of preparing the bill and attending the taxation will not be allowed. No sum is awarded for costs of taxation.

- 10% Goods and Services Tax (GST)

  The plaintiff was not awarded 10% GST because he represented himself in the proceedings. He was not engaged in a business to provide legal services nor did he engage a law firm for its legal services to be entitled to a claim of 10% GST.[18]

  The plaintiff's itemized bill of costs was in the sum of K5,505,174.40. After tax, the sum awarded was K1,165,009. 00. However, the Court allowed for the plaintiff on solicitor-client cost, a sum of K80,139.87.

[18] Compare this case to Napoleon Canonizado case (*Napoleon Canonizado v Kapu Rageau* (2011) N4387) where it was held that 10% GST is allowable to the lawyers because if legal services rendered to a client.

Comments on the Kumbu v Mann case

There are published judgments on review of taxed costs where the courts have taken similar approach to review taxed costs on the ground of "reasonableness". The exercise of the Taxing Officer's discretionary power must be based on reasonableness with proper pleadings on the particulars supported by evidence. The Taxing Officer must not allow any costs on items not clearly pleaded with particulars supported by evidence. However, where the work is presumed to be done, though such cannot be claimed, it must be done on reasonableness.[19]

There are instances where plaintiffs represent themselves in court and where costs are awarded in their favour, they are not entitled to certain items claimed. In this case, the plaintiff was not entitled to costs under Part 5 (attendances with other lawyers for advice, reviewing of court documents by another lawyer, conferences and consultation). He was also not entitled to 10% GST.[20]

In contrast, in the Karingu case[21], the plaintiff who was a lawyer represents himself in court and was entitled to claim costs for seeking advice from legal advisers, attendances by interviewing witnesses, loss of his leisure time, disbursement and 10% GST. Whether or not GST is allowable in a bill of costs, will depend on whether or not the party claiming the costs is registered for GST purposes.

The significance of the Kumbu case is that, for the first time, the standard rate on certain items, which were not clearly stated in the Scale of Costs, in Schedule 2 of the NCR were clarified. This case sets out some guidelines for lawyers when they are preparing their bill of costs and for the Taxing Officer when he or she is taxing the costs.

The scale of costs under Schedule 2 of the NCR does not cover rates for each part set out in Table 1 of Schedule2. The rate is open to the party preparing the bill of costs and is subject to the discretion of the Taxing Officer.

In the SCR, Schedule4, sets out the rates of each item. For instance, the preparation of documents for trial, the Supreme Court has rates labelled against the items and it guides the Taxing Officer to properly tax the itemized bill of costs unlike the scale of costs in Table 1 of Schedule 2 of the NCR.

The Kumbu case also clarifies the one sixth rule under Order 22, Rule 56, of the NCR and Order 12, Division 39(9) of the SCR. If one sixth or more of the amount claimed in the bill is taxed off, then the amount claimed for preparing the bill or for attending on taxation, will not be recovered and or claimed. In preparing the bill of costs, one sixth rule is applicable and it must be considered by the party preparing the bill of costs. The Taxing Officer is also guided by the one sixth rules when taxing costs on Part 9 - taxation of the bill of costs.

Conclusion

This review of taxed costs is from an order made for costs to be on a solicitor-client basis. There are other cases where the court has ordered costs on a party-party basis. Whichever the order may be and where a certificate of taxation is endorsed, liability is not an issue in any review application.[22]

In a review application, the court has a wide discretionary power as the Taxing Officer and may allow only costs reasonably incurred throughout the proceeding of the matter. On the other hand, the courts approach to charge out rates for lawyers differ on a case by case basis. A court reviews taxed costs, based on the objection raised by the aggrieved party, on the outcome of the taxation and the Taxing Officer's decision on each item in the bill of costs. The court can also exercise its discretionary power to review the lawyer's charge out rate. The Taxing Officer also uses different charge out rates for lawyers in taxation.

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19 *Sankin v PNG Electricity Commission* (2002) N2257.

20 See *Kramer Consultants Pty Ltd v The State* [1985] PNGLR 200 and *Bank South Pacific Ltd v Thomas Serowa* (2014) SC1373.

21 *Karingu v PNG Law Society* (2001) SC10.

22 *Thirlwall v Eng Chin Ah &Ors* [1988-1989] PNGLR 34.

The current rates set out under Order 22, Schedule 2 of the NCR are said to be very low. The living costs and other associated administrative costs of running legal businesses are very high given the current financial status of the country.

It is therefore, suggested that Table 2 of Schedule 2, under Order 22 of the NCR be reviewed and amended to incorporate standardized charge out rates under each part and item. Also, the charge out rates for lawyers should be standardized in both the NCR and the *Lawyers Act* 1986.

Schedule 4 of the SCR has standard rates for professional work done by a lawyer for his client. It is suggested that similar scale of costs should be drawn for Table 2 of Schedule 2 of the NCR.

So, what is significant about the Kumbu case in relation to other judicial precedents on court reviewed taxed costs? Several poignant points may be drawn from the case. However, two key contributions stand out.

First, the scale of costs, in the NCR is too vague, and is open to any winning party claiming costs, to charge any rate on each item, that is not covered by the charge rate in Schedule 2. The case also scales down the unreasonable charge out rate and the unnecessary work done to inflate the costs for the losing party to pay.

Second, the Kumbu case guides both the Taxing Officer and the lawyer on the reasonable rate to be used for each item although cases may differ. Also, it sets out the reasoning for disallowing costs, allowing costs and reducing the charge out rate used by the Taxing Officer for a person who represents himself or herself throughout the entire proceedings.

Given the above and the challenges in taxation of costs, the Law Society should review the *Lawyers Act* to include standard charge out rates for lawyers ranging in seniority based on years of practice in both the Supreme and National Courts of Papua New Guinea. Also it is recommended that Table 2 of Schedule 2 of the NCR be reviewed to include the standard charge out rate for each item in the bill of costs.

