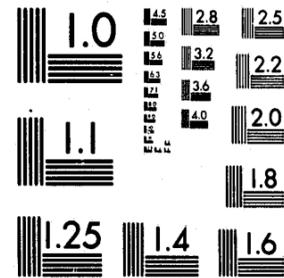


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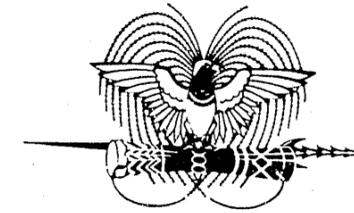
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Washington, D. C. 20531

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6/11/81



# LAW REFORM COMMISSION OF PAPUA NEW GUINEA



62583

## ANNUAL REPORT 1977



**NCJRS**

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**ACQUISITIONS**

**LAW REFORM COMMISSION**

**OF**

**PAPUA NEW GUINEA**

**ANNUAL REPORT 1977**

**THE COMMISSION**

(as at 31st March 1978)

**COMMISSIONERS:**

Bernard Mulu Narokobi, LL.B. (Sydney) - Chairman  
Francis Iramu, Acting Magistrate Grade 4 - Deputy Chairman  
Mek Taylor, LL.B. (Melbourne), Public Solicitor's Office  
John Nilkare, Private Secretary to the Minister for Justice  
William Kaputin, LL.B. (University of Papua New Guinea), Public Solicitor's Office  
Anna Natera, Deputy Principal, Holy Trinity Teachers College, Mt. Hagen

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**ADMINISTRATIVE STAFF**

Joseph Maingu  
Virginia Maraya Llamas  
Marianne Boko  
Jack Ukie

3rd April, 1977

The Honourable Delba Biri, M.P.  
Minister for Justice

Sir,

In accordance with Section 8 of the *Law Reform Commission Act 1975*, we present the Law Reform Commission's Third Annual Report to cover the period from January 1977 to 31st December 1977.

Events occurring after 31st December 1977 have been included for completeness.

*Bernard Narokobi, Chairman*  
*Francis Iramu, Deputy Chairman*  
*Mek Taylor*  
*William Kaputin*  
*Anna Natera*  
*John Nilkare*

#### ACKNOWLEDGEMENTS

The Commission finds great encouragement in the assistance given to it by the Minister, the Parliament, the Secretary for Justice, the lawyers, governmental organizations and the people of the country. We thank the National Broadcasting Commission, the Post Courier and the Wantok newspaper for publicising our efforts. The Office of Information has assisted us with translation into Pidgin and Motu of some of our papers. We also thank the following persons for their assistance -

Professor Rudi James  
Mr. Jim Fingleton  
Mr. David Weisbrot  
Mr. Warwick Andrew  
Mr. Hosea Mina  
Mr. Bob Mellor  
Mr. John Cagney

Law Faculty  
Department of Natural Resources  
Law Faculty  
Public Solicitor's Office  
Chief Magistrate  
Magisterial Services Commission  
Public Prosecutor's Office

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**INTRODUCTION**

The Law Reform Commission is now firmly established and is happy to boast a very high success rate for the implementation of its recommendations. This success we attribute to the commitment of the parliament, the government and the people of Papua New Guinea to the task of transforming our legal system.

However, we met with some setbacks at the beginning of 1978. When the Prime Minister asked for advice on how to fight an apparently worsening violent crimes situation, it was proposed that the Summary Offences, Arrest, Search and Bail Acts should be repealed. It was said that they were the cause of the rising crime rate because of the limitations they placed on police powers. Since the Commission recommended these laws, by implication, the Commission was blamed for the apparently rising crime rate. This assertion ignores the fact that these laws were in force for only three months and whatever effects they would have had one way or the other would have been minimal. The Chairman wrote to the Minister for Justice, pointing out that there were numerous flaws in the advice and that there were other factors contributing to urban crime. We are happy to report that sound advice has prevailed and that the legislature has amended rather than repealed these Acts.

During this year, we have continued to work on areas which we hope will form the foundation of a new legal order for Papua New Guinea. In particular, we hope that our Report on the Role of Customary Law in the Legal System will be received favourably by all people and groups interested in the reform of our law. The next few years will be crucial for law reform in this country, for it will establish whether our country is really willing to follow the constitutional guidelines in building a new legal system or it merely accepts the introduced laws with the outside values implicit in them.

## CHAPTER 1. THE GOALS OF LAW REFORM

We are now deeply involved in the task of re-structuring our legal system. Our aims in restructuring our legal system are clear:

### 1. Our Legal System must be founded on our Customary Laws.

With our Constitutional founders we believe in the wisdom of our ancestral roots. However, we are not looking to a backward and static customary law. Customary Law is a flexible system of law and it must be moulded in accordance with our National Goals and Directive Principles to meet the new needs of Papua New Guinea society. We cannot depend on the slow, tedious and haphazard method of judicial innovation. The legislature must guide the courts.

### 2. We must build a truly National Legal System.

Our Legal system is not 'national' in several ways. Introduced law left a legacy of different legal systems for Papua and New Guinea. There must be uniform codes applying throughout Papua New Guinea, allowing of course for provincial variations to suit local needs, as provided for under our Constitution. However, this diversity must be based on a unity of principle. This unity is directed by our National Goals and Directive Principles. Without unity, we shall cease to be a nation. Thirdly, our customary laws also vary from area to area. Yet we firmly believe that the basic principles on which our customary laws operate are the same. Therefore, while some diversity of custom must be allowed for, we must move in principle towards a unified national legal system. Our proposals on the underlying law will help in this direction.

### 3. The New Legal system must be based on the Needs and Values of our People

Many of our laws are based on Australian or English values. For example the *Marriage Act 1963* and the *Matrimonial Causes Act 1963* and the *Wills Probate and Administration Act 1966* are reflections of Australian laws. They demand standards which effectively keep the benefits of the laws out of the reach of the masses of Papua New Guineans. For example, Papua New Guineans can and do marry under the *Marriage Act 1963* but find it impossible to arrange a divorce as they cannot afford the expense of the National Court. Law making must start with the needs of the average Papua New Guinean.

