

NOTE. THE LAW REFORM COMMISSION'S  
REPORT ON ADULTERY.

I. INTRODUCTION.

In June 1975, the Law Reform Commission of Papua New Guinea received a reference from the then Minister for Justice, The Honourable N. Ebia Olewale, asking it to inquire into and report on how to effect the repeal of the *Native Regulations* of Papua and the *Native Administration Regulations* of New Guinea. Pursuant to this reference, the Commission recommended the repeal of most of the Regulations.<sup>1</sup> However, it was recognised at the time that the Regulations relating to adultery raised especially difficult and controversial issues, and these were put aside for a specialised report.

In October 1975, the Commission published a working paper on adultery,<sup>2</sup> in which it set out alternative methods for reforming the law and asked the general public for their views. Submissions were received from all over the country and the Commissioners held public meetings in many areas to assess the views of the people. The Commission's activities received attention from the press and aroused considerable public interest. In February 1977, the *Report on Adultery*<sup>3</sup> was published. It recommends the repeal of the existing law on adultery and enticement, and the enactment of the draft *Adultery and Enticement Bill 1977*.<sup>4</sup> The Bill will probably be presented at the next session of parliament.

At the beginning of the *Report* it is noted that "it may come as a surprise to many modern persons that the Commission should spend much time on a subject which in most countries is no longer a matter for formal legal process".<sup>5</sup> The reason becomes clear, however, when adultery is seen in its social context. In Papua New Guinea the

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1. Law Reform Commission of Papua New Guinea, *Working Paper No. 2: Abolition of Native Regulations* (October, 1975). The regulations were subsequently repealed by the National Executive Council.
  2. Law Reform Commission of Papua New Guinea, *Working Paper on Adultery* (October, 1975).
  3. Law Reform Commission of Papua New Guinea, *Report No. 5: Adultery* (February, 1977). (Hereafter cited as the *Report*.)
  4. *Report*, at pp. 19-24.
  5. *Report*, at p.1.

essence of adultery is the usurpation of the husband's right to his wife's sexuality by the male adulterer.<sup>6</sup> The husband will at the least demand compensation from the male adulterer, and he may well take revenge by physical violence or sorcery. Social disruption does not end at this point. Marriage in Papua New Guinea closely involves the clan or kin group of each spouse. The husband's kinsmen are also likely to consider that their rights (which arise from their general identification with the aggrieved man who has suffered an injury; their interpretation of the offence as a challenge to their group, their long term interest in the marriage; the rights they have over any wife married to (say) a clansman - rarely are these sexual rights, but usually include an interest in her good behaviour and loyalty, and their previous assistance with bridewealth payments, which validates their involvement in the marriage<sup>7</sup>) have been challenged, and to seek redress from the male adulterer's group, so that the matter may escalate to the point where fighting breaks out between the two groups.

Adultery, then, is a source of considerable violence and social upheaval in Papua New Guinea. It is important that the law should provide adequate remedies so that aggrieved parties will not feel it necessary to take matters into their own hands.

## II. THE PRESENT LAW.

The present law provides a variety of civil and criminal actions in relation to adultery. The *Report* outlines these actions and points out their deficiencies.

### *Criminal Proceedings.*

Under the remaining Native Regulations applying to Papua<sup>8</sup> and to New Guinea<sup>9</sup> adultery is a criminal offence subject to fine, six

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6. For an account of adultery in Papua New Guinea, see Marilyn Strathern, *Report on Questionnaire Relating to Sexual Offences as Defined in the Criminal Code* (February 1975). Strathern says that a wife who commits adultery may be severely punished by her husband, and an adulterous husband may be divorced or subjected to domestic chastisement by his wife and to reproach from his community. But it is the dispute between the husband and the male adulterer which usually gives rise to legal proceedings according to customary law. *Id.*, at pp. 55-66.
  7. *Ibid.* Strathern writes that "there is still today the possibility of violence in some form occurring between the men involved in at least three quarters of the societies [in Papua New Guinea]".
  8. *Native Regulations* (Papua), s.84(1) and (2). Adultery was first made an offence in Papua in 1891 on the ground that it constituted a threat to the peace. See Edward P. Wolfers, *Race Relations and Colonial Rule in Papua New Guinea* (1975), 24. These provisions were amended and made more uniform with their New Guinea counterparts in 1955.
  9. *Native Administration Regulations* (New Guinea), s.84(2).

months imprisonment, or both.<sup>10</sup> Proceedings are brought in the Local Courts.<sup>11</sup> They may be initiated only by the aggrieved spouse or his or her "nearest relatives",<sup>12</sup> and only against the person with whom the guilty spouse had sexual intercourse.<sup>13</sup> The police cannot initiate proceedings, and spouses cannot lay complaints against each other.<sup>14</sup> It is also an offence for a person to abduct or entice (in New Guinea<sup>15</sup>) or to induce or compel (in Papua<sup>16</sup> and in New Guinea<sup>17</sup>) a female to have sexual intercourse with a person other than her husband or, in New Guinea only, to entice a woman away from her husband even where there is no sexual motive involved.<sup>18</sup>

These proceedings are by no means a dead letter<sup>19</sup> and they have tended to overshadow the civil jurisdiction of the Local Court in relation to adultery.<sup>20</sup> But the *Report* argues convincingly the need for their repeal. It points out that the Regulations operate unfairly in the sense that one party to the adultery may be punished whilst the other escapes legal proceedings altogether, depending upon whether there is an aggrieved spouse who feels inclined to lay a complaint.<sup>21</sup>

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10. *Native Regulations* (Papua), s.84(1) and (2); *Native Administration Regulations* (New Guinea), s.84(2) and see also s.84(5). The fine in both cases is K6.
  11. *Local Court Act 1963* (No. 65 of 1963), s.19.
  12. *Native Regulations* (Papua), s.84(3), *Native Administration Regulations* (New Guinea), s.84(3). In *Labian-Saiuwen v. Yerei-Yautan* [1965-66] PNGLR 152, the Prosecution failed because (*inter alia*) it neglected to prove that the complainant was the "nearest relative" of the aggrieved spouse. Frost J. considers the meaning of the words at pp. 157-159.
  13. *Native Regulations* (Papua), s.84(3), *Native Administration Regulations* (New Guinea), s.84(3).
  14. *Maumau v. Maragili* [1963] PNGLR 108 (Papua), *Gaudaida v. Domanapu* [1964] PNGLR 253 (New Guinea).
  15. *Native Administration Regulations* (New Guinea), s.84(1).
  16. *Native Regulations* (Papua), s.84(5).
  17. *Native Administration Regulations* (New Guinea), s.85. In *Nyangri v. Omakan* [1965-66] PNGLR 8 it was held that the offence is committed where the person doing the inducing or compelling himself has intercourse with the female. This would cover males who solicit married prostitutes.
  18. *Native Administration Regulations* (New Guinea), s.84(1).
  19. E.g. In *Tol v. Lao* (unreported, Appeal No. 46 of 1972, S.C.) Prentice J. mentions in passing that there were seven convictions for adultery during one month in 1972 at Madang.
  20. Law Reform Commission of Papua New Guinea. *Working Paper on Adultery* (October 1975), at p.3.
  21. *Ibid* at pp. 10-11.