POLICY PAPERS

Speech on the Inaugurations of the Chief Justice of Papua New Guinea – Sir Gibbs Salika

Hon. Davis Steven, LLB*

May it please the court, the honourable Chief Justice of Papua New Guinea, esteemed members of the higher judiciary, the Chief Magistrate and honourable members of our lower judiciary, the President of the Papua New Guinea Law Society (PNGLS), our law officers, distinguished members of the Bar, members of the Judicial and Legal Services Commission (JLSC), Constitutional Office holders, leaders of our country, distinguished guests and ladies and gentlemen. On this special occasion, I have the very rare privilege of addressing this honourable court to welcome our nation's fifth Chief Justice since we attained Independence in 1975.

In his usual masterful style, the Honourable Justice Nicholas Kirriwom has admirably summarised the distinguished career of our learned Chief Justice. I can only respectfully endorse the inevitable conclusion that our Chief Justice is a worthy and undoubtedly deserving of this appointment.

Justice Kirriwom's assurance gives us comfort. It gives the appointing authority a sense of justification. It is assuring indeed that our decision to appoint the Chief Justice is sound in law and meets with the approval of your Honours and of our people. Many accolades have been laid at your honour's feet in the past few weeks since the news of your appointment was published, but I know that, your honour has been working too. In the past few days, your honour has secured important decisions in the JLSC, to reappoint your acting judges, reappoint a permanent judge, appoint another acting judge for a term and your honour has reminded me of incomplete work, many of which are well known, work that needs to be done including the review and extension, of the term of appointment of our expatriate judges.

Your honour has assisted the JLSC to make an important appointment, the appointment of the Deputy Chief Justice, which has already been announced before the swearing in, for good reason, of your honour, and I thank you, on behalf of the JLSC. So, I pose here to offer congratulations on behalf of the government, our people in the profession, to his Honour Ambeng Kandakasi for a well-deserved appointment and to others whose terms have been extended.

Allow me now to mention a few points concerning the challenges we face and how your honour's appointment as Chief Justice comes at a critical time in our nation's journey. If I may respectfully submit, your Honour's journey described this morning means a lot more than just a recount of your life and achievements. The story of your journey carries a message for our nation and our people today. Yours is indeed a remarkable story, a story of a young man from a rural village in Lumniau, in the great southern plains of the mighty Fly River in Western Province, the province that hosts our Ok Tedi Mine in Mount Fubilan in the upstream and the famous barramundi in the south. From there, the tale began of a journey to the city to pursue education and a dream of becoming a lawyer in a young nation that was in transition. Your honour did read the law in our nation's only Law School at the University of Papua New Guinea and chose the public service over other career options upon admission to the Bar in 1979.So, the story of a young man, a village boy became a narrative of the budding life of a State Prosecutor that spanned over six years.

Your honour, in following reported cases in our PNG Law Reports, I learnt that your honour was the Prosecutor in charge of the Highlands region based in Mount Hagen at one point of your career. And

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* The Deputy Prime Minister and Attorney General of Papua New Guinea.

permit me, if I may, to rewind a bit of your honour's history. I realize that your honour was very brave and selfless in performing the functions of the Public Prosecutor during quite turbulent times in that part of our country. It is on public record that three state of emergencies were declared to curb social unrest in parts of the Highlands region in the time when your honour was prosecuting offenders over there.

So, the story of a school boy from Western Province is rewritten to that of a lawyer dedicated to upholding the rule of law and our *Constitution* without fear or favour, our noble and lonely course, as officers of the court, and for those of us who have pledged to uphold the rule of law and our *Constitution*, I might add.

In 1985, your honour's success, in what one would call an emerging legal career in the public service, was recognized by the Ombudsman Commission in your appointment as its Counsel. May I venture respectfully to say that, that appointment has evidently enhanced your honour's appreciation of the unique and important place and governance role of the Ombudsman Commission under our *Constitution.* That insight gained would put your Honour, on a good stead in the ensuing years of your great career, on the bench as a judicial officer. That is evident in the plethora of cases involving leaders and public officials that your honour has presided over. So, now a new chapter opens, in the story that turns from a tale of a village boy to a legal officer into a judicial career in 1988, when your honour was appointed as the justice of the peace of the lower benches of our judiciary.

Your honour, many young students in our schools throughout the nation will hear about this occasion. Many young lawyers will read and will learn from our statements today that your honour went from the lower bench to becoming a member of our court of records the higher judiciary in two years. Today, it is on record that, your honour's is the longest serving judge in our judiciary. You have served under three previous Chief Justices. You have served as the Deputy Chief Justice and during that time, your honour, your services to our nation in the administration of justice was recognized by her Majesty, the Queen of England and Head of our State in bestowing upon you the great honour of a Knight and a Commander of the British Empire.

So, the boy from Western Province became a lawyer, a magistrate, a judge and following a well-deserved appointment by our government, you are now welcomed today, this morning, as the Honourable Chief Justice, Sir Gibbs Salika KBE CMS OBE. You are the head of the third arm of government and respectfully, the chief defender of our *Constitution* and everything we stand for.

Your honour, we will look to you to ensure the rule of law is never compromised in our land. You hold the hopes of our people, countless communities in remote and isolated areas from which many of us hail, often disconnected and voiceless. We need you to steer our country to the great heights that our founding fathers and mothers had envisaged when they sat to frame our *Constitution*. In a time when we face social and economic challenges, when public confidence in the State and its instrumentalities are low, when we are looking to achieve our economic priorities by use of human and natural resources, your honour, it is our hope that you will lead our judiciary in the way set for us by our founding fathers and mothers in our *Constitution*. From time to time, your honour will be right to remind us and steer us towards the National Goals and Directive Principles, the Basic Social Obligations enshrined in our *Constitution*. We need to be reminded in times like this, of our commitment and indeed the indispensable place of the rule of law, and the principles of human rights.

Today, as your honour knows too well, we stand at the crossroads on deciding our national moral foundation. We see the legislation on prostitution, same sex marriages, nude beaches and we hear of nations who have outlawed Christian education in their education systems, the evils of terrorism, cyber related crimes, transnational crimes confront us. We are thrown into global and regional arrangements not by design, but often times, by necessity. In this hour, we are required to make choices to network but in doing so, we must be guided by the national interest and our *Constitution*. In these times, our government and our people look to the judiciary for guidance, and your honour knows, the challenge now lay before us, is a very special one. In the midst of all, as it may be, we all know that, this is a job that must be done.

Your honour, as I prepared this statement, I could not help noticing the good fortune of having been part of a decision-making body that has appointed you and your brothers and sisters that now serve in our judiciary. Your honour, you are among our finest prosecutors coming out of the Law School in the early years after our Independence. You know the circumstances and challenges then. You know and worked with the founding fathers and mothers who inspired our *Constitution*. You worked with our Ombudsman Commission, the lower judiciary and your honour has witnessed our politics and the journey of our nation.

Today, I assure you of my undivided support to complete the work you have started with the outgoing Chief Justice.

Indeed, the work of codifying customary law, and developing our own Underlying Law, is a constitutional dictate that must be done. The work of reviewing the appointment procedures of our judicial officers, appointment of our Chief Justice, appointment of our Deputy Chief Justice and our judges must now be reviewed. Yes, reforming the higher judiciary and the lower judiciary, connecting the law and justice sector, firmly into an effective coherent body to support the delivery and the administration of justice, is imperative. That is work that has been started, your honour, and you were involved. Rebuilding the court infrastructure and digitising our systems, is a project that I am proud to say, is already bearing results here in our judiciary, while it is still the subject of talk, more talk and more money elsewhere.

At this juncture, allow me to acknowledge the honourable and the most learned outgoing Chief Justice, Sir Salamo Injia for his leadership and his personal contribution to the work of the judiciary. His honour has made our country proud. Chief Justice Injia's legacy surrounds us and all I say is our nation is blessed to have had a leader of his stature and wisdom. And to you my Chief Justice, your honour, I can say in sincerity and all confidence this morning, that our government knows the important role and place of our judiciary in our nation today. We stand ready to help you as our Prime Minister has recently assured you. May I say that we did not appoint you to watch you sink on this side of the hill.

I want to close with a reminder to us all that, the core function of our people's courts and therefore our duty as lawyers is to help administer justice in a manner that is independent, impartial, fair, timely, accessible, affordable and of a high standard. I borrowed these words from a manual that is before your honours. Almost 28 years ago, your honour was welcomed to the bench as the last appointed judge, the most junior in rank, for want of better words. The Chief Justice then described the distinguished career and experience your honour brought with you then. It was predicted at that occasion, that your honour would prove to be a good choice given the evidence of your judicial acumen but also the community of judicial temperament. You have proven it and you have exceeded the prediction. Today, I am happy and very privileged to welcome you to the leadership of our judiciary as its most senior judge.

Speech on the Occasion of the Welcome Ceremony of Sir Gibbs Salika, KBE, CSM, OBE, LLB as Chief Justice of Papua New Guinea

Dr. Vergil Narokobi, PhD*

The Chief Justice, Honourable Sir Gibbs Salika, Lady Salika and your family, Honourable Davis Steven, Minister for Justice and Attorney-General, judges of the National and Supreme Court of Papua New Guinea (PNG), Chief Ombudsman, Constitutional office holders, Chief Magistrate, Heads of the Disciplined Forces, representatives of the Diplomatic Corp, the Papua New Guinea Law Society Council (PNGLS) members, colleague lawyers, ladies and gentlemen, it is indeed an honour to be able to speak at the welcome ceremony of our new Chief Justice.

Firstly, on behalf of all lawyers and the PNGLS, we would like to sincerely congratulate you, Sir Gibbs Salika, your family and the people of Togo Village, Western Province on your appointment by the National Executive Council as the new Chief Justice of PNG. I would also like to register on behalf of the legal profession our appreciation to the former Chief Justice, Sir Salamo Injia, for the important contributions he has made to justice administration and the development of Papua New Guinea's jurisprudence.

At this juncture, we would also like to congratulate Justice Ambeng Kandakasi, for his appointment as the new Deputy Chief Justice, when the position fell vacant after Sir Gibbs Salika's elevation.

Section 169(3) of the *Constitution* provides for the role of the Chief Justice as follows:

> In addition to his other powers, functions, duties and responsibilities, the Chief Justice, *after consultation with the other Judges*, is responsible for the *organization of the affairs* and the *administration of the business* of the Supreme Court and the National Court…

This is an onerous and solemn duty and Chief Justice Salika is well qualified for this role, as the most senior member of the Judiciary as well as being the immediate past Deputy Chief Justice. We note that on many occasions, Deputy Chief Justice Salika (as he then was), acted as Chief Justice.

We have no doubt that all the experiences he has acquired in the long judicial service will be gainfully employed to carry out this important responsibility as the head of the third arm of government in PNG. It is a human truism that, with each new leader of an organisation, and the judiciary is no exception, he or she will bring his or her own vision, chemistry, unique set of experience and philosophy to bear in the management of the organisation.

Chief Justice Salika, from his initial appointment to the Bench, has served in the judiciary for some 30 years now. This long service has been recognised by his Honour being awarded a Knight Commander of the Most Excellent Order of the British Empire, Companion of the Star of Melanesia and Officer of the Most Excellent Order of the British Empire.

His honour has a solid track record in the public service since his provisional admission to the bar in 1979, commencing his legal career as a State Prosecutor; followed by work as Legal Counsel to the Ombudsman Commission in 1986; and before being appointed to the judiciary, was the Principal Magistrate for the New Guinea Islands and the Southern regions.

Amongst the many engagements, his honour has had, while being a judge, was the Chairman of the Law Reform Commission from 1995 to 2000, and Chairman of the PNG Centre for Judicial Excellence between 2010 and 2016.

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* The President of the Papua New Guinea Law Society and also the Senior Legal Counsel of the Ombudsman Commission of Papua New Guinea.

His honour has deliberated on cases in the National Court, Supreme Court and Chaired Commission of Inquiries and Leadership Tribunals. Many of these court decisions have decided on important constitutional questions and consolidated the independence of the judiciary in PNG. These decisions have maintained the principle of the separation of powers and demonstrated PNG's commitment to upholding the rule of law.

His honour is the seventh Chief Justice of PNG since Independence, and the fifth Papua New Guinean, after Sir Salamo lnjia, Sir Mari Kapi, Sir Arnold Amet and Sir Buri Kidu.We are confident that your honour as the new Chief Justice, conscious of the fact that all power belongs to the people, will discharge this constitutional responsibility to, and for the people of PNG, to the best of your ability, with commitment to the values of integrity, honesty, respect for the rule of law and independence of mind. These values have stood your honour in good stead for the past three decades, and will no doubt, steer you in the next decade.

Your honour's professional legal development was in the formative years of the country, witnessing first-hand, Constitution-making and of course subsequent independence in 1975 whilst a law student at the University of Papua New Guinea. Your honour has witnessed many of the momentous events that have occurred in the 43 years of the nation's sovereignty.

In many ways, your honour will be an authoritative commentator on how the country has fared as measured against the Constitutional ideals that underpin our *Constitution* and system of government. For instance, in *Haiveta, Leader of the Opposition v Wingti, Prime Minister; and Attorney-General; and National Parliament*[1], your honour made the following profound observations:

> It is my view that the proper construction of s 142(3) is that when a Prime Minister resigns, Parliament is to be informed and stands adjourned to the next sitting day. This is because the question of appointment of a Prime Minister arises in Parliament after the notice of resignation of the Prime Minister is tabled in it. Furthermore, it gives effect to the aspirations of the Constitutional Planning Committee and to the National Goals and Directive Principles. On the next sitting day, the new Prime Minister is appointed. This is consistent with the original intention of the CPC.

We therefore believe that, it is not only the law, that will sanction your honour's leadership of the judiciary, but equally important, the spirit of the *Constitution* as expressed in the National Goals and Directive Principles and Basic Social Obligations as well as the voice of the Constitutional Planning Committee that will inspire your honour to diligently and without fear or favour uphold the rule of law.

There are many challenges ahead, and I am sure that I speak on behalf of my colleague lawyers, as important stakeholders in the dispensation of justice, that we pledge our cooperation, to assist the judiciary, of course, respecting our boundaries, to address those challenges. We would like to explore avenues for cooperation with the judiciary, particularly in the area of:

1. Continuing legal education in terms of improving the skills of lawyers,
2. Improving the problem of delayed judgements, and
3. The restructuring of the Higher Courts.

If there is a need for consultation in any new developments, I am sure, senior members of the Bar, with many years of experience, will welcome the opportunity to comment, to provide useful ideas to assist that process.

Papua New Guinea by many accounts is a difficult and costly place to decentralise judicial services – rugged mountainous terrains, remote islands, and unparalleled cultural diversity. However, PNG has come 43 years and I trust that with your leadership this will continue into the future.

I now conclude by wishing your Honour every success, God's blessings and good health in your role as the seventh Chief Justice of the Independent State of Papua New Guinea.

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[1] [1994] PNGLR 197.

Paper Presented at the CIMC Regional Conference on Law and Order, Kavieng, New Ireland Province (21-23 May 2019)

Dr Eric Kwa, PhD*

Introduction

Thank you New Ireland Provincial Administrator, Mr. Lamellar Pawut and Governor for West New Britain, Hon. Sanindran Muthuvel, for joining us at this conference. I acknowledge the leaders of New Ireland and thank you for welcoming us today. It is good to see you all. I also acknowledge the presence of our sector leaders because of the importance of this gathering. I thank the Public Prosecutor, Mr. Pondros Kaluwin, the Acting Correctional Services Commissioner, Mr. Stephen Pokanis, the Deputy Chief Magistrate, Mr. Mark Selekepuru and Mr. Sam Geno, the Acting Director of the Law and Justice Sector (LJS) Secretariat and other national department's representatives. It is great to see you all here, as well as our two Bishops, from the Catholic Church and the United Church.

What I want to share with you today is important. I know that many of you will be expecting me to say new things about the sector because of my position as Chairperson of the National Coordinating Mechanism (NCM) of the LJS. There are 15 government agencies[1] in the LJS. Hearing the Provincial Administrator and the Governor's speeches, I am sure you are wondering what answer I will give you, regarding the Law and Order problems in our country - which is the challenge I have. I think that is what you want to hear from me as the new Secretary. I took office on the 19th of November, just after the Asia Pacific Economic Cooperation (APEC) Conference last year.

The question is what do I bring to this sector, and how are you going to help us, solve the problem of Law and Order in this country? I think 15 minutes to talk to you about this very important subject is not sufficient for me. I will therefore, take a bit more time, just to share with you, some of the new initiatives we are taking for the sector. What I want to share with you today, is what is, going to drive us for the next five years.

I hope that our partners, who are here, like Mr. Stanley Komunts from New Crest Mines, and some of you from the community and Churches will actively participate with the LJS to arrest the Law and Order situation in the country. I would like you to listen to us because; I believe we have a little bit of an answer to the big problem that confronts us. Together, with your partnership, we can be able to tackle this big problem that continues to attack our nation.

Crime Management and Deterrence by the LJS

There are three important things I would like to share with you all today. These are:

1. To inform you about what we are doing as a Sector (as a single unit) so that you can join us in combating the evils of crime in our beautiful country.
2. To discuss briefly with you our performance under the Medium Term Development Plan (MTDP) III.

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* Secretary for the Department of Justice and Attorney General.

1 These are: (1) Department of Justice and Attorney General; (2) the National Judiciary; (3) the Department of National Planning and Monitoring; (4) the Department for Community Development, Religion and Youth; (5) Police; (6) Defence; (7) Correctional Services; (8) Magisterial Services; (9) National Intelligence Organisation; (10) Ombudsman Commission; (11) Constitutional and Law Reform Commission; (12) Legal Training Institute; (13) National Narcotics Bureau; (14); Public Solicitor; (15) Public Prosecutor; (16) National and Supreme Courts.

3. To share with you our new focus in dealing with the Law and Order issue.

As a sector, we agree and support the Government's Vision 2050 and related national policies. I am, here at this gathering, to share with you, how the LJS is also going to implement the MTDP III.

When we look at the Strategic Development Plan 2030, the government wants to reduce the crime figure from 90 to 30 per 100,000 people by 2030. On the other hand, MTDP III (2019-2023) requires the sector to reduce the crime rate by 80% from the maximum. Unfortunately, I am not sure how the government arrived at this figure, because I do not know how many crimes are committed throughout the country daily, weekly, monthly or yearly. However, I can tell you that the entire Village Courts in the country numbering 1680 are dealing with 60,000 cases every year. From this total, we can determine how many cases are for assault, rape, stealing, swearing, land disputes, etcetera. We also know how many court cases our Deputy Chief Magistrate and his team handle every year (30,000). We also know how many people go to jail every year.

But these are the figures we are dealing with. What about those that we do not have records of, and those that we do not get the data from?

Reducing the crime rate by 80% by 2023 is a big dream for the country and we acknowledge that. The government's plan is to provide a safe, secure, and stable environment for all citizens, visitors, communities and businesses so that they conduct their affairs freely. Thus, our overarching theme is to create a crime free society for better livelihoods. This is the goal of the government and the LJS will support the government to achieve this goal. I know that we cannot create, a totally crime free society, but at least we can, minimize or reduce crime.

The LJS, under MTDP I and II, had 12 government agencies dealing with Law and Order. Today, it has grown to 15 agencies. In the recent past, the National Planning Department was the chair of the sector. What was the sector doing at that time? The focus of the LJS was on Crime Management and Deterrence. What do I mean by Crime Management and Deterrence? It is like this, as soon as someone comes in conflict with the law, he or she is arrested, investigated and charged at the police station, the whole Law and Order machinery reacts by summoning all its resources to deal with the perpetrator.

In other words, the police receive a complaint, record it, investigate the crime and lay the charges where appropriate. After the charge is laid, the Public Prosecutor prosecutes, while the Public Solicitor defends, the accused person. The Magistrate then hears the case at the District Court, and where appropriate, refers the case to the National Court. Where an accused is found guilty, he is sentenced to prison where the Correctional Services take over his or her affairs as a prisoner. As you can see, the whole system is designed to deal with the criminal. The key principle underpinning this system is to manage and deter criminal behaviour. So, the whole criminal justice system is driven to attend to this one person – the criminal.

At the moment we have 5000 prisoners throughout the country. And of this number, only 2000 are prisoners; while 3000 are remandees (is awaiting court). When we consider the number of prisoners against the total population of the country which is 8.5 million people, the prisoner population ratio is 0.05% which is very small by global standards. Unfortunately, we spend a lot of resources dealing with a small fraction of the population who end up being part of the 5000.

As I said earlier, the whole law and justice system is designed to attend to this very small group of people. So what have we in the sector been doing? We have not been focusing on crime reduction, but managing crime as deterrence. That is what we have been doing in the last 44 years, and especially in the last decade, under MTDP I and II. The aim of the LJS was to manage crime as a means to deter criminal activities.

Crime Prevention – The new LJS Policy

The evidence is unequivocal – so much has been invested in the sector, but crime has spiralled out of control.

From police reports, we note that the crime rate is always on the increase. It is increasing every day. Last year, the crime rate was recorded as very high. As we heard this morning, truly, Law and Order, is a major challenge for Papua New Guinea.

Let me show you some data to highlight to you the major crimes in this country. According to the latest police reports, the number one crime in our country is murder. This shows that the life of a person is meaningless to us as a nation.

The young people sang this morning that they want to live in a community that is peaceful, safe and secure. They want to promote respect, and they have pledged to respect each other because we are One Nation, One Country and One People. However, many Papua New Guineans are being killed frequently as if human life means nothing to us. Murder is the number one criminal activity in this country. Bribery is 19th on the list.[2] I leave you to work out the rationale for this divergence.

When we see the list of crimes that are perpetuated against the citizens, obviously, no one is immune to crime. Crime affects people in cities, provincial centres, regional centres, local communities and the villages. These crimes are happening across the board. No one is safe. Do not for a minute; think that, you are in Port Moresby, so you are safe from these 19 crimes and others. Everyone is susceptible to these crimes.

How are we going to deal with these crimes that affect everyone? From the available data, we can observe that, there is a huge gap between our efforts and the rate of crime. Crime has overtaken our efforts and we are playing catch up. Crime, as I mentioned above, is just spiralling out of control.

In my view, we need to first, ascertain which crimes are prevalent, in which part of the country. What is the prevalent crime in Port Moresby, or Namatanai in New Ireland Province, or Bialla in West New Britain Province, or Siassi Island in the Morobe Province? Having this information will then assist us in identifying the root causes of the crime and thus devising appropriate strategies to deal with each of the crime.

