

COMPENSATION FOR ADULTERY IN PAPUA NEW GUINEA: THE ADULTERY AND ENTICEMENT ACT 1988

Owen Jessep*

INTRODUCTION

Passing through Parliament in a single day, without debate or amendment, and gazetted with virtually no publicity, the Adultery and Enticement Act 1988 (No.5 of 1988) came into force on 20 October 1988. In this paper I shall review the main provisions of the Act, and highlight some aspects of the legislation which deserve further consideration and possible amendment.

While the end product arrived suddenly and without fanfare, reform of the law of adultery had been in the pipeline for more than a decade. As the Minister for Justice, Bernard Narokobi, observed when introducing the Bill to Parliament on 7 September 1988, the legislation was based upon a draft statute prepared by the PNG Law Reform Commission during 1976, when he himself was the Chairman of the Commission.¹ The draft statute was part of the *Commission's Report on Adultery*, issued in February 1977.²

The Commission had been especially concerned at the family disruption, violence, and social upheaval commonly caused by adultery disputes in Papua New Guinea.³ Nevertheless, despite the widespread view encountered during the Commission's enquiry that adultery and enticement should continue to be regarded as criminal offences,⁴ as was the case under the Native Regulations then applicable in Papua and in New Guinea,⁵ the Commission felt it more appropriate that such disputes be treated as civil claims, involving mediation before adjudication, and compensation rather than punishment.⁶ The discriminatory Native Regulations, moreover, which applied only to Papua New Guineans, were seen as an unfortunate reminder of colonial times, inconsistent with the spirit of the new Constitution. For these reasons the Commission recommended that the Native Regulations be repealed and that the new civil law on adultery should apply to everyone in Papua New Guinea.⁷

* Faculty of Law, University of New South Wales.

1. *Hansard*, 7 September 1988, p.60.
2. *Report No 5* ("Report on Adultery"), Feb. 1977.
3. *Id.*, 5. Cf. the views of Narokobi A.J. in *Sipo v Meli* (1980) N240.
4. *Id.*, 3. Cf. M. Strathern, *Report on Questionnaire Relating to Sexual Offences as Defined in the Criminal Code* (Feb 1975), at 49-62; and more recently, B.L. Richardson, D.B. Wullemin, and D.W. Moore, "Ranking of Crime Seriousness By the People, the Law and the Police in Papua New Guinea", (1987) 15 *Mel LJ* 49-65.
5. See *Native Administration Regulation (T.N.G.)* (Ch 315), ss14-15; *Native Regulation (Papua)* (Ch 316), ss17-18.
6. Law Reform Commission, n2 *supra*, pp.1,3,8.
7. *Id.*, 2.

As will be seen, although there are differences in detail between the Commission's earlier draft statute and the 1988 Act, the new legislation does indeed reflect the main thrust of the Commission's recommendations.

JURISDICTION IN ADULTERY CASES AFTER THE 1988 ACT

(i) *Adultery and enticement no longer criminal offences*

By the Native Regulations previously applicable in Papua and in New Guinea, adultery was an offence for which the adulterous third party (but not the adulterous spouse) could be punished by a small fine or by up to six months imprisonment.⁸ Both sets of Regulations also made enticement of a female spouse an offence in some situations.⁹ As a result of s22 of the 1988 Act, s2 of each set of Native Regulations has been repealed, although curiously the specific regulations detailing the offences of adultery and enticement (ss14 and 15 in New Guinea, ss17 and 18 in Papua) have not been expressly repealed.¹⁰ Since s2 is in each case a section of definitions, including that of a "person who is subject to this Regulation", the draftsman presumably was of the view that if this definition was repealed there would then no longer be anybody subject to the Regulations, and therefore no other repeal was required.

If this is the correct interpretation of what has in fact been achieved by s22 of the 1988 Act, it follows that acts of adultery and enticement are no longer criminal offences as such. Nevertheless, as one of the offences prescribed as part of the Village Court's criminal jurisdiction under s22 of the Village Courts Act (Ch 44), Regulation 3(k) refers to "conduct that disturbs the peace, quiet and good order of the village...". It may then be possible to argue in some cases that the circumstances surrounding an adulterous relationship, or an actual or attempted enticement, amount to a breach of this Regulation. If so, the Village Court is empowered to fine a person up to K50 or impose up to one month's community work.¹¹

(ii) *Claims for compensation or damages*

Prior to the 1988 Act, claims for compensation or damages arising from adultery or enticement could arise in two ways.¹² First, if the claim was based on custom, a claim could be variously brought to a Village, Local or District Court.¹³ Secondly, a party to a

8. Ch 315, s14; Ch 316, s17. See *Maumau v Maragili* (1963) P&NGLR 108; *Gaudaida v Damanapu* (1964) P&NGLR 253.

9. Ch 315, s15; Ch 316, s18.

10. It may be noted in passing that s14 of Ch315 appears to have been repealed by mistake (i.e. in place of s4, which deals with succession) by s3(1) of the *Wills, Probate and Administration (Amendment) Act 1987*.

11. *Village Courts Act* (Ch 44), s23.

12. It was decided by the Supreme Court in *Poisi Tatut v. Chris Cassimus, Constitutional Reference No 1 of 1977* (1978) PNGLR 295 that the common law action for enticement, having been abolished by statute in England in 1970, was consequently not part of the common law received in Papua New Guinea at Independence by virtue of Sch 2.2 of the Constitution.

13. See *Village Courts Act* (Ch 44), s21; *Local Courts Act* (Ch 41, s12; *District Courts Act* (Ch 40), s21. For discussion of jurisdiction in customary claims, see O. Jessep and J. Luluaki, *Principles of Family Law in Papua New Guinea* (UPNG) Press 1985), 77-81.

statutory marriage petitioning for a divorce under the Matrimonial Causes Act (Ch 282) on the ground of the other spouse's adultery was entitled under s32 of that Act to seek damages for adultery from the spouse's partner, who was referred to as the co-respondent.¹⁴

According now to s21 of the 1988 Act, claims for compensation arising from adultery or enticement "shall not be brought... except in accordance with this Act", jurisdiction to hear such claims being conferred on Local and District Courts.¹⁵ Although the heading to the section refers only to the abolition of certain "common law" rights, the substantive wording of the section is much wider in scope. Consequently, the previously referred to jurisdiction of Local and District Courts in customary claims will presumably no longer operate in this area. Similarly, although s32 of the Matrimonial Causes Act (Ch 282) has not been specifically repealed, it follows from the wording of s21 of the 1988 Act that damages for adultery against the co-respondent may no longer be sought as part of the divorce proceedings, but must be the subject of separate proceedings under the 1988 Act.

It would seem however, despite the wording of s21, that the civil jurisdiction of Village Courts (e.g. to award compensation of up to K300)¹⁶ in adultery cases has not been affected. This is because by s27 of the Village Courts Act (Ch 44), the Village Court's jurisdiction is not affected by any other Act which is not expressly applied to it. Thus a person living in an area served by a Village Court will be able to choose between arguing a customary claim for compensation in the Village Court or, as an alternative, bringing the claim in the Local or District Court under the 1988 Act.

CLAIMS FOR COMPENSATION UNDER THE 1988 ACT

As the Minister for Justice pointed out, the 1988 Act is intended to provide "one law for everybody", regardless of customary differences, sex, or nationality.¹⁷ Thus it makes no difference whether the claim is initiated by a wife or a husband, or whether the claim is consistent or inconsistent with customary practice, or whether some or even all of the parties involved are expatriates.

By s2 of the Act, an "act of adultery" is committed when a "spouse" engages in "voluntary sexual intercourse" with someone other than his or her spouse. A person commits "enticement" by "persuading or attempting to persuade" someone else's spouse to commit an act of adultery, whether or not the contemplated adultery takes place (s3). The word "spouse" is defined in s1 to include "a party to a relationship between a man and a woman which can reasonably be considered as a subsisting relationship having the status of a marriage". Before examining these important definitions in more detail (see next section), it will be helpful to summarise the provisions dealing with procedure and the court's powers in relation to claims for adultery or enticement.

