

PROSTITUTION AND HOMOSEXUALITY IN PAPUA NEW GUINEA: LEGAL, ETHICAL AND HUMAN RIGHTS ISSUES

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Abstract

This work-in-progress paper was originally prepared in June 2005 to provide background for the '*Poro Sapot* Project' of the NGO 'Save the Children' in Papua New Guinea (PNG). The Project provides peer education, support, advocacy, counselling, drop-in centre facilities, and condom distribution in several places in PNG for disadvantaged groups, including people involved in commercial sex and in male-to-male sex.¹ The Project is concerned that criminalisation of aspects of these sexual activities facilitates breaches of human rights, and wishes to take steps to promote rights awareness and if possible, advocate for decriminalisation.

Keywords: sex work, prostitution, homosexuality, Papua New Guinea (PNG), human rights, law, decriminalisation.

Introduction

The rationale for conflating the two forms of sexual activity, sexwork and sodomy, may be found in the law. They are the only two forms of consensual adult sexual activity

¹ Terminology is highly contested in the PNG context; the terms 'prostitution' (the language of the law) and 'homosexuality' (a commonly understood term) and their variants will be used in this paper to apply to these two forms of sexual activity, in addition to the current internationally acceptable terminology.

carried out in private that are systematically subject to criminal sanctions in PNG.² The same rationale impelled the United Kingdom government through the Home Office and the Scottish Home Department to investigate the law and practice on homosexual and prostitution offences. The result was the Wolfenden Report of 1957 (Wolfenden Committee 1957) which resulted in changes to soliciting laws and the decriminalisation of male-to-male sex in private by consenting adults aged over twenty-one and over.

However, because there are significant differences both at law and in practice in respect of the two types of offence, they will to an extent be treated separately in this paper.

It should be noted that this paper is not intended as an exhaustive review of the topics, but was prepared simply to highlight significant background data and possibilities for future legal interventions.

Prostitution

Background

Definitions and Categories

Prostitution takes so many forms globally that a simple definition is difficult. But some commonalities may be observed. It usually involves:

- the exchange of sex for money or other items or services of value;
- multiple sex partners and a high rate of acquisition of new partners;
- discrete sexual transactions which imply no commitment to future relationships; and
- in urban settings, it may be socially institutionalised and spatially localised (Wardlow 2001).

Even in 'Western' societies (notably England and Australia, the countries which informed PNG's formal legal system and increasingly, social attitudes) prostitution operates in a range of settings and modes: street soliciting, brothels, agencies offering 'escort' services, etc. (Perkins 1991). In some third-world countries, such as those in Asia and the Caribbean, much prostitution is based on the sex tourism industry, and is usually brothel-based, though the form and operation of these brothels may vary widely (Hyde 2000; Kempadoo and Doezema 1998; Murray and Robinson 1996). In other countries, more informal sex-for-money exchanges may co-exist with an institutionalised form of commercial sex more clearly understood as prostitution (Wojcicki 2002a).

In PNG, before colonialism and the introduction of a cash economy, there was no such thing as commercial sex in the strict sense of the term. Even if it were possible to discover a true record of pre-contact social organisation and sexual practices, which is unlikely, it is still not possible to generalise about PNG's highly diverse range of

² In 1988, the third form, adultery between indigenes, was decriminalised by the *Adultery and Enticement Act* 1988.

cultures. However, some ethnographies indicate that random or exchange sex was not unknown in certain societies in pre-contact times. For example, for some ethnic groups, notably those of the delta region of the upper Papuan Gulf, the selling of sex seems to have been a development over time from customary practices of wife-giving in exchange for traditional objects of value such as shell, shell armbands or dog teeth (Hammar n.d.b; Johnstone 1993) through exchange of sex for imported trade commodities in the colonial era, to the sale of sex today for cash. In societies which encourage pre-marital sexual experimentation, it may be customary for the boy to give his sexual partner a small gift, even for a one-time only encounter.³ For many other ethnic groups, however, extra-marital sex and even pre-marital promiscuity were strongly disapproved and often violently punished (see, for example, Sack 1974).

Surveys undertaken under the auspices of the Institute of Medical Research in the 1990s (Jenkins 1994) discerned several types of female prostitutes in PNG today. This and other studies have discerned the following categories:

- the *tu kina meri* ('two-kina girl'⁴) street walkers who work the streets, usually in daytime;
- the *disko meri* ('disco girls') who find their partners at discos, clubs and hotels, usually at night, and are paid more than the *tu kina meri*;
- escorts kept in high-class houses;
- housewives or working women who sell sex occasionally to top up their incomes or meet sudden cash calls;
- women who are not motivated by economic need, but who deliberately live promiscuously and sell sex as revenge against the perceived wrongdoing of husbands or male kin (Wardlow 2004);⁵ and
- the *pasindia meri* ('passenger girls'), formerly known as *haiwei meri* ('highway girls'), who have left home and travel extensively, receiving transport, subsistence and temporary protection in return for sex (Wardlow 2002; Wardlow 2004).

Within these categories, there may be a range of local variations as, for example, the varying categories noted in Daru in the early 1990s (Hammar 1996) and the increase in class ranking in the *disko meri* category which sees the emergence of those at the lower end of the scale who are more likely to frequent guesthouses during the daytime. A considerable amount of prostitution also targets specific areas such as major ports and the truck stops along the Highlands Highway (Jenkins 2000; National Sex and Reproduction Research Team and Jenkins 1994). The number of women in the country selling sex, whether consistently or on a casual basis only, is large in PNG, and growing.