Spouses cannot lay complaints against each other. Further, the Regulations discriminate on grounds of sex and race contrary to s. 55(1) of the *Constitution*<sup>22</sup> - in Papua they apply only where all parties are automatic citizens<sup>23</sup> and in New Guinea only where at least one of the parties is an automatic citizen,<sup>24</sup> and the provisions relating to enticement apply only to females.<sup>25</sup> As well, the *Report* emphasises that "the Native Regulations are part of the colonial era. Their continued existence is contrary to our country's independence and to the spirit of its Constitution".<sup>26</sup>

#### *Civil Proceedings.*

The Village Courts and the Local Courts have civil jurisdiction over cases involving adultery<sup>27</sup> and, when mediation fails,<sup>28</sup> they may award appropriate compensation. However, little use has been made of these powers because the courts have been more inclined to treat adultery as a criminal matter.<sup>29</sup>

Where divorce is granted on the ground of adultery<sup>30</sup> the successful petitioner may claim damages from the co-respondent.<sup>31</sup> This action is derived from English and Australian legislation.<sup>32</sup>

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22. Qualifications to s.55(1) are set out in ss.55(2), 55(3) and 38 of the *Constitution*. See *Report*, at p.2.
  23. *Native Regulations* (Papua), s.84(1), (2), (3).
  24. *Native Administration Regulations* (New Guinea), s.84(2), but s.84(3) appears to assume that complaints may be brought by and against automatic citizens only.
  25. *Native Regulations* (Papua), s.84(5), *Native Administration Regulations* (New Guinea), ss.84(1), 85. In Papua, women, but not men, may be charged with being "abandoned and dissolute" under s.84(7).
  26. *Report*, at p.2.
  27. See *Village Courts Act* 1973 (No. 12 of 1974), s.15; *Local Courts Act* 1963, s.13(c).
  28. The Local Court may attempt mediation at any stage of civil proceedings (*Local Courts Act* 1963, s.31) and the Village Courts must make a preliminary attempt at mediation (*Village Courts Act* 1973, s.20).
  29. Law Reform Commission of Papua New Guinea, *Working Paper on Adultery* (October 1975), at p.3.
  30. *Matrimonial Causes Act* 1963 (No. 18 of 1964), s.21(a).
  31. *Ibid*, s.37.
  32. For an account of the case law, see H.A. Finlay and A. Bissett-Johnson, *Family Law in Australia* (1972), 423-429. The action was abolished in England by the *Law Reform (Miscellaneous Provisions) Act* 1970, s.4, and in Australia by the *Family Law Act* 1975, s.120.

It does not apply where there is a customary marriage<sup>33</sup> and is available only to those who can afford to bring divorce proceedings in the National Court.<sup>34</sup>

The common law action of enticement<sup>35</sup> may also be available, but according to the *Report* this is not part of the English common law adopted by Papua New Guinea under the Constitution at Independence.<sup>36</sup>

### III. APPROACH TO LAW REFORM.

After it concluded that the present law was unsatisfactory, the Commission had to choose between three alternative methods of implementing law reform. First, it could recommend abolition of all the existing civil and criminal actions based on adultery, thus following the trend in most western countries. This approach was rejected on the ground that it would fail to "reflect the present needs of the [Papua New Guinea] communities".<sup>37</sup> Second, it could recommend repeal of the Native Regulations together with preservation of the jurisdiction of the Local and Village Courts to treat adultery as a civil matter. This would avoid the pitfalls of drafting new legislation in a sensitive and controversial area, and at the same time leave the courts free to apply local custom. It is argued below that this would have been the best approach, but the Commission does not consider it. Third, the Commission could replace all the existing law with new comprehensive draft legislation, and this is in fact the approach it adopts. The Draft Bill provides that henceforth proceedings based on adultery can be taken only in the Village Courts,<sup>39</sup> or in some circumstances the Local Courts,<sup>40</sup> and only under the new legislation. All other actions are abolished - the Native Regulations<sup>41</sup> and the provisions covering damages for adultery<sup>42</sup> are repealed, the

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33. *Matrimonial Causes Act* 1963, s.8.

34. According to statistics compiled for the University of Papua New Guinea Seminar on Divorce Law Reform (1976), few Papua New Guineans who enter registered marriages obtain divorces.

35. For accounts of the old actions of enticement, harbouring and criminal conversation see Finlay and Bissett-Johnson, *op. cit.*, 423-425, and J.G. Fleming, *The Law of Torts* (4th ed.), 570-573.

36. *Report*, at p.6.

37. *Report*, at p.3.

38. Law Reform Commission of Papua New Guinea draft *Adultery and Enticement Bill* 1977 (hereafter referred to as Draft Bill), in *Report*, at pp. 19-24.

39. Draft Bill, cl. 2 and 16.

40. Draft Bill, cl.16(2).

41. See Draft Native Administration (Amendment) Regulation 1977 (N.G.), and draft Native (Amendment) Regulation 1977 (P) (*Report*, at p.25).

42. Draft Matrimonial Causes (Damages for Adultery) Bill 1977. (*Report*, at p.26).

common law action of enticement abolished,<sup>43</sup> and the *Village Courts Act* 1973 amended to ensure that the Village Courts exercise jurisdiction under the new legislation and not under their general jurisdiction.<sup>44</sup>

#### IV. GENERAL PRINCIPLES.

The Commission takes the constructive and helpful approach of stating the general principles it used in drafting the new Bill, emphasising that several "significant policy decisions"<sup>45</sup> have been incorporated in the *Report*. These are derived mainly from the Constitution. They form a rather vague and sometimes inconsistent basis for law reform and the Commission uses them to formulate a series of guidelines, rather than a coherent philosophy, for its proposals.

At the outset, the Commission emphasises that the law should 'reflect our people's prevailing moral values'<sup>46</sup> and should "spring from the common will of the people"<sup>47</sup> rather than be used as an instrument for shaping public opinion or for bringing about reform which is ahead of public opinion. It asserts that custom should form the foundation of new laws - not incorporated uncritically, but used "'dynamically and creatively'" as the foundation for developing our legal system",<sup>48</sup> and modified where necessary to comply with the National Goals and Directive Principles, Basic Social Obligations and Basic Rights set out in the Constitution.<sup>49</sup> The Commission recognises the diversity of custom and opinion throughout Papua New Guinea, but it also searches for common threads and attempts to reach compromises which will "harmonise the differing views of our people".<sup>50</sup> The *Report* also refers occasionally to Christian principles and at one point goes

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43. Law Reform (Enticement) Bill 1976 (*Report*, at p.28).