A spouse complaining of an "act of adultery" (which includes all such acts between the adulterous couple prior to the initiation of proceedings)¹⁸ may bring the claim against the

14. For recent examples, see *Tolison v. Tolison* (1985) PNGLR 125; *Gray v. Gray* (1987) N 592.
15. *Adultery and Enticement Act 1988*, s1. This is in contrast to the views of the Law Reform Commission, which recommended that jurisdiction should be conferred on Village Courts wherever these existed (*Report*, n2 *supra*, p.10).
16. *Village Courts Act* (Ch 44), s21.
17. *Hansard*, 7 Sept. 1988, p.60.
18. *Adultery and Enticement Act 1988*, s4(2).

other spouse, or the third person, or both (s4). If only one defendant is named, he or she may ask the court to join the other party to the adultery as a second defendant (s8(3)). An action for enticement, in contrast, may not be brought against the spouse, but only against the person responsible for the enticement (s5). Claims for adultery or enticement must be initiated within six months of the act complained of or, if the court finds reasonable cause for delay, within a further period of three months (s7). An action may be brought by a "relative" (not defined) on behalf of a spouse only where the spouse has given permission, or where the spouse is "unable or incapable of" bringing the action and giving permission to a relative to do so (s6). By s8, where separate claims for adultery are brought against the other spouse and against the third party, or separate actions are begun for enticement and for subsequent adultery between the spouse and the enticer, the court may hear the actions together. Before hearing any action under the Act, the court must try to have the action settled by mediation (s10).¹⁹

Where mediation is unsuccessful and the hearing proceeds, s19 provides that the standard of proof "shall be that applied in a criminal prosecution". In addition to any other defences which may be raised by a defendant, s9 states that the action is to be dismissed where the defendant is able to establish that the complainant had previously consented to the act of adultery or enticement, or had subsequently forgiven the defendant,²⁰ or that the defendant believed on reasonable grounds that the spouse with whom the act was committed was not married.

If the court proceeds to uphold the claim, a spouse complaining of adultery may be awarded a maximum of K1,000 compensation (regardless of whether one or two actions were brought), and a spouse complaining of enticement may be awarded a maximum of K500 (ss 12-13). Where an act of enticement was followed by an act of adultery with the same person, the spouse shall not be awarded more than K1,000 in total (s14). The actual sum awarded will depend upon the defendant's earning capacity, any financial hardship likely to follow the making of the order, whether customary compensation has been paid, and any other relevant matters (s16). Where there is more than one defendant, the court shall specify the portion of compensation payable by each of them (s15).

Compensation may be awarded in cash or goods, in a lump sum or by instalments, but the compensation awarded shall not include alcoholic liquor (s17). A defendant failing to comply with an order for compensation may be sentenced to imprisonment for up to six months (s18).

SOME POINTS OF INTERPRETATION

(a) Who is a "spouse"?

It will be noted that for an act of adultery or enticement to occur, one of the parties involved must be a "spouse". By s1, this term is defined to include:

a party to a relationship between a man and a woman which can reasonably be considered as a subsisting relationship having the status of a marriage.

19. By s10(2) of the 1988 Act, ss 31-33 of the *Local Courts Act* (Ch 41) apply to any such mediation. Cf. Law Reform Commission, n2 *supra*, p.8, p.22.

20. For comment on the concepts of consent and forgiveness, see H. McRae, 'Note: The Law Reform Commission's Report on Adultery', (1977) 5 *Mel. LJ.* 130-132.

Given that claims under the Act are to be heard by Local and District Court magistrates, it is especially important that key definitions in the Act should be as straightforward and unambiguous as possible. The wording of the definition of "spouse" is anything but straightforward, and will pose difficult problems of interpretation.

One might start with the assumption that "spouse" means a party to either a statutory marriage or a customary marriage.²¹ The definition in the Act however is certainly wide enough to encompass other relationships as well, but the wording is so vague as to give little indication of what these might be. If, for example, it was intended to include a party to a void statutory marriage, or an invalid customary marriage, who believed on reasonable grounds that the marriage was valid,²² it would have been easy to say so specifically.

To take the point further, could the definition also be intended to cover persons in a de facto relationship? In this respect, the terms "considered" and "status" are quite ambiguous, and could be given either a social or a legal content. "Considered" by whom? "Status" in law, or in the eyes of the community (or of the couple, or of merely one of them)? If a couple deliberately choose not to get married, or if one party is unable or unwilling to marry the other, are they nevertheless "spouses" under the Act?

The term "subsisting" is also likely to produce confusion. "Subsisting" in a legal sense, or in the sense of a functioning social relationship? If a statutory marriage has broken down, but the parties have not yet applied for a divorce, are they still "spouses" or not for the purposes of the Act? Or was it intended that once a couple separate, even though they are not divorced, the Act no longer applies to them?²³

(b) What is "adultery"?

Another matter to be considered is the types of activity and situations intended to be covered by the term "adultery", which according to s2 occurs when a "spouse" (as previously discussed) "engages in voluntary sexual intercourse with a person other than his [or her] spouse". Although this definition is different to that used in the 1977 draft prepared by the Law Reform Commission, a number of comments on that draft made by McRae²⁴ are still relevant to the interpretation of the 1988 definition. It is a pity that her critique has not been given greater attention, in order to clarify what is meant by the terms "person", "sexual intercourse", and "voluntary".

While at common law, and in the Native Regulations, adultery could only be committed with a person of the opposite sex,²⁵ the 1988 Act simply refers to "person". Whether

21. For discussion of the statutory provisions dealing with statutory and customary marriages in Papua New Guinea, see Jessep and Luluaki, n13 *supra*, Ch.2.

22. Cf Law Reform Commission, n2 *supra*, p.20 (definition of "marriage" in cl 2).

23. In this respect it is interesting to note that s3 of the *Marriage Act* (Ch 280) excludes a Papua New Guinean who is already a party to a "subsisting" statutory marriage from being able to enter a customary marriage. In *State v. Boas Gugu* (1981) PNGLR 5, Andrew J apparently proceeded on the basis that "subsisting" merely meant existing in a legal sense (at pp6-7). See also s57(8) of the *Marriage Act* (Ch 280) and s360(8) of the *Criminal Code Act* (Ch 262), in relation to the crime of bigamy.

24. Mc Rae, n20 *supra*.

25. Ch 315, s14; Ch 316, s17. *Rayden's Law and Practice in Divorce, and Family Matters*, 4th ed. (1983), Vol.1 pp.204-206.

homosexual as well as heterosexual behaviour is sufficient to allow a spouse to bring a complaint is thus not clear.

A further uncertainty may arise with the word "sexual intercourse". Again, at common law the concept of adultery extended only to heterosexual intercourse of the conventional kind, involving at least partial penetration of the vagina by the penis.²⁶ If sexual "intercourse" is simply construed in the dictionary sense of sexual "connexion", however, then it is possible that oral or anal intercourse would be included. Reference to the Criminal Code Act in this context does not assist, since the sections dealing with sexual offences use quite different language, and the term "sexual intercourse" does not appear.²⁷

Finally, what is intended by the word "voluntary"? If it means that each party must consent to the intercourse, it would follow of course that if a wife was raped, the husband could not sue her for adultery. But could he sue the rapist, since the act was "voluntary" on the part of the rapist? Conversely, if a husband raped another woman, presumably the wife could not sue the victim, but could she sue her husband? At common law, it may be noted, the woman's lack of consent was a defence to a claim against her, but this did not bar an action against the man involved.²⁸ Other issues of "voluntariness" may arise where the third party is mentally incapable of consenting, or where the third party is still a child under 16.²⁹ Although the Law Reform Commission's draft contained a defence in a situation where "the adulterer was below the age of puberty",³⁰ no similar or related defence appears in the 1988 Act. Thus the magistrates will have the difficult task of determining when an under-age girl, for example, can give an effective consent to sexual intercourse with a husband so as to be liable to an action for damages by the wife.³¹

In summary, it is suggested that the definitions of "spouse" and of "act of adultery" are seriously deficient. The wording used is inadequate to give the court, or potential litigants and their legal advisers, a clear idea of what categories of people, and what types of activity, are intended to be covered by the Act. These are not merely matters of peripheral interest. Whether homosexual behaviour by a spouse with a third person, for instance, should be regarded as analogous to heterosexual adultery, or whether partners to a de facto relationship should be treated in the same way as married partners for claims under the Act, are complex issues of policy. The answers given to these questions will depend upon one's views as to what are or should be the basic purposes, and underlying premises or assumptions, of the legislation. Rather than expect magistrates to have to guess at such matters, the legislation itself should be more specific.

(c) *Defences under s9*

It is particularly unfortunate that the term "spouse" is so vaguely defined, for the same term also appears in s9(c), where it is a valid defence that the defendant believed on

26. *Rayden*, n25 *supra*, p.204; *Dennis v. Dennis* (1955) P.153; *Sapsford v. Sapsford* (1954) P.394; *cf Report*, n2 *supra*, p5.

27. See *Criminal Code Act* (Ch 262 ss209-224)

28. *Redpath v. Redpath* (1950) 1 All ER 600; *Vrska v Vrska* (1960) SASR 74

29. *S v. S* (1962) p.133; *Barnett v Barnett* (1957) p.78. For discussion, see H. Finlay and A. Bissett-Johnson, *Family Law in Australia* (1972), p.285; *cf Rayden*, n25 *supra*, pp.204-205

30. Law Reform Commission, n2 *supra*, p21 (cl 8(1)(c))

31. *Barnett v Barnett* (1957) P 78. *cf Rayden* n25 *supra* p.205

reasonable grounds that the "spouse with whom the act of adultery or enticement was committed, was not married". If, reasonably enough, "not married" is to be taken to mean "not a spouse", then all the points of uncertainty already mentioned are again relevant. It is consequently not clear what the defendant will have to show in order for the defence to succeed: only a reasonable belief that the person was not a party to a valid legal marriage, or also a reasonable belief that the person was not a party to a void or invalid legal marriage, or not a party to a de facto relationship? On the other hand, if the word "subsisting" in the definition of "spouse" means "socially functional", will the defence be able to succeed, for example, by showing a reasonable belief that the partner was separated from the other "spouse" (in whatever sense this term is to be understood)?

It may be, of course, that the court prefers to attach a narrow interpretation to the word "spouse" in the Act, confining it to parties to a valid statutory or customary marriage. If so, then as long as the legal tie persists, a separated spouse will be able to complain whenever the other spouse begins a new relationship. Is this desirable? In her comments on the 1977 Law Reform Commission proposals, for example, McRae argued that the lack of such a restriction "permits intolerable interference with and disruption of stable de facto relationships formed since the separation."³² Rather than rely on the good sense of the magistrate to award minimal compensation in such a case, she argued, it would be better to provide a specific defence, or to exclude a separated spouse from the ambit of other key definitions in the Act (e.g. those of "adultery", or "spouse").³³

Another defence not spelt out in the Act is that of sorcery. Section 15 of the Sorcery Act (Ch 274) provided a sorcery defence to a person charged with adultery offences against the Native Regulations of Papua or of New Guinea, "or against any corresponding or analogous provision of any other law". The defence would succeed if it was shown that an act of sorcery had been performed without consent on the defendant, that it was generally believed in the defendant's community that such sorcery would induce the defendant to commit adultery, and that according to custom the defendant would have been excused.

It is difficult to argue that civil proceedings under the 1988 Act are "analogous" to criminal proceedings under the Native Regulations. As s9 does not purport to be an exhaustive list of defences, however, it may still be possible to raise a sorcery defence by virtue of s5 of the Customs Recognition Act (Ch 19), especially paras (h) and (i).³⁴

As originally recommended by the Law Reform Commission,³⁵ however, consideration should be given to including a specific sorcery defence in s9.

32. McRae, n20, *supra*, p.130.

33. *Id.*, 130. Of course, the notion of "separation" itself involves complexities, as to the mental element involved, whether parties may be "separated" while still living under the one roof, whether a deserting spouse can claim to be "separated", and so on. For a brief discussion of these issues in relation to the ground of divorce on the basis of five years separation under s17(m) of the *Matrimonial Causes Act* Ch 282) see Jessep and Luluaki, n13 *supra*, pp.66-67; cf. Finlay and Bissett-Johnson, n29 *supra*, pp.330-339.

34. Section 5(h) refers to "the reasonableness or otherwise of an act..." and s5(i) refers to "the existence of a state of mind of a person", and the section concludes with the words "...or where the court thinks that by not taking the custom into account injustice will or may be done to a person". Section 19 of the *Sorcery Act* (Ch 274) preserves the general operation of the *Customs Recognition Act* (Ch 19), except where the contrary is expressly provided.

35. *Report*, n2 *supra*, p.8.

(d) Amount of compensation payable

I should be noted that while the Law Reform Commission recommended that the legislation should state the maximum compensation payable in all proceedings resulting from an act or episode of adultery or enticement, the 1988 Act takes a different approach. Thus, the maximum compensation in one or more proceedings initiated *by the same spouse* for an act of adultery will be K1,000 (s12). Where the third party is also married, however, that party's spouse will also be able to bring proceedings against one or both of the adulterous couple. Thus the total compensation payable from the act of adultery will be up to K2,000.

As to enticement, the Act departs from the position at common law, in that enticement of a spouse for any reason other than adultery is not an offence under the Act.³⁶ Further, where the enticement actually results in adultery, the K1,000 limit referred to in s14 only applies where the enticer is also a partner in the adultery. Thus, where A entices B, who is married to C, to commit adultery with D, and this happens, C will be able to claim up to K500 from A for enticement (s13) and up to K1,000 maximum in one or more actions against B and D for adultery (s12), i.e. K1,500 in all.

(e) The burden of proof

As indicated, s19 provides that the standard of proof in an action shall be that applied in a criminal prosecution, i.e. proof beyond reasonable doubt. Since the remedies available under the Act are civil in nature, the remedy being compensation, such a high burden of proof appears quite anomalous. There seems no reason why anything more than proof on the balance of probabilities, with due regard to the gravity of the subject matter, should be required.³⁷ Are there any other instances in the law of Papua New Guinea where a party in civil proceedings must carry the criminal onus of proof?³⁸ If there is a concern that claims might be upheld on the basis of false accusations or insufficient evidence, the section could impose a requirement of corroboration, or provide other guidance as to the type of evidence necessary to establish the claim.³⁹

CONCLUSION

The passage of the 1988 Adultery and Enticement Act certainly indicates, as the Minister for Justice told Parliament, that "the process of changing laws in this country is very slow indeed."⁴⁰ Everyone should nevertheless applaud the removal of the offensive and discriminatory Native Regulations dealing with adultery and enticement.

36. This is consistent with the Law Reform Commission's view; see *Report*, n2 *supra*, p.6.

37. This is the test applied in divorce petitions involving adultery under the *Matrimonial Causes Act* (Ch 282); see *Briginshaw v. Briginshaw* (1938) 60 CLR 336.

38. It is possible that the wording of s19 of the 1988 Act is simply the result of an oversight. An earlier draft of the legislation in 1987 allowed the court to impose a fine or a term of imprisonment in addition to or instead of an order for compensation (see draft *Adultery and Enticement Bill 1987*, clause 11), and in those circumstances it is not surprising that the criminal burden of proof was required (clause 18). It may be that this provision was transferred to the 1988 Act, without regard to the fact that the provision dealing with fines and imprisonment had been dropped.

39. Cf. Finlay and Bissett-Johnson, n29 *supra*, pp.285-288.

40. *Hansard*, 7 Sept. 1988, p.60

As an exercise in law reform, the Act undoubtedly breaks new ground. Rather than leave adultery disputes to be dealt with according to custom, or according to a statutorily modified custom under which wives might have equivalent rights to those of husbands to bring such a claim (consistently with s55 of the Constitution), the 1988 Act has gone considerably further, and produced "one law for everybody".⁴¹

Given the need, as stated in the Preamble to the Act, to regulate adultery and enticement disputes "as a matter of national interest", it is regrettable that in a number of key respects the intended ambit of the legislation is quite unclear. This lack of precision could have been appreciably lessened if more attention had been given to McRae's valuable 1977 commentary on the Law Reform Commission's proposals.⁴²

It will be interesting to observe the way in which the Local Court and District Court magistrates carry out the onerous task of determining the proper application of the new provisions. In the meantime, it is not too late for Parliament to amend the sections relating to defences, and the burden of proof, and most importantly to clarify the basic definitions of "spouse" and "adultery", to indicate more clearly what persons, and what types of activity, are to be covered by the Act.

41. See n17, *supra*.

42. McRae, n20, *supra*.