

ACCESSING RIGHTS AND PROTECTIONS UNDER THE *HIV/AIDS MANAGEMENT AND PREVENTION ACT* IN PAPUA NEW GUINEA: MAKING A CASE FOR GRANTING A LIMITED JURISDICTION TO THE VILLAGE COURTS

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INTRODUCTION

In 2003 the National Parliament of Papua New Guinea (PNG) unanimously passed the *HIV/AIDS Management and Prevention Act* (HAMP Act), although it was not gazetted for commencement until 2004. The HAMP Act is a progressive piece of legislation creating rights and responsibilities both for people living with HIV and AIDS and for the general public. The passage of the Act was intended to create a legal infrastructure to assist PNG to manage a disease which threatens to spread across the country with catastrophic consequences.¹

Jurisdiction for the making of complaints under the Act was given to a number of courts and tribunals including the Ombudsman Commission, the National Court and the District Court. The Ombudsman Commission has limited reach throughout PNG, can only provide very limited assistance to private sector complainants and can provide limited remedies for public sector complainants. It cannot grant compensation. National and District Courts also have jurisdiction to grant relief under the HAMP Act including compensation for loss or damage and a declaration that the act was unlawful. National and District Courts are difficult to access for the ordinary people of PNG. These paths to relief for actionable acts of discrimination and stigmatisation are not readily accessible to a population which is low literate and would struggle with legal forms such as summons, statements of claim and like documents, has limited resources to access legal advice and might find it very difficult to travel to a regional centre to access a fixed court, or court on circuit.

This paper suggests that while a legal pathway presently exists for the application of the principles of the HAMP Act within village courts, a law reform granting some direct but limited jurisdiction to the village courts ought to be given serious consideration by the National AIDS Council, the National Department of Health and the Department of Justice and Attorney General. Such a reform would make some of the rights and protections created by the HAMP Act much more accessible to the

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¹ National AIDS Council Secretariat and the National Department of Health, *Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome in Papua New Guinea – 2005 Annual Surveillance Report* (2006).

people of PNG. It would be also consistent with the present policy of the Government of PNG for “mainstreaming” HIV.²

THE SPREAD OF HIV AND AIDS IN PNG

Gathering accurate data on the incidence of HIV infection in PNG is difficult; however, figures suggest the existence of an epidemic. The latest estimates put national adult HIV prevalence at 1.3%, indicating an epidemic that is still expanding, although at slightly lower levels than previously believed. The number of annual new HIV infections detected in the country reached 4017 in 2006 – more than double the 1713 reported in 2002. Some 84% of all reported HIV infections to date have been in rural areas, where more than 80% of the population lives.³ However, the outgoing Minister for Health in August 2007 called these figures unrealistic. ‘The actual figures that we’ve been able to obtain through fairly accurate means over the limited number of people being tested comes down to 1.28, which unfortunately ... sounds good because it’s lower than the 1.7 that’s been commonly thought, [but] we don’t believe that the figures are, in reality, true because we need to do a lot more testing.’⁴

It is clear from numerous reports and studies that HIV infection remains a serious problem in PNG. As one commentator put it: ‘The socio-economic realities, and behaviours moulded by cultural and sexual practices as well as the gender dimensions of the HIV epidemic in PNG, presents ideal conditions for the rapid spread of HIV and other sexually transmitted infections.’⁵

THE HIV AND AIDS MANAGEMENT AND PREVENTION ACT 2003

The *HIV AIDS Management and Prevention Act 2003* passed the Parliament of PNG in August 2003. It was gazetted in October 2004. It is colloquially known in Papua New Guinea as “the HAMP Act”.

The HAMP Act is intended to give effect to some of the rights and freedoms acknowledged in the Preamble to the *Constitution of the Independent State of Papua New Guinea* by providing for the prevention of the spread of HIV/AIDS, protection of people affected from discrimination and the protection of public health.

Law reform to support the management and prevention of HIV/AIDS was approached in a systemic way by the PNG National HIV/AIDS Medium Term Plan 1998-2002. The Plan recognised the contributions of the United Nations guidelines on a human rights approach to the management of HIV/AIDS,⁶ the regional strategy for the prevention of STD/AIDS produced by the South Pacific Commission,⁷ and the

² See Kate Butcher, ‘Mainstreaming HIV into AusAID’s Development Portfolio in Papua New Guinea – Summary Operational Guide for Managers’ (November 2006) http://www.ausaid.gov.au/publications/pdf/png_mainstreaming.pdf (Accessed 28 March 2007).

³ National AIDS Council Secretariat and the National Department of Health, above n 1.

⁴ Radio New Zealand International, ‘Outgoing PNG Health Minister calls new HIV figures unrealistic’ <http://www.rnzi.com/pages/news.php?op=read&id=34296> (Accessed 8 June 2008).

⁵ National AIDS Council Secretariat and the National Department of Health, above n 1, ix.

⁶ UNHCHR/UNAIDS, ‘HIV/AIDS and Human Rights: International Guidelines’ (1996).