It is futile to westernise our law and expect the people to catch up with that law. At the same time we cannot make laws which will not be acceptable to our people. In our report on Adultery, we considered taking adultery out of the courts' jurisdiction. However, we were convinced following our consultations with our people that for the Papua New Guinea villager adultery remains a serious matter. In our discussions on family law, we have also considered prohibiting polygamy, but we are equally convinced that this will not be realistic. This does not mean that we should accept every practice or behaviour of our people. We must give a lead, but the lead must come from a base which our people understand and appreciate. Our work on tribal fighting in the Highlands was influenced by such a perspective - that the people in the Highlands are fed up with tribal fighting.

### 4. The Law must be De-Colonised.

Our legal system has been built by our colonisers. This has left its mark not only in the rules but also on the attitudes of our people. Whereas our traditional values emphasise mediation and compromise, pre-Independence values emphasised retribution and punishment. This can be seen in the attitudes of some of our village court magistrates, who prefer to exercise their authority by fining and imprisoning people rather than by arriving at compromises based on mediation and requiring compensation.

Traditional values tend to emphasise equality and participation but pre-Independence values tended to emphasise submission to authority. Take the employer-employee situation where an employer abuses a worker. The principle of equality and participation demands democracy in the workplace where employers and employee work together to build the national economy, but the present *Industrial Relations Act 1962* starts to operate when a formal industrial dispute is found to exist. Greater emphasis should be placed on workers' welfare than on confrontation and dispute settlement.

Some laws enacted before Independence distinguished between people on the basis of their colour or historical incidents and depended too much on the whims of public servants. New differences are developing in our society due to differing standards of education and wealth. A simple example of this is the practical discrimination against two million of our countrymen who have no shoes or long trousers and are therefore barred from certain public places.

### 5. We must Create our Own Legal Materials.

The dominance of foreign law and consequently foreign values in our legal system is created by the fact that information on foreign laws is more readily available than that on our own laws, and particularly our customary laws. Our law students study from foreign text-books, our judges and lawyers use foreign cases as precedents and our draftsmen rely on foreign legislation for writing our laws. This must be changed. We need to develop our own sources of information on our laws and to actively rely on these sources. In particular, our customary law resides in the minds and practices of our people rather than in a written form. This is an advantage in the short term because it gives customary law its characteristic flexibility and adaptability. However, in the long term customary law will be destroyed because our modern society depends on the written form. We must study our customary law in order to enable its creative development. We must also provide information to our law students, lawyers and judges which will enable them to develop the law according to the needs of our own society. It is for this reason that our project for Customary Law Development and our proposal for a Legal Information Centre fulfil vital needs.

### 6. The Laws must Encourage Papua New Guinea Control of the Economy.

National Sovereignty and Self Reliance is one of our most important national goals. Our economy must be controlled by Papua New Guineans acting as a nation or as individuals. Yet, our economy continues to be dominated by foreign interests. Our commercial laws are geared towards the needs of foreign enterprises. The expensive legal services of private practitioners are only readily available to these foreign enterprises. The complexities of legal rules and procedures leave our people confused. The system must be changed so that the

interests of the masses of Papua New Guineans come first and foreigners second. Otherwise we will be left with only a small number of Papua New Guineans sharing the fruits of the economy in partnership with foreign enterprise.

**7. Law Reform Means not only Reform of Substantive Law but also of Legal Institutions.**

While much work needs to be done with our substantive laws such as the criminal law, family law and economic laws, changing the substantive laws will not be enough. The legal institutions must be changed so that the law becomes more accessible to the people. This means changing the structure of our courts and of our legal profession. We must remove the mystifying elements of the law. There is much attraction for lawyers in the idea that bewigged and begowned lawyers performing strange rituals in the court room will convince the people of the majesty of the law. This is an unsatisfactory idea which depends on keeping the distance between the lawyers and the people. Our people must understand the functioning of the law not as a strange machine meting out strange punishments but as a human process of doing justice between people.

There is another and more obvious problem of accessibility to legal services. There are too few lawyers and their services are expensive. The Public Solicitor's Office which provides the only source of legal aid for most of the people of Papua New Guinea is still too small and operates from too few offices. At the same time national lawyers, trained at great expense to the government continue to go into private practice or elsewhere where the conditions of employment are much more rewarding. While an independent and fearless legal profession is probably the best protection of the liberty of the subject, it is also important that priority continues to be given to the legal needs of those least able to afford lawyers.

**8. The People Must Know the Law.**

We must ensure that our people know the law. We should adopt a number of different approaches.

Firstly, we must make law-making simpler. Our system of writing laws is too complex, but it need not be so if the experience of other countries is anything to go by. For example our laws are written in English, a language incomprehensible to the majority of Papua New Guineans. We should start by providing summary translations of all our laws in Pidgin and Motu.

We must also provide for better secondary methods of informing our people about the law. This needs the co-operation of radio and newspapers, government organizations such as the Office of Information as well as lawyers, law students and teachers. We should also teach law in secondary schools to increase our young people's awareness of its existence and purpose.

**9. Reformed laws must not remain on the books but must be made effective.**

Society has a way of preventing changes. Even if Parliament passes a law, it may lead only to symbolic and not real change. For example, the *Transactions with Natives Act 1958* provided for a wide ranging review of any unfair contract. However, very few contracts have ever been brought before the courts. The same may become the fate of our proposed law on Fairness of Transactions unless

machinery is provided for people to make the law effective. This means two things: the people must know the law and they must have an easy access to law enforcement mechanisms. It is the task of the Law Reform Commission not only to change the laws but also to ensure that these changes are effective.

## CHAPTER 2. THE WORK OF THE COMMISSION

During 1977, Parliament enacted the legislation recommended in two of our reports. The Commission has issued three more reports, four working papers and three occasional papers. It has also made considerable progress in its work on other references.

### ARREST, SEARCH AND BAIL.

Our Report on Arrest, Search and Bail recommended simplified laws on arrest, search and bail in accordance with the requirements of the Constitution. The recommended legislation was enacted in the last session of the previous Parliament early this year. It came into effect on 3 November 1977.

