

DISCRIMINATING ON THE GROUNDS OF STATUS: CRIMINAL LAW AND *FA'AFAFINE* AND *FAKALEITI* IN THE SOUTH PACIFIC

SUE FARRAN AND ALEXANDER SU'A^[*]

INTRODUCTION

Scattered through the South Pacific region, particularly in Polynesian countries,^[1] are groups of people who, while of the male sex,^[2] might regard themselves and be regarded as, being of the feminine gender. These are the *fa'afafine* of Samoa, the *fakaleiti* of Tonga, the *pinapinaaine* of Tuvalu and Kiribati, the *mahu* or *rae rae* of Tahiti and Hawaii^[3] and the *vakasalewalewa* of Fiji.^[4]

While there is quite a lot of anthropological and sociological material available about these people, there is considerably less legal comment.^[5] This paper looks at the legal response to these groups, focusing particularly on the *fa'afafine* of Samoa with some comparative references to the *fakaleiti* of Tonga and the provisions of the criminal law in each country, and considers some of the legal and social ambiguities which emerge and the difficulties that these pose both for individuals identifying with these groups and for law makers and enforcers.

WHO ARE *FA'AFAFINE* AND *FAKALEITI*?

Literally, in Samoa, a *fa'afafine* is an 'effeminate man or youth',^[6] while the Tongan term *fakaleiti* means "like a lady" or "ladylike". Members of these groups of men are not just cross-dressers – indeed they may choose not to cross-dress at all - but often males who have been reared as females and see themselves as females, or who, as they grow up choose to identify with females rather than males. This may happen where there is a shortage of girls to help a mother or where a boy expresses a wish to undertake traditional female tasks. Whether men are born destined to be *fa'afafine* or *fakaleiti* or are nurtured to become so is not clear. Biologically such transgendered persons are men, but psychologically they may be women, perceiving themselves as women and carrying out women's work in the home or the community. They have traditionally been valued for their ability to carry out tasks of both genders. Today they are frequently engaged in work involving support and care in the community, hospitals and other organisations, such as youth and church groups,^[7] and, because of their skills and flair are often in demand as employees in the tourism and hotel industry. They have also developed their own niche in the modern entertainment industry, working in drag shows, fashion parades and cabarets, not only staged for tourists but also entertaining local audiences.^[8]

In some respects, transgendered men are less constrained by society than both men and women. In Tonga, for example, *fakaleiti* can cross the divide between men and women by making fun of male stereotypes and female stereotypes. They are able to behave far more outrageously than women because they are not women, who are expected to be reserved and dignified. They are able to act in a less inhibited way than men, who are constrained to act with seriousness and formality demanded by ideals of Tongan

masculinity.^[9] In Samoa *fa'afafine* have considerably more freedom to come and go as they like compared to their sisters or female relatives, and at the same time are not subject to the same strict taboos which govern the relationship between brothers and sisters generally. Consequently they enjoy the friendship and confidences of female siblings and their friends in a way which most males cannot. In dances and performances they are permitted to behave in a way which would be shocking in the case of women, but at the same time are able to mock and satirise stereotype male behaviour.

The presence of such groups in Polynesian society is not simply a modern development. There is some evidence that early visiting mariners consorted with *fa'afafine* and encountered men behaving as women.^[10] From these early encounters it would seem that it is probable that *fa'afafine* and *fakaleiti* were indigenous to traditional pre-contact society as men dressed as women lured or tricked visiting sailors, in the early contact period. Also, once missionaries put an end to the unclad, suggestive dances (*poula*) of women, it seems that *fa'afafine* assumed some of those roles. However, as is quite common when seeking to disentangle the past from the present when it comes to the culture and tradition in South Pacific societies, it is by no means clear that the *fa'afafine* or *fakaleiti* encountered today are either viewed the same way as those who might have been encountered in the past or identify themselves in the same way as earlier *fa'afafine* or *fakaleiti*.^[11]

Indeed, it is increasingly difficult to strictly define these socially recognised transgender groups across Polynesia, particularly as there may be considerable differences between, for example, urban and rural *fa'afafine* or *fakaleiti*, or younger and older members of these groups.

Today, Western influences on sexual identity and gender roles, and the increasing break down in clear distinctions between men's work and women's work in paid employment means that *fa'afafine* and *fakaleiti* may seek new identities, especially in urban areas. These may be with the gay community—although this community is still fairly closeted in much of the Pacific—or with women. Identifying with women would entail an increasing emphasis on feminisation in dress, makeup, mannerisms, and social and sports activity. At the same time, women's rights movements are gaining ground especially in education and employment, so that the gender gap between modern women and effeminate men is narrowing (although in Tonga these developments have not reached far yet). Modern women are more likely to 'speak out', may be more sexually active and more outrageous in their dress. At the same time, *fa'afafine* or *fakaleiti* may be more extrovert in their mannerisms, appearance and conduct. In urban areas and among the migrant Polynesian population of New Zealand, there is a general social shift away from community and communal roles towards greater individualism. With greater focus on individual achievement, wage earning capacity, education and the expression of personal choices and identity, both men and women are redefining themselves. Taboos, especially sexual and social taboos are being broken and what is regarded as acceptable or unacceptable both subjectively and objectively, for men and women, is changing.

THE LEGAL FRAMEWORK

Samoa became the first independent state of the South Pacific region in 1962 having been previously ruled by Germany from 1900-1914, then by Britain under a mandate from the League of Nations until 1919 and then under the colonial rule of New Zealand.^[12] Tonga by contrast was never a colony. Known by early discoverers as "The Friendly Islands" it was united into a Polynesian kingdom in 1845. It became a constitutional monarchy in 1875, a British protectorate in 1900 and acquired its independence in 1970. It remains the only monarchy in the Pacific. Its written *Constitution* dates from 1875 and was granted by King George Tupou I. It was revised in 1967.

At independence in both Samoa and Tonga introduced laws continued to have effect. In Samoa, under the *Samoa Act 1921*, English legislation in force in England on 14 January 1840 and also in New Zealand on 7 December 1921 applied, provided this legislation was not inconsistent with the Samoa Act or any Ordinance or Regulation in force in Western Samoa and was not inappropriate to the circumstances of Western Samoa. Custom was restricted, applying only to customary land and titles, and to marriages contracted before 1921. New Zealand legislation passed specifically for Samoa also applied at Independence. Since Independence, however, almost all introduced legislation has been abolished under the *Repeal of Statutes Act 1972* and replaced by national laws.^[13] Under the *Samoa Act 1921*^[14] and the *Constitution*,^[15] the principles of common law and equity drawn from English court decisions remain in force, except in so far as such principles may be inconsistent with the *Constitution*, legislation or subsidiary legislation in force in Samoa, or inappropriate to the circumstances of the country.^[16] It also remains open to the courts in Samoa to consider the case law from elsewhere as a persuasive although not binding authority, especially where novel situations arise and where there are no Samoan precedents to follow. Although the application of customary law is limited, customs and traditions remain strongly influential in Samoan society and may influence the way in which written law is interpreted and applied. Social custom certainly may influence how judges view matters brought to their attention.

Unlike Samoa, Tonga has no “cut-off date” for applicable colonial law. Therefore, modern English law remains applicable and Tongan courts are permitted to apply the most recent English court decisions and legislation if they wish to do so. Introduced law was originally made applicable to Tonga by a Pacific Order in Council in 1893. Now, under the *Civil Law Act 1966*, any English statute of general application applies in Tonga unless it has been replaced by national legislation or its application is ‘incompatible with the circumstances of the Kingdom of Tonga and its inhabitants’.^[17] There is no specific reference to customary law in the legal system of Tonga. However, the ‘circumstances of the Kingdom of Tonga’ may be taken to include the social and traditional context in which the law operates.

While both Samoa and Tonga have written constitutions, the statement of rights contained within each are different, particularly in respect of safeguards against discrimination - those of Tonga do not prohibit discrimination on the grounds of sex; those of Samoa do - and the right to freedom of expression and association.

In Samoa the preamble to the *Constitution* states that ‘Samoa as an Independent State should be based on Christian principles, Samoan customs and traditions’. The *Constitution* also contains provisions relating to the right to personal liberty (Article 6); freedom of speech, assembly, expression and association (Article 13); and freedom from discrimination (Article 15). In Tonga by contrast there is no freedom of association but there is freedom of the press which impliedly includes freedom of expression as it is stated that ‘it shall be lawful for all people to speak, write and print their opinions and no law shall ever be enacted to restrict this liberty ...’^[18]

Criminal Law

As far as the criminal law is concerned, in Samoa there are two provisions in particular that appear to be directly aimed at *fa’afafine*. These are sections 58D and 58N of the *Crimes Ordinance 1962*.

Section 58D criminalizes ‘indecent assaults’ and ‘indecent acts’ committed by or permitted by one male in respect of another male, regardless of consent. Boys under the age of 16 cannot be charged with either committing or permitting or inducing indecent acts unless the other male is under the age of 21. This section therefore effectively criminalizes any physical contact of a sexual nature between males. It appears to have been adopted directly from section 141 of New Zealand’s *Crimes Act 1961*.

Section 58N makes it an offence for a male person to have ‘on or about his person any article intended by

him to represent that he is a female or in any other way is impersonating or representing himself to be a female'. The offence must be committed in a public place and with the intent to deceive any other person as to his 'true sex'. There is no equivalent section to be found in the New Zealand *Crimes Act 1961*, which suggests that this offence may have been specifically created for Samoa.

Although this section is located in those provisions of the criminal law directed at prostitution, arguably this section could apply to any *fa'afafine* who wants to appear feminine by wearing female clothing – including even trouser suits, other than in the privacy of their own home. As cross-dressing is a characteristic of many *fa'afafine*, who may wear women's clothes to work and at home, or just on social occasions – including sometimes to church – they run the risk of being arrested under suspicion of having committed this offence, particularly as it is not clear whether the representation or impersonation of a "female" is intended to mean a person of the female sex, or of the female gender, nor is it clear to what extent the test is objective or subjective, i.e. must it be shown that the accused actually did intend to mislead, or is it sufficient if the complainant was misled or "the reasonable person" would have been misled. Most Samoans would recognize a *fa'afafine* as just that, so it may be the case that this provision was largely intended to protect unwary foreigners. If so, it seems unnecessary as deception as to a person's true sex is only really going to be necessary either in the case of marriage, or – and given the location of this provisions this is more likely – where a person is soliciting for sex. If the latter is the case then a general provision against prostitution would suffice.

In Tonga the *Criminal Offences Act* [Cap 18] makes it an offence under section 80(6) to keep, manage or act or assist in the keeping or management of a brothel including premises where 'lewd homosexual practices' occur. Whether all homosexual practices are covered by this or only those which are considered to be lewd, is not clear. Additionally section 81 (5) - which was added in 1978 – as in Samoa, makes it an offence for any male person, who is soliciting for an immoral purpose, to impersonate or represent himself as a female with the intention of deceiving any other person as to his true sex. The scope of this provision is slightly more narrow than in Samoa as it is clearly limited to soliciting. However, homosexual acts – whether consensual or not – are criminalised under sections 136- 140 under the provisions for sodomy and bestiality, indecent assault and attempted sodomy or indecent assault. While sodomy requires penetration, indecent assault on a man - which was added by Act 9 of 1987 - does not and could include other homosexual sexual conduct.

CHALLENGES FOR CHURCH, STATE AND SOCIETY

Religion and sexual conduct

The significance of religion and the influence of the Church in both Samoa and Tonga should not be underestimated. Christianity arrived in Samoa around 1830^[19] and in Tonga in 1822. The Constitutions of both countries refer to God and to Christian principles. In both countries the majority of the population are practising or baptised Christians.⁵ In Tonga, one of the major influences on the drafting of the Constitution was the King's closest political adviser, the Reverend Shirley Baker.

From the outset introduced religion had an impact on sexual and social behavior. Polygamy, public ceremonies witnessing a bride's virginity, arranged marriages of young people, institutionalised homosexuality and marriage of close relatives were all frowned upon and virtually eliminated under the influence of the church. Other practices appear to have been tolerated or, at least in some societies, not eradicated, including the recognition of *fa'afafine* and *fakaleiti*. Indeed, there is some suggestion that the church may have had a positive influence on the development of the role of the *fa'afafine*. Mageo has written about the exchange of puns and witticisms (*poula*), which had sexual overtones and were part of traditional Samoan entertainment, noting that:

before missionary times, the exchange of *ula* was hosted and sponsored by the village girls as a form of public entertainment for visiting groups. Christianity changed the roles of girls, making this type of behaviour no longer acceptable for them. Because “she” belongs in a category that is neither boy nor girl, *ula* is acceptable behaviour for the male transvestite, or *fa’afafine*.^[20]

Prior to missionary influence the *poula* or “joking nights” were traditional forms of entertainment at village and state occasions.^[21] The ceremonial village virgin would start the dance in a dignified manner and thereafter less revered girls would take up the dancing culminating in provocative and hilarious sexual dancing directed at entertainment and enticing potential husbands or suitors.^[22]

The influence of Christianity in Samoa and Tonga has had an impact on reactions to sexual behaviour in general and homosexuality in particular. Indeed the stand of established churches against homosexuality is a very real concern in the Pacific, as indicated by the Fiji Council of Churches Research Group which commissioned a research project on the matter a few years ago.^[23]

At the same time the traditional veneration of virgin women and the cloistered existence that many young women had to lead prior to marriage meant that same sex experiences have long been part of traditional social practice. Peteru has stated ‘it is generally acknowledged that young Samoan men frequently engage in sexual acts with each other...but only in the absence of available young women.’^[24] This is supported by research by Schmidt who states:

...such play is not condoned, or even really acknowledged between adult men. Two masculine youths having sex are also careful not to mimic heterosexual positioning or actions and thus neither adopts the passive or feminine role that would put their masculinity into question. Such acts have little relation to an identity that that is demonstrated by the fact that those involved will almost inevitably and unproblematically go on to have sexual relations with young women and eventually marry.^[25]

Religion and Society

In Tonga there is constitutional provision to keep the Sabbath day holy,^[26] and the *Constitution* opens with the words:

Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom shall be free for ever.^[27]

In Samoa, churches physically dominate villages and church attendance can be enforced by the village *fono*, so that within villages there are strict rules about church attendance and participation in church activities and fund raising, with sanctions in the way of fines and punishments imposed by the village council for non-compliance.^[28] The continuing influence of the church and religion in everyday life is evident in church membership numbers, the frequency of prayers at formal and informal occasions and the important social and educational role of church groups. In Samoa the *matai* is inferior in the village to the *fai'fau* (minister) to the extent that the *aiga* (family group) of any *matai* is expected to set aside the best portion of food for the minister.

Fa’afafine are bound by these codes of conduct just as any other village members are and are often valuable members of the church, singing in choirs and participating in fund-raising, acting as deacons, Sunday school teachers, church youth leaders and participating in many church activities. They may even attend church dressed in frocks or Samoan *pule'atasi*. Yet many churches appear to be ambiguous about

fa'afafine who may be subject to verbal castigation from the pulpit and from church members. Part of this appears to stem from the difficulties that the Church may have in accepting *fa'afafine* as members of the community while condemning any sexual behaviour which they may engage in. Indeed Peteru reports an interesting comment from a Pentecostal church leader who stated:

... we must take affirm stand on this issue (fa'afafine as cross dressers and homosexuals) now or we've got big problems on our hands. It's hard enough trying to keep our people from these negative influences ...the bible condemns homosexuality, we need good role models and they (fa'afafine) don't fit the bill.^[29]

There is also a distinction between those churches which have become integrated into the *fa'asamoa*, and those churches which arrived later and follow a more westernised approach which at times is in conflict with traditional Samoan ways.^[30] In the former there may be greater acceptance of *fa'afafine* as part of the *fa'asamoa*, although this is by no means uniform.

Tradition and custom in the social life of *fa'afafine* and *fakaleiti*

Although introduced to both Samoa and Tonga by foreign missionaries, religion and affiliation to certain Christian faiths and tenets has become an integral part of the custom of Samoa and Tonga.^[31] This gives rise to another ambiguity.

For example, the *fa'asamoa* - which is collectively the culture and traditions of Samoa - is valued as epitomizing the Samoan way of life. *Fa'afafine* are brought up in the *fa'asamoa*. As individuals and as members of the wider community, they are judged according to their observance of the *fa'asamoa*. The *fa'asamoa* reflects established culture and traditions and incorporates changes which have taken place in society including the introduction of Christianity, the wearing of western dress and the value of education. Within the *fa'asamoa* there are rules determining obligations, rights, the stratification of society, the status of individuals and codes of conduct. The *fa'asamoa* is central to the organisation of social and political life in Samoa. Individuals are located in their *aiga* or family and this in turn is part of an extended family – *aiga pototopoto*. The selected head of the *aiga*, the *matai* represents the family in the village *fono* or council which has extensive powers both under custom and under statute – the Village Fono Act. The status of the *matai* determines that of his wife and sisters, and that of the adult male and female members of the family. The reputation of the family and its head traditionally depended on the strength and ability of its male members and the virginal status and potential marriage value of its unmarried female members. Traditionally, and often today, the honour and virtue of a sister reflected the status of her brother with the consequence that relations between the two were strictly controlled.^[32]

In the extended family female adults undertook lighter, cleaner work than the young adult males, but the latter had considerably more freedom to roam around the village and its environs than the former. Within the village the *aumaga* was the traditional assembly of untitled males while the *aualuma* was the assembly of the women of the village responsible for providing hospitality to visitors and guests of the village council. It was also responsible for coaching the girl chosen to be the village's ceremonial virgin – the *taupou*- who would be married to a high chief from another village to create an alliance through marriage.

Within this structure *fa'afafine* are viewed by their *aiga* as sons or brothers, not daughters or sisters. They have the freedom to roam about and go beyond the village that males rather than females have. At the same time they may be permitted to work with their sisters and even to share the same sleeping accommodation because they are not perceived as being a sexual threat. They are not therefore subject to the same taboos between the sexes that male Samoans are usually subject to within the *feagaiga* of the *Fa'asamoa*.^[33] Within the village, they take their place in the male *aumaga* rather than the female *aualuma* although there is evidence to suggest that in some villages a compromise is reached whereby

fa'afafine are only required to pay dues to the *aumaga* and not to participate in its activities.^[34] Similarly some village councils recognize the *fa'afafine* preferences for women's activities to those of men and may or may not allow them to wear female clothing in the village.

Fa'afafine may be *matai* although this may mean giving up their life-style as a *fa'afafine* and conforming to the male roles expected under the *fa'asamoa*, including marrying a female, but they may also be *taupou*, taking on the ceremonial and symbolic role of the *taupou* in non-sacred activities outside the village, including taking the role of the *taupou* in ceremonial dancing.^[35]

In Tonga, traditionally *fakaleiti* did not sleep in the boys' houses and were not kept as apart from the girls as other boys were.^[36] Unlike girls, however, they had freedom of movement and could act as useful go-betweens, not only because of their freedom of movement but also because they could speak out in a way that would not be appropriate for Tongan women. Sexually they were often protected from predatory men by their families and kept apart from same-sex adolescent activities.

Religion and the State

Religion and church affiliation does not just play a part at local village level. It extends to national level with the participation of church representatives in consultative processes, including law reform. Religious faith is important in directing not only the views of ordinary citizens but also, and more importantly, the views of members of Parliament, who consider changes to existing legislation.^[37] Recent evidence of this can be found in the responses to the Fiji Reform Commission's Proposals regarding family law. Twenty-seven church groups were consulted during the consultation process.^[38] There was strong criticism as well as confusion regarding proposals to allow artificial insemination and the recognition of *de facto* unions, especially by the Fijian Methodist Church. Because the *Constitution* of Fiji prohibits discrimination on the grounds of sexual orientation, church groups voiced their concerns over the reforms proposed by the Bill, some suggesting that this would open the door to homosexual marriage and parenting. Although advocates of the reform strongly denied this, these proposals have been shelved for the time being.

If the church is homophobic then there is a strong likelihood that a number of politicians will be homophobic. Consequently there is a strong probability that any discussion of laws relating moral or sexual conduct is likely to be influenced by the established view of the church.^[39] Religious beliefs combined with views of what is or is not part of customary and traditional *mores* of society will influence the way in which law makers view and vote on legal measures to do with subjects such as prostitution, indecent assault, homosexual conduct and other subjects having a moral component.

THE SEXUALITY OF *FA'AFAFINE* AND *FAKALEITI*

The question of the sexuality of *fa'afafine* and *fakaleiti* is complex and cannot be generalised. Traditional or conservative *fa'afafine* and *fakaleiti* may both perceive themselves and be perceived by others as different from their urban or more modern counterparts. One of the factors which seems to have attracted increasing attention in recent years is the assimilation of *fa'afafine* and *fakaleiti* with homosexuals. While the raised profile of the rights of minority groups and the indignities suffered by them has many positive aspects which may in the long run be beneficial to *fa'afafine* and *fakaleiti*, in the shorter term the impact may be negative, particularly as there seems to be a growing tendency for Western media to depict *fa'afafine* and *fakaleiti* either as deviant - usually as homosexuals or transvestites or both - or as erotically exotic in some way. There is the danger that too much focus on the erotic/exotic myths of *fa'afafine* and *fakaleiti* and speculative voyeurism on their sexuality will detract from the multi-faceted role of

Polynesian transgender groups.^[40] It may also be the case that aligning *fa'afafine* with gender groups which are familiar outside the region - such as homosexuals or transvestites - is leading some individuals to shun traditional nomenclature and seek alternatives.^[41] A further consequence of focusing on the (homo)sexual dimension of *fa'afafine* or *fakaleiti* is that there are problems in accommodating such people within the traditional social structure where roles are determined by sex and behavioural taboos.

Indeed many *fa'afafine* and *fakaleiti* argue that they are not homosexual in so far as they desire men because to desire women would be akin to lesbianism. For example, a young *fa'afafine* interviewed by Poasa defined a *fa'afafine* as:

...a person that is biologically a male but mentally a female. They want to live their whole life and everything as a woman. They socialize with girls and are sexually attracted to males.^[42]

There is some limited evidence to suggest that at least some *fa'afafine* or *fakaleiti* see themselves as women. For example, one of the informants interviewed by Schmidt stated:

I was born like this. Right from when I was young, I was like this. When I grow up, I just... my brain, I think my brain works as a woman's brain, you know, not a man's.^[43]

Conversely some *fa'afafine* may be effeminate but feel that they are men. They may have effeminate mannerisms but dress as males and may be associated with high status in the villages as *matai*, or in their careers, and indeed may be married with children.

On the other hand, some *fa'afafine* or *fakaleiti* admit to homosexual acts but would argue that this sexual dimension is not the defining feature of being *fa'afafine* or *fakaleiti*. More important is their role in the structure of the family or society and their observance of traditional behavioral norms. Others would argue that the sexuality of *fa'afafine* or *fakaleiti* is not important compared to being feminine in terms of manner and personality within their specific cultural and social context and values.^[44]

Alternatively, it may be argued that *fa'afafine* or *fakaleiti* always play the passive (feminine) role when engaging in sex with men,^[45] or that even if they take a more active role they are not assuming a male sexual role, and that to do so would, for example, be a fundamental contradiction of "fa'afafineness". They may also argue that having sex with a man is not the same as two males having sex, and men who have sex with *fa'afafine* or *fakaleiti* may in fact see themselves – and be seen as - as heterosexual rather than homosexual.

Indeed there is evidence that both traditionally and today in Samoa *fa'afafine* may be vulnerable to sexual abuse and use by heterosexual men who see them as women rather than men, and may use them either because young girls and married women are not available due to social taboos, or because as victims they are ranked as males and are therefore not protected by their brothers or male relatives in the same way as daughters and sisters - there is no need to protect their chastity. At the same time *fa'afafine* offer a significant contact for young males with a 'feminine' person outside their own family and an important social experience in male sexual education.^[46] Alternatively they may be regarded as being on the social and sexual level of prostitutes or women of loose virtue – or even lower than such women - who deserve little respect and with whom sex involves no responsibility or commitment.

Similarly in Tonga, both in the past and today, it seems that adult *fakaleiti* may be used for sexual gratification by men.^[47] The reasons for this are complex and may include: men's restricted access to women, social acceptance of male promiscuity and abhorrence of homosexuality on the part of Tongan men, and the preference of *fakaleiti* for sexual encounters with straight men rather than women. There is

also some evidence to suggest that traditional forms of homosexuality were viewed somewhat differently from Western “modern” constructions of homosexuality,^[48] so that traditionally sex with a *fakaleiti* was not subject to the same condemnation as homosexuality.

It has also been suggested that in some cases *fa'afafine* or *fakaleiti* were associated with barrenness and were thus viewed as women who could not conceive rather than as men who had to demonstrate sexual prowess.^[49] Also, while women in some roles, notably as sisters and virgins, were highly respected, women in general were regarded in many respects as inferior to men, so that *fa'afafine* and *fakaleiti* – who could not claim the status of either sisters or virgins, were subject to various forms of abuse or disrespect. To some extent, this general inferiority ascribed to women, and – by extension - to *fa'afafine* and *fakaleiti*, continues. Even today these sexual encounters are not necessarily viewed by either side as homosexual or adulterous. From the straight male perspective sex with a *fa'afafine* or *fakaleiti* may be discounted because ‘she’ is neither a woman nor a homosexual man.

CONCLUSION

While it can be argued that *fa'afafine* and *fakaleiti* do not neatly fit into Western categories of male, female, heterosexual, homosexual or transsexual,^[50] but are unique to the Pacific region and therefore should retain their own labels,^[51] the sexual dimension combined with the homophobia of the church in much of Pacific society places *fa'afafine* and *fakaleiti* at a disadvantage when it comes to advocating law reform, such as the de-criminalization of homosexual acts between consenting adults.

The question of whether the law should concern itself with the moral behaviour of adults has been debated elsewhere.^[52] The difficulty in the context of Samoa and Tonga is that on the one hand there is the strong influence of the church which has become an integral part of society, custom and political life, and on the other hand there are introduced ideas of individual liberty and fundamental rights. There is also the problem of the traditional place of *fa'afafine* and *fakaleiti* and the more recent emergence of the sexuality of some *fa'afafine* and *fakaleiti*.

At present the criminal law in neither country accepts the possibility of consensual adult homosexual conduct in private. However, until more empirical data is available it is difficult to state to what extent *fa'afafine* or *fakaleiti* are being prosecuted under the relevant provisions.^[53] It may be the case that the police turn a blind eye to this in the case of adults.^[54] If this is so then it might be asked why the law is not amended – as it has been in other countries – to allow adult consensual homosexual acts in private. This would go some way to recognizing fundamental rights to freedom of association and expression, and the privacy of sexual conduct, while continuing to protect those who might be vulnerable to sexual abuse and/or predatory homosexuals, especially children.^[55] At the same time, however, it should not be forgotten that *fa'afafine* and *fakaleiti* are themselves vulnerable to abuse including forms of abuse that are not currently covered by the law, such as verbal abuse, intimidation, ridicule and harassment.

Similarly in the case of cross-dressing, if the criminal provisions against impersonating a female are narrowly interpreted so as to be limited to prosecuting those involved in prostitution and who have the requisite subjective intent to deceive,^[56] then in all other circumstances *fa'afafine* and *fakaleiti* ought to be allowed to cross-dress without prosecution or fear of prosecution.^[57] Indeed the tacit understanding of the police may be that unless they are soliciting they are allowed to do this, in which case perhaps the written law should be clarified either by statutory amendment or a clear ruling by the courts. In most cases the occasional or regular cross-dressing of *fa'afafine* or *fakaleiti* is unlikely to mislead anyone, and for many is seen as being a form of self-expression.

As far as the writers are aware, to date there have been no test-cases brought by either *fa'afafine* or *fakaleiti* concerning their fundamental rights in either Samoa or Tonga.

In many respects the contemporary experience of *fa'afafine* and *fakaleiti* within Tonga and Samoa is surrounded by silence especially as regards those aspects of their lives which might present challenges to the existing law.^[58] Even if *fa'afafine* or *fakaleiti* are not actually prosecuted under the provisions of the criminal law indicated above, the fact remains that they could be, and consequently they may feel or be marginalized and stigmatised. Also the very existence of such laws could not only be discriminatory in their effect but also impinge on a range of fundamental rights which *fa'afafine* and *fakaleiti* have a right to enjoy equally with other members of society. At the same time the recognition of such individual rights and giving effect to them through law reform may be seen as jeopardizing traditional social structures and the cohesion of society by challenging some of the underlying and pervasive premises upon which this is based. Nevertheless, *fa'afafine* and *fakaleiti* are part of that society and many make a valuable contribution to their communities, their families and their national resources. At the very least the silence should be broken and some of the issues raised in this paper and elsewhere, debated openly.

[*] Sue Farran is a Senior Lecturer in the Department of Law, Dundee, Scotland and formerly an Associate Professor of Law at the University of the South Pacific. Alexander Su'a is a University of the South Pacific LLB graduate from Samoa and himself a *fa'afafine*. Part of this work is based on his unpublished research project submitted for his degree studies, 2004 'The Silent Law and Fa'afafine in Samoa'. See also Sue Farran, 'Transsexuals, Fa'afafine, Fakaleiti and Marriage Law in the Pacific: Considerations for the Future' (2004) 113 *The Journal of the Polynesian Society* 119.

[1] The Polynesian people of Samoa are related to those of Tonga, parts of Fiji, Tokelau and Niue. Indeed the Tongans conquered and ruled Samoa for several hundred years until approximately 1,400 B.C., when they were driven out. Meleisea Malama, *Lagalaga: A Short History of Samoa* (1987) 9.

[2] This assumes congruence of chromosomes, gonads and genitals as established in the English common law case of *Corbett v Corbett* [1971] P 83, although it should be noted that the *Corbett* test has since been rejected notably in the Australian case of *Re Kevin* (2001) 165 FLR 404 and the New Zealand case of *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603.

[3] See N. Besnier, 'Polynesian Gender Liminality through Time and Space' in Gilbert Herdt, (ed) *Third Sex, Third Gender* (1994) 286: and on *mahu* Andrew Matzner, 'Transgender, queens, whatever: An Oral History from Hawai'i' (2001) 6 *Intersections* <http://www.she.murdoch.edu.au/intersections/issue6/matzner.html> (last accessed 19/07/2005).

[4] Tracey McIntosh, 'Words and Worlds of Difference: Homosexualities in the Pacific' Working Papers on Sociology and Social Policy, University of the South Pacific 1999.

[5] See for example, Jeannette Marie Mageo, 'Male transvestism and cultural change in Samoa' (1992) 19 *American Ethnologist* 443; N. Besnier, above n 3; Johanna Schmidt, 'Paradise lost? Social change and fa'afafine in Samoa (2003) 51(3) *Current Sociology* 417.

[6] G. Milner, *Samoa Dictionary* (1976).

[7] N. Besnier, above n 3, 296.

[8] Julianne Pierce, 'The artful divas' (2002-03) 52 *Real Time* <http://www.realttimearts.net/rt52/pierce.html> (last accessed 26/11/2003). Drag Queen Pageants and *fa'afafine* shows in Samoa are very popular among locals and tourists and in some respects build on the more traditional role of *fa'afafine* and other male dancers in drag dancing the *poula* (see below).

[9] K. James, 'Effeminate males and changes in the construction of gender in Tonga' (1994) 17 *Pacific Studies* 39.

[10] There are references to this in the writing of G. Mortimer *Observations and remarks made during a voyage* (1791), and a review of early references in N. Besnier, above n 3 288-92. See also K. James, *ibid* 39-40.

[11] For example, informants involved in research undertaken by Alexander Su'a expressed the view that in Samoa *fa'afafine* were not part of the pre-contact *fa'asamoa* and post-contact the label was applied to effeminate males but *fa'afafine* were not homosexuals.

[12] For an extensive review of the different legal systems applicable through the pre-independence period in Samoa see *The Samoan Public Trustee v Annie Collins and others and Elizabeth Collins and Others* [1960-69] WSLR 52.

[13] Guy Powles, 'Western Samoa' in Michael Ntumu, (ed) *South Pacific Islands Legal Systems* (1993) 398.

[14] Section 349.

[15] Articles 111 and 114.

[16] Don Paterson, 'South Pacific customary law and Common law – their interrelationship' (1995) *Commonwealth Law Bulletin* 661.

[17] Jennifer Corrin Care, 'Colonial legacies?' (1997) 21 *Journal of Pacific Studies* 33.

[18] Article 7.

[19] The London Missionaries were the first to arrive led by a missionary called John Williams, although legend has it that the coming of Christianity was predicted some time before this. This may have facilitated the rapid conversion of one of the paramount chiefs of Samoa, Malieto Vainu'upo. Other early churches were the Wesleyan Church and the Catholic Church. Later churches include the Latter Day Saints, the Seventh Day Adventists, Assembly of God and the Baha'i.

[20] Jeannette Marie Mageo, 'Fa'afafine: Transvestism in Samoa' Washington State University, Museum of Anthropology, Virtual Exhibit 2003 <http://libarts.wsu.edu/anthro/museum/virtual%20exhibits/fa'afafine.htm> [2] (last accessed 5/05/03).

[21] A first hand observation by John Williams (1830-1832) is described by Jeannette Marie Mageo, above n 5 at 445.

[22] Jeannette Marie Mageo, 'Samoa, on the Wilde Side: Male transvestism, Oscar Wilde and liminality in making gender' (1969) 24(4) *Ethos* 588, 593.

- [23] Tracey McIntosh, above n 4. See also an earlier unpublished paper by the same author ‘Homosexuality in the Pacific’ http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/pacific%20general/ (last accessed 28/11/2003).
- [24] Andrew Peteru, ‘The sexuality and STD/HIV risk related sexual behaviours of single, unskilled, young adult, Samoan males: A Qualitative study, unpublished MA thesis 1997.
- [25] Johanna Schmidt, above n 5.
- [26] Article 6.
- [27] Article 1.
- [28] See *Tariu Tuivaiti v Sila Fa’amalala et al* [1980-1993] WSLR 17.
- [29] C. Peteru, ‘The gay life’ *Pacific Islands Monthly* October 1996 43.
- [30] An example is that in the Catholic church traditional offering such as a fine mat, baked pig and tapa cloth may be offered, whereas in the “newer” churches these are not regarded as acceptable.
- [31] This is clearly reflected by the fact that the *feagaiga* – a term which expresses the special relationship between brother and sister – was extended to encompass the special relationship between the minister and the village in Christianised Samoa.
- [32] P. Schoeffel, ‘Daughters of Sina: A study of gender, status and power in Western Samoa’ 1979 unpublished PhD Thesis, 1979, Australian National University, Canberra, Australia, p56-73.
- [33] Alexander Su’a ‘For example, in my family, I work indoors with my sisters, I sleep in the same beds or mats with my sisters even with my female friends’.
- [34] R. Dolgoy, ‘The search for recognition and social movement emergence: Towards an understanding of the transformation of the fa’afafine of Samoa’ unpublished PhD thesis, 2000, University of Alberta, Canada. 143.
- [35] *Ibid*, 148.
- [36] K. James, above n 10 54.
- [37] Johanna Schmidt, ‘Redefining fa’afafine: Western discourses and the construction of transgenderism in Samoa (2001) 6 *Intersections*’ <http://wwwshe.murdoch.edu.au/intersections/issue6/schmidt.html> (last accessed 26/11/2003); Andrew Matzner, note 3 9.
- [38] P Imrana Jalal, ‘Summary of Family Law Bill 2003’ <http://www.vanuatu.usp.ac.fj/sol%5Fadobe%5Fdocuments/usp%20only/pacific%20law/jalal2.htm> (last accessed 19/07/05).
- [39] See further, Anita Jowitt, ‘Reconstructing Custom: The politics of homophobia in Vanuatu’ (2005) 30(1) *Alternative Law Journal* 10.
- [40] Andrew Matzner, above n 3; Johanna Schmidt, above n 37.

[41] One term favoured in Samoa is *mala*, which emphasises the combination of male and females skills and attributes. This critique of labels is something that has also happened in Hawaii's with the *mahu*. See Matzner note 3.

[42] K. Poasa, 'The Samoan fa'afafine: One case study and discussion of transsexualism' (1992) 5(3) *Journal of Psychology and Human Sexuality* 39 at 46. This is a view supported by Johanna Schmidt, above n 5, 425.

[43] Johanna Schmidt, above n 37.

[44] For example, for Alexander Su'a it is the place in the *aiga* and the *fa'asamoa* which is truly important.

[45] N. Besnier, challenges this, suggesting that his own ethnographic data contradicts this generalization. Above n 3, 319.

[46] D. St Christian, 'Body/work: Aspects of embodiment and culture in Samoa' unpublished PhD thesis, 1994, School of Graduate Studies, McMaster University, Hamilton, Canada, 183.

[47] N. Besnier, above n 3, 299-302.

[48] Tracey McIntosh, above n 4.

[49] Johanna Schmidt, above n 37.

[50] Johanna Schmidt, above n 37.

[51] Some writers have suggested that they should be regarded as a third gender. See for example, B. Shore, 'Sexuality and gender in Samoa: Conceptions and missed conceptions' in S. Ortner and H. Whitehead, (eds) *Sexual meanings: The cultural construction of gender and sexuality* (1981)54; and Sua'ali M Tamasailau 'Samoans and gender: some reflections on male, female and fa'afafine gender identities' in C. Macpherson, P. Spoonley and M. Anae (eds) *Tangata o te moana nui: The evolving identities of Pacific Peoples in Aotearoa/New Zealand* (2001)16. This is a theme worthy of consideration but outside the scope of this paper.

[52] Famously by H.L.A. Hart, *Law, Liberty and Morality* (1963) and in the English case of *Shaw v Director of Public Prosecutions* [1962] AC 223.

[53] As preliminary step it would be helpful if police indicated on the records whether an offender is a fa'afafine or fakaleiti as recording them as 'male' does not help to give an accurate picture of the extent to which such individuals are being subject to arrest or indeed police harassment.

[54] Two of the informants interviewed by Alexander Su'a, who were themselves police officers in Samoa, indicated that homosexual acts amongst adolescents or teenage males are not rare from certain police reports.

[55] There is some evidence that *fa'afafine*, for example, have been abused as children. See K. Poasa, above n 42. Arguably all children should be protected from sexual abuse.

[56] Dolgoy, while undertaking research in Samoa was warned to beware of cross-dressed. Above n 34 at 276.

[57] Indeed, today when they are performing in cabarets or pageants they are encouraged to cross-dress. However in the 1960s there was considerable suppression of cross-dressing.

[58] Johanna Schmidt, above n 5 at 425, while Alexander Su'a's own observations from personal experience are that *fa'afafine* are careful, silent and secretive with Samoan traditions and Christianity about their homosexuality.

© University of the South Pacific 1998-2006