Section 1

1.1 Introduction

The Criminal Procedure Act, 2004 (act no. 25 of 2004) and statutory time limit for the rendering of judgments workshop was held at Waterberg in the Otjozondjupa Region and was aimed at providing a platform to eminent members from the legal fraternity, to engage in dialogue on the topical issue of the implementation of the Criminal Procedure Act of 2004 and proposed guidelines and statutory time limit for the rendering of judgments. The outcomes, contained in the form of resolutions are discussed under the auspices of the Law Reform and Development Commission, policy makers and other relevant institutions *inter alia* the Law Society of Namibia, University of Namibia, Office of the Ombudsman, Legal Aid, Office of the Attorney General, Office of the Prosecutor General, the Judiciary and the development partner, Konrad Adenauer Stiftung Foundation.
Section 2

2.1 Criminal Procedure Act 25 of 2004

2.1.1 The Presentations and deliberations

The Criminal Procedure Act of 2004 has been questioned on the following grounds:

- Practicality
- Logic
- Lucidity,
- Legality (constitutionality).

Submissions were made from various stakeholders, including; LAC, Law Society of Namibia, Office of the Prosecutor General, UNAM, Office of the Attorney General and the following preliminary recommendations were made: to bring Criminal Procedures Act of 2004 in line with jurisprudential demands of the Constitution; and abreast of legal developments or draft a new Criminal Procedure Bill 2013.

2.1.2 Issues raised:

- Sensitization to the 2004 legislation to sensitize relevant legal practitioners to the change in the sectional structure from the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- Hesitation on retaining or amending the CPA of 1977. The legislation of 2004 just needs revision before it is put into operation.
- Consideration to amend the Constitution as it is currently pro-accused.
- CPA of 2004 cannot be implemented until Magistrate’s Court Act is implemented.
- Although the CPA of 1977 was an inherited legislation, it is possible that we could have retained the arrangement of some sections.
- The issue of keeping a South African historical document is not as pertinent as the issue of establishing new Namibian laws with Namibian character. An important aspect that
needs careful consideration is that academia has relied on South African textbooks for over 20 years which complicates issues from an academic perspective.

- Retaining the structural integrity of the 1977 Act would exist as a matter of convenience and certainty of the law. It is not just within the South African context that we want legal certainty and jurisprudence.
- Discussions demonstrate that there are inherent problems in the 2004 Act. We should take into consideration the establishment of a 2013 Act; it further demonstrates the issue that legislation in Namibia is not being created through a consultative process. Although we have strong reasons to move from CPA of 1977, it is of as much importance that this must not be haphazard.
- If the CPA of 1977 can be amended, it should be amended. And retaining sectional integrity is important.
- Debate of whether we should introduce plea bargaining? Wider considerations must be provoked in this regard.
- At present there is no Namibian legal literature on Criminal Procedure subject matter.

### 2.1.3 Specific Issues (Sections) from CPA of 2004 discussed and resolved

#### i. Bail

- Requirement of “interest of justice”; no discretion to Presiding Officer for grounds for denial of bail.

- **Section 63(4) of CPA of 2004** states the grounds for Bail. Bail is not a right. Bail can be refused on certain grounds, stated in subsection 4(a).

- There exists the problem that it is often the case that the record of bail proceedings is being used in trial as evidence. Fear that it may negatively affect the criminal proceedings in future, how do we prevent that from impacting on a fair trial? Bail application is not within the criminal proceedings therefore the rules of evidence that are applicable in bail proceedings, are not the same in terms of trial proceedings.
• The need to balance the right of the victim and the right of the accused to liberty. There exists no right to bail but there is the right to liberty. The two concepts are ancillary and one cannot access the right to liberty if bail is denied. However, the right to liberty is not an absolute liberty but can be limited.

**Recommendation:** Retain the section; provision be made to balance evidence in trial, during bail proceedings and right to liberty. Lessen infringement as much as possible. We should approach international legal instruments as a measure for establishing legislature.

**ii. Disclosure by accused**

• Is it against the constitution for the accused to be compelled to disclose; it is not mandatory. *Section 114 (2)* creates an implication that the failure of the accused to disclose does not create sanction but produces a negative inference to be concluded. This contradicts the accused right to remain silent and right against self-incrimination and therefore will be punished for exercising his/her right.

• The rights of the accused includes; the right to be assumed innocent until guilty; the right to remain silent; and the right to not self-incriminate. The onus is on state to prove the accused’s guilt, if the accused is forced to disclose, this would support the States case against the accused. Therefore the central issue here is to determine if there is a prejudice against the accused; reverse onus is prejudicial as the state bares the onus to prove accused is guilty. Requiring the accused to help the state in proving his guilt is the result of expecting ‘defense disclosure’.