44. Draft Village Courts (Engagement Gifts, etc.) Bill 1977 (*Report*, at p.27). In this Bill the Law Reform Commission has made other small amendments unconnected with the draft Bill. This practice is inadvisable, as it is likely that the provisions may either slip through without sufficient consideration or else, if objection is taken to them, retard the progress of the main provisions.

45. *Report*, at p.1.

46. *Ibid.*

47. *Ibid.*

48. *Ibid.*, quoting from the fifth National Goal and Directive Principle in the *Constitution*.

49. For example, modification would be necessary where custom discriminates against women contrary to s.55(1) of the *Constitution*. This is consistent with the draft *Underlying Law Bill* 1976, set out in the Law Reform Commission of Papua New Guinea, *Working Paper No. 4 : Declaration and Development of Underlying Law* (September 1976).

50. *Report*, at p.1.

so far as to cite a biblical passage in support of its recommendations.<sup>51</sup> The Commission does not see the primary role of the law as the enforcement of morality, but rather as a means to 'encourage peace and the restoration of human relations that are often broken by acts of adultery'.<sup>52</sup>

V. ANALYSIS OF THE DRAFT BILL.

*Restoration of Harmony: Compensation and Mediation.*

Clause one of the Draft Bill states that.

The purpose of this Act is to settle disputes concerning adultery and enticement that disrupt the peace and harmony of families and villages, and to that end the Act requires magistrates to mediate and, if necessary, to arbitrate disputes and assess compensation so that disputes concerning adultery and enticement will be settled peaceably and in fairness to all.

(i) Compensation.

After the Commission decided to repeal the Native Regulations and to enact new legislation, another choice arose - whether to retain adultery as a criminal offence, or to make it a civil matter giving rise to compensation only. During meetings held by the Commissioners to gauge public opinion, there was considerable support for making adultery a crime on the ground that it was a very serious matter, ranked third in culpability after wilful murder and land stealing.<sup>53</sup> Nevertheless, the Commission decided against making adultery a crime and recommended that it be a civil matter only.<sup>54</sup> Whilst there are many arguments in favour of this conclusion, one is left with the impression that the Commission (acting on some unstated principle such as reluctance to make consensual sexual conduct between adults the subject of criminal proceedings) failed to implement their stated principle that "the law should spring from the common will of the people" when the Commission did not agree with the people's priorities.<sup>55</sup>

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51. *Ibid*, at p.3, fn. 2. The Preamble to the Constitution states that 'we, the people of Papua New Guinea ... pledge ourselves to guard and pass on to those who come after us ... the Christian principles which are ours now'.

52. *Ibid*, at p.1.

53. *Ibid*, at p.3.

54. The total amount that can be awarded against any person in relation to an act of adultery or enticement under the Bill is K200 (cl.12(1) and see also *Report*, at p.15). A complainant cannot sue the same person for both adultery and enticement (cl.11). In determining the amount of damages the court must take into account all the matters listed in cl.11(2), and it may order payment in cash or goods or both (cl.12(3)). In default, the defendant may be ordered to perform community work (cl.13(2)) or be imprisoned for a period not exceeding six months (cl.13(3)).

55. *Report*, at p.3.

They conclude that "while adultery can be socially disruptive, it is not as serious an offence as killing or armed robbery and does not warrant severe punishment".<sup>56</sup> This approach, they hope, forms a satisfactory compromise between "the rigours of some of our traditional cultural values" and the more "liberal" and "permissive" elements of Papua New Guinea society.<sup>57</sup>

(ii) Mediation.

The central recommendation that adultery should be treated as a civil matter is accompanied by the requirement that magistrates must attempt mediation before they commence proceedings for adultery,<sup>58</sup> and any settlement arrived at during mediation shall be recorded and enforced as if it were an order of a Village Court.<sup>59</sup> Mediation is not a new development.<sup>60</sup> But the Draft Bill gives added prominence to mediation, and the *Report* states that it should be the "primary role"<sup>61</sup> of the magistrate. No legislative guidelines are set out because the Commission intends to make a special study of mediation in the future.<sup>62</sup> On the role of magistrates as mediators in disputes involving adultery, the *Report* states:<sup>63</sup>

When adultery has been committed there can be many consequences. A child might be born to an adulterous relationship. A fight might have occurred. The question of divorce, or the return or recovery of bride or groom gifts might be in question. A person's career might be at stake, his or her reputation and so on might be up for questioning. An adulterous relationship might have developed at a time of prolonged and unavowed [sic] separation, strained relationship or deep distress.

In an adversary proceeding, the only issue before the court would be - has adultery or enticement been committed? In the mediation process many more of the associated issues can be considered.

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56. *Ibid.*

57. *Ibid.*

58. Draft Bill, cl.9(1), 10(c). Provision is made for joining all proceedings which result from a single act of adultery or enticement to bring all the parties together and facilitate mediation (cl.7).

59. Draft Bill, cl.9(3), (4).

60. See fn. 28, *supra*.

61. *Report*, at p.8.

62. *Ibid*: "Mediation is clearly envisaged in the Preamble to the Constitution when it rejects violence and seeks consensus as a means of solving our common problems".

63. *Ibid.*

In handling mediations magistrates should be flexible and prepared to move with the wishes of the parties, playing the role of an intermediary, disinterested in the outcome of the proceedings, but very much concerned about the life, health, harmony and the welfare of both parties and their clan groups. They should be able to assess and evaluate the extent of the claim and the extent to which concessions can be made, by the other party.

Mediation should be a gradual, persuasive, non-coercive process aimed at restoring peace not only between the people directly affected, but also their clans. ... Thus, through mediation, forgiveness, softening of feelings and reconciliation may result.

This approach to the settling of disputes involving adultery (and disputes in general) is commendable. Its success depends upon co-operation by the magistrates. It is to be hoped that the Draft Bill's strong emphasis on mediation will result in greater use by the magistrates of their role as mediators than has occurred in adultery proceedings in the past.

*Acts Which Give Rise to Proceedings.*

(i) Definition of Adultery

In the Draft Bill "adultery" means -64

- (a) voluntary sexual intercourse or attempted sexual intercourse between a married person and a person other than his spouse, or
- (b) any act of a sexual nature between a married person and a person other than his spouse that, between such persons, is, by custom, unlawful.

Under part (a) of the definition, where penetration occurs or is attempted, the action is available irrespective of the custom of the parties. It covers expatriates (thereby eliminating discrimination on the ground of race), and also Papua New Guineans who come from areas where such conduct is not an offence or is an offence only in limited

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64. Draft Bill, cl.2. Clause 3(1) provides that "where two persons commit adultery with each other more than once, the separate acts shall be regarded as being a single act of adultery", although acts committed after a complaint has been made may be considered as separate acts of adultery, under cl.3(2).

circumstances according to customary law.<sup>65</sup>

Part (b) includes a much wider variety of sexual conduct than the traditional common law definition of adultery. At common law, at least partial penetration is required - neither attempted penetration<sup>66</sup> nor any other form of sexual gratification amounts to adultery.<sup>67</sup> It seems advisable to extend the Bill's operation to the usurpation of all sexual rights recognised by custom rather than to limit proceedings to where the narrow common law definition is fulfilled. However, the wording of part (b) leads to problems of interpretation.

What will amount to an "act of a sexual nature" in part (b)? It seems clear that heterosexual and homosexual acts like fellatio and anal intercourse which involve contact with primary sex organs are included. Paedophilic, animal and masturbatory acts are excluded<sup>68</sup> even where they are unlawful according to custom. It is not clear whether acts which do not involve the primary sexual organs - such as kissing, holding hands, flirtatious conversation, exchanging presents - can be classified as "acts of a sexual nature". Further, the acts which fall within part (b) are restricted to those which are "by custom, unlawful" and it may be difficult to distinguish between acts regarded with disapproval or distaste by spouses and by the community and those which are actually "unlawful" by custom.

The definition makes no formal distinction between the acts for which a husband and a wife may bring proceedings under the Draft Bill though Strathern points out that the wife's rights under customary law are often restricted.<sup>69</sup> Under the Draft Bill, the wife can bring proceedings where sexual intercourse has been committed or attempted

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65. Strathern, *op. cit.*, at p.51, writes that "whether intercourse with a married man is considered 'adultery' or not depends on many attendant factors". For example, spouse-exchange occurs in some areas, and clandestine affairs, e.g. by temporary guests or where proceedings might cause unwanted quarrelling, may be ignored (*Id.*, at p.61). In some societies a wife and her kin are not regarded as possessing rights over her husband's sexuality, and his adultery gives no cause for legal proceedings (*Id.*, at pp. 53-55).

66. Attempted sexual intercourse is sufficient under the Draft Bill's definition of adultery in part (a) above. The law relating to attempts is notoriously difficult to apply. These difficulties could be eliminated by leaving attempted intercourse to be covered by part (b) of the definition of adultery.

67. *Dennis v. Dennis* [1955] P.153; *MacLennan v. MacLennan* [1958] S.L.T. 12.

68. Actions for adultery are excluded where the adulterer was below the age of puberty under Draft Bill cl.8(1)(c). Animal contacts and masturbation are excluded because the definition stipulates that the sexual act must take place between two persons.

69. Strathern, *op. cit.*, at pp. 53-55 and see fn. 6, *supra*.

under part (a) of the definition even if this would not be allowed by customary law. But her rights to bring proceedings where the act comes within the definition in part (b) are dependent on custom and may be more restricted than her husband's rights. In this case, the Draft Bill discriminates on grounds of sex contrary to section 55(1) of the Constitution.<sup>70</sup>

The use of the word "voluntary" in part (a) of the definition produces the anomalous situation whereby a husband who commits rape of a third party may have a good defence to proceedings for adultery brought against him by his wife, though there seems no reason why she should not be able to sue in these circumstances. On the other hand, although it seems wrong to allow proceedings against the victim of sexual attack, the wording of part (b) does not preclude such an action. The Draft Bill should make it clear that proceedings for adultery can be brought against persons who commit sexual attack in circumstances which amount to adultery, but not against the victim.<sup>71</sup>

(ii) Definition of Enticement.

"Enticement" under the Draft Bill means "the persuading of a person to live apart from his spouse, with the intent that the person so persuaded have sexual intercourse with the enticer or some other person".<sup>72</sup> The action is derived from the common law action of enticement.<sup>73</sup> It enables proceedings to be brought where the enticer intends to have intercourse with the enticed person, or where the enticer intends the enticed to have intercourse with a third party. In either case, the enticer must persuade the enticed person to live apart from his or her spouse.

"Enticement" is restricted by definition to where sexual intercourse is intended. This seems unnecessarily restrictive, for presumably the intention to commit other sexual acts which amount to "adultery" under the Draft Bill is regarded as equally offensive.

The advantage of creating the action for enticement, according to the *Report*, is that it will enable proceedings to be brought before the commission of sexual intercourse,<sup>74</sup> and this will minimise social disruption. Where the "greasing" or enticing of another man's wife is regarded as a serious affront warranting legal action according to customary law, it seems advisable for the Draft Bill to provide redress. The Draft Bill does not, however, limit proceedings to where there has been a breach of customary law. It also appears to make

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70. If the discrimination is considered necessary in the public interest then the Draft Bill must comply with s.38 of the Constitution.

71. This would accord with the common law position. See *Vrska v. Vrska* [1960] S.A.S.R. 74.

72. Draft Bill, cl.2.

73. See fn. 35, *supra*.

74. *Report*, at p.6.

unsuccessful attempts at persuasion actionable, though the use of the word "persuading" does not make this entirely clear.<sup>75</sup> If the provision is interpreted widely by the courts, the Draft Bill could well encourage false and trivial accusations by jealous spouses and promote discord rather than harmony between the parties concerned. The Draft Bill should, if it is submitted, limit the action of enticement to where the enticer's conduct would be actionable according to the custom of the parties.

The common law action for enticement was based on the loss of the spouse's services irrespective of the objective of the enticement.<sup>76</sup> The Draft Bill, however, restricts proceedings to where there is a sexual motive for inducing the enticed spouse to leave. This seems unnecessarily restrictive. Why should the Draft Bill preclude an action by a husband who contends that his wife's parents persuaded her to leave him in circumstances unjustified by customary law, such as demanding extra brideprice to which they are not entitled, or because their relationship with his kin group has deteriorated? The Commission rejects the extension because they consider it unjust that proceedings could be brought where, for example, a wife's parents persuade her to leave a husband who has constantly ill-treated her.<sup>77</sup> Under common law, the action could not succeed where the enticement occurred out of motives of humanity,<sup>78</sup> and a similar restriction - perhaps related to whether the enticement would be justified according to custom - could be inserted in the Draft Bill.

The common law action for enticement also enabled parents to sue third parties for loss of the services of their children.<sup>79</sup> Strathern writes that sexual intercourse with an unmarried girl is an offence by customary law similar to adultery in that it is seen as the usurpation of proprietary rights in the girl's sexuality for which her relatives or kin group who have an interest in arrangements for her marriage have right to redress.<sup>80</sup> Because of the similar nature

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75. "Persuading" may mean that the enticer has succeeded in getting the enticed person to leave his or her husband, or it may simply mean the process of trying to convince a spouse to leave.
76. See Finlay and Bissett-Johnson, *op. cit.*, at p.152. The English courts in *Gray v. Gee* (1923) 39 T.L.R. 42 held that both husbands and wives could sue third parties who enticed their partner away from them. The High Court of Australia, in *Wright v. Cenzich* (1929) 43 C.L.R. 493 refused to extend the action to the wife, on the ground that it was based on the notion that husbands have a proprietary right in their wives, that this objectionable notion should not be extended, and that the action should be abolished altogether. This was accomplished by s.120 of the *Family Law Act* 1975.
77. *Report*, at p.6.
78. *Berthon v. Cartwright* (1796) 2 Esp. 480, and see the remarks of Denning L.J. in *Gottlieb v. Gleiser* [1957] 3 All E.R. 715n.
79. See Finlay and Bissett-Johnson, *op. cit.*, at pp. 203-204..
80. Strathern, *op. cit.*, at p.100. Strathern suggests that the courts, whilst compensating the girl's relatives, should place no restrictions upon the girl's freedom to marry.

of the offence and the need for mediation and legal redress, it may be advisable to extend the definition of enticement in the Draft Bill so that it covers this situation.

*Proof.*

(i) Proof of Acts of Adultery or Enticement.

At common law it has long been recognised that accusations of adultery are often mistaken or malicious, difficult to disprove, and of a serious nature. Technical rules relating to the use of circumstantial evidence, confessions, corroboration, and evidence of non-access by husbands preceding the birth of a child evolved at common law to protect the interests of the accused.<sup>81</sup>

Under the Draft Bill, the court shall not apply technical rules of evidence.<sup>82</sup> Thus, the common law rules of evidence designed to safeguard accused persons from false accusations are jettisoned. There seems no reason why false accusations should be less common in Papua New Guinea than elsewhere, and it has already been shown that they are regarded here as extremely serious. Certainly, it is inadvisable to require Village Court magistrates to apply complicated rules of evidence developed by the common law, but it may well be advisable to insert guidelines directing magistrates that strong evidence of guilt is required and that findings of adultery must not be lightly made.

(ii) Proof of Marriage.

Under the *Native Regulations*, the complainant had to prove that a marriage had taken place, and the court refused to apply the presumption of validity of marriage based on proof of cohabitation and reputation.<sup>83</sup> In *Labian-Saiuwen v. Yerei-Yautan*, Frost J., as he then was, said that where the complainant asserted the existence of a customary marriage "the magistrate should require evidence, both as to the custom prevailing in the tribe establishing the elements of a valid marriage, and as to whether in the case before him those elements were complied with so that there was a valid marriage".<sup>84</sup>

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81. See Finlay and Bissett-Johnson, *op. cit.*, at pp. 285-288.

82. Draft Bill, cl.14.

83. *Labian-Saiuwen v. Yerei-Yautan* [1965-66] PNGLR 152, 156-157, *per* Frost J.

84. [1965-66] PNGLR 152, 157. This test is based on s.55 of the *Marriage Act* 1963 which provides that a customary marriage shall be recognised as valid and effectual if it is entered "in accordance with the custom prevailing in the tribe or group of natives to which the parties to the marriage or either of them belong or belongs". T.E. Barnett (ed.), *Case Book on the Formation of Customary Marriage in Selected Areas of Papua and New Guinea* (unpublished) writes at pp. 3-4, that:

Under the Draft Bill it is much easier to prove marriage. It is sufficient that the complainant believes, on reasonable grounds, that the marriage was valid or believes that there are a relationship of husband and wife.<sup>85</sup> However, it would be more fair if proof were required that the adulterous spouse and the third party with whom adultery was committed also believed on reasonable grounds that there was a valid marriage.<sup>86</sup>

*Who May Bring Proceedings.*

A person whose spouse has committed adultery<sup>87</sup> or whose spouse has been enticed away<sup>88</sup> may bring proceedings under the Draft Bill.

Strathern shows that members of the clan or kin-group of the wronged spouse may have an independent interest in bringing proceedings.<sup>89</sup> Under the Draft Bill, however, "relatives"<sup>90</sup> cannot bring proceedings on their own behalf, irrespective of their rights according to customary law. They may bring proceedings only on behalf of the aggrieved spouse where the spouse and the court give permission.<sup>91</sup> The reason for this restriction, according to the *Report*, is that the decision to take legal action should be initiated only by the offended spouse, and not by relatives,<sup>92</sup> consistent with the Constitutional right to "reasonable privacy in respect of ... private and family life ...".<sup>93</sup>

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84. continued

"Most of the parties [to the marriages studied] are now accepted by their peers as respectably married persons but a study of the variety of procedures (or lack of procedures) by which they achieved this status demonstrates the futility of courts trying to find rules about formation of marriage by reference to obligatory procedures. In some villages about the only common denominator between the informants is that their union is accepted by the community as a marriage".

The powers of the court to obtain proof of custom are set out in the *Native Customs (Recognition) Act 1963* (No. 28 of 1963), s.5.

85. See the definition of "marriage" contained in the Draft Bill, cl.2.

86. See *infra* for discussion of the Bill's failure to provide that lack of knowledge of marriage constitutes a good defence.

87. Draft Bill, cl.4.

88. Draft Bill, cl.5.

89. See fn. 7, *supra*.

90. Defined in Draft Bill, cl.15(1).

91. Draft Bill, cl.15(2).

92. *Report*, at p.3.

93. Constitution, s.49. Section 49 must be read with s.38.

### *Who May be Brought to Court*

Proceedings for adultery may be taken against the adulterous spouse or the person with whom the spouse committed adultery, or both.<sup>94</sup>

Proceedings for enticement may be brought against the enticer, whether he intends sexual intercourse to occur with himself or with a third party,<sup>95</sup> but not against the enticed spouse. If the offended spouse wishes to bring proceedings against his or her spouse, it is necessary to wait until the act of adultery has occurred. The *Report* gives no reason for this restriction. Perhaps it assumes that the enticed spouse should be regarded as the victim of the enticer. But the conduct of a spouse who allows himself or herself to be enticed away is surely as blameworthy as that of the enticer, and the rationale behind the offence - that it allows proceedings to be brought before an act of adultery has occurred - seems to apply equally.

The Draft Bill does not allow proceedings to be brought against a third party who procures an act of adultery with no intention of persuading the spouses to live apart. Thus, no redress is available to a wife against a person who procures an act of adultery between her husband and a prostitute, or to a husband against a person who procures his wife to become a prostitute. It seems inconsistent with the general philosophy of the Draft Bill that no action is provided in these circumstances.

### *Defences*

In the following circumstances, the Bill fails to provide a defence to a charge of adultery or enticement, though it is submitted that it should do so.

#### (i) Lack of Knowledge of Marriage.

Lack of knowledge that a sexual partner is married does not provide a good defence to a charge under the Draft Bill. If a man leaves his village and goes to town, meets a woman there and tells her that he is unmarried, and upon this understanding they have sexual intercourse, there is nothing in the Draft Bill to stop the man's wife from bringing proceedings against the woman.<sup>96</sup> The imposition of strict liability for a matter as serious as adultery seems contrary to generally accepted principles of justice.

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94 Draft Bill, cl.4(1). If proceedings are taken against both, the complainant is entitled to a total amount not exceeding K200 under cl.12(1).

95. Draft Bill, cl.5.

96. The use of the word "voluntary" in the definition of adultery relates only to consent to the act of intercourse, not to knowledge of the circumstances in which it occurs.

The necessity for knowledge of the existence of the marriage by the defendant should be included in the definition of adultery and enticement or, alternatively, a defence of honest and reasonable mistake of fact should be inserted in the Draft Bill.

(ii) Separation of Spouses.

Nothing in the Draft Bill precludes spouses who have separated and are living apart with no intention of resuming cohabitation (but who do not obtain a divorce) from suing each other or each other's sexual partners for adultery. This permits intolerable interference with and disruption of stable de facto relationships formed since the separation. The definition of adultery should be changed or a defence inserted to cover this situation.<sup>97</sup>

The Bill provides defences to charges of adultery and enticement in the circumstances outlined below. Some of the defences are superfluous. The language in which they are expressed is difficult to interpret. In some cases the defences are more likely to exacerbate bad relations and lead to breakdown of marriage than to promote harmony between the parties. It is submitted that this aspect of the Draft Bill should be carefully reconsidered before it is presented to Parliament. The circumstances in which the Draft Bill provides defences are as follows:

(i) Consent or Connivance.

An action for adultery shall be dismissed if "the complainant consented to or connived at the adultery or enticement".<sup>98</sup> This ensures that spouses do not co-operate with each other and commit adultery in order to collect compensation.<sup>99</sup> It also precludes proceedings where the spouse gives consent in circumstances where adultery is accepted according to the parties' custom, for example spouse exchange, secret arrangements made by a sterile husband for his wife to conceive by another man, or where extra-marital licence is prescribed for certain ceremonies.<sup>100</sup>

The word "connivance" is derived from the *Matrimonial Causes Act* 1964 where connivance at various matrimonial offences including adultery constitutes a bar to divorce proceedings.<sup>101</sup> There it has caused problems of interpretation, and similar problems will arise under the Draft Bill. For example, does strong suspicion of adultery,

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97. In both the circumstances outlined, the Court could, under cl.12(f), order minimal compensation. But this does not provide a satisfactory solution as it is unjust to subject parties to legal proceedings at all in these circumstances.
98. Draft Bill, cl.8(1)(a). Clause 8 does not provide a defence to enticement proceedings but this appears to be a drafting error.
99. *Report*, at p.7.
100. Strathern, *op. cit.*, 61.
101. *Matrimonial Causes Act* 1964, s.32. This was in turn derived from Australian and English legislation. In Australia the bars were abolished by the *Family Law Act* 1975, and in England by the *Divorce Reform Act* 1969.

combined with turning a blind eye to the situation, amount to "connivance" at the adultery? Does a suspicious spouse who deliberately creates the opportunity for his spouse to commit adultery in the hope that he will catch the adulterers in the act connive at their adultery? Does connivance at one act of adultery imply connivance at all subsequent acts?102

The word "consent" in the provision will create similar problems of interpretation. In interpreting "consent", however, the courts will be less likely to resurrect the Australian and English case law, and more likely to develop case law suitable for Papua New Guinea. Therefore, the word "connivance" should be omitted from the Draft Bill. It seems necessary, however, to retain a bar based on consent by the complainant.103

(ii) Forgiveness.

The action for adultery shall be dismissed where "the complainant has forgiven the adulterer or enticer".104 In the case of adultery the provision does not make clear whether "adulterer" means the adulterous spouse, the person with whom the spouse committed adultery, the defendant(s), or all of these parties. If a husband forgives his wife, for example, is he precluded from proceeding against the male adulterer? If he is precluded this may have the undesirable effect of discouraging husbands who wish to take action against the male adulterer from forgiving and reinstating their wives.105

The notion of forgiveness in the Draft Bill is similar to that of condonation in matrimonial causes,106 and it raises similar difficulties of interpretation. For example, is unilateral, unexpressed forgiveness sufficient, or must forgiveness be communicated expressly to the adulterous spouse or the person with whom adultery was committed? Must the elements of condonation - full knowledge of the offence, intention to remit legal proceedings, and reinstatement of the adulterous

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102. For cases relating to the bar of connivance, see Finlay and Bissett-Johnson, *op. cit.*, at pp. 359-365.

103. Unless a provision were inserted that the right to succeed in the action is dependent upon the complainant's rights according to customary law, in which case there would be no need for the legislation to include specific defences.

104. Draft Bill, cl.8(1)(b).

105. According to Strathern, the husband's sense of grievance is directed primarily towards the male adulterer. See fn. 7, *supra*. The *Report*, at p.7, states that "forgiveness of one party should be treated as forgiveness to both parties to adultery", but it is unlikely that the offended spouse would always see forgiveness in this light.

106. Condonation is a bar to divorce under the *Matrimonial Causes Act 1964*, s.32.

spouse - be fulfilled? Is full and complete pardon required? Can forgiveness of an act of adultery be conditional, so that it will be nullified by further acts of adultery with the same or with a different person?<sup>107</sup>

The *Report* states that the defence "is based on the customary practice of forgiving wrongs",<sup>108</sup> and that the provisions will encourage spouses to forgive one another and settle their problems amicably without recourse to legal proceedings.<sup>109</sup> Under the matrimonial causes jurisdiction, however, condonation, though originally intended to encourage forgiveness, was found in practice to have the opposite effect - it made the offended spouse wary of attempting reconciliation after the commission of a matrimonial offence for fear that the ground for divorce would be barred by the forgiveness or condonation involved in the reconciliation attempt.<sup>110</sup> Similarly, under the Draft Bill, a wronged spouse who is uncertain whether to institute legal proceedings against the adulterous spouse or the third party will be reluctant to attempt reconciliation where this may jeopardise his or her right to bring proceedings for adultery. Thus, the provision is likely to have the opposite effect from that intended by the Commission.

The *Report* also states that the defence is necessary to "stop the possibility of old acts of adultery being used as blackmail in disputes between spouses".<sup>111</sup> But this objective is achieved by the provision which sets a time limit for taking proceedings,<sup>112</sup> discussed below.

(iii) Adulterer Below the Age of Puberty.

Proceedings for adultery shall be dismissed where "the adulterer was below the age of puberty".<sup>113</sup>

Sexual acts with pre-pubescent boys and girls are performed almost invariably by males rather than by females, so the defence will be relevant only where a wife brings adultery proceedings in relation

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107. For case law relating to condonation see Finlay and Bissett-Johnson, *op. cit.*, at pp. 347-359.

108. *Report*, at p.7.

109. *Ibid*, at pp. 7-8.

110. In Australia, this led in 1965 to an amendment of the *Matrimonial Causes Act 1959* which enabled parties to resume cohabitation for a period not exceeding three months without condonation arising.

111. *Report*, at pp. 7-8.

112. Draft Bill, cl.6.

113. Draft Bill, cl.8(1)(c).

to paedophilic acts performed by her husband.<sup>114</sup> The use of the word "adulterer" leaves it unclear whether proceedings are precluded against both the husband and the child, or only against the child.

The *Report* argues that this defence is necessary to protect children whose acts should be merely considered "childhood aberration" rather than a matter for legal action.<sup>115</sup> It is generally accepted that children should be regarded as victims of sexual exploitation in these circumstances and not as offenders.<sup>116</sup> As well, children subjected to legal proceedings for sexual offences may suffer grave and permanent psychological damage. Therefore, it is desirable that the Draft Bill should preclude adultery actions against pre-pubescent children.<sup>117</sup>

It is not so clear that legal proceedings for adultery against the adult concerned should be prohibited.<sup>118</sup> If a wife feels a sense of grievance and the sexual conduct of the husband is unlawful by custom, then she has a prima facie right to proceed against him. However, the danger of psychological damage to children remains even if the law treats them as victims or witnesses rather than offenders, and it may be advisable to prohibit legal proceedings against offenders for the protection of child victims.<sup>119</sup> Further, paedophilia is a pathological condition,<sup>120</sup> and legal proceedings may also have a damaging effect on the adult concerned out of all proportion to the seriousness of his conduct.

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114. Proceedings for adultery in relation to paedophilic acts would usually come within part (b) of the definition of adultery in the Draft Bill, because paedophilic contacts are usually limited to fondling or masturbation, and rarely involve penetration. On paedophilia generally, see J.W. Mohr, R.E. Turner and M.B. Jerry, *Pedophilia and Exhibitionism* (1964). Nothing has been written about paedophilia in Papua New Guinea.
115. *Report*, at p.7.
116. Protection from criminal proceedings is given by s.29 of the *Criminal Code Act 1974*.
117. It may be advisable to extend this protection to older children in early adolescence, although the factor which distinguishes paedophilia from normal heterosexual or homosexual contacts is whether the child has attained puberty (Mohr et al, *op. cit.*).
118. The adult would be liable also to criminal proceedings under ss.216-220 of the *Criminal Code Act 1974*.
119. D.J. West, in "Thoughts on Sex Law Reform" in *Crime, Criminology and Public Policy* (ed. R. Hood, 1974) suggests that doctors and community workers, rather than lawyers, should handle cases of this kind except in the most extreme circumstances. However, mediation might provide a satisfactory means of handling them in Papua New Guinea.
120. Mohr et al, *op. cit.*

Problems relating to sexual offences involving children arise most acutely in the criminal law. Criminal proceedings may be necessary to prevent repetition of the conduct with other children. This consideration does not apply to adultery proceedings. Therefore, it is probably preferable to bar adultery proceedings altogether where pre-pubescent children are involved.<sup>121</sup>

(iv) Sorcery.

Where the defendant performs an act of adultery because he or she has been subjected to an act of sorcery which is accepted by custom as inducing and excusing the adultery then proceedings shall be dismissed against the defendant.<sup>122</sup> This defence is consistent with current legislation<sup>123</sup> and with the Law Reform Commission's recommendations for reform of criminal law.<sup>124</sup>

(v) Polygynous Marriage of Adulterers.

Proceedings for adultery may not be brought if:<sup>125</sup>

- (a) the adulterous spouse has married the other adulterer; and (b) the complainant has continued to live as husband or wife, as the case may be, with the adulterous spouse.

This provision produces the effect that where a husband goes through a polygamous marriage with the female adulteress,<sup>126</sup> and the complainant wife continues to live with him as his wife, then she is precluded from bringing proceedings for adultery. The provision

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121. This conclusion would have to be revised, however, if evidence were produced that the wife or her relations would be likely to take the law into their own hands in the absence of provisions for legal redress. Also, if the wider definition of enticement suggested above were accepted the parents of a child might bring an action for enticement against the adult, and this would raise similar problems.

122. Draft Bill, cl.8(2). It may be possible for an action of enticement to be brought against the sorcerer under cl.5, or for proceedings to be taken under the *Sorcery Act* 1971 (No. 22 of 1971).

123. See *Sorcery Act*, s.19.

124. Law Reform Commission of Papua New Guinea. Working Paper No. 6. *Criminal Responsibility: Taking Customs, Perceptions and Beliefs Into Account* (February, 1977), 16-18.

125. Draft Bill, cl.4(2).

126. Polygamous customary marriages are valid if they are accepted by the custom of the parties under s.55(1) and (2) of the *Marriage Act* 1963.

applies equally in relation to wives in the few areas of Papua New Guinea where polyandry is practiced.<sup>127</sup> It seems to be necessary in the interests of preserving harmony between all the parties to a polygynous marriage.

(vi) Time Limit for Taking Proceedings .

Proceedings must be taken within twelve months after the complainant comes to know of the act of adultery or of the enticement.<sup>128</sup> Where several acts of adultery are regarded for the purposes of the Draft Bill as a single act of adultery, the time limit runs from when the last act came to the complainant's knowledge.<sup>129</sup> The time period may be extended by another six months at the discretion of the court where the complainant had "reasonable excuse" for the delay.<sup>130</sup> The *Report* envisages factors like sickness, unavailability of magistrates or witnesses, or coercion<sup>131</sup> providing reasonable excuse.

This defence has the desirable effect of preventing old acts of adultery from being resurrected many years after they occurred and of preventing an offended spouse from indefinitely blackmailing the other spouse or the person with whom adultery was committed.

There is nothing under the Draft Bill to stop a spouse who learns of the occurrence of adultery after many years from bringing an action. A malicious or vengeful spouse might in these circumstances stir up a great deal of trouble over an act of adultery which has been forgotten by the parties. It may be advisable to fix an absolute time limit from the date of the commission of adultery to prevent this. However, it is undesirable to abolish a right to which the offended spouse is entitled by customary law, so alternatively the right to proceed may be made dependent upon whether he or she is still considered by customary law to have an extant cause of action.

VI. *CONCLUSION.*

By making adultery a civil, rather than a criminal, matter, the Commission has refrained from using the law as an instrument to enforce morality where sexual conduct between consenting adults is concerned, and this is consistent with the spirit of the Constitution.<sup>132</sup> The Commission has taken a pragmatic approach to law reform,

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127. The validity of these marriages would also depend on application of ss.55(1) and (2) of the *Marriage Act* 1963. I have been told that polyandry is practiced in a few places in the Sepik and in New Ireland.

128. Draft Bill, cl.6(1).

129. *Ibid*, cl.6(2)(2) and cl.3.

130. *Ibid*, cl.6(3).

131. *Report*, at p.6.

132. See the right to privacy, Constitution, s.49 and the first National Goal and Directive Principle relating to integral human development.

acknowledging that in Papua New Guinea adultery is not a purely private matter and that the law must provide a legal remedy so that aggrieved spouses will not take the law into their own hands. This is a sensible and humane solution.

The Commission has determined that customary methods of dispute settlement, with emphasis on mediation and restoration of harmony between the parties, should be used, and therefore jurisdiction has been vested primarily in the Village Courts.<sup>133</sup> This approach has many advantages - it makes the law accessible to the people, enables magistrates familiar with customary law and with the local community to administer justice, retains contact between customary law and the official courts, and encourages legal development based on customary law.<sup>134</sup>

However, whilst the Draft Bill incorporates customary methods of dispute settlement, it leaves the Village Court magistrates little scope for applying substantive rules of customary law. The Commission has presented the magistrates with legislation in the Anglo-Australian tradition setting out universally-applicable rules designed to anticipate and cover all possible situations and circumstances.<sup>135</sup> Admittedly, the Commission has attempted to ensure that the rules are suitable for Papua New Guinea. However, the Draft Bill restricts the development of customary law to the straitjacket of a western framework, setting out complicated definitions, defences, and restrictions on who can sue and be sued in a manner which may be quite foreign to the parties' customary law. This method also stifles development of Papua New Guinean case law, for the magistrates will be forced to concentrate on interpreting the legalistic and technical provisions of the Draft Bill rather than on the creative and dynamic application of customary law, though they are much more adept and effective in the latter role. Further, it is desirable that Papua New Guinea should develop a body of case law untrammelled by traditional common law principles, but the Draft Bill's incorporation of vocabulary and concepts from matrimonial causes jurisdiction may well tempt the courts to resurrect English and Australian cases to aid in its interpretation. In areas such as adultery where there is a highly developed body of custom,<sup>136</sup>

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133. The Local Courts also have jurisdiction in some circumstances. See fn. 40, *supra*.
134. This is consistent with the fifth National Goal and Directive Principle calling for development primarily through the use of Papua New Guinean forms of social, political and economic organisation, and with the Law Reform Commission of Papua New Guinea *Working Paper No. 4: Declaration and Development of Underlying Law* (September, 1976).
135. The only section of the Draft Bill which directs the court to apply customary law is part (b) of the definition of adultery.
136. See, for example, David K.G. Tibu, "An Unfaithful Wife and her Lover", from a report entitled "Four Customary Law Cases", (1975) 3 M.L.J. 151, 154; Marilyn Strathern, *Women in Between: Female Roles in a Male World: Mount Hagen: New Guinea* (1972); R.M. Glasse and M.J. Meggitt (ed.), *Pigs, Pearlshells and Women: Marriage in the New Guinea Highlands, A Symposium* (1969).

Papua New Guinean values and concepts can best be incorporated in the law by the enactment of general provisions which require the application of customary law (accompanied by guidelines to ensure modification of customary law where it fails to comply with the Constitution) and by careful monitoring of decisions. If the law becomes chaotic, order can be imposed eventually by legislation, but not until an underlying structure has emerged. This process should not be forestalled by legislation like the present Draft Bill.<sup>137</sup>

The Commission's approach of drafting universally-applicable provisions rather than directing that the custom of the parties should be applied extends the scope of the law relating to adultery. Instead of limiting the action for adultery to those who have an action according to their customary law, it is extended to everyone irrespective of their rights according to custom - for example, to women, to expatriates, to Papua New Guineans who no longer live within a group governed by customary law, and to Papua New Guineans whose customary law does not provide any remedy for adultery. This appears at first glance a desirable development, consistent with the Constitutional prohibition of discrimination on grounds of race, tribe or sex.<sup>138</sup> But it must be emphasised that the action for adultery is based on the notion that one spouse (usually the husband) has proprietary rights over the sexuality and services of the other spouse. This is inconsistent with the spirit of the constitutional directive that:

'every person be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others'.<sup>139</sup>

and the constitutional right to privacy which states that "every person has the right to reasonable privacy in respect of his private and family life".<sup>140</sup> Therefore, while it is acknowledged that the action for adultery should not be abolished, it would be preferable to limit its scope to where parties are entitled to a remedy by their customary law.

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137. The Commission should have directed itself more closely to its earlier Working Paper No. 4. *Declaration and Development of the Underlying Law. (op. cit.)*.

138. Constitution, s.55(1).

139. Constitution, first National Goal and Directive Principle.

140. Constitution, s.49.

In conclusion, then, it is submitted that the Draft Bill should simply repeal the present legislation relating specifically to adultery, leaving settlement of adultery disputes exclusively within the existing general jurisdiction of the Village Court.<sup>141</sup> The more specialised and specific provisions should be excluded.<sup>142</sup> This would achieve the main aims of the Draft Bill - compensation and mediation<sup>143</sup> - without unduly hampering the magistrates in their application of customary law. It may well be advisable to enact legislation which encourages magistrates to use their powers of mediation more widely, and to ensure that magistrates are aware of the need to modify aspects of customary law which are inconsistent with the Constitution, but these are of general application with no particular relevance to adultery disputes.

- - - HEATHER McRAE.

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141. The jurisdiction of the Local Courts under *Local Courts Act* 1963, s.13(1)(c) could also be preserved.

142. This would entail dropping the whole of the draft Adultery and Enticement Bill 1977 and the draft Village Courts (Engagement Gifts, etc.) Bill 1977 and retaining the draft legislation referred to in fns. 41-43, *supra*.

143. See fn. 60, *supra*.