The *Arrest Act* 1977 has been amended by the *Arrest (Amendment) Act* 1978. In sections 2 (2) and (3) "the penalty" has been substituted with "a penalty" to make it clear that a policeman may, without warrant, arrest a person for an offence where imprisonment is an alternative penalty for that offence. Section 10 (1) has been recast to remove the necessity for laying a new information leading to the issue of a warrant to arrest a person who is believed to be in breach of a condition of his bail. A further amendment in March 1978 allows the Courts greater discretion in actions for damages for wrongful arrest against the police.

The *Search Act* has been amended to allow searching premises without warrant and search of villages with or without the co-operation of village elders. A third amendment to the act permits the courts greater discretion in suits for damages for unlawful search against the police. The *Bail Act* has been amended to tighten the granting of bail. The magistrate can refuse bail if the arrestee is unlikely to appear at his trial. The police can now object to the granting of bail on this ground and on six other prescribed grounds. However if bail is refused in a lower court the arrestee has the right to apply for bail in a higher court.

The *Arrest (Amendment) Bill* 1976 and the *Public Order (Amendment) Bill* 1976 which were also included in this Report remain unenacted. The former Bill failed because it did not have the majority required under Section 30 of the Constitution. It provided that a policeman could enter a building without a warrant to arrest a person committing a serious crime. The *Public Order (Amendment) Bill* was not enacted because the government wishes to introduce its own legislation.

### SUMMARY OFFENCES.

Our Report on Summary Offences suggested a simpler law on summary offences which would be uniform for Papua and New Guinea. Summary Offences are those offences which can be tried by the local and district courts. Our proposals replaced many archaic and unsatisfactory offences contained in the *Police Offences Acts*. Our majority report also recommended the abolition of the vagrancy offence of "being without lawful means of support". However, a minority report recommended that a person without lawful means of support could be excluded from the town areas.

The last session of the previous Parliament enacted the *Summary Offences Act* 1977. It also enacted the *Vagrancy Act* 1977 based on the minority report. The Acts came into effect on 3rd November, 1977.

The *Summary Offences Act* 1977 was amended in March 1978. This amending act prescribes two new offences of causing a fight or behaving in a manner likely to cause a fight and of being drunk in a public place. It further prescribes heavier penalties for the offences of being drunk and disorderly and use of firearms and missiles such as stones and sticks without reasonable cause and in a way to injure someone or to damage property.

### THE ROLE OF CUSTOMARY LAW IN THE LEGAL SYSTEM.

This report was completed in November, 1977. It is our most significant report so far and is based on our references on customary law, common law and equity, underlying law and the criminal justice system. The main recommendation of our report is that customary law should be given a greater role in our legal system.

This report is divided into two parts. Part I deals with the underlying law and the Part II deals with the criminal responsibility.

The underlying law is that part of the law which applies when there is no specific legislation by the Parliament on the subject. The Constitution provides a temporary scheme for the underlying law until an Act of Parliament can be passed on the subject. In the Report we propose this Act of Parliament. Our basic proposal is that customary law should be the underlying law of Papua New Guinea. The courts should develop the underlying law in accordance with the National Goals and Directive Principles and Basic Rights and Social Obligations. English common law should only apply in exceptional cases.

In Part II of the report we recommend changes in the criminal justice system to take greater account of customary law, perceptions, beliefs and practices. Our major proposal is that if a person is considered innocent by custom, then he should either be found innocent under the criminal law or in the case of serious offences, be given a maximum penalty of three years. We also recommend changes in the punishment and other orders that a court can make. The court should take customary law into account when determining how much punishment to give to a convicted person. In particular it should take into account compensation or other customary form of atoning for the crime which has been made or is likely to be made.

We suggest two changes in the form of punishment or other orders that a court can give. These are inspired by our customary law. Firstly, a court can order an accused person to do up to four weeks' community work in substitution for imprisonment. Secondly, the court can order the accused or (with its consent) his customary group to make compensation of up to K10,000 to the person or group suffering injury, loss or damage as a result of the action of the accused. The compensation need not be in money, but may be in goods or in a customary form.

In our work towards this report we received the assistance of Professor Yash Ghai of the Scandinavian Institute of African Studies in Uppsala, Sweden. We also received tremendous inspiration from the participants at two seminars organised in Goroka by the Commission.

### CHAPTER 3. REFERENCES IN PROGRESS

#### CRIMINAL JUSTICE SYSTEM

##### 1. Interrogations and Confessions

Working Paper No. 3 on this topic was issued in August 1976 and comments and submissions have been received. Following further work on this topic the Commission has agreed to the general approach to be adopted in the report on this topic. Briefly, the report will recommend that a new set of rules be enacted governing the conduct of interrogations and the handling of confessions. The suggested rules are similar to the present approach adopted by the courts, with the difference that their infringement would lead to the exclusion of any evidence thereby obtained.

##### 2. Indictable Offences Triable Summarily

Following the consideration of responses to the Joint Working Paper No. 1 of 21st February 1977 on this topic a report is being prepared, but will not be finalized until the draft of the new Magistrates Courts Bill is complete (see "Lower Courts Review" below).

The substance of the report is that some eighty of the less serious indictable offences would become triable by Senior Magistrates, the Magistrates Grade IV. The maximum punishment that a senior magistrate could award would be two years imprisonment. (The Inter-Group Fighting Act 1977 has increased Senior Magistrates' jurisdiction to 5 years imprisonment and K20,000 fines for offences under the Act in an attempt to discourage inter-group fighting). In addition it is proposed that limitation on the value of goods in certain property offences be increased to K2000.

##### 3. Committal Proceedings

A draft working paper and bill were circulated for the consideration of a working party during the year. The working party, consisting of the Acting Public Solicitor and representatives of the Public Prosecutor, the Chief Magistrate and the Law Reform Commission added their comments to the paper which was then published as Joint Working Paper No. 2.

Generally speaking the working party was concerned with speeding up and simplifying the procedure for preliminary examinations in the District Court by the introduction of "hand-up" briefs. The working party proposed that the written statements of the accused and witnesses be handed to the magistrate for his consideration as to whether or not the accused should be committed. Whilst there are dangers in this procedure the working party considered that if any errors are made in the decision whether or not to commit these errors could be detected upon review or appeal.