It is worth noting that the sale of sex in PNG does not necessarily follow the accepted patterns of other regions of the world. Commercial sex is not brothel-based,

³ This is still true of Trobriand society today—pers. comm. Katherine Lepani, 2005.

⁴ This literally translates as 'two-kina girl' and is a reference to her cheap price – the *kina* is the basic unit of currency, currently around AUD 40 cents.

⁵ And see also the testimony of Kuragi Ku in *Monika Jon & Ors. v. Dominik Kuman & Ors.* (Unreported) N253 8 August 1980.

and although many women, particularly street workers, may have a *wasman* (guard, protector) who guards the area and assists in money-collection, these assistants do not exert coercion in the way that pimps and brothel-keepers in other countries may. Forced sex trafficking is also unknown. Various writers have described ‘survival sex’ in both rural and urban areas in Africa as non-commercial, non-professional sex-for-money exchanges driven by survival and economic need (Wojcicki 2002a; Wojcicki 2002b).⁶ This construct appears better suited to the circumstances of PNG today than that taken by the formal law, of a commercialised sex industry organised by third parties in and through brothels and other fixed locations.

Attitudes and Theories

Over the last two centuries, a wide range of theories has been put forward, and attitudes developed, towards prostitution. Many of these emerged from or have been influenced by the socio-political thinking of the time. The following is a non-exhaustive list (adapted from Scambler and Scambler 1997; Veen 2000):

- *Sociobiological*: prostitution is necessary in society so as to accommodate the overpowering male sex drive;
- *Functional*: prostitution is essential for the stability of institutions in society, for example, marriage, the safety and chastity of women and girls, and because it provides an outlet for male sexual energy;
- *Victorian morality*: women were valorised as wives and mothers; transgressors such as prostitutes were a necessary evil to be accommodated and controlled;
- *Psycho/socio-pathological*: prostitution is an underlying pathology in some women’s psyches, or in their upbringing, which makes them willing participants in commercial sex;
- *Marxist*: prostitution is caused by the underlying laws of the capitalist system. Economic necessity makes it a kind of forced labour;
- *Feminist*: prostitution is yet another manifestation of the patriarchal domination of women, which deprives them of their sexuality and permits their violation by men;
- *Discursive/Foucaultian*: the construction of sexual deviants such as prostitutes, homosexuals and sexual psychopaths as outclasses was a means by which the emerging bourgeoisie of nineteenth-century Europe defined and maintained itself as a social class;
- *Sexual radical*: prostitution is a form of labour like any other, and prostitutes are independent, entrepreneurial practitioners of their trade.

From these various views, espoused at different times and in different social settings, the following differing approaches to prostitution have been developed (Veen 2000):

- In England in the Victorian era, prostitutes were a necessary evil, to be tolerated but controlled and restricted to ‘red-light’ districts and brothels;

⁶ ‘Survival sex’ may also be known as ‘transactional sex’ or ‘non-commercial sex’.

- In the early 1900s, the panic about ‘white slave trafficking’ was eventually addressed by the 1949 UN Convention for the Suppression of Traffic in Persons and Exploitation of Prostitution of Others;
- The 1950s saw a relaxation of criminal proscription of prostitution, in the UK culminating in the implementation of the ‘Wolfenden Report’;
- The radical feminists of the ‘second wave’ of feminism in the 1960s and 1970s in the West, who saw prostitutes as victims of patriarchy, sought to eradicate prostitution entirely;
- During the 1980s and 1990s, rights advocates countered the abolitionists with a view which legitimated a range of sexual subject positions, including commercial sex, and urged decriminalisation. International law instruments shifted to making a distinction between voluntary and forced prostitution;
- More recently, growing fundamentalist religious movements worldwide have urged a return to family values and the abolitionist position (and thereby, have allied themselves, somewhat anomalously, with the radical feminists).⁷

Trafficking and Prostitution

Where a viewpoint is totalitarian, it obscures differences among prostitutes (Doezema 1998). This has been the outcome of the anti-trafficking initiatives, which have gathered force in recent years. But the distinction between forced (trafficking) and non-forced prostitution has been overlooked by the USA government’s *Leadership Against HIV/AIDS, Tuberculosis and Malaria Act* 2003, which combined the two with serious implications for HIV/AIDS management world-wide (Butcher 2003). This is not to say that there always exists a clear-cut distinction between the two: women who choose prostitution from economic necessity, and would leave if they could, fall somewhere between the two extremes. But it is claimed that the voluntary/forced dichotomy and the consequent search for the ‘forced’ aspect of economic need simply perpetrates the moral stand of guilty/innocent—those who are forced into prostitution are innocent, those voluntarily choosing to remain are immoral and guilty. This feeds paranoid reactions to women’s increased sexual autonomy, carries overtones of racism and reinforces systems which abuse prostitute rights (Doezema 1998; Wardlow 2001).

