

## 7. Where to Now?

I urge all countries to remove punitive laws, policies and practices that hamper the AIDS response.... Successful AIDS responses do not punish people; they protect them.... In many countries, legal frameworks institutionalize discrimination against groups most at risk. Yet discrimination against sex workers, drug users and men who have sex with men only fuels the epidemic and prevents cost-effective interventions. We must ensure that AIDS responses are based on evidence, not ideology, and reach those most in need and most affected.

Ban Ki-moon, United Nations Secretary-General, 2009.<sup>1</sup>

In this concluding chapter, I turn to questioning whether law reform would make a difference to social attitudes. This is the question Ryan Goodman asked himself as he embarked on his South African work. He learned that, yes, even when punitive laws are not enforced, they affect people's attitudes to those criminalised, but that with decriminalisation these attitudes begin to change. I thought it was not too much to hope that decriminalisation might have the same outcome in Papua New Guinea (PNG).

In Chapter 3, I referred briefly to the ancient English case of 1584, *Heydon's Case*, which sets out the parameters for reform of the common law, as

for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy;

and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress

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<sup>1</sup> United Nations Secretary-General's message for World AIDS Day, 30 November 2009, online: <http://www.un.org/News/Press/docs/2009/sgsm12638.doc.htm>, accessed 23 August 2011.

subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

News of the Three-Mile Guesthouse Raid first alerted me to the ‘mischief.’ People were suffering, and it seemed to me that one of the reasons was a defect in the law. The police and the bystanders were able to do as they did because they believed that their actions were legitimised by criminalising laws. I also recalled my regret that the PNG Law Reform Commission’s research into sexual offences, particularly the sodomy offence, had never been completed. I felt it incumbent on me to ‘discern and consider’ the possibility of a defect in the law which, if found, might be remedied by law reform.

I posed myself several questions. Is decriminalisation necessary? Do those criminalised by such laws really suffer ill-effects? If so, how much can be blamed on criminalising laws? Do these laws have any effect at all on community attitudes, or are other influences at work? What form do the laws take and how did they achieve their present form? Given that the attitudes and sexual practices of many traditional PNG communities differed greatly from those reflected in the sexuality laws introduced by the colonists, why does the post-Independence society retain the introduced laws? Should they be retained or repealed? I needed answers to questions such as these. I needed evidence and understanding. I needed to review reform efforts both overseas and locally. I needed to understand the fundamental issues at the heart of the decriminalisation efforts. Only then could I engage with the obstacles to reform and assess the prospects for success.

## Research

### Finding the evidence

There have been very few comprehensive studies of the history, development or form of sexuality laws in PNG. From the little that has been compiled, and from comprehensive searches of primary materials, I have put together a picture not only of the history of the cases and statutes, but also of the legal influences on sexuality laws: influences such as the various international treaties and declarations having a bearing on human rights, the incorporation of the

principles of the *International Covenant on Civil and Political Rights* (ICCPR) in the *Constitution at Independence*, the recently declared and accepted *Yogyakarta Principles* and so on.<sup>2</sup>

Social research however was a bigger challenge. Some work had been done on the sex trade, mainly behavioural studies in connection with HIV-related research and programming. I knew of some excellent ethnographic studies, the most notable being those of Joan Johnstone,<sup>3</sup> Lawrence Hammar<sup>4</sup> and Holly Wardlow,<sup>5</sup> but otherwise, there was little else on transactional sex until the appearance of the *Askim na Save* report. The broader corpus of literature dealing with the marginalisation, vulnerability and abuse of women and girls in PNG makes little or no reference to those who sell or exchange sex—‘women’ have been essentialised in PNG studies as elsewhere in the world. Much anthropological work has been done on ‘ritualised homosexuality,’ but the arguments that the semen exchange practices involved in the initiation ceremonies of certain Melanesian societies are not a matter of sexuality are convincing. In contrast, male-male sexual practices today are largely invisible, to be revealed only recently in connection with HIV prevention work. I needed to discover and reveal what goes on in PNG in the present, and for that I needed engagement with subjects in the field, supported by archival and textual studies.

My research has provided plenty of evidence to support an argument for decriminalisation. I have traced the origins of the present-day laws to the early days of the colonial rule. It was then that the sexuality laws were introduced, beginning with the paternalist Native Regulations of colonial times and developing through to the formal cases of the post-Independence appellate courts, which establish the parameters of the laws criminalising (and declining to decriminalise) prostitution and sodomy. Under this regime, the Port Moresby residents who sell sex, and those identified as gays or transgenders, live their lives and endure multiple misfortunes. They endure opprobrium not only through the processes of the law, but through the media and through the practices of a society which blames, condemns and oppresses them.

As my research proceeded, other work in the same areas began to appear. I have found very little in this recent work to contradict what I had already found.

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2 United Nations Human Rights Council, International Commission of Jurists and International Service for Human Rights, 2007, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, online: [http://www.yogyakartaprinciples.org/docs/File/Yogyakarta\\_Principles\\_EN.pdf](http://www.yogyakartaprinciples.org/docs/File/Yogyakarta_Principles_EN.pdf), accessed 15 May 2007.

3 Joan Drikoré Johnstone, 1993, ‘The Gumini *Bisnis-Meri*: a study of the development of an innovative indigenous entrepreneurial activity in Port Moresby in the early 1970s,’ Ph.D. thesis, Brisbane: University of Queensland.

4 Among others, Lawrence Hammar, 2010, *Sin, Sex and Stigma: A Pacific Response to HIV and AIDS*, Wantage, UK: Sean Kingston Publishing.

5 Among others, Holly Wardlow, 2006, *Wayward Women: Sexuality and Agency in a New Guinea Society*, Berkeley and Los Angeles, California: University of California Press.

In fact, some of my early conclusions were borne out and augmented by later, more intensive studies: for example, the findings of the *Askim na Save* report on the lack of clear self-definition of female sex sellers as sex workers; male sex selling; and the violence and stigma experienced by gays in the home. Together, these studies paint a picture of highly marginalised groups. Gays and transgenders suffer greatly from stigmatisation, discrimination and persecution, as my research has demonstrated. Much of this is enacted in physical violence, sexual and otherwise, from society at large and, significantly, from agents of the state, and some of the violence has had very serious and sometimes fatal consequences.

But there are differences. Females who sell or exchange sex in PNG are not doing so out of a sense of identity. It is something they do, permanently or sporadically, either willingly, or because they are forced or obliged to do so by kin, or because they have no other choice for survival. The law disapproves of the exchange of sex for gain, and hence criminalises it. Attempts to prosecute sex sellers on the grounds of identity exceed the limits of the legal process, and become acts of persecution. Nevertheless, the fact of criminalisation lends credence to society's condemnation of those so labelled, and support for police action against them.

By contrast, males engage in sex with other males for any number of motives ranging from emotional attachment to economic gain, and in doing so they may assume one of several sexual identities, including that of the heteronormative man engaged in an act of sexual penetration. There is a dissonance between perceived identity, internal subjectivity or sense of self, and actual conduct, and the law can only prosecute the last.<sup>6</sup> But opinions expressed in the media generally take a more simplistic view. Males having sex with other males are condemned not for what they do but for what they are. And the higher the status, the more there is to be lost by openly professing a non-normative sexual identity.<sup>7</sup> Professional gays, who should be best-positioned to advocate gay rights, have the greatest need to conceal their sexuality. The gay rights movement in PNG, such as it is, is so far one principally of the *grassroots*.

## Understanding the sources

To understand the origins of this stigma, discrimination and persecution, I have applied the theories of Michel Foucault and his views of the relationship of law to disciplinary power, bio-power and governmentality. These regulatory processes are supported by other discourses, principally those of medicine and

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6 Sonia Katyal, 2002, 'Exporting identity,' *Yale Journal of Law and Feminism* 14(1): 98–176, 168.

7 PNG gays are not just afraid of repercussions such as blackmail or violence, they can also be deeply concerned about shame visited on the family and community, as illustrated by Victor's story.

religion. To these, in the context of the colonial enterprise, should be added the language of race and class.<sup>8</sup> Writers on colonialism both in and beyond PNG have highlighted the effective use of introduced sexual norms and laws in governing colonised populations and, whether or not they acknowledge Foucault, his insights can be discerned in much of their work.

In Chapter 2, I described how ‘civilisation’ along western lines was introduced into the former territories of PNG through these processes of the introduction and adoption of discourses of Christianity and of western medicine. Non-monogamous, non-heteronormative and deviant sexuality was criminalised in the introduced Anglo-Australian common law system. At Independence, despite a few faltering attempts to develop non-western mores and laws, the PNG *elites* of the post-colonial era emerged as a dominant class which embraced much of western modernity and consumerism. Despite overt espousal of the principles of human rights, moves to reform the introduced colonial law and faltering attempts to recover ‘tradition,’ the formal legal system has been retained virtually intact, and that system includes proscription of prostitution in the form of the offence of living on the earnings of prostitution, and homosexual behaviour in the form of the sodomy law.

In Chapter 3, I described how Ben Golder and Peter Fitzpatrick developed Foucault’s theories by challenging those who argue for the ‘expulsion thesis’: that the power of mediaeval law has been ousted by the regulatory norms of modernity. They considered that law has merely retreated to the boundaries of the socially normative, leaving society’s regulatory norms as the core. But while law evokes fixity, it is nevertheless responsive to the demands of an ever-changing society, affirming the status quo or shifting the boundaries, either inward or outward, in processes of law reform. In this chapter I have demonstrated the processes by which the law determines and maintains those boundaries, through a study of the history of the criminalising process as applied to sex selling and sodomy.

Through tales of the fraught experiences of sellers of sex and gays in Port Moresby nowadays, in chapters 4 and 5 I have described the exercises of power both in maintaining and resisting the boundaries of what is normative and legal. Chapter 6 considered media representations through the lens of intersectionality theory to examine the narratives which attach to social groups, creating and maintaining powerful social norms of sexual behaviour. Social norms, which are created by and create the law, in turn are supported by and support the law.

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<sup>8</sup> Ann Laura Stoler, 2003, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, Berkeley: University of California Press, 158.

## Questioning reform

In Chapter 1, I posed a central question: will law reform have any effect on prevailing social norms which stigmatise sex sellers and gays? To respond, I turned to the work of legal writers who challenge the 'enforcement principle': the belief of commentators, lawyers and courts that an unenforced criminal law is harmless. The opposing view is that as long as such laws remain on the statute books, they operate to form and inform social norms. To understand the effects of law in general, and laws which criminalise sexual conduct in particular, one must take into account the law's role in a wider social context. Goodman realised this when he took the opportunity to study South African society's attitudes to and treatment of gays and lesbians before and after the repeal there of the sodomy law. The processes of sexuality reform elsewhere offer further examples of the interaction between laws and society.

Although I believed, and continue to believe, that decriminalisation is essential if the constitutional rights of all citizens are to be recognised, some friends and colleagues disagree, pointing to the negative and emotional responses that have been made in the past to decriminalisation proposals. Some pressed what I now recognise as the enforcement principle. Many of my gay respondents, even the well-educated, displayed little if any knowledge or understanding of the sodomy law, believing that social and family attitudes or church doctrine were the cause of all their problems. But it is my firm belief that the fact of criminalisation has made a difference, especially in a country which had developed such a strong culture of violence among the police as well as the general community. I respond that it is the threat of criminal sanctions, coupled with a culture of poor internal discipline, which enables state law enforcement agents to act with increasing severity against vulnerable groups. Because they knew that prostitution is a crime, the police were able to break down the gate of the Three-Mile Guesthouse and commit the atrocities of the raid there with impunity. And because the judge in *Mala's Case* knew that sodomy was a crime, he was able to describe Mala's action as 'the behaviour of animals.' Both these incidents may have exceeded reason and legitimacy, but there has been no redress for those stigmatised and abused. Criminalised victims of law enforcement abuses are unable to resist or to enforce their human rights. The law's view that such behaviour is criminal facilitates and supports social condemnation and stigma.

Nevertheless, I acknowledge that decriminalisation is not the end of the process. On its own, legislative reform will not guarantee universal respect, dignity or better lives to those currently criminalised. Cheryl Overs and Bebe Loff argue that the fundamental issue is that of 'lack of recognition as a person before the law' and conclude that 'multi-faceted, setting-specific reform is needed,'

rather than mere decriminalisation.<sup>9</sup> Legislative reform must be accompanied by implementation and awareness, and by addressing the structural causes of the power imbalance which the criminalisation regime has created and maintained. But legislative reform is a start and, as Goodman has shown, it can have an immediate effect on the lives of those most closely affected before the law was changed. In my view, any initiative which can prevent or at least reduce the stigma, discrimination and violence experienced by sex sellers and gays is worth undertaking.

My final task then is to review reform initiatives to date in other countries, and the recent moves at international level to urge states to consider decriminalisation of marginalised groups. Based on this survey, I then set out the various ways and means by which decriminalisation could be achieved in PNG.

## Reform initiatives

Advancing human rights and gender equality for the HIV response means ending the HIV-related stigma, discrimination, gender inequality and violence against women and girls that drive the risk of, and vulnerability to, HIV infection by keeping people from accessing prevention, treatment, care and support services. It means putting laws, policies and programmes in place to create legal environments that protect people from infection and support access to justice. At the core of these efforts is protecting human rights in the context of HIV—including the rights of people living with HIV, women, young people, men who have sex with men, people who use drugs and sex workers and their clients.... Countries with punitive laws and practices around HIV transmission, sex work, drug use or homosexuality that block effective responses [to be] reduced by half.

UNAIDS Strategy 2011–2015.

## International and regional initiatives

The HIV epidemic, despite its tragedy, has had its positive side. The necessity to focus on and work with individuals and groups whose sexual activity is criminalised engenders their greater recognition and assistance.<sup>10</sup>

<sup>9</sup> Cheryl Overs and Bebe Loff, 2013, 'Toward a legal framework that promotes and protects sex workers' health and human rights,' *Health and Human Rights* 15(1): 186–96.

<sup>10</sup> Dennis Altman, 2001, *Global Sex*, Sydney: Allen & Unwin, 75. Although the recognition may be adverse, as in the Three-Mile Guesthouse Raid described and discussed in Chapter 5, the final outcome can sometimes be positive.

Acknowledgement of the epidemic as more than purely a health issue led to the formation of UNAIDS. In conjunction with other international partners, UNAIDS produced the *International Guidelines* and the *Handbook for Legislators*,<sup>11</sup> and, in 2007, *Taking Action Against HIV: A Handbook for Parliamentarians*,<sup>12</sup> to guide states in the development of appropriate laws and policies for HIV management and prevention. These publications urge states to adopt a human rights approach to epidemic management, an approach which includes the repeal and removal of discriminatory laws and practices. United Nations agencies have produced or supported the production of a host of other publications, all with the same message: HIV can only be managed through a human rights approach, and this is underpinned by reform of the law.

In September 2000, building upon a decade of major United Nations conferences and summits, world leaders came together in New York to adopt the *United Nations Millennium Declaration*, a set of eight targets, the Millennium Development Goals (MDGs), which embody basic human rights to health, education, shelter and security. Among other things, they combined Goal 3: 'Promote gender equality and empower women' with Goal 6: 'Combat HIV/AIDS, malaria and other diseases' to urge greater control by women over their own sexuality.<sup>13</sup> This was followed in June 2001 by the United Nations General Assembly Special Session (UNGASS) *Declaration of Commitment on HIV/AIDS*, the subsequent General Assembly 60<sup>th</sup> Session *Political Declaration on HIV/AIDS 2006*<sup>14</sup> and a further *Political Declaration* in 2011.<sup>15</sup> All of these Declarations urge states to enact legislation aimed at eliminating discrimination against vulnerable groups, and to overcome stigma and discrimination associated with the epidemic. None however has achieved treaty status, attempts being consistently blocked by some Middle Eastern states and the USA. The only references in the 2011 Declaration to actions regarding 'populations at higher risk' require states to define their specific populations at risk (§29), to promote human rights (§38), to target prevention strategies and data collection systems at them (§61) and to

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11 Office of the United Nations High Commissioner for Human Rights (UNHCR) and Joint United Nations Programme on HIV/AIDS (UNAIDS), 1998, *HIV/AIDS and Human Rights: International Guidelines*, HR/PUB/98/1, report prepared for United Nations, New York and Geneva: UNHCR and UNAIDS (*International Guidelines*); Joint United Nations Programme on HIV/AIDS (UNAIDS), 1999, *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of its Devastating Human, Economic and Social Impact*, UNAIDS/99.48E, report prepared for Joint United Nations Programme on HIV/AIDS (UNAIDS), Geneva (*Handbook for Legislators*). The PNG legislation which I drafted in 2001–2002 was based on these guidelines.

12 Inter-Parliamentary Union (IPU), United Nations Development Programme (UNDP) and Joint United Nations Programme on HIV/AIDS (UNAIDS), 2007, *Taking Action Against HIV: A Handbook for Parliamentarians*, Le Grand-Saconnex, New York, Geneva: IPU, UNDP, UNAIDS.

13 United Nations, 2002–2006, *Millennium Development Goals Beyond 2015*, online, <http://www.unmillenniumproject.org/goals/>, accessed 15 April 2014.

14 A/Res/60/262 adopted 15 June 2006.

15 Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS, A/RES/65/277, adopted 10 June 2011.

create enabling legal frameworks for the protection of women and girls (§81), with an emphasis on ‘sexual exploitation including for commercial reasons,’ meaning trafficking. This may leave sex workers even more vulnerable to state-sanctioned violence and rights abuses. Nevertheless, the Declaration is groundbreaking in that for the first time it makes specific reference to sex workers and men who have sex with men (but not transgenders) as groups at higher risk of HIV infection.<sup>16</sup>

Meanwhile, in 2007, the International Commission of Jurists and the International Service for Human Rights produced the *Yogyakarta Principles*, a set of twenty-nine principles which address a broad range of human rights standards and their application to issues of sexual orientation and gender identity.<sup>17</sup> The *Yogyakarta Principles* combine the familiar civil and political rights of the ICCPR with the less justiciable social and economic rights of the International Covenant on Economic, Social and Cultural Rights (ICESCR), plus some newly expressed rights of particular significance for gender minorities and disadvantaged groups such as the right to recognition before the law, protection from all forms of exploitation, sale and trafficking of human beings, and protection from medical abuses. All actors have responsibilities to promote and protect these rights, including the UN human rights system, national human rights institutions, the media, NGOs and donor agencies.<sup>18</sup>

The Global Commission on HIV and the Law was launched in June 2010, to develop human rights-based recommendations for effective HIV responses.<sup>19</sup> It comprised eminent persons from public life and aimed to promote and develop an enabling legal environment for epidemic management, which may in some cases be undermined by the criminalisation of HIV transmission and exposure, sex work, adult consensual same-sex sexual relations, and drug use. PNG’s Dame Carol Kidu was one of the Commissioners.<sup>20</sup>

At regional level, Pacific Island leaders at the Pacific Islands Forum Meeting of 2003 called for a regional strategy on HIV/AIDS, resulting in *The Pacific Regional Strategy on HIV/AIDS 2004–2008*.<sup>21</sup> The Strategy called for equitable attention to vulnerable groups, including those involved in the sex trade and

16 Asia Pacific Council of AIDS Service Organizations (APCASO), Civil Society Perspectives on the 2011 HIV/AIDS HLM, 2011, ‘The 2011 Political Declaration on HIV/AIDS,’ *infocus* 1 (August), online: <http://www.apcaso.org/v2/wp-content/uploads/2011/12/APCASO-InFocus-No1.pdf>, accessed 15 April 2014.

17 *Yogyakarta Principles*.

18 *Ibid.*, 7.

19 *Global Commission on HIV and the Law*, n.d., online: <http://www.hivlawcommission.org>, accessed 21 March 2011.

20 ‘Information note,’ June 2010, *Global Commission on HIV and the Law*. And see ‘The Commissioners,’ n.d., *Global Commission on HIV and the Law*, online: [www.hivlawcommission.org/images/stories/cmsrsbios\\_28\\_sept2010\\_english.pdf](http://www.hivlawcommission.org/images/stories/cmsrsbios_28_sept2010_english.pdf), online: accessed 22 March 2011.

21 Secretariat of the Pacific Community (SPC), 2005, *The Pacific Regional Strategy on HIV/AIDS 2004–2008*, Noumea, New Caledonia: Secretariat of the Pacific Community.

men who have sex with men.<sup>22</sup> In 2004, the Pacific Parliamentary Assembly on Population and Development (PPAPD) called its inaugural meeting to inform Pacific Parliamentarians on basic facts about HIV and AIDS and to urge them to become champions in leading the fight against HIV and AIDS in Pacific communities.<sup>23</sup> The meeting reinforced the importance of commitment by Pacific states to the Pacific Regional Strategy, and culminated in the signing by the Parliamentarians, including Dr Banare Bun Zzferio, MP of PNG, of the *Suva Declaration on HIV/AIDS*. The Declaration's commitment to legislative action was couched in general terms and made no specific mention of sex work or MSM when it discussed protection of vulnerable groups from stigma, violence and discrimination.<sup>24</sup> In 2007, UNAIDS facilitated the establishment of the Commission on AIDS in the Pacific and tasked it with providing an analysis of the status of the epidemic in the region, in order to provide policy options to Pacific countries and their development partners. In 2009 the Commission produced its report, *Turning the Tide*, which found that targeted prevention programmes with sex workers and gays are successful, and recommended that 'countries must undertake progressive legislative reform to repeal legislation that criminalizes high-risk behaviour and promotes HIV-related discrimination. Changing the laws need not imply approval of the behaviour but would signal a greater concern for people.'<sup>25</sup>

The same year, the Pacific Sexual Diversity Network, the regional network of Pacific MSM and transgender organisations, launched its Strategic Plan 2010–2013, with one of its goals to reform discriminatory laws affecting MSM and transgenders.<sup>26</sup>

## Reforms overseas

Long before PNG's reform attempts at the time of Independence, reform of sexuality laws was under way overseas. In the United Kingdom, as a result of social changes in post-World War II England, the government through the Home Office and the Scottish Home Department in 1954 commissioned a joint investigation of law and practice relating to homosexual and prostitution offences.<sup>27</sup> Helen J. Self considers that the primary aim was to endorse the current

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22 Ibid., 32.

23 Pacific Parliamentary Assembly on Population and Development (PPAPD), 2004, 'The Suva declaration on HIV/AIDS by Pacific parliamentarians,' report of the *1st Conference for Pacific Parliamentarians on: 'The Role of Pacific Parliamentarians in the Fight against HIV/AIDS'*, Suva, Fiji, 11–13 October (*Suva Declaration*).

24 Ibid., 35.

25 UNAIDS, 2009, Commission on AIDS in the Pacific, *Turning the Tide: An OPEN Strategy for a Response to AIDS in the Pacific*, Recommendation 4: 6, online: [http://data.unaids.org/pub/report/2009/20091202\\_pacificcommission\\_en.pdf](http://data.unaids.org/pub/report/2009/20091202_pacificcommission_en.pdf), accessed 8 July 2014.