##### 4. Childrens' Courts

As part of the review of the Criminal Justice System, the Commission is also required to enquire into and report on changes in legislation needed to help overcome the problems associated with juvenile offenders. Particular difficulties

are experienced in the present structure and functioning of the courts as well as in the arrest, questioning and appropriate sentencing of young persons.

The Commission is preparing a working paper and draft legislation which will include the criminal responsibility of young people, questions of arrest, search and bail, conduct of trials and the adequacy of present sentencing practices.

Where young people are concerned, the questions of rehabilitation and the fostering of good relationships within the family and the community are of great importance and it is proposed that the available means of dealing with young offenders will be greatly extended.

Fr. William Liebert of Boys Town in Wewak has continued to assist the Commission in this work, bringing his valuable experience as Director of Boys Town.

#### THE LOWER COURTS

As we noted in last year's Annual Report, the work of the Commission on the criminal justice system has already led to some review of the criminal procedure in the lower courts.

After a number of discussions with the Chief Magistrate and after one false start, the Commission now believes that a completely new Magistrates Courts Bill is needed to replace the present District and Local Courts Acts. The new bill would incorporate the amendments to the District Courts Act proposed in the working papers on Indictable Offences Triable Summarily and Committal Proceedings and also incorporate increases in court powers in civil matters for all but the most junior magisterial grade. Work has commenced on the drafting of the new bill.

#### CUSTOMARY LAW

Our Constitution has imposed on the Commission the special responsibility of developing our own system of law based mainly on the custom of our people. However, much of the custom remains unwritten. The reference on the review of customary law urges the Commission to meet the call of the Constitution by research into custom and restating or codifying its contents where possible.

The Commission has to date been unable to undertake this review on the very wide scale that its terms demand. Nevertheless it has taken one step and is preparing to take two more major steps in that direction:

(a) Publication of two occasional papers on customary marriage and divorce and customary succession. The marriage and divorce paper deals with the custom and practice of forming and dissolving marriages in thirteen societies in five of the nineteen provinces of Papua New Guinea. The matters dealt with include the regulation, preliminary phases, bridewealth, proof and political import of marriage and causes of divorce, custody of children and ownership and distribution of matrimonial property. On the basis of this paper certain recommendations have been made regarding customary marriage in a proposed family law bill.

(b) Customary Law Development Project. A customary law development project, under a co-ordinator, will be established to ascertain in any

area of customary law our people's values, traditions, beliefs, perceptions and institutions, develop them along national policy lines and integrate them in the national legal system. Information will be collected from all courts, village leaders, councillors and written sources. This information will be used to produce a digest of customary law as well as assist courts with evidence of customary law and legislators in the formulation of new legislation.

(c) Legal Information Centre. This centre will be established to co-ordinate the general collection of information on law, including customary law, by various agencies and to process and store or disseminate such information to all who require it. It is recommended that in collecting information on law in the form of literature or cases these questions should be kept in mind: "who needs what information for what purposes from whom and in what form". Professor William Twining, Professor of law at the University of Warwick, United Kingdom, an eminent authority in this area has surveyed the collection of legal information in Papua New Guinea. He has reported to the Commission and his report has been issued as an occasional paper (Occasional Paper No. 6) and distributed for discussion and comments to members of the public.

#### FAMILY LAW

The Commission is preparing a working paper and a draft Bill, which will be issued early in 1978.

The proposed reforms will be put into a single Act, to be known as the Family Law Act. The Act will include the following matters: definition and requirements for a valid marriage, registration of marriage, grounds for divorce, recognition of foreign marriages and divorces, maintenance, property and custody claims, jurisdiction of courts in family law matters and offences against the Act.

The Family Law Act will consolidate, simplify and reform various fragmented and often overlapping statutes currently in force into one law.

The parts dealing with marriage recognise one state of marriage, which may be entered into through customary or non-customary ceremonies. Different sets of proposed grounds for divorce will be put forward to draw public comment. The emphasis will be away from "fault" to whether the marital relationship has ended. Procedure will be simplified and lower courts will play a much bigger role.

Rights of dependents to maintenance will be more closely related to need than to the expected marital roles of each partner. There will be detailed provisions relating to enforcement of maintenance orders.

#### SUCCESSION

A draft working paper has been issued by the Commission to those authorities and persons involved in the administration of deceased estates, to gather their preliminary comments. The Commission has begun drafting a Bill which is to be presented with the final paper for further discussion.

The principal aim of the suggested reforms is to provide a law which reflects customary concepts of the movement of property on death, or in anticipation of death. In researching these aspects, the Commission has been assisted by the field work done by Robert Wanji, a teaching fellow at the Faculty of Law, University

of Papua New Guinea. This work formed the basis of the Commission's Occasional Paper No. 3, "General Statement of Customary Rules of Succession in the Amele Area, Madang Province and the Wosera, East Sepik Province", which was issued in August 1977.

The proposals in the draft working paper are aimed at providing a unified law of succession for all people in Papua New Guinea. The primary concern in distributing a deceased person's estate should be to ensure the adequate maintenance and housing of the deceased's immediate family. The other relevant factors are the customary rules if any, which apply to the community to which the deceased belonged, and any will or other evidence of testamentary intention of the deceased. The scope of operation of testamentary intention should be limited to that permitted by custom, and subject always to the family maintenance provisions of the written law.

It will be presumed until the contrary is shown, that any will or other form of testamentary intention has been made in accordance with any applicable customary law.

Statutory rules of distribution will be provided where custom does not apply. The proposals for the administration of estates emphasise the role of local administrative authorities and de-emphasise the role of the courts. The Public Curator will have wide power to delegate functions, and it is envisaged that Provincial Governments, where established, will accept and exercise these delegated functions.

The proposals relating to death duties recommend collection of duty only on large estates, where the duty collected would justify the expense of collection.

#### ECONOMIC LAWS

Our work in other areas has prevented us from making a thoroughgoing review of economic laws as is required by this reference. However, we have made progress in three areas.

