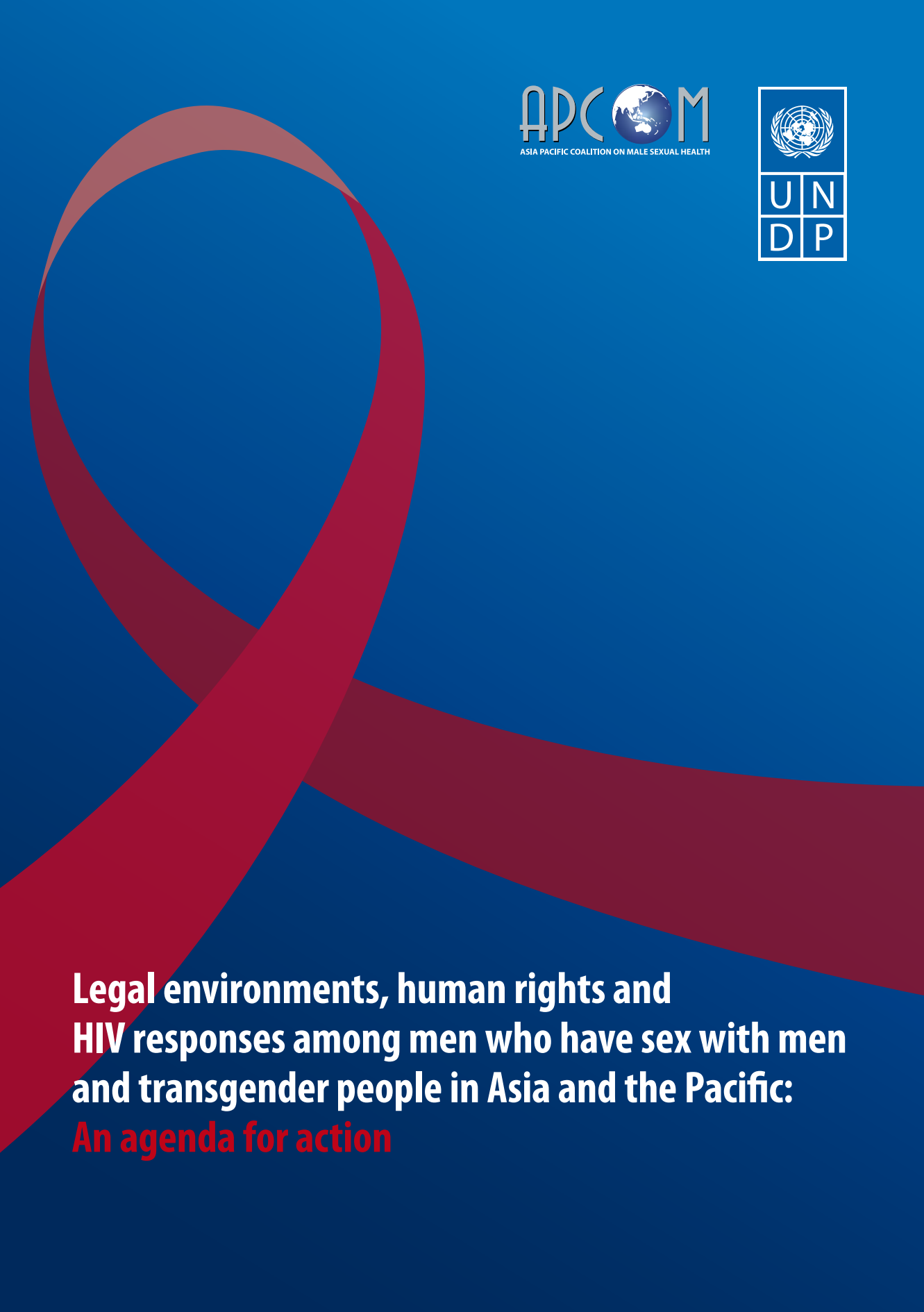


A large, stylized red ribbon graphic that forms a loop and extends across the page, symbolizing HIV/AIDS awareness.

Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action

Legal environments, human rights and HIV responses among
men who have sex with men and transgender people
in Asia and the Pacific: An agenda for action

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Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action

John Godwin
July 2010



"I urge all countries to remove punitive laws, policies and practices that hamper the AIDS response... Successful AIDS responses do not punish people; they protect them... We must ensure that AIDS responses are based on evidence, not ideology, and reach those most in need and most affected."

Ban Ki-moon

Secretary General

United Nations

World AIDS Day, 2009

"Every day, stigma and discrimination in all their forms bear down on women and men living with HIV, including sex workers, people who use drugs, men who have sex with men, and transgender people. Many individuals most at risk of HIV infection have been left in the shadows and marginalized, rather than being openly and usefully engaged... To halt and reverse the spread [of HIV], we need rational responses which shrug off the yoke of prejudice and stigma. We need responses which are built on the solid foundations of equality and dignity for all, and which protect and promote the rights of those who are living with HIV and those who are typically marginalized."

Helen Clark

Administrator

United Nations Development Programme

Launch of the Global Commission on HIV and the Law

Geneva, 2010

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Foreword

The Asia Pacific region is truly at a critical moment in its response to HIV. One of the biggest and most immediate challenges is confronting the rapidly rising rates of infection among men who have sex with men and transgender people. This in a region already mired in long-running challenges from legal and social barriers that inhibit effective programming and resource allocation, and from deep-rooted stigma in health care settings. Urgent action is required. This new, ground breaking report spells out not only these challenges but also provides recommendations for governments, civil society, development partners and the UN family to address these challenges swiftly and effectively.

Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action clearly documents how both punitive and protective laws, policies and practices impact comprehensive HIV responses. To support the findings and recommendations, the report maps out recent judicial, legislative and policy developments and community responses at the global, regional and national levels. Together, these findings demonstrate why it is necessary for stakeholders across the spectrum to adopt a rights-based approach to universal access and proactively address policy and legal barriers to effective HIV responses. Finally, the report recommends that each government, development partner and UN agency take bold and effective programmatic and policy measures to reach out to communities and individuals at risk, particularly those living with HIV.

All is not doom and gloom. Recent progress by the UN system and member states provides momentum to build upon. Globally, the UNAIDS Secretariat and Cosponsors are guided by the *Joint Action for Results: UNAIDS Outcome Framework 2009-11*, which defines the priorities of work towards the removal of punitive laws, policies and practices, and empower men who have sex with men and transgender people to protect themselves from HIV and, where necessary, fully access antiretroviral therapy. Addressing the specific concerns of HIV among men who have sex with men and transgender people is one of the UN family's key priority areas.

In another key development, the recent *UN Economic and Social Commission for Asia and the Pacific (UNESCAP) Resolution 66/10* provides a further platform for national action by member states. The resolution notes the continuing high prevalence of HIV among key affected populations, including men who have sex with men, sex workers and injecting drug users. It calls on governments to acknowledge the extent of the legal and policy barriers that impede progress in developing and implementing effective ways of responding to HIV and related risks among them. Increasingly, member states not only in Asia Pacific but across the world have been incorporating this platform in national HIV programmes.

We are less than five years from 2015. An enabling legal and policy environment is absolutely essential in order to achieve universal access to HIV prevention, treatment, care and support and to demonstrate significant progress towards the Millennium Development Goals.

Our societies are often uncomfortable in addressing issues relating to sexual orientation and gender identity in an open and honest way. The escalating HIV epidemic means that we cannot afford to shy away from these issues. Prejudices must be challenged and stigma confronted. Law and policy must be based on evidence, not on myths and prejudices. Fortright leadership, courage and compassion are required, particularly from legislators, the judiciary and law enforcement agencies. There are examples of success, and progress is occurring in some quarters. However, our region has some of the fastest growing HIV epidemics in the world and action on the legal environment is not keeping pace with the epidemic. The window of opportunity to address these issues is fast closing. We trust that this report assists us all to mount a more concerted and better-informed response, in which the needs and rights of marginalized populations take centre place.



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Acronyms



AIDS	Acquired Immunodeficiency Syndrome
APF	Asia Pacific Forum of National Human Rights Institutions
APN+	Asia Pacific Network of People Living with HIV/AIDS
APCOM	Asia Pacific Coalition on Male Sexual Health
APTN	Asia Pacific Transgender Network
ASEAN	Association of South East Asian Nations
AusAID	Australian Agency for International Development
BDS	Blue Diamond Society
CIDA	Canadian International Development Agency
COJ	Companions on a Journey
CBO	Community-based organization
CCM	Country Coordinating Mechanism (of Global Fund)
DFID	United Kingdom Department for International Development
Global Fund	Global Fund to Fight AIDS, Tuberculosis and Malaria
HIV	Human Immunodeficiency Virus
ICAAP	International Congress on AIDS in Asia and the Pacific
IAVI	International AIDS Vaccine Initiative
IEC	Information, education, communication
LGBT	Lesbian, gay, bisexual and transgender
MSM	Men who have sex with men
NFI	Naz Foundation International
NGO	Non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
PSDN	Pacific Sexual Diversity Network
PNG	Papua New Guinea
PSI	Population Services International
PSN	Purple Sky Network
SAARC	South Asian Association for Regional Cooperation
SAR	Special Administrative Region (China)
SIDA	Swedish International Development Agency
STI	Sexually transmitted infection
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UN ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNOHCHR	UN Office of the High Commissioner for Human Rights
USAID	United States Agency for International Development
WHO	World Health Organization



Executive summary

A study was conducted of legal environments affecting HIV responses among men who have sex with men (MSM) and transgender people in 48 countries and territories of the Asia and Pacific region. The study was conducted from August 2009-June 2010, and considered legislation, cases, and published research and grey literature regarding laws, and law enforcement policies and practices. The study was informed by consultations with community representatives, legal experts and UN agencies.

The study was undertaken to fill gaps in knowledge about (i) the effects of laws and law enforcement policies and practices on HIV responses among MSM and transgender people, and (ii) the role of civil society organizations, governments, donors, UN agencies and other multilateral agencies in supporting improvements to legal environments affecting MSM and transgender people. The study highlights examples of good practice.

The information in this study is intended to provide a more complete regional assessment of these issues than has previously been available. The study contributes to the evidence-base available to civil society organizations, governments, donors and multilateral agencies to inform policy development, planning and implementation of programmes. This information is provided to UN agencies to support implementation of priorities relating to removal of punitive laws and empowerment of MSM and transgender people under the *UNAIDS Outcome Framework 2009-11*. This information is intended to support donors in implementing their commitments to scale-up HIV responses among MSM and transgender people, including the *Strategy on Sexual Orientation and Gender Identities* of the Global Fund to Fight AIDS, Tuberculosis and Malaria. The information is also intended to assist governments to implement regional and international commitments, including the commitments made at the United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP) in 2010 to ground universal access to HIV services in human rights and to address legal barriers to HIV responses (*Resolution 66/10*).

Key findings

In Asia, HIV prevalence among MSM and transgender people is significantly higher than of the general adult population. The Commission on AIDS in Asia found that MSM can potentially account for between 10 and 30 percent of new HIV infections occurring annually in Asian countries, making HIV among MSM a significant factor in the overall epidemic. Projections of the Asian epidemic indicate that MSM will comprise an increasing proportion of total new HIV infections, such that close to half of all new HIV infections in Asia as a whole will be among MSM by 2020, unless prevention efforts are scaled-up.

In Pacific island countries, male-to-male sex as a cause of HIV transmission is thought to be under-reported. Even so, male-to-male sex is known to be a factor in a significant number of cases. If Papua New Guinea is excluded, one third of recorded HIV cases in Pacific island countries have been transmitted through male-to-male sex.

The majority of countries in the region have legal environments that are repressive towards MSM and transgender people.

Male-to-male sex between consenting adults is criminalized in 19 of the 48 countries of the Asia Pacific region: Afghanistan, Bangladesh, Bhutan, Brunei, Cook Islands, Kiribati, Malaysia, Maldives, Myanmar, Nauru, Pakistan, Palau, Papua New Guinea, Samoa, Singapore, Sri Lanka, Solomon Islands, Tonga and Tuvalu. In addition to the 19 countries in which male-to-male sex is criminalized, there are reports of criminal laws relating to public order or sex work being selectively enforced by police against MSM and transgender people in a further eight countries.

No low or middle-income country in the region has passed comprehensive legal protections from discrimination on the grounds of sexual orientation and transgender status.

Repressive legal environments that marginalize MSM and transgender people contribute to low levels of access to HIV services. Recent studies show less than 20 percent of MSM and transgender people have access to HIV prevention services in many countries of the region. If legal and policy barriers remain and prevention interventions are not intensified, HIV epidemics will escalate.

Repressive legal environments are characterized by:

- i. laws criminalizing male-to-male sex between consenting adults;
- ii. law enforcement practices targeting MSM and transgender people for harassment, assault, extortion and detention, relating to allegations of breach of public order, sex work, trafficking or other offences;
- iii. censorship laws restricting publication of images or messages relating to homosexuality;
- iv. laws that restrict community-based organizations (CBOs) from obtaining legal status;
- v. absence of legal protections from discrimination on the grounds of sexual orientation or gender identity;
- vi. absence of legal recognition of transgender status, for purposes including identification, passports and travel rights, voting, entitlements to welfare, and the right to marry;
- vii. absence of legal recognition of same-sex relationships. This can result in denial of a range of benefits available to heterosexual partners including participation as next-of-kin in medical decisions, denial of welfare and housing entitlements, and denial of inheritance rights.

HIV responses for MSM and transgender people may also be affected by a range of other laws, for example, laws that criminalize sex work, drug use, or the transmission of HIV.

Countries in which male-to-male sex between consenting adults is criminalized are jurisdictions with common law traditions, most of which are former British colonies. Some countries also apply *Sharia* law, which provides severe penalties for male-to-male sex, including death (in Afghanistan and parts of Pakistan), whipping and life imprisonment. These offences are rarely prosecuted, but nonetheless significantly impede HIV responses by adding to stigma and acting as a strong deterrent to MSM and transgender people identifying themselves to HIV services. Jurisdictions with civil law traditions do not criminalize male-to-male sex i.e. East Asian countries, Vietnam, Cambodia, Lao PDR, Philippines and Indonesia (except in the Indonesian provinces where *Sharia* law applies).

Many national HIV policies and programmes now accord a priority to MSM, even though the legal environment remains repressive. The national HIV policies of 22 countries in the Asia and Pacific region identify MSM as a most-at-risk or priority population for the purposes of HIV prevention. Four countries have specific national strategies or action plans on MSM and HIV (Cambodia, China, Indonesia and India). Legislation and law enforcement often lags behind national HIV policy, with the result that the reach and effectiveness of programmes for MSM and transgender people are limited. Most HIV programmes for MSM and transgender people in the region are in their early stages of implementation and operate in non-supportive legal environments. There is a clear need for greater coordination between law and justice sectors and health sectors within national HIV responses.

There are some recent examples of protective and enabling laws, and supportive judicial and policy actions. Recent court judgments have improved the legal environment in Nepal, India, Pakistan, Philippines, Fiji, South Korea and Hong Kong SAR of China. Eight jurisdictions now recognize that certain constitutional protections extend to sexual minorities. There are examples of specific legislation protecting MSM from discrimination on the grounds of sexual orientation in eight countries. Nepal's *Interim Constitution* has been interpreted by its Supreme Court as guaranteeing equal rights to people regardless of sexual orientation or gender identity. The government of Nepal is considering proposals to introduce comprehensive legal protections from discrimination relating to sexuality and gender identity in the context of the drafting of a new Constitution. However, these are exceptional developments. Examples of high-level political action and law reform to introduce enabling legal environments for MSM and transgender people are rare.

MSM and transgender people confront multiple forms of stigma and discrimination, including in relation to sexual orientation, gender identity, involvement in sex work, drug use history and actual or presumed HIV status. MSM and transgender people are highly stigmatized in most countries of the region. Many MSM and transgender people report discrimination in access to health care services and in other areas of public life, including education, employment and access to justice. In its extreme form, discrimination includes violence perpetrated by police and health care workers.

The experience of many countries of Asia and the Pacific is that repressive legal environments can result in a range of adverse consequences for HIV responses. These consequences may include:

Impeding prevention activities

- HIV prevention services are interrupted as a result of police harassment of outreach workers, many of whom are MSM or transgender peer educators.
- HIV prevention education activities are restricted by police on the grounds that the activities encourage or 'aid and abet' illegal acts of male-to-male sex or sex work.
- Condoms and lubricants are confiscated by police as evidence of sex work or of illegal male-to-male sex.
- HIV materials are censored, and police raids occur on events and venues where HIV education takes place.
- Dissemination of health promotion information on safer sex practices is restricted on the grounds that it may be considered to be in breach of obscenity laws.

- The existence of sodomy offences restricts or discourages MSM and transgender people from forming support groups, which are essential for effective peer-based HIV prevention, care and support interventions.

Driving MSM and transgender people away from HIV services

- MSM and transgender people are reluctant to identify themselves to providers of HIV services for fear of discrimination or information regarding sexual orientation or gender identity being recorded or disclosed to police or media.
- Police abuses decrease the control that MSM and transgender people have over their lives, increase stigma and alienate MSM and transgender people from society, with the result that they are more difficult to reach with services.

Inhibiting investment in programmes and research relevant to HIV responses among MSM and transgender people

- In countries where male-to-male sex is criminalized, there is often a reluctance to provide resources for HIV services targeted to MSM and transgender people and for social and epidemiological research relevant to MSM and transgender people.
- In some countries, male-to-male sex is not illegal, but transgender people and same-sex relationships are not recognized or protected by law. This lack of legal recognition contributes to social invisibility and lack of influence on policy makers and officials responsible for resource allocation and service delivery. Low visibility of MSM and transgender people in society can mean their numbers are under-estimated and inadequate resources are invested in targeted programmes to address their HIV needs.
- In countries where male-to-male sex is criminalized, MSM may avoid contact with HIV services. As a result, their needs are not well understood by service providers and they do not appear in service data as a client group. HIV programmes may not be informed by reliable evidence of need or an accurate understanding of sexual and gender diversity in their communities.

Reduced self-esteem and increased risk-taking behaviors

- Lack of legal recognition of same-sex relationships and of transgender status contributes to low self-esteem and social marginalization. Low self-esteem is often associated with behaviors that increase risk for HIV. People with low self-esteem may fail to protect themselves or their partners from HIV infection and avoid identifying themselves to services.
- Fear of arrest, harassment by police, discrimination and stigma leads to a lack of safe places for socializing. Sexual encounters may occur in public places at night, and be hurried and unsafe.
- High levels of stigma and lack of laws to protect from discrimination mean that many MSM and transgender people have poor education and work opportunities. Throughout the region, MSM who are poor and transgender people have limited employment options and many turn to sex work for perceived security and income. Sex work can greatly increase vulnerability to HIV if there is no regular access to HIV prevention information, peer education, condoms and sexual health services.

Legitimizing discriminatory and inhumane health services

- HIV-positive MSM and transgender people report high levels of discrimination by providers of health services. Repressive legal environments can add legitimacy to discrimination against MSM and transgender people by health care workers.
- Criminalization perpetuates discriminatory and outmoded beliefs of some health professionals who consider homosexuality and transgender status as diseases or disorders. This can result in application of inhumane and unethical treatments, such as 'aversion therapy' to treat homosexuality as if it were a disease.
- Reluctance of HIV services to address MSM and transgender issues is influenced by repressive legal environments, which reinforce negative and judgmental social attitudes.

Recommendations

Priority actions for the Asia Pacific region

Governments should:

- Repeal laws that criminalize sex between consenting adults.
- Halt public security and police harassment, violence and selective enforcement of sex work, obscenity, vagrancy and other public order offences targeting MSM and transgender people.
- Enact anti-discrimination laws in relation to sexual orientation and transgender status.
- Provide legal recognition of sex reassignment and 'third sex' status.
- Define law and justice sector responsibilities relating to the promotion and protection of the human rights of MSM and transgender people in national HIV policies and plans.
- Support national human rights institutions and the ASEAN Intergovernmental Commission on Human Rights, in partnership with the Asia Pacific Forum of National Human Rights Institutions, to provide leadership on sexual orientation and transgender human rights issues.
- Ensure parliamentarians, police, judges and justice ministry officials have access to evidence-based information and are trained on the epidemiology of HIV and the harmful public health and human rights impacts of punitive laws and law enforcement practices relating to MSM and transgender people.
- Support community-based education and advocacy regarding the human rights of MSM and transgender people, and access to legal aid for MSM and transgender people who have experienced human rights violations.

Key regional institutions such as the Association of South East Asian Nations (ASEAN), South Asian Association for Regional Cooperation (SAARC) and the Pacific Islands Forum should take proactive measures to promote and protect the human rights of MSM and transgender people, and encourage member states to repeal laws criminalizing male-to-male sex and to review discriminatory laws, policies and practices.

Recommendations are also made to donors and multilateral organizations. Detailed recommendations for an Agenda for Action are set out in Chapter 8. The priority to be accorded to these detailed recommendations should be identified through country-level processes. Detailed recommendations relate to the following areas:

A. Improvements to the legal environment for HIV responses

1. Community empowerment and advocacy for improved legal environments and access to justice.
2. Support to the judiciary and improvements to law enforcement practices of public security officers and police.
3. Decriminalization and law reform to protect the human rights of MSM and transgender people, such legal reforms to be achieved by legislative and judicial action.
4. Incorporating actions to address the legal environment and improving access to justice in national policies and plans.
5. Research and monitoring of the legal environment and access to justice.

Improvements to health sector HIV services and increased social protection

1. Improvements to HIV prevention, treatment, care and support services to ensure equitable access, and to ensure services are responsive to the specific needs of MSM and transgender people.
2. Public education programmes and use of the public media to raise awareness of the human rights of MSM and transgender people and to combat stigma.
3. Employment programmes, income-support and inclusion in social protection schemes.

1 Introduction

1.1 Objectives and method

The objectives of this study were to:

- i. describe and assess the diversity of laws that affect HIV responses for MSM and transgender people in the Asia Pacific region;
- ii. document the impact of laws, regulations, policies and law enforcement practices on HIV responses for MSM and transgender people; and
- iii. provide recommendations for actions required to create enabling legal and policy environments, whereby the adverse impact of punitive laws, regulations and policies can be removed or mitigated and universal access to HIV services achieved.

The study focused on 48 countries and territories of the Asia Pacific region, which were described and assessed in four sub-regions: South Asia (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka), East Asia (China (including the jurisdictions of mainland People's Republic of China, Hong Kong SAR, Macao SAR and Taiwan), Japan, Mongolia, North Korea, South Korea), South East Asia (Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, Vietnam), and the Pacific (Australia, American Samoa, Cook Islands, Guam, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Northern Mariana Islands, Palau, Pitcairn Islands, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and Wallis and Futuna).

The study method involved review of legislation, cases, published research and grey literature, consultations with community representatives, technical experts and UN agencies, and analysis. A list of participants in the series of community and high-level consultations convened by UNDP to inform the report is provided at Annex II.

The report summarizes and assesses punitive laws and practices that are detrimental to HIV responses, including:

- criminal offences applying to consensual sex between adult males;
- public order, obscenity and sex work offences that are selectively enforced against MSM and transgender people;
- criminal offences relating to gender non-conformity (e.g. cross-dressing);
- censorship laws that impede provision of HIV prevention information; and
- law enforcement practices.

In addition, the report summarizes protective and enabling laws that are supportive of HIV responses, including:

- anti-discrimination laws, which can have a positive impact in supporting HIV prevention, care, support and treatment services; and
- legal recognition of sex reassignment and “third sex” or “third gender” status.

The report also provides an overview of actions of the judiciary and parliamentarians, and law enforcement practices that impact on HIV prevention, treatment, care and support services for MSM and transgender people. The report highlights examples of good practice by civil society, governments, UN agencies and donors (but is not intended to be a comprehensive mapping of every country response).

The report is intended to provide an evidence-base for: policy makers working in government, regional and multilateral organizations; parliamentarians and the judiciary; civil society organizations including community-based organizations (CBOs), faith-based organizations and media organizations; donor agencies; and MSM and transgender people engaged in activism to improve the legal and policy enabling environment for HIV responses.

1.2 Approach

This report applies a human rights analysis of the effect of laws on HIV responses and in the recommendations proposed for an agenda for action. The premise of this study is that MSM and transgender people are entitled to legal protections of their human rights, consistent with international law and human rights norms. International human rights law requires states to take measures to respect, protect and fulfill the human rights of MSM and transgender people to equality, non-discrimination, privacy and the highest attainable standard of health.¹

The human rights-based approach asserts that HIV responses are more effective in contexts where the human rights of people living with HIV and those most-at-risk of HIV are protected by laws and policies. This approach informed the development of the *International Guidelines on HIV/AIDS and Human Rights*.² With legal and policy protections of human rights in place, most-at-risk populations are more likely to participate in prevention efforts and come forward for testing, treatment and care. HIV services can operate more effectively when most-at-risk populations can access services openly and without fear of adverse legal and social consequences.³ With supportive laws and practices in place, MSM and transgender people can also openly participate in planning, managing and delivering HIV services, which helps to ensure that the services are effective, accessible and acceptable to their communities.

1.3 International legal and policy context

At the international level, over the last fifteen years there has been growing recognition of human rights relating to sexual orientation and gender identity, and the public health benefits of action to protect these human rights. This can be seen in developments in international law

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- 1 See: *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) available at: www.yogyakartaprinciples.org; in relation to state obligations to decriminalize consensual sex between adult males, see: Human Rights Committee, Communication No. 488/1992: Australia, U.N. Doc. CCPR/C/50/D/488/1992, *Nicholas Toonen v. Australia*, 4 April 1994; and in relation to state obligations to transgender people see judgments of the European Court of Human Rights: *B. v. France*, judgment of 25 March 1992, Series A no. 232-C; *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.
 - 2 OHCHR and UNAIDS (2006) *International Guidelines on HIV/AIDS and Human Rights*. Geneva: OHCHR and UNAIDS 1998, updated 2006.
 - 3 Baral S., Trapence G., Motimedi F., et al. (2009) HIV prevalence risks for HIV infection, and human rights among men who have sex with men (MSM) in Malawi, Namibia, and Botswana. *PLoS ONE* 4(3): e4997.

and in the policy positions of the Joint UN Programme on HIV/AIDS (UNAIDS), comprising the ten Cosponsors⁴ and UNAIDS Secretariat, and donors including the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), the U.S President's Emergency Plan for AIDS Relief (PEPFAR), Australian Agency for International Development (AusAID) and United Kingdom's Department for International Development (DfID).

The following developments (described in more detail in Annex III) represent important international milestones in the human rights-based response to HIV, sexual orientation and gender identity:

- (i) the UN Economic and Social Commission for Asia and the Pacific (UNESCAP) *Resolution 66/10* (2010), which notes the high HIV prevalence levels among MSM and calls on member states to ground universal access in human rights and to address legal barriers to HIV responses (see Chapter 6);
- (ii) the Report of the UN Special Rapporteur on the Right to Health to the Human Rights Council 14th Session, which calls for decriminalization of consensual same-sex conduct between adults (2010);
- (iii) *Joint Action for Results: UNAIDS Outcome Framework 2009-11* (2009), which defines the priorities of UNAIDS to include the removal of punitive laws, policies and practices and the empowerment of MSM, sex workers and transgender people to protect themselves from HIV and to fully access antiretroviral therapy;
- (iv) the UN *Economic and Social Council Resolution on HIV/AIDS* (2009), which calls for action on MSM issues;⁵
- (v) the *UNAIDS Action Framework on Universal Access for MSM and Transgender People* (2009), which calls for a human rights-based approach;
- (vi) the Global Fund's *Sexual Orientation and Gender Identity Strategy* (2009);
- (vii) the reports of the Independent Commission on AIDS in Asia (2008) and the Independent Commission on AIDS in the Pacific (2009), which call for repeal of sodomy laws;⁶
- (viii) the *United Nations Declaration on Sexual Orientation and Gender Identity* (2008), signed by 67 member States of the UN;
- (ix) the *International Guidelines on HIV/AIDS and Human Rights* (1997 & 2006), which recommend repeal of sodomy laws and enactment of anti-discrimination laws and other protective laws;⁷
- (x) the 2008 statement by Ban Ki-moon, Secretary-General of the United Nations, calling for legal protections for the human rights of sex workers, drug users and MSM;

4 The ten UNAIDS cosponsors are the Office of the United Nations High Commissioner for Refugees (UNHCR); United Nations Children's Fund (UNICEF); World Food Programme (WFP); United Nations Development Programme (UNDP); United Nations Population Fund (UNFPA); United Nations Office on Drugs and Crime (UNODC); International Labour Organization (ILO); United Nations Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO); World Bank.

5 ECOSOC (2009) *Economic and Social Council Resolution E/2009/L.23* adopted 24 July 2009.

6 Commission on AIDS in Asia. (2008) *Redefining AIDS in Asia: Crafting an Effective Response*. New Delhi: Oxford University Press p.203; Commission on AIDS in the Pacific. (2009) *Report of the Commission on AIDS in the Pacific -Turning the Tide: An OPEN strategy for a response to AIDS in the Pacific*. UNAIDS Pacific Region, p.89.

7 OHCHR and UNAIDS (2006) *op cit*. fn.2, pp.29, 37.

- (xi) the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007);
- (xii) the 2001 *UNGASS Declaration of Commitment on HIV/AIDS* and the 2006 *UN Political Declaration on HIV/AIDS*, which commit states to removing legal barriers to HIV responses and passing laws to protect vulnerable populations;
- (xiii) the 1994 case of *Toonen v. Australia*, which found that the law of the state of Tasmania, which criminalized consensual homosexual conduct between adults, violated the right to privacy guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR).

1.4 National policy contexts

Domestic policies that impact on MSM and transgender people include national HIV policies, policies of law and justice ministries and law enforcement agencies, and military law and policy in countries affected by strong military sectors and organizations.

Examples of national HIV policy responses are outlined in the sub-regional chapters below (Chapters 2–5). A common theme across the region is lack of alignment and coordination between justice sector responses and health sector responses to the rights and needs of MSM and transgender people. In the context of escalating HIV epidemics among MSM and transgender people, many health ministries have developed policies that accord a priority to reach these populations with HIV prevention services. Twenty two national HIV responses in the Asia and Pacific region⁸ have identified MSM as a most-at-risk or priority population for the purposes of HIV prevention. Four countries have specific strategies or action plans on MSM and HIV (Cambodia, China, Indonesia and India). Furthermore, a regional Global Fund proposal on MSM and HIV has been endorsed by seven countries in South Asia.⁹

However, actions by legislators and the justice sector to address HIV among MSM and transgender people are generally either absent or lagging behind the health sector response. Criminal sanctions for consensual male-to-male sex between adults remain in place in 19 countries across the Asia Pacific region (Afghanistan, Bangladesh, Bhutan, Brunei, Cook Islands, Kiribati, Malaysia, Maldives, Myanmar, Nauru, Pakistan, Palau, Papua New Guinea, Samoa, Singapore, Sri Lanka, Solomon Islands, Tonga and Tuvalu). A further eight countries do not specifically criminalize male-to-male sex, but are reported to selectively apply other criminal provisions, such as public order and indecency offences, to target MSM and transgender people on the grounds of their real or perceived sexual orientation, gender identity and gender expression (Cambodia, China, India, Indonesia, Mongolia, Philippines, Thailand and Vietnam). Four countries also criminalize cross-dressing (Afghanistan, Malaysia, Tonga and Samoa). The application of these laws often violates the human right to privacy, undermines the enjoyment of the human right to the highest attainable standard of health, and can result in violations of other fundamental human rights, such as freedom of association, freedom of assembly, and the principle of non-discrimination.