26 Pacific Sexual Diversity Network, 2009, *Strategic Plan 2010–2013*, 9.

27 *Report of the Committee on Homosexual Offences and Prostitution, 1957*, London: HMSO, Cmnd. 247, (*Wolfenden Report*).

situation of criminalised prostitution, and sodomy was included not because reforms to homosexual laws were considered necessary, but because of public anxieties of the time over several incidences of homosexual cases involving high-profile figures and because, at the time, homosexuality was considered to be a curable pathology.<sup>28</sup>

The result was the 1957 *Wolfenden Report* (so named for its Chairman). It recommended some changes to soliciting laws and the decriminalisation of male-to-male sex in private by consenting adults aged twenty-one years and over. The logic of the *Wolfenden Report*, in reconstructing homosexuality and prostitution in terms of public proscription and private freedom, was gradually adopted by other English-speaking countries of the developed world.<sup>29</sup> Countries such as Australia and New Zealand, motivated in part by the liberation movements which gathered momentum through the 1960s and 1970s, not only withdrew from the active policing of private consensual sex but also began to move towards decriminalisation.<sup>30</sup>

## Prostitution

We are concerned not with prostitution itself but with the manner in which the activities of prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive or injurious, or involve the exploitation of others.

*Wolfenden Report*, 1957.<sup>31</sup>

Reform of prostitution laws in the Anglo-Australian common law world has long been beset by problems. It is piecemeal, attempting to appease the conflicting aims of maintenance of public order and protection of women and children from

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28 Helen J. Self, 2003, *Prostitution, Women and Misuse of the Law: The Fallen Daughters of Eve*, London and Portland OR: Frank Cass Publishers, 76.

29 John Ballard, 1998, 'The constitution of AIDS in Australia: taking government at a distance seriously,' in *Governing Australia: Studies in Contemporary Rationalities of Government*, ed. Mitchell Dean and Barry Hindess, Melbourne: Cambridge University Press, 125–38.

30 For accounts of reforms in Australia, see for example Roberta Perkins and Garry Bennett, 1985, *Being a Prostitute: Prostitute Women and Prostitute Men*, Sydney: George Allen & Unwin; Graham Willett, 2008, 'From 'vice' to homosexuality: policing perversion in the 1950s,' in *Homophobia: An Australian History*, ed. Shirleene Robinson, Annandale, NSW: The Federation Press, 113–127; Clive Moore, 2001, *Sunshine and Rainbows: The Development of Gay and Lesbian Culture in Queensland*, St Lucia: University of Queensland Press.

31 *Wolfenden Report*, 80 §227.

'trafficking'; an agenda which proliferated following the US Anti-Prostitution Pledge.<sup>32</sup> Every attempt to ameliorate perceived injustices only serves to create new issues and more social problems.<sup>33</sup>

As I observed earlier, the criminalisation of prostitution has had a long history in British law. The fornicating penitent of mediaeval times was transformed into the recalcitrant sinner in need of discipline by the rise of Protestantism in the Reformation period. Following first the Enclosures Acts of the sixteenth century, and then the Industrial Revolution in the nineteenth, the promiscuous woman, the female vagrant, the single mother were all cast as prostitutes—there was little else left for them but to sell themselves for survival.<sup>34</sup> The Contagious Diseases Acts of the nineteenth century were a means of controlling female sexuality in the interests of maintaining the health of garrisoned soldiers.<sup>35</sup> The panic over white slaving prompted their repeal, but police powers and vagrancy laws were tightened, pushing prostitutes off the streets and into the hands of pimps.<sup>36</sup> All this regulatory action succeeded in creating an 'outgroup,' deserving of both contempt and pity, although both sentiments were eclipsed by the fear of disease.<sup>37</sup>

In post-World War II England, women were evicted from wartime work back to 'the home' or into low-paid menial employment. Prostitution was not an offence, nor was solicitation unless it caused annoyance.<sup>38</sup> But concerns about the preference of Englishwomen for American servicemen, the increasing incidence of venereal disease, scaremongering about the possibility of large numbers of 'coloured' immigrants and about prostitution and street soliciting generally all played a large part in prompting the Wolfenden Committee's enquiry into 'the law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes, and to report what changes, if any, are in our opinion desirable.'<sup>39</sup>

The Committee was not convinced that it was primarily economic circumstances, 'bad upbringing, seduction at an early age, or a broken marriage,' which compelled

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32 Larissa Sandy, 2007, 'Just choices: representations of choice and coercion in sex work in Cambodia,' *The Australian Journal of Anthropology* 18(2): 194–206, 197–09; Nicole Franck Masenior and Chris Beyrer, 2007, 'The US anti-prostitution pledge: first amendment challenges and public health priorities,' *PLoS Medicine* 4: 7, online: [http://www.humantrafficking.org/uploads/publications/Masenior\\_and\\_Beyrer.pdf](http://www.humantrafficking.org/uploads/publications/Masenior_and_Beyrer.pdf), accessed 16 May 2011; Center for Health and Gender Equity, 2008, *Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers*, online: <http://www.genderhealth.org/files/uploads/change/publications/aplobrief.pdf>, accessed 16 May 2011.

33 Self, *Prostitution, Women and Misuse of the Law*, 293.

34 *Ibid.*, 22–40.

35 Judith R. Walkowitz, 1982, *Prostitution and Victorian Society: Women, Class, and the State*, Cambridge and New York: Cambridge University Press.

36 Self, *Prostitution, Women and Misuse of the Law*, 40–41.

37 *Ibid.*, 53.

38 *Ibid.*, 74–77, 80–81.

39 *Wolfenden Report*, §1.

women to take to selling sex,<sup>40</sup> and opined that there must be something in the psychological make-up of certain women to predispose them to the enjoyment of this occupation. But the Committee took very little evidence from women—misogyny and the caricaturing of women were commonplace at the time, and the Committee was not really concerned to decriminalise prostitution.<sup>41</sup> What it found objectionable was the public display of sexual availability which street prostitution produced. So it recommended the framing of an offence which tightened the soliciting laws, designed to remove the prostitute from the streets, and incidentally, into the hands of pimps and brothel-managers.<sup>42</sup>

In Australia, prostitution (and pornography) were first constituted as public problems in the late-nineteenth and early-twentieth centuries.<sup>43</sup> Although the act of prostitution was never itself illegal, the visibility of its practice drew the attention of police and lawmakers. In the 1950s, new cultural concerns about sexual deviance (homosexuality and prostitution) began to appear and new laws to control salacious literature were enacted. By the 1970s, commercial sex became an important political and social issue, with new anti-prostitution laws enacted. During the 1970s, as sexuality was being constructed in terms of freedom, reciprocity and mutuality, sex industries expanded and traditional governmental approaches to control were questioned. Prostitution was conceptualised in terms of a private sexual activity in which state interference was illegitimate, and some states decriminalised. Currently, the legal status of prostitution varies between Australian states, while trafficking and sex-slavery are criminalised under Federal law.<sup>44</sup>

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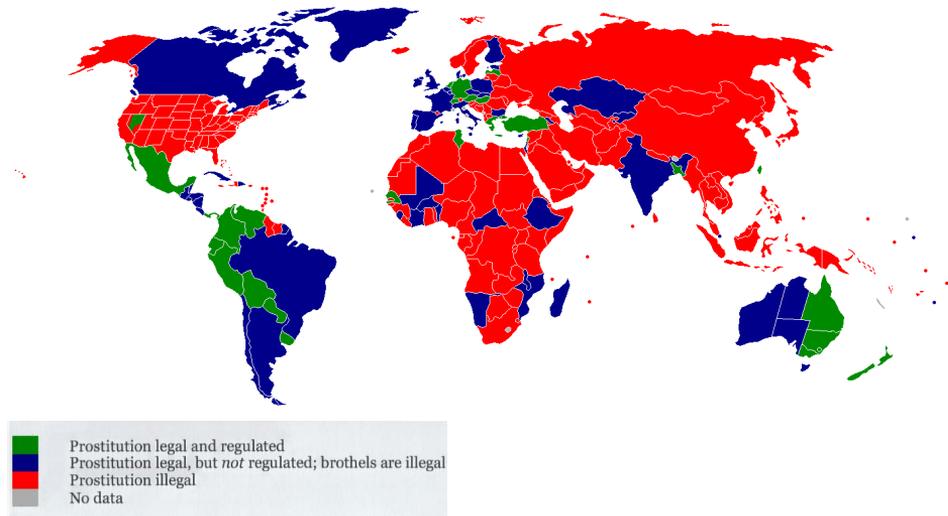
40 See Chapter 3 for my description of society's (mis-)constructions of the reasons why women sell sex.

41 Self, *Prostitution, Women and Misuse of the Law*, 76, 121.

42 *Wolfenden Report* §79–80, §87.

43 Barbara Ann Sullivan, 1997, *The Politics of Sex: Prostitution and Pornography in Australia since 1945*, New York: Cambridge University Press, 10–12. See also Roberta Perkins, 1991, *Working Girls: Prostitutes, their Life and Social Control*, Canberra: Australian Institute of Criminology; Meg Arnot, 1988, 'The oldest profession in a new Britannia,' in *Constructing a Culture*, ed. Verity Burgmann and Jenny Lee, Fitzroy, Vic: McPhee Gribble/Penguin, 46–62; Craig Johnston, 1985, 'Prostitution law reform in New South Wales: two shuffles forward, one stumble back,' in *Being a Prostitute: Prostitute Women and Prostitute Men*, ed. Roberta Perkins and Garry Bennett, Sydney, London, Boston: George Allen & Unwin, 261–73.

44 Perkins, *Working Girls*; Susanne Davies, 1995, 'Captives of their bodies: law and punishment, 1880s–1980s,' in *Sex Power and Justice: Historical Perspectives on Law in Australia*, ed. Dianne Kirkby, Melbourne: Oxford University Press, 99–115, 101–05; Sullivan, *The Politics of Sex*; and for updates during the last two decades, Scarlet Alliance, ca. 2010, *State by State Laws in Australia*, online: <http://www.scarletalliance.org.au/laws/>, accessed 8 July 2010.



**Map 7.1. Prostitution laws of the world.**

Source: 'Prostitution laws of the world' by Runningfridgesrule – Own work. Licensed under Public domain via Wikimedia Commons - [http://commons.wikimedia.org/wiki/File:Prostitution\\_laws\\_of\\_the\\_world.PNG#mediaviewer/File:Prostitution\\_laws\\_of\\_the\\_world.PNG](http://commons.wikimedia.org/wiki/File:Prostitution_laws_of_the_world.PNG#mediaviewer/File:Prostitution_laws_of_the_world.PNG), accessed 8 July 2014.

Elsewhere, New Zealand reformed its prostitution laws in 2003, retaining only offences of coercion.<sup>45</sup> The USA, most of the Asian continent and most African states continue to criminalise prostitution, as shown in Map 7.1. The extent and type of regulation, where it exists, varies greatly.

## Sodomy

In the 1950s, while the *Wolfenden Report* was being prepared, the only countries in Europe apart from the United Kingdom which criminalised consensual sex between adult males in private were Austria, Germany and Norway. Other European countries only punished such behaviour when it involved underage boys or an abuse of a situation of dependency; offended public decency; or was conducted by means of force or coercion.<sup>46</sup>

The Wolfenden Committee was tasked 'to consider the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts; and to report what changes, if any, are ... desirable.'<sup>47</sup> It recommended the decriminalisation of sex between consenting adults in private,

45 'Prostitution in New Zealand,' *Wikipedia*, online: [http://en.wikipedia.org/wiki/Prostitution\\_in\\_New\\_Zealand](http://en.wikipedia.org/wiki/Prostitution_in_New_Zealand), accessed 27 August 2011.

46 *Wolfenden Report*, Appendix III: 149–51.

47 *Ibid.*, §1.

'adult' being defined as a person over twenty-one years of age.<sup>48</sup> However, it took ten years for a reluctant parliament to implement the recommendation, and in that period, public interest waned.<sup>49</sup> It took a further thirty-five years for the European Court of Human Rights to affirm that the European *Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>50</sup> prohibits discrimination on the basis of sexual orientation.<sup>51</sup>

Reform movements in Australia were sparked in large part by the Wolfenden inquiry, and aided by the new liberalism of Whitlam and the Labour Party in the 1970s.<sup>52</sup> South Australia was the first state to decriminalise homosexuality in 1972, to be followed gradually by others, although Tasmania held out for over twenty years until the Australian Commonwealth was taken to the Human Rights Committee of the United Nations in 1994,<sup>53</sup> and Tasmania was obliged to capitulate.<sup>54</sup>

Elsewhere, in 1986 the US Supreme Court in the case of *Bowers v Hardwick* upheld the constitutional right of states to enact laws criminalising homosexuality,<sup>55</sup> although not their right to discriminate.<sup>56</sup> However, the *Bowers Case* was overturned in 2003 by *Lawrence v. Texas*,<sup>57</sup> which held that laws criminalising same sex activities by consenting adults in the privacy of their own homes are unconstitutional as they violate the fundamental right to privacy. In 1998, the prohibition on discrimination on the grounds of 'sexual orientation' (as opposed to 'sex') in South Africa's new *Constitution* was applied to strike down the South African sodomy law.<sup>58</sup> In 2005, the High Court of Hong Kong declared that the relevant sections of the *Crimes Ordinance* of the Special Administrative Region offend the rights to equality and freedom from discrimination under the Basic Law and the right to freedom from interference in privacy under the Bill of Rights.<sup>59</sup>

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48 Ibid., §62.

49 Jeffrey Weeks, 1977, *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, London, Melbourne, New York: Quartet Books, 156.

50 *Convention for the Protection of Human Rights and Fundamental Freedoms* (Europe) (ETS No. 5), 213 U.N.T.S. 222, entered into force 3 September 1953.

51 *Salgueiro da Silva Mouta v. Portugal* [2001] 1 F.C.R. 653, discussed in Jonathan Herring, 2002, 'Gay rights come quietly,' *Law Quarterly Review* 118: 31–35.

52 Moore, *Sunshine and Rainbows*; Graham Willett, 2000, *Living Out Loud: A History of Gay and Lesbian Activism in Australia*, St. Leonards, NSW: Allen & Unwin, 26–27.

53 *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97, discussed in Michael Kirby, 2000, 'Human rights—the way forward,' *Victoria University of Wellington Law Review* 36(4): 703–20, 711–2.

54 Ibid.

55 *Bowers v Hardwick* 478 U.S. 186 (1986).

56 *Romer v Evans* 116 S.Ct. 1620 (1996).

57 *Lawrence v. Texas* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

58 *National Coalition for Gay and Lesbian Equality & Anor v. Minister of Justice & Ors*, 1998 (12) BCLR 1517 (Constitutional Court); and see Ryan Goodman, 2001, 'Beyond the enforcement principle: sodomy laws, social norms, and social panoptics,' *California Law Review* 89: 643–740.

59 *Leung TC William Roy v. Secretary for Justice* [2005] HKCFI 713.

Closer to home, in the notable cases of *Nadan v The State* and *McCoskar v The State* in the High Court of Fiji in 2005,<sup>60</sup> the appeal court held that the sections of the Fiji *Penal Code* dealing with carnal knowledge against the order of nature and gross indecency between males breached the constitutionally guaranteed rights to privacy and equality, and were invalid to the extent that they applied to consensual sexual conduct between males eighteen years and over occurring in private. And then in early 2010, following the promulgation of a new constitution which prevented discrimination on the grounds of 'gender equality' rather than 'sex,' a new *Criminal Decree* repealed the *Penal Code* and thereby abolished the crime of consensual sex between adult males in Fiji.<sup>61</sup> This was hailed as a first for the Pacific.<sup>62</sup> Then in 2009 in India, in the landmark *Naz Case*,<sup>63</sup> the New Delhi High Court struck down the law as it related to consenting adults in private on the grounds that it infringed the human rights to privacy, equality and liberty. The positive recognition of queer people and their rights (to equality, to love) was accompanied by a 'broader acceptance in public culture.' That decision was a starting point for a nation-wide conversation in India.<sup>64</sup> Unfortunately, the case was overturned by the Indian Supreme Court late in 2013,<sup>65</sup> but public acceptance remained high and the Supreme Court's decision elicited much criticism.<sup>66</sup>

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60 *Nadan v The State* [2005] FJHC 1 and *McCoskar v The State* [2005] FJHC 500.

61 Shalveen Chand, 2010, 'Same sex law decriminalised,' *Fiji Times*, 26 February, online: <http://www.fijitimes.com/print.aspx?id=140812>, accessed 26 February 2010. See also Editorial, 2010, 'Being happy and gay,' *Fiji Times*, 26 February, online: <http://www.fijitimes.com/print.aspx?id=140824>, accessed 26 February 2010, published upon the announcement of decriminalisation of sodomy in Fiji.

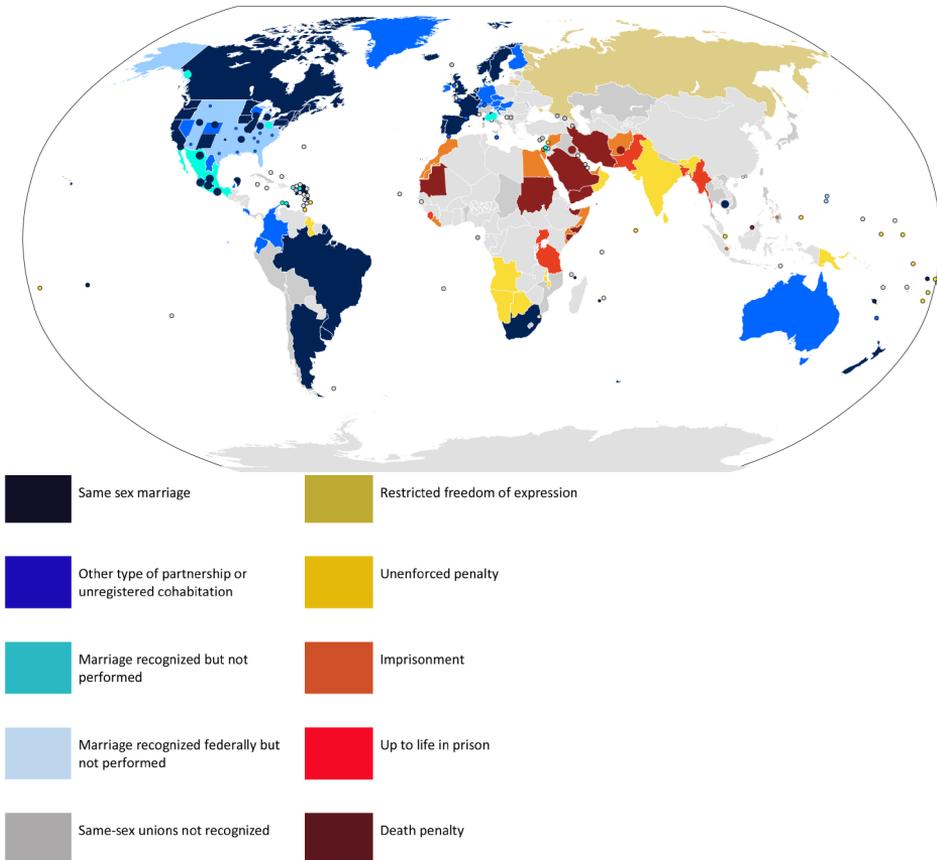
62 'UNAIDS welcomes Fiji decree to decriminalise homosexuality,' 2010, *PACNEWS*, 3 March, posted to AIDSTOK, 3 March 2010, online: [aidstok@lyris.spc.int](mailto:aidstok@lyris.spc.int). This claim should more properly be restricted to the Anglophone Pacific.

63 *Naz Foundation (India) Trust v Government of ACT of Delhi and Others* WP(C) No.7445/2001, date of decision 2 July 2009, (India) (*Naz Case*).

64 Arvind Narrain and Alok Gupta, 2011, 'Introduction,' in *Law Like Love: Queer Perspectives on Law*, ed. Arvind Narrain and Alok Gupta, Calcutta: Yoda Press, xi–lvi, xi–xii.

65 *Suresh Kumar Koushal and another v Naz Foundation and others*, Civil Appeal No.10972 of 2013, 11 December 2013 (*Naz Appeal*).

66 For example Sudhir Krishnaswamy, 2013, 'Naz Foundation: reading down the Supreme Court,' *Oxford Human Rights Law*, 13 December, online: <http://ohrh.law.ox.ac.uk/?p=3733>, accessed 31 December 2013; Prachi Shrivastava, 2013, '7 creative (legal) reasons the Supreme Court found not to strike down Section #377,' online: <http://www.legallyindia.com/201312114184/Constitutional-law/7-reasons-the-supreme-court-didnt-strike-down-377>, accessed 14 December 2013; Erik Voeten, 2013, 'The recriminalization of homosexuality in India and the potential for broader backlash,' *Washington Post*, 11 December, online: <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/11/the-recriminalization-of-homosexuality-in-india-and-the-potential-for-broader-backlash/>, accessed 16 December 2013.



**Map 7.2. 'LGBT rights by country or territory'.**

Source: 'World laws pertaining to homosexual relationships and expression' by Various (Initial version by Silje) - Own work. This vector image was created with Inkscape. Other sources: Nigerian Sharia states based on File:NG-Sharia.png Merida (Venezuela) from File:Venezuela Merida State Location.svg; Wisconsin: File:Blank US Map.svg; Law in Russia restricting freedom of expression and assembly [1] US after DOMA decision [2] Syria: [3] Moldova: [4]. Licensed under Creative Commons Attribution-Share Alike 3.0 via Wikimedia Commons - [http://commons.wikimedia.org/wiki/File:World\\_laws\\_pertaining\\_to\\_homosexual\\_relationships\\_and\\_expression.svg#mediaviewer/File:World\\_laws\\_pertaining\\_to\\_homosexual\\_relationships\\_and\\_expression.svg](http://commons.wikimedia.org/wiki/File:World_laws_pertaining_to_homosexual_relationships_and_expression.svg#mediaviewer/File:World_laws_pertaining_to_homosexual_relationships_and_expression.svg), accessed 8 July 2014.

Map 7.2 shows that it is predominantly the Arab-speaking nations of the Middle East and northern Africa, and the former British colonies of Africa, South Asia and the Pacific, which continue to criminalise sodomy. A distinction may be drawn between the laws of Pacific countries based on the laws of the colonist or former colonist. French territories and Micronesian states whose laws are based on the American legal system do not criminalise sex between males: nearly all of those whose laws are derived from England, Australia and New Zealand do.

The exception here is Vanuatu, with a combined English-French legal heritage, which only prohibits 'homosexual acts' with a person of the same sex under eighteen years.<sup>67</sup>

## Reform in PNG

There are two ways to reform law. One is through direct legislative intervention, by preparing and having Parliament pass legislation; and the other is by court challenge, either in the context of an appropriate case already on foot, or as a constitutional challenge on the grounds of infringement of human rights. Both have their problems.

Legislative action requires the concurrence of the government of the day, and to a large extent, of society also. If the government sponsors a Bill, it will usually pass; such is the nature of the Westminster system. Non-government-sponsored legislation may yet achieve parliamentary approval, but only if the government agrees. This was the situation in PNG with the 2002 *Criminal Code* amendments, brought as a private member's Bill by Dame Carol Kidu, which were supported by government because they were framed as protecting children from abuse.<sup>68</sup> The major stumbling block to legislative action is lack of political will.

Court challenges run various risks. If they arise in the course of another matter, as was the situation with the 2005 *Nadan* and *McCoskar Cases* in Fiji, they are totally dependent on the circumstances of the case, the lawyers and judge who happen to be involved, and the processes applicable in the circumstances. In Fiji, the cases came before a single judge in the appellate division of the High Court, who chose to apply human rights principles. In PNG, a clear process is set out in the *Constitution* where a question of constitutionality arises in the National Court. The matter should immediately be referred to the Supreme Court, either upon request of the lawyers involved or on the judge's own initiative.<sup>69</sup>

A direct court challenge may be initiated in two ways. PNG's *Constitution* at Section 57(1) provides that

a right or freedom referred to in this Division [*Division 3.—Basic Rights*] shall be protected by, and is enforceable in, the Supreme Court or the National Court ... either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the

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67 Section 99 of the Vanuatu *Penal Code*.

68 Even the title was designed with this in mind: although only an amending Act, it was entitled the *Criminal Code (Sexual Offences and Crimes against Children) Act*.

69 *Constitution* Section 18.

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.

This was the action contemplated when a case for the protection of human rights was filed in the National Court by the women in the Three-Mile Guesthouse Raid. It was the kind of action taken in *Croome's Case* in Tasmania.<sup>70</sup> Properly planned, it could be very effective. It relies however on a situation which has already occurred in which the rights have been infringed. And it relies on the courage of an applicant (in this context, a sex seller or gay person) to take the case, or on the court being prepared to declare that another person or body has sufficient standing to take the action on their behalf.<sup>71</sup>

Alternatively, a challenge to the constitutionality of a law may be taken directly by 'special reference' to the highest court in the land, the Supreme Court, by certain prescribed officers.<sup>72</sup> The Attorney-General, the Ombudsman Commission and the Law Reform Commission are among those entitled to take these special references. They differ from the usual case process where the court is asked to make a ruling on a set of facts—in special references, the Supreme Court may be asked to give its opinion on a hypothetical question, such as that of the unconstitutionality of the laws governing prostitution or sodomy.<sup>73</sup>

All cases, particularly those arising unexpectedly, run the risk of an adverse finding, so the safer course of action is to take a fully-prepared case directly to an appropriate court of competent jurisdiction under Section 19 or Section 57. There is now ample precedent overseas to provide material for a case of this kind. Further material can be sourced from international documents. The *Constitution* specifically recognises the relevance in the PNG context of determinations of the United Nations under international human rights law. Section 39 provides that when considering whether a restriction of a particular right under the *Constitution* is 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind,' a court may have regard—among other things—to any decision of the United Nations concerning human rights and fundamental freedoms. This enables the courts to allow use of these international instruments 'apparently without the need for ratification.'<sup>74</sup> This would be relevant, in particular, to the right to privacy, because the United Nations Human Rights Committee has ruled that laws criminalising

70 *Croome v Tasmania* (1997) 191 CLR 119.

71 *In the Matter of an Application under Section 57 of the Constitution; Application by Individual and Community Rights Advocacy Forum Inc (ICRAF); In re Miriam Willingal* (Unreported) N1506 (10 February 1997) (*Willingal's Case*).

72 *Constitution* Section 19.

73 SCR No 5 of 1982: *Re Disputed Returns for the Kairuku-Hiri Open Electorate* [1982] PNGLR 379.

74 Pacific Regional Rights Resource Team, 2005, *Pacific Human Rights Law Digest: Volume 1, PHRLD*, Suva: Pacific Regional Rights Resource Team, xi.

consensual male-male sex amount to an arbitrary interference with privacy in violation of Article 17 of the ICCPR. So the existence of laws making male-male sex a criminal offence in PNG most probably amounts to a breach of the right to privacy under Section 49 of the *Constitution* as well as a breach of PNG's obligations as a signatory to the ICCPR.

None of these courses has yet been adopted in PNG. Despite having signed up to many of the international resolutions, and despite Dame Carol's participation at regional and international level in many HIV initiatives, the PNG government has been reluctant to follow international trends. Attempts have been made, but are largely ignored by the government of the day. The *National HIV/AIDS Medium Term Plan 1998–2002* included the recommendation that the sex-work industry be decriminalised 'under specific conditions to enable the enforcement of appropriate health standards and to enable sex workers to access health services without fear of discrimination,'<sup>75</sup> and the National AIDS Council was ready to implement the Plan. But due to the Westminster system of apportionment of ministerial responsibilities, the National AIDS Council fell within the portfolio of the Minister for Health at the time when HIV management legislation was being prepared, while criminal legislation was the responsibility of the Minister for Justice. So the National AIDS Council was unable to propose that the Minister for Health take any direct action to reform the laws, either those relating to prostitution or those criminalising sodomy. Neither was the Minister for Justice (and indeed most of the government of the time) in the least interested in participating in any such reform initiative.

The one piece of legislation for which the National AIDS Council was responsible, the *HIV/AIDS Management and Prevention Act 2003*, did attempt to protect marginalised groups presumed to be associated with HIV infection from stigma and discrimination in a climate of criminalisation of non-normative sexuality. But inadequate awareness and understanding of its terms in the community, and the inability of the marginalised to access effective legal services, have left this legislation largely unimplemented.<sup>76</sup> The *National Strategic Plan on HIV/AIDS 2004–2008*, although making much of the need to target prevention programmes to vulnerable groups including sex workers and gays, made no

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75 Papua New Guinea, 1988, *National HIV/AIDS Medium Term Plan*, Port Moresby: Government of Papua New Guinea Strategy, 3.1.11: 35.

76 Work has begun to remedy this situation. In 2010, the International Development Law Organization (IDLO), an international intergovernmental organisation dedicated to promoting the rule of law and good governance in developing countries, commenced a PNG programme providing legal aid to People Living with HIV (PLHIV) and vulnerable groups: field notes and pers. comm. 2010, Port Moresby. In 2013, funding was assumed by the Australian government and responsibility transferred to the HIV/AIDS Legal Centre (HALC), a community legal centre which provides free legal aid and advice to people with HIV-related legal matters and advocates for the reform of laws and the legal system in areas that affect people living with HIV.

mention of legislative reform.<sup>77</sup> But, due in part at least to the participation of sex sellers, gays and transgenders in its formulation, the subsequent *National HIV and AIDS Strategy 2011–2015* does so.<sup>78</sup> In carefully chosen language, it acknowledges that ‘laws that criminalise sex work and same-sex practices create barriers to people accessing services and reinforce vulnerability, stigma and discrimination’ and urges that ‘greater advocacy from all stakeholders is needed to support plans for introducing reforms to legislation that aim to reduce vulnerability and stigma and discrimination.’<sup>79</sup> And PNG’s report to the United Nations General Assembly Special Session on HIV/AIDS (UNGASS) on PNG’s progress in meeting its obligations under the 2001 *Declaration of Commitment on HIV/AIDS*<sup>80</sup> identified laws criminalising sex work and sodomy as presenting an obstacle to HIV prevention, treatment, care and support for sexually marginalised groups.<sup>81</sup>

### Decriminalisation of prostitution

TWO adults enter a room, agree a price, and have sex. Has either committed a crime? Common sense suggests not: sex is not illegal in itself, and the fact that money has changed hands does not turn a private act into a social menace. If both parties consent, it is hard to see how either is a victim. But prostitution has rarely been treated as just another transaction, or even as a run-of-the-mill crime: the oldest profession is also the oldest pretext for outraged moralising and unrealistic lawmaking devised by man.

*Economist*, 2004.<sup>82</sup>

In Chapter 6, I identified the main arguments made in PNG for decriminalising acts of selling or exchanging sex: that decriminalisation would reduce rape and sexual violence, whereas criminalisation drives the practice underground, increases the spread of disease, and in any event cannot stop it. Arguments against are that the sex trade spreads disease and is against Christian, moral, cultural and family values. Blame is attributed to the needs of survival, women’s

77 National AIDS Council of Papua New Guinea, n.d., *Papua New Guinea National Strategic Plan on HIV/AIDS 2004–2008*, Port Moresby: PNG National AIDS Council.

78 Carol Kidu, 2011, ‘A national response to the HIV epidemic in Papua New Guinea,’ *UN Chronicle* XLVIII (1) May, online: <http://www.un.org:80/wcm/content/site/chronicle/home/archive/issues2011/hivaidsthefourthdecade/nationalresponsetohivpapuanewguinea>, accessed 20 August 2011.

79 National AIDS Council of Papua New Guinea, 2010, *Papua New Guinea: National HIV and AIDS Strategy 2011–2015*, Port Moresby National AIDS Council of Papua New Guinea, 52.

80 United Nations General Assembly Special Session on HIV/AIDS (UNGASS), *Declaration of Commitment on HIV/AIDS*, 27 June 2001 A/RES/S-26/2.

81 National AIDS Council of Papua New Guinea, *Papua New Guinea: National HIV and AIDS Strategy 2011–2015*, 52.

82 ‘Sex is their business,’ 2004, *Economist* (London), 372(8391), September 4: 11, online: <http://www.economist.com/node/3151258>, accessed 27 August 2011.

laziness and failure to 'go home to the village and work hard,' lack of discipline and more recently, the intervention of men as moneyed clients or as pimps. Solutions posited are to send the women back to the village, rehabilitate them with domestic skills training, or to legalise prostitution through registration of brothel workers accompanied by regular health checks.

Whether or not the criminalisation of the sex trade is supported or condemned, most public comments demonstrate that there is considerable confusion surrounding the terms decriminalisation and legalisation.<sup>83</sup> The Australian Sex Workers Association Scarlet Alliance defines them as follows:

*Decriminalisation* refers to the removal of all criminal laws relating to sex work and the operation of the sex industry. The decriminalisation model is the favoured model of law reform of the international sex workers rights movement. Occupational health and safety and other workplace issues can be supported through existing industrial laws and regulations that apply to any legal workplaces ...

*Legalisation* refers to the use of criminal laws to regulate or control the sex industry by determining the legal conditions under which the sex industry can operate. Legalisation can be highly regulatory or merely define the operation of the various sectors of the sex industry. It can vary between rigid controls under legalised state controlled systems to privatising the sex industry within a legally defined framework. It is often accompanied by strict criminal penalties for sex industry businesses that operate outside the legal framework.<sup>84</sup>

The regulatory aspects of legalisation do not appear to serve sex sellers well, certainly not in the developing world, at least. According to Jenkins,

[T]he regulatory approach is government-driven and aims at monitoring impact through standard HIV surveillance. The broader public is ... considered to be at risk due to sex workers who must be controlled. This is apparent from the emphasis on commercial sex only.... Stigmatization of sex workers, discriminatory practices and activation of their rights as either workers or citizens are not issues of concern. The police and madams play a major role and gain additional power over sex workers through government (usually health department) intervention....

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83 In 2011, Dame Carol Kidu attributed the failure of public advocacy efforts to inadequate differentiation of the two. See Kidu, 'A national response to the HIV epidemic in Papua New Guinea.'

84 Scarlet Alliance, n.d., *Terminology*, online: <http://www.scarletalliance.org.au/issues/terminology/>, accessed 20 March 2011.

Secondary issues, such as prevention of violence, recruitment into sex work, trafficking of girls and women, and retirement from sex work are not addressed at all.<sup>85</sup>

Others too consider that legalisation, with or without regulation of the sex industry, is not appropriate for less-developed countries.<sup>86</sup> A recent report from Fiji details severe human rights abuses at the hands of the military following the introduction of that country's new, stricter prostitution laws.<sup>87</sup> Any intervention by the state into the selling of sex in PNG will only open the way for further abuse, if not by police then by health officials, city rangers appointed to regulate the informal sector, and so on.<sup>88</sup> PNG would be better served by simple decriminalisation. This is the aim of Scarlet Alliance itself, even in a developed country such as Australia.<sup>89</sup>

In 2004, a paper was prepared for the National AIDS Council on decriminalisation options for prostitution.<sup>90</sup> It raised the possibility of a test case to challenge the reasoning of Justice Wilson in *Anna Wemay's Case*, or at least to affirm Acting Justice Narokobi's suggestion in *Monika Jon's Case* that a single act of selling sex does not constitute a crime. It then suggested various legislative amendments: first, to the child prostitution provisions in the *Criminal Code*, to ensure that prostitution by a child was not a crime in any circumstances; second to ensure that condoms did not provide evidence of prostitution. The possibility of legalisation and regulation was again canvassed, and dismissed as inappropriate in the PNG context. The paper concludes with a recommendation for simple decriminalisation.

The options for reform of sex trade laws are firstly, legislative action. In addition to the changes to the *Criminal Code's* child prostitution provisions canvassed in

85 Carol Jenkins and Andrew Hunter, 2005, *Empowering Sex Workers: Does It Matter?* Report for CARE, Asia Regional Management Unit 4.

86 See for example Bebe Loff, Cheryl Overs and Paulo Longo, 2003, 'Can health programmes lead to mistreatment of sex workers?' *Lancet* 361, 7 June: 1982–83.

87 Karen McMillan and Heather Worth, 2011, *Sex Workers and HIV Prevention in Fiji: after the Fiji Crimes Decree 2009*, Sydney: International HIV Research Group, UNSW.

88 The international Network of Sex Work Projects has long recognised the negative effects of mandating STI health checks, brothel registration, condom use and so on. Placing more powers of control into the hands of officials, whether police or otherwise, simply enables more harassment and abuse. See Loff, Overs and Longo, 'Can health programmes lead to mistreatment of sex workers?'; Jenkins and Hunter, *Empowering Sex Workers: Does It Matter?* 8. Even where the objects of surveillance and control are not engaging in sexual activity, abuses are frequent. Reports of rangers in Moresby harassing *buai* sellers are frequent, and in 2010, I personally witnessed a contingent of police swooping on vendors of drinks, newspapers, cheap trade goods etc., and while I saw no personal violence, I saw property smashed and confiscated.

89 As I heard declared and roundly cheered at the Scarlet Alliance National Forum, 17–19 November 2009, Canberra.

90 Eventually published in 2010. Karen Fletcher and Bomal Gonapa, 2010, 'Decriminalisation of prostitution in Papua New Guinea,' in *Civic Insecurity: Law, Order and HIV in Papua New Guinea*, ed. Vicki Luker and Sinclair Dinnen, Canberra: ANU E Press, 141–52, online: <http://press.anu.edu.au?p=94091>, accessed 8 April 2014.

Fletcher's paper, legislative changes should also be considered to the *Criminal Code* Section 231 (Bawdy Houses), which creates the offence of keeping a 'bawdy house': 'A person who keeps a house, room, set of rooms or place of any kind for purposes of prostitution is guilty of a misdemeanour.'

Other legislative reform initiatives should also include reforms to the *Summary Offences Act* Section 55, the law which makes 'living on the earnings of prostitution' an offence; and to Section 56 'Keeping a Brothel' and Section 57 'Suppression of Brothels'; two sections which criminalise brothel-keeping, providing financial assistance to brothel-keeping, using or permitting the use of premises as a brothel, or letting premises to be used as a brothel.

None of these provisions is much used by the formal law enforcement system. The greatest threats posed to sex sellers come from police violence, abuse and harassment, and the stigma and abuse associated with them in PNG. This is profoundly disempowering, undermining any sense of self-esteem and self-worth of those involved, and reduces their ability to come out into the open to access counselling, information about HIV prevention, condoms or necessary health and social services, or to insist on safe sex practices with their clients. Repeal of Section 55 at least could reverse these negative effects, uphold the human rights of sex sellers, and assist greatly in the management of the HIV epidemic.

The alternative to direct legislative intervention lies through the courts. A test case could be mounted whereby a person convicted in the District Court Under Section 55 appeals to the National Court to have the decision in *Anna Wemay's Case* overturned, firstly on the simple ground that it is bad law, supported by such constitutional grounds as interference with the right to privacy, and the rights of all citizens to integral human development. Success in such a case will not affect laws relating to brothels, but there is some argument for retaining these offences which criminalise the sexual exploitation, particularly of women and girls. Removal of brothel and pimping offences may encourage an increase in brothels, which may become centres for organised crime, drug dealing and trafficking. On the other hand, retention of brothel offences will maintain the sex trade as a covert activity, with its associated stigma and discrimination, and continue to restrict the access by workers themselves to health, counselling and condoms.

### Decriminalisation of sodomy

It was urged that conduct of this kind is a cause of the demoralisation and decay of civilisations ... this argument ... is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these

reasons. But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind.

*Wolfenden Report*, 1957.<sup>91</sup>

Legislative reform of the sodomy laws would be a relatively simple matter. Unlike many other jurisdictions which must rely exclusively on them to prosecute instances of forced sex and sex with boys, PNG already has laws to cover these offences, introduced as part of the *Criminal Code (Sexual Offences and Crimes Against Children) Act* 2002. By the introduction of gender-neutral language and the concept of 'sexual penetration,' this amendment made it illegal to rape a male.<sup>92</sup> And the new Part IV Division 2A criminalises all sexual interference with children, boys or girls. The continuance of the sodomy laws means that there are now in effect two different offences for the same act; and that the removal of Sections 210 and 212 would be a simple matter of repeal.<sup>93</sup> Again, success of this course of action depends on political will.

An alternative would be to take a case challenging the constitutionality of the sodomy laws to the Supreme Court under *Constitution* Section 19. This does not require the existence of a prior course of conduct, but it does require that one of the officers or bodies specified under Section 19 agrees to mount the case. Alternatively, if a person considers that his rights have been breached, for example his right to privacy if he is being prosecuted under *Criminal Code* Section 210 as Johnny Mala was, he could ask the judge during the prosecution to refer the case to the Supreme Court under *Constitution* Section 18. Or he could take a case under Section 57. There are many variations on these scenarios, but they all presume that a case will come to court in the first place, and that the person involved (as applicant or defendant) has access to legal assistance.

### Decriminalisation initiatives

Rather than analyzing power from the point of view of its internal rationality, it consists of analysing power relations through the antagonism of strategies.... For example, to find out what our society means by sanity, perhaps we should investigate what is happening in the field of insanity.... And what we mean by legality in the field of

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<sup>91</sup> *Wolfenden Report*, §54.

<sup>92</sup> *Criminal Code* Sections 347, 349.

<sup>93</sup> This of course does not take into account the many other issues raised in the area of queer law reform, such as rights to insurance, marriage etc. Those are different issues entirely, and I have not considered them in my research.

illegality.... And, in order to understand what power relations are about, perhaps we should investigate the forms of resistance and attempts made to dissociate these relations.

Michel Foucault, 1982.<sup>94</sup>

Resistance comes in many forms. The sex selling gays I described in Chapter 5 who stole the abusive expatriate client's wallet were resisting in a small way. So too is Peter, when he tells men from the Disciplined Forces to get lost. In Chapter 5 too, I described the activism of one of PNG's favourite singing stars, Moses Tau. I portrayed his position as a 'resistive subject,' the individual activist who challenges essentialised stereotypes and disrupts the normative framework—he demonstrates the power of the 'resistive subject' to bring about change. He is not alone, although he may be one of the most conspicuous. When Dame Carol Kidu became Minister for Community Development, she was able to further various human rights agendas, including that of decriminalisation of sex work and sodomy. In Chapter 6, I described her involvement in the public debate of 2005 on the legalisation of prostitution. When members of the medical profession informed her of their concerns about the harmful effects on HIV prevention and care of criminal laws on selling sex and male-male sex, she embarked on a multi-sectoral effort to review those laws. After reappointment following elections in 2007, she reformulated this effort into a Reference Group of public sector, private sector and civil society representatives, including representatives of criminalised groups, to further the decriminalisation initiative.<sup>95</sup> The Reference Group started work, canvassing possibilities for reform based on human rights and public health grounds.

In 2010, Dame Carol took a submission to the National Executive Council (Cabinet) based on the Reference Group work, requesting a review of laws on sex work and consensual male-to-male sex from a social and public health perspective, but Cabinet rejected it outright on moral, religious and custom grounds.<sup>96</sup> She did however succeed in obtaining endorsement of her proposal to refer a review of the laws in question to the Constitutional and Law Reform Commission (CLRC), with instructions to undertake widespread and lengthy community consultation and work in conjunction with the Reference Group. Meanwhile, her advocacy work with parliamentarians had resulted in the then Attorney-General becoming enthusiastic about the possibilities of a special reference under *Constitution* Section 19 to the Supreme Court challenging the

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94 Michel Foucault, 1982, 'The subject and power,' *Critical Inquiry* 8(4): 777–95, 780.

95 Kidu, 'A national response to the HIV epidemic in Papua New Guinea.'

96 Ibid.

constitutional validity of laws which criminalised consensual sex between adults in private.<sup>97</sup> She called the ‘perfect storm’ meeting, on that sultry morning in late 2010, to tell us this good news.

But politics intervened. Within weeks of the Attorney-General’s decision, a Cabinet reshuffle saw him replaced by a new Attorney-General known for his conservative religious views on social issues.<sup>98</sup> The initiative lapsed, and the CLRC did not make any apparent moves to implement the NEC direction.

Despite these political upheavals, Dame Carol Kidu continued her work, which culminated in a ‘National Dialogue on HIV/AIDS, Human Rights and Law’ held in Port Moresby in June 2011. Retired Australian High Court Justice Michael Kirby was guest speaker, and proceedings included satellite consultations with the faith community, civil society, the media and women’s groups, panel and group discussions at the Dialogue itself, and side meetings facilitated by Kirby with parliamentarians, legal officers, religious leaders and the media.<sup>99</sup> Although many invited politicians, including the Minister for Health, failed to attend, Dame Carol Kidu claimed that the Dialogue had ‘got people talking,’ and had given a human face to the epidemic as participants from all groups in the community met and exchanged views.<sup>100</sup>

In 2011, politics intervened again in a highly significant way. The Somare-led government of the day was voted out of office in August, Dame Carol lost her Ministry, and she had already announced publicly that she would not stand for election again.<sup>101</sup> Following the general election of 2012, the decriminalisation initiative lost its prime parliamentary champion. The new Minister for Community Development does not appear to be interested in such matters.

## What are the chances?

If law is discourse, it plays a role in the construction of the subject. Law is constantly engaged in re-inventing and re-interpreting the subject, including the sexual subject.... When the sexual [subject] comes to law,

97 Field notes November 2010.

98 The new Attorney-General was sworn in on 7 December. See ‘Govt in turmoil,’ 2010, *Post-Courier* (online), 8 December.

99 National AIDS Council of Papua New Guinea, 2011, Press Release, 14 June, online: <http://www.undp.org.pg/docs/Press%20Release%2014%20June%202011%20-%20National%20Dialogue.pdf>, accessed 27 August 2011.

100 L. Fox, 2011, ‘Australian lawyer calls for PNG action on HIV,’ *Australia Network News* (online), 17 July, online: <http://www.undp.org.pg/docs/Press%20Release%2014%20June%202011%20-%20National%20Dialogue.pdf>, accessed 27 August 2011; pers. comm. friends involved in organisation of the Dialogue.

101 See for example ‘Dame Carol Kidu,’ 2011, *Australia Network—Pacific Pulse* (online), 8 June, <http://australianetwork.com/pacificpulse/stories/3238859.htm>, accessed 27 August 2011.

whether to claim rights, or to challenge a punitive regime that bounds her off as someone who is stigmatized, inauthentic or foreign, she counters the weight of sexual and cultural normativity as she transgresses the boundaries of both. In challenging these normative boundaries, she creates the possibility for the recognition of multiple sexual identities or sexual practices through redefining and redrawing the boundaries.

Ratna Kapur, 2001.<sup>102</sup>

Law reform is not just a matter of selecting the best course of action from the options canvassed above, writing the law or the case submissions, and letting it all take its course to a triumphant conclusion. A further essential requirement is will—political will, the will of society, the will of peripheral and resistive non-state actors—which inspires and guides the contests of power in a society. Law is inextricably linked to power, through its role in constructing and maintaining the socio-political norms which guide the exercise of that power. But society is not managed solely through regulatory norms. Resistance, the continual transgression of the boundaries of identity and community, can provoke social transformation as well as social reproduction. Because law's ever-responsive nature keeps it open to an ever-changing society, it too may be provoked into change.<sup>103</sup> Through successful resistance, social order can be unmade and remade, and law can respond accordingly. Resistance, capable of redrawing the boundaries, of remaking society's order, becomes a process aimed at disrupting the dominant narratives which comprise social norms.

## A problem of narratives

In Chapter 6, I used intersectionality theory to analyse the nature of categories of experience in PNG, and the construction of dominant and subordinate groups within those categories which provides a matrix of power relations. This is done by the linguistic creation of labels and narratives affixed to categories, groups and sub-groups, who are then classified as 'good' or 'bad' depending on their degree of dominance or subordination. So prostitutes as a group are categorised by gender as 'woman.' The dominant narrative of 'woman' is inflected in the category of locale, by the quality of the hardworking, submissive village-dwelling woman, and in the category of sexuality by the quality of purity, so that the mobile, urbanised, promiscuous prostitute becomes 'bad' in multiple ways. By the same process, gays and transgenders, although classified by gender

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102 Ratna Kapur, 2000–2001, 'Postcolonial erotic disruptions: legal narratives of culture, sex, and nation in India,' *Columbia Journal of Gender and Law* 10: 333–84, 382–83.

103 Ben Golder and Peter Fitzpatrick, 2009, *Foucault's Law*, Abingdon, UK: Routledge, 61–62, 65, 80–81, 109–10.

as ‘man,’ fail completely in terms of sexuality to conform to the dominant narrative of the heterosexual, married and fertile *man tru*. Like sex sellers, gays and transgenders are ‘bad,’ and deserving of society’s punishment.

Herein lies the problem. It is not enough to argue that criminalising sexual minorities spreads HIV by driving them underground. It is not enough to argue their human rights to equal treatment before the law, and their freedom from discrimination and abuse. Those seeking reform must challenge the entire weight of the normative narratives which subordinate them. In doing so, they perform enter the murky terrain of law’s right to define, distinguish and adjudicate right and wrong.

## Crimes, sins and morals

A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.

Constitutional Court of South Africa, 1998.<sup>104</sup>

Half a century after the *Wolfenden Report*, sexual reform movements are firmly on the international agenda. The United Nations and its agencies, countless international NGOs, national governments and civil society organisations, are all urging states to move towards the decriminalisation of the selling of sex and sex between males. Apart from pressing the public health issue of HIV, the main principle on which arguments are founded (briefly, lengthily, eloquently, forcefully) is the breach of human rights.<sup>105</sup>

104 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15, §136 per Sachs J.

105 See for example ‘Objectives,’ n.d., *Scarlet Alliance*, online: <http://www.scarletalliance.org.au/object/>, accessed 31 August 2011; Frans Viljoen, 2009, ‘International Human Rights law: a short history,’ *UN Chronicle* L(4) December, online: <http://www.un.org:80/wcm/content/site/chronicle/home/archive/Issues2009/internationalhumanrightslawashorthistory>, accessed 6 August 2011; Human Rights Watch, 2008, *This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism*, New York: Human Rights Watch; Kirby, ‘Human rights—the way forward’; and numerous international and regional documents, including those referred to above.

Opposition to decriminalisation in PNG is based largely on concerns about morality. Arguments against selling and exchanging sex are posed usually in terms of threats to the status of those involved, Christian principles, and the need to uphold family values. Arguments against condoning male-male sex are perhaps even more blatantly couched in terms of offences against morality and Christianity. As I have demonstrated in Chapter 6, publications, letters and statements propounding these arguments usually conclude with an exhortation to reaffirm criminalisation. Such views rarely if ever undertake any express consideration of the relationship of morality and law, or of law's right to intrude in matters of sexual morality.<sup>106</sup>

### Law and morality

The function of the criminal law ... is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence ... but [not] to intervene in the private lives of citizens, or to seek to enforce any particular patterns of behaviour.

*Wolfenden Report, 1957.*<sup>107</sup>

The *Constitution* recognises the significance of this principle. Laws may regulate or restrict fundamental rights and freedoms to the extent necessary in order to give effect to the public interest in public safety, public order and public welfare (Section 38). The right to privacy under Section 49, the right to equal treatment before the law in Section 37, the freedom from discrimination in Section 55 may all be restricted on the grounds of public interest. This was the argument taken in the *Naz Appeal*. The problem lies in the interpretation and application of these principles.

The court in *Mama Kamzo's Appeal*, and indeed the lawyers who instigated it, were deeply concerned that a precedent would be set whereby every recipient in an anal sex act would be able to claim duress, or a lack of free will. The Chief Crown Prosecutor considered it 'a matter of principle of such importance that the judgement should not be permitted to stand as an authority.' He noted that the offence charged was serious, carrying a high maximum penalty, and went on to opine that 'there must be some reasonable proportion between the seriousness of the offence and the steps that must be taken to prevent it by those

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<sup>106</sup> A striking exception is Bernard Narokobi's essay in the *Post-Courier* in 1977. See Narokobi, 1977, 'Should the law permit immorality?' *Post-Courier*, 27 April, 12–13.

<sup>107</sup> *Wolfenden Report*, §13–14.

whose duty is to not “permit” it.’<sup>108</sup> The court agreed, declaring that the accused must do more than simply allow, in order to be not guilty of ‘permitting’ the act. The accused must be proactive in his opposition.<sup>109</sup>

But perhaps Justice Prentice, who wrote a separate but concurring opinion in the appeal case, came closest to revealing the true intentions of the law when he wrote:

Buggery is one of the offences of sexual indecency which modern text writers see as ‘not designed so much for private protection as for the enforcement of officially received opinions on particular aspects of sexual morality.’... The State, until recent times has asserted an interest against its occurrence, to the extent of constituting it an assault despite its being a consensual act.<sup>110</sup>

The state, he pointed out, objects to acts of sodomy, or ‘buggery’ as he calls it, on moral grounds. And if society decrees through its laws that its morals must be thus protected via the law, then the judges are bound to obey and protect. A similar argument had been raised, although not for the first time, before the Wolfenden Committee a decade previously. But in its report, the Committee declared that ‘unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.’<sup>111</sup>

These differing views of the relationship of law and morality are but one representation of a debate which has been carried on since the nineteenth century. British jurist Lord Devlin, in response to the *Wolfenden Report*, urged that it is the law’s duty to protect morality, perhaps because it promotes social cohesion—even private acts should be criminalised if ordinary people feel a sufficient intensity of ‘intolerance, indignation and disgust’ towards a particular form of conduct.<sup>112</sup> Contra this view, legal philosopher H.L.A. Hart supported the *Wolfenden Report’s* view that each individual has the right to act as he wants, so long as these actions do not harm others,<sup>113</sup> an argument based

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108 *Mama Kamzo File*, Chief Crown Prosecutor to Crown Solicitor, 21 March 1972, Accession 452, Box 14612, Crown Prosecution file 5-9218, 1.

109 *R v M.K.* [1973] PNGLR 204 (*Mama Kamzo’s Appeal*).

110 *Ibid.*

111 *Wolfenden Report*, §13–14, §61.

112 Patrick Devlin, 1960, *The Enforcement of Morals*, London: Oxford University Press.

113 H.L.A. Hart, 1963, *Law, Liberty and Morality*, London: Oxford University Press.

on John Stuart Mill's 'Harm Principle': 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'<sup>114</sup>

Since then, new considerations have been advanced and new principles have been elaborated: those of equal rights, the right to privacy, and a clearer articulation of the morality/law divide. The *Universal Declaration of Human Rights* (UDHR) provides at Article One that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'<sup>115</sup> And at Article Twelve: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

The PNG *Constitution*, in common with the constitutions of other newly-independent nations of the time, entrenches the political and civil human rights set out in the UDHR, including the right to life, the right to privacy, the right to freedom of choice of employment, the right to equal treatment of all before the law and the right of all citizens to the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.<sup>116</sup> It also requires courts to have regard to this and many other international documents regarding human rights.<sup>117</sup> However, as described above, PNG's legal system is characterised by tensions between this modern and detailed system of constitutionally entrenched human rights, the body of imported law which is often paternalistic, outdated and inappropriate, and many of the fundamental principles of customary law.<sup>118</sup>

In a lengthy newspaper article on decriminalisation of prostitution in 1977, Bernard Narokobi made reference to Mill's Harm Principle and reminded readers that, nevertheless, the English criminal law is known for its heavy encroachment

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114 John Stuart Mill, 1992 [1959], *On Liberty*, Legal Classics Library; John Skorupski, 2005, 'Mill, John Stuart,' in *The Oxford Companion to Philosophy* [2nd ed.], online: <http://www.oxfordreference.com/view/10.1093/acref/9780199264797.001.0001/acref-9780199264797-e-1604?rsk=NAp1Zf&result=3>, accessed 16 April 2014.

115 Despite being a statement of the equal rights of all humanity, the term 'brotherhood' is patently gendered. Similarly, the masculine pronoun is used in Article 12.

116 See the description in Christine Stewart, 1993, *Law, Ethics and HIV/AIDS: Existing Law of Papua New Guinea*, report prepared for Law Reform Commission of Papua New Guinea and Papua New Guinea Department of Health, Boroko, Papua New Guinea; Law Reform Commission of Papua New Guinea and Papua New Guinea Department of Health, 2–3; and the further discussion in National AIDS Council of Papua New Guinea, 2001, *Review of Policy and Legislative Reform Relating to HIV/AIDS in Papua New Guinea*, report prepared for National AIDS Council of Papua New Guinea, Port Moresby, 27–31.

117 *Constitution* Section 39(3).

118 Christine Stewart, 1993, 'Existing law on HIV/AIDS in Papua New Guinea,' in *Law, Ethics and HIV: Proceedings of the UNDP Intercountry Consultation, Cebu, Philippines 3–6 May, 1993*, ed. Robert A Glick, New Delhi: United Nations Development Programme, 133–50, 68–70.

on matters of individual liberty. But there can be a price: ‘For those who want to see law and morality merge, there is the need also to see that the policing of that law does not create even greater social and moral ills. It is all too easy for us to set up our own judgement.’<sup>119</sup> He warns that ‘there is a limit to what we can do by way of controlling human conduct through criminal law.’ Reliance on the criminal law not only might create further harm, but might not really work to address underlying social issues, for example the poverty which causes women to sell sex.<sup>120</sup> And how right he was!

A further dimension can be added to this argument. In the *Naz Case* which declared the Indian *Penal Code*’s sodomy law unconstitutional insofar as it related to consensual sex between adults, the New Delhi High Court drew a distinction between what it termed popular or public morality and constitutional morality:

Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights.... Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting [*sic*] notions of right and wrong. If there is any type of ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality.<sup>121</sup>

Constitutional morality, the court went on to point out, is to be found in the Fundamental Rights and Directive Principles of the Indian *Constitution*—the ‘conscience of the *Constitution*.’<sup>122</sup> The same argument can be made in relation to the PNG *Constitution*, where ‘constitutional morality’ is better-known as ‘the spirit of the Constitution,’ and its principles are to be found in the Preamble. In both jurisdictions, it is incumbent on the State to protect these principles.<sup>123</sup>

Contradicting these arguments, however, the Indian Supreme Court proceeded to strike down the initial *Naz Case* on the grounds *inter alia* of morality. Whereas the Delhi High Court had held that moral indignation cannot be a basis for curtailing an individual’s rights to privacy and dignity,<sup>124</sup> the Supreme Court too found no ‘compelling state interest’ which would justify retention

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119 Narokobi, ‘Should the law permit immorality?’ 12–13.

120 Ibid.

121 The *Naz Case*. The Indian *Penal Code* is similar to the PNG *Criminal Code*; so too are the human rights provisions of the Indian *Constitution*.

122 Ibid., §80.

123 Ibid., §81.

124 Mrinal Satish, 2013. ‘Comment: breaking down the SC judgement on Section 377,’ *IBN Live*, online: <http://ibnlive.in.com/news/comment-breaking-down-the-sc-judgement-on-section-377/439348-3.html>, accessed 14 December 2013.

of a law which infringes on fundamental human rights, but nevertheless applied the principle—or more precisely, declined to take responsibility for overturning it.<sup>125</sup>

### The new Christianity

Lawyers may argue the legal niceties of popular, private and constitutional moralities, but it is through expressions of community opinion that social norms can be mapped. In PNG, family values and Christian morality, the latter increasingly derived from fundamentalist doctrine, are significant factors in the formulation of public opinions on sexuality, as I have described in Chapter 6. The constructs of intersectionality I developed in that chapter answered many of my questions, but failed in part to respond to one: why do many of today's Christian churches in PNG come to the aid of the state in condemning outlawed sexualities, while at the same time ignoring the Christian message of tolerance, love and forgiveness?

Allen Feldman discusses the modern state's use of visual and aural images portraying 'anthropologically threatening images of violence, terror, covert infection and social suffering' to construct a *cordon sanitaire* around its citizens, striving to protect them from danger.<sup>126</sup> Risks are classified using categories similar to those posited by intersectionality theory (race, class, gender, ethnicity, religion, immune system status and sexuality) to identify and construct a narrative of the 'other' as constituting the zone of danger. This danger lies not only beyond the boundary of the zone, it also lurks within, as a terrorist 'sleeping body' which carries the continual risk of violence and destruction. We are no longer able to perceive or defend ourselves from these insidious threats, and must rely on superior agency to do it for us. The globalised sleeping body within is impossible to eradicate completely but can be managed by exposure and combat. We must be eternally vigilant, and our need for protection must be continually reproduced through media techniques which enable and legitimise the state's on-going processes of security provision.

Feldman's discussions centred upon the politics of western states and the threat of physical violence from sleeper terrorists. His arguments are constructed in the context of the USA post-9/11, but they have a wider application. The same psychology may apply anywhere, and for any reason. Disease, the 'covert infection,' elicits the need for greater social control.<sup>127</sup> Stigmatised and

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125 Prachi Shrivastava, 2013, 'Column inches slamming SC's ruling overwhelm but 2009 academic argues how #377 is constitutional,' *Legally India*, online: <http://www.legallyindia.com/201312124187/Constitutional-law/section-377-judgment-reactions>, accessed 14 December 2013.

126 Allen Feldman, 2005, 'On the actuarial gaze: from 9/11 to Abu Ghraib,' *Cultural Studies* 19(2): 203–26.

127 Catherine Campbell and Andrew Gibbs, 2009, 'Stigma, gender and HIV: case studies of inter-sectionality,' in *Gender and HIV/AIDS: Critical Perspectives from the Developing World*, ed. Jelke Boesten and Nana K. Poku, Farnham: Ashgate, 29–46, 32.

vulnerable groups such as sex sellers and gays are easily perceived as sources of covert infection, sin and social suffering and classified as risk-bearing parts of the threatening sleeper body. The processes of security-provision decrease their capacity to make visible the consequences of their stigmatisation, render invisible or marginal the violations of their human rights.

New-wave churches in PNG and elsewhere, through their fundamentalist and charismatic Christian preaching, extend to their congregations the protection of a similar spiritual *cordon sanitaire*. In place of the shock conveyed by the images of death and destruction which Feldman describes, these churches deploy often exuberant, dramatic, spirit-filled rituals to elicit ecstatic experiences; insist on strict adherence to rigid rules of living; and promise salvation to every individual who achieves conversion and the appropriate state of grace. The doctrinal message is of the damnation of sinners without and the saved within—salvation is achieved by prayer, obedience to church doctrine and constant vigilance.<sup>128</sup> Vulnerable groups stigmatised on the basis of their sexuality are the bearers of threat, posing risk to the utopian vision of normalcy within. The New Testament message of brotherly love is eclipsed by this exclusionary process, which declares them all as sinners, to be damned or saved but never to be accepted for their sexual identity or activity. They constitute the moral sleeper body, and it is the church, not the state, which provides the vital ongoing processes of security-provision for their management and containment, through the vehement preaching and public statements by any number of pastors and congregational adherents. Reasoned appeals to the New Testament's Christian ideals of love, humility, compassion and mercy pale beside the promise of protection from threats of death and damnation.<sup>129</sup>

## The hope of change

Law represents a key modality of our sociality, of our continue being-with each other. Through its ability to combine iteratively a determinate securing of limits and a responsive regard to the disruption of those limits and their re-formation, law provides an opening to futurity.

Ben Golder and Peter Fitzpatrick.<sup>130</sup>

The title of this book is designed to emphasise the nexus between the criminal law and the opprobrium with which sex sellers and gays, as people criminalised

128 Tanya Luhrmann, 2004, 'Metakinesis: How God becomes intimate in contemporary US Christianity,' *American Anthropologist* 106(3): 518–28; Joel Robbins, 2004, *Becoming Sinners: Christianity and Moral Torment in a Papua New Guinea Society*, Berkeley: University of California Press, 319–24; Robbins, 2004, 'The globalization of Pentecostal and Charismatic Christianity,' *Annual Review of Anthropology* 33: 117–43.

129 Franco Zocca, 2007, *Melanesia and its Churches: Past and Present*, Goroka: Melanesian Institute, 193–95.

130 Golder and Fitzpatrick, *Foucault's Law*, 125.

for acts of consensual sex, are regarded in PNG today. They are criminalised by a system of governing laws introduced by a colonising power—laws based on the principles of the relationship between law and morality pertaining in the metropole at the time, and often greatly at odds with indigenous legal systems.

But times have changed, and as the colonised became citizens of an independent state, so too have their social mores. Laws given by the state are accepted, in principle at least, as the system of power by which society is governed. Other discourses have also become internalised in the new PNG. The colonial system of medicine was based on the control of the health status of colonised individuals, using public health models of disease control, such as identification, contact tracing, barrier nursing, isolation, quarantine and so on, measures now fixed in public health law. If the disease is connected to sex, then the sexually subordinated were subject to the most stringent forms of these controls. Medical discourse now focuses on the search for power over the HIV virus, an enterprise strengthened by constant media attention and international aid donor strategies of epidemic management.

Religious discourse is even more strongly linked to disciplinary power: 'All religions are basically concerned with power. They are concerned with the discovery, identification, moral relevance and ... the systematic orderings of different kinds of power, particularly those seen as significantly beneficial or dangerous.'<sup>131</sup> Both before and after Independence, religion (whether Christian or not) played a crucial role in social ordering in PNG, and people still move easily between the secular and the 'religious,' which today has become a blend of traditional beliefs and Christian piety. Today, religious narratives are an inextricable part of political discourse, right up to the level of national politics.<sup>132</sup> The right of religion to declare who are sinners and who are saved, as interpreted by the essentialised teachings of the 'new churches,' is increasingly accepted. Social protectionism now sits well with fundamentalist Christian doctrine and its promise of control over the sleeper body (be it the HIV virus or the sexually abnormal) within society.

But as Foucault reminds us, the sovereignty of the state, the form of the laws it promulgates and enforces, are only the terminal forms that power takes—power

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131 Kenelm Burridge, 1969, *New Heaven, New Earth: A Study of Millenarian Activities*, Oxford: Basil Blackwell, 5.

132 Phillip Gibbs, 2002, 'Religion and religious institutions as defining factors in Papua New Guinea politics,' *Development Bulletin* 59 (October): 15–18; Gibbs, 2005, *Political Discourse and Religious Narratives of Church and State in Papua New Guinea*, State Society and Governance in Melanesia Working Paper No. 1 of 2005, 5–6. The political upheaval of December 2011 saw a coalition of most of the mainstream churches, and several Pentecostal and fundamentalist ones, organising a roundtable conference between the two contending Prime Ministers, O'Neil and Somare, to resolve the political impasse, saying that 'being the voice and the mouthpiece of the 6-point-5 million Papua New Guineans, they have made it their business to ensure there's reconciliation so that the ordinary Papua New Guineans are not unnecessarily penalized.' See 'O'Neill/Namah ... In control of Government,' 2011, *Papua New Guinea Blogs*, 16 December, online: <http://www.pnblogs.com>, accessed 17 December 2011.

is always immanent and power relations are always unequal.<sup>133</sup> Despite PNG's official acceptance of global standards of human rights and their entrenchment in the *Constitution*, the PNG state today is little interested in the human rights of its citizens. Those who have the power, the *elites*, declare the norms and make the laws. Crimes, sins and morals typically focus on sexual practices as the area most subjected to unduly harsh penalties, if they fall outside the parameters of normative heterosexual, marital, monogamous, reproductive and non-commercial sexuality. Practices such as sex between males or selling sex bear the greatest social, religious and legal stigma. Any attempts to refigure 'bad' sexual practices as morally and legally acceptable are feared and resisted.<sup>134</sup> The sexually subordinated are at the intersection, but it is not a forgotten space; rather, the space looms large in the imagination, as it confronts dominant and predominant narratives of what is 'good' and 'bad' about sex and sexualities, what is legitimate and what is criminal, what is blessed and what is sinful.

I trust that the evidence and analysis I have set out will help those who hope and work for change in carrying on, on many fronts:<sup>135</sup> in challenging fear and resistance; in loosening the forces which entangle law and morality; in identifying and foregrounding those 'resistive subjects,' the champions whose social transgressions can be morally productive, like those of the *bigman* of old.<sup>136</sup> I hope that my research has provided evidence which can support the argument for reform of oppressive and stigmatising laws. I hope that someday, Dame Carol Kidu's perfect storm will break and PNG will come closer to achieving the respect for the dignity of the individual, the freedom for all from domination and oppression and the protection rather than the oppression of the law, as called for by the *Constitution*.

Ultimately it is God—not human beings, legislators, courts or churches—who will decide whether the actions of the gay, lesbian and transgender community are right or wrong.

We cannot judge people because of the choices they make about whom to love or live with.

*Fiji Times Online*, 2010.<sup>137</sup>

133 Michel Foucault, 1978 [1976], *The Will to Knowledge: The History of Sexuality: Volume 1*, London: Penguin Books, 92–94.

134 Kapur, 'Postcolonial erotic disruptions: legal narratives of culture, sex, and nation in India,' 339.

135 Ratna Kapur, 'The tragedy of victimization rhetoric: resurrecting the "native" subject in international/post-colonial feminist legal politics,' *Harvard Human Rights Journal* 15: 1–37, 5.

136 F.G. Bailey, 2007, 'Reaching for the absolute,' in *The Anthropology of Morality in Melanesia and Beyond*, ed. John Barker, Aldershot and Burlington: Ashgate, 191–207.

137 On the announcement of decriminalisation of sodomy in Fiji the following was published: 'Being happy and gay,' 2010, *Fiji Times Online*, 26 February, online: <http://www.fjitimes.com/print.aspx?id=140824>, accessed 26 February 2010.

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