⁷ South Pacific Commission *Regional Strategy for the Prevention and Control of STD/AIDS in Pacific Island Countries and Territories* (1997).

AusAID auspiced National HIV/AIDS Support Project in PNG.⁸ It expressly sought to create a supportive legal and ethical environment for HIV/AIDS prevention and care, to uphold human rights in HIV/AIDS prevention and care, and to support legislation and policy based on an ethics of compassion and non-discrimination.⁹

To this end the PNG Parliament unanimously passed a law to help manage and prevent HIV/AIDS for all citizens of PNG in August 2003. The HAMP Act was drafted with reference to the specific constitutional and legal frameworks in PNG and the political and social responses to HIV/AIDS that prevailed at the time.¹⁰ Within these limitations, it sought to reflect the legislative principles of HIV/AIDS management outlined in the *UN Handbook for Legislators on HIV/AIDS, Law and Human Rights*.¹¹

The human rights approach to the management and prevention of HIV/AIDS posits that the most effective way to tackle the HIV/AIDS epidemic is to protect the human rights of people most at risk of receiving and spreading the virus.¹² The disproportionate spread of HIV/AIDS amongst the poorest and most marginalised in society amplifies the need for human rights protection. Human rights infringements promote HIV infection because poor access to information makes people more vulnerable to infection. People may be reluctant to seek health care if they fear discrimination or harassment, and will avoid services or prevention messages if they fear being associated with HIV/AIDS.¹³ Limited medical care and treatment, poor nutrition, low income and poor shelter mean that people living with HIV are more susceptible to disease. Furthermore, prevention and support programs have proved to be ineffective without the participation of the people affected.¹⁴

In a paper written by Christine Stewart who assisted the National AIDS Council in the drafting of the HAMP Act, she states that the approach was strongly influenced by the work of the United Nations in this area and, in particular, the 1999 *Handbook for Legislators on HIV/AIDS, Law and Human Rights*. As noted by Stewart, the human rights approach, which had proved successful in other countries, was not immediately

⁸ Christine Stewart, 'Towards a Climate of Tolerance and Respect: Legislating for HIV/AIDS and human rights in Papua New Guinea' (2004) 8(2) *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/vol08no1/2.shtml> (Accessed 20 August 2008).

⁹ Government of Papua New Guinea, *Papua New Guinea National HIV/AIDS Medium Term Plan 1998-2002* (1998).

¹⁰ *Ibid.*

¹¹ D Patterson and L London, 'International law, human rights and HIV/AIDS' (1999) 80(12) *Bulletin of World Health Organisation; Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of its Devastating Human, Economic and Social Impact* (1999).

¹² Justice Michael Kirby, 'Foreword' in L O Gostin *The AIDS Pandemic* (2004); L O Gostin, *Human rights and public health in the AIDS pandemic* (1997); Justice Michael Kirby, 'Human rights and the HIV paradox' (1996) 348 *Lancet* 1217; Jonathan Mann, 'Health and Human Rights' (1996) 312 *British Medical Journal* 924.

¹³ S C Kalichman and L. C. Simbayi, 'HIV testing attitudes, AIDS stigma, and voluntary HIV counselling and testing in a black township in Cape Town, South Africa' (2003) 79(6) *Sexually Transmitted Infections* 442.

¹⁴ Ralf Jurgens, (2004) 'Human rights for people living with HIV/AIDS' (Paper presented at the Breaking the Barriers-partnership to fight HIV/AIDS in Europe and Central Asia Conference, Dublin Ireland, 24 February 2004).

accepted in Papua New Guinea and it appeared that such an approach would need to be enshrined in law.¹⁵ Stewart noted the rise of human rights abuses in PNG:

Disturbing reports of people thrown out of their houses, dismissed from their jobs of many years, subjected to medical tests without their consent, denied access to their children — and most disturbing, tales of people drowned, burnt to death or otherwise murdered. And the number of orphans and abandoned babies was clearly on the rise. Despite counter-stories of incredible compassion and support, it was evident that the epidemic was creating an urgent need for enhanced protection of human rights. Some of the provisions of the HAMP Act are based not merely on guidelines from international and national literature, but on perceived needs which are derived from these and other reports.¹⁶

How does the HAMP Act protect those infected or affected by HIV or AIDS?

The HAMP Act makes it unlawful to discriminate against a person on the grounds that the person is infected or affected by HIV or AIDS.¹⁷ The discrimination must be to the detriment of that person, adding another limb to the offence.

The HAMP Act also sets out a number of areas in which discrimination might be found to be taking place. These include: in relation to employment and contract work; partnerships; industrial and professional organisations and clubs; education and training; persons in custody; the provision of accommodation; surveillance and access to goods, services and public facilities.¹⁸

The HAMP Act makes it unlawful to stigmatise a person on the ground that they are infected or affected by HIV/AIDS. The term 'stigmatise' is defined and includes 'to vilify or incite hatred, ridicule or contempt against a person or group on the grounds of an attribute'.¹⁹ Means of stigmatisation include publication and communication, which extends to gestures and actions.

The definition of a person infected or affected by HIV/AIDS is broad, encompassing people infected, but also those presumed to be, those being tested, seeking to be tested or refusing to be tested. It also covers those related to or associated with people infected with HIV and even includes those presumed to have such associations.²⁰

This means that the right to the protections provided by the HAMP Act extend considerably beyond people known to be infected. The scope for complaints about unlawful acts of discrimination is very broad. Rights to complain are likely to be encountered in every day life in the villages and cities of PNG by people infected with HIV, and also by their families, workmates and other community members.

¹⁵ Christine Stewart, above n 8.

¹⁶ *Ibid.*

¹⁷ *HIV/AIDS Management and Prevention Act 2003*, section 6.

¹⁸ HAMP Act, sections 7(a),(b),(c),(d),(e), (f),(g) and (h).

¹⁹ HAMP Act, section 2.

²⁰ HAMP Act, section 2.

The HAMP Act contains strong confidentiality protections for people infected or affected by HIV or AIDS and these include court proceedings. Measures are able to be taken to exclude persons from proceedings or to prohibit publications of reports of proceedings where information relating to the status of a person infected or affected by HIV is heard.²¹

Unlawful acts under the HAMP Act are declared to be actionable under other PNG legislation,²² giving people with an action a range of possible remedies in different jurisdictions and tribunals. For example, if a person infected or affected by HIV wishes to bring an action to protect his or her rights under the HAMP Act, some avenues are:

- Complaints about alleged unlawful acts by Government departments or publicly funded organisations or their employees to the Ombudsman's Commission;²³ and
- Seeking a declaration in the District or National Court that an act is unlawful under the HAMP Act and then seeking relief such as compensation, apology, reinstatement, etc.²⁴

There is also an avenue for complaints about professionals acting in the course of their duties for hearing in various disciplinary tribunals, but that jurisdiction is not the subject of comment in this paper.

Passing such a progressive HAMP Act is a forward step in the fight against the spread of HIV/AIDS in PNG. However, it is important that ordinary people in PNG who are affected by or infected with HIV/AIDS under the HAMP Act are aware of their rights and able to pursue a remedy should they be subject to an unlawful act of discrimination or stigmatisation. Rights must be accessible and enforceable, if they are to provide the protections intended by Parliament in passing the law.

Jurisdiction of the Ombudsman Commission

²¹ HAMP Act, sections 18 and 19.

²² HAMP Act, section 27.

²³ Section 219 of the *Constitution of the Independent State of Papua new Guinea* states that the functions of the Ombudsman Commission are to investigate, on its own initiative or on complaint by a person affected, any conduct on the part of—

- any State Service or provincial service, or a member of any such service; or
- any other governmental body, or an officer or employee of a governmental body; or
- any local government body or an officer or employee of any such body; or
- any other body set up by statute that is wholly or mainly supported out of public moneys of Papua New Guinea; or all of, or the majority of, the members of the controlling authority of which are appointed by the National Executive.

Section 218 sets out the purposes of the Ombudsman Commission which also relate only to investigation of public and government agencies. These functions are largely repeated in Section 13 of the *Organic Law on the Ombudsman Commission*. Thus the Ombudsman Commission only addresses complaints against public bodies or their employees. It appears that members of the Ombudsman Commission also take the view that jurisdiction extends to private individuals and corporations by virtue of sub-section 219 (1)(c) of the *Constitution*.

²⁴ HAMP Act, section 28.

Jurisdiction under the HAMP Act is granted to the Ombudsman Commission.²⁵ The Ombudsman Commission derives its jurisdiction under the HAMP Act via the discriminatory practices jurisdiction. This appears to be a jurisdiction additional to the overseeing of government administrative decision making and is intended to extend to practices by private individuals. Clause 37 of the *Constitutional Planning Committee Report 1974* states that:

We recommend that the Commission should have a general jurisdiction similar to that possessed by Ombudsmen in other countries, but that in addition it should have two specific areas of responsibility – one concerned with the supervision and enforcement of the Leadership Code... and the other the enforcement of legislation prohibiting discriminatory practices.

The *Constitution* does not specifically state that this jurisdiction extends to consideration of the actions of private individuals and a reading of the *Organic Law on the Ombudsman Commission* suggests that the only action open to the Ombudsman Commission in relation to complaints about private sector individuals and organisations is to refer matters to the Public Prosecutor.

However, even for complaints about public sector individuals or agencies, the Ombudsman Commission discriminatory practices jurisdiction sits awkwardly in the *Organic Law on the Ombudsman Commission*, which otherwise appears entirely drafted to cover issues arising from the exercise of administrative functions of government or the operation of public bodies.

The Organic Law does not provide easily understood and applicable remedies for complaints about discrimination and stigmatisation made against private bodies and individuals.²⁶ Remedies appear to be confined to procedural arrangements, such as to:

- (a) consider the matter further; or
- (b) take certain specific action; or
- (c) modify or cancel any administrative act; or
- (d) alter any regulation or ruling; or
- (e) explain more fully any administrative act; or
- (f) do any other thing.²⁷

This list of remedies concentrates on procedure. They are not likely to be the kinds of remedies sought by ordinary people in the villages of PNG encountering discrimination or stigmatisation.

The Ombudsman Commission cannot award compensation²⁸ and decisions cannot be reviewed.²⁹ While legal representation is not necessary, the resources and coverage of the Ombudsman Commission do not stretch throughout PNG. The Ombudsman Commission has regional offices for Southern (Port Moresby), Momase (Lae), Highlands (Mt. Hagen) and Islands (Kokopo/Rabaul). PNG has twenty provinces,

²⁵ HAMP Act, section 27.

²⁶ *Organic Law on the Ombudsman Commission*, sections 13,14, 17,17 and 22.

²⁷ *Organic Law on the Ombudsman Commission*, section 22.

²⁸ *Organic Law on the Ombudsman Commission*, section 22.

²⁹ *Organic Law on the Ombudsman Commission*, section 24.

Each province is divided into one or more districts which in turn are divided into one or more local level governments. There are thousands of villages. Four offices throughout PNG makes the Ombudsman Commission virtually inaccessible for a large proportion of Papua New Guineans.

Since the HAMP Act was gazetted in 2004, there have been very few cases of discrimination heard by the Ombudsman Commission relating to discrimination on the grounds of HIV infection or because of having AIDS. The Commission has taken its responsibility seriously, with the creation of a specialised unit in May 2005. Since the creation of the unit, the Commission has been concentrating on conducting awareness campaigns. As a result of the awareness and advocacy campaigns, the Commission has so far received and opened for investigations four cases of discrimination on the ground of HIV/AIDS. These comprise three cases against government bodies and one against a private organisation.³⁰ Given the increasing rate of infection in PNG, the general population rate and the breadth of rights protected under the HAMP Act, these are very small figures.

District and National Court Jurisdiction

If relief is sought as compensation, or one of a number of orders,³¹ action can be taken in the National Court or a District Court. An action in the National or District Court is a formal legal process which requires lodgement of appropriate court documents and would be better undertaken with the assistance of a lawyer. The accessibility of these courts to ordinary Papua New Guineans is questioned. Further, there are signs that the courts are struggling with increasing caseloads. 'An expanding caseload has placed great pressure on the court system and led to lengthy delays in proceedings.'³²

The Magisterial Service administers, manages, and sustains the operation of seventy District Court establishments and four hundred Circuit Court locations throughout the country. The District Courts provide a mechanism for the administration of justice and the resolution of disputes.³³ Some relevant areas of District Court Jurisdiction include civil matters of up to K10,000, a summary criminal jurisdiction, village court appeals, and review of administrative tribunals. A recent commentary on the law and justice system in PNG noted in relation to the accessibility of District Courts that 'There are currently 130 District Court Magistrates. This works out at only 1 magistrate per 36,000 people and less than 1.5 per administrative district. The deteriorating condition of court buildings and staff accommodation has also had an adverse impact in many areas.'³⁴

The civil jurisdiction of the National Court is for the trial of major matters involving an amount exceeding K10,000. Therefore, actions seeking sums over K10,000 in

³⁰ Annual Reports not yet available. Source, informal enquiries to the Ombudsman Commission in May 2007.

³¹ HAMP Act, section 28. Includes declaration that act unlawful; order not to repeat the act; order for apology or retraction; damages and other orders of a restorative nature.

³² Sinclair Dinnen, 'Building Bridges: Law and Justice Reform in Papua New Guinea' in Anita Joiwtt and Tess Newton Cain (eds) *Passage of Change: Law Society and Governance in the Pacific* (2003) 277, 288.

³³ See website on Magisterial Service of PNG <http://www.magisterialservices.gov.pg/> (Accessed 20 July 2007).

³⁴ Sinclair Dinnen, above n 32, 288.

compensation would need to be taken in the National Court. While some cases seeking this level of relief would arise, most matters of discrimination and stigmatisation would be for lower compensation figures than K10,000.

Other agencies with responsibility for disciplinary offences for medical, legal, public service, police, correctional services, and defence personnel are also given new responsibility under the HAMP Act in relation to breaches of the Act amounting to unprofessional conduct for the purposes of the legislation governing these agencies. Those jurisdictions are not discussed in this paper.

Literacy rates in PNG are low. English is an official language. However, over 715 indigenous languages are also spoken and Melanesian pidgin remains the lingua franca.³⁵ Motu is also widely spoken. The literacy rate remains between 58-71 percent.³⁶ Low literacy is concentrated in rural areas and is greater for women.

It would not be easy for a low-literate person to become aware that they had an actionable grievance under the HAMP Act, and then to take the necessary action to prosecute that action in the National or District Court.

Agriculture provides a subsistence livelihood for 85% of the population. It is estimated that approximately 37 percent of the population live below the poverty line.³⁷ For many people in PNG a journey to a regional centre to access the court registry to file a complaint would present considerable difficulty and expense. Access to legal assistance for poor people in civil matters is unlikely, and without it, it would be very difficult for an ordinary PNG villager to take a District or National Court action to seek damages and other relief for an actionable act of discrimination or stigmatisation.

VILLAGE COURTS

The Village Courts are a strong institution, well entrenched in PNG. They are undoubtedly the courts most accessible to the ordinary people of PNG, who live mainly outside the cities.

Village Courts provide an inexpensive, readily available means by which ordinary people can seek justice. It is estimated that 13,000 officials conduct 1,100 village courts, hearing about half a million cases every year. They operate under the *Village Courts Act 1989* (passed in 1974) and the principal purpose is to maintain harmony within the community through mediation and application of customary law.³⁸ Customary law existed in PNG well before the arrival of the British and their legal system.

Village courts are ...used widely and constitute the most important hybrid institution established in the post independence period. The effectiveness of

³⁵ CIA, *The World Factbook*, 'Papua New Guinea' <https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-d.html> (Accessed 21 July 2007).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ See Department of Justice and Attorney General, 'Village Courts' <http://www.justice.gov.pg/vc/> (Accessed 19 July 2007).

informal processes is largely a consequence of the degree of social cohesion of rural communities.³⁹

The Village Courts are the only courts that truly reach across PNG and are accessible to most of the population. This is not to deny some significant problems in the operation of the Village Courts. Some reports have pointed to courts exceeding their jurisdiction, perpetuating violence against women, and showing little understanding of the broader legal framework in which they operate.⁴⁰ Another report suggests that some of these negative accounts of the operations of village courts lack credibility, as they are based on anecdotes and not on representative research. The commentator puts forward his own research to suggest that Village Courts are in fact a useful resource for women and are successfully used by them.⁴¹

Village Courts are well entrenched in PNG, have an impressive reach, are known and understood by most of the population, are conducted in local language, and do not require the lodging of complicated documents, onerous costs or legal representation. Small amounts of compensation can be awarded, to K1000.⁴² Orders can also be made to perform specified work, or work of a specified kind, for the benefit of an injured or aggrieved party.⁴³ These could be quite useful remedies for small acts of discrimination or stigmatisation.

The *Village Court Act 1989* sets out the jurisdiction of the Village Court. It has a general jurisdiction in relation to its geographical area if the dispute arose in its area, or all the parties are ordinarily resident in the area. It also has jurisdiction if some of the parties are ordinarily resident and the rest consent to jurisdiction. The rules of evidence do not apply, but the *Constitution* imposes an obligation to apply the rules of natural justice.⁴⁴ Parties may be represented by a person other than a lawyer.

There is a criminal jurisdiction over prescribed offences. The offences are set out in the *Village Court Regulation 1974* in Regulation 3.⁴⁵

³⁹ Sinclair Dinnen, above n 32, 284.

⁴⁰ M Demian, 'Custom in the Courtroom; Law in the Village; Legal Transformations in Papua New Guinea' (2003) 9(1) *The Journal of the Royal Anthropological Institute* 97; Sarah Garap, 'Human Rights program in Village Court Services, Human Rights in Village Courts: the Challenges and Opportunities of working with Village Courts' (Paper presented at the CEDAW Conference, Port Moresby Papua New Guinea, 24 – 25 November 2005) <http://www.justice.gov.pg/vc/images/Docs/CEDAW%20Women%20and%20Village%20Courts.pdf> (Accessed 28 August 2008).

⁴¹ Michael Goddard, 'Women in Papua New Guinea's Village Courts' (Discussion Paper 2004/3, State Society and Governance in Melanesia Programme, 2004) http://rspas.anu.edu.au/papers/melanesia/discussion_papers/04_03_dp_goddard.pdf (Accessed 8 June 2008).

⁴² *Village Courts Act 1989* section 45.

⁴³ *Village Courts Act 1989* section 44.

⁴⁴ See section 37(22) of the *Constitution* which requires the powers and procedures of Village Courts to be exercised in accordance with the rules of natural justice. The rules of natural justice are set out in Division 4 of the *Constitution*, sections 59 to 62

⁴⁵ Section 41(a) of the *Village Courts Act* states that the Village Court has criminal jurisdiction in respect of prescribed offences for the purposes of this section. Regulation 3 of the *Village Court Regulations* purports to set out the prescribed offences but refers to them as being for the purposes of Section 22(a) of the Act. This appears to be an error. The correct section is section 44(a). The prescribed offences are:

The Act grants a number of jurisdictions to village courts in addition to the general and criminal jurisdictions. These are civil, including matters related to some land disputes, bride price, custody or guardianship of children, customary marriage, and illegitimate children.

The court also has a preventive jurisdiction allowing it to act in order to prevent a dispute which may have caused a breach of the peace. The final jurisdiction granted in the Act is the mediatory jurisdiction, which states that the primary function of the court is to 'ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes.'⁴⁶

The Village Courts apply custom. Perusal of the relevant legislation and the Village Court website and discussions with Village Court magistrates reveal that there is some confusion about the nature of custom and how it is applied.

The *Constitution* establishes that custom is part of the underlying law of PNG. The *Underlying Law Act 2000* sets out how custom is to be ascertained and applied. Ascertaining custom is to be done by having regard to submissions made by or on behalf of the parties concerning the customary law relevant to the proceedings. Village Courts may also consider books and other relevant materials.

Custom may only be applied subject to the justiciable parts of the *Constitution*. Section 55 would be likely to be raised often in the context of Village Courts. It may only be applied subject to statute law.⁴⁷ Village Courts must apply the rules of natural justice.⁴⁸ The question of the existence of a custom is a matter of law.⁴⁹

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- (a) taking or keeping, without the consent of the owner, the property of another to a value not exceeding K100.00;
 - (b) striking another person without reasonable cause;
 - (c) using insulting words or conduct;
 - (d) using threatening words or conduct;
 - (e) using offensive words or conduct;
 - (f) intentional damage to trees, plants or crops belonging to another person;
 - (g) intentional damage to trees, plants or crops belonging to the defendant and another person;
 - (h) intentional damage to any other property belonging to another person;
 - (i) making a false statement concerning another person that offends or upsets him;
 - (j) spreading false reports that are liable to cause alarm, fear or discontent in the village community;
 - (k) conduct that disturbs the peace, quiet and good order of the village, or of a resident of the village;
 - (l) drunkenness in the Village Court area;
 - (m) carrying weapons so as to cause alarm to others in the Village Court area;
 - (n) failure to perform customary duties or to meet customary obligations after having been informed of them by a Village Magistrate;
 - (o) failure to comply with the direction of a Village Magistrate with regard to hygiene or cleanliness within a Village Court area;
 - (p) sorcery, including—
 - (i) practising or pretending to practise sorcery; or
 - (ii) threatening any person with sorcery practised by another; or
 - (iii) procuring or attempting to procure a person to practise or pretend to practise, or to assist in, sorcery; or
 - (iv) the possession of implements or charms used in practising sorcery; or
 - (v) paying or offering to pay a person to perform acts of sorcery.

⁴⁶ See section 52.

⁴⁷ *Underlying Law Act 2000* section 6.

⁴⁸ *Constitution* sections 58 to 62.

The Village Courts have no specific jurisdiction for the application of the HAMP Act, but the legal infrastructure in which the village courts operate requires that they apply custom subject to the constitution and to other law. As they are bound to consider custom in this way, it would certainly be open to Village Court Magistrates to consider the provisions of the HAMP Act in relation to discrimination and stigmatisation when dealing with matters in the general jurisdiction, or in cases of insult or breach of the peace. They could also be applied in the preventive and the mediatory jurisdiction of the village courts.⁵⁰ They may also have application in adultery, divorce, and bride price cases.

There appears to be some confusion about the correct role of custom and law in Village Court jurisdiction. The training materials on the Village Court website suggest that custom is applied subject only to the *Constitution*.⁵¹ This interpretation is likely to be incorrect, as it is inconsistent with the application of custom as set out in the *Underlying Law Act*, the most recent law to flesh out the *Constitution* on this issue.

To avoid further confusion about the application of custom and to ensure credibility and engagement with an initiative to introduce the application of HAMP Act principles into village courts, a law reform would be the simplest approach. A well publicised and implemented amendment to the HAMP Act and the *Village Courts Act* would operate to assist village courts administration, magistrates, peace officers, and most importantly, the people who know and use the Village Courts in such large numbers throughout PNG, that the law has changed in relation to matters of stigmatisation and discrimination on the basis of HIV or AIDS.

While problems with the Village Courts' jurisdiction have been acknowledged, the Courts remain a highly accessible jurisdiction known and respected by ordinary Papua New Guineans. Proceedings are conducted in the local language, no complicated forms need be filled in, travel is generally not required, lawyers are not required and the process is not costly. As one commentator put it: 'their strength lies in the provision of an accessible legal forum that is highly responsive to local expectations. Their location between the national court system and local dispute resolution makes them an important point for creative interaction between formal and informal justice sectors.'⁵² Further, the suggested additional jurisdiction will fit very well with the existing criminal jurisdiction of the village courts. The following areas of Village Court jurisdiction are examples of areas which would fit well with complaints of discrimination or stigmatisation:

- using offensive words or conduct;

⁴⁹ *Underlying Law Act 2000* section 16.

⁵⁰ The options available to Village Court Magistrates to apply the HAMP Act within their present jurisdiction was considered in 2005 in a project funded by the Australia Agency for International Development (AusAID). This is a large part of the VC Project and training curricula will be developed to assist them to do so. This curricula will also need to briefly address the legal environment in which they presently operate to assist them to fit some application of the HAMP Act into that legislative environment.

⁵¹ Department of Justice and Attorney General, *Village Courts Manual* (2nd ed) 60 <http://www.justice.gov.pg/vc/images/Docs/EnglishManual%202nd%20edition.pdf> (Accessed 28 August 2008).

⁵² Sinclair Dinnen, *Above n 32*, 290.

- making a false statement concerning another person that offends or upsets him;
- spreading false reports that are liable to cause alarm, fear or discontent in the village community; and
- conduct that disturbs the peace, quiet and good order of the village, or of a resident of the village.

Such a reform would also be an excellent example of the use of restorative justice. One commentator, who noted the damage done to societies by crime, noted the importance of the use of restorative justice to rebuild and restore harmony. He states that ‘empowering communities to manage conflict in this way can thus become an important force for community development.’⁵³ It is suggested that empowering village courts with a limited HAMP Act jurisdiction will empower local communities to use traditional methods of restorative justice to address stigma and discrimination based in HIV status.

Legislative Amendment to give Village Courts Limited Jurisdiction under the HAMP Act

It is suggested that the necessary amendment should be limited to matters of discrimination and stigmatisation and add to the criminal jurisdiction of the Village Courts. This is because the nature of Village Court jurisdiction best lends itself to consideration of matters of discrimination and stigmatisation. Matters such as dismissal from employment or improper conduct on the part of a health practitioner are better managed under the other avenues of relief provided by the HAMP Act.

For example, the list of criminal matters on which the village courts could hear matters should be increased to include:

- Using discriminatory words or conduct on the grounds that the person is infected or affected by HIV/AIDS; and
- Stigmatising a person on the grounds that the person is infected or affected by HIV/AIDS.

Other amendments would be necessary to make both Acts consistent and workable. Other parts of the criminal jurisdiction of village courts may also be expanded to encompass HAMP Act principles. For example:

- using insulting words or conduct; or
- using offensive words or conduct.⁵⁴

⁵³ Sinclair Dinnen, above n 32, 293.

⁵⁴ See Regulation 3, *Village Courts Regulation 1974*.

Amending legislation could also slightly expand jurisdiction in cases of insult or breach of the peace and enable HAMP Act principles to be applied in the preventive and the mediatory jurisdiction of the village courts. They may also have application in adultery, divorce, and bride price cases.

The possible situations giving rise to discrimination, as set out in Section 7 of the HAMP Act, should be limited in the Village Court jurisdiction to sub-sections (f), provision of accommodation, and (h), access to goods, services, or public facilities. Other examples of discrimination included in Section 7 would not be suitable for application in a Village Court jurisdiction (such as employment, partnerships, industrial and professional organisations, education and training, and detainees and persons in custody).

The confidentiality provisions of the HAMP Act would apply to the operation of HAMP Act jurisdiction in Village Courts. Witnessing the very public nature of Village Court hearings and noting that, on many occasions, villagers attend to watch proceedings, it is acknowledged that protection of confidentiality in the village setting would be difficult. It is suggested that this issue could be addressed in two ways. The first approach is the hearing where the status of the person infected or affected by HIV or AIDS is already known and a public direction as to their rights and the illegality of discriminatory acts and practices would be a benefit to that person. This may be a complaint about gossip or a public act of discrimination. In this scenario, a confidential hearing is unnecessary, even undesirable and the usual arrangements would be appropriate. This would also be consistent with the parallel objective of “mainstreaming” HIV.

In a second scenario, where the person concerned wished to keep his or her status as a person affected or infected by HIV confidential, confidentiality must be protected. Support should be sought from the Village Courts Secretariat as part of the implementation strategy for the law reform to provide the necessary information, training, facilities, and monitoring to ensure this is strictly applied. The effective convening of closed hearings would have to be routinely available in every village court.

In relation to remedies, it is suggested that current remedies available in Village Court jurisdiction would be adequate. Small amounts of compensation may be awarded to K1000.⁵⁵ Orders can also be made to perform specified work, or work of a specified kind, for the benefit of an injured or aggrieved party.⁵⁶ These could be quite useful remedies for small acts of discrimination or stigmatisation.

The appeal jurisdiction from the Village Courts provides a further means for enforcement of the HAMP Act. A person aggrieved by a decision of a Village Court may lodge an appeal.⁵⁷ The application must be lodged within three months after the day on which the decision is pronounced, and may be made orally or in writing to a Magistrate.⁵⁸ While it has been argued earlier in the paper that District Courts are not easily accessible to ordinary Papua New Guineans, once someone is exposed to the

⁵⁵ *Village Courts Act 1989* section 45.

⁵⁶ *Village Courts Act 1989* section 44.

⁵⁷ *Village Courts Act 1989* section 86.

⁵⁸ *Village Courts Act 1989* section 87.

court system it is easier to provide targeted information on how to appeal to him or her. Further, the Village Courts Secretariat may monitor such cases from time to time and perhaps provide assistance to complainants in some appeal cases as part of a broader strategy to enforce the new laws.

The *District Courts Act 1963* grants a right of appeal to a person aggrieved by a decision of the District Court to appeal to the National Court from the conviction, order or adjudication.⁵⁹

Where, in the opinion of the National Court, the matter is one of such public importance that leave should be granted, the Attorney-General may appeal against a decision of a District Court on behalf of a party.⁶⁰

Taking action in the National Court would provide a further opportunity for the Attorney-General to monitor the performance of Village Courts and District Courts in the application of the HAMP Act. The Attorney General might wish, from time to time, to send a public message about the importance of the implementation of this law, and if a suitable case presents itself, he or she could lodge such an appeal.

This approach is intended to be used strategically from time to time to draw the attention of both the public and the Village Courts personnel to the additional rights granted under the *Village Courts Act*. It is not thought to be a tool to be widely accessible in the manner of the suggested additional rights under the *Village Courts Act*. Village Courts personnel could provide material on rights of appeal to complainants whose cases are dismissed. The law and justice sector may be able to provide some support to those interested in pursuing an appeal.

Appeals of this nature would send a powerful message to both Village Courts and District Courts about the importance of the HAMP Act principles in Village Courts. The importance to PNG of the management of the spread of HIV infection should make it relatively easy for the Attorney-General to mount a credible argument to meet the public importance criteria for such appeals.

Funds could be set aside to select one to two test cases per year to reinforce the message that discrimination and stigmatisation of people infected with or affected by HIV is unlawful and will be not be tolerated.

There would undoubtedly be a significant challenge in educating Village Court Magistrates about their new responsibilities and jurisdiction. However, training programs would have the advantage of calling upon Village Court Magistrates, already “big men” in their villages, to understand the risks of transmission of HIV/AIDS better and to assist the village in managing its spread by applying the law to protect those vulnerable to stigmatisation and discrimination. AusAID commissioned a scoping study in 2005 to consider the feasibility of training Village Court magistrates in the application of HAMP Act principles.⁶¹

⁵⁹ *District Courts Act 1963* section 219.

⁶⁰ *District Courts Act 1963* section 219(3).

⁶¹ Department of Justice and Attorney General, ‘Village Courts’ <http://www.justice.gov.pg/vc/> (Accessed 20 July 2007).

Such an ambitious exercise would be easier, and much more credible to all stakeholders including Village Court Magistrates and other relevant Village Court personnel, if the necessary amendments to legislation preceded the training effort.

Policy to Mainstream HIV

The PNG Government has recently adopted a policy of mainstreaming HIV. This means adapting core business to the realities of HIV. A guide to mainstreaming, developed by a donor, describes it as consideration by organisations of core business and how it might impact on HIV.⁶² This is distinguished from “AIDS work” which focuses on working with people infected with or affected by HIV.

The application of the HAMP Act principles by Village Courts is a clear route to HIV mainstreaming. The jurisdiction of the Village Courts is core business for the Village Courts Secretariat and the Law and Justice Sector Program.

It is acknowledged that the Village Courts ought to only be granted a limited HAMP Act jurisdiction. This would enable them to apply it in some parts of their day-to-day work, and in particular, such a jurisdiction would mainly assist with addressing stigma and discrimination in some of its present criminal jurisdiction and some added areas. This would, in itself, be a valuable contribution in increasing awareness of HAMP Act protections to a much broader section of the PNG population, and therefore a contribution toward the reduction of stigma and discrimination and an excellent application of the mainstreaming policy.

Where people living with HIV are stigmatised and discriminated against, they are less likely to seek help or services. This in turn is likely to fuel the epidemic since it does not support behaviour change. Countering stigma is vital and every sector has a role to play.⁶³

In attempting to find an institution suited to the application of accepted ideas of local law and order, the village courts provide the ideal structure.

CONCLUSION

PNG has to confront a dangerous adversary in HIV infection. Analysis of data points to an epidemic. There are serious consequences for the people of PNG; culturally, economically, socially, and personally.

The HAMP Act is a progressive law intended to assist in preventing the spread of infection by protecting the rights of those infected with or affected by HIV or AIDS. The rights and protections afforded by the new law cannot be effective unless they are known and accessible to the PNG people. The present jurisdictions of the Ombudsman Commission, the National Court, and the District Court are not readily accessible to a population which is low-literate and based mainly in villages outside cities and regional centres.

⁶² Kate Butcher, above n 2.

⁶³ Kate Butcher, above n 2, 3.

The Village Courts have a jurisdiction which truly reaches across PNG, is known and accepted by people, and can be accessed by them in their own village and conducted in their own language. Complicated forms are not required and access is not prohibitively expensive. Small awards of compensation can be made.

Amending the HAMP Act and the *Village Courts Act* to extend Village Court criminal jurisdiction and other parts of its jurisdiction to enable people to bring complaints under the HAMP Act in some limited matters would expand the reach of the Act to every village in PNG.

It is acknowledged that expansion of the jurisdiction of Village Courts to include matters of stigmatisation and discrimination for those infected and affected by HIV presents considerable challenge to the Government of PNG. The PNG Parliament was sufficiently progressive and forward thinking to pass the HAMP Act. Having taken that enormous step, it should be prepared to take further steps to make sure the rights and protections provided by the Act are truly accessible to the people of PNG. If the rights and protections provided by the HAMP Act cannot be accessed by the people of PNG, a progressive legal reform will fail to achieve its objectives.