⁸ Bangladesh, Cambodia, China, Fiji, India, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, Mongolia, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Singapore, South Korea, Sri Lanka, Thailand, Timor Leste, Vietnam: personal communication, UNAIDS Regional Support Team, April 2010.

⁹ Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka.

Although many national HIV policies have been adjusted to include MSM as a priority, there is often a lack of representation of MSM or transgender people on national policy and programming bodies such as national AIDS councils and committees, or on Global Fund Country Coordinating Mechanisms (CCMs). A global review of CCMs conducted in 2006–2007 found that, out of sixty-five CCMs reviewed, just five had representatives easily identifiable as MSM or LGBT (lesbian, gay bisexual, transgender) organizations or members.¹⁰ As a result, many governments determine their national HIV priorities without the participation of their most-affected populations, including MSM and transgender people. Exceptions are the Indonesian National AIDS Commission, which includes the Indonesian Gay, MSM and *Waria* Network (GWL-INA) as a full member, and the National AIDS Council of Cook Islands, which includes the Te Tiare Association as a member.

1.5 The role of national and regional human rights institutions

Regional and national human rights institutions, such as Human Rights Commissions and Ombudsman's Offices, have been under-utilized in efforts to respond to issues affecting MSM and transgender people. National human rights institutions have a role in monitoring and responding to human rights violations, investigating complaints and advocating human rights perspectives in national policy discussions and to the media.

The Asia Pacific Forum of National Human Rights Institutions (APF) is the leading regional human rights organization in the Asia Pacific and has increased its engagement on HIV, sexual orientation and gender identity issues in recent years. In 2009, APF demonstrated leadership in convening a regional meeting for human rights institutions, in partnership with Indonesian Human Rights Commission, focusing on the role of national institutions in promoting the *Yogyakarta Principles*. In 2010, a Regional Workshop on HIV and Human Rights for National Human Rights Institutions was organized by the UN Office of the High Commissioner for Human Rights (UNOHCHR) and the Danish Institute for Human Rights, with the support of UNAIDS, UNDP and APF. These regional meetings have been successful in linking human rights institutions with civil society organizations, such as national organizations of people living with HIV.

The establishment of the ASEAN Intergovernmental Commission on Human Rights in 2009 presents an opportunity to further highlight priority human rights issues for MSM and transgender people at a regional level, to explore the relationship between human rights and public health in the context of the escalating regional HIV epidemic, and to identify examples where country-level action (such as recognition of constitutional rights to non-discrimination on grounds of sexual orientation) provide useful models for consideration by other jurisdictions.

Some national human rights institutions have sought to inform law reform agendas. For example, in 2007, the National Human Rights Commission of Korea advocated for inclusion of sexual orientation in a national Anti-discrimination Bill. The National Human Rights Commission of Thailand proposed the inclusion of an Article to protect the rights of persons of diverse sexual orientations and gender identities in the process of drafting the 2006

¹⁰ Fried S., Kowalski-Morton S. (2008) Sex and the Global Fund: How sex workers, lesbians, gays, bisexuals, transgender people, and men who have sex with men are benefiting from the Global Fund, or not. *Journal of Health and Human Rights* 10(2).

Constitution, and proposed to Parliament to amend laws to allow transgender persons to change their sex on their identity cards. These are ongoing battles.¹¹

1.6 Social and religious contexts

‘Asian values’ objections to MSM and transgender human rights

Some Asian politicians have argued that a rights-based approach to homosexuality is an inappropriate imposition of Western concepts, which conflicts with ‘Asian values.’¹² It has been argued that human rights-based approaches stressing individual freedoms and civil and political rights such as rights to privacy and non-discrimination are associated with Western political philosophy, but are not rooted in Asian political cultures. Most Asian and Pacific island societies place a stronger emphasis on community and family life than Western societies, which are generally more individualistic. Some Asian cultures (particularly in East Asia) place a greater emphasis on social stability and discipline than on individual liberties.

The human rights-based approach to sexuality and gender diversity is perceived by some as peculiarly Western, in that it originated in the gay rights movement of Western countries in the 1970s and 1980s, which then evolved into a broader movement for LGBT rights (lesbian, gay, bi-sexual and transgender rights). Certainly, issues of sexuality and gender are understood differently in many Asian and Pacific island cultures than in Western cultures. The Western concept of a gay identity is largely absent beyond specific urban centers. These issues may therefore require different legal and policy responses than in the West.¹³

Sexuality is seen as more fluid in many Asian and Pacific island cultures than in the West. Many Asian and Pacific island countries traditionally acknowledged and accepted diversity of sexual orientations and gender variance. In Asia, transgender people were accorded specific roles such as spiritual mediums, healers, actors, singers and dancers.¹⁴ In Polynesia, people with culturally-specific gender identities, such as *fa’afafine*, were assigned specific roles in the family and community. In modern times, it may be culturally accepted for a homosexual person in Asia to marry a woman and have children, while continuing to engage in private in same-sex relationships. Many Asian and Pacific island societies are accepting of homosexuality as long as there is an effort made to be discreet. This can clash with an approach that encourages the positive assertion of rights to equality and visibility.

This report recognizes that legal and policy responses to issues of sexuality and gender need to be sensitive to local cultural and religious contexts. However, responses also need to be guided by universal principles of human rights. The argument that a human rights-based approach is incompatible with values of Asian and Pacific island communities is difficult to sustain given that the human rights approach has been accepted by the vast majority of

11 See country papers on the APF website: http://www.asiapacificforum.net/issues/sexual_orientation.

12 Sanders D. (2005) *Flying the Rainbow Flag in Asia*, paper presented at 1st International Conference on Asian Queer Studies, Bangkok, p.60, available at <http://bangkok2005.anu.edu.au/papers/Sanders.pdf>

13 See: Laurent E. (2005) Sexuality and Human Rights: An Asian Perspective, *Journal of Homosexuality* p. 192.

14 See Winter S., King M (in press). Well and truly fucked: transwomen, sex work, stigma and sexual health in South and South East Asia. In: Dalla, R. L., Baker, L. M., DeFraen, J. & Williamson, C. (eds.) *A Global Perspective of Prostitution with Implications for Research, Policy, Education, and Service* (Vol. II: North America, Latin America, and Europe). Landham: Lexington Publishers, at fn.12.

governments of countries of Asia and the Pacific in the context of a range of other public policy issues. The duties of governments in relation to protection and promotion of human rights have been incorporated into the Constitutions of many countries of the region. An ASEAN Inter-governmental Commission on Human Rights was established in 2009.

Further, the contention that human rights principles are foreign concepts does not hold up to historical scrutiny. Human rights values can be identified in Asian philosophical traditions such as Buddhism dating back thousands of years, as well as in the West.¹⁵ However, as Sanders has cautioned, the shift of Asian governments towards supporting human rights in general does not automatically mean a shift in favor of homosexual rights: "The recognition of gay and lesbian equality (is) still far too marginal to be a clear part of the human rights package."¹⁶ The slow progress in achieving legal protections and equal rights for MSM and transgender people through political action, as distinct from judicial action, suggests that cultural conservatism, and its influence on that which is considered politically acceptable, plays a significant role in the region.

Religious opposition to homosexual sex, sex reassignment and cross-dressing

Some religious organizations play a significant role in supporting repressive legal environments, particularly in conservative Muslim communities (in countries such as Pakistan, Bangladesh, Malaysia and Maldives), and conservative Christian communities (particularly in Pacific island countries such as Samoa, Tonga, Cook Islands and Papua New Guinea). In Christianity and Islam, objections to same-sex sexual relations have been based on the belief that only heterosexual intercourse is natural. A human rights-based approach to homosexuality has been argued to conflict with conservative Christian values of Pacific island communities and some Asian communities.¹⁷ In Singapore, conservative Christian opposition is understood to be a factor influencing the reluctance of the government to decriminalize homosexuality in the last decade.

In recent years there has emerged a range of different views within Islamic and Christian faiths, with some voices strongly supportive of an interpretation of religious doctrines that does not discriminate on grounds of sexual orientation or gender identity.¹⁸ However, historically, Christian and Islamic religious bodies have supported criminalization of homosexuality in a variety of circumstances. *Sharia* law continues to impose harsh penalties for homosexual conduct in some parts of Asia, and *fatwas* have been issued prohibiting homosexual conduct, sex reassignment and cross-dressing.¹⁹

Although the Catholic Church takes a conservative position towards sexuality generally, it nonetheless has recently adopted a formal position *opposing* criminalization of homosexuality.

15 Sen A. (1997) *Human Rights and Asian Values, Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy*. New York: Carnegie Council on Ethics and International Affairs.

16 Sanders D. (2005) *op cit* fn.12 p.62.

17 Radio Australia (2008) *Church opposed to decriminalising homosexuality in Pacific* <http://www.radioaustralia.net.au/programguide/stories/200809/s2359966.htm>; Chan, P C 'Stonewalling through Schizophrenia: An Anti-Gay Rights Culture in Hong Kong?' *Sexuality & Culture*, Vol.12 No.2 (2008) p.71-87.

18 E.g. Siti Musdah Mulia argues that Islamic humanism supports a human rights-based approach to sexual orientation and gender identity: Musdah Mulia S. *Understanding sexuality in Islam: promoting the appreciation of human dignity*. Paper presented at Asia Pacific Forum on Human Rights Institutions Regional Workshop on Yogyakarta Principles, May 2009.

19 See e.g. sections on Malaysia and Bangladesh, below.

At the UN General Assembly in 2008, the representative of the Holy See stated that, although the Holy See did not support the *Declaration on Human Rights, Sexual Orientation and Gender Identity*, it did agree to “advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal penalties against them.”²⁰

The Pacific Sexual Diversity Network describes the context in the Pacific island countries as follows:²¹

The traditional teachings of the Christian church that homosexuality, and other forms of sexual diversity, are sinful have played a significant part in shaping the attitudes and actions of society towards Pacific MSM and transgenders. As with many other areas, there is a degree of divergence across religious denominations, and within church communities, about sexual and gender diversity. Some MSM and transgenders hold important and valued positions within their religious communities. Unfortunately, others are not accepted and some are even rejected from their church, causing significant emotional and spiritual distress...

In many Pacific countries, the rise of fundamentalist evangelical Christian churches is posing a threat to more moderate, traditional churches. Some of these churches are promoting discredited and harmful ‘reform’ strategies for MSM and transgenders that falsely claim to be able to change sexual orientation. Some are also promoting hoax ‘snake-oil’ remedies for HIV instead of anti-retroviral treatment. The reactionary and hateful rhetoric of these churches is of great concern to MSM and transgenders and should concern all religious leaders who respect human dignity.

Unlike in Islamic and Christian teachings, homosexuality is rarely discussed in religions that originated in Asia.²² There is no discussion of homosexuality in Confucian texts. Hindu scriptures are generally silent on homosexuality, but the religion is generally tolerant and recognizes third-gender persons. There is no Hindu law requiring punishment for homosexual acts. Buddhism does not specify homosexuality as a sin, but lust in any form is considered wrong. The Buddhist societies of Sri Lanka and Burma had no legal statutes against homosexuality between consenting adults until the colonial era.

Role of media

Media responses are affected by the treatment of MSM and transgender people by the formal legal system. Media coverage of homosexuality is often sensationalist. The supportive role of media in the HIV response may be absent if public media reflects legal, military, cultural and religious norms in society that are hostile towards MSM and transgender people. This deprives MSM and transgender people of potentially supportive allies in informing and educating the general community. Hon. Michael Kirby, former Justice of the High Court of Australia, has

20 Statement of the Holy See Delegation at the 63rd Session of The General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity (18 December 2008).

21 PSDN (2009) *HIV/AIDS, men who have sex with men and transgender people in the Pacific: Recommendations for an improved response* PSDN and ACON, pp.8, 22.

22 See: Jenkins C. (2006) *Male sexuality and HIV: the case of male-to-male sex* Background Paper: Risks and Responsibilities, Male Sexual Health and HIV in Asia and the Pacific International Consultation, New Delhi 2006 p.11; See also *Religion and Homosexuality*: http://en.wikipedia.org/wiki/Religion_and_homosexuality

spoken of the positive power of media in reshaping attitudes to be more supportive and accepting of diversity of sexualities and gender identities as follows:

An important element in securing a change in global attitudes to sexual orientation and gender identity has been the operation and outreach of international media. No longer can the actualities of sexual variation be kept a secret. In today's world, satellites, global media, the internet and social networking have reduced the barriers to awareness and discovery of sexual variations. The inclusion of characters in popular television programmes, both of documentaries and soap operas, has helped to change human perceptions of this issue. The revelation by leading citizens that they are homosexual or bisexual has begun the process, at least in many developed countries, of shattering the reinforcement for the binary (heterosexual) illusion that previously prevailed because of silence and shame.²³

1.7 Epidemiological and demographic contexts

Estimates of HIV prevalence in MSM and transgender populations

Studies confirm that HIV prevalence among MSM is rising in cities in China, India, Indonesia and Thailand.²⁴ Significant increases in newly diagnosed HIV infections have also been reported among MSM in Hong Kong SAR, Taiwan, Singapore and Japan between 2002 and 2007, with the number of new cases either doubling or more than tripling. In all four jurisdictions, MSM contributed the single largest number of new HIV cases.²⁵

The Commission on AIDS in Asia found that MSM can potentially account for between 10 and 30 percent of new HIV infections in Asian countries, making HIV among MSM a significant factor in the overall epidemic.²⁶ Projections of the Asian epidemic indicate that MSM will comprise an increasing proportion of total new HIV infections over the next decade, such that close to half of all new HIV infections occurring annually in Asia as a whole will be among MSM by 2020, unless prevention programmes are scaled-up.²⁷

Sentinel surveillance in 16 cities in India found HIV prevalence in MSM of between 4 percent and 32.8 percent in 2006; and in China, MSM were estimated to account for more than 12 percent of HIV incidence in 2006.²⁸

23 Kirby M. (2010) Deconstructing homophobia.(in) UNDP (2010) *High-level dialogue Report: Punitive laws, human rights and HIV prevention among men who have sex with men in Asia Pacific, Hong Kong, 17 May 2010*. Bangkok: UNDP. p.20.

24 UNAIDS, WHO (2009) *AIDS Epidemic Update 2009*. Geneva: UNAIDS and WHO.p.45; WHO SEARO (2009) *HIV/AIDS in South East Asia Region 2009* WHO SEARO p.28.

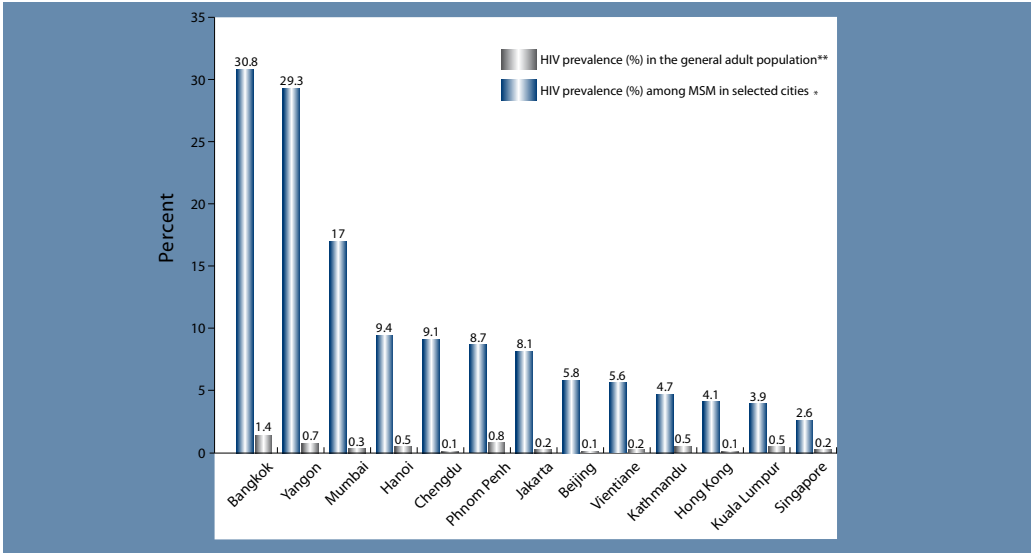
25 WHO (2010) *Priority HIV and sexual health interventions in the health sector for men who have sex with men and transgender people in the Asia Pacific Region*. Manila: WHO WPRO.

26 Commission on AIDS in Asia. (2008) *op cit*.fn.6, p.203.

27 *Ibid* p.57.

28 UNAIDS (2009) *2009 AIDS Epidemic Update*. Geneva: UNAIDS p.45.

HIV prevalence among MSM in Asian cities is consistently higher than HIV prevalence among adults in the general adult population (see Chart).²⁹



** Source: UNAIDS (2008) *Report on the Global AIDS Epidemic*

* Sources: see footnote ²⁹

In Asian cities, HIV prevalence among samples of transgender people is reported to be even higher than among MSM e.g. 14 percent in Bandung, 25 percent in Surabaya, 34 percent in Jakarta, 37 percent in Phnom Penh, 42 percent in Mumbai and 49 percent in Delhi.³⁰ In Pakistan, data from eight cities found HIV prevalence among *hijra* sex workers to be 6.1 percent in 2008, compared to 0.9 percent among male sex workers.³¹ Reasons for high HIV prevalence in transgender populations include lack of prevention services targeted to transgender people, involvement in street-based sex work, lack of power in negotiating condom use and being the receptive partner in sexual intercourse. The vulnerability of Asian transgender sex workers has been described as follows:

Engaging in sex with multiple customers, they are vulnerable to customers who are unwilling to use condoms. Often barred from venues open to other sex workers, they commonly work the streets, doing so without a supply of condoms and lubricant, which

29 For Bangkok, Beijing, Yangon, Hanoi, Chengdu, Phnom Penh, Jakarta, Vientiane see: Van Griensven F. (2009) *HIV Epidemiological Status of Men who have Sex with Men and Transgenders in the Asia Pacific Region* APCOM Pre-Conference: From 200 to 0: Responding Effectively to HIV among MSM and Transgenders in Asia and the Pacific. 8 August 2009, Bali, Indonesia. <http://msmasia.org/200forumdocs.html>; for other cities see: Singh S.M. et al. (2006) Men who have sex with men and transgenders in Mumbai, India: An emerging risk group for STIs and HIV *Indian Journal of Dermatology, Venereology and Leprology*, Vol. 72, No. 6, November-December, 2006, pp. 425-431; Tan S. (2009) 2.6% HIV prevalence rate among MSM in Singapore *fridae.com* <http://www.fridae.com/newsfeatures/2009/06/10/8438>; Kanter J. et al. (2010) *Risk Behavior and HIV Prevalence among MSM in a Predominantly Muslim and Multi-ethnic Society: A Venue-based Study in Kuala Lumpur, Malaysia* Paper 973, 17th Conference on Retroviruses and Opportunistic Infections, <http://www.retroconference.org/2010/Abstracts/38448.htm>; Acharya L. et al. *HIV and STI prevalence among MSM in Kathmandu, Nepal*. AIDS 2006–XVI International AIDS Conference: Abstract no. MOPE055.

30 WHO SEARO (2009) *op cit* fn.24; Commission on AIDS in Asia *op cit* fn.6, p.49.

31 Government of Pakistan (2010), *UNGASS Pakistan Report: Progress report on the Declaration of Commitment on HIV/AIDS*. Islamabad: Ministry of Health p.13.

police often regard as evidence of sex work... Sex work liaisons on the street may be brief (leaving less time for the niceties of a condom) and fewer (leaving the worker in an economically powerless position to insist on condom use)... Drug and alcohol use, quite common among those involved in sex work, exacerbate the problem of unsafe sex.³²

In Pacific island countries, due to cultural reticence to disclose homosexuality, male-to-male sex as a cause of HIV transmission is thought to be under-reported. Even so, male-to-male sex is known to be a factor in a significant number of cases. If Papua New Guinea is excluded, a third of the reported HIV cases in Pacific island countries are through male-to-male sex.³³ A high proportion of HIV diagnoses in MSM in the Pacific have been in French Polynesia and the US territories. In 2009, the Commission on AIDS in the Pacific reported:³⁴

The extent to which HIV is transmitted by sex between men in the Pacific is not known... Since most sex between men in the Pacific is hidden, illegal and denied, it is not addressed appropriately in most national HIV plans... Behavioural surveillance identifies male-to-male sex among youth in Solomon Islands, Vanuatu and Samoa, as well as police and military in Fiji Islands (6.7%), STI clinic patients in Fiji Islands and Samoa (7%), and seafarers in Kiribati in 2002–2003 (5.6%) and 2004–2005 (1%). Surveys in Papua New Guinea also reported male-to-male sex (often for payment) in many male-dominated situations, such as boys' school dormitories, prisons, the military, mining and logging camps and oil rigs.

MSM and risk of HIV transmission to women

About half of all MSM in Asia also have sex with women (i.e. wives, girlfriends, female clients and female sex workers).³⁵ Some of these women acquire HIV from these men, and may pass the virus to their babies. The Commission on AIDS in the Pacific observed:³⁶

Ethnographic studies confirm high rates of male bisexuality though the practice is rarely open and even less often acknowledged... A survey of people defined as MSM in Port Moresby found that more than three-quarters had sex with both men and women and did not identify as being homosexual.

Where punitive laws are absent and social acceptance of male-to-male sexual relationships is greater, men may feel less societal pressure to marry. This may reduce opportunities for transmission of HIV from MSM to wives.³⁷

Estimates of the size of populations of MSM and transgender people

Estimates of the size of MSM and transgender populations are essential to inform planning of HIV responses, including the amount of resources and the scale of services required. Estimations can inform an assessment of the proportion of MSM and transgender people reached by health service programmes and programmes addressing human rights and legal issues. High levels of stigma mean that in the past there has been significant under-

32 Winter S., King M. *op cit* fn.14, p.13.

33 Commission on AIDS in the Pacific. (2009) *op cit* fn.6, p.25.

34 *Ibid* p.39.

35 Jenkins C. (2006) *op cit* fn.22, p.4.

36 Commission on AIDS in the Pacific (2009) *op cit*, fn.6, p.39.

37 Jenkins C. (2006) *op cit*. fn.22, p.11.

estimation of the size of MSM and transgender populations, which can result in poor targeting of programmes and low coverage of services.³⁸

Estimates of the percentage of men who have ever had sex with another man ranges from 3 to 19 percent in East Asia, 6 to 34 percent in South Asia and 7 to 12 percent in South East Asia. Estimates of the percentage of men who had sex with another man in the last year are 7 to 8 percent for South Asia and 4 percent for South East Asia. Recent estimates of MSM (based on numbers of men who had sex with another man in the last year) include approximately 3.8 million in Bangladesh, 30.5 million in India, 3.8 million in Pakistan, 615,000 in Nepal and 502,000 in Sri Lanka.³⁹ Other MSM estimates include 560,000 in Thailand, 70,000 in Ho Chi Minh City, 1.6 million in Indonesia, 240,000 in Myanmar and 10 million in China.⁴⁰

Transgender people often have culturally-specific identities and form distinct communities in Asia and Pacific island countries (see Annex I). Estimates of male-to-female transgender people include 26,000 *waria* in Indonesia; 200,000 to 300,000 *kathoey* in Thailand; between 50,000 and 100,000 *mak nyahs* in Malaysia; a million or more *hijras* in India; and 12,000 *hijras* in Bangladesh.⁴¹

1.8 The relationship between enabling legal environments and reduction of HIV

Legal environments need to be understood as comprising not only written laws, but also law enforcement practices of police, public security and military personnel, legal institutions (including the judiciary and the formal, religious and informal customary courts), and systems for delivery of legal aid. Legal environments set the overall context for HIV responses of government and civil society and influence the social climate in which prevention, treatment, care and support programmes operate. Legal environments that are coercive and punitive can contribute significantly to stigma. Legal environments that are protective and empowering can help combat stigma and underpin health promotion efforts that rely on the voluntary cooperation of populations in changing behaviors and accessing prevention, testing, treatment and care services. In countries where the HIV epidemic disproportionately affects people whose behaviors are criminalized, it is particularly important to assess the role of policing in influencing the vulnerability and risk-taking behaviors of marginalized populations.

An ecological model has been proposed by Burris and colleagues to inform analysis of the effects of laws on the HIV-risk environments of sex workers and injecting drug users:⁴²

38 *Ibid.*

39 APCOM (2010) *It all starts here: Estimating the size of populations of men who have sex with men and transgender people*. http://www.nfi.net/downloads/APCOM/APCOM_Policy_Brief_3_Pop_Est_2010.pdf

40 Jenkins C. (2006) op cit fn. 22; WHO SEARO (2009) op cit. fn.24 p.123.

41 Jenkins C. (2006) op cit fn. 22, p.4; Winter S. (2009) Lost in transition: transpeople, transprejudice and pathology in Asia *International Journal of Human Rights* 13(2-3) 365-390, p.369.

42 Burris S., Xia G. (2009) The "Risk Environment" for Commercial Sex Work in China: Considering the Role of Law and Law Enforcement Practices, in: Poston et al eds. *Gender Policy and HIV in China* Springer; Burris, S., Blankenship, K., Donoghoe, M. et al. (2004). Addressing the "Risk Environment" for Injection Drug Users: The Mysterious Case of the Missing Cop. *Milbank Quarterly* 82:125-56.

Law may be seen as an ecological cause of risk and a medium of structural intervention to reduce risk. As a causal factor, law contributes to the construction of ecological determinants, and also operates as a mechanism through which ecological characteristics operate to produce health outcomes. ... (T)he daily interactions of law enforcement agents and injection drug users in particular places are a mechanism through which ecological conditions are transformed into risks and outcomes. Law is also a prime potential mode of structural intervention. It sets broad and effective rules of behavior. Both new and well-established public health interventions rely on law as a means of structuring an environment in healthy ways. For example, a law requiring customers in brothels to use condoms changes the context in which sex workers and clients negotiate safe sex.

This ecological model is helpful to inform an analysis of the role of legal environments in influencing HIV responses for MSM and transgender people. This model requires us to analyze the components of the legal environment to include not only legislation, regulations and court decisions, but also the institutions and practices through which laws are implemented and the understanding of laws and the legal system by populations. Consideration also needs to be given to the management of law enforcement agencies, implemented through training, guidelines and operating procedures, and the practices, knowledge, attitudes and beliefs of police and other officials involved in law enforcement. Knowledge, attitudes and beliefs of populations who are subject to law enforcement are also relevant.

There has been some research on reduction of sexually transmitted infections (STIs) and HIV among sex workers and injecting drug users as a result of decriminalization and other reforms that provided more enabling legal environments for health promotion.⁴³ However, there is very little published research regarding the impact of repeal of punitive laws and introduction of protective laws on reducing the incidence of HIV and STIs among MSM and transgender people. Investment in social research on this topic in countries of the Asia Pacific region is required to increase our understanding of the public health benefits of decriminalization and the establishment of protective legal environments.

Outside of the Asia Pacific region, studies have explored the association between legal environments affecting MSM and the effectiveness of HIV responses. Lower HIV testing rates among MSM who experienced blackmail in criminalized environments have been found in African contexts.⁴⁴ A study of European countries examined the effect of legalizing same-sex partnerships on the incidence of STIs.⁴⁵ That study found that same-sex partnership laws in Europe were associated with lower incidence of syphilis, but found no significant association with incidence of gonorrhea or HIV.

43 *Ibid*; Hammett T., Bartlett N., Chen Y., et al. (2005) Law enforcement influences on HIV prevention for injection drug users: observations from a cross-border project in China and Vietnam. *Int J Drug Policy* 16:235-245; Des Jarlais D., Kling R., Hammett T., et al. (2007) Reducing HIV infection among new injecting drug users in the China-Vietnam Cross Border Project. *AIDS* 21 Suppl 8:S109-14; Harcourt C., Egger S., Donovan B. (2005) Sex work and the law *Sexual Health* 2(3):121-8; Harcourt C., O'Connor J., Egger S., Chen M., W and H, Fairley C. et al. (2010) The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers. *Aust NZ J Public Health*, in press; Donovan B., Harcourt C., Egger S. (2010) Improving the health of sex workers in NSW: maintaining success *NSW Public Health Bulletin* 21(3-4):74-77; and see generally: Gable L., Gostin L., Hodge J., (2009) A global assessment of the role of law in the HIV/AIDS pandemic *Public Health* 123 pp. 260-261.

44 Baral S. et al. (2009) *op cit.* fn.3.

45 Dee T. (2008) "Forsaking All Others? The effects of same-sex partnership laws on risky sex," *Economic Journal* 118, 1055-1078.

Another study examined the effects of society-wide tolerance for gay men on the incidence of HIV in the USA.⁴⁶ This study drew from survey data and legislative practices (whether there had been legislation banning same-sex marriage or civil unions) over a period of twenty years. The study found evidence consistent with the theory that social tolerance for homosexuality enables sexually active MSM to avoid underground, anonymous, risky sexual behaviors that contribute to HIV transmission. The study argues that social acceptance of gay men lowers stigma, harassment and other social costs associated with homosexuality, and induces some men who have had exclusively female partners or no partners to start having male partners. These men are unlikely to have HIV and, as these men enter the pool of partners, the overall rate of HIV transmission among MSM is likely to decrease.

The findings and recommendations of this report, as set out below, draw on the consistent reports of experiences of CBOs and technical experts that HIV services are more effective in reaching and responding to the needs of MSM and transgender people when police harassment does not occur, when punitive laws are repealed or not actively enforced, and when protective and enabling laws and law enforcement practices are introduced.

Coverage of HIV services is low in countries where anti-discrimination laws are absent

Data on the coverage of HIV services reported by countries of the Asia Pacific region confirm that only between 9 percent and 20 percent of MSM are reached by HIV prevention services. Countries are falling short of their universal access targets.

In Thailand, below 20 percent of MSM had access to a minimal package of HIV services in 2009. Similarly, in Bangladesh, Maldives and Sri Lanka, less than 20 percent of MSM were covered by prevention services in 2009. In Indonesia, only 9 percent of MSM had been reached by HIV prevention services by the end of 2009. In Papua New Guinea, only 10 percent of MSM were reached by prevention programmes by 2006 and in the Philippines only 18.5 percent had been reached by prevention programmes by 2007. None of these countries with low coverage of HIV services for MSM have laws protecting MSM or transgender people from discrimination. Lack of protective legislation for MSM and transgender people contributes to low levels of access to HIV services.