Prostitution and the Law

Prostitution in England has been regulated since at least the fourteenth century, but the major legal interventions took place in the nineteenth century (Edwards 1997). First, the vagrancy laws of 1824, 1839 and 1847 penalised women who were offending public decency. Then the Contagious Diseases Acts of the 1860s policed women as a class, constructing female prostitutes as ‘reservoirs of infection’ responsible for spreading venereal diseases, and infected children and men were innocent victims in need of protection. Prostitutes were to be sequestered in ‘red-light’ areas and forced under the control of pimps and brothel-keepers (Walkowitz 1980). The Wolfenden Report resulted in the focus of legal control resting squarely on control of prostitution as a street nuisance.

⁷ This is only a very brief summary.

Prostitution, or being a prostitute, has never been an offence per se. But the terms have never been defined. It has been left to judges to decide just what constitutes prostitution and who is a prostitute. In English law, these definitions have been restricted to females, and prosecutorial power is exercised primarily over street-walkers (Edwards 1997). Where men are charged for soliciting, it is for immoral purposes, or homosexuality, not for commercial sex.⁸ Otherwise, if a man solicits a woman for prostitution, this is not an immoral purpose (*Crook v. Edmondson* [1966] 2QB 81). Gender differentiation is evident also in the different evidential requirements for soliciting offences, and the lack of prosecution for ‘kerb-crawling’ by men.

PNG’s Prostitution Law

PNG’s formal legal system is derived from and informed by the Anglo-Australian common law system, introduced by the former administering powers. Until 1963, most legal relations between coloniser and colonised were regulated by Courts for Native Affairs, staffed by patrol officers and applied a mixture of Native Regulations, local customary norms and practicality. The only areas of introduced law affecting the people were those connected with land acquisition, employment and the commission of major crimes.

After 1963, these Courts were abolished and most of the Native Regulations of both Territories were repealed, so that control of minor criminal behaviour fell predominantly under vagrancy laws and the police offences ordinances of both Territories.

Prostitution under Pre-Independence Law

The *Police Offences Ordinance* of New Guinea provided at Section 38:

Any common prostitute who solicits, importunes or accosts any person for the purpose of prostitution, or loiters about for the purpose of prostitution, in any public street, road, thoroughfare or place, or within the view or hearing of any person passing therein shall be guilty of an offence.

Soliciting was not an offence under the Papuan *Police Offences Ordinance*. However, the District Courts of Port Moresby prosecuted anyone who appeared to be engaged in prostitution by using the *Vagrancy Ordinance* 1912-1964. Joan Drikoré Johnstone, during her study (Johnstone 1993) of the Gumini *bisnis-meri* (‘business-woman’)⁹ trade in Port Moresby in the late 1960s, observed several District Court cases. She relates:

⁸ Under the U.K. *Street Offences Act* 1959, only women can be charged with loitering or soliciting for prostitution. See Paul Crane, *Gays and the Law* (London: Pluto Press Ltd., 1982).

⁹ This was the name given to themselves by women of the Gumini tribe of the Chimbu District in the Highlands, who practised a type of prostitution in Port Moresby in which they were accompanied by their husbands to find clients around the city, the sex usually taking place in a secluded spot out-of-doors. Given that it resembled any other form of small-scale trading enterprise, the term ‘*bisnis-meri*’ (adopted in Pidgin from the English ‘business-woman’) is probably a more appropriate term in PNG than ‘sex worker’, with its implications of wage labour. It has however fallen into disuse.

The Court cases involving bisnis-meris which I observed each lasted approximately ten minutes. The woman accused was brought in by a policeman who stood before the magistrate. The police prosecutor then said to the woman in Pidgin, abruptly: “You got work? You got house? You got money?”, to which the women almost invariably answered, “No,” to each question.

The police prosecutor would then address the magistrate, still speaking in Pidgin. “This woman has no work, no house and no money. She is a vagrant,” and the magistrate would convict her (Johnstone 1993, 227). (Original emphasis).

The women themselves, however, assumed that they were being prosecuted and gaoled for being prostitutes, hence the guilty pleas. These Gumini women (and women from other areas as well) complained of pack rape by police and prison warders whilst in gaol (as above, 226). It is likely that the same sort of thing happened to women convicted of soliciting in New Guinea. Police harassment of prostitutes in PNG was apparently already established.

The Law Reform Commission Work

At Independence the momentum towards law reform and the constitutional entrenchment of human rights increased. The Law Reform Commission, established in 1974, commenced its project of reform of the entire criminal law system, starting with a review of summary offences as contained in the remaining Native Regulations and the Police Offences Ordinances of the two Territories (Law Reform Commission of Papua New Guinea 1975a; Law Reform Commission of Papua New Guinea 1975b).

Regarding prostitution, the Commission said that the present laws were ‘most unsatisfactory’. It recommended the retention of offences relating to brothels, and living off the money made by prostitutes, but saw no gain in retaining the offence of soliciting found in the New Guinea law, or extending the offence to Papua. It considered that there was already sufficient power under the *Public Order Act* ‘to control prostitutes who are causing trouble in public places’ (Law Reform Commission of Papua New Guinea 1975b, 22).