##### 1. Small Scale Enterprises

We have been working together with a working group chaired by the National Planning Office to remove legal restrictions to small scale enterprises. We consider that it is essential if we are to encourage Papua New Guinean participation in the economy to give small businessmen a chance to participate in informal sector activities. Yet, many legal rules unnecessarily restrict such participation. This is an important part of the National Development Strategy. Legislation on the subject is now being prepared by the working group and we hope that it will be presented to the Parliament in the early part of 1978.

##### 2. Transfer Pricing and Profits Manipulation

The Commission has also established a working group bringing together other relevant departments on Transfer Pricing and Profits Manipulation by multi-national corporations. These corporations with their many subsidiaries in different countries often arrange their pricing policies and accounting profits in such a way as to work to the detriment of a developing country such as Papua New Guinea. Often the host country does not earn sufficient revenue from

activities such as mining, fishing or logging which deplete its natural resources. The problems in this area are not only legal but those of administrative co-ordination between various government departments. The United Nations Centre on Transnational Corporations has provided us with the short-term services of Mr. Panayotis Roumeliotis to study the problem. His report is expected in the early part of 1978.

We hope during 1978 to make an appointment concerned primarily with work on economic law. At present, we are considering the priorities for reform of the economic laws and believe that the legal system must have three aims in this area.

- (a). Papua New Guineans must be encouraged to participate more fully in economy, both the individuals and the state;
- (b). adequate control must be established over foreign enterprises in accordance with the goal of national sovereignty and self-reliance;
- (c). In line with our goal of equality and participation, workers must be given a greater role in the control and management of enterprises, whether owned by the state, Papua New Guinean individuals or foreigners.

### 3. Contract Protection

Following the publication of a working paper on this subject, Report, No. 6 entitled *Fairness of Transactions* was published in November.

The report proposes that the *Transactions with Natives Act* 1958 be repealed and replaced by a new *Fairness of Transactions Act*. The new law would apply to most commercial transactions in Papua New Guinea and would allow for the review of transactions that were manifestly unfair or were not entered into on an equal footing. The new law would emphasise mediation as a means of settling disputes.

### LEGAL PROFESSION AND THE JUDICIARY

On 29 April 1977 the then Minister for Justice, Mr. Ebia Olewale gave us a reference to conduct a thoroughgoing review of the legal profession and judiciary. Particular issues raised by the Minister are localisation, the establishment of a National Legal Corporation to serve semi-governmental institutions and the establishment of para-legal workers. We consider it essential that if we are going to have a healthy legal system, we need a legal profession and a judiciary fit for the needs of our country.

We have made progress on this topic this year. In this we were helped by Mr. Stan Ross of the University of New South Wales, who in conjunction with the Law and Development class at the University of Papua New Guinea, has produced two Research Reports for us on the judiciary and the legal profession. Both will be issued as working papers and sent out to various people for discussion and comments.

### ADMINISTRATIVE LAW

Following the presentation of a paper by Peter Bayne to the Commissioners

and an important meeting between staff, the Chief Magistrate and the Ombudsman Commissioners in August 1977 there have been discussions with the Public Service Commission and other interested parties.

The difficulties of administrative law are best overcome by simplifying the review of administrative decisions within the government itself. The Commission has suggested that the Public Service adopt a very simple procedure that would allow an applicant to request a review of a decision within the responsible department. The procedure would also provide that written reasons be given for the decision. Armed with the reasons the aggrieved party could take his case to the departmental head and then if necessary to the Ombudsman Commission or an appeals tribunal. Only if all these steps fail need he apply to the courts for review.

A review of the content of administrative law is proposed as a step towards the consideration of a principle of review going to the merits. A study of the consolidation of the laws of Papua New Guinea in order to establish precisely which body has been delegated which powers under legislation has been proposed.

Finally the problem of achieving "open government" remains. The Commission proposes a study of the possible approaches to this problem and expects to produce a working paper on this topic in 1978.

### COMPENSATION

#### 1. Customary Compensation

The Commission is considering a proposal which will both recognise compensation as a method of settling disputes and redressing wrongs and also as a way of controlling excessive and anti-social demands. Many of our people feel that fines and imprisonment are not adequate because these may benefit the state, not the victim or his relatives and group. But it is true that very large amounts of compensation in cash, pigs and goods are being demanded and paid in some areas of our country for injuries, deaths and killings with serious consequences for the groups involved. Some groups have been impoverished in trying to meet excessive demands for compensation while others have been substantially set back in their effort to develop themselves.

The proposed legislation will -

- (a). Fix the maximum claim for compensation at K5000 for any injury or any death and at K10,000 for any one accident;
- (b). punish excessive demands for compensation following warning;
- (c). exclude strangers from either directly demanding or receiving shares in compensation payments;
- (d). punish failure to pay reasonable compensation after a settlement has been reached;
- (e). prescribe ways of assessing a reasonable compensation;
- (f). provide for government representatives to mediate but not to decide cases; and

- (g). prescribe composition of compensation either in cash or goods or both.

A working paper is being prepared.

## 2. Compensation for Motor Vehicle Accidents

Many of the extortionate demands for compensation arise from deaths and injuries caused by motor vehicle accidents. Quite apart from the excessive compensation claims made by the victim's customary group to the driver's customary group, the victim or his family has a potential claim against the Motor Vehicles (Insurance) Trust or the Government.

A working paper (No. 7) on the operation of the *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974* will be published early in 1978. The paper will contain the Commission's tentative proposals regarding compensation for motor vehicle accidents in Papua New Guinea. Insurance is only one aspect of the problem. The number of deaths involving motor vehicles continues to increase and has doubled in the five years from 1971 to 1976 (from 103 to 207). The hardship and social disruption that follow such deaths is also increasing. It is doubtful whether the present system of motor vehicle insurance is helping to alleviate these problems, for less than 50% of all possible insurance claims for traffic accident deaths are ever lodged and maintained until compensation is paid. For those claims that are lodged the *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974* has become the main method by which compensation is paid.

## 3. Small Claims

A related problem is that of the efficient settlement of small claims. A detailed examination of the present method of handling claims in the local and district courts and the effect of the rapid development of Village Courts appears necessary.

## SORCERY

We have begun work on this important reference which the Minister gave us in April. In October we issued an occasional paper (O.P. 4) in which we set out what we ourselves already know about sorcery and the present law dealing with sorcery. In this paper we have asked many questions about sorcery which only our people in the villages and sorcerers themselves can answer satisfactorily. The Chairman and Commissioner Kaputin have talked with their people in the East Sepik Province and the East New Britain Province and have collected much valuable information which they have compiled in two separate papers. We hope that with some more information like this which reflects the true situation, we will be better able to define what role, if any, the law should play in dealing with sorcery, a phenomenon which affects the daily lives of most Papua New Guineans.

## CHAPTER 4. OTHER ACTIVITIES OF THE COMMISSION

The Commission has three functions. Its primary function, under references from the Minister for Justice is to review the laws of Papua New Guinea in order to facilitate their systematic development and reform.

Under Section Schedule 2.14 of the Constitution, the Commission also has a special responsibility to investigate and report to the Parliament and the National Executive Council on the development, appropriateness and adaptation to the circumstances of the country of the underlying law. We have tried to carry out this responsibility this year in Part 1 of our Report on the Role of Customary Law in the Legal System.

The Commission also has the right under Section 19 of the Constitution, to apply to the Supreme Court for its opinion on any question relating to the interpretation or application of a constitutional law or the validity of a law or proposed law. The Commission did not exercise this right in 1977.

## SEMINARS

The Commission ran three seminars in 1977 to assist it in its work.

### 1. Goroka Seminar on the Underlying Law and Customary Law.

This seminar which was sponsored jointly by the Dag Hammarskjold Foundation and the Commission, took place in Goroka between 31st March and 3rd April. The seminar was attended by a broad range of people interested in the law. These included the Chief Justice, Local and District Court Magistrates, Village Court Magistrates, students, academic and practising lawyers, politicians, police, social workers, anthropologists and interested citizens.

The purpose of the seminar was to consider our proposals on the underlying law, customary law and criminal responsibility. The Commission was impressed and encouraged by the enthusiasm shown by Papua New Guineans for the development of a legal system based on our own needs and values. The seminar suggested a stronger role for customary law than that proposed in our working paper on the underlying law. It proposed a systematic study of customary law. It was more critical of our recommendations on criminal responsibility. The suggestion was made that there should be some punishment for a wider range of serious offences even though the acts or omissions are considered innocent under custom. However it was felt that the role of customary law in the criminal justice system should be wider and not merely confined to criminal responsibility. We have in our Report on the Role of Customary Law in the Legal System acted on many of the recommendations of the seminar. Our Customary Law Development Project will, we hope, result in the kind of systematic study of customary law envisaged by the seminar participants.

### 2. Information about Law in Papua New Guinea

This was a half-day seminar organised during Professor Twining's visit to Papua New Guinea from 20 July to 10 August. The seminar was attended by various persons interested in legal documentation and literature in Papua New Guinea. The main purpose of the seminar was to discuss ways in which the recording and collection of information can be better made available to the different

audiences that are interested in the laws of Papua New Guinea. The main concern of the seminar was that if Papua New Guinea is to develop its own legal system, it is important that it have a better organised and independent legal literature. In particular, it was necessary to build up information about customary law. Professor Twining's proposal for a Legal Information Centre was generally well received by the seminar participants.

### 3. Transfer Pricing

The seminar was organised during the December visit of Mr. Panayotis Roumeliotis under the auspices of the United Nations. It was attended by government personnel involved with the control of transfer pricing. The purpose of the seminar was to explore ways in which the present legal and administrative controls over transfer pricing activities of multi-national corporations can be improved.

## CONFERENCES ATTENDED

### 1. Fourth Conference of Australian Law Reform Agencies

This conference was held in Sydney on 1st July 1977. As it was a one day conference only, it was decided that it should be attended by our consultant Mr. Nicholas O'Neill, who reported on the conference to the Commission during his visit to Port Moresby.

### 2. South Pacific Judicial and Legal Conference

This conference was held at the Islander Hotel, Port Moresby between 19th and 23rd April 1977. The Conference was hosted by the Chief Justice, Sir Sydney Frost and was attended by judges and lawyers from the countries of the South Pacific and the administering powers such as the United Kingdom, France and the United States.

The theme of the conference was the adaptation of western law in the Pacific. The Chairman of the Law Reform Commission delivered a paper on the topic which dealt specially with Papua New Guinea. The paper discussed the historical imposition of colonial laws in Papua New Guinea and discussed our plans to build our legal system on customary law foundations. The paper evoked great interest, even among those countries of the South Pacific which have until now accepted the superiority of the western legal system.

### 3. World Congress of Law and Social Philosophy

This conference was organised by the Faculty of Law at the University of Sydney in Australia. Over three hundred jurists and philosophers from the world over were invited. The Chairman of the Law Reform Commission attended the conference. The conference managed to explore a wide ranging set of issues but it was too disparate for any common theme to emerge. It did, however, manage to emphasise the division between the perception of law in the socialist countries and that in the capitalist world. It also emphasised the attachment of western orthodox jurisprudence to legality. The Chairman delivered a paper on the Papua New Guinean's perceptions of the imposed law, and accentuated the need for liberation from colonial laws. This found supporters. However, it was criticised by some as being nostalgia for a 'backward' customary legal system.

## CHAPTER 5.

## MISCELLANEOUS MATTERS

The Commission lost the services of Ms. Nahau Rooney during this year. She successfully contested the National Elections and is now the Minister for Corrective Institutions and Liquor Licensing. The Commission is grateful for the valuable service given to it by Ms. Rooney. During the year two new commissioners were appointed. Ms. Anna Natera was appointed commissioner for a period of one year on 10th March 1977. Ms. Natera is Deputy Principal of Trinity Teachers College, Mt. Hagen. Mr. William Kaputin was appointed for one year on 25th August 1977. Mr. Kaputin is with the Public Solicitor's Office. The appointments of Ms. Mek Taylor and Mr. John Nilkare were renewed. The Commission now has seven commissioners.