What have we, as a country, achieved since Vision 2050 was adopted in 2009 and the MTDP I and II? There is nothing much to show for. In the last five years, at least K4 Billion was spent in the LJS under MTDP II. Where did this money go to? Did the people from Tabar in New Ireland see this K4 Billion or not? I am from Siassi Island, in the Morobe Province. My people do not know about the K4 Billion nor do they care about the money. According to them, they are far away from Port Moresby, busy doing their own thing. They do not care where the K4 Billion went.

As you can see, I am disappointed with this scenario. We now have the MTDP III which was launched early this year. We celebrated the MDTP III with dances and sounds of the kundu drums. However, to the majority of the people in the country, the policy is just a piece of paper.

What is the LJS doing about this challenge? At the LJS, we have been working hard to answer this critical question. We understand that the sector requires a fundamental shift in its response to dealing with Law and Order in the country.

The government has given the LJS 17 targets[3] to achieve by 2023. These 17 targets are big and I do not think we can achieve all of them. We currently have 15 agencies. Does that mean that two of the targets will have no one to take care of? Obviously not.

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2 1. Murder; 2. Manslaughter; 3. Rape; 4. Other Sexual Offense; 5. Robbery; 6. Robbery Using motor vehicle; 7. Break in Commercial; 8. Break in Domestic; 9. Stealing Motor Vehicle; 10. Stealing; 11. Fraud; 12. Gender Base Violence; 13. Fire Arms; 14. Drugs; 15. Escape CIS; 16. Escape Police; 17. Arson; 18. Abduction; 19. Bribery.

3 1) Increase effective training programs; 2) Increase recruitment of policemen and policewomen; 3) Reintroduce rural lock-ups in the 89 districts; 4) Review existing legislation and ensure compliancy; 5)

In 2019, the LJS is making a new shift. Just last week there was an earthquake in New Ireland. I received a map from a geologist from the USA, showing that there is a shift from West New Britain and New Ireland. There is a shift that is happening. We too in the LJS want to make a shift as well. For far too long, the LJS has been sitting and not being proactive in devising new strategies in dealing with the Law and Order challenge in the country. We have been doing the same thing over and over again, and the statistics are showing clearly that we are not going anywhere.

Starting this year, we are refocusing our efforts. Our new direction will be to *Prevent Crime* before it happens. We are spending so much time, resources, and effort on dealing with a minority group and not focusing our attention on the 8.5 million people who need our help and protection. We need to engage with them.

The new focus of the sector will now be on *Crime Prevention*. In the past we were dealing with Crime Management and Deterrence. When a crime is committed, we react by immediately, pooling all our resources together to deal with the perpetrator. This approach comes to an end this year.

Can we change our focus, can we change our attention, and can we change our resources and focus everything on *Crime Prevention*? How will this work? That is why I told you that, you need to give me a bit more time, because I need to explain to you what we are thinking and doing as a sector so you can work with us. Our strategy is this: of the 17 targets provided under MTDP III, the NCM has resolved to collapse them into five main targets under the new Crime Prevention policy. These targets are:

1. Revitalizing and Strengthening the Village Courts system
2. Village Court infrastructure
3. Partnership with the Churches to Prevent Crime
4. Provincial and District Engagement
5. Investment in ICT

Each of these strategies is discussed in detail below.

1. Revitalize and Strengthen the Village Courts and Land Mediation System

As I said earlier, we are now all going back to the village. My blood is from Siasi Island. I am not from Port Moresby where I now live. I am 51 years old and I will return to the village. The question is: am I going to a safe and secure village or am I going to a place which is full of murderers, rapists and all kinds of criminals? We need to attend to them first. Our focus now is not on Port Moresby, not on Kavieng town, but the village and local communities. We are going back to the village because at the moment we have 1800 Village Court officials and Land Mediators throughout the country. We have abandoned them for the last 50 years. We want to go back to them, we want to go back and strengthen their operations. As the children sang, "pupu bai kamapim peles", that is why we are going back to the village. Enough of spending money only in the urban centres and let us go back to where the majority of the people are living – villages, settlements and local communities. Enough of building massive infrastructures and huge facilities which are very costly, while our people are not receiving the basic service, such as access to justice.

Increase the number of magistrates and judges to improve the backlog of court cases; 6) Infrastructure development in construction and renovation of deteriorating facilities throughout the country; 7) Develop crime prevention strategies to curb the crime prevalence issues; 8) Strengthen the communication and information management systems; 9) Strengthen partnership arrangements between police and interested stakeholders including private sector and development partners; 10) Improve and enhance participatory based approaches at the community to strengthen the processes of law and justice; 11) Continue to recruit, train and develop the Defence Force; 12) Improve PNGDF infrastructure and facilities; 13) Develop and build the land, air and sea capabilities and appropriate border security infrastructure; 14) Strengthen existing bilateral and security arrangements that aims to promote PNG sovereignty and strengthen its borders; 15) Strengthen the cooperation and partnership between regulatory agencies associated with border security; 16) Improve policy and legislation covering all aspects of national security; and 17) Scale up training programs associated with the administration of national security.

We want to build 1680 simple and low-cost court houses, so that our Village Court officials can have a proper place to sit and conduct court hearings. They must have an office, telephone, and computer as we are no longer in the Stone Age. At the moment we have five Village Court Magistrates, four Peace Officers, one Village Court clerk and four Land Mediators for every Village Court.

There are currently 18,000 Village Court officials and Land Mediators who are already being paid by the government through the Department of Justice and Attorney General. These people are front liners of law and justice services. These people are in urgent need of support by the government.

Why are we not helping them? We have forgotten about them even though they are dealing with the 50,000 cases annually. We need to utilize these public officials. We are in dialogue with the Police to train our peace officers and appoint them as reserve Police officers so that we have police right in the village. These reserve Police officers can then arrest and detain law breakers as they will have those powers. In this way they can start applying the rule of law right there in the village.

The LJS will initiate programs to revitalize and strengthen the Village Courts and Land Mediation system to ensure that we prevent crime and enable our people to enjoy peace and security in their villages, settlements and local communities. Our focus will be on improved training of Village Court officials and the provision of the enabling environment to secure a peaceful and happy society.

2. Village Court Infrastructure

This strategy is closely aligned to the first strategy. Starting this year, we will begin building Village Court houses. Enough of our people carrying court papers and conducting court hearings under trees and open areas. This practice must end now. The Village Court officials are the frontline officers of justice in the country. They deserve respect and dignity.

We need to give respect to our Village Court Magistrates and officials so that they can uphold their integrity. We envision that by having a permanent place to conduct their business, Village Courts will be better respected and the rule of law will begin to gain traction in the villages, local communities and settlements throughout the country.

The Village Court house can serve multiple purposes. It can be used as a meeting house for women, youth or church groups when the court is not in session. It can also be used for mediation and other purposes. Village Court houses will be the centre of government business in the communities. Currently we have 1680 Village Courts in the country. However, as many of you know, most of them have no court houses.

The LJS will be looking at other partners to join us to roll out the Village Court houses. Those of you in this forum who are interested in partnering with us to pursue this objective are welcome to join us.

If possible, we would like to see that Australian aid is directed to building Village Court houses so that people in the village can see what the Australian Government is doing in the country. At the moment our people are disconnected with the Australian aid because they cannot see the services. We have told DFAT to invest back into the community. We want to work together as single unit so now we want to talk about *Crime Prevention* and put in place interventions to prevent crime before it happens right at the door steps.

Under the MDTP I and MDTP II, the government gave the LJS money and we threw it here and there on all kinds of things. The sector leaders have now agreed that, this will now stop, as we refocus our attention on the village, and work with the people in the villages. That is what we are going to do. We are partnering together to achieve this policy shift.

3. Churches as Number 1 Partner in Crime Prevention
Beginning this year, the LJS will actively engage with the Churches to develop Crime Prevention programs to roll out in the villages, settlements and local communities. Who will be our number one partner in Crime Prevention? It will be the Churches. Our rationale is that in almost every village, local community or settlement in the country, there is a church. The church is structured with leadership and programs designed to keep peace and harmony in the community based on the Gospel of Christ.

According to the 2011 Census, almost 96% of Papua New Guineans subscribe, to the Christian faith. There are more than 20 different Christian churches in the country, with the Catholic Church leading in membership at 27%, Lutheran at 19.5%, United Church at 11.5% and Seventh - Day Adventist Church at 10%.

Papua New Guineans, who claim to be Christians, integrate their Christian faith with some indigenous beliefs and practices. The influence of the Church has over the years transformed many societies across the country to the extent of replacing some of their cultural beliefs. Some have even merged culture and religion. These Christian Churches are also providing 60 – 80% of the social and welfare services in the country, especially in the remotest parts of the country. Therefore, the networks of the Churches are trusted by the people in the country.

The Churches are therefore the natural partners to help the government reduce crime in the country. The Churches are led by a priest or a pastor. The priest or pastor and his team of church leaders, partnering with the LJS, can be a potent team in preventing and reducing crime in the communities. For instance, consider the large savings that can be made by the government, if the pastors and church leaders, report and assist the Village Court officials in apprehending suspects, escapees and also monitoring parolees and probationers. The Police, Correctional Service, the Justice Department and the National Intelligence Organization do not need to unnecessarily expand funds, human and other resources to apprehend suspects and escapees.

The MTDP III has earmarked K4 Billion for the LJS. We want to invest that fund in *Crime Prevention* programs so that we stop crime at the doorstep – the home. That is our focus right now. The best partner to help us achieve this goal is the Churches. We therefore have a partner, who lives and works with the people, in the villages, local communities and settlements. We only need to call upon their services to prevent and reduce crime in our societies.

4. Provincial and District Engagement
The LJS is mindful of the national government's policy on decentralization. We are aware that the government has approved East New Britian, New Ireland and Enga provinces to implement the autonomy agenda. The sector would like to construct a single LJS provincial headquarters so that our people can access our services in one location. Our plan to roll out this program with New Ireland, East New Britain and Enga provinces beginning in 2020.

We hope that through this effort, our fathers and mothers from the villages will gain easy access to our law and order services in the one building, instead of moving from one building to another. We are here to help our people. Now they will access Correctional Service, Police, Public Prosecutor, Public Solicitor, Narcotics in the same building.

In the districts, we will focus on building District Court houses. We are liaising with the Magisterial Services to identify which of the 89 Districts need a District Court house. At the moment, the Chief Magistrate and his Deputy are concerned that there are no houses for the Magistrates in the districts. We will liaise with the Open Members of Parliament and provincial governments to construct Magistrates houses. The Department of Justice and Attorney General is currently building eight District Court houses in eight districts as a start to bring justice services to the districts.

We are going to deliver government services right to the districts. Although we have some funding, we will be looking to other partners to join hands with us to achieve this outcome. Our plan is to deliver justice at the national, provincial, district and village levels. When District Court houses are built, we can also build police stations, rural lock-ups and provide other justice services.

5. Investment in ICT
Since we are living in the modern computer age, the sector needs to invest in ICT. There are too many individual institutionalized ICT frameworks which are not complementing each other. Data is dispersed throughout the sector.

The sector needs a single ICT data collection and management system so we are able to track crime throughout the country with the press of a button. With this tool, the sector can provide appropriate solutions to the different types of crimes.

We would like to ensure there is connectivity between the national agencies and the Village Courts. Our Village Court clerks should be the first point of contact for information relating to crime. An excellent and reliable ICT framework will assist us greatly in attending to crime across the country. For example, if our Village Court is given the additional role of being an intelligence officer, he or she can provide intelligence information about a criminal in his village, settlement or local community to the Police or the National Intelligence Organization. By utilizing this information, the Police can easily apprehend the criminal without expanding so much resource to search and locate the criminal.

Conclusion

The LJS is mindful of our history, particularly our inability to arrest the upsurge in crime in the country. These are lessons that will now help us to shape a better future. We have agreed to the paradigm shift – away from Crime Management and Deterrence to Crime Prevention. We have identified several strategies that we hope will prevent and reduce crime.

These strategies are however, as the village people say, ‘tingting tasol’. The LJS acknowledges the difficulties in pursuing these objectives and looks to partners to assist us in successfully implementing these strategies. Law and Order is everyone’s business. As such, we all need to help each other to ensure that these and other useful strategies are fully implemented to create a safe and secure village or community for our people.

BOOK REVIEW

Eric L. Kwa, Kwa's Legal Dictionary, (Port Moresby: 110 Ltd, 2018)

Professor Edward P. Wolfers*

When the Constitutional Planning Committee (CPC) was consulting the people in the lead-up to Papua New Guinea's independence – through discussion-groups which were provided with papers that raised important questions (not preferred ways forward or choices on offer), consideration of submissions received from interested parties, and public meetings convened at centres around what was then the Territory of Papua New Guinea – the Constitution which would take effect at independence was described in Tok Pisin as the '*As Lo bilong Gavman* ('the basic – or foundation - law of government'). Now, the term generally employed to refer to the National *Constitution* some 44 years later is '*Mama Lo*' ('primary source). The difference is best understood by reference to the process whereby succeeding generations of Papua New Guineans have grown up, lived, and worked at a time when the founding document of the Independent State of Papua New Guinea has transitioned from a proposal to a framework within which the institutions of national government have acquired and exercised constitutional authority.

Papua New Guinea's system of government is the product both of colonial inheritance as well as national self-determination.

The former is evident in the adoption of arrangements which owe a great deal to the Westminster system of responsible ministerial government (in which the Government-of-the-day is formed, held accountable, and subject to removal by the National Parliament), as well as a number of laws adopted from Australia and England.

The CPC was firmly committed to developing a 'home-grown' constitution, devised and adopted by Papua New Guineans to suit Papua New Guinea, and (unlike the constitutions of many other former colonies) neither negotiated with nor deriving its authority from the former colonial power.

The pre-independence House of Assembly's and the Constituent Assembly's acceptance of many (but by no means all) of the CPC's recommendations explains why significant aspects of the *Constitution of the Independent State of Papua New Guinea* and the Organic Laws which implement many matters of detail cannot be properly understood by reference to legal texts which apply in Australia or other Commonwealth countries. They are unique – and can be understood only by reference to distinctively Papua New Guinean sources. Thus, the *Constitution of the Independent State of Papua New Guinea* contains a set of National Goals and Directive Principles, including Papua New Guinean Ways, as well as Basic Social Obligations. While the Queen is head of state, the Governor-General, who represents her, is appointed on the advice of the National Executive Council (NEC) in accordance with a decision by the National Parliament. The Governor-General is required to act not only 'on' but 'in accordance with' the advice received from the NEC or another body specified by law; the Ombudsman Commission administers a Leadership Code which defines the duties and responsibilities, including the integrity required, of Ministers, Members of Parliament, and other holders of public office, and provides for the investigation and penalisation of breaches; the Prime Minister is elected on the floor of the National Parliament, and is assured a minimum term in office (which has grown over time) before a motion of no-confidence can be moved; etc.

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The provisions outlined explain why a dictionary of legal terms specific to Papua New Guinea is needed – not only by lawyers, public officeholders, and aspiring students, but by citizens with an interest in their rights, obligations, and Papua New Guinea's system of government generally.

Echoing what might be regarded as an enduring aspect of life in Papua New Guinea and the changes occurring, the first entry in *Kwa's Legal Dictionary* is 'a close blood relative', and the last is 'zone' (which is defined as 'an area designated for a specific purpose'). The Dictionary consists of a carefully researched and recorded collection of words and phrases contained in Acts of Parliament and/or decisions of the National and Supreme Courts. Each entry consists of a clearly worded definition or explanatory phrase, followed by citations of the law(s) and the National and Supreme Court judgment(s) in which the word or phrase appears.

Kwa's Legal Dictionary is the product of truly impressive, original research. In focusing on Acts of Parliament and court judgments, it provides a useful supplement to information contained in the *Interpretation Act* 1975, which contains guidelines for the application and definition of provisions contained in Acts and other legal instruments, and to the *Constitution* (Section 24) which specifies that certain materials can be used as aids to interpretation. The specified aids are the official records of the deliberations on the CPC's Final Report in the House of Assembly (the parliament of the pre-independence Territory of Papua New Guinea) and the body into which it was reconstituted in order to debate and adopt the National *Constitution*, namely the Constituent Assembly. Relevant records other than the CPC's Final Report (which is available online at the Pacific Islands Legal Information Institute website, paclii.org) are not readily accessible.

The particular contribution and value of *Kwa's Legal Dictionary* is that it provides succinct explanations, with relevant sourcing, of many key terms employed in Papua New Guinea laws and court judgments. In doing so, it builds on previous publications by the author, Dr Eric Kwa, and reinforces his reputation as a leading, productive, scholarly researcher and writer of Papua New Guinea law (now serving as Secretary of the Department of Justice and Attorney General).

Kwa's Legal Dictionary is an essential reference for anyone interested in contemporary Papua New Guinea law. It is a volume that readers familiar with Latin will regard as a *sine qua non* – an essential tool - for anyone seeking guidance on distinctive aspects and the evolving character of Papua New Guinea Law. Or, if one may be permitted to adapt the original Latin expression just cited, 'a sine Kwa non' (an essential of Kwa's creation).

Over all, the book provides a carefully researched and clearly formulated guide to the legislative and judicial development and current understanding of significant aspects of Papua New Guinea law. One can only hope – and encourage the author and other interested parties – to update *Kwa's Legal Dictionary* from time to time as legislation and judicial interpretations continue to evolve.