The Commission also recommended the repeal of the ‘lawful means of support’ provisions of the *Papuan Vagrancy Ordinance* and the equivalent provisions of the *New Guinea Police Offences Ordinance* (Law Reform Commission of Papua New Guinea 1975b, 14) although the fact that in Papua the statute was used to prosecute prostitution was not mentioned in the Commission Report. Instead, reference was made to its use in attempting to curb urban migration and rising unemployment in the formal employment sector, but the majority, with only one dissenting voice, held the view that ‘[u]sing the criminal law to control social and economic problems is not only ineffectual but also inappropriate and unnecessary’ (Law Reform Commission of Papua New Guinea 1975b, 15).

The Commission’s draft Summary Offences Bill was enacted without alteration by the National Parliament in 1977,¹⁰ and contains the following:

¹⁰ Appearing as Chapter 264 of the *Revised Laws of Papua New Guinea*.

55. Persons living on the earnings of prostitution.

(1) A person who knowingly lives wholly or in part on the earnings of prostitution is guilty of an offence.

Penalty: A fine not exceeding K400.00 or imprisonment for a term not exceeding one year.

The Anna Wemay Case

Thereafter, the District Courts started prosecuting prostitutes under Section 55, so that in the following year, the Public Solicitor took an appeal in *Anna Wemay and Others. v. Kepas Tumdual and Others* [1978] PNGLR 173 (the *Anna Wemay Case*) against a District Court conviction and sentence of four women for ‘living on the earnings of prostitution’ in the National Court in Rabaul. The women had admitted to ‘being prostitutes’ and having sex for money. The expatriate judge, Justice Wilson, had to decide whether:

the prostitute herself, as distinct from the madam, the tout, the bully, the protector, or the pimp, may be convicted of a breach of s. 55(1) (at p. 174).

Despite being urged to consider the Law Reform Commission’s report, and Parliament’s possible intention in enacting the changes to the wording of the offence, the Judge preferred to take what he saw as the ordinary and natural meaning of the words in the Act, and decided that they now meant that a woman living on the earnings of her own prostitution was contravening Section 55(1). As far as can be ascertained, this interpretation does not appear to have been followed in other common-law jurisdictions, where the provision is used only against those living on the earnings of the prostitution of others.

The Monika Jon Case

So women who were caught selling sex continued to be prosecuted. A similar case, *Monika Jon and Others v Dominik Kuman and Others* 8/8/1980 (Unreported N253 Narokobi J.) came before the National Court two years later. The women involved admitted to receiving money, or money was found on them, so that they were convicted in the District Court under S.55(1). But the judge in this case, leading human rights advocate Narokobi A.J., distinguished the *Anna Wemay Case* by holding that in this instance, there was no evidence of any intent to sell sex on an ongoing basis, and that something more than an isolated case of receiving money for sex was required to support the element of living even partly on the earnings of prostitution.

Despite this case, however, women are still being prosecuted under the *Summary Offences Act*. The charges laid against the women in the Three-Mile Guesthouse Raid in March 2004 all recited the contravention of Section 55(1).

The Criminal Code (Sexual Offences and Crimes Against Children) Act 2002

This Act was the result of the work of the Family and Sexual Violence Action Committee, a multi-sectoral committee established by the Consultative Implementation and Monitoring Council. The Act amends the *Criminal Code* in order *inter alia* to protect children from sexual abuse and commercial sexual exploitation, including child prostitution.

For the purposes of control of child prostitution, a child is defined as a person under the age of eighteen years. The Act criminalises both persons purveying or allowing child prostitution, and persons who are clients of a child prostitute.

Flaws in the Act

(a) New Section 229Q of the *Criminal Code* now reads:

229Q. CHILD NOT TO BE CHARGED

No person under the age of 18 years shall be charged with an offence under this Subdivision of any sexual service by that child for financial or other reward, favour or compensation.

Unfortunately, when the support legal team attempted to invoke the Act in assistance to girls under eighteen years of age who were arrested in the Three-Mile Guesthouse Raid, they realised that the proviso ‘offence under this Subdivision’ meant that it could not be applied to charges under Section 55(1) of the *Summary Offences Act*. The only assistance the law could afford girls less than eighteen years of age involved in the raid was to allow their cases to be heard in the Juvenile Court.

(b) John Luluaki (2003) points out that the *Criminal Code (Sexual Offences and Crimes Against Children) Act* may not always be appropriate to PNG, where ‘[t]he crises of survival, poverty and hunger are not unique...to persons above the age of 18’. He argues that the result is that while underage girls voluntarily engaging in prostitution are immune to prosecution under the Act, their clients are not.¹¹

(c) Section 229O requires owners, lessors, managers, tenants and occupiers of premises to report any use of the premises to the police. This and the stricter provisions of the Act in general have the potential to increase police harassment of prostitutes and the so-called ‘high-risk’ venues, on the grounds that they are enforcing the new legislation.

Data on Prostitution Convictions

The Terms of Reference required data on the practical application of the law criminalising prostitution: data such as rates of conviction, geographical distribution of convictions, ease or difficulty of convictions, etcetera. But it is probably impossible to obtain accurate data on the use of the law against prostitution today. Charges under the *Summary Offences Act* are brought in the District Court, which is experiencing poor

¹¹ It is worth noting, however, that prosecution of clients is rarely if ever undertaken in PNG today. Luluaki’s concerns are somewhat misfounded.

record-keeping and archiving. The only time such charges come to the attention of record-keepers is when appeals are brought to the National Court. Charges under the Act of 2002 will be brought as indictable offences in the National Court but, so far, the new provisions have not been used.

Consequences of Criminalisation

–Police Harassment

Criminal law tends to have an effect beyond the mere prosecution of offenders. The law of prostitution in PNG can be, and has been, used for other purposes. Sex workers have identified their priority need as protection against police harassment (Jenkins 2000). They are regularly picked up by police and forced into sex, sometimes amounting to serious gang rape, under threat of prosecution, despite repeated interventions over the past decade. The Three-Mile Guesthouse Raid is an extreme example of present-day police harassment, providing an opportunity not so much for forced sex as for looting (of cash, beer and other goods) and self-aggrandisement.

–HIV/AIDS Intervention

This is made all the more difficult by the criminalisation of prostitution. It is claimed that stigmatisation and criminalisation of types of sexual behaviour does not stop the behaviour, but simply drives those engaged in it underground, making them harder to reach and assist (UNAIDS/IPU 1999). In PNG, HIV/AIDS peer education work and the formation of sex worker action groups has invited police harassment and violence (Jenkins 2000).¹²

The irony is, as Carol Jenkins has pointed out (2000), that one of the best ways of protecting society from HIV is to protect the human rights of sex workers.

Prostitution and Human Rights

The polarisation of views of prostitution and prostitutes into forced/voluntary, or victim/agent, or prostitution as exploitation and prostitution as sex, has had implications for human rights action. The radical-feminist and family-values abolitionist views argue that prostitution is an abrogation of fundamental human rights; the sexual-radical and prostitutes' rights view claims that the right to sell sex is a fundamental human right (Edwards 1997). However, both sides of the debate recognise that discriminatory practices against women engaged in prostitution are themselves abrogations of human rights. These practices, particularly when practised by the State itself through its legislature, its courts and its police force, are arguably a breach of constitutional rights in PNG. Certainly women should have the right to resist being forced into prostitution, but they should also have the right to work and go about their lives with the law's protection from rape, violence, robbery or other violations (Butcher 2003).

¹² It is quite possible that the guesthouse raid of March 2004 was triggered by a peer education intervention conducted there shortly beforehand.

The 1949 UN Convention for the Suppression of Traffic in Persons and Exploitation of Prostitution of Others reflected the abolitionist approach. CEDAW¹³, when adopted in 1979, used the same language, but its General Recommendation 19 of 1992, and the Declaration on the Elimination of Violence Against Women of 1993, shifted the emphasis to the prostitute as one whose rights could be violated. The Beijing Women's Conference platform for action of 1995 proposed the eradication of forced prostitution but called for decriminalisation of prostitution in general as a means to strengthen the human rights and bargaining position of prostitutes.

It is possible, in many contexts, particularly those of developing countries, to shift beyond the sex/exploitation debate. In PNG, taking the view that most sex-for-money exchanges fall into the 'survival sex' category, and may therefore be informal, sporadic and uninstitutionalised, perhaps the focus should be to avoid the sex/exploitation debate entirely, and concentrate instead on the infringements of human rights actually taking place in PNG.

Homosexuality

Background

Sex takes place between males throughout all social classes and culture areas of the world (Jenkins 2004; Murray 1992), but only in some cultures has it developed into a sub-culture, in response to the emergence of hostile social norms (Weeks 1977).

However, while most societies place a high value on reproductive heterosexual sex, sexual identities, relational patterns, cultural contexts and attitudes to homosexual activity can vary greatly. Relational patterns may involve:

- relative age (older man with younger man or boy);
- gender status (feminine, feminised or transgendered, with masculine); and
- duration (such as same-sex relations between adolescents which are abandoned upon marriage).

Identities vary by time and place: the current 'gay' identity of the West involves two men who are predominantly homosexual; but the concept of 'gay' in other places of the world may have different meanings, for example, as a group distancing themselves from local indigenous forms. And 'gay' is proving to be only one small part of a much bigger picture. Varying forms of non-Western identity are being described even as new forms are developing.

Teasing, stigmatisation and discrimination are common, in varying degrees, in most societies, but outright hostility towards sexual minorities is only found in some societies. Much of the homophobia and anti-sexuality found throughout the non-Western world today is rooted in Western Judeo-Christian-Islamic traditions which were exported throughout the world over the last half-millennium via European

¹³ 'CEDAW' refers to The Convention on the Elimination of All Forms of Discrimination Against Women.

colonialism. It appears that it is not homosexuality which was imported into the non-Western world by Europeans, but its intolerance. Homophobia, like other phenomena such as racism and child sexual abuse, can be internalised by its target victims and emerge as a variety of expressions of self-hate, leading to heightened levels of depression and suicide.

Male sex work probably originated in urban settings, at ports, markets and trade centres. Ancient records tended to confine themselves to references to transgenders associated with dancing, performing and court or temple prostitutes. Today, most cities of the world have a male sex trade, with the great diversity among the sellers reflecting the same variations in identities, presentations and practices as among non-sexworkers. The clientele may be similarly varied.

Homosexuality in PNG

In 1975, a poll was taken which questioned anthropologists and others regarding various societies with which they were familiar (Strathern 1975). Their responses regarding homosexual behaviour in PNG societies were classified as follows:

- in the majority of PNG societies, such behaviour was rare and considered deviant; reactions varied from amused to horrified;
- behaviour is normal, often taking place in certain age-groups or stages of life (e.g. adolescence, widowerhood); and
- practice is institutionalised, usually in the context of initiation ceremonies.