The Secretary to the Law Reform Commission, Mr. Nick O'Neill resigned on 1st March 1977. The Commission is grateful to Mr. O'Neill for his work. He continues to give us his services as a consultant to the Commission. Dr. Paliwala became the new secretary on a one year secondment from the University of Papua New Guinea. Dr. Paliwala commenced his leave at the end of the year and will resume with the University of Papua New Guinea as Dean of the Law Faculty. Mr. Samson Kaipu will be appointed Acting Secretary until a permanent appointment can be made. Mr. Kaipu holds the degree of LL.B. and B.A. of the University of Papua New Guinea and has been the Senior Projects Officer with the Commission. The Commission staff has been joined by Mr. Brian Casey. Mr. Casey is a New Zealander and comes to us for two years under the Commonwealth Fund for Technical Co-operation. He fills a very great need for a legislative draftsman for the Commission.

During 1977 the Commission was given considerable support by the Commonwealth Secretariat, the Dag Hammarskjold Foundation, the United Nations Centre on Transnational Corporations and many other individuals who volunteered their services.

### 1. The Commonwealth Secretariat

We are most grateful to the Commonwealth Secretariat for providing us with the services for two years of Mr. Brian Casey, our legislative draftsman. The assistance is provided under the Commonwealth Fund for Technical Corporation. Under this scheme, the government of Papua New Guinea pays a local salary component and the Funds pays the expatriate component and other expenses.

### 2. Dag Hammarskjold Foundation

The Dag Hammarskjold Foundation provided assistance towards meeting the cost of the Goroka seminar on the Underlying Law and Customary Law. We appreciate the continuing interest shown by the Foundation in the work of Law Reform in Papua New Guinea.

### 3. The United Nations Centre on Transnational Corporations

This Centre has provided us with the short term services of Mr. Panayotis Roumeliotis, their expert on transfer pricing. There is a great need for co-operation between developing countries in dealing with multi-national enterprises.

The Centre on Transnational Corporations exists to promote this co-operation. Mr. Roumeliotis visit has been of great benefit to Papua New Guinea. We hope, also, that the information provided by him will be of benefit to developing countries generally. His report is expected in February 1978.

Mr. Peter Bayne

Mr. Bayne, who is head of the Department of Legal Studies at La Trobe University has undertaken to assist the Commission in its work on the reference on Administrative Law. We appreciate Mr. Bayne's work for us.

Professor Twining

Professor Twining who is professor of law at the University of Warwick in England, is an eminent world authority on legal documentation and literature. During his three week visit he carried out an intensive study of the legal information needs of Papua New Guinea and subsequently prepared a Report on Information about Law in Papua New Guinea. We are grateful to Professor Twining.

Mr. Stan Ross

Mr. Stan Ross visited Papua New Guinea for the second half of this year from the University of New South Wales. During this period, he was visiting associate professor at the Law Faculty of the University of Papua New Guinea. He is co-author of a recently published book on lawyers. He carried out for us research on the legal profession and the judiciary in Papua New Guinea. This work was performed in conjunction with the Law and Development class at the Law Faculty. Mr. Ross has prepared two Research Reports for us on the legal profession and the judiciary. We thank Mr. Ross and his class for their valuable effort.

Mr. Robert Wanji

Mr. Wanji, a teaching fellow at the University of Papua New Guinea and now studying for a master of laws at Harvard University gave us his assistance in undertaking two studies on the customary law of succession. These studies have now been published as an occasional paper. The paper forms a valuable beginning to our efforts on the documentation of customary law.

Fr. William Liebert

Father Liebert has continued to assist the Commission by working on a new Juvenile Court Act. He brings to this valuable work his great experience as Director for Wewak Boy's Town.

#### VISITS

Mr. Russel Scott an Australian Law Reform Commissioner visited us from 22nd August to 4th September 1977 to study the Village Courts in Papua New Guinea. His study was made in connection with his Commission's reference on Aboriginal Customary Laws. The Commission assisted Mr. Scott in organising his visit. Mr. Scott has prepared a Report on Village Courts which is also of assistance to our country. The visit was a fine example of the two way co-operation which exists between us and the Law Reform Commissions in Australia.

#### TALKS AND LECTURES

1. The Chairman and Dr. Peter Jones, professor of history at the University of Illinois, spoke on the national dreams of Papua New Guinea and the United States of America at a seminar called "National Integration and Political Maturity" which was jointly organized by the Department of External Studies of the University of Papua New Guinea and the American Embassy in June.
2. Mr. Kaipu, Senior Project Officer of the Commission, on the invitation of the Goroka branch of the National Council of Women of Papua New Guinea, discussed with the members of that branch matters of concern to them, such as divorce and maintenance and provision of contraceptives to girls in secondary schools. Mr. Kaipu was again invited to a Lae seminar organized by the Council to speak to the participants about the same issues but a mutual misunderstanding of the timetable prevented this talk from taking place.
3. The Chairman, the Secretary and the Senior Project Officer gave a series of lectures during August-September to students enrolled in customary law at the University of Papua New Guinea. Subjects covered included traditional dispute settlement, sorcery, marriage, village courts and criminal responsibility. It is the desire of the Commission that customary law have a place on the curriculum of the Faculty of Law. This is one way of ensuring a place of prominence to customary law in the legal system of our country.

#### RECOMMENDATIONS TO THE POLICE TASK FORCE

The Commission was asked to submit proposals for reform of the Police Force to the Task Force set up by the then Police Commissioner, Mr. Pious Kerepia. In its submission in September the Commission recommended fifteen ways in which the Police Force could be improved. Among the recommendations were a change of name by replacing "Force" with "Service" and placement of married police officers within the community. The Law Reform Commission also recommended that the police be controlled by a Police Commission of three members: two professional policemen and one lay representative. Alternatively, the force should be managed by a team comprising the Commissioner and his deputies with lay participation in the formulation of the policies and directions that are to be put to the Minister.