• The alternate perspective is that many attorneys attempt for an acquittal rather than a trial. Refusal of disclosure is often used as a means to delay proceedings and we must be weary of engendering this ‘right’. Is justice being served if it is only protecting the accused interest rather than the States? *Section 114* gives the court discretionary power to request defense disclosure; it is not clear as to the position of the accused once this request is made by the court. We should determine these factors and guidelines to make it clearer. Rationale for Section is to prevent the defense from preparing its case while State is presenting its case.
Recommendation:

- We must establish clear criteria for the court to use discretionary power for the administration of justice or public interest.
- Language of Section 114 must be clear.
- We must consider domestic law, the Constitution with reference to international legal instruments.

iii. Use of force during arrest

How to determine proportionality of force? Current CPA does not account for fraud as included in the “serious offences” list. Minimum force should be mentioned and defined. Concept of “Reasonable force” is not understood by police personnel as it is subject to interpretation, under different circumstances, and therefore must be curtailed. There is little which curtails their power to kill.

Recommendation:

- Concept of “Amount of force” must be defined clearly. Reasonable requirement stipulated in 51(2), of 2004 must be clearly defined with regard to proportionality.
- Police should be sensitized about civil claims that may be laid against them for killing/injuring suspects. It should be drafted into the Police Act that any police officer that causes a loss of life, under whatever circumstances, shall be suspended, pending departmental enquiry, within a stipulated time period. Examine Section 51(4) and polish language and provide for securing court attendance without use of arrest and detention.

iv. Omission of right to Legal Aid

Magistrates must inform accused of their right to Legal Aid. Issue currently too vague; the right is informed however not the procedure thereof.

v. Compensation
Amend jurisdiction of Community Courts which excludes them from having criminal jurisdiction to only have civil jurisdiction. Customary records of community courts should not be used during trial but only at sentencing. However, we must be weary that the problem with compensation is that it may be used to cover up many offences; especially those of domestic violence and rape. Consider a compensation fund in order to support victims.

**Issues raised but not discussed:**

- Detention
- Fair trial
- Rights of victims of crime
- Competent verdict

**3. Recommendations:**

1. CPA of 2004 is alien and displaced and thus should be repealed in its entirety. Consideration should be give to the constitutional review of CPA of 2004 with the view to create a 2013 Bill. Alternatively, the affected provisions should be amended to bring them in line with the provisions of the constitution.
2. Penal Code and Magistrates Court Act to be developed along-side CPA.
   Implications: Policy and manpower
3. Plea-bargaining: If we are to consider the introduction of plea-bargaining it must be introduced after extensive consultations and research on the matter.
   - Will not exist as part of CPA 2013 but may be incorporated as an amendment at a later date
   - It is important to remember that, in terms of manpower, the introduction of plea-bargaining will necessitate an increase in man-power among Magistrate and High courts.
   - Must take into consideration policy, jurisprudential and capacity issues; the role of courts and at what court level and to which offences it will be applied
   - Examine Indian model/SA mode/USA model
4. It would be problematic to want to amend the constitution; the Constitution cannot be amended because of a statute, rather amend the statute to conform to the Constitution. In terms of the Constitution; we can only add onto Chapter three, we cannot amend to remove from the Constitution. In this regard the notion of amending the Constitution would be superfluous.

5. We should take into consideration issues such as Section 208 Criminal Procedure of 2004 and the issue of Witness Protection. Process now results in the witnesses being “detained” for that period and certain freedoms and liberty will ultimately be infringed upon. An amendment draft should be established for this section.

   - We must consider that this is a costly exercise and would require collaboration with regional countries.
   - LRDC has initiated the process on this; already a discussion paper by IPPR has been completed. However, this paper presents merely a basis to show we need further research on the matter.

6. LRDC should consider developing a penal code and plea bargaining framework to be applied in Namibia.
3.1 Statutory Time Limits for the Delivery of Judgments

3.1.1 Presentations and Deliberations

We must determine whether Namibia should implement legislature as opposed to a Code of Conduct for Time Limits.

Two issues:

1. When proceedings are delayed
2. When proceedings are done but judgments are delayed

Deliberations centered on when proceedings are done but judgments are delayed.

The issue of outstanding judgments may be understood, to a certain degree, from the experience of acting judges. Delay of judgments is unacceptable and there should be statutory guidelines. However, complications occur from the following:

1. Not enough standing judges on the bench.
2. Minimum of 1000 cases per annum.
3. Within the international jurisdictions, judges have research clerks and legal secretaries but not the same in Namibia.
4. Day to day administrative difficulties in preparing for court, and writing judgments.
5. Heads of arguments too lengthily and often which do not favour the case.
6. JSC: handling complaints: offer guidelines as compensation for complaints, No one from JP office will provide list of outstanding judgments. Recess periods are provided to Judges so as to complete judgments, however are not utilized for this purpose.

3.1.2 Recommendations:
1. Agree with Statutory time limits.

2. Judiciary currently polices itself; however the Ministry of Justice should be approached for legislative intervention. Judiciary should not be consulted as to whether there should be legislative sanctions but rather on the content thereof.

3. Re-trial, due to delays in judgments, should be free

4. Judicial Service Commission not complying with their function of receiving and attending to complaints nor reprimanding judges. Establish Independent Committee under the JSC to oversee complaints/grievances/procedures. Should remove onus of parties having to make complaints as system would be internally regulated.

5. Composition of JSC is flawed and must be addressed.

6. Ministry of Justice must commit to providing further internal administrative support services as a matter of urgency

7. Need to employ Legal Clerks and Legal Secretaries to ease the pressures as well as to implement Statutory Time Limits:
   - Pupilage candidates could be utilized
   - Examine Canadian system

8. Other support services required include:
   - Training to judges (justice training centre must be re-examined by Ministry of Justice together with University of Namibia)
   - Computer literacy and IT support
• Functioning Law Reporting System
• Case management tools

9. Legislature should define the concept of “outstanding judgments”; a concept of “reasonable” time should be noted

10. Approach development agencies for financial support/funding for training initiatives

11. Need Statutory Framework; consideration should be made either to establish a new statute or amend the High Court Act or JSC Act – Need further research on this matter to ensure that it fits within the Constitutional framework

12. Suggestions on Time Limit: Annexure “A”; JSC Guidelines could be used as a fair framework.

13. System for appointing judges is flawed and must be remedied:
   • The individuals who are appointed on the bench should go through a process of public scrutiny.
   • Criteria to ensure competence of judgment drafting should be established.
   • Judge should demonstrate accountability and transparency to public in terms of their integrity as an extension of the integrity of the bench; introduce system of responsibility taking.
   • The appointment of judges should not be confined to legal practitioners alone; should widen scope of candidates. This issue links with the issue of training.
   • Acting judge to be temporarily appointed to the bench should be given a month, post their appointment, in which to complete judgments. Judges with outstanding judgments should not be allowed to sit in new cases until they have completed the judgments.
   • Must ensure integrity of interview process; there is a need to protect the Judges from undue slander. Scrutiny and assessment of Judges should be conducted to balance the issues of ensuring transparency and accountability while also protecting their integrity.

14. Digital recording of court records should be introduced to all courts
15. Issue of vetting is problematic and should be remedied

16. Create graduate programmes for training and grooming of graduates from which to create pool of Judges; hybrid system be implemented which offers training to graduates and acting Judges

17. LRDC should consult Judge President on guidelines as to time limits for oral submissions and page limits for written submissions. Rules of court should be amended, specifically Rule 6 and Rule 8 and 18.

18. Code of conduct should cover conflict of interests: Regional comparative assessment of Judges and the assessment of remuneration

19. International Judicial codes of Conduct could be borrowed

20. Consult with Ministry of Justice and Chief Justice to discuss creation of more posts for High Court and Supreme Court Judges

3.1.3 Recommended composition of JSC:

- Chief Justice; Judge of High Court; Chairperson of Magistrates Commission; representatives from legal profession; government/legal sector; academia; Faculty of Law; Chairperson on Parliamentary Committee on Constitutional Legal Affairs.

- Need to implement a Statutory Secretary to JSC.

3.1.4 Proposed Time Limit for Judicial Decisions Bill 2013
Contents of Statute:

1. Recommend new Statute of Time Limits, adopted from the Guyana model, which includes a new Code of Conduct and sanctions
2. Guidelines and sanctions should apply to the entire judiciary system, including magistrates
3. Time limits for trials must be determined
4. Expectations of Judge’s conduct must be determined so as to incorporate misconduct. Mechanism for suspension of a Judge amid scandalous behavior.
5. Protection of the complainant and simplified system of complaint should be introduced
6. List of outstanding judgments should be published periodically to ensure access to information
7. Code of Conduct appended to Statute to buttress transparency measures to the public.
8. Age Limits: Criteria specifying appropriate candidates for position while allowing for discretion. Caution of constitutional constraints on the issue of minimum/maximum age limits.