A body of scholarship has developed in relation to this last category, known as ritual homosexuality, and it appears that the practices of semen-receiving practices first described by ethnographers have more to do with acquisition of growth and maturation matter than with eroticism (Elliston 1995; National Sex and Reproduction Research Team and Jenkins 1994).

It is probably impossible to get true pre-missionary ethnographic baselines for all but a very few ethnic groups. Christianity has had an enormous influence on traditional societies' ideologies and constructs of sexuality and gender, creating embarrassment and shame concerning homosexuality (Jenkins 1996). Simultaneously, the colonial plantation labour regime produced an increased incidence of homosexual activity in the labour lines (Reed 1943), which was then 'introduced' into many village societies by returning labourers.¹⁴

Modernisation, increased mobility and increased mingling of ethnic groups has gradually expanded the range of homosexual behaviours. In the post-war colonial period, particularly in urban areas, the 'patron' system developed between expatriate and indigene, with food, shelter, money and gifts being provided while both remain single. When the local man marries, the patron moves sideways into an 'uncle' or 'father' role *vis a vis* the new family (Jenkins 1996).

¹⁴ Claimed for Sepik societies in testimony given in *R. v Kausigor* 7 November 1969 (Unreported Full Court FC3).

Recently, mass communications have introduced Papua New Guineans to new gender constructs, and nowadays 'drag' events are staged in the closed spaces of city nightclubs. At the same time however, most of society is uncomfortable with open discussion of homosexuality. Attitudes range from reluctance to discuss, to outright angry denial. There are many causes for this, but the consequence is that suggestions to consider law reform are usually met with hostility, and assertions that it was not customary, and a foreign import.

Homosexuality and the Law

–European law

As with the law relating to prostitution, the law does not recognise an offence of 'being' a homosexual. Rather, it targets what is considered to be objectionable behaviour. The proscription of homosexual behaviour has a long history in European countries, based on Christian teaching from the earliest times. Thomas Aquinas characterised bestiality, sodomy (male and female) and masturbation as sins against God, thereby providing the basis for the categorisation of the first two in the *Criminal Code*. Blackstone in the late eighteenth century restated early anti-sodomy legislation as a 'crime against nature', which is the terminology still used in the *Code* (Sloan 1987).

A century later, the English law was extended to include all male homosexual activity, whether in public or in private. The *Vagrancy Act*, which prohibited soliciting and prostitution, was used by the police against homosexual men. The offence of 'carnal knowledge against the order of nature' was exported via the *Code* to various colonies, including Queensland, from where it was conveyed to PNG.

In the UK, following the Wolfenden Report in 1957, sexual acts in private between consenting adult males over twenty-one were eventually decriminalised in 1967. Various motives for this were claimed, including the fact that the unenforceability of a total prohibition on homosexuality was unenforceable and, therefore, tended to bring the law into disrepute. A change in social attitudes was not the purpose; reform of the individual was (Crane 1982). In recent decades, the HIV/AIDS epidemic has provided an impetus to homosexuality law reform in common law countries, including Australia.

–PNG Law

The *Criminal Code* of PNG was adopted from that of Queensland over a century ago. Before the amendments of 2002, it contained the following offences:

- the crime of 'carnal knowledge against the order of nature' under the heading 'Unnatural offences' (S.210);
- the crime of 'indecent treatment' of boys under fourteen years of age (S.111); and
- the misdemeanour of indecent practice between males, described as 'an act of gross indecency' (S.212).

None of these archaic terms was defined, although reference was made in S.6 to the act of carnal knowledge being complete upon penetration.

These provisions led to some anomalous results, such as:

- a male person could not be raped within the meaning of the law;
- both parties could be prosecuted, and the receptive party had to show more than mere fear if he submitted (*R. v. M.K.* [1973] PNGLR 204); and
- the maximum penalty for infringement of Section 210 was fourteen years, as opposed to those for Section 211 (seven years) and Section 212 (three years), meaning that where the evidence permitted, Section 210 tended to be used irrespective of the age of the accused's sexual partner (*State v. Merriam* [1994] PNGLR 104).

Data on Homosexuality Convictions

In contrast to prostitution, it is far easier to discover cases dealing with homosexuality or sodomy, which is due to the fact that they are prosecuted in the higher courts which have maintained more complete records over the last half-century. Records¹⁵ of the pre-Independence Supreme Court and post-Independence National Court show that the vast majority of cases reaching the National Court deal either with indecent dealings with underage boys, or forced sodomy in gaol, presumably because in such situations there is a clear complainant. A small number of cases mentioning sodomy refer to anal intercourse between a man and a woman.

The Criminal Code (Sexual Offences and Crimes Against Children) Act 2002

This Act made the following reforms related to homosexuality:

- previous gendered references such as 'woman', 'girl' and 'boy' are replaced with the gender-neutral terms 'person' or 'child' as appropriate;
- the term 'carnal knowledge', is changed to 'sexual penetration', defined more widely as the insertion of any object into the vagina, mouth or anus;
- both males and females can be held responsible for sexual penetration;
- the former definition of rape is now replaced with a more general definition, meaning that men also can be raped; and
- the term 'indecent assault' is replaced by 'sexual assault'—coupled with the repeal of provisions relating to sexual activity between males, the result has been that sexual assault is gender-neutral.

However, the amendments stopped short of actual repeal of Section 210.

¹⁵ An incomplete listing of reported cases, unreported cases, and summary of sentencing practices of National Court Judges covering 6 of the years between 1990 and 1997, compiled from Judges' monthly notebooks by Woods J. and covering both trial and plea cases.

Consequences of Criminalisation

Condemnation of homosexual acts with young boys or in circumstances amounting to rape is not in itself objectionable. But by effectively criminalising homosexuality through the retention of the sodomy offence, the law has provided opportunities for blackmail, dismissal from employment, violence, and other forms of victimisation. Little is officially known about the incidence of homosexual victimisation in PNG at present, but as with prostitution, the criminalisation of homosexuality makes it harder to engage in open HIV/AIDS interventions with PNG's gay and bisexual men.

Homosexuality and Human Rights

The principles of equality and non-discrimination are fundamental elements of international human rights law. This is reflected in Article 7 of the Universal Declaration of Human Rights 1948:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any such discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 26 of the International Covenant on Civil and Political Rights 1966 also reflects this:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Section 55 of the *Constitution* is based on this provision. But there has been great reluctance world-wide to agree that the term 'sex' includes sexual orientation. In general, the view has been in the negative. Only very recently, in 2001, has the European Convention on Human Rights been held to prohibit discrimination on the grounds of sexual orientation, provided another right has been breached (Herring 2002). The UK has been reluctant to follow the example of the Continental countries, but recently instituted a review of sexual offences (Lacey 2001).

In Australia in recent decades, law reform decriminalised homosexual behaviour between consenting adults in private, in all States except Tasmania, which was eventually obliged to follow suit after proceedings in the Human Rights Committee of the United Nations forced the Commonwealth to enact overriding legislation, the *Human Rights (Sexual Conduct) Act 1994* (Kirby 2000).

Possibilities for Action

Legislative Change

It has been said repeatedly that law does not create public opinion, it merely reinforces and helps shape it (Weeks 1977). It is also claimed that changing the law will not of itself bring about individual behaviour change. But law reform can assist by promoting an enabling environment within which change can take place, by focusing on the socio-environmental factors which determine social attitudes (Tawil et al. 1995). Legislative reform can be a great step forward in changing public opinion, but at the same time, public opinion can be a major factor in determining the success or otherwise of law reform proposals. Public opinion in PNG frequently constructs law reform in the context of a knee-jerk reaction against a sudden perceived ill in society ('we must make a law for/against it'). But the longer-term benefits of changes in the law are ill-understood and usually ignored.

In matters of sexuality, the law reform arena is emotionally charged and heavily influenced by such factors as fear of HIV/AIDS, fundamentalist Christian doctrine and ethnic shame. Among the most popular and influential beliefs at present are those which construe prostitution as a sin and a source of HIV infection; and which insist that homosexuality is a sin and an expatriate import not previously known in PNG societies.

In this context, it may be difficult to accomplish reform of the laws criminalising prostitution and homosexuality. The likeliest route could be to emphasise the HIV/AIDS control benefits to be gained from decriminalisation.

–Alteration to Homosexuality Laws

The 2002 amendments to the *Criminal Code* took considerable time and attention on the part of the Family and Sexual Violence Action Committee (originally the Family Violence Action Committee) and the Minister for Community Services, who was eventually obliged to bring the recommended legislation to Parliament as a series of Private Member's Bills, in the absence of any clear political will on the part of government. It is unclear why the Committee did not include a more thorough overhaul of Section 210 in its final recommendations, but it must be remembered that the Committee's original brief was to investigate domestic violence only (Bradley 2001). The unfortunate consequence of this is that any future lobbying for legislative change will need to focus directly on reform of Section 210.

–Decriminalisation of Prostitution

The stigmatisation of prostitution is deeply entrenched in many societies and has taken root in PNG as well. HIV/AIDS awareness campaigns and the concept of 'high-risk' groups and settings have focused the spotlight on commercial sex, and sellers of sex provide useful targets for community blame and antipathy.

Nevertheless, the National AIDS Council, following the recommendations of the National HIV/AIDS Medium-Term Plan 1988-2002, has continued to press in various ways for the decriminalisation of prostitution.

It is important to distinguish between decriminalisation and legalisation or regulation of prostitution. Decriminalisation refers to the simple removal or amendment of provisions which criminalise. Legalisation implies more: the permitting of the activity under certain prescribed conditions. It has been suggested (Kidu, C. pers. Communication, 9 May 2005) that legalisation of prostitution and accompanying requirements for regular medical checks will assist in disease control.

However, this view is simplistic. Any form of regulation, whether for the health of prostitutes or the price of a loaf of bread, requires monitoring and enforcement by some officially designated authority. In the case of regulation of prostitution, the establishment of a regulatory system can play right into the hands of those already prone to excessive exertion of power over them: police, health officials etcetera. (Loff et al. 2003; Wolffers and van Beelan 2003). Mandatory HIV/AIDS testing is prohibited under the *HIV/AIDS Management and Prevention Act*, except under very limited circumstances (see Section 14) and in any case would probably be an infringement of human rights. This destroys the main reason for regulation (health check-ups). Finally, regulation involves the defining of who is and who is not to be legitimised and regulated; that is, who is and who is not a legal sex worker. In the PNG context of predominantly informal, unorganised survival sex, this is impossible. The danger is that very little will be achieved and much could actually be lost by regulation.

The 1975 Law Reform Commission recommendations, of decriminalisation of soliciting while retaining the offences of brothel-keeping and living off the earnings of (others') prostitution, embody the approach of condemning trafficking while permitting freedom of choice. In the Papua New Guinea context, of minimal sex tourism, brothel-based prostitution or sex slavery, this was and still is a pragmatic solution, requiring only careful rewording of Section 55. Ample precedents exist for this in many Pacific jurisdictions.

Any move to decriminalise prostitution should also take into account the flaws in the *Criminal Code* amendments of 2002, as outlined above.

–Court Action

Anomalously, the success of a legal regime or reform can often be measured not in the number of cases coming before the courts but in the sudden cessation of the need to bring such cases to court. One or two well-prepared successful test cases can often achieve what direct approaches to government cannot. It is essential, though, to select a case situation which is a 'clear winner' (although even this can sometimes backfire, as happened in the *Anna Wemay Case*).

Apart from direct constitutional challenges under Section 19, it is necessary for a test case to be made on a fact situation that has already arisen. There are various grounds on which both anti-prostitution and anti-homosexuality cases might be based.

Infringement of Constitutional Rights

The *Constitution* contains an elaborate set of human rights, mainly political and civil, which may be upheld by an application under Section 57. Areas of possible infringement in relation to prostitution and homosexuality are:

- freedom from inhuman treatment (Section 36);
- the right to protection from proscribed acts under Section 41; a proscribed act is one which is performed under a valid law but in the particular case is harsh or oppressive, is disproportionate to the requirements of the situation, or is not reasonably justifiable in a democratic society;
- the right to liberty under Section 42;
- freedom from arbitrary search and entry under Section 44; search and entry is arbitrary if it is not carried out under a court order, a search warrant, or a law permitting officials to enter for certain prescribed purposes;
- the right to reasonable privacy in respect of private and family life under Section 49; and
- the right to equality for citizens, irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex. The term 'sex' may be interpreted to mean 'gender' or 'sexual orientation'.

Once a possible infringement of human rights has been detected, Section 57 of the *Constitution* provides that:

(1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

Ample precedent exists in case law for applications under S.57. Among others, ICRAF (Individual and Community Rights Advocacy Forum) has standing (*In Re Miriam Willingal* [1997] PNGLR 119). The Ombudsman Commission has standing to make Constitutional references under Section 19, and could hardly be denied standing under Section 57. If the court can be persuaded that homosexuals or prostitutes are unable fully and freely to exercise their rights on the grounds of self-incrimination or potential victimisation, then any other person acting in their behalf could do so.

Unlawful Acts under the HIV/AIDS Management and Prevention Act

This Act is now in force, and provides relief for HIV/AIDS-related discrimination and discriminatory acts. HIV/AIDS discrimination can occur where a person is discriminated against on the grounds that he or she is, or is related to or associated with, a person with or presumed to have HIV or AIDS, or is, or is presumed to be, a member of or associated with a group, activity or occupation, or living in an environment, which is commonly associated with, or presumed to be associated with, infection by or

transmission of, HIV: Section 6 and definition of ‘person infected or affected by HIV/AIDS’ in Section 2. Examples of this are:

- where a woman is treated unfairly because she is presumed to be a prostitute, and prostitutes are presumed to be responsible for transmission of HIV;
- where a person is presumed to have AIDS because he associates with someone who is rumoured to be gay, and HIV/AIDS was brought into the country by expatriate homosexuals; and
- where a person is presumed to have HIV/AIDS or to be associated with HIV-carriers because he or she is carrying or distributing condoms.

These provisions were intended as a ‘back-door’ way of protecting the rights of those disadvantaged classes and groups of society most likely to be targeted in HIV/AIDS discrimination and stigmatisation. They could possibly be employed in conjunction with claims for infringement of general constitutional rights.

A further protection is provided by making unlawful the denial of access to a means of protection from HIV infection: Section 11. The possession of condoms is specifically included as a means of protection from infection. Given current reports of condom possession being used by police as evidence of any number of criminal activities, it is possible that this provision will be useful in court actions.

The Act provides a wide range of remedies against unlawful and discriminatory acts:

- investigation by the Ombudsman Commission, acting under its jurisdiction over discriminatory practices as defined by law; although the Commission is only empowered to report, it can recommend further action by the appropriate body;
- application to the National or District Court for a wide range of remedies, as appropriate;
- charges of professional misconduct or disciplinary action against the perpetrator, where appropriate; and
- criminal prosecution for an offence.

The Overturning of the Anna Wemay Case

It is possible that this case could be overturned by either the National or the Supreme Court. The National Court is not necessarily bound by its previous decisions (Constitution Sch.2.9) and, moreover, this case is more than twenty-five years old. An appeal from a conviction under Section 55 of the *Summary Offences Act* now stands a good chance of success.

An alternative approach may be for the Ombudsman Commission to mount a challenge under Section 19 of the *Constitution* to the *Summary Offences Act*, on the basis that the reading of Section 55 gives rise to an infringement of human rights.

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