**APPENDIX 1.****ESTIMATED EXPENDITURE**

The Commission estimates its expenditure for the calendar year 1977 at K67,822.42. The expenditure was divided into the following categories:

Salaries	K49,817.40
Travel and Subsistence	5,194.93
Materials and Supplies	1,881.89
Plant and Transport Hire	1,720.98
Public Utilities	4,707.22
Printing	1,000.00
Seminar	2,000.00
Library	1,500.00
<b>TOTAL</b>	<b>K67,822.42</b>

**APPENDIX 2.****STAFF ESTABLISHMENT**

The Commission staff establishment on - 31st December 1977 was -

Secretary  
Principal Legal Officer  
Senior Legal Officer  
Principal Project Officer  
Senior Project Officer  
Project Officer  
Administrative Officer  
Records Officer  
Keyboard Operator Gd. 4  
Keyboard Operator Gd. 2  
Messenger

Dr. Abdul Paliwala<sup>1</sup>  
Mr. Ross De Vere  
Mr. Alan Marsh  
Vacant  
Mr. Samson Kaipu<sup>2</sup>  
Vacant  
Mr. Joseph W. Maingu  
Vacant  
Ms. Virginia M. Llamas  
Ms. Marianne Boko  
Mr. Jack Ukie

Mr. Brian Casey

Legal Draftsman, Mr. Casey was made available to the Commission through the Commonwealth Fund for Technical Co-operation, as a consultant for two years from May 1977.

Mr. Nicholas O'Neill

The first Secretary of the Commission who resigned on February 1977 has a Government contract as a consultant till April 1978 on a number of Projects with the Commission.

<sup>1</sup>Dr. Paliwala has been on a one year secondment from the University of Papua New Guinea and his term expired on 2nd of March 1978. As he went on leave from the 16th December 1977 and was to be absent till the end of his term, Mr. Samson Kaipu was Acting Secretary to the Commission.

<sup>2</sup>Mr. Samson Kaipu was appointed Acting Secretary on 2nd March 1978 although he has been performing the duties of the office since 19th December 1977.

**APPENDIX 3.**

**NEW REFERENCES RECEIVED IN 1977**

References from the Minister referring to Administrative Law, Local and District Courts and Sorcery were received in 1977 and summarized in our last Annual Report.

In addition a reference concerning the legal profession and the judiciary was also received and is summarized below:

**REVIEW OF THE LEGAL PROFESSION AND THE JUDICIARY  
29TH APRIL 1977**

Because -

1. The structure of the legal profession in Papua New Guinea was established during the colonial times; and
2. It's services are not cheap or made readily available to the public in accordance with National Goal and Directive Principle No. 2 of the Constitution, which calls for equalization of services in all parts of the country, and for every citizen to have equal access to legal process and all services, governmental and otherwise, that are required for the fulfillment of his or her real needs and aspirations; and
3. The establishment of a legal system based on Papua New Guinea ways of doing justice requires a legal profession which is in line with those ways.

Enquire into and report to me on -

1. The structure of the legal profession including the judiciary, and their methods of training, payment, etiquette and conduct including the manner of their dress; and
2. The ways in which the legal profession including the judiciary meets or fails to meet the needs of our country and its people; and
3. The ways in which the legal profession and the judiciary should be changed so that they will meet the needs of our country.

In undertaking this review, you will -

1. Consult with any body of lawyers established in Papua New Guinea and such other bodies or people as you consider appropriate; and
2. Give particular attention to the localisation of the legal profession and the judiciary; and
3. Give particular attention to the ways in which legal services can be made cheaper and more readily available; and
4. Consider the establishment of a National Legal Corporation to serve semi-governmental institutions; and

5. Consider the establishment of para-legal lawyers; and

6. Consider the ways in which legal expertise can be developed among Papua New Guineans in particular areas such as dealing with foreign investors.

When making your reports on the matters the subject of this reference you will attach drafts of any legislation required to give effect to any of the recommendations in those reports.

APPENDIX 4.

PUBLICATIONS OF THE COMMISSION

Reports	Date Submitted	Action
1. Summary Offences	15.9.75	Summary Offences Bill enacted by the National Parliament on 18th Feb. 1977 (in force since 3rd Nov. 1977).
2. Abolition of Native Regulations	10.10.75	Repealing regulations-Native (Amendment) Regulations (P) No. 63 of 1975 and Native Administration (Amendment) Regulation (NG) No. 64 of 1975, came into force on 20th Feb 1976.
3. Punishment for Wilful Murder	15.10.75	Criminal Code (Amendment) Act 1976 came into force on 1st April 1976.
4. Arrest, Search & Bail	2.3.76	Five of the six bills attached to the report were enacted on various days in February 1977 (in force since 3rd November 1977).
5. Adultery	28.2.77	Adultery Bill to be enacted by the National Parliament.
6. Fairness of Transactions	29.11.77	Fairness of Transactions Bill to be enacted by the National Parliament.
7. The Role of Customary Law in the Legal System	29.11.77	Criminal Responsibility is included in this Report. Declaration and Development of Underlying law Bill to be considered by National Parliament. Same for Criminal Responsibility.
Working Drafts	Date Circulated	
1. Summary Offences	4.7.75	Now Report No. 1.
2. Arrest, Search & Bail	20.8.75	Now Report No. 4.
3. Succession	29.11.77.	Comments being sought.

Working Papers	Date Circulated	Action
1. Abolition of Native Regulations	11.8.75	Now Report No. 2.
2. Adultery	5.11.75	Now Report No. 5.
3. Detention for Interrogation and Confessions	16.8.76	Final Report in preparation.
4. Declarations and Development of the Underlying Law.	13.9.76	Now Report No. 7.
5. Fairness of Transactions	18.10.76	Now Report No. 6.

Joint Working Papers	Date Circulated	Action
1. Indictable Offences	21.2.77	To be completed together with a review of the lower courts.
2. Committal Proceedings (Preliminary Examinations)	15.7.77	Another working paper being prepared.

Occasional Papers	Date Circulated
1. The Punishment for Wilful Murder: A Study by the Law Reform Commission.	July 1976
2. Review of the Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974.	February 1977
3. General Statement of Customary Rules of Succession in the Aemele Area, Madang Province and the Wosera, East Sepik Province.	August 1977
4. Sorcery	October 1977
5. Customary Marriage and Divorce in Selected Areas of Papua New Guinea.	November 1977
6. Law Information Centre	October 1977

**END**