Countries where anti-discrimination laws exist show greater coverage of prevention services. In a global review, the percentage of MSM reached with prevention services was found to be almost 60 percent in countries with legal protections from discrimination for MSM.

Sources: UNAIDS (2008) Report on the global AIDS epidemic Geneva: UNAIDS p.84; WHO SEARO (2009) HIV/AIDS in the South East Asia Region 2009 p.45; National AIDS Commission Republic of Indonesia (2010) UNGASS Country Report 2008-2009 p.ix; Adam P., De Wit J., John B. et al (2009) Estimating Levels of HIV Testing, HIV Prevention Coverage, HIV Knowledge, and Condom Use Among Men Who Have Sex With Men (MSM) in Low-Income and Middle-Income Countries. JAIDS (52) S143-S151.

46 Francis A., Mialon H. (2009) Tolerance and HIV Emory University School of Law, Law and Economics Research Paper Series 08-37.

2 South Asia

2.1 Overview

The study considered laws of the following South Asian countries: Afghanistan, Bhutan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka. Three of these countries include *Sharia* law in their legal systems (Afghanistan, Maldives and parts of Pakistan), which specifically criminalizes male-to-male sex. Six of these countries have legal systems influenced by common law traditions of England (Bhutan, Bangladesh, India, Nepal, Pakistan, Sri Lanka). Typically, criminal offences for sodomy introduced in the British colonial era are facially neutral, such as the offence of 'carnal intercourse against the order of nature'. In theory, these offences are equally applicable to heterosexual as well as homosexual anal intercourse. However, prosecutions for these offences have been almost exclusively of homosexual men. Judicial interpretation has increased the scope of the offence of 'unnatural act' to cover many forms of sexual expression between males. Offences have been used by police to target MSM and transgender people for extortion and harassment.

Adding to this environment of criminalization is the absence of laws and protocols to protect MSM and transgender people from discrimination and unethical medical treatment, which has allowed for their abusive and inappropriate treatment in the context of mental health.⁴⁷

There have been important recent advances in improving the legal environment in South Asia, particularly as a result of the following court judgments:

- decriminalization of male-to-male sex in National Capital Territory of India as a result of the High Court of Delhi judgment in *Naz Foundation (India) Trust v. Government of NCT Delhi* (2009) (*Naz Foundation Case*);⁴⁸
- judgment of the Supreme Court of Pakistan recognizing transgender rights (2009);
- judgment of Supreme Court of Nepal decriminalizing male-to-male sex, providing legal recognition to 'third sex' individuals and granting legal equality to people regardless of sexual orientation or gender identity: *Sunil Babu Pant and others v Nepal Government and others* (2007).⁴⁹

Nepal is currently drafting a new Constitution and there are proposals for including specific provisions relating to equality and non-discrimination on the grounds of sexual orientation and gender identity. Nepal's current *National HIV/AIDS Plan 2006-2011* is unique in the region

47 Narrain A., Chandran V. *It's not my job to tell you it's okay to be gay: Medicalisation of homosexuality: a queer critique*, Alternative Law Forum, available at <http://www.altlawforum.org/gender-and-sexuality/publications/medicalizationfinal.rtf/view>; and see Annex III.

48 *Naz Foundation (India) Trust v. Government of NCT* (2009) 160 DLT 277; W.P. (C) No. 7455/2001 of 2009 (Delhi HC).

49 *Sunil Babu Pant and others v. Nepal Government and others* [2008] 2 NJA L.J. 261-286 http://www.njanepal.org.np/Anex_2.pdf.

in that it sets a specific target relating to law reform viz. to ensure the human rights of affected populations (including MSM) through an effective legislative framework by 2011.

2.2 Laws affecting HIV responses among MSM and transgender people

2.2.1 Criminal laws and police practices

Country	Legality of male-to-male sex	Applicable laws
Afghanistan	Illegal	<i>Penal Code 1976</i> Article 427. Pederasty. Penalty: long imprisonment. <i>Sharia</i> law also applies, with a maximum of death penalty for homosexual acts and criminal sanctions for cross-dressing.
Bangladesh	Illegal	<i>Penal Code 1860</i> Section 377. Carnal intercourse against the order of nature Penalty; imprisonment which may extend to life.
Bhutan	Illegal	<i>Penal Code 2004</i> Section 213. Sodomy or any other sexual conduct that is against the order of nature. Penalty: prison sentence up to 1 year.
India	Legal in Delhi	Legal in the National Capital of Delhi, as a result of <i>Naz Foundation Case 2009</i> . Application of this judgment to other jurisdictions of India is yet to be determined. Supreme Court proceedings are pending.
Maldives	Illegal	<i>Sharia</i> law regarding sexual conduct is recognised by the <i>Penal Code (Section 88) and Rules Relating to the Conduct of Judicial Proceedings (100 and 173)</i> . <i>Sharia</i> law punishment for male-to-male sex is banishment for one to three years, imprisonment or a whipping of 10 to 39 strokes.
Nepal	Legal	Legal, as a result of a 2007 Supreme Court ruling.
Pakistan	Illegal	<i>Penal Code 1860</i> Section 377. Carnal intercourse against the order of nature Maximum Penalty: imprisonment for life. In parts of Pakistan, male-to-male sex is also prohibited under <i>Sharia</i> law, with penalties of up to 100 lashes or stoning to death.
Sri Lanka	Illegal	<i>Penal Code</i> Article 365. Carnal intercourse against the order of nature. Penalty: imprisonment for a term which may extend to ten years. Article 365A Gross indecency. Penalty: imprisonment for a term which may extend to two years and/or a fine.

Table 1: Legality of male-to-male sex in South Asia

Of the eight South Asian countries, only Nepal has decriminalized male-to-male sex between consenting adults. Although the Delhi High Court effectively decriminalized male-to-male sex in the National Capital Territory of India in 2009, the situation in India as a whole remains uncertain pending the outcome of appeals against the decision.

Across the South Asia sub-region, the offences listed in Table 1 and a range of other more minor offences have been used to target MSM and transgender people for harassment, extortion, detention and assault. In many cases men have reported being detained for

the purpose of extorting payments, but not prosecuted. These offences include vagrancy, begging and public nuisance offences, indecent behavior in public, breach of the peace, obscenity, soliciting, abetment and conspiracy.

Evidence has been gathered through social research that demonstrates the detrimental impacts of police practices on MSM and transgender people, and to services seeking to address their needs, in a range of locations across South Asia. Reported cases of police abuse of MSM and transgender people have included incidents of sexual assault and rape, extortion, blackmail, beatings, imprisonment (including on false charges), and harassment in public cruising areas. HIV prevention workers report that police harassment results in reluctance of MSM to carry condoms for fear of being arrested for sex work. Many men resort to having sex in public places, due to lack of private spaces. These men risk having rushed and unsafe sex as a result of fear of being caught by the police. Over the last decade, incidents reported from India, Nepal and Bangladesh have included incidents of police harassment, assaults and detention of HIV prevention workers and censorship of prevention materials.⁵⁰

Poverty and lack of alternative livelihoods leads many men and transgender people to work as sex workers. *Hijras*⁵¹ traditionally earned their living by singing and dancing. However, many now supplement their earnings by begging or selling sex.⁵² A variety of factors contribute to male and *hijra* sex workers lack of access to HIV prevention services, including stigma and lack of targeted health promotion for male and *hijra* sex workers. Although sex work that occurs in private is not illegal in most South Asian countries, the organized industry is illegal (e.g. keeping a brothel), which means that sex work is often hidden, based in informal settings and difficult to reach by prevention services. Street-based sex workers are targeted by police with charges for public nuisance, and possession of condoms has been used as evidence of soliciting. On the other hand, an informant in Sri Lanka stated that MSM working as sex workers may be treated leniently if carrying a condom:

keeping a condom is an advantage. Sometimes when the sex worker gets caught by police with a condom, the police advise and release the sex worker.

Afghanistan

The offence of 'pederasty' refers to intercourse between older and younger males, including when the younger male is 18 years or over. Article 427 of the *Penal Code 1976* states that an individual who engages in sodomy may be punished by "a lengthened imprisonment in accordance with the circumstance". Sexual relations with persons under the age of 18 is regarded as an aggravated form of the offence, falling under subsection 2(a) of article 427. Data on prosecutions and police conduct was not available.

50 See Chatterjee P. (2006) AIDS in India: police powers and public health *The Lancet*, Volume 367, Issue 9513, at 805-806; Chakrapani V., Newman P., Shunmugam M. et al (2007) Structural violence against Kothi-identified men who have sex with men in Chennai, India: A qualitative investigation. *AIDS Educ Prev* 19(4): 346-364; Safren S., Martin C., Menon S., et al. (2006), *A survey of MSM HIV prevention outreach workers in Chennai, India*. *AIDS Educ Prev* 18: p. 323-332; International Gay and Lesbian Human Rights Commission (2003) *Nepal: Renewed Police Brutality Against Transvestites, HIV/AIDS Outreach Workers* 24 July 2003 <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/584.html>.

51 A culturally-specific transgender sub-population found in Pakistan, India and Bangladesh, many of whom identify as being neither male nor female, but as *hijra*.

52 See e.g. Nag M. (2005) Sexual behaviour in India with risk of HIV/AIDS transmission. *Health Transition Review* 5, Supplement, 293-305 p.300.

Sharia law is also accepted within the Afghan legal framework and is applied in informal tribal courts. There have been no reports of the death penalty being carried out for sodomy since the Taliban era. Individual judges retain broad discretion. It is reported that sentences for sodomy imposed as a result of prosecutions under the Penal Code and under *Sharia* law vary widely.⁵³

Among the Pashtun, there is a common practice of sexual conduct between teenage boys and older men, who reward their younger partners with money and gifts. This is not considered a reflection of homosexual identity, but of the limited options among males to have sex with females.⁵⁴

Bangladesh

The sodomy offence of the *Bangladesh Penal Code* is rarely enforced against MSM, but there have been incidents of harassment by vigilante groups. Local *fatwas* have been issued against MSM, which influence application of *Sharia* law by informal courts.⁵⁵ Arrests of MSM have also occurred under public order offences of the *Code of Criminal Procedure*. Arrests are rarely followed by prosecutions. According to the NGO Bandhu Welfare Society, police frequently stop, harass and arrest MSM under suspicious behavior laws. Such laws have effectively prevented Bandhu Welfare Society's staff from handing out condoms in public places.⁵⁶

A study of Bangladeshi *hijras* describes the vulnerability of sex workers to law enforcement abuses:

The *hijra* sex workers were exploited by clients, mugged, and beaten by hooligans but never received any police support. They hardly reported any incidents to police because of fear of further harassments. The law enforcing agents either raped a *hijra* sex worker and/or burglarized earnings from sex trade.... *hijra* are not safe in sex trade. They are forced to have unprotected sex with clients, local influential persons, and police free of charge.⁵⁷

A 2003 Human Rights Watch report found that the police actively interfered with outreach work among MSM, including confiscation of condoms.⁵⁸

Social research findings are available from the following three studies conducted in Bangladesh.

(i) Bandhu Social Welfare Society (2000)⁵⁹

124 respondents participated in a study from the cities of Chittagong, Dhaka, Mymensingh and Syhlet. 64 percent of respondents reported harassment by police. Gang rape by police

53 Pudasaini S. (2009) A fillip to queer rights: reading down Section 377 *Himal South Asian* http://www.himalmag.com/A-fillip-to-queer-rights-Reading-down-Section-377_dnw177.html.

54 Jenkins C. (2006) *op cit* fn.22, p.5.

55 Diwas K. (2008). The state of homosexuality *Himal Magazine*. March 2008

56 Hussain D. (2009). Between invisible friends *Himal South Asian*. December 2009.

57 Khan, S, Hussain M, Parveen S., et al (2009) Living on the Extreme Margin: Social Exclusion of the Transgender Population (*Hijra*) in Bangladesh *Journal of Health Population and Nutrition* 27(4): pp. 441-451 at 446.

58 Human Rights Watch (2003). *Bangladesh : ravaging the vulnerable: abuses against persons at high risk of HIV infection in Bangladesh*. New York: Human Rights Watch.

59 Bondyopadhyay, A. (2000) *The Impact of legal, sociocultural, legislative and socio-economic impediments to effective HIV/AIDS interventions with MSM*, Lucknow: NFI and Bandhu Social Welfare Society.

officers was reported where *kothis*⁶⁰ were taken to police barracks or the police post and sexually assaulted. 29 respondents reported that they have been sexually assaulted by policemen. 55 respondents reported that they have been sexually assaulted by *mastaans* (thugs). Other abusive police conduct targeting *kothis* that was reported included: extortion on the threat of imprisonment; blackmail; beatings; restriction of movement in public places; and disclosure of sexual practices to *mastaans* and family.

87 percent of the respondents stated that they had been subjected to sexual assault simply because they were effeminate.

71 percent of respondents stated that they had faced harassment from *mastaans*. This included extortion (38 percent), beatings (45 percent), threats and blackmail (31 percent). Focus group discussions and interviews revealed that *mastaans* collaborated with police, such that *kothis* were denied protection from the police if they report harassment or assaults by the *mastaans*.

(ii) Human Rights Watch (2003)⁶¹

Human Rights Watch found that the police actively interfered with outreach work among MSM, including confiscation of condoms. A peer educator described his experience:

[The police] hit me with a cane, with their gun, they kicked me and slapped me and pulled my hair and pulled on my collar and the waistline of my pants...I said I was working for HIV/AIDS prevention. They asked to see my ID card but I had forgotten it that day. They took me to jail. After I promised that I would never go to cruising spots again, they let me go.

The peer educator concluded that this kind of police violence “creates a big problem for condom distribution. The police think we promote sex work.” A manager of a drop-in center told Human Rights Watch that he went to a cruising spot to supervise his peer educators.

...three police caught me. I explained my duty, that I work for an HIV/AIDS prevention program, and that this is permitted by the government. But they said I have to go to the *thana* [police station]. I showed my ID card but he threw away my card...I was arrested at six p.m. and finally they let me go at midnight.

(iii) NFI (Naz Foundation International) (2003–2005)

A study was conducted in Dhaka and five Indian cities. The findings were grouped with findings from India (described below).⁶²

India

In 2009, the Delhi High Court judgment in the *Naz Foundation Case*⁶³ decriminalized sex between consenting adult males in private in India's National Capital Territory. The case was brought by the Naz Foundation (India) Trust, an Indian NGO, which claimed that Section 377 of the *Indian Penal Code* obstructed effective HIV prevention.

60 *Kothi* is a term used in India and Bangladesh to refer to men who are not transgendered but assume feminine traits.

61 Human Rights Watch (2003) *op cit.* fn.58.

62 See summary of findings re. India and Bangladesh from: Khan S., Bondyopadhyay A. (2005), *infra*.fn 68.

63 *Op cit* fn.48.

The application of the Delhi judgment to other jurisdictions in India is unclear. The Supreme Court has admitted several Special Leave Petitions filed by religious groups that lodged appeals against the Delhi High Court judgment. The government has not lodged an appeal. When the Supreme Court considers the appeals, its judgment will have national application.

In the Delhi High Court hearing, India's National AIDS Control Organization (NACO) gave evidence that Section 377 *Indian Penal Code* impedes HIV prevention efforts. NACO stated to the Court that people were reluctant to reveal same-sex behavior due to the fear of law enforcement agencies, making it difficult for public health workers to access them. NACO submitted that enforcement of Section 377:

renders risky sexual practices to go unnoticed and unaddressed inasmuch as the fear of harassment by law enforcement agencies leads to sex being hurried, particularly because these groups lack 'safe place', utilise public places (for sex)... and do not have the option to consider or negotiate safer sex practices.

In its decision, the Court read down Section 377, so that it does not criminalize sex between consenting adult males in private. According to the Court:

the criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.

In assessing whether application of Section 377 to criminalize consensual sex between adults is consistent with the Indian Constitution, the judges referred to international law. Regard was had to Article 12 of the *Universal Declaration of Human Rights* which states, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honor and reputation", and Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, which requires states "to fulfill everyone's right to the highest attainable standard of health."

The judgment in the *Naz Foundation Case* accepted the argument that criminalization is harmful to HIV responses. The Court concluded that to stigmatize or to criminalize people on account of their sexual orientation is against constitutional morality and principles of inclusiveness in the Indian Constitution. In finding that criminalization of male-to-male sex between adults is in breach of the Article 21 of the Indian Constitution, which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law, the Court stated:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood, which is implicit in notion of life under Article 21 of the Constitution.

In addition, the Court held that criminalization of male-to-male sex under Section 377 violated Article 14 (equality before the law) and Article 15 (prohibiting discrimination on the grounds of sex).

The *Naz Foundation Case* provides an example of strategic litigation by an HIV organization, accompanied by a broader campaign to mobilize the community regarding the human rights and public health arguments of the case for decriminalization. An alliance of civil society organizations came together in support of the case, under the banner of Voices Against 377. The internet was used to coordinate advocacy and campaigning. The Lawyers Collective, which represented the Naz Foundation (India) Trust, was also active in efforts outside the formal legal process to raise awareness. It was essential to develop coherent policy arguments to convince stakeholders that decriminalization was necessary. The Lawyers Collective organized seminars throughout India and discussed the issues with a wide range of community stakeholders. It was important to communicate the key messages to the broader community, including community leaders and the health and welfare sector. Much work was done by a range of NGOs that were supportive of the case to sensitize the media to the public health and human rights policy arguments.⁶⁴

Although decriminalization of homosexuality in Delhi in 2009 was an important step forward for HIV prevention and the human rights of MSM, there is a risk of punitive police practices continuing in India if measures are not taken to change community attitudes, educate police and implement policies that require supportive and ethical policing. Police conduct in enforcing sex work offences remains a major issue. In India, the *Immoral Traffic (Prevention) Act 1986* criminalizes soliciting, running a brothel, living on the earnings of sex work, procuring a person for sex work and sex work in the vicinity of a public place. Male and transgender sex workers in India (many of whom are originally from Nepal) have reportedly been targeted for harassment by police and prosecution under the *Immoral Traffic (Prevention) Act 1986* and state summary offences legislation.

64 Berry S. (2009) *What can MARPs advocates in HIV learn from India's success* APMG <http://hivinasia.blogspot.com/2009/11/what-marps-advocates-can-learn-from.html>

The Naz Foundation (India) Case, decriminalization and the Constitution of India

Statement by Hon. Ajit Prakash Shah, former Chief-Justice, High Court of Delhi, High Level Dialogue: Punitive laws, human rights and HIV prevention among men who have sex with men in Asia Pacific, Hong Kong, 17 May 2010.

The instantaneous social impact of the judgment was to actually begin a national conversation. LGBT persons were out of the closet and literally onto the front pages of all Indian papers and news channels. Some religious bodies and individuals have challenged the verdict in the Supreme Court...(but) even amongst religious groups progressive voices were heard, like Swami Angnivesh, a Hindu rationalist responding to the verdict said, "We should treat the constitution as our Dharam Shastra today". Asghar Ali Engineer, Islamic Scholar and rights activist, welcomed the verdict since upholding the basic human rights was central to the judgment. Citing verses from the Koran, Dr. Engineer said it was deemed punishable only when it was practised by an entire community and not in individual cases. K.C. Abraham from the Church of South India said that the final goal of all religions was to move towards an inclusive society and not isolate anyone.

What is certain is that Section 377 is wielded as a threat against sexual minorities by the police and others in positions of authority as well as thugs and goons to harass, blackmail, threaten and assault vulnerable men...its very existence moulds beliefs and attitudes, and drives the demeaning and abusive treatment meted out to people of alternative sexualities and those who work with them...

If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of 'inclusiveness'. The Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination.

India: incident reports and social research data

(i) Lucknow incident (2001)⁶⁵

The police raided a park that was frequented by *hijras* and *kothis* and arrested ten people. Among those arrested was an activist from the NGO Bharosa Trust. The police then raided the offices of Naz Foundation International (NFI) and Bharosa Trust, seized safer sex material and registered a complaint under Section 377 (unnatural sexual offences), and conspiracy to commit an offence relating to obscene material. Outreach workers and staff of NFI and

⁶⁵ Human Rights Watch (2002) *Epidemic of abuse: police harassment of HIV/AIDS outreach workers in India*, Human Rights Watch Report 14(5)c. New York: Human Rights Watch, p.19.

Bharosa Trust were arrested and HIV prevention materials and condoms were confiscated. HIV prevention activities of these NGOs were suspended for more than five months as a result. While detained, staff members were beaten, denied food and refused medical treatment. The Senior Superintendent of Police of Lucknow claimed: "The two organizations, Naz and Bharosa, were running gay clubs in contrast to the Indian culture and ethics under the garb of educating the masses about AIDS." The Magistrate denied bail on the grounds that the HIV prevention workers "are polluting the entire society by encouraging the young persons and abetting them for committing the offence of sodomy."⁶⁶ The accused were released on bail as a result of a High Court appeal after being in detention for 47 days.

(iii) Bangalore (2003)⁶⁷

A study of *hijra* sex workers commissioned by People's Union for Civil Liberties-Karnataka documents cases of violence, police entrapment and extortion:

Sexual violence is a constant, pervasive theme... Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the *hijra* also becomes a target of prurient curiosity, at the very least and brutal violence as its most extreme manifestation. As the narratives indicate, the police constantly degrade *hijras* by asking them sexual questions, feeling up their breasts, stripping them, and in some cases raping them... such actions constitute a violation of the integrity and privacy of the very sexual being of the person. The police attitude seems to be that since *kothis* and *hijras* engage in sex work, they are not entitled to any rights.

(ii) Study of Chennai, Hyderabad, Kolkata, Lucknow and Pune in India, and Dhaka (Bangladesh)⁶⁸

Of 240 MSM surveyed in the period 2003-2005:

- 42 percent reported that they had been sexually assaulted or raped by policemen.
- 60 percent reported sexual assault or rape by *goondas* (thugs).
- 70 percent reported facing harassment from police, ranging from extortion, blackmail, beatings, restrictions to movement, and disclosure of sexual practices to *goondas* and family.
- 50 percent of respondents stated that fellow students or teachers harassed them in school or college.
- 82 percent of respondents stated that if they were not *kothis*, they would have better job opportunities.

(iii) Lucknow incident (2006)

In 2006, Lucknow police arrested four men for allegedly running an on-line gay club. Police traced the phone number of one of the accused on the website, and met him under-cover.

⁶⁶ Alternative Law Forum (n.d.), *Articulation of Queer Rights* <http://www.altlawforum.org/gender-and-sexuality/publications/articulation-of-queer-rights>.

⁶⁷ PUCL-K (2003) *Human Rights Violations against the Transgender Community: A study of kothi and hijra sex workers in Bangalore, India* Peoples' Union for Civil Liberties, Karnataka (PUCL-K).

⁶⁸ Khan S. and Bondyopadhyay A. (2005). *From the frontline: A report of a study into the impact of social, legal and judicial impediments to sexual health promotion, care and support for males who have sex with males in Bangladesh and India*. Lucknow: Naz Foundation International.

The police then forced him to call several of his friends, who were arrested because of their perceived sexual orientation.⁶⁹ This led to *kothis* avoiding public meeting sites for fear of drawing police attention. After the arrests, for a period of time the NGO Bharosa Trust stopped holding peer education HIV prevention workshops.

(iv) Chennai study (2005–2006)⁷⁰

A study of the vulnerability of *kothis* in Chennai was conducted in 2005-2006. Findings of the Chennai study included:

Participants reported being verbally harassed by police. Police regularly monitor public spaces where *kothis* meet. *Kothis* are of lower socio-economic status and can be recognized by their feminine mannerisms. *Kothis* reported being physically accosted and beaten by police for no specific reasons. In addition to physical abuse, participants reported being sexually assaulted by police...The police ask for money or for periodic payments under threat of informing family members that the participant is engaging in public sex or sex work...

Some MSM who are frequent visitors of a particular cruising area have to regularly pay the beat policemen so the men can remain at the site. *Kothis* who engage in part-time sex work may be particular targets, because they are seen as able to afford to pay. In addition to abuses of police powers, participants described the police failure to protect *kothis*. *Kothis* who reported physical or sexual abuse stated that often they don't report the incidents to police because they have lost faith in them and cannot rely on police protection.

The Chennai study reports that police harassed and obstructed HIV outreach workers. A respondent explained:

The outreach workers face problems from policemen if they have condoms with them. Outreach workers are even afraid to carry educational materials that show pictures of STDs. Some policemen don't even look at the identity cards shown by the outreach workers. They will say, "I know who you are . . . don't fool me by showing this [identity card]."

(v) Chennai study (2006)⁷¹

Of 62 MSM outreach workers surveyed, 85 percent reported having experienced varying levels of harassment from police, and 86 percent reported varying levels of harassment from others.

69 Report on the arrest of 4 men in Lucknow. *Yawning Bread*. January 2006. Available at: http://www.yawningbread.org/apdx_2006/imp-249.htm

70 Chakrapani V., et al (2007). *op cit*.fn.50.

71 Safren S., et al.(2006) *op cit*.fn.50.

(vi) Survey of Ahmedabad, Goa, Cochin, Tiruchirapally, Pondicherry and Vishakhapatnam (2007)⁷²

48 percent of 301 *kothis* surveyed in six Indian cities reported that they had been harassed by police because they have had sex with other males. The primary motivation of the police was reportedly to extort money. Some police were reported as demanding sexual gratitude in lieu of money. There were reported instances where MSM were picked up from public areas and allege being gang-raped in police barracks. One third of respondents reported harassment at school or other educational institutions. 40 respondents stated that if they had not faced any harassment, they would have been better educated and would have better employment prospects. Many stated that they were sex workers because of failure to complete education.

(vii) Bangalore (2008)

Sangama, an LGBT organization in Bangalore, reported arrest of activists:

Police brutally attacked five sexual minority activists and arrested them on false charges when they tried enquiring about the illegal detention of five *hijras*... Police illegally detained and assaulted a large number of human rights defenders when they held a peaceful protest against the illegal police actions. Police also arrested 31 human rights defenders on false charges.⁷³

(viii) IAVI Study: Maharashtra, Andhra Pradesh and Tamil Nadu (2008)⁷⁴

A study in Maharashtra, Andhra Pradesh and Tamil Nadu commissioned by International AIDS Vaccine Initiative (IAVI) India was conducted in Mumbai, Chennai and Hyderabad. Over 140 MSM and transgender people were interviewed and 580 MSM and 229 transgender people participated in the survey. Sex work was reported as the only, or an additional source of income, by 50 percent of MSM and 80 percent of transgender respondents in the survey. One fifth of the respondents said they experienced forced sex in the three months preceding the survey. Perpetrators of this violence included police, *goons* (thugs), clients and sometimes partners. Discrimination experienced by transgender people from health care providers dissuaded many of them from using health services. As a result of discrimination, many turned to unqualified medical providers.

Maldives

Seven men were arrested for engaging in homosexual activity in 2009.⁷⁵ The *Penal Code* of Maldives is being revised in 2010, based on *Sharia* principles. There are proposals to end the practice of whipping as punishment for sexual offences under the new Code.⁷⁶

72 Bondyopahyay A. (2007) *A qualitative study into the degree of violence, abuse, discrimination and violation of civil and fundamental rights as faced by males who have sex with males in six cities of India*. Lucknow: Naz Foundation International.

73 *India: Bengaluru Police Brutally Assaulted Sexual Minorities*, International Gay and Lesbian Human Rights Commission 11 July 2008 available at: <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/587.html>

74 IAVI India (2008). MSM and transgender communities: Understanding vulnerability and risk to HIV, *IAVI India Newsletter SANKALP*, Vol 7(4) December 2008.

75 Seven men arrested for engaging in homosexual activity *Haveeru online* 8 December 2009. http://www.haveeru.com.mv/english/details/28681/Seven_men_arrested_for_engaging_in_homosexual_activity

76 Buncombe A. (2009) 150 women face adultery flogging on Maldives *The Independent* 22 July 2009.

Nepal

The Supreme Court decriminalized homosexuality in its judgment in the *Sunil Babu Pant Case* (2007).⁷⁷ This case considered a range of issues in relation to equality of sexual minorities (see below). The Supreme Court clarified that the existing Article 16 of the *Criminal Code* did not apply to male-to-male sex or sex involving transgender people. Article 16 provides for an offence of rape of animals and sodomy in the following terms: "No person should have sexual intercourse with four-legged animals or perform, or cause to be performed, any other unnatural sexual act." The Court based its finding on privacy rights:

The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural.⁷⁸

There is a history of police abuses directed at MSM and transgender people. However, the legal and political environment has improved since 2007 as a result of the Supreme Court decision and hostility towards MSM and transgender people has decreased. Prior to 2007, the NGO Blue Diamond Society states there were numerous reports of MSM and transgender people being harassed by police, arbitrarily arrested using Nepal's public nuisance laws, held without a hearing and beaten and tortured by prison guards.⁷⁹

In 2004, a policeman forced a *meti* to perform oral sex on him and then slit her throat. At a protest a few days later, police arrested 39 people. Police conduct was denounced by Human Rights Watch.⁸⁰

In 2006, police arrested 26 transgender people in a raid. According to Blue Diamond Society, they were taken to the Hanuman Dhoka central police station in Kathmandu, where they were held for weeks without being allowed to contact anyone. During an incident in 2007, police in Kathmandu carried out an assault on several *metis*, beating, stripping, and sexually abusing them. The following day, the officer responsible for the assaults acknowledged to Blue Diamond Society that beatings were regular police practice and stated that carrying condoms is evidence of illegal acts.⁸¹

⁷⁷ *Op cit* f.n.49.

⁷⁸ Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People *NJA Law Journal* (2008) p.280 http://www.njanepal.org.np/Anex_2.pdf.

⁷⁹ See e.g. International Gay and Lesbian Human Rights Commission (IGLHRC) (2003) *Nepal: Renewed Police Brutality Against Transvestites, HIV/AIDS Outreach Workers* 24 July 2003 <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/584.html>.

⁸⁰ *Nepal: Police Attack Transgender People—Pattern of Police Abuse Highlights Broader Threat to Civil Society* <http://www.hrw.org/en/news/2005/04/17/nepal-police-attack-transgender-people>.

⁸¹ Government of USA (2006), State Department *Human Rights Report Nepal 2006*, <http://www.state.gov/g/drl/rls/hrrpt/2006/78873.htm>; Police assault *metis* at Ratna Park for carrying condoms *Pukaar* 59 October 2007.

Qualitative research drawing from interviews with 14 *metis* published in 2010 concluded:⁸²

Specific HIV-related risks identified were rape and abuse by law enforcement officers leading to inconsistent condom use due to fear of carrying condoms in public. Low access and ability to carry condoms paired with high reported numbers of sexual partners revealed an environment ripe for the spread of HIV among *Metis* and their partners. These data suggest the imminent need for interventions to reduce law enforcement violence towards *Metis* in order to decrease the risk for HIV among *Metis* who are raped and to increase access to and the ability to safely carry condoms. Sensitivity trainings and strict enforcement of existing legal protections for *Metis* should be considered.

Pakistan

There is little published research data on MSM and transgender people in Pakistan.⁸³ Anecdotal information describes fear, secrecy, isolation, suicides, forced marriage and community pressure to conform to heterosexual norms.⁸⁴ Pakistan is an Islamic republic and religion has a strong influence on law and law enforcement. Sex outside of marriage of any kind is forbidden. Overt homosexual behaviour is legally and socially censured and can lead to social stigmatization, discrimination, ostracism from family and friends, and prosecution.⁸⁵ Clandestine sex between men may be tolerated if it is in private and does not interfere with family life.

Prosecutions for male-to-male sex under the *Penal Code* are thought to be rare, although reliable data is unavailable.⁸⁶ A man and a eunuch were reportedly held in custody on unnatural sex charges in Peshawar in 2010, after allegedly attempting to conduct a 'wedding' ceremony.⁸⁷ The strict prohibitions of *Sharia* law apply in the districts of the Malakand Division of the North West Frontier Province, including lashings and the death penalty for sodomy. The government agreed to application of *Sharia* law in Malakand under a peace deal in 2009. In parts of Pakistan, application of *Sharia* law penalties for homosexual conduct occurs periodically by tribal authorities, with reports of penalties of whipping being applied for male-to-male sex in 1997 and 2005.⁸⁸ There are no reports of the death penalty for homosexual sex being applied in recent decades, although in 2005 when two men allegedly purported to participate in a 'marriage ceremony', the local tribal council told the couple to leave the area or face execution for breaking tribal laws.⁸⁹

82 Wilson E., Pant S. (2010) Stigma and HIV risk behaviors of transgender women in Nepal: implications for HIV prevention. *Retrovirology* 7(Suppl 1):122.

83 Rehan N., Chaudhary I., Shah S., Socio-sexual Behaviour of Hijras of Lahore *Journal of Pakistan Medical Association* Vol. 59, No. 6, June 2009 380-384.

84 International Gay and Lesbian Human Rights Commission (2008), *Human Rights and Transgender People in Pakistan*. IGLHRC.

85 Rajabali Aet. al. (2008) HIV and homosexuality in Pakistan *The Lancet Infectious Diseases* 8(8), pp. 511–515, August 2008.

86 Government of USA (2010) *2009 Human Rights Report: Pakistan*, State Department <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136092.htm>.

87 Gay-marriage couple remanded to police custody, *Daily Times*, 26 May 2010.

88 First gay marriage in Pakistan, *BBC News Online* 5 October 2005. http://news.bbc.co.uk/2/hi/south_asia/4313210.stm; ILGA (2008) *ILGA World Survey: Pakistan* <http://www.asylumlaw.org/docs/sexualminorities/PakistanIlga060206.pdf>

89 Happy and gay in Pakistan? *ABC news* <http://www.asylumlaw.org/docs/sexualminorities/Pakistan060109.pdf>

A 2002 study reported that police abuses of transgender people (*zenanas*) in Lahore were common and frequent.⁹⁰ The Supreme Court case on transgender rights (see 2.2.3, p.42 below) identified police abuses against *hijras* and made orders directing improved police treatment of transgender people.

Sri Lanka

There have been incidents of violence against MSM by the police and security forces (see p.48). The *Vagrants Ordinance of 1842* has reportedly been used to harass MSM and male sex workers.⁹¹ Transgender people have had their movements restricted in public spaces, and there have been instances of prolonged blackmail. Outreach workers distributing condoms were arrested and harassed by police in December 2005. More recently, outreach workers have adjusted approaches, with police being cooperative where condom distribution is not overt to the broader community.

2.2.2 Laws relating to discrimination

South Asian countries do not have specific anti-discrimination laws relating to sexual orientation or transgender status. It is proposed that the new Constitution of Nepal will include guarantees of non-discrimination on the grounds of sexual orientation and gender identity. The absence of anti-discrimination laws has allowed for abusive and inappropriate treatment of MSM and transgender people in the context of access to HIV-related services (see box, p.38) and mental health services (such as use of aversion therapy by clinicians to 'treat' homosexuality).

There have been recent case law developments that are supportive of equality before the law for MSM in India and Nepal, and transgender people in Nepal and Pakistan (see below).

In the *Naz Foundation Case*, the Delhi High Court ruled that sexual orientation is a ground analogous to sex and that the prohibition of discrimination of Article 15 of the Constitution of India applies. This means that the state is prohibited from discriminating against citizens on the basis of sexual orientation. Article 15 also prohibits discrimination by one citizen of another in access to public spaces.

An Indian employment case demonstrates that the provisions of India's Constitution can be used to respond to workplace discrimination by a University. In 2010, the Allahabad High Court provided an interim remedy to an employee who claimed that he was discriminated against by Aligarh Muslim University.⁹² Dr. Siras, an academic and teacher at the University, was open about his homosexuality. Dr. Siras was photographed with a male friend. On the basis of these photographs, he was suspended, directed to vacate his residence and asked not to leave Aligarh until completion of an inquiry. Suspension meant that he could not apply for professorship. The University alleged that Dr. Siras had committed misconduct because "he indulged himself into immoral sexual activity and in contravention of basic moral ethics". Dr. Siras argued that the University had violated his fundamental rights to privacy, dignity and

90 Khan S, Khilji T. (2002) *Pakistan enhanced HIV/AIDS program: social assessment and mapping of men who have sex with men (MSM) in Lahore, Pakistan*. Luknow: Naz Foundation International.

91 Rohan De Silva, personal communication, December 2009.

92 *Dr. Shrinivas Ramchandra Siras & Ors. Vs. The Aligarh Muslim University & Ors. Civil Misc. Writ Petition No.17549 of 2010* Allahabad High Court. <http://www.lawyerscollective.org/sites/default/files/Order%201.4.2010.pdf>

equality, and subjected him to discrimination on the grounds of his homosexuality. The Court granted an interim injunction to Dr. Siras to stay the suspension, the order to vacate premises and the order not to leave Aligarh. The Court held that Dr. Siras was entitled to be considered for Professorship and directed the University to complete the inquiry in accordance with law. The Court noted:

the right of privacy is a fundamental right, needs to be protected and that unless the conduct of a person, even if he is a teacher, is going to affect and has substantial nexus with his employment, it may not be treated as misconduct.

These cases demonstrate that application of constitutional human rights protections can promote equality for MSM and transgender people. In addition to constitutional rights, comprehensive anti-discrimination legislation is also required to ensure that equality and non-discrimination is enjoyed in all aspects of life, including employment in the private sector. Comprehensive anti-discrimination laws can also establish accessible complaints processes, to avoid the complexity of constitutional litigation.

India HIV/AIDS Bill

India has draft HIV legislation pending before its government, which envisages legal protections to vulnerable populations, including MSM and transgender people and those providing services to them.⁹³ Lawyers Collective HIV/AIDS Unit developed the *HIV/AIDS Bill* through a consultative process. The *HIV/AIDS Bill* includes the following provisions, which, if enacted, would provide protections to MSM and transgender people:

In the application of this Act, the following shall be recognised and taken into account:

- (a) The existence of systemic discrimination and inequalities, particularly in respect of gender, sexuality, class, disability, religion, race, caste, sex and place of birth in all spheres of life as a result of past and present discrimination, including that brought about by patriarchy; and
- (b) The need to take measures at all levels to eliminate such discrimination and inequalities.

The Act prohibits certain conduct towards protected persons. The Bill provides that the term “protected person” means a person who is:

- (i) HIV-positive; or
- (ii) actually, or perceived to be, associated with an HIV-positive person; or
- (iii) actually, or perceived to be, at risk of exposure to HIV infection; or
- (iv) actually or perceived to be, a member of a group actually or perceived to be, vulnerable to HIV/AIDS.

No person shall, publish, propagate, advocate or communicate by words, either spoken or written, or by signs or by visible representations or otherwise against any protected person, or group or category of protected persons, in general or specifically, anything or disseminate or broadcast any information, or publish or display any advertisement or notice, that could reasonably be construed to demonstrate an intention to be harmful

⁹³ Available at <http://www.lawyerscollective.org/hiv-aids/draft-law>

or to incite harm, promote or propagate hatred, or which is likely to expose protected persons to hatred, discrimination, harm or physical violence.

The Bill also provides a right to information relating to sexuality in the following terms:

No person shall be denied access to and availability of HIV/AIDS-related IEC (information, education, communication), including information relating to sexual health, sexuality and safe drug use, by the State.

Provided that where the person is below the age of 12 years and, in the opinion of the provider of information, is incapable of understanding and appreciating the nature of the HIV/AIDS-related IEC, the provider may, in the best interests of the person, require the presence of a person above the age of 16 years of the person's choice before providing such information.

Nepal

The Supreme Court of Nepal in the *Sunil Babu Pant Case* (2007) directed the Government to end discrimination on the basis of sexual orientation and gender identity. Action is yet to be taken to introduce legal protections from discrimination. It is proposed that the new Constitution will include guarantees of non-discrimination on the grounds of sexual orientation and gender identity.

Discrimination and violence in access to health care:

Treatment access for HIV-positive MSM and transgender people

An analysis of data from a study of MSM and transgender people in Asia conducted in 2008 concluded:

- stigma and discrimination, particularly amongst healthcare providers, is a major disincentive to seek treatment;
- unethical disclosure of sexuality and/or HIV status by healthcare staff perpetuates distrust in local healthcare infrastructure;
- strong cultural norms pertaining to sexuality impedes availability of accurate treatment information, creates the fear of disclosure, and an increased chance of social isolation and loss of social support;
- gender-based discrimination makes treatment access an additional challenge for HIV-positive transgender people.

India

77.9 percent of 421 HIV-positive MSM and transgender people who were surveyed admitted it is a challenge to access HIV services. Almost one third of survey participants had experienced healthcare service refusals. 4.8 percent of participants reported assaults by healthcare staff.

Of the 48 HIV-positive transgender individuals interviewed, almost one in two said that they were uncomfortable when accessing healthcare services and unethical disclosure of sexuality was significantly associated with being transgender.

Nepal

Institutionalized discrimination within the healthcare sector is a critical concern for HIV-positive MSM and transgender people. Almost 1 in 5 of 148 HIV-positive MSM and transgender people surveyed reported suffering both physical abuse and service refusals in the context of health care.

Of the 71 HIV positive transgender people interviewed, 47 percent said that they were uncomfortable accessing healthcare services. The survey findings indicated that in Nepal being transgender is significantly associated with the unethical disclosure of sexuality by healthcare providers, assaults by healthcare staff, and being refused healthcare services.

Fear and stigma are generated by discrimination and abuse. There is a low level of trust in governmental healthcare facilities. A high proportion of survey participants reported service refusals (30.8 percent) and assaults by healthcare staff (37.7 percent).

Choo M. (2010) *Treatment Access for Positive MSM in the Asia Pacific-An APN+ Analytical Report on Data from 6 Countries* APN+ (in print).

2.2.3 Legal status of transgender people

Due to the lack of laws recognizing transgender status in South Asia, transgender people have often been excluded from basic rights associated with citizenship such as passports, property rights, inheritance, employment, education and health care. There are recent examples of laws aiming to remedy this situation through recognizing the legal status of transgender people in India, Pakistan and Nepal for the purpose of electoral registration and other forms of legal identification.

India

Since 2005, passport applicants have had the option of identifying themselves as male, female or 'others' on the application form, enabling *hijras* to identify as 'others' regardless of whether they have had a sex-change operation.⁹⁴ Some *hijras* receive certificates from doctors who have performed a sex-change operation, stating that the *hijra* is now a woman. These medical certificates have been used by *hijras* to apply for new passports as 'female' or change the sex in the previous passport from 'male' to 'female'. A change in sex can be recorded if a *hijra* submits a sworn affidavit and a medical certificate from the hospital where the person has undergone a sex change operation.

The Indian electoral law was changed in 2009 to enable transgender people to register as third sex. Apart from the state of Tamil Nadu, application forms for other identity cards (e.g. ration card or drivers license) do not yet recognize a third gender identity or third sex category.

Progress has occurred in the state of Tamil Nadu in recognizing rights of transgender people (*aravanis*). In 2006, the Government of Tamil Nadu issued an *Order on Rehabilitation of Aravanis*,⁹⁵ which states:

- i. The Health Department shall undertake a programme of counseling and sensitizing.
- ii. Family counselling by teachers, with the help of NGOs sensitized in the area, should be made mandatory so that children are not disowned by their families.
- iii. There is no ban in admitting *aravanis* in Schools and Colleges. Admission in School and Colleges should not be denied based on gender identity. If any report is received of denying admission of *aravanis*, disciplinary action should be taken by the authorities concerned.
- iv. A detailed survey of *aravanis* in the state should be done.
- v. Health and Family Welfare is requested to take up a decision regarding legalized Sex Reconstruction surgery in Government Hospitals for *aravanis* who are willing to take up the surgery after counselling.
- vi. Special vocational training and skill development training should be given either through exclusive Self Help Group or as individuals, by Women Development Corporation. Small and petty loans to be arranged to *aravanis* in Self Help Groups who have undergone skill training.
- vii. Distribution of Identity Cards and ration cards and other problems are to be addressed.

94 See: Indian Passports Office <http://passport.gov.in/cpv/ppapp1.pdf>.

95 *Social Welfare – Rehabilitation of Aravanis's (eunuchs) Recommendation Sub-Committee – Orders Issued*. G.O. (Ms) No.199, 21.12.2006 http://www.tn.gov.in/gorders/social/sw_e_199_2006.htm; and see: Sood N. (2010) *Transgender People's Access to Sexual Health and Rights: A Study of Law and Policy in 12 Asian Countries*. Kuala Lumpur: Asian-Pacific Resource and Research Centre for Women.

At least one Government hospital in Tamil Nadu is now offering sex reassignment surgery for free. The Government has issued new ration cards identifying *aravanis* as a third gender. A special state Welfare Board has been established for *aravanis* to promote their equality and security through welfare schemes.⁹⁶

Other Indian states are considering replicating the experience from Tamil Nadu in establishing a Welfare Board and other protective measures, with UNDP collaboration. Some public hospitals in Mumbai and Delhi are offering sex reassignment surgery at nominal rates.

Indian courts have begun to respect transgender persons as persons deserving of fundamental protections. For example, in *Jayalakshmi v The State of Tamil Nadu & Others*,⁹⁷ the Madras High Court dealt with a case of a transgender man who was so harassed by the police that he immolated himself and died. The Court held that the State had to pay compensation for the harassment by its police force and also directed the institution of disciplinary proceedings against the officers.

The *Indian Penal Code* includes as offence for “emasculatation” (Section 320, *Indian Penal Code*, which punishes “grievous hurt”). As a result, some *hijras* are denied safe medical facilities for castration.⁹⁸ Section 88 of the *Indian Penal Code* provides an exception for action undertaken in good faith and with consent to suffer that harm. While there are no documented cases of doctors being prosecuted for sex reassignment surgery, the ambiguity in the law has meant that few transgender persons have been able to access safe medical facilities for sex reassignment surgery.⁹⁹

Some *hijras* have been elected to political positions in India. Shabnam Mausi became India’s first *hijra* Member of a Legislative Assembly (Madhya Pradesh) in 1999. Kamla Jaan was elected as mayor of Katni. Meenabai became the president of the Sehora municipality, Madhya Pradesh. In 2005, *hijra* Sonia Ajmeri ran for state assembly to represent eunuchs in Gujarat. In November 2000, Asha Devi was elected mayor of Gorakhpur, a post reserved for a woman. She was unseated when a court decreed that she was a man, but was later restored.¹⁰⁰

Nepal

Nepal’s citizenship card regulations have denied transgender people (*metis*) civil rights on the basis of non-conformity to a male or female category. Legal recognition of transgender people is required as a result of the Supreme Court’s ruling in the *Sunil Babu Pant Case* (2007), which recognized transgender identity and equal rights for transgender people as citizens (see box).¹⁰¹ Nepal’s Election Commission plans to grant recognition to transgender voters at the next general election. A voter will be able to register as male, female or third gender. The Government has indicated the intent to include a separate column for third gender people in the House/Family List of the form prepared by Central Statistics Bureau for the 2011 census.

96 http://www.tn.gov.in/policynotes/archives/policy2008-09/pdf/swnmp/women_child_welfare.pdf.

97 *Jayalakshmi v The State of Tamil Nadu & Others*, 2007 [4] MLJ 849, <http://www.indiankanoon.org/doc/1373799/>

98 Gupta A. (2002) Right to sexual identity—Legal concerns of the eunuch community in India. *Int Conf AIDS*. 2002 Jul 7-12; 14: abstract no. TuOrE1158.

99 Narrain S. (2009) Crystallising queer politics – the *Naz Foundation Case* and its implication for India’s transgender communities. 2 NUJS.L.Rev 455, p.462

100 The Tale of the Outcasts, *Star Weekend Magazine* 8(84) 28 August 2009; Peoples’ Union for Civil Liberties, Karnataka (2003) op cit f.n.67.

101 Op cit f.n.49.

Sunil Babu Pant Case

A case was brought against Government of Nepal by four NGOs involved in sexual minority rights and HIV (Blue Diamond Society, Mitini Nepal, Cruse AIDS Nepal, and Parichaya Nepal). The NGOs argued that Government of Nepal's laws and policies were discriminatory.

The Supreme Court of Nepal issued orders to the Government of Nepal to end discrimination against people of different sexual orientations or gender identities. The Supreme Court used the term "teshro Lingi" or "third gender", to refer to transgender persons who feel neither female nor male.

The directive requires the Government of Nepal to end the system that prevented transgender individuals from obtaining basic citizenship rights.

The Court's decision made reference to the *Yogyakarta Principles* on the application of international human rights law in relation to sexual orientation and gender identity and other authorities on international law. The judgment noted the importance of Articles 2, 16 and 17 of the *International Covenant on Civil and Political Rights* in concluding that a state should provide the right of a person to their identity. The Court emphasized the importance of the term "dignity" within Article 12(1) of the *Interim Constitution of Nepal*, which is to be interpreted in a manner consistent with the realization of equal rights for people of different sexual orientations or gender identities.

The Supreme Court directed the government to enact all necessary laws to enable same-sex partners to jointly own property and have inheritance rights. The Supreme Court made orders that:

- The Government of Nepal should enact new laws and amend all existing discriminatory laws so that all individuals with different sexual orientations and gender identities can exercise rights equal to other citizens of Nepal.
- A seven-member committee be formed by the Government of Nepal to study same-sex partnership laws in other countries and take initiatives as recommended by that committee. Prospective committee members were listed as:
 - i. a medical expert doctor as assigned by the Ministry of Health;
 - ii. a representative from National Human Right Commission;
 - iii. a representative of the Ministry of Law;
 - iv. a sociologist as assigned by the Government of Nepal;
 - v. a representative of Nepal Police, who is expert on this issue;
 - vi. a representative of the Ministry of Population and Environment; and
 - vii. the legal representative of petitioners.(This Committee has convened and is due to report in 2010.)
- Cross-dressing should not be penalized as it is within an individual's human right to freedom of expression.
- Equal rights, identity and expression must be ensured for transgender people regardless of their sex at birth.

Source: *Sunil Babu Pant and others v Nepal Government and others* 2 NJA L.J.[2008] 261-286 http://www.njanepal.org.np/Anex_2.pdf

Pakistan

A 2008 ruling of the Lahore High Court permitted a sex-change operation in circumstances where the person was certified as suffering from gender identity disorder.¹⁰²

In a series of rulings in 2009, the Supreme Court of Pakistan held that transgender citizens should have equal rights and access to government benefits.¹⁰³ The case was filed after police arrested several transgender people. The plaintiff was the chair of the Moorat Foundation of Pakistan, an NGO working to improve the welfare of eunuchs. She claimed that transgender people are routinely denied opportunities to education and are trained to beg, dance or are forced into sex work. The Supreme Court ordered that transgender people, being equal citizens of Pakistan, should benefit from the federal and provincial governments' financial support schemes. The Court held that transgender people enjoy the protections guaranteed under Article 4 (rights of individuals to be dealt with in accordance of law) and Article 9 (security of person) of the *Constitution* of Pakistan.

The Supreme Court rulings:

- allow transgender people to receive financial support through relief organizations;
- require the Government conduct a survey of transgender people;
- direct Pakistan's Interior Ministry to ensure that police officers provide protection to transgender people from crime;
- direct the government National Database and Registration Authority to add a third gender column on national identity cards for transgender people;
- direct authorities to register transgender people in electoral rolls;
- require that a mechanism be established to protect transgender people from police harassment and to assist them with inheritance rights.

2.3 Actions taken to improve the legal environment

2.3.1 Community

In Bangladesh, India, Nepal and Sri Lanka, a variety of NGOs and CBOs are involved in advocacy for changes in laws and policies. As a result, MSM and transgender people have had a direct influence on law and policy. In the other South Asian countries, there has been very little engagement of communities of MSM or transgender people in law reform or related policy development processes (Afghanistan, Pakistan, Bhutan and Maldives).

South Asia sub-region

Naz Foundation International (NFI) provides technical support to MSM and transgender CBOs to provide HIV services in six countries in South Asia. NFI has supported the development of four national organizations providing HIV services to MSM and transgender people: Bandhu

¹⁰² Pakistan court allows woman to change sex. Zee news. 30 April 2008. <http://www.zeenews.com/news439951.html>.

¹⁰³ In response to a petition filed by Islamic jurist Dr Mohammad Aslam Khaki, the Supreme Court made a series of rulings in July, October and December 2009. See: Khan H. Eunuchs in Pakistan want laws against harassment Central Asia Online 20 January 2010 http://centralasiaonline.com/cocoon/caii/xhtml/en_GB/features/caii/features/pakistan/2010/01/20/feature-02; Pakistan Supreme Court OKs third sex for identity cards 25 February 2010 <http://equalground.wordpress.com/2010/02/25/pakistan%E2%80%99s-supreme-court-oks-third-sex-for-identity-cards/>.

Social Welfare Society in Bangladesh, India Naz Foundation International (India NFI or *Maan*), Blue Diamond Society (BDS) in Nepal, and Companions on a Journey (COJ) in Sri Lanka. In 2009, these CBOs initiated the first successful regional Global Fund proposal to address HIV among MSM.

NFI has hosted regional consultative meetings on the policy environment for MSM and transgender CBOs from across South Asia, involving CBOs, donors, international NGOs, government representatives, UN agencies and other stakeholders. The Integrated Network for Sexual Minorities (INFOSEM), Bharosa Trust and NFI have successfully advocated for inclusion of MSM and transgender people in national HIV strategies, plans and budgets in India, Bangladesh, Pakistan and Sri Lanka.

In addition to receiving support from the South Asia Regional Global Fund Grant, NFI has been supported by DFID, SIDA, CIDA, World Bank, USAID and the European Commission. NFI has played a lead role in establishing APCOM.

India

At the national level, individual activists, experts, NGOs and CBOs participate in advocacy for law reform through a wide range of initiatives, including the work of the following organizations:

- Humsafar Trust;
- INFOSEM;
- Voices Against 377;
- Sangama;
- Lawyers Collective HIV/AIDS Unit;
- Alternative Law Forum;
- Manas Bangla;
- Network of Indian People of Alternative Sexualities Living with HIV;
- India NFI; and
- India NFI's National MSM and HIV Policy, Advocacy and Human Rights Network.

Many of these organizations have developed materials, including LGBTI rights advocacy, training and educational materials, and provide referrals to other service providers such as legal aid groups.

INFOSEM has played a central role in ensuring community voices have been represented in advocacy for law reform. INFOSEM objectives are to:

- i. advocate for sexuality and sexual health rights with specific focus on prevention and care of HIV/AIDS and other STIs;
- ii. help emerging grassroots groups by providing inputs and training in setting up and managing health, social, and legal issues faced by persons belonging to sexual minority/LGBT communities;
- iii. work towards clarifying the legal status of transgender/transsexual persons; and
- iv. work towards repealing all discriminatory legislation that criminalizes same-sex sexual behaviors between consenting adults in private.

'Voices Against 377' is a broad coalition of NGOs, individuals and groups that have worked together to advocate for the repeal of section 377 of the *Indian Penal Code*. Members include Amnesty International (India), HIV organizations, women's rights organizations and other human rights NGOs.

Lawyers Collective HIV/AIDS Unit has organized several advocacy initiatives on HIV, law and rights, including capacity-building workshops for the LGBT community and for law enforcement personnel, public campaigns for LGBT rights, sensitization of the judiciary and parliamentarians on LGBT rights, lobbying for law reform related to MSM, transgender persons and HIV, drafting rights-based legislation on HIV, and mounting the challenge to Section 377 of the *Indian Penal Code* on behalf of Naz Foundation (India) Trust. It has also provided extensive legal aid to LGBT individuals and organizations, including in the arrest of NGO HIV workers in Lucknow in 2001, police harassment, and processing of identity papers for transgender persons.

India NFI is a national organization that advocates on behalf of MSM and transgender communities for improved legal environments. It has approximately 45 state and district partners. India NFI established the National MSM and HIV Policy, Advocacy and Human Rights Network in India with a network of state-level advocacy cells to monitor and document violations of the rights of MSM in the geographical area in which they work; conducted advocacy at a policy level to change attitudes as well as policies and laws; and provided legal aid for people arrested or harassed by police. The National Network has worked with a range of MSM CBOs such as Humsafar Trust, INFOSEM, and others, to inform development of the National AIDS Control Policy on MSM and HIV programming. As a result, budgeting guidelines have been developed for MSM and HIV interventions that include funds for advocacy work and support for legal retainers.

Community organizations played a critical role in development of the National Strategy *Evidence to Action: Strategic Plan for Scaling-up Interventions for MSM and Transgender Populations in India 2007/08 – 2011/12*. This Strategy was informed by four regional workshops convened by Humsafar Trust and NFI and their members and partners in 2007. The Strategy was included in the National Program Implementation Plan of the National AIDS Control Program Phase III from 2008.

Strategies to improve the legal environment for *hijras* and *kothis* in Bangalore, India

Sangama is an NGO that focuses on the rights of sexual minorities in Bangalore. Sangama established a drop-in centre in 2002 for *hijras* and *kothis*. *Hijras* and *kothis* attending the centre formed a collective that worked with Sangama to improve the legal environment. Sangama established a service providing free legal representation to *kothi* and *hijra* who reported harassment and abuse from the police.

Sangama linked its advocacy on sexuality minority rights with the sex workers' movement. The group became involved in a range of related human rights issues. A model of crisis intervention based on community mobilization helped to build a sense of community. Sangama distributed pamphlets in cruising areas about legal rights with contact numbers in case of police harassment. Cases of harassment were documented and taken up as campaign issues.

After incidents of police assaults on street-based *kothi* and *hijra* sex workers, a campaign was launched including press conferences, protest rallies, representations to police officials and the Chief Minister. Sympathetic media coverage was prompted by the fact that *hijras*, *kothis*, and male sex workers aligned themselves with the human rights struggles of other minorities (e.g. women, Dalits). Networking with other social movements gave self-confidence to *kothis* and *hijras* to resist police violence. After the campaign, there was a drastic reduction of police abuses.

Source: *Human Rights Violations against the Transgender Community: A study of kothi and hijra sex workers in Bangalore, India* (2003) Karnataka: Peoples' Union for Civil Liberties.

Community responses to violence against MSM and transgender people

Community-led crisis response is a method of addressing violence, abuse and discrimination. Avahan, the India AIDS Initiative of the Bill & Melinda Gates Foundation, has set up crisis response systems for sex workers, MSM and transgender people.

Avahan partner NGOs have trained teams of MSM and transgender people to respond to incidents of violence. They provide hands-on support to resolve issues, offer emotional support, and ensure that legal rights are respected and health needs are looked after. This helps create an environment in which people feel safe and confident to access HIV services and peer outreach workers are protected from police harassment.

Avahan has provided support for work with the police across six states. This work has included the training of 30,000 police on issues related to HIV and high-risk groups.

In 2006, a memorandum was issued by the police in Andhra Pradesh in collaboration with the State AIDS Control Society and Avahan's two state-wide partners. The memorandum stated:

- Carrying condoms is not to be used as "proof" of solicitation in order to arrest sex workers.
- The police in each district to sign the identity cards of the HIV prevention program staff so that they are not arrested for doing their job in the program.
- The NGO program staff to conduct one-hour sensitization sessions during the monthly crime meetings at all levels (district and sub-district).
- The NGO program staff to hold workshops for police officers at all levels.
- An HIV sensitization workshop or module to be incorporated into the training for police recruits.
- The police to cooperate with the state AIDS control body and Avahan partners in implementation of their programs.

Some Avahan partners have found creative ways to involve police in their work and familiarize them with the lives and issues of the community. For example, police officers have been invited to give awards to high-performing peers at community meetings, or to serve as judges at a fashion show put on by MSM.

AVAHAN India AIDS Initiative (2009) *Community-led crisis response systems: a guide to implementation* Bill & Melinda Gates Foundation, New Delhi

Nepal

BDS has been involved in community empowerment activities for MSM and transgender people (*metis*), awareness on rights issues, legal aid, documentation of human rights violations, media advocacy, and providing support groups for complainants. BDS makes representations to the National Human Rights Commission and UN Office of the High Commissioner for Human Rights on cases of violations against MSM and transgender people. In a rape case of a *meti* in Kathmandu, BDS obtained compensation from the police. BDS has linkages with other NGOs providing legal aid such as the Forum for Women, Law and Development and the International Commission of Jurists.

In 2007, the BDS met with political parties to secure commitments to protect human rights of sexual minorities. In 2008, the Communist Party of Nepal (Maoist), the Nepali Congress Party, and the Communist Party (United) included the rights of sexual minorities in their election manifestos.

BDS is campaigning for inclusion of human rights guarantees for sexual minorities in the new Constitution, which is due to be enacted by May 2011. A national consultation of sexual minorities on the Constitution was sponsored by BDS in 2008. The consultation recommended affirmative action to guarantee fundamental rights including education, health, and employment to sexual minorities, legal provisions for same-sex marriage, laws against sexual exploitation and sexual violence of lesbians, MSM, and third genders, and compensation for victims. In 2008, Sunil Pant, BDS Director, was appointed as a constituency representative to the Nepalese parliament.

Nepal's umbrella advocacy organization is the Federation of Sexual & Gender Minorities – Nepal.

Pakistan

There is a growing civil society movement in support of MSM and transgender rights. For example, in Karachi, Participatory Organization for Empowerment of Transgender (POET) has been formed to pressure the government for protection of rights.

Maldives

Rainbow Maldives is an organization with an on-line presence which advocates for decriminalization of male-to-male sex in Maldives and introduction of legal protections. Rainbow Maldives was formed in 2009 aiming to take advantage of a more progressive political context, flowing from the country's multi-party elections in 2008, to argue for the rights of sexual minorities.¹⁰⁴

Sri Lanka

The community-based response to MSM and transgender human rights and health issues is very recent. There are two NGOs engaged in human rights advocacy for MSM and transgender people:

- i. COJ, which provides services and safe space to gay-identifying men and MSM, and focuses on decriminalization and providing support, outreach, and HIV education services; and

104 See: <http://www.starobserver.com.au/soap-box/2009/08/25/providing-support-for-the-maldives/15359>

- ii. Equal Ground, which focuses on advocacy to repeal the *Penal Code* prohibition of homosexual activity and organizes social events in Colombo.

A small amount of funding was provided by the Swedish International Development Agency (SIDA) to COJ for advocacy work. Another gay men's group, The Sakhi Collaboration, has also been established. Family Planning Association Sri Lanka provides counseling and HIV prevention for MSM.

Developments in 2009 regarding the community response have included the first series of national meetings relevant to MSM:

- i. A national consultation on the proposed South Asian Human Rights Commission on Marginalized Sexualities and Genders was convened by the Women's Support Group in 2009, with participation of LGBT activists, human rights lawyers, and journalists.
- ii. A national consultation on Sexual Health and Rights was organized by the Women's Support Group, with the support of Equal Ground and COJ in 2009. Objectives of the consultation included to identify issues and security concerns, and community expectations.
- iii. A national consultation meeting was convened on MSM, HIV and Sexual Health by COJ, with support from NFI, UNAIDS and UNDP.

Findings of the 2009 COJ consultation on MSM, HIV and Sexual Health included:¹⁰⁵

- Violence against MSM is incurred by the police and security forces, particularly focused on feminized MSM.
- Significant levels of sexual abuse, violence and rape of MSM occur.
- Many MSM face blackmail and threats.
- Many MSM have feelings of insecurity, loneliness, fear, isolation, low self-esteem and shame brought on by social attitudes producing stigma, discrimination and social exclusion.
- Because of these factors, combined with stigma and discrimination by service providers, many MSM have low health-seeking behaviors, including low condom usage, significant rates of STIs, high risks of HIV infection, and lack of knowledge on sexual health.

Recommendations of this national consultation included:

- Address stigma, discrimination and violence through training and sensitization programmes. Law enforcement personnel need to be sensitized, trained and engaged in supporting HIV prevention amongst MSM and transgender people.
- Reading down of Section 365 and 365A of the *Penal Code*, so as not to criminalize consensual sex between adults.
- Strengthened local and national advocacy with government, educational establishments, medical schools, law enforcement agencies, and the judiciary.
- Provide literacy and vocational training for MSM and transgender people to address employment needs, along with enabling access to micro-credit schemes.
- Promote greater involvement of MSM and transgender people in policy and decision making levels in all institutions working with STIs and HIV programming. MSM and transgender people need to be offered leadership skills development programmes.
- Police harassment and violence needs to be addressed to increase the safety of MSM and project staff who are working with them. Most of the harassment and abuse is by local

¹⁰⁵ COJ (2009) *Report of the national consultation on MSM, HIV and Sexual Health*.

constables. More senior police may not be aware of the problem. A liaison programme will need to explain to the police the necessity for the work, persuade a reduction in local harassment and violence, and provide training programmes for the police on sexual health issues and government concerns on the epidemic.

2.3.2 Government

MSM and transgender people have been included as priority populations in the national HIV and AIDS strategies and plans of India and Nepal.

India

India's national MSM and transgender strategy *Evidence to Action: Strategic Plan for Scaling-up Interventions for MSM and Transgender Populations in India 2007/08 – 2011/12* was developed through a year-long consultation with over 80 MSM and transgender groups and is implemented in support of the *National AIDS Control Programme (NACP) Phase III (2006-2011) Strategy and Implementation Plan*. There is a specific programme line for MSM in the *NACP Phase III Strategy and Implementation Plan*.

The National Human Rights Commission in its report of the National Conference on Human Rights and HIV/AIDS in 2000, recommended, inter alia, the revision of laws and processes such as Section 377 of the Indian Penal Code to enable the empowerment of marginalized populations and their access to HIV/AIDS prevention messages as well as care and support and legalization of any sexual activities undertaken with consent between adults.¹⁰⁶

The 172nd report of the India Law Commission recommended that the rape laws be changed to criminalize rape of males and that Section 377 of the Indian Penal Code be repealed.

The Indian election authority recognized 'third gender' voters in 2009¹⁰⁷ and the passports office recognizes a third gender.

In 2007, the Ministry of Home Affairs issued an official order to all state and territory Directors-General of Police to designate a nodal officer for NGO Coordination at the state and district level. The Ministry of Home Affairs, in partnership with UNAIDS, organized four regional conferences in 2008 for the nodal officers for NGO Coordination who would facilitate in rolling out of the strategy for HIV programming for uniformed services in all states. The events were an opportunity to sensitize the state police leadership to MSM issues.

Tamil Nadu state of India is making progress in efforts to sensitize police. The transgender community and state officials have implemented a training initiative. The programme has been scaled-up with support from UNDP and other development partners. A community-driven approach was adopted for sensitizing the police. 300 master trainers from the transgender community were trained. Over 7,500 police have been sensitized by the community. Community representatives have reported a dramatic decline in police harassment since the training was implemented. The programme was organized by the Tamil Nadu State AIDS Control Society, UNDP and Constella Futures Group. People living with HIV

¹⁰⁶ Available at: http://nhrc.nic.in/Publications/report_hiv-aids.htm.

¹⁰⁷ See: <http://edition.cnn.com/2009/WORLD/asiapcf/11/12/india.gender.voting/>

participated in delivering the programme. The government aims to scale-up to reach 100,000 police personnel in the State.¹⁰⁸

Nepal

Nepal's *National HIV and AIDS Strategy 2006-2011* set a target of ensuring the human rights of affected populations (including MSM) through an effective legislative framework by 2011. The *National HIV and AIDS Strategy* identifies the need to address "institutional and policy stigma and discrimination" as a priority. Proposals relating to equality rights are being considered in consultations on the new Constitution to be introduced by 2011. Preliminary drafts of the Fundamental Rights Chapter of the Constitution include provisions relating to non-discrimination on grounds of gender and sexual orientation, recognition of a third gender for the purposes of rights and entitlements, and the right to family of everyone, irrespective of gender or sex. Other proposals to the committees involved in drafting the new Constitution include:

- i. citizenship to all citizens according to gender identity;
- ii. a non-discrimination clause in the Constitution that extends to sexual orientation and gender, with gender defined to include male, female and third gender identities;
- iii. affirmative action obligations of the state to improve the situation of marginalized people, including sexual and gender minorities;
- iv. social security rights that are inclusive of sexual and gender minorities;
- v. Social Justice chapter that is inclusive of sexual and gender minorities; and
- vi. the right to family, marriage, labor and pay are to be formulated in gender neutral language.

In 2009, Nepal's Election Commission began to grant recognition to transgender people.¹⁰⁹ Voters can register as either male or female or third gender for the 2010 General Election.

Sri Lanka

In Sri Lanka, an MSM representative participates in the National AIDS Committee sub-committee for Prevention. In 2008, the UN Joint Team on AIDS in Sri Lanka supported the development of a methodology for the mapping of most-at-risk populations. The National STI and AIDS Control Programme established a steering group in mid-2009 to guide this initiative with membership drawn from the National STI and AIDS Control Programme, senior ranking law enforcement agents, two CBOs (COJ and Community Strength Development Foundation) and the UN system. This initiative is mapping 'hot spots' for MSM to inform prevention services. A Global Fund country grant is supporting prevention interventions for MSM and other most-at-risk populations and generation of strategic information (including surveillance data and estimation of the size of the population of MSM).

108 <http://www.thehindu.com/2008/02/29/stories/2008022959431200.htm>.

109 Indo Asian News Service. *Nepal readies to recognise third gender voters*. 18 November 2009.

South Asia Global Fund Regional Programme on MSM and HIV

The Global Fund is supporting efforts to address the legal and policy environment through a multi-country grant in South Asia. The Regional Programme is the first community-led multi-country grant supported by the Global Fund specifically addressing MSM, transgender people and HIV. From 2010- 2015, NFI, UNDP and Population Services International (PSI) Nepal are jointly implementing the Programme focused on MSM in Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka. Currently, the national level community partners include the Bandhu Social Welfare Society, Blue Diamond Society, Companions on a Journey and Maan (India NFI).

The Programme aims to build the capacity of CBOs to deliver HIV services, engage in policy development and advocacy, and increase the development of strategic information. The grant will support a regional resource centre, consisting of knowledge resources and training services that CBOs and others can access. In Pakistan, the grant will support an MSM and transgender HIV-related technical support agency that will provide advocacy and sensitization training for government and NGOs. In addition, the grant will support organizations to engage in regional and national-level policy development and advocacy to address punitive laws and policies, provide technical support and support multi-country research on the vulnerability of MSM and transgender people.

Available at http://www.theglobalfund.org/grantdocuments/9MNZH_1884_0_full.pdf

2.3.3 Donors and multilateral agencies

The Global Fund is supporting efforts to address the legal and policy environment through a regional programme in South Asia (see box).

In 2009, UNDP India supported the first national consultation on transgender people and HIV. UNDP India also supported the mobilization of stakeholders to engage in advocacy regarding the *Naz Foundation Case*.

There has been limited engagement by South Asian Association for Regional Cooperation (SAARC) on MSM and transgender issues. The *SAARC Regional Strategy on HIV and AIDS 2006–2010* includes an objective of reduction of risk and vulnerability of vulnerable populations including MSM and sex workers, and identifies the need to address lack of support to MSM through scaling-up MSM interventions. The Global Fund regional programme identifies SAARC as a potential platform to openly discuss issues of stigma and discrimination at a regional level, and to support regional and in-country advocacy.

DFID provided funding for the development of the India *National MSM and Transgender Strategy* within National AIDS Control Programme (NACP) III.¹¹⁰

110 *Evidence to Action: Strategic Plan for Scaling up Interventions for MSM and Transgender Populations in India* 2007/08 – 2011/12.

In Afghanistan, UNICEF sponsored an assessment of sexual exploitation issues of young MSM and HIV, health and protection issues in 2009.

2.4 Conclusions

The legal environments in India, Nepal and Pakistan are becoming less punitive. Recent court judgments in these three countries place an emphasis on the role of the law in assuring equality, human dignity and inclusiveness. Some legal measures have been taken to recognize diversity of gender identities in Nepal and India, for example in allowing electoral registration as a third sex. These events signal a trend towards a more protective legal environment. Although the social context remains in many respects hostile towards sexual minorities in Pakistan, law and policy is more supportive for transgender people since the 2009 Supreme Court case.

These improvements in the legal status of MSM and transgender people will support efforts to scale-up HIV responses. Humsafar Trust reports that a direct result of decriminalization of sex between men in Delhi in 2009 has been more honest practices regarding recording of sexual histories of MSM and transgender people by clinicians to the benefit of patients seeking sexual health services and their sexual partners.

The progress in these three South Asian countries contrasts with the other five countries of the sub-region. In Afghanistan, Bangladesh, Bhutan, Sri Lanka and Maldives the legal environment remains to a large extent repressive, although there are significant variations between these countries in relation to the extent to which punitive laws are actually enforced.

Building on the progress in India and Nepal, repeal of the laws criminalizing male-to-male sex in Afghanistan, Pakistan, Bangladesh, Bhutan, Sri Lanka and Maldives would greatly improve the environment for HIV responses among MSM and transgender people. In India, further progress depends on the outcome of the Supreme Court appeals in the *Naz Foundation Case*, which will clarify the national position. In India, work will need to occur to monitor how decriminalization of male-to-male sex is understood by the religious community and police, and reflected in improved treatment of MSM and transgender people.

Consideration needs to be given to not only removing criminal penalties that affect MSM and transgender people, but also to introducing positive legal protections that provide remedies for discriminatory conduct and that protect from vilification and hate crimes. The India *HIV/AIDS Bill* prepared by Lawyers Collective for NACO provides a useful model. Proposals for inclusion of constitutional guarantees of equality and non-discrimination on grounds of sexual orientation and gender identity in the draft Constitution of Nepal may also provide a powerful model for the Asia Pacific region.

Across the sub-region, minor police offences relating to public conduct and nuisance are often reported as being used to target MSM and transgender people for harassment. There have also been instances where laws have been used to restrict dissemination of sexual health information and HIV prevention outreach workers have been vulnerable to police abuses of power. Although probably the worst of these incidents occurred eight years ago (in Lucknow, India), the risk remains of reversion to repressive policing if ongoing measures are not taken to change community attitudes, educate police and implement policies and protocols that require supportive and ethical policing.

The research that has been conducted in Bangladesh and India to document the incidence of violence and harassment targeting MSM and transgender people by police confirms the detrimental impact of legal frameworks that enable police to harass and extort without fear of retribution. This exposes MSM and transgender people to HIV risk as a result of sexual assaults and also presents a barrier to HIV prevention by marginalizing MSM and transgender people, undermining self-esteem and driving people away from HIV services.

The South Asia Regional Global Fund Programme proposal observed that the following lessons have been learnt by community partners in addressing MSM and transgender issues in South Asia:

- Fortright engagement with government policy makers, including judicial, legal and law enforcement agencies, is essential for policy change and programme development.
- Open national and regional leadership is required to address the continuum of health and human rights needs, including effective integration of sexual health services for MSM and transgender people, integration of HIV interventions with interventions related to tuberculosis, STIs, substance use, prison health, and social services.
- Local experience needs to guide policy and programme development. In the largest South Asian countries, this local input must be made in every district, province, and state. This, in turn, requires systematic 'upstream' engagement with political, social, and religious institutions to allow the issues from local and district-level MSM and transgender programmes, with their fundamental knowledge of practical challenges and potential solutions, to help guide national research, policies and programmes.

In formulating recommendations, it is important to recognize the complex causes of vulnerability of MSM and transgender people in South Asia. They are often poor and uneducated. Gender non-conformity leads to denial of access to services and targeting by police for extortion and harassment. In addition, feminized males and transgender people who are living with HIV may be further stigmatized by society, discriminated against by health service providers and rejected by other people living with HIV due to moral judgments about gender non-conformity. These factors contribute to disempowerment, low self-worth, and increased HIV risk.

3 East Asia

3.1 Overview

The civil law tradition means that, on the whole, East Asia has had a less repressive legal environment than the other sub-regions of Asia and the Pacific. The civil law countries of this sub-region do not criminalize homosexuality. Under British colonial rule, Hong Kong (East Asia's only common law jurisdiction) criminalized male-to-male sex as the offence of buggery, which was punishable with a penalty of life imprisonment. The buggery offence was removed from the *Crimes Ordinance* of Hong Kong in 1991.

Post-operative transgender people can be legally recognized as their new sex on identity documents and can marry people of their former sex in China, Japan and South Korea. Legal systems in Hong Kong SAR and Taiwan prohibit discrimination on the grounds of sexual orientation in certain circumstances. The role of the judiciary has been important in development of the law in Hong Kong SAR. As a result of recent judgments in criminal law cases, MSM now enjoy constitutional protection from discrimination on the grounds of sexual orientation under the *Bill of Rights Ordinance*.

In all East Asian countries, sex between men is socially stigmatized, although to varying degrees. In some countries (e.g. China, Mongolia) there are recent reports of police targeting of MSM and transgender people, including some allegations of local police harassment and abuse.

3.2 Laws affecting HIV responses among MSM and transgender people

3.2.1 Criminal laws and police practices

Country/Territories/ SAR jurisdiction	Legality of male-to-male sex	Applicable laws
China	Legal	Homosexual or heterosexual sex involving three or more people may attract prosecution under Article 301 of the <i>Criminal Law of China</i> , which provides that where an assembled crowd commits licentious activities, the ringleaders or other persons who participate several times shall be sentenced to imprisonment of not more than five years.
Hong Kong SAR (China)		Legal since 1991.
Japan	Legal	
Macao SAR (China)	Legal	

Continues...

Continued

Country/Territories/ SAR jurisdiction	Legality of male-to-male sex	Applicable laws
Mongolia	Legal	Legal since 2002.
North Korea	Legal	
South Korea	Legal (except military)	Homosexual acts between soldiers are punishable by a maximum of one year imprisonment under the <i>Military Penal Code</i> .
Taiwan	Legal	

Table 2 Legality of male-to-male sex in East Asia

China

Male-to-male sex was prosecuted under the offence of hooliganism until this offence was repealed in 1997. Homosexuality was officially removed from the government's list of mental illnesses in 2001.¹¹¹ There are now no specific offences criminalizing male-to-male sex between adults. However, the legal position of homosexual conduct is considered to be ambiguous, as there have been no clear statements in law or policy confirming legality of male-to-male sexual conduct or relationships.

A review of the status of lesbian, gay, bisexual and transgender people (LGBT) in China conducted in 2009 observed:

Although the situation varies from region to region there are many continuing reports of police harassment of LGBT people across China. In particular there are a significant number of incidents where police have detained LGBT people. These incidents tend to involve LGBT people meeting together in private or public spaces, from gay bars to public parks. As many LGBT people live with their families and are not open about their sexuality it is very common for LGBT people to meet in public...

Anecdotal evidence suggests that there are many incidents where LGBT people, once detained by the police, face harassment, blackmail and extortion. These incidents are almost never reported and it is very difficult to obtain written corroboration. However it seems that when these incidents occur the LGBT people concerned are forced to pay money to the police on threat of the police continuing to detain them or revealing their sexuality to their employer, family or local community.¹¹²

Some MSM and transgender people come to police attention due to suspected involvement in sex work, which is illegal in China. In a survey conducted by a Chinese NGO from December 2008 to January 2009 among 50 transgender persons, an NGO found 20 percent of transgender people had been arrested and 50 percent had been threatened by the police.¹¹³

111 Settle E. (2005) Yes, gay men are at risk in China, *International Herald Tribune*. <http://www.nytimes.com/2005/01/20/opinion/20iht-edsettle.html>.

112 Mountford T. (2009) *The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China* at pp.18-21. <http://www.iglhr.org/cgi-bin/iowa/article/takeaction/resourcecenter/1107.html>.

113 Wan Yanhai, Hu Ran, Guo Ran, Arnade L. (2009) Discrimination against people with HIV/AIDS in China, *Equal Rights Review* vol 4. p.20, citing: Aizhixing Institute (2009) *The Survey Report on the Status Quo of Beijing Transgender Sexual Service Providers*, Beijing: Aizhixing.

Guangzhou¹¹⁴

In March–April 2009, in *Renmin Gongyuan* (People's Park), Guangzhou, officers from the Public Security Bureau detained 110 men who were believed to be engaging in sexual activities or sex work, including 11 outreach workers from an HIV NGO, Chi Heng Foundation, who were providing safe sex education as part of an HIV prevention program. No charges were filed. In August 2009, the police attempted to remove 100 men from the park, including some outreach workers. The men protested and persuaded the police to leave. The park is a popular gathering spot for MSM. In China, public parks are one of the few spaces where MSM can socialize and develop a sense of community. Parks where MSM meet provide opportunities for HIV prevention workers to reach men who are otherwise hidden.

Beijing

In 2008, in the lead-up to the Olympic Games more than 40 people were detained in Beijing's *Dongdan* Park. One of the detainees was a volunteer for the HIV NGO Aizhixing. It was reported that the police asked the detainees why young people like them were coming to the park for sex work. This incident came after previous detentions of Aizhixing volunteers in 2007. In 2009, police in Beijing detained a number of transgender people for up to 48 hours. Although the reason for these detentions was expressed in terms of public order, police action often targets transgender people as likely sex workers.¹¹⁵

Hong Kong SAR

Legal equality for homosexual men under the criminal law

In *Leung's Case* (2006),¹¹⁶ the Hong Kong Court of Appeal recognized sexual orientation as a proscribed ground of discrimination to be treated in the same way as other proscribed grounds of discrimination, such as sex and race. In *Leung's Case*, the Court found that provisions of the *Crimes Ordinance* that defined an older age of consent for homosexual sex (21 years) than heterosexual sex (16 years) were unconstitutional. These provisions were challenged on the grounds of breach of rights of privacy and equality under the Hong Kong *Bill of Rights Ordinance* and the *Basic Law*. The Court of Appeal held that the laws were discriminatory and in breach of the *Bill of Rights Ordinance*.

Concerns with HIV were included in the original decision of Justice Hartmann, the High Court Judge who originally heard the case that was later upheld on appeal. Justice Hartmann concluded that discriminatory age of consent prohibitions reduce the possibilities of providing HIV prevention education to young people. He found that the rationale for choosing 21 as the age of consent was not justifiable, on the basis of changed medical views on the causes of a homosexual orientation and in light of the best strategies for preventing HIV. Justice Hartmann ruled that the criminal provisions discriminated on the basis of sexual orientation, stating:

The sections constitute, in my view, a grave and arbitrary interference with the right of gay men to self-autonomy in the most intimate aspects of their private lives.

¹¹⁴ Guangdong police arrests 110 men in 2 raids. *Fridae.com News*, 7 April 2009. <http://www.fridae.com/news/features/2009/04/07/2253>.

¹¹⁵ Mountford T. (2009) *op cit*, fn.112, p.20.

¹¹⁶ *Leung T.C. William Roy v. Secretary of Justice* [2006] 4 HKLRD 211(C.A.).

...In so far as the risk of AIDS or similar diseases may rationally require some difference of treatment between anal intercourse and intercourse *per vagina*, I fail to see how it can be said that the four sections which are challenged provide a rational response or a proportionate one. In respect of the issue of health, I can do no better than cite from the judgment of Abella JA in *R. v. CM*:

The health risks from unprotected anal intercourse are real and ought to be aggressively addressed. But, in my view, the measures chosen in s.159 to protect young people from risk are arbitrary and unfair, compared to the measures used to protect against the health risks for individuals who prefer other forms of sexual conduct. There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the draconian criminal means chosen to achieve them.¹¹⁷

In *Zigo Yau's Case* (2007)¹¹⁸ two men were charged with homosexual sex occurring otherwise than in private, because they had sex in a parked car. The Court of Final Appeal held that the provision of the *Crimes Ordinance* that made homosexual sex in a public place a criminal offence contravened Hong Kong's *Basic Law* and *Bill of Rights Ordinance*, as it did not equally apply to heterosexuals. The Court of Final Appeal confirmed that sexual orientation is a classification analogous to race and sex.

Mongolia

The NGO Youth for Health reports that stigma and discrimination against MSM in Mongolia, including from police, contributes to vulnerability. Men searched by police and found to have lubricant (considered a sign of homosexuality) have reportedly been subjected to violence and abuse.¹¹⁹ Testimonies gathered by the Mongolian LGBT Centre suggest widespread and pervasive harassment and persecution of LGBT persons by the General Police Department and the General Intelligence Agency. This includes covert surveillance of known LGBT persons, keeping files on known LGBT persons, monitoring LGBT social events and filming those in attendance, phone-tapping, arbitrary arrests, intimidation, threats, and physical and sexual assaults on LGBT persons while in custody.¹²⁰

North Korea: Democratic People's Republic of Korea (DPRK)¹²¹

The official website of DPRK states as follows:

Due to tradition in Korean culture, it is not customary for individuals of any sexual orientation to engage in public displays of affection. As a country that has embraced science and rationalism, the DPRK recognizes that many individuals are born with homosexuality as a

117 *Leung T.C. William Roy v. Secretary of Justice* [2005] 3 HKLRD 657 Hartmann J, Judge of the Court of First Instance, High Court at para 147-150.

118 *Secretary for Justice v Yau Yuk Lung Zigo & Another* [2007] 3 HKLRD 903.

119 Begzsuren E. (2008) *Successfully reaching MSM in Mongolia* XVII International AIDS Conference, Mexico City, Poster THPE0378.

120 Mongolian LGBT Centre NGO and the Sexual Rights Initiative (2010) *Report on Mongolia – Ninth Round of the Universal Periodic Review*.

121 See: <http://www.korea-dpr.com/faq.htm>.

genetic trait and treats them with due respect. Homosexuals in the DPRK have never been subject to repression, as in many capitalist regimes around the world. However, North Koreans also place a lot of emphasis on social harmony and morals. Therefore, the DPRK rejects many characteristics of the popular gay culture in the West, which many perceive to embrace consumerism, classism and promiscuity.

No further information is available to verify this statement in relation to policing practices or other aspects of the legal environment for MSM and transgender people.

South Korea: Republic of Korea

The South Korean Constitutional Court was asked in November 2008 to review the provisions prohibiting homosexual conduct in the military. As of May 2009, the Court had not made any judgment on the request. Military service is mandatory for male citizens of South Korea. Dismissal from the military on grounds of homosexuality can lead to future employment discrimination.¹²²

3.2.2 Laws relating to discrimination

Greater China

China has no national laws protecting people from discrimination on the grounds of sexual orientation or transgender status.

In 2008, a study of 1,259 homosexual men conducted in China found that 62 percent had never openly revealed their homosexuality. Nine percent said they had been dismissed from employment or forced to quit after employers discovered their sexual orientation. Five percent believed their sexuality had affected their income and career development. About one-fifth said they had suffered verbal and physical abuse. 35 percent of respondents admitted they had contemplated suicide, while 13 percent had attempted it.¹²³

In southwest China, a study in Chengdu found that stigma and discrimination from health care personnel is one of the major reasons MSM do not use health services. The study observed:

fear of discovery is still a major force that keeps the homosexual population hidden, denying them access to information and intervention programmes. MSM tend to disguise their true identities when they are involved in community activities, making outreach more difficult.¹²⁴

In Hong Kong SAR, Article 22 of the *Hong Kong Bill of Rights Ordinance 1991* provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground, including

122 International Gay and Lesbian Human Rights Commission (2009) *South Korea: Pressure to End Discrimination in the Military Mounts*. <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/902.html>.

123 Survey by Professor Zhang Beichuan at Qingdao University in Shandong province, reported in: Cao Li (2010) Gay rights in China: road to respect. *China Daily*, 24 February 2010.

124 Feng Y., Wu Z., Detels R. et al. (2010) Evolution of Men who Have Sex with Men Community and Experienced Stigma Among Men Who Have Sex With Men in Chengdu, China. *Journal of Acquired Immune Deficiency Syndromes*. February 2010, Vol. 53 pp. S98-S103.

“other status”. In the case of *Leung T. C. William Roy v. Secretary for Justice*,¹²⁵ this phrase was interpreted to include sexual orientation. The *Hong Kong Bill of Rights Ordinance* protects against discrimination by government authorities. It may be possible to bring a complaint of discrimination on the grounds of transgender status under the *Hong Kong Bill of Rights Ordinance* or the *Sex Discrimination Ordinance*, although there have been no cases brought to test this.

In Taiwan, legislation was enacted in 2007 providing that discrimination based on sexual orientation in employment is unlawful. Discrimination on the grounds of sexual orientation in education has been prohibited since 2004 by Article 14 of the *Gender Equity Education Act 2004*. In 2010, it was announced that, from 2011, school textbooks will include topics on LGBT human rights and non-discrimination.¹²⁶

Mongolia

There are no legal protections from discrimination on the grounds of sexual orientation or gender identity. The Mongolian LGBT Center has reported¹²⁷ that discrimination against LGBT persons is endemic in the public, private and non-governmental sectors and encompasses the police and the judiciary, health-care services, education, the housing sector and the media. Evidence gathered by the LGBT Center from the Mongolian LGBT community suggests a lack of understanding of sexual minorities among healthcare providers. Many LGBT persons reportedly fear that the disclosure of their sexuality to health-service providers will lead to ridicule, dismissal, a denial of services or reporting of their sexuality to government authorities. Sexual orientation and transgender identity are commonly misunderstood as a psychiatric disorder or addiction.

South Korea

In 2001, the National Human Rights Commission of Korea was established by legislation with a mandate to address discrimination on the basis of a range of grounds, including sexual orientation.¹²⁸ Although the Human Rights Commission can recommend actions such as payment of compensation and pressure the government, its recommendations are not binding. Government agencies are required to develop plans to address discrimination on all grounds, including sexual orientation.

3.2.3 Legal status of transgender people

China

In 2003, a circular issued jointly by the Supreme People's Court and the Ministry of Health established the procedure for transgender people to change their gender designation in

¹²⁵ *Leung T.C. William Roy v. Secretary of Justice* [2006] 4 HKLRD 211.

¹²⁶ School textbooks to introduce gay topics from 2011: Taiwan's Ministry of Education. 8 March 2010 *fridae.com* <http://fridae.com/newsfeatures/2010/03/08/9717>; the *Employment Services Act 1992* was amended in 2007 to include sexual orientation as a prohibited ground of discrimination.

¹²⁷ Mongolian LGBT Centre NGO and the Sexual Rights Initiative (2010) *Report on Mongolia – Ninth Round of the Universal Periodic Review*.

¹²⁸ Article 2(4) of the *National Human Rights Commission Act* states that no individual is to be discriminated against on the basis of sexual orientation.

their household registry and marry a person of their previous sex.¹²⁹ The government of China has adopted policies that grant transgender citizens civil rights under the law, allow them to change their identification cards, and legally recognize marriage after sex reassignment surgery.

Hong Kong SAR (China)

The government provides funding for sex reassignment procedures through the Gender Reassignment Programme. Transgender people who have had sex reassignment may apply to the Immigration Department to have their identity card changed and for a replacement Hong Kong SAR passport. Unlike in the rest of China, Hong Kong SAR law does not permit post-operative transgender people to marry a person of their previous sex, because the law requires marriage to be between different sexes and transgender people are unable to change the sex recorded on their birth certificate.¹³⁰

Japan

Act Regarding Special Provisions for the Treatment of the Gender of Persons with Gender Identity Disorder 2008 provides that the Family Court may change the legal sex of a person with gender identity disorder. Transgender people who have gone through reassignment surgery can apply to change their legal sex.

South Korea

In the case of *In re Change of Name and Correction of Family Register* (2004), the Supreme Court of South Korea held that the country's statutory scheme and the Constitution of South Korea require the government to legally recognize the change of sex of certain transgender persons. The majority of judges stated: "a transsexual has the right to enjoy the dignity and value of a human being, to seek happiness and to lead a humane life."¹³¹ The Supreme Court held that transgender people who had undergone successful sex reassignment surgery have the right to declare themselves in their new sex in all legal documents. This includes the right to request a correction of their sex in government records such as the census registry.

In 2007, the National Human Rights Commission of Korea held a seminar on the human rights of transgender persons in order to gather advice from experts and transgender petitioners who filed complaints requesting that their official documents be changed to reflect their gender identity. The petitioners called for the revision of *Supreme Court Administrative Guideline No.716*, which only allows people who have undergone sexual reassignment surgery, reached legal age and have no children to change their official documentation. This seminar laid the ground for a review of the Supreme Court guidelines to ensure consistency with constitutional rights.¹³²

129 Sanders D. (2006). *Health and Rights: Human Rights and Interventions for Males Who Have Sex with Males. Background Paper to Risks and Responsibilities Consultation, Delhi, 23-26 September 2006* p.31.

130 Emerton R., Country report: Hong Kong legal issues *TransgenderASIA*, University of Hong Kong website http://web.hku.hk/~sjwinter/TransgenderASIA/country_report_hk_legal.htm

131 *In re Change of Name and Correction of Family Register*, 2004 Seu 42 (S. Kor., June 22, 2006); available at http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.htm; see Lau H (2008) Sexual Orientation and Gender Identity: American Law in Light of East Asian Developments 31 *Harvard Journal of Law & Gender* 67.

132 See South Korea country paper on APF website: http://www.asiapacificforum.net/issues/sexual_orientation.

3.2.4 Other laws

Same-sex relationships

Until 2009, there were no laws giving legal recognition to same-sex relationships in East Asia. In 2009, a law introduced by Hong Kong SAR allows victims of domestic violence in same-sex cohabitation relationships to seek legal remedies to prohibit perpetrators of violence from entering or remaining in their residences. Legislators reached consensus only after the government agreed to rename the law *Domestic and Cohabitation Relationships Violence Ordinance*, so as not to be perceived to be conferring any marriage-like legal status to same-sex relationships.¹³³

China

(i) Media censorship

China's state-controlled media has often referred to homosexuality as one of three "social evils" contributing to the early spread of HIV in China.¹³⁴ Media regulations and censorship laws define homosexuality as 'abnormal' and fail to differentiate between sexually explicit and non-explicit gay content. Homosexuality is dealt with in the sections of regulations that deal with criminal sexual activity, such as rape and sex work. This contributes to reluctance of film-makers and the media to include positive LGBT content. With few exceptions, MSM and transgender people are portrayed negatively in public media and at cultural events.

In the past, there has been censorship of HIV prevention materials and restrictions on HIV activists. In 2005, Human Rights Watch published reports of censorship of some websites offering HIV prevention and health promotion information to MSM and transgender people.¹³⁵ The internet is an important source of information for MSM in China. Given the stigma associated with homosexuality, the internet offers an anonymous medium for accessing information about health and sexuality. Government regulation of pornographic materials on the internet includes gay social networking websites with images considered pornographic.

The internet is governed by legislation, regulations and official guidelines. National regulations, including the *Methods for the Management of Computer Information Network International Internet Safety Protection*, forbid the publication of obscene or sexual information. The *Regulations on Management of Publishing* prohibit the publication of obscene materials. These regulations do not define what is obscene, and in practice, local authorities have wide discretion in how they implement these regulations.¹³⁶ Regulations, such as *Regulation on Banning the Transmission of Pornography and Obscene Information Online 2004* issued by the Internet Society of China, define homosexuality in terms of an abnormal sexuality and restrict the diffusion of pornographic gay content.¹³⁷

One of the few regulations to define the term "obscene" is the *Temporary Regulations on the Establishment of Obscene and Sexual Publications 1988*. Article 6 states that material may be considered obscene if it includes: "Perverted and specific descriptions of homosexual

133 Hong Kong's domestic violence law to cover gay partners after year-long battle. 18 December 2009 fridae.com.

134 Settle E. (2003) *AIDS in China: Annotated Chronology 1985 – 2003*. Monterey: China AIDS Survey, p. 22.

135 David S. (2005) *Restrictions on AIDS Activists in China* New York: Human Rights Watch.

136 *Ibid.* p.37.

137 Mountford T. (2009) *op cit.* fn.112, p15.

sexual behavior or other abnormal behavior, or specific descriptions of abnormal energy, ill-treatment, or humiliating behavior.”¹³⁸

The *Film Censorship Regulation* 1997 states: “If the content [of the programme] includes individual scenes, language or plotlines about the following types of content it should be corrected and cut.” This is stated to apply to: “any portrayal in detail of pornography, rape, prostitution or homosexuality.” (Article 10)¹³⁹

In 2004, an *Official Notice on Ensuring that Broadcasting Strengthens and Corrects the Moral Character of Adolescents* was issued. Article 15 of the Official Notice states:

Any pornographic details, licentious scenes or lewd language should be prevented from inclusion in broadcasts... This certainly includes a prohibition against the promotion of any unhealthy content that is against normal morals. As for unhealthy sexual content such as the promotion of sexual freedom, promiscuity and sexual enjoyment together with language, scenes and plots about homosexuality, all of the above should be cut.¹⁴⁰

Progress has been made with the media in China. In 2009, *China Daily*, the government’s official English language paper, highlighted the contributions to society by Chinese gay rights activists, academics and parents of gay men during their 60th Anniversary Edition.¹⁴¹

(iii) NGO registration

To register as an organization, the law requires an NGO to obtain the approval of administrative authorities above county level. For HIV and MSM groups, approval of the Ministry of Health, Center for Disease Control is required at provincial level. Secondly, approval of the local civil affairs administration is required. This double-management system acts as a barrier to NGOs registering their organizations. NGOs have reported that volunteers working for MSM and transgender NGOs are not provided with identity documents by officials so that they can be identified when they conduct outreach work. Volunteers require proof of their role as outreach workers so that they avoid police harassment and can seek assistance if required when working in dangerous environments.

South Korea (Republic of Korea)

Internet censorship

The *Youth Protection Law* of 1997 was introduced to regulate media available to young people. Under the law, a list of “harmful” matters included “things promoting perverted sexual acts such as bestiality, group sex, incest, homosexuality, sado-masochism.” The Commission on Youth Protection developed a list of websites to be blocked, including a number of gay websites. Korean LGBT organizations protested the censorship and formed the Lesbian and Gay Alliance Against Discrimination. Amnesty International considered the blanket censorship of gay and lesbian websites as a violation of the fundamental human rights of individuals to be protected against all forms of discrimination, as guaranteed by the South Korean Constitution.

138 David S. (2005) *op cit* fn.135, p.38.

139 Mountford T. (2009) *op cit* fn 112. p.10.

140 *Ibid*.p.11.

141 China Daily (2009) http://www.chinadaily.com.cn/60th/2009-09/30/content_8752413.htm.

In 2001, the owner of Exzone.com, the country's first and largest gay website, was threatened with two years' imprisonment unless he immediately labelled Exzone a "harmful site" and blocked access to young people. The Lesbian and Gay Alliance Against Discrimination filed a lawsuit against the government censorship, arguing that it was a violation of constitutional rights (*Exzone.com Case*). A judge upheld the censorship of Exzone in 2002. The National Human Rights Commission of Korea looked at the issue and concluded that the censorship was a violation of human rights. This conclusion was not binding on the government, but the government accepted the Commission's conclusions.¹⁴²

Refugee status

In 2010, the Administrative Court of Seoul granted refugee status to a homosexual man on the grounds of a well-founded fear of persecution due to his homosexuality should he return to Pakistan, his country of origin. This decision is subject to Supreme Court review.¹⁴³

Hong Kong SAR: Decriminalization is only the first step

Johannes M.M. Chan SC, Dean of the Faculty of Law of the University of Hong Kong: Welcoming address to the High Level Dialogue–Punitive Laws, Human Rights and HIV prevention among men who have sex with men in Asia Pacific, Hong Kong, 17 May 2010.

...Why should someone's dignity and ability be judged by his or her sexual preference, and why should one's career be determined by other people's prejudice, ignorance and stigmatization?

....a review of the law by the Law Reform Commission recommended in 1983 the decriminalization of homosexual conduct in private between two consenting adults. The Report is interesting in that apart from a comparative jurisprudential study, it also approached the issue from medical and cultural perspectives. It found that homosexual activities were not an evil of the West. They existed and were well documented in classical literature in ancient China back to 3,000 years ago. They were indeed quite open and prevalent in the Tang Dynasty, which was about 1,000 years ago. There is nothing foreign about homosexual conduct; instead, it exists in all cultures and societies at all times. Yet it still took the Government three attempts and a decade before the law was successfully reformed in the mid-nineties of the last century.

Yet decriminalization is only the first step. It does not address prejudice, discrimination, harassment, selective enforcement of law, access to service and justice, protection, and finally, acceptance and recognition. These are complex issues involving law, religion, morality, dignity and culture.

¹⁴² Sanders D. (2006) *op cit.* fn.129, p.39. and see: <http://www.utopia-asia.com/tipskor.htm>.

¹⁴³ Ji-Sook Bae. Homosexual's refugee status recognized. *Korea Times*. 3 January 2010.

3.3 Actions taken to improve the legal environment

3.3.1 Community

China

There are around 300 MSM NGOs and CBOs in China operating in all provinces and most autonomous regions. Most of these organizations focus on service provision rather than advocacy. In 2008, the China Male *Tongzhi* Health Forum, a national MSM advocacy body, was established by 20 key MSM NGOs to focus on policy and advocacy, with support from UNDP. MSM CBOs agreed upon the Forum's establishment during the first China MSM Community Against HIV/AIDS Strategy Discussion Meeting, held in Nanjing on July 10–13, 2008. In 2010, the number of CBO members had grown to 78. The Forum conducts advocacy and capacity building for NGOs and CBOs, including organizations of people living with HIV. The China Male *Tongzhi* Health Forum is guided by a board consisting of CBOs, people living with HIV, and owners of gay entertainment establishments. The National Center for STD/AIDS Control and Prevention and academic institutes are represented on the Forum as advisors. Currently, civil society is represented by an MSM representative on the Global Fund CCM.

Mongolia

The LGBT Center of Mongolia was registered in 2009. In addition to offering peer support and counselling, the Center aims to advocate for anti-discrimination and hate-crime legislation, the provision of legal counseling and legal representation and work with the judiciary on LGBT advocacy.

3.3.2 Government

China

In 2005, China's Ministry of Health identified MSM as a high risk population.¹⁴⁴ In 2006, national Technical Guidelines for the Control of HIV/AIDS among and from MSM were developed by the Ministry of Health and community groups, with support from UNDP and WHO. National consultations with MSM communities were held in 2005 and 2007. The China National Centre for HIV/AIDS developed a *China MSM HIV Prevention and Control Framework* with the participation of MSM CBOs in 2008. Since 2007, the Government has been implementing a national programme involving 61 cities to systematically collect epidemiological information which is then used to inform local MSM prevention and care projects.¹⁴⁵ Although there has been strong progress addressing policy for MSM and HIV, there has been very little attention to the need for specific policy and programme responses for transgender people.

3.3.3 Donors and multilateral agencies

UN agencies

Since 2006, UNDP Asia Pacific Regional Center has provided guidance and direct technical support to country offices to design and implement rights-based MSM and HIV programming.

144 Settle E. (2003) *op cit* f.n.134.

145 WHO (2009) *Technical Consultation on Health Sector Response to HIV/AIDS among MSM held in Hong Kong from 18-21 February 2009*, WHO, p.10.

In China, this support enabled the formation of the China Male *Tongzhi* Health Forum, and the community's participation in the development of the *China MSM HIV Prevention and Control Framework*. In support of this process, UNDP China convened a Working Group on MSM and HIV/AIDS in 2006–2008, with the aim to increase the involvement of CBOs in policy development, and programme design, implementation and monitoring. The MSM Technical Working Group mechanism established by UNDP China was restored in 2010 in partnership with WHO and Bill & Melinda Gates Foundation, based in Beijing.

Donors

The Global Fund and the Bill & Melinda Gates Foundation have supported prevention, care and support activities with MSM communities through local Centers for Disease Control and the Chinese Association of STD/AIDS Control and Prevention. The Canadian International Development Agency (CIDA) HIV/AIDS Small Grants Programme supported the Canadian HIV/AIDS Legal Network to provide technical assistance to Chinese organizations to provide MSM with information on AIDS and human rights. In 2009, the Foundation for AIDS Research (*amfAR*) provided a grant to the China Male *Tongzhi* Health Forum to support access to legal aid for MSM in seven Chinese cities.

3.4 Conclusions

The legal and social environment for MSM and transgender people has become gradually less repressive in the East Asian sub-region since the 1990s. The judgments of the Court of Appeal of Hong Kong SAR (on equal age of consent, and consensual sex in public) and of the Supreme Court of South Korea (on transgender recognition) are highly significant in recognizing that constitutional protections of rights extend to MSM and transgender people. There has also been some progress in relation to legal recognition of transgender status in China, Hong Kong SAR and Japan, although transgender status is still considered a disorder.

Legal protections from discrimination in Hong Kong SAR and Taiwan provide useful models for other jurisdictions. South Korean legislation provides a right to non-discrimination on the grounds of sexual orientation, but the law does not provide a strong mechanism for enforcement or redress. As yet, there are no anti-discrimination protections for transgender people in East Asia.

China is providing leadership nationally and to the sub-region in developing, resourcing and implementing the *National Strategic Plan on MSM and HIV*. Additional measures to ensure that the law and justice sector acts in support of this *National Strategic Plan* would be beneficial to the HIV response. Furthermore, programmes to educate, sensitize and engage public security officers and police should be formulated and linked to the *National Strategic Plan*. Enactment of anti-discrimination laws relating to sexual orientation and transgender status would support implementation of the *National Strategic Plan*.

In China, the legal position of homosexual conduct remains unclear and legal protections from discrimination and vilification are absent. Internet restrictions and lack of consistent positive coverage of MSM and transgender people in the media contribute to continuing ignorance, stigma and discrimination. Relaxation of regulatory constraints to publication of positive portrayals of homosexuality would greatly improve the environment for HIV responses.

4 South East Asia

4.1 Overview

The South East Asian sub-region encompasses countries with common law, civil law and *Sharia* law traditions. Four countries of the sub-region have criminal sanctions for consensual sex between adult men (Brunei, Malaysia, Myanmar and Singapore). These countries have common law legal systems that were introduced during the British colonial era.

Sharia law, which is applied in Brunei, Malaysia and parts of Indonesia, also criminalizes the behaviors of MSM and transgender people.¹⁴⁶

No laws specifically prohibit male-to-male sex between consenting adults in Cambodia, Lao PDR, Vietnam or Philippines, all of which have legal systems significantly influenced by civil law traditions. The three former French colonies were the beneficiaries of the removal of sodomy offences from the law of France by the codifiers of the *French Penal Code* in 1806. This affected the laws of colonies, protectorates and other nations whose legal systems were influenced by civil law. However, evidence suggests there is police action targeting some MSM and transgender people, particularly those who are also sex workers.

The effect of legal environments on HIV responses is varied across the region. There are examples of law enforcement practices that significantly impede HIV prevention. In some countries (e.g. Cambodia, Malaysia, Indonesia) there are reports of police harassment of MSM and transgender people, including some allegations of violence and abuse perpetrated by police.

4.2 Laws affecting HIV responses among MSM and transgender people

4.2.1 Criminal laws and police practices

Country/ Territory/SAR	Legality of male-to-male sex	Applicable laws
Brunei	Illegal	<i>Penal Code</i> Section 377. Carnal intercourse against the order of nature. Penalty: fine or prison sentence up to 10 years. <i>Sharia</i> law also operates, which criminalizes sexual relations between male persons (<i>Liwat</i>).
Cambodia	Legal	
Indonesia	Legal	Legal, except in provinces or districts that have enacted local laws based on <i>Sharia</i> law (e.g. South Sumatra Province).

¹⁴⁶ A codified form of *Sharia* law also operates in some districts of Mindanao, Philippines, which is understood not to criminalize homosexual conduct.

Country/ Territory/SAR	Legality of male-to-male sex	Applicable laws
Lao PDR	Legal	
Malaysia	Illegal	<i>Penal Code</i> Section 377A. Carnal intercourse against the order of nature. Punishment: whipping and up to 20 years imprisonment. For less serious acts, Section 377D criminalizes “gross indecency”, maximum penalty two years in prison. State-level <i>Sharia</i> law operates to criminalize sexual relations between males (<i>Liwat</i>) e.g. Section 82 <i>Syariah Criminal Offences Enactment 1995</i> (Sabah); Section 25 <i>Syariah Criminal Offences (Federal Territories) Act 1997</i> ; <i>Syariah Criminal Offences (State of Penang) 1996</i> . Penalty: imprisonment for a term not exceeding three years or whipping not exceeding six strokes.
Myanmar	Illegal	Illegal. <i>Penal Code 1860</i> Section 377. Carnal intercourse against the order of nature. Penalty: up to 10 years imprisonment.
Philippines	Legal	Legal since 1823.
Singapore	Illegal	<i>Penal Code</i> Section 377A. Act of gross indecency by male with another male person. Since 2007, police do not proactively enforce the provision.
Thailand	Legal	Legal since 1956. Sex between men was criminalized from the early 1900s until 1956.
Timor-Leste	Legal	Legal since 1975.
Vietnam	Legal	

Table 3 Legality of male-to-male sex in South East Asia

Cambodia

In Cambodia, there is a history of allegations of police abuses targeting transgender sex workers. A study conducted among a sample of 1,000 female and transgender sex workers in 2004 in Phnom Penh found that approximately half of those surveyed reported being beaten by police. Harassment of HIV outreach workers was reported by 15 percent of *srey sraos* (transgender sex workers). 86.8 percent of female freelance sex workers and 90.8 percent of *srey sraos* reported that they have been raped in the past year. 41.8 percent of sex workers reported being raped by police in the past year.¹⁴⁷

Cambodia's *Law on the Suppression of Human Trafficking and Sexual Exploitation* (2008) has reportedly been used to harass and assault male, transgender and female sex workers, and to extort payments in exchange for release from detention. In enforcing the law, police reportedly confiscated condoms as evidence of sex work. NGOs and UN agencies expressed concern that the widespread police crackdown on the sex industry in Cambodia in 2008 resulted in sex workers being driven into a hidden, illegal and unsafe sex industry. The United Nations Country Team in Cambodia called for a pragmatic approach to the implementation of the anti-trafficking law where individuals (both female and male) are able to carry condoms

¹⁴⁷ Jenkins C., Cambodian Prostitutes' Union (CPU), Women's Network for Unity (WNU), Sainsbur C. (2008) *Violence and exposure to HIV among sex workers in Phnom Penh, Cambodia* Washington: POLICY Project USAID.

without threat, extortion, or arrest.¹⁴⁸ Sex workers who were detained in the 2008 police crackdowns alleged rape by guards and other prisoners, beatings, deaths in custody and bodies left among inmates, lack of medication or medical care. Documentation of one case reported:

A transgender sex worker was arrested and put into the (rehabilitation) center. She was able to escape from the center when another woman died after being raped and beaten until she died.¹⁴⁹

Indonesia

In Indonesia, the overall social and political climate is generally improving for MSM and transgender people. However, the situation is complex due to the devolution of law-making powers to provinces and districts in the context of cultural diversity. This has resulted in confusion regarding the extent of the authority of different levels of government to enact laws and regulations. Some local regulations appear to conflict with the *Constitution of the Republic of Indonesia* and international conventions ratified by Indonesia. This situation is felt strongly in Aceh Province, which has special autonomy and has enacted *Sharia* laws. However, at the provincial and district level there are examples of draconian laws and regulations that have been proposed or introduced and of selective policing targeting MSM and transgender people. *Sharia*-based laws, such as those proposed in Aceh Province and enacted in South Sumatra, create an intimidating atmosphere for MSM working in CBOs involved in HIV prevention and care.

The International Gay and Lesbian Human Rights Commission reported the following as the situation in 2007:¹⁵⁰

... the Indonesian police regularly interpret laws concerning sex work as applying to homosexuality and transgenderism, something that is not challenged or corrected by the government. Arbitrary harassment, summary arrest and detention of waria and gay men by the police are common-place occurrences. In Indonesia, gay men and waria in particular, tend to assemble in public areas such as parks and roadsides. Often arrests occur in such places on the pretext of being violations of the Public Disturbance Law. As Arus Pelangi staff member Widodo Budi Darmo attests, "Many LGBT people are arrested and detained, often without charges or clear reason, only to be released after a few days."

The NGO GAYa NUSANTARA reports violence perpetrated by municipal police at transgender people's gathering places.¹⁵¹ It is common practice for municipal police to conduct "clean-up" operations in public places such as parks, squares and major streets to remove homeless people and street-based sex workers. Transgender people (*waria*), some of whom sell sex, are often targeted together with female sex workers. During clean-ups, the municipal police have reportedly used physical violence and verbal abuse, including sexual molestation of *waria*. In

148 UNAIDS (2008) *Joint Statement from the United Nations Country Team*. 1 December 2008. Phnom Penh. <http://www.un.org.kh/>.

149 Overs C. (2008) *Caught Between the Tiger and the Crocodile: The Campaign to Suppress Human Trafficking and Sexual Exploitation in Cambodia*, Asia Pacific Network of Sex Workers.

150 International Gay and Lesbian Human Rights Commission (2007) *Human Rights Abuses Against Sexual Minorities in Indonesia*. <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/336.html>.

151 Dédé Oetomo, personal communication, February 2010.

many cases, *waria* are released only after payment of money without an official receipt. This police conduct is disruptive to HIV outreach workers and peer educators.

The NGOs Arus Pelangi and the Community Legal Aid Institute have documented cases of police abuse and violence towards *waria* in Jakarta. In 2009, a transgender sex worker claimed she was subjected to violence and abuse, and detained in solitary confinement. The Community Legal Aid Institute stated that this case “is only one of many examples of torture frequently experienced by transgender people”.¹⁵²

The Province of South Sumatra passed by-laws against sex work in 2004. The *Perda on Eradication of Prostitution* (by-law) states that prostitution is defined as an act committed on purpose by any individual or a group with the intention to seek sexual pleasure outside legal marriage with or without receiving gratification, either in the form of money or in other forms. The acts of ‘prostitution’ are defined to include homosexual acts and sodomy.¹⁵³

In September 2009, the legislature of Aceh passed the *Qanun Jinayat* (Islamic Criminal Law). Article 33 of the proposed law provides for penalties for homosexual acts of 100 lashes, a fine of 100 grams of gold or eight months imprisonment. The Ordinance was enacted by the Aceh Legislative Council. Approval from the Governor of Aceh is mandatory before a provincial law can be formally enacted. Once the *Qanun* Bill has been accepted by the Governor of Aceh, it remains subject to the final endorsement of the Minister of Home Affairs of the national government as a prerequisite to entering into force. The local Governor has not endorsed the bill and has suggested revisions.¹⁵⁴ It has been reported that human rights organizations are seeking to challenge the validity of the *Qanun Jinayat* in the Constitutional Court.¹⁵⁵

Despite the lack of confirmation of the *Qanun Jinayat*, there are reports of *Sharia* police harassing sexual minorities in Aceh. *Sharia* police reportedly harass transgender people who work at beauty parlours, on the grounds that *Sharia* law prohibits men working in female environments.¹⁵⁶

In March 2010, the Asia Conference of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), scheduled to be held in Surabaya, was cancelled due to threats from radical Islamic groups.¹⁵⁷ The conference organizing committee had obtained a police permit to hold the conference. The permit was withdrawn on the grounds that attacks by Islamic groups were anticipated. The police claimed that they were unable to guarantee the safety of the conference participants. Islamic groups protested at the hotel where people intending to attend the conference were staying, harassing participants who were forced to take refuge for fear of violence.

152 Gunawan R. (2009) *Indonesian police torture must be stopped* http://www.upiasia.com/Human_Rights/2009/11/04/indonesian_police_torture_must_be_stopped/8862/

153 *Regional Regulation of the City of Palembang (South Sumatra); No.2/2004: Eradication of Prostitution* see: International Gay and Lesbian Human Rights Commission (2007) *Human Rights Abuses Against Sexual Minorities in Indonesia* Appendix A.

154 *Report of the Special Rapporteur on freedom of religion or belief: Summary of cases transmitted to Governments and replies received*, Human Rights Council, Thirteenth session 16 February 2010 A/HRC/13/40/Add.1 at p.33.

155 Mustika M. (2010) Give Aceh a Chance: How to Struggle Against the *Qanun Jinayat*, *Coalition for Sexual and Bodily Rights in Muslim Societies (CSBR) E-News* 4(1) Spring 2010, p.6.

156 Homosexuals battle medieval bylaw *Jakarta Post* 21 January 2010.

157 Liang J. (2010). Homophobia on the Rise. *Inside Indonesia* 100 April-June 2010.

In April 2010, Islamic Defenders Front interrupted a three-day human rights training workshop for *waria*. The event was organized by the National Human Rights Commission. Islamic Defenders Front members reportedly stormed the hotel where the workshop was being held, destroyed property and assaulted participants. Orders were given by local public security officials for the Commission to stop the event and move to another venue.¹⁵⁸

Lao PDR

Homosexual conduct is not criminalized. Little work has been done to assess the status of MSM and transgender people in Lao PDR. Discrimination is a concern for MSM, many of whom hide their sexual orientation.¹⁵⁹ One research study observed there to be social acceptance of gender variance, with low levels of discrimination against transgender people (*kathoey*).¹⁶⁰

Malaysia

There have been a number of prosecutions for sodomy in the last decade, before which Section 377A of the *Penal Code* was not commonly enforced.¹⁶¹ The legal environment for MSM and transgender people in Malaysia is considered to have become more punitive over the last decade, with adverse consequences for HIV prevention and peer support services. Media coverage of prosecutions has contributed to a climate in which MSM fear public visibility. While prosecutions for sodomy generally only occur in exceptional circumstances, police harassment of MSM and transgender people is frequently reported and there have been a number of prosecutions for gross indecency. There have been documented incidents of police harassment of MSM in public parks and police raids of social venues over the last decade.¹⁶² There are reports of harassment and abuse of transgender people when detained by police. Some report that they have been victims of sexual violence by police.¹⁶³

Human Rights Watch reported in 2002 that government inspectors forced some HIV prevention groups in Malaysia to stop distributing condoms.¹⁶⁴ In 2006 it was reported that business licensing board inspectors forced gyms, spas and massage businesses to remove condoms provided by the PT Foundation, an HIV NGO.

In 2008, police raided four venues in Penang State and detained 70 men. Charges were laid for acts of gross indecency under Section 377D of the *Penal Code*. Police seized lubricants and boxes of condoms.¹⁶⁵ In 2007, police in Kuala Lumpur charged 37 men with gross indecency after a raid on a sex club.¹⁶⁶ In 2010, Section 377D was used to justify detention of six men in

158 *Ibid.*; Suryakusuma, J. (2010) Stop in the Name of Love *The Jakarta Post*, 5 May 2010.

159 See: Center for HIV/AIDS and STIs and UNAIDS (2006) *Lao PDR Country Report to Risks and Responsibilities Consultation*, http://www.nfi.net/downloads/Risks_Responsibilities/Country%20Reports/Laos.pdf.

160 Doussantousse S., Keovongchit B. (2005) *Male Sexual Health: Kathoeyes in the Lao PDR, South East Asia—Exploring a gender minority* Australian National University

161 The prosecution of the prominent opposition politician Anwar Ibrahim and others connected with him for homosexual acts is considered to have been a departure from ordinary prosecution practices.

162 Williams W. (2009) Strategies for Challenging Homophobia in Islamic Malaysia and Secular China. *Nebula* 6, March 2009, 1, at 12, <http://www.nobleworld.biz/images/Williams.pdf>

163 Immigration and Refugee Board of Canada (2005). *Malaysia: Treatment of sexual minorities*. August 2004–August 2005.

164 Human Rights Watch (2002) *World Report 2002: Special Issues and Campaigns*. New York: Human Rights Watch.

165 Shukla S. (2008) *Malaysian police detain 70 in gay sex party raids* <http://www.topnews.in/law/malaysian-police-detain-70-gay-sex-party-raids>.

166 *Penang police arrest 37 men at "sex party"*. Fridae.com, 6 Nov 2007. <http://fridae.com/newsfeatures/2007/11/06/1933>.

a raid of a fitness center in Penang, and 25 men who were detained in a raid on two massage centers in Kuala Lumpur.¹⁶⁷

Those arrested are generally detained overnight by the police and released the next day. Though NGOs working on MSM issues confirm that very few prosecutions actually result in convictions or are even brought to trial on charges of sodomy, these arrests are seen as a form of harassment. The fears of being arrested, and the use of condoms and lubricants as evidence, make men reluctant to keep them on their persons during their visits. Owners of spas and massage parlours are also discouraged from keeping condoms and lubricants at their premises for fear of them being used as evidence of “illegal activities” and thus losing their business licences.

Transgender persons (*mak nyah*) have been detained and prosecuted under the *Minor Offences Act 1955* for “indecent behavior” and often *Sharia* law has been applied to Muslim citizens to punish cross-dressing with fines. *Sharia* law is recognized in the states of Malaysia as a personal law applying exclusively to Muslims and applied by ‘Syariah’ courts. Offences are defined by the *Syariah Criminal Code Enactment* to include offences for male-to-male sex and cross-dressing. In 1983, the Conference of Rulers in Malaysia decided that a *fatwa* prohibiting sex change operations should be imposed on all Muslims, with the exception of hermaphrodites. Cross-dressing is also prohibited by *fatwa*. Thus, Muslim *mak nyahs* could be charged in the Syariah Court for violating the tenets of Islam. Muslim surgeons are also prohibited from carrying out sex-change operations.

A survey of 507 *mak nyahs* across Malaysia in 2000 found more than half of *mak nyahs* were involved in the sex industry and 55.2 percent of the respondents had been arrested by the police at least once. They were arrested and charged under the *Minor Offences Act 1955* for cross-dressing which is interpreted as indecent behavior. Most of them pleaded guilty and paid a fine. Those found to have reoffended may be given a three-month jail term. 70 percent of the respondents who had been arrested said they were forced to strip before other people in the lock-up. 20 percent said they had been asked to expose their breasts and genitals.¹⁶⁸

Myanmar

Sodomy is an offence and police use public order laws against MSM suspected of involvement in sex work. Little information is available about law enforcement practices or the effect of the law on HIV responses. In 2007, a man was sentenced to seven years in prison for committing homosexual acts.¹⁶⁹

In 2008, the *3rd National MSM Consultation and Capacity Building Meeting in Myanmar* reported that HIV behaviour change communication cannot be explicit because of government censorship policies and laws. The meeting recommended that advocacy work occur with the government and police, and that censorship rules be changed to enable provision of sexual health information. In relation to male sex workers, the meeting recommended that

¹⁶⁷ *Gay massage, fitness centres in Penang, Kuala Lumpur raided*, Fridae.com 24 May 2010.

¹⁶⁸ Ong Ju Lynn (2000) Misconception About Transsexuals *The Star*, 2 October 2000; Refugee Review Tribunal (2009) *Research Response: information regarding the treatment of transsexual persons in Malaysia*. Refugee Review Tribunal of Australia.

¹⁶⁹ Mon Mon Myat (2010) *Burma: HIV Infection on the Rise Among Men Who Have Sex with Men* Inter Press Service, 2 June 2010.

advocacy occur with law enforcement agencies and personnel to reduce levels of harassment and abuse, including male-on-male rape and sexual violence.¹⁷⁰

In 2010, *Bi-Weekly Eleven*, a popular national news journal, published an article quoting a former psychology professor who claimed homosexuality can cause mental illness and encourages sexual crimes.¹⁷¹

Philippines¹⁷²

Philippines does not criminalize male-to-male sex, however police harassment of MSM and transgender people occurs. Laws being used by police to harass MSM and transgender people include the anti-vagrancy and anti-sex work laws (*Revised Penal Code* Article 202), anti-public scandal law (*Revised Penal Code* Article 200), the *Anti-Trafficking in Persons Act* and laws that pertain to moral turpitude. The vagueness of some of these laws enables some law enforcement personnel to threaten prosecution for sexual conduct, and to harass or extort money from MSM and transgender people.

The anti-vagrancy law was established so that the authorities could provide shelter to vagrants, but is used by some police to detain MSM and transgender people for the purpose of extortion. The anti-public scandal law is used to arrest MSM and transgender people suspected to be having sex in public places. The police usually do not proceed with a prosecution once a payment is made.

Police have used the presence of condoms, used or unused, as evidence to prove that male sex work is encouraged in establishments such as gay clubs, bath houses, movie houses and bars. Condoms as evidence of sex work are used to instigate police raids and threaten MSM and transgender people with criminal charges. The enforcement of these laws creates a climate of stigma. Commercial establishments, such as sex-on-premises venues, find it difficult to take part in safer sex initiatives if it involves the distribution or sale of condoms. Despite the lack of legal basis, the police reportedly continue to use possession of condoms as an excuse for harassment.

The *Anti-Trafficking in Persons Act of 2003 (Republic Act No. 9208)* expanded the definition of prostitution to cover transactional sex between males. Prior to the enactment of the anti-trafficking law, prostitution was a crime committed by females only. Raids in gay venues have used the anti-trafficking law as a basis because its gravity makes it easier for the police to extort money for arrested individuals and owners of establishments accused of facilitating sex work.

Singapore

There were 113 convictions of men for 'outrages on decency' under Section 377A of the *Penal Code* between 2000 and 2006.¹⁷³ There are no cases of police entrapment after 2004.

170 Khan S. (2008) *Living with Dignity – Social Justice for All*, 3rd National MSM Consultation and Capacity Building Meeting in Myanmar PSI Myanmar.

171 Mon Mon Myat (2010) *op cit.* fn.169.

172 This section draws on data provided by Jonas Bagas, personal communication, December 2009.

173 *Official Parliamentary Reports (Hansard)* Government of Singapore, 21 May 2007. http://www.parliament.gov.sg/reports/public/hansard/full/20070521/20070521_HR.html

Cases since 2001 only involve minors or extortion.¹⁷⁴ Section 377, which criminalized carnal knowledge against the order of nature (including buggery), was repealed in 2007.

Section 377A was introduced in 1938 to criminalize non-penetrative sexual acts between men. In 2007, the Prime Minister of Singapore, Hon. Lee Hsien Loong, stated that Section 377A is not actively enforced by Government.¹⁷⁵ Prosecutions for male-to-male sex are also brought under Section 354 *Penal Code* ('molest' or 'outrage of modesty'), Section 294(a) *Penal Code* (doing an obscene act in public) or Section 19 (soliciting in a public place) of the *Miscellaneous Offences (Public Order and Nuisance) Act*.

Roy Chan of the NGO Action for AIDS summarizes the effects of criminalization of male-to-male sex as follows:¹⁷⁶

As a result of the fear of being identified as homosexual, many do not seek timely testing for HIV and delay care, support and treatment for HIV-related illnesses. Delays in diagnosis and counselling increase the risk of onward transmission of infection to others and to poorer clinical outcomes as a result of delayed treatment.

The discomfort with and avoidance of homosexuality in Singapore has resulted in insufficient research into same-sex identity and behaviour...This lack of data has hampered efforts to design effective HIV/AIDS education and prevention programmes for MSM...

It has been very difficult to reach out to young MSM who are contemplating or already having sex. Young MSM are especially at risk of STI including HIV infection because they are less able to access sources of information and advice about safer sexual practices for the following reasons -

- School-based programmes do not have information and materials that discuss homosexuality in an impartial and unbiased manner, including emotions, identity, sexual practices, safer sex techniques and negotiation skills;
- Young MSM may fear seeking professional advice (e.g. from doctors, teachers, youth workers) because to do so would be to admit having committed a crime;
- Support groups and youth organizations for young MSM are practically non-existent; if they do exist they tend to keep a low profile to avoid drawing attention to themselves. Many young MSM will not know of sources of support and peer education;
- MSM venues and clubs operate under clear age-restricted rules to comply with licensing laws. Young MSM are thus not exposed to AIDS education messages and campaigns; young MSM are also less likely to be able to afford the cover charges levied at these clubs and venues. They are also less exposed to the social climate within the organized gay community, which strongly supports "safer sex";
- Young MSM may feel isolated and marginalized and regarded as not part of the broader society due to the criminalization of their sexuality.

174 Sanders D. (2009) 377 and the Unnatural Afterlife of British Colonialism in Asia *Asian Journal of Comparative Law* (4)1 Article 7, p.42.

175 Lee Hsien Loong, Speech on Section 377A, *Official Parliamentary Reports (Hansard)* 23 October 2007. http://www.yawningbread.org/apdx_2007/imp-360.htm.

176 Chan R. (President, Action for AIDS Singapore) (2007) *Sections 377 and 377A of the Penal Code Impact on AIDS Prevention and Control*. <http://www.afa.org.sg/policypapers.php>.

Action for AIDS has on several occasions been asked to stop distributing materials containing information on homosexuality even though these materials were meant specifically for MSM venues and events. The reasons repeatedly given by the authorities were that because homosexual sex is illegal, it cannot be mentioned; therefore providing information on safe sex relevant to MSM is also illegal...

Several police actions targeting venues frequented by MSM have hampered and interrupted HIV prevention programmes. Some venue owners have expressed their fear and concern that the provision of condoms and lubricants in their premises may be used as evidence that they were promoting illegal homosexual sex. The criminal status of homosexual sex has made it very difficult to get all venue owners together and to commit their businesses to adhere to best practice health and safety standards.

Thailand¹⁷⁷

Although male-to-male sex is not criminalized, police practices have been detrimental to HIV prevention. The rapid rise in HIV prevalence among MSM in Bangkok from 2001 to 2006 illustrates the harm to HIV prevention that can be caused by a hostile legal environment. HIV prevalence rose from less than 10 percent in the late 1990s to more than 28 percent by 2006. Police conduct impeded HIV responses during a Social Order Campaign that saw strict policing of bars and saunas. Under the Social Order Campaign, police had the power to harass, threaten with closure and extract bribes from the owners and managers of sex venues. Police harassment effectively forced the removal of condoms at sex-on-premises venues for MSM because, although sex between men is not illegal in Thailand, sex work is illegal and a condom can be used as evidence of sex work.

In 2004, owners of gay saunas in Bangkok removed condoms from their businesses due to concerns that police would use condoms as evidence for charges of operating commercial sex establishments. UNAIDS intervened to raise the issue with officials from the Ministry of Public Health. Police also reportedly harassed MSM in public cruising sites such as parks in Bangkok, interfering with peer education outreach. Another aspect of the Social Order Campaign was early closure of entertainment venues. A consequence of the early closures was the concentration of young men moving on to parks or illegal sex venues. The effect was to intensify opportunities for sexual encounters in environments where condoms were unavailable. In the context of the government's Social Order Campaign, the Thai Ministry of Public Health faced major hurdles in attempting to change the Interior Ministry policy and the practices of local police.

Vietnam

Homosexuality is not criminalized. However, in 2002, Vietnam's state-run media declared homosexuality a 'social evil' equally harmful as drug use and prostitution, and proposed laws to allow the arrest of gay couples. A report by the Ministry of Labor, War Invalids and Social Affairs stated the behavior of MSM was "associated with HIV and the social evils of prostitution and drug use".¹⁷⁸ MSM generally keep their sexual behaviors hidden, due to stigma and fear of

177 See: Baxter D. (2006) Bangkok's MSM HIV Explosion: Precursor for Asia's Mega-cities? *HIV Australia* 5(2)

178 Vietnam media call homosexuality "Social Evil," vow crackdown *The Body* 19 April 2002 <http://www.thebody.com/content/art22986.html>

discrimination. In 2008, the head of the STD, HIV and AIDS Prevention Center in Hanoi stated “[t]hose who are open about their sexuality cannot even get an ID card or work for public companies”.¹⁷⁹

A national NGO meeting in 2008 reported a lack of support from police and the Department of Social Evils Prevention for a national MSM HIV prevention program. The meeting also reported stigma and discrimination against MSM and transgender people, particularly *bong lo* (feminized men/transgender people), in health and social services.¹⁸⁰ It has been reported that venues for gay men have been closed several times in recent years, and that their managers have been given prison sentences.¹⁸¹

4.2.2 Laws relating to discrimination

Philippines

The decision of the Supreme Court in the *Ang Ladlad Case* (2010) clarified that the provisions of the Constitution relating to equality before the law and non-discrimination extend to LGBT populations (see 4.2.4 below).¹⁸² This may have far-reaching (but as yet untested) implications in terms of challenging discriminatory practices (particularly in government services and the public sector) and application of laws. The *Ang Ladlad Case* established that the Constitutional principle of non-discrimination requires laws of general application relating to elections to be applied equally to all persons, regardless of sexual orientation. Other laws that are applied unequally to homosexual or transgender people can be challenged under the Constitution, although the result of a challenge would depend on the circumstances of the case.

Legislation enacted in 2007 provides legal protection for public social workers from discrimination based on sexual orientation.¹⁸³ Legislation enacted in 1998 prohibits discrimination on the basis of gender or sexual orientation in the Philippines National Police.¹⁸⁴

There are no specific laws against discrimination on the grounds of sexual orientation or gender identity in areas such as health care, education and private sector employment. Schools have discretion to exclude homosexual or transgender students, ban the promotion of condoms and exclude HIV prevention or sexual and reproductive health issues from the curriculum.

There have been numerous attempts to introduce national anti-discrimination laws for sexual orientation and gender identity. In 2008, *House Bill 956 Anti-Discrimination Bill* sought to make unlawful a wide-range of practices and policies that discriminate on the basis of

179 Immigration and Refugee Board of Canada. *Viet Nam: Treatment of homosexuals, including legislation, availability of state protection and support services*. 8 January 2010.

180 Vu Ngoc Bao, *Key Issues in MSM and HIV Programming in Vietnam* Workshop on HIV harm reduction for MSM in Vietnam, Hanoi, 30 October 2008, FHI.

181 Jenkins C. (2006) *op cit.* fn.22, p.6.

182 *Ang Ladlad LGBT Party represented by Danton Remoto v. Commissioner of Elections*, Supreme Court of Philippines at Baguio City, 8 April 2010. <http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/190582.htm>.

183 *An Act Providing for a Magna Carta of Social Workers*, Rep. Act No. 9432, 11 April 2007, Section 17(a).

184 10th Congress of the Philippines. Fifth Special Session, 1998. Republic Act No. 8551: *An Act Providing for the Reform and Reorganization of the Philippine National Police and for Other Purposes*, Section 59.

sexual orientation and gender identity. The *Anti-Discrimination Bill* proposed to prohibit discrimination in the workplace, educational institutions, health centers, commercial establishment, police force and the military.

Timor-Leste

The *Labour Code* protects against discrimination on the basis of sexual orientation and HIV status.¹⁸⁵

Challenging discrimination through political leadership in the Philippines

Statement of Hon. Riza Hontiveros, Akbayan Partylist Representative to House of Representatives, and author of the Anti-Discrimination Bill.

The real problem is the status quo – the fact that we stigmatize sex and sexual relationships between men, the fact we have rendered transgenders as objects of ridicule and as an invisible community, the fact that we still ignore the clamor for equal rights and human dignity from our LGBT community...

Change the status quo and reverse the current situation. A holistic approach is necessary to scale up our response to the spread of HIV. Our response needs to keep up with the spread of virus, and that cannot happen if we continue to treat gays, bisexuals, and TGs as second or third class citizens in our country and if we continue to tolerate abuse and discrimination...

Akbayan has been working closely with the LGBT community to enact the *Anti-Discrimination Bill*, a measure that penalizes discrimination and abuse on the basis of sexual orientation and gender identity. The approval of the bill is a crucial step to remove barriers to safe and healthy outlook towards sex, which is the kind of consciousness that we need in promoting safer sex behavior and scaling up our response to HIV and AIDS. The key is to empower marginalized communities and that cannot happen if they continue to face abuse and discrimination.

(Akbayan Citizens' Action Party is a party-list organization in the Philippines House of Representatives. The *Anti-Discrimination Bill* is yet to receive the political support required for it to become law. Akbayan Citizens' Action Party was the first Philippine political party to integrate LGBT rights into its party platform in the 1990s).

Plenary Address of Hon. Riza Hontiveros, Conference report: M2M 2009: 1st national conference on MSM/TG and HIV, 22-24 July 2009, San Juan, Philippines. UNDP, APCOM, TLF Share Collective Inc., HAIN, Philippine National AIDS Council.

¹⁸⁵ *Labour Code of the Democratic Republic of Timor-Leste*, 2005-2010, Ministry of Labour and Community Reinsertion, Timor-Leste.

4.2.3 Legal status of transgender people

Indonesia

It is possible for inter-sex and post-operative transsexuals to legally change their sex on identity cards. Although a legal mechanism to change sex exists, it requires documentation that many *waria* do not have.¹⁸⁶ *Waria* are often unable to acquire basic legal documentation. The Department of Social Affairs classifies *waria* as mentally handicapped under the national 'cacat law' (*Mentally Disabled Law*). This effectively denies *waria* the right to work or reduces them to working in low-paid jobs in the hidden economy.

Malaysia

Sex reassignment surgery and reassignment therapy are legal in Malaysia, although transgender people cannot change their identity cards to reflect their new gender.¹⁸⁷ Without proper documentation, transgender people face harassment and persecution from the police and religious authorities, are refused employment and are deprived of the right to marry. In 2004, a man who had undergone a sex change and was previously a woman lost his bid to the Ipoh High Court to be legally recognized as a male.¹⁸⁸

Philippines

In general, transgender people in Philippines have no legal right to change their gender on identity documents such as passports and the electoral register. In 2008, the Supreme Court of the Philippines allowed a person to change the name and gender on his birth certificate. This was an exceptional case, since the person was born intersex (with both male and female characteristics). The case may not have been decided in the same way if the person was a transgender person seeking a change of legal gender after reassignment surgery. The Court observed that "sexual development in cases of intersex persons makes the gender classification at birth inconclusive. It is at maturity that the gender of such persons, like the respondent, is fixed".¹⁸⁹

In 2007, the Supreme Court denied the petition of a transsexual to change the entry as to sex and first name recorded by the office of Civil Registrar. The Court said that considering that there is no law recognizing sex reassignment, the determination of a person's sex at the time of birth is immutable. In 2002, Silverio filed a petition for change of his first name and sex in his birth certificate to facilitate marriage to his fiancé. A year before, Silverio had undergone sex reassignment surgery. In 2003, the Regional Trial Court found in Silverio's favour and ordered the Civil Registrar of Manila to change the entries. In 2006, the Court of Appeal set aside the Regional Trial Court decision. In 2007, the Supreme Court upheld the Court of Appeal decision.¹⁹⁰

186 Anderson J. (2009) *Improving Human Rights Protection for Sexual Minorities: Key to effective HIV prevention in Southeast Asia* (unpublished) presented during the Insular Southeast Asia Consultation on Male-to-Male Transmission of HIV, Bali, 4-6 August, 2009 p.18.

187 *Ibid.*

188 Refugee Review Tribunal (2009) *op cit.* fn.168.

189 *Ibid.* p.29, quoting: *Republic of the Philippines v. Jennifer B. Cagandahan*, G.R. No. 166676, 12 Sept. 2008.

190 *Silverio v Republic*, 22 October 2007, GR No. 174689, see: <http://sc.judiciary.gov.ph/news/courtnews%20flash/2007/10/10220703.php/>

Singapore

The *Women's Charter* was amended in 1996 to allow transgender people who have completed their sex reassignment surgery the right to marry someone of the opposite sex. The amendment also added a provision that voids same-sex marriages. In 1973, Singapore legalized sex-reassignment surgery. Government policy allows post-operative transgender people to change their legal sex on their identity cards (but not their birth certificates).¹⁹¹

Thailand

In 2009, regulations were introduced to require male-to-female transgender people to live as women and receive hormone therapy for one year and consult a psychiatrist before a sex-change operation. The regulations ban sex-change operations for under-18s and require 18 to 20 year olds to have parental permission for a sex-change operation.

Winter provides the following summary (as at 2002):

In Thailand *kathoeys* remain legally male, even after sex re-assignment. Their identification cards and passports show them to be male. This leads to all sorts of unfortunate consequences. In school many *kathoeys* will be required to dress as a male and respond to their male name. At university *kathoeys* may be allowed to dress in female uniform for lectures and tutorials, but may be required to dress as male or cut hair for special events (e.g. graduation awards, official visits etc.). In relationships, a *kathoeys* finds that she cannot legally marry a man, though it will almost certainly be a man with whom she enters a relationship. In employment, *kathoeys* commonly experience prejudice and discrimination when trying to get jobs; some employers (large and small) are quite clearly uncomfortable with the prospect of having a *kathoeys* on staff. Finally, *kathoeys* may have difficulty travelling abroad, risking refusal of entry and intrusive questioning and inspection at immigration points in other countries...(There are) isolated reports of harassment and violence towards *kathoeys*, including cases in which the perpetrators were police.¹⁹²

Vietnam

In 2008, a Government Decree was issued to allow sex-change operations in prescribed circumstances.¹⁹³ The Decree allows surgery for hermaphrodites and people born with certain genital abnormalities, but not for people who are physically of one sex and request sex reassignment surgery. The decree does not permit sex-change for those who are already in their original gender, as determined by medical and genetic testing. The Decree ensures the privacy of people who have legally undergone surgery. Reassignment is only legal following approval by government health officials. Those who have been legally sexually reassigned will be provided with a health certificate, which enables them to change birth certificates, marriage licenses and other personal documents.

191 *Transgender people in Singapore* http://en.wikipedia.org/wiki/Transgender_people_in_Singapore#Legal_reform

192 Winter S. (2002) Country report: Thailand *TransgenderASIA*: University of Hong Kong website: http://web.hku.hk/~sjwinter/TransgenderASIA/country_report_thailand.htm.

193 *Vietnam allows some sex change surgeries* 7 August 2008. <http://news.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20080807-81243.html>

4.2.4 Other laws

Indonesia

(i) National legal framework for district support to community-based responses

Presidential Decree No. 75/2006 defines the powers of the National AIDS Commission and the AIDS Commissions operating at the provincial and municipal or district-levels. In some localities, this has provided a framework in which local government health authorities have been able to assist in the development of CBOs that focus on HIV responses for MSM and transgender people.¹⁹⁴ Devolution of legislative powers in Indonesia is resulting in a diversity of local responses to HIV.

(ii) Rape of males

There is no protection against sexual assault or rape for homosexual men. The Indonesian *Penal Code* rape provisions (Art. 285) only protect women.

(iii) Pornography Law

The *Pornography Law of 2008* defines pornography broadly to include any picture, photograph, conversation, body language or other messages through various forms of communication and/or public performance that contain obscenities that violate the norms of morality. Educational materials for HIV prevention and other purposes are not intended to be within the definition of pornography. Nonetheless, there are concerns that this definition is so broad that the law may act as a disincentive to use of explicit images or messages in health promotion materials that relate to homosexuality. Indonesia's Constitutional Court has upheld the validity of the *Anti-Pornography Law*.¹⁹⁵

(iv) Broadcast standards

Guidelines for Broadcast Behavior and Broadcast Program Standards were issued by the Indonesian Broadcast Commission in 2004. Article 49 on Homosexuals/Lesbians states:

Broadcasting institutions can broadcast programmes which report, discuss, or contain a story on homosexuality and lesbian [sic], within the following parameters: the programmes may not promote and depict homosexuality and lesbian as an acceptable practice within society; except for news programmes, those discussing or containing a story on homosexuality and lesbian may only be broadcast between 22.00 to 03.00 hours of the time zone of the broadcasting station.

Transgender people are not mentioned in Article 49. Transgender people are protected from humiliating depiction in Article 51 of the *Guidelines*.

¹⁹⁴ Personal communications, Dédé Oetomo, December 2009.

¹⁹⁵ Sabarini P. (2010), Lesbians face double discrimination, *Jakarta Post* 10 April 2010; Indonesian court upholds anti-pornography bill, *BBC News on-line* 25 March 2010.

Malaysia

Censorship

Strict censorship laws restrict depiction of homosexuality in the media or on films. The *Garis Panduan Penapisan Filem* (Film Censorship Guidelines) discourage positive portrayals of homosexuality.¹⁹⁶ Recent revisions of these guidelines in March 2010 have indicated that depictions of transgender persons (mak nyah) were permissible in films but required that they became “normal” (i.e. heterosexual) in the end or died somewhere in the storyline insinuating a form of divine retribution.

An independent review of HIV prevention for MSM in Kuala Lumpur observed:

While service organizations are needed, the effectiveness of their work is limited by government censorship and control—explicit or implicit—of safer-sex information, particularly that which is targeted at the MSM community. Penal code sections 292, 293, 377A, and possibly others are broadly used to control information about homosexual sex, and effective HIV prevention must speak frankly about sexual activity. Section 292 criminalizes the circulation of “obscene” materials; Section 293 extends and harshens this criminalization around access to these materials of young persons “under the age of twenty years”...

While these laws are rarely used for prosecution, their existence provides government officials the authority to question the dissemination of MSM-targeted safer-sex information, the public distribution of condoms in businesses or elsewhere, and the operation of gay-targeted businesses. One case in point is the difficulty of distributing condoms at gay venues. Business owners fear harassment or adverse repercussions for “publicly announcing” they have a gay clientele by housing MSM-targeted materials.¹⁹⁷

Philippines

Right to equal protection under the law: Registration of political parties

Ang Ladlad, a national advocacy group for the rights of LGBT people, applied to the Commission on Elections be included in the list of groups that are eligible to be chosen as a sectoral party under the system of representation. The Commission on Elections rejected the application because the group “tolerates immorality which offends religious beliefs”. The Commission’s decision equated homosexuality with immorality as defined by religion, and claimed that Ang Ladlad presented a threat to youth. The Commission invoked Article 201 of the *Revised Penal Code*, which deals with the glorification of criminals, violence in shows, obscene publications, lustful or pornographic exhibitions, claiming that Ang Ladlad espouses doctrines contrary to public morals.

Ang Ladlad filed a petition asking the Supreme Court to review the decision of the Commission on Elections. In 2010, the Supreme Court, in a unanimous decision, directed the Commission on Elections to grant Ang Ladlad’s application for party-list accreditation.¹⁹⁸ The Court held

196 AFP (2010) *It’s ok to be gay in Malaysian movies as long as you go straight* <http://www.news.com.au/entertainment/movies/its-ok-to-be-gay-in-malaysian-movies-as-long-as-you-go-straight/story-e6frfmvr-1225844087894>

197 Scotville C. (2004) *An assessment of HIV prevention work for the MSM population in Kuala Lumpur* p.13. http://www.ptfmalaysia.org/news/MSM/KL_MSM_HIV_prevention_assessment.pdf

198 *Op cit* f.n.182.

that the Constitutional principle of non-discrimination requires that laws of general application relating to elections be applied equally to all persons, regardless of sexual orientation. The Court stated:

From the standpoint of the political process, the lesbian, gay, bisexual, and transgender have the same interest in participating in the party-list system on the same basis as other political parties similarly situated...Hence, laws of general application should apply with equal force to LGBTs, and they deserve to participate in the party-list system on the same basis as other marginalized and under-represented sectors.¹⁹⁹

The Court based its decision on the equal protection clause of the Constitution of the Philippines, which guarantees that no person or class of persons shall be deprived of the same protection of laws which is enjoyed by other persons or other classes in the same place and in like circumstances. Moral disapproval of an unpopular minority was not a legitimate state interest sufficient to require the Court to uphold the Commission's discriminatory application of the law. The Court also regarded the Commission's decision as in violation of the rights of members of Ang Ladlad to freedom of expression and association. The Court recognized that the principle of non-discrimination as it relates to the right to electoral participation established under international human rights law applies in the Philippines.

Singapore

Freedom of assembly and association

While homosexual conduct remains an offence, "a gathering of gays and lesbians may be construed as [an] unlawful assembly".²⁰⁰

Censorship

Singapore's *Free-To-Air Television Programme Code* states as follows:

Broadcasters should bear in mind the importance of the family as the basic unit of society in Singapore. The sanctity of marriage should be respected...Information, themes or subplots on lifestyles such as homosexuality, lesbianism, bisexuality, transsexualism, transvestism, paedophilia and incest should be treated with utmost caution. Their treatment should not in any way promote, justify or glamorise such lifestyles. Explicit depictions of the above should not be broadcast. Programmes on sex education should not ...encourage or promote unnatural sex acts.

In 2008, a TV station was fined for broadcasting a home renovation programme that depicted a homosexual couple in a positive way.²⁰¹

199 *Ibid.* per Delcastillo J. at 14.

200 Wai-Teng Leong L. Singapore. Chapter in: West D., Green R. (1997) *Sociolegal control of Homosexuality*, p.138.

201 Reuters (2008) *Singapore TV fined \$11,000 for pro-gay scene: Paper* <http://www.reuters.com/article/idUSSP2207620080425>.

Vietnam

Condom promotion by outreach workers²⁰²

The *Law on HIV/AIDS Prevention and Control 2006* states that homosexual people will be given priority access to information, education and communication on HIV/AIDS prevention and control (Article 11).

Decree 108 of 2007 on Implementation of Articles of the Law on HIV/AIDS Prevention and Control provides that harm reduction interventions (including provision of free or subsidized condoms and guidance on condom use) are to be provided to MSM and sex workers. The Decree provides for identity cards to be provided to outreach workers including peer communicators and volunteers, and protects peer educators from prosecution if they have notified the People's Committee and police prior to conducting outreach and are carrying their cards. The People's Committee and police are responsible for "creating favorable conditions for programmes and projects to operate and development of the network of condom distribution points in their localities" (Articles 7 and 8).

4.3 Actions taken to improve the legal environment

4.3.1 Community

Sub-regional initiatives

Greater Mekong Sub-region

Purple Sky Network (PSN) is a network of MSM organizations in the Mekong countries. PSN is composed of country and technical working groups from the countries of the Greater Mekong Sub-region (Cambodia, China (Guangxi and Yunnan Provinces), Lao PDR, Myanmar, Thailand, and Vietnam). The goal of PSN is to enhance and strengthen the capacity of these working groups to develop and advocate for programmes and policies for reducing the transmission of HIV among MSM. PSN employs an advocacy officer to represent its members at the national and regional level and to liaise with international organizations.

Insular South East Asia

A Sub-regional Network on HIV and MSM in Insular Southeast Asia was established in 2009 by representatives of organizations working on HIV prevention, treatment, care and support among MSM and transgender people from Indonesia, Malaysia, Philippines, Timor-Leste and Singapore, and representatives of governments, UN agencies and donors. The network will initially focus on improving country-level coordination, and joint advocacy for scaling-up of HIV responses for MSM.

²⁰² Government of Viet Nam (2008) *The Law on HIV/AIDS Prevention and Control 2006 and Decree 108 of 2007 on Implementation of Articles of the Law on HIV/AIDS Prevention and Control*.

National CBOs and networks

Cambodia

In 2006, a national MSM network, Bandanh Chaktomuk, was formed to advocate for equality and promote health and welfare services. UNAIDS reports that capacity building is required as few community leaders have the experience necessary to effectively advocate for MSM. UNAIDS and its partners are working to promote policy and services to fill this gap.

Malaysia

The first Malaysian MSM Network Development meeting was held in 2009. Funded by a Netherlands NGO (Hivos) through APCOM and supported by the Malaysian AIDS Council (MAC), the meeting was attended by MAC Partner Organizations, informal MSM social groups, venue operators, doctors and gay advocates. In collaboration with the Malaysian Bar Council's Legal Aid Clinic, MAC has organized paralegal workshops and training-of-trainers on legal rights for people living with HIV, MSM, transgender people, sex workers and injecting drug users.

Indonesia

The National Network of MSM, *Waria* and Other Stakeholders (GWL-INA) sits on the National AIDS Commission.

Arus Pelangi is the Indonesian Federation of Lesbian, Gay, Bisexual and Transgender Communities. Arus Pelangi campaigns for LGBT issues, with a focus on issues affecting human rights. Arus Pelangi advocates and lobbies with governmental institutions in order to increase the level of formal protection of LGBT people through government policies and the law. Arus Pelangi is involved in advocacy related to legal representation and campaigns for the amendment of discriminatory public policies.

GAYa NUSANTARA is another CBO that conducts advocacy on MSM and *waria* issues.

Indonesian *Waria* Communication Forum (Forum Komunikasi Waria Indonesia–FKWI) advocates for legal recognition of transgender people. In 2009, FKWI reached an agreement with House of Representatives' Commission IX, which oversees citizenship, health, labor and transmigration affairs for protection from discrimination. The Commission asked the manpower minister to pay serious attention to complaints about employment discrimination and has facilitated meetings between ministry officials and *waria* groups.

Indonesia: CBO success in challenging police harassment and violence towards *waria* sex workers

Surabaya

After a spate of violent police operations targeting sex workers in 2008, the Surabaya Association of Waria (Perwakos) approached a local legal aid organization (LBH Kosgoro) and an HIV NGO (Genta Foundation) working with female sex workers for assistance in advocacy with authorities. A meeting was held with officials from Provincial Social Services, regular police officers from different levels (provincial, metropolitan and suburban) and from the municipal police. The result was that police clean-up operations were carried out without physical or sexual violence for some months. However, the violence happened again in 2009, and a similar mediation meeting was facilitated by the same organization with the same institutions, which succeeded in preventing further violence.

Denpasar, Bali

The Ubung area in the eastern part of Denpasar is known to be a *waria* hangout. Many *waria* rent rooms at boarding houses around the bus terminal area. In 2004, there was an attempt by the local ward authorities to force *waria* to leave their boarding houses and move elsewhere. Two officers of GAYa Dewata, an LGBT organization, together with local *waria*, engaged in advocacy with civil administration authorities, especially with social services, starting from the ward level and going to higher sub-district, municipal and provincial levels. This resolved the problem and a decision was made to issue temporary identity cards to *waria*, many of whom came from other cities or provinces.

Sources: Irma Subechi (Surabaya Association of Transgender Persons), Ari Febrian (GAYa Dewata); Dédé Oetomo, Rafael H. da Costa, GAYa NUSANTARA

Philippines

Advocacy NGOs include Progay-Philippines, LAGABLAB (the Lesbian and Gay Legislative Advocacy Network), STRAP (Society of Transsexual Women of the Philippines) and Philippine Forum on Sports, Culture, Sexuality and Human Rights (TEAM PILIPINAS). The Library Foundation conducts advocacy focusing on lobbying, organizing campaigns, mobilizing the media, and raising public awareness of discrimination and the need for sexual health programmes for MSM. The Library Foundation works with LAGABLAB in a joint effort with Amnesty International-Pilipinas in the 'Stop Discrimination Now!' campaign, which aims to raise awareness of the situation faced by LGBT communities and mobilize popular support for the adoption of policies and legislation to protect their human rights. LAGABLAB has assisted in documenting violations of human rights, input to drafting of the *Anti-Discrimination Bill* and lobbying for its enactment. Advocacy priorities include preventing the police from using condoms as evidence for sex work, and amendment of the *Anti-trafficking Law* and police policies to prevent law enforcement agencies from harassing sex workers.

Thailand

There are specific CBOs of MSM and transgender people (Mplus+, Rainbow Sky Association), a national network (Thai Sexual Diversity Network – chaired by Rainbow Sky Association) and NGO programmes providing peer outreach and other HIV services. As sex between men is legal and homophobic violence is thought to be rare, there have not been strong incentives for CBOs to evolve with a specific focus on political or law reform advocacy. In 2009, gay activists and the National Human Rights Commission argued that the new Constitution should protect LGBTs.

Timor-Leste

Fundacion Timor Hari provides HIV prevention outreach to MSM. Scarlet Timor is a peer-based organization of sex workers that includes male and transgender sex workers among its members.

4.3.2 Government

Cambodia

The *Cambodia National Strategic Plan II for HIV and AIDS 2006–2010* recognizes MSM as high risk for HIV. The National AIDS Authority has developed a specific *National Strategic Framework and Operational Plan on HIV/AIDS and STI for MSM 2008–2011*.²⁰³ The Plan states the need to involve the Ministry of Interior in relation to sensitization of Police. The Plan recommends that the Royal Government of Cambodia consider legislation to make discrimination against MSM unlawful in specified areas of public life such as employment, education, housing, and the provision of services. The Plan states that a training module on MSM and discrimination in employment will be included within the Ministry of Labor and Vocational Training's HIV workplace training course. This will include the development of workplace policies to protect MSM against stigma and discrimination.

A National MSM Technical Working Group provides oversight to all activities in the country relating to MSM. Government agencies and NGOs participate in the working group.

Indonesia

In a speech at the 2009 International Congress on AIDS in Asia and the Pacific (ICAAP) held in Bali, Indonesia's President H.E. Mr. Susilo Bambang Yudhoyono welcomed the partnership of "the network of gay, transgenders and men who have sex with men."²⁰⁴ High-level recognition of the role of MSM and transgender people in the national HIV response is consistent with Indonesia's *National Strategy and Action Plan on AIDS 2010–2014*, which specifically identifies development of a comprehensive program for addressing HIV among MSM as a strategy. The National AIDS Commission developed a *National MSM Strategic Framework and Operational Plan* in 2010, which encompasses transgender people. The Ministry of Social Welfare has identified *waria* as an economically marginalized group and established training programmes.

203 <http://www.msmandhiv.org/documents/Asia/Government/CambdiaMSMStrategicFramewrkOPFINAL.doc>

204 *Speech of H.E. Mr. Susilo Bambang Yudhoyono President of the Republic Of Indonesia on the Occasion of the Opening of the 9th International Congress on Aids in Asia And the Pacific, 9 August 2009 Denpasar, Bali.*

Lao PDR

In Lao PDR, MSM are referred to in the *National Strategy and Action Plan on HIV/AIDS/STI: 2006–2010*. The mid-term review of the Plan in 2008 recommended expansion of prevention for MSM.

Malaysia

The *National Strategic Plan on HIV/AIDS 2006–2010* focuses on key population groups, which are defined to include MSM and transsexuals. The *National Strategic Plan on HIV/AIDS* states:

actions aimed at reducing vulnerability in the short or medium term may include: drafting and amendment of laws and policies that discriminate against specific populations; changing laws that enhance risk; giving special attention to the needs of vulnerable populations...; ensuring that HIV/AIDS programs are culturally appropriate; and increasing access by vulnerable populations to services and programs.

The overall national AIDS programme which is more than 90 percent publicly funded, identifies interventions with MSM and transgender persons as part of HIV prevention activities and has provided financial support for such programmes under the current NSP.

Although the *National Strategic Plan on HIV/AIDS* recognizes the needs of MSM and transgender people, implementation faces great challenges from judgmental moral and religious influences and sensationalist media reporting regarding MSM and transgender issues, which contribute to high levels of stigma and discrimination.²⁰⁵

Myanmar

MSM are ranked in the *Myanmar National Strategic Plan on HIV and AIDS Operational Plan 2008–2010* as the second highest priority population after sex workers and their clients.

Philippines

The *Fourth AIDS Medium Term Plan 2005–2010* (AMTP-4) includes the strategy of scaling-up preventive interventions, targeted to identified highly vulnerable groups, which are defined to include MSM. In support of the Plan, MSM are being reached by prevention services financed by the Global Fund. MSM HIV services commenced in the 1990s, when a number of pilot interventions to prevent HIV transmission among MSM were implemented.

Thailand

MSM are a priority of the *National Plan for the Prevention and Alleviation of HIV/AIDS in Thailand: 2007–2011*. Under the strategy of AIDS Rights Protection, the Plan states its vision to be: “The rights of hard-to-reach groups such as IDUs, labour migrants, ethnic groups, MSM, sex workers, prisoners etc., are protected and they have access to prevention services with proper coverage and quality assurance.” Measures to be taken to address human rights outlined in the Plan include:

- Build a policy-enabling environment that supports responses in MSM population groups.

205 Personal communication, Malaysian AIDS Council, February 2010.

- Create a better understanding about sex and sexuality to reduce the stigma and discrimination of MSM, AIDS and STIs.
- Review and develop the existing knowledge on rights to improve laws and regulations which will be more relevant to current situations.
- Disseminate knowledge to improve the understanding of human rights among all personnel and population groups.

Timor-Leste

MSM are identified as a most-at-risk group in the *National Strategic Plan on HIV/AIDS/STIs 2006–2010*. The Strategy states that it is based on human rights and explicitly recognizes the importance of ensuring accessible legal remedies are available to people living with HIV and those most vulnerable to HIV. The Strategy notes that citizens can access the Office of the Ombudsman for Human Rights, which responds to citizens' complaints of abuse of public powers.

4.3.3 Donors and multilateral organizations

United Nations agencies

In Indonesia, the UNAIDS Secretariat has been involved in advocacy with the National AIDS Commission relating to universal access for MSM, has undertaken partnership work with the Human Rights Commission and supported capacity building and small-scale funding for MSM networks. UNAIDS has coordinated the funding of two national meetings of GWL-INA, with contributions from UNFPA and UNDP. UNAIDS has facilitated meetings between religious leaders and MSM representatives.

UNDP Philippines is supporting a national programme to review and analyze current community-based responses to HIV among MSM and develop a comprehensive package of services to encourage effective community responses. This project will also build the capacity of civil society organizations to use strategic information and participate in local government processes that respond to HIV. This programme is being funded through UNDP's Thematic Trust Fund on MSM and HIV. In 2009, UNDP supported a Knowledge, Attitude, and Practices study in four locations to define MSM and transgender sub-populations and networks, finalized arrangements for qualitative analysis of surveillance data to better define the health profile and practices of MSM and transgender people; helped map MSM-focused programmes, and ensured that MSM and transgender people were informed and involved in these processes.

In Cambodia, in response to the *Law on the Suppression of Human Trafficking and Sexual Exploitation*, UNAIDS is working with the National AIDS Authority, the Ministry of the Interior, Family Health International (FHI), Population Services International (PSI) to develop guidelines for a community-police partnership to support HIV interventions for entertainment workers as an alternative to promoting the arrest of entertainment workers. These guidelines will define the role of police in supporting HIV prevention. Owners of hotels, guest houses, karaoke parlours and massage parlours will be encouraged to cooperate with health workers and provide support to promotion of condoms. UNAIDS and NGOs, including the Cambodian League for the Promotion and Defence of Human Rights, successfully advocated for the closure of a sex worker rehabilitation center. One center remains in operation.

UNESCO has supported an Ethnography Study of Male-to -Male Sexuality in Cambodia and helped to develop a regional reference manual for peer educators and outreach workers working with MSM available in the following eight languages: Burmese, Chinese, English, Khmer, Lao, Mongolian, Thai, and Vietnamese.

ASEAN Inter-governmental Human Rights Commission

In 2009, the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights. The Commission's purpose is to promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities. The Commission's functions include development of an ASEAN Human Rights Declaration, with a view to establishing a framework for human rights cooperation. The Commission is an overarching human rights with overall responsibility for the promotion and protection of human rights. The Commission has the potential to be an important body for promoting and protecting the human rights of MSM and transgender people.

Donors

The USAID Asia regional program provides assistance to policy-makers in applying strategic information in planning and in strengthening the enabling environment for HIV responses among MSM. USAID has also invested in strengthening the technical and institutional capacity of MSM groups. USAID has provided significant support to PSN and its members to develop advocacy capacity.

In 2009, the Swedish Embassy funded a project aimed at improving human rights of sexual minorities in Vietnam.

AusAID is supporting Indonesia's National AIDS Commission to develop and implement a national plan for HIV and MSM. AusAID is supporting GWL-INA to develop leadership and advocacy capacities in partnership with Australian Federation of AIDS Organisations. AusAID is also supporting MSM initiatives in Myanmar.

4.4 Conclusions

Responses of the law and justice sectors of South East Asian countries are generally lagging behind health sector responses to HIV among MSM and transgender people.

The continued criminalization of male-to-male sex in Brunei, Malaysia, Myanmar and Singapore undermines HIV responses. The legal environment for MSM and transgender people in Malaysia is punitive, with adverse consequences for HIV prevention and peer support services. Singapore also has repressive Penal Code and censorship laws that contribute to stigma. Repressive laws also exist in Myanmar, but little is known about law enforcement practices or the effect of the law on HIV responses, although alarmingly high HIV prevalence among MSM has been reported in urban areas.

The dramatic rise in HIV prevalence among MSM in Bangkok in 2001-2006 provides a useful case study that demonstrates the harm to HIV prevention efforts that can be caused by a hostile legal environment.

Although homosexual behavior is not criminalized in Philippines, Lao PDR, Vietnam and Cambodia, there are concerns that selective policing of sex work and trafficking offences involves harassment of MSM and undermines HIV prevention.

Some progress in aligning justice sector and health sector responses has occurred in Cambodia, which has introduced a national policy that recognizes the need for protective laws to support HIV responses among MSM. The Cambodia *National Strategic Framework and Operational Plan on HIV/AIDS and STI for MSM 2008-2011* provides a model for the region, in that it addresses the need for anti-discrimination laws and sensitization of police. More work is required in Cambodia to ensure that policing of sex work does not undermine prevention efforts.

In Indonesia, the situation is complex due to the devolution of law making powers to provinces and districts. At the national level, the President's statement at the Bali ICAAP in 2009 was highly significant to breaking silence and challenging stigma regarding MSM and transgender people. However, whereas the overall social and political climate is generally improving in Indonesian society for MSM and transgender people, at the local level there are examples of draconian laws that have been introduced and of selective policing targeting MSM and transgender people.

In the Philippines, the Supreme Court judgment in the *Ang Ladlad Case* has sent out a very positive message regarding the obligation of government authorities to accord equal treatment to LGBT populations under the law.

Cultural acceptance of transgender people varies significantly across the sub-region. Even in countries such as Thailand where gender non-conformity receives a high degree of social acceptance, there has been little progress in formally recognizing transgender people's rights to non-discrimination and gender identity. Apart from Indonesia and Singapore, countries in South East Asia do not provide transgender people with the right to have their gender of choice recognized by law.

5 Pacific

5.1 Overview

The study reviewed the laws of the 22 Pacific island countries and territories, and also of Australia and New Zealand, which are members of the Pacific Community. Male-to-male sex between adults is illegal in nine of these 24 countries and territories. Most countries do not give legal recognition to transgender status, although there are varying degrees of social acceptance of transgender people. The study particularly focused on the laws and police practices in the larger independent Melanesian countries of Papua New Guinea (PNG) and Fiji Islands.

There is wide diversity in the legal and social environments for MSM and transgender people across these countries. Some traditional Melanesian communities have a history of ritualized homosexuality. Some Pacific island communities recognize culturally-specific gender identities. Pacific islanders who adopt gender-variant roles often do not identify as homosexual or gay because these terms focus on sexuality. Indigenous terms tend to be more centered on roles within the family and community. In traditional island societies, sexuality and sexual expression are seen as private matters that are not central to public identity.²⁰⁶

The report of the Independent Commission on AIDS in the Pacific observes:

Since most sex between men in the Pacific is hidden, illegal and denied, it is not addressed appropriately in most national HIV plans...Western constructs of homosexuality and gay identity do not fit comfortably with Pacific cultures. Traditions of transgender people in the region include the *mahu* of French Polynesia, the *fa'afafine* of Samoa and the *leiti* (or the older term *fakafafine*) of Tonga. Many cultural groups in Papua New Guinea have traditions of male-to-male sex practised at certain stages of men's lives.²⁰⁷

Most Pacific countries are strongly influenced by Christian religious values, and some Christian churches have been vocal opponents of decriminalization of male-to-male sex. For example, in Fiji, some Methodist Church representatives have publicly threatened violence against homosexual men.²⁰⁸ The Pacific Sexual Diversity Network (PSDN) made the following observations in a 2009 report:²⁰⁹

Many Pacific MSM and transgenders experience harassment, abuse, rejection and both sexual and physical violence, some from a very young age. These threats can come

206 Jenkins C. (2006) *op cit* fn.22, p.9.

207 Commission on AIDS in the Pacific (2009) *op cit* fn.6., p.39.

208 Fiji Women's Rights Movement (2009) *Shadow NGO Report on Fiji's Second, Third and Fourth Combined Periodic Report to the Committee on the Elimination of Discrimination Against Women*, p.23. http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/FJ/FWRM_UPR_FJI_S07_2010_Fiji_WomensRightsMovement_annex1.pdf

209 PSDN (2009) *HIV/AIDS, men who have sex with men and transgender people in the Pacific: Recommendations for an improved response*, PSDN and ACON, p.9.

from within their families and schools as well as from the community more broadly and the police. There is insufficient social, community and legal support for MSM and transgenders...Many, though not all, religions in the Pacific are antagonistic to MSM and transgenders. The rise of fundamentalist Christian churches in the Pacific is generating increased stigma and hostility. Where there is support for Pacific MSM and transgenders this support is sometimes conditional and only based on their capacity and willingness to act as entertainers, to organise charity functions or voluntarily engage in other community activities.

It is important that legislative responses to reducing vulnerability to HIV and increasing access of MSM and transgender people to HIV services are informed by the unique contexts of these Pacific island cultures.

5.2 Laws affecting HIV responses among MSM and transgender people

5.2.1 Criminal laws and police practices

Sub-region/country/territory	Legality of male-to-male sex	Applicable laws
Polynesia		
American Samoa (territory of the United States)	Legal	
Cook Islands	Illegal	<i>Crimes Act 1969</i> Sections 154 and 155 provide offences of indecency between males, and sodomy. Penalty for sodomy is imprisonment for a term not exceeding seven years
French Polynesia	Legal	
Niue	Legal	
Pitcairn Islands (territory of the United Kingdom)	Legal	
Samoa	Illegal	<i>Crimes Ordinance 1961</i> Section 58D prohibits indecent acts between males, regardless of consent. Section 58E prohibits sodomy and consent is not a defence. Penalty for sodomy of a male: imprisonment for a term not exceeding 5 years. Section 58J prohibits keeping of any premises used as a place of resort for the commission of indecent acts between males. Section 58N provides an offence for a male impersonating or representing himself to be a female.
Tokelau (part of the realm of New Zealand)	Legal	

Continues...

Continued

Sub-region/country/ territory	Legality of male-to-male sex	Applicable laws
Tonga	Illegal	"Sodomy" and indecent assaults upon males are illegal under Sections 136–140 of the <i>Criminal Offences Act</i> . Penalty: imprisonment for a period not exceeding ten years. <i>Criminal Offences Act</i> Section 81 provides an offence for a male to impersonate a female.
Tuvalu	Illegal	<i>Penal Code</i> [Cap 8] Section 153 prohibits 'buggery' or permitting buggery. Penalty: imprisonment for 14 years. Section 155 prohibits the commission of acts of gross indecency between males 'whether in public or private'.
Wallis and Futuna	Legal	
Melanesia		
Fiji	Legal	
New Caledonia	Legal	
Papua New Guinea	Illegal	<i>Criminal Code 1974</i> Section 210 provides for the offence of sexual penetration against the order of nature. Penalty: Imprisonment for a term not exceeding 14 years. Section 212 provides for the offence of gross indecency between males. Penalty: Imprisonment for a term not exceeding 3 years.
Solomon Islands	Illegal	Illegal. Section 160 of the <i>Penal Code</i> criminalizes 'buggery' with another person; the permitting of a male person to commit buggery on him or her; and attempts. Penalty: imprisonment for fourteen years. Section 161 provides for a lesser offence of 'committing any act of gross indecency' by persons of the same-sex.
Vanuatu	Legal	
Micronesia		
Guam (unincorporated territory of the United States)	Legal	
Federated States of Micronesia	Legal	
Kiribati	Illegal	Sex between males is prohibited by the <i>Penal Code</i> . Section 153 of the <i>Penal Code</i> prohibits "buggery" and "permitting buggery". Penalty: Imprisonment for 14 years. Section 155 prohibits gross acts of indecency between males "whether in public or in private".
Marshall Islands	Legal	

Continues...

Continued

Sub-region/country/ territory	Legality of male-to-male sex	Applicable laws
Nauru	Illegal	Nauru adopted the <i>Criminal Code</i> of Queensland including offences of having carnal knowledge against the order of nature, and indecent practices between males (Sections 208, 211). Penalty for carnal knowledge against the order of nature: imprisonment with hard labour for 14 years.
Northern Mariana Islands	Legal	
Palau	Illegal	Sodomy is a crime under <i>Code of Palau</i> , Title 17 Cap 28 Section 2803. Penalty: imprisonment for not more than 10 years.
Australasia		
Australia	Legal	
New Zealand	Legal	

Table 3: Legality of male-to-male sex in the Pacific sub-region

Fiji

Homosexuality has been decriminalized in Fiji as a result of the *Nadan and McCoskar Case*²¹⁰ and the *Crimes Decree 2010*.

The *Crimes Decree 2010* replaced the *Penal Code*. The *Crimes Decree* does not criminalize sex between adult males, although it does impose stricter criminal prohibitions on sex work than had existed previously.

In the *Nadan and McCoskar Case*, the High Court of Fiji ruled that *Penal Code* offences criminalizing consensual sexual acts between adult men in private (carnal knowledge against the order of nature and gross indecency between males) were in breach of the constitutional guarantees to personal privacy and equality. These rulings decriminalized homosexuality under the 1997 Constitution. The 1997 Constitution was abrogated in 2009.

The *Nadan and McCoskar Case* arose after two men were convicted of sodomy and gross indecency, and sentenced to two years imprisonment. The men appealed their convictions. The 1997 Constitution included provisions guaranteeing the rights of every person to equality before the law, to not be unfairly discriminated against on various grounds including gender and sexual orientation, and to personal privacy.

The appeal Judge based his decision on privacy rights and gender discrimination. Gender discrimination was relevant because the 'gross indecency' offence only applied to men. The Court accepted that the carnal knowledge section did not, on its face, discriminate on the basis of sexual orientation or gender, but the Court concluded that the section was selectively enforced primarily against homosexuals and that the gross indecency section discriminates both on grounds of gender and sexual orientation. The Judge stated:²¹¹

What the Constitution requires is that the law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates

210 *Nadan and McCoskar v. State* [2005] FJHC 500. <http://www.pacilii.org/fj/cases/FJHC/2005/500.html>.

211 *Ibid.* per Winter J.

diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law. A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator.

The government argued that the offences were required because Fiji is conservative and religious, a fact recognized in the Constitution. The Judge found that, while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law. The Judge stated:

The present case concerns the most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before the State or community can interfere with an individual's right to privacy.

Although decriminalization has improved the legal environment, concerns remain regarding policing of transgender sex workers. The MSM NGO project *Amithi* reports that transgender sex workers are regularly held overnight after being detained pursuant to loitering charges and subject to humiliation e.g. being forced to strip in front of police.

The *Crimes Decree 2010* recognizes that a sex worker may be either male or female, whereas previously a sex worker was defined only as female. The *Crimes Decree 2010* also introduced evidential clauses that could make it possible for the courts to use carrying condom evidence that one intends to engage sex work. There are concerns that this may provide an environment in which police can harass sex workers, including male and transgender sex workers, and that sex workers and their clients will be difficult to reach by prevention workers.²¹²

A study based on interviews with 40 female and transgender sex workers conducted in 2009 made the following findings:²¹³

Harassment and abuse from all quarters was experienced more commonly by sex workers who pick up clients from the streets, and by transgender sex workers in particular. More of the transgender participants reported being subject to violence and sexual abuse, typically from heterosexual men. Numerous participants, both transgender and female, described being robbed and/or being driven out of town by clients and dumped in another village, often without clothes.

Some participants, again most commonly those who worked from the streets, reported police harassment, ... in Nadi there were numerous reports of extortion: sex workers having to pay money to police, usually alluded to as 'grog money'. In and around Suva the descriptions of police response are more mixed. Mostly participants describe the policing of the streets: 'chasing' sex workers away, telling them to go home, or threatening them

212 Makutu, A. (2010). *New Fiji drive against prostitution a threat to safety of sex workers*. UNAIDS Fiji (15/02/2010). <http://www.unaids.org.fj>

213 McMillan K., Worth H. (2010) *Risky Business: Sex work and HIV prevention in Fiji*. Sydney: International HIV Research Group, University of NSW p.15.

with arrest. Some transgender reported being forced to provide oral sex. Interestingly, there were no claims of corruption or brutality in Lautoka and Labasa, where sex worker organisations have been securely established and engage in building community and liaise with the police to improve understanding about HIV prevention.

Papua New Guinea (PNG)

Cases of police mistreatment of MSM and transgender people are reported as common by the NGO Save the Children. Human Rights Watch has documented sexual assaults by police of MSM.²¹⁴ Human Rights Watch reported in 2008:²¹⁵

Despite police training on HIV/AIDS, police undermine prevention efforts by targeting female sex workers and men and boys suspected of homosexual conduct for beatings and rape. Police are able to do so in part because they can threaten arrest using laws criminalizing homosexual conduct and certain forms of sex work, and because social stigma against homosexuality and sex work shields police from public outrage.

Sodomy charges have rarely been laid under the *Criminal Code* in recent years. In the period immediately before independence in 1975, several prosecutions of men for sodomy involving consenting adult men in private came before the courts.²¹⁶ The continued existence of sodomy and sex work offences provides opportunities for police to overstep their authority. Police violations of the rights of sex workers and MSM have been documented and there are reports of police harassment of HIV peer education workers and sex worker action groups.²¹⁷ There are reportedly many cases of police brutality, harassment and blackmail against MSM.

The Royal PNG Constabulary has developed an HIV Workplace Policy that includes reference to MSM as a vulnerable group to HIV.

Samoa

Samoa Law Reform Commission is reviewing the *Crimes Ordinance 1961* in 2010, and is considering submissions relating to repeal of the offences of sodomy and indecency between males.

There are taboos against same-sex relationships, which are reinforced through the application of customary law at village level. In a recent case, a same-sex couple was punished for breaching custom by living together in a village. The penalty was provision of mats by way of apology to the village. Once the penalty was provided, the couple was accepted into the village.²¹⁸

214 Human Rights Watch (2005) *"Making Their Own Rules": Police Beatings, Rape, and Torture of Children in Papua New Guinea*, Human Rights Watch Reports 17(8)(C) New York: Human Rights Watch, pp.43, 47.

215 Human Rights Watch (2008) *Human Rights Watch World Report 2008*, New York: Human Rights Watch, p.314.

216 Stewart C. (2008) Men behaving badly: Sodomy cases in the colonial courts of Papua New Guinea. *Journal of Pacific History* 43(1) p.77-93.

217 Course-Neff Z. (2006) *Still Making Own Rules: Ongoing Impunity for Police Beatings, Rape and Torture in Papua New Guinea*, Human Rights Watch, New York; Worth H. (2006) AIDS is a tear in the social fabric of PNG: HIV and its impact 2005-2025 *Health Sociology Review* 15(3).

218 Personal communication, Alex Su'a, Samoa Fa'afafine Association, December 2009.

A recent incident of police harassment of a *fa'afafine* (transgender person) was responded to by the Samoa Victims Support Group, which filed charges against police for misconduct.

5.2.2 Laws relating to discrimination

Fiji's *Human Rights Commission Decree* 2009 prohibits discrimination on the grounds of actual or supposed sexual orientation in employment, education, accommodation, access to places and provision of services. Legislation in Fiji protects from discrimination on the grounds of sexual orientation in the workplace. Sections 6, 75 and 77 of the *Employment Relations Promulgation* 2007 prohibit discrimination against workers or prospective workers on grounds including gender, sexual orientation, disability, and actual or supposed HIV/AIDS status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

The Constitution of Pitcairn Islands states that discrimination on various grounds including sexual orientation is unlawful. Section 23 of the *Constitution of Pitcairn* 2010 provides that no law shall make any provision which is discriminatory, no person shall be treated in a discriminatory manner by any organ or officer of the executive or judicial branches of government or any person acting in the performance of the functions of the Public Service or a public authority, and no person shall be treated in a discriminatory manner in respect of access to places to which public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort.

New Zealand's *Human Rights Act* 1993 makes discrimination on the grounds of sexuality unlawful. New Zealand does not have specific transgender anti-discrimination laws, although New Zealand's Human Rights Commission accepts complaints from transgender people as 'sex' discrimination. In 2008, New Zealand's Human Rights Commission conducted a comprehensive inquiry into discrimination experienced by transgender people.

In Australia, there is no comprehensive federal anti-discrimination legislation relating to sexual orientation and gender identity, however there is legislation at the state and territory level that provides protections from discrimination in areas such as employment, accommodation, education and access to services. In Australia, anti-discrimination laws relating to transgender status (or similar terms) were first introduced in 1992 (Australian Capital Territory), and since 2003 have been in place in all states and territories (New South Wales (1996), Northern Territory (1993), Queensland (2003), South Australia (1986), Tasmania (1999), Victoria (2000), Western Australia (2001)). Queensland and Victoria use the term 'gender identity'. The Australian Capital Territory uses the terms 'transgender intersex'. New South Wales uses the term transgender. Western Australia uses the term 'gender history'. The other states use the term 'transsexuality'.

5.2.3 Legal status of transgender people

Legislation and policy in Australia and New Zealand recognizes the rights of transgender people to change legal sex. In these countries, transgender people are able to obtain a

passport that identifies their sex as corresponding to their gender identity (regardless of whether the person has had sex reassignment surgery).²¹⁹

In New Zealand, a transgender person's change of sex is recognised by the law for the purpose of the validity of a marriage.²²⁰

The decision of the Family Court of Australia in *In re Kevin*²²¹ was the first case in Australia to deal with the question of whether a transgender person could marry. Prior to *In re Kevin*, the Australian courts relied upon biological factors. The Family Court decision in *In re Kevin* confirmed that post-operative transgender people can marry according to their new sex.

No laws of Pacific islands countries and territories were identified that provide legal recognition of transgender status. Samoa and Tonga have criminal offences for female impersonation, although these are not enforced.

5.2.4 Other laws

Same-sex relationships

Of the Pacific island countries and territories, three jurisdictions provide for registration of same-sex relationships. In 2009, the French Government approved the application of the French law recognising same-sex civil unions to the collectivities of New Caledonia and Wallis and Futuna. Pitcairn Islands applies English statute law, which allows registration of civil unions between same-sex partners under the *Civil Partnership Act 2004* (UK). Guam's legislature is debating a *Same-sex Civil Union Bill 185* in 2010.²²²

Although same-sex partners cannot marry, same-sex partnerships can be registered in New Zealand and three Australian jurisdictions (Tasmania, Victoria and ACT). Same-sex couples are granted legal status equal to *de-facto* (co-habiting) heterosexual couples for most legal matters in Australia and New Zealand. In 2008, Australia enacted legislation to recognize same-sex couples in federal law, offering them the same rights as unmarried heterosexual couples in areas such as taxation, social security, health, aged care and employment.²²³ As a result, although they cannot marry, same-sex couples who are in a *de facto* relationship have most of the same rights as married couples.

Censorship

The film *Harvey Milk* was censored through exercise of powers under the *Film Censorship Act* in Samoa in 2009. The Act gives the Principal Censor wide powers of discretion to censor films considered harmful to morals of society. *Harvey Milk* is an American film portraying the struggle for gay and lesbian rights in San Francisco in the 1970s and the assassination of the

219 The position in Australia was clarified as a result of a complaint by Stefanie Imbruglia to the Human Rights and Equal Opportunity Commission in 2009. See: *Department of Foreign Affairs & Trade (DFAT) agrees to issue appropriate passports to sex and gender diverse people and change offensive terminology in its training material to be more inclusive of diversity*. News 1st November 2009. <http://www.sageaustralia.org/>

220 *Attorney-General v Otahuhu Family Court* (1994) 1 NZLR 603, High Court, Ellis J.

221 *In re Kevin (Validity of Marriage of a Transsexual)* [2001] FamCA1074 (Chisholm J), upheld by the Full Court of the Family Court of Australia: *The Attorney-General for the Commonwealth v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission* [2003] FamCA 94.

222 Podger C. *Debate intensifies over Guam's same-sex civil union bill* Radio Australia, 26 January 2010.

223 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth).

openly gay mayor as a result of his leadership on gay and lesbian civil and political rights. Samoa's principal censor rejected an application for the film to be rented and sold in Samoan outlets for home viewing.

5.3 Actions taken to improve the legal environment

5.3.1 Community

Pacific Sexual Diversity Network (PSDN) includes representation from Fiji, PNG, Samoa, Tonga and Cook Islands. PSDN sits on the Regional HIV and STI Strategy Working Group convened by Secretariat of Pacific Community and UNAIDS. PSDN is assisting an MSM group to form in Vanuatu and has member organizations in PNG and Fiji (MEN Fiji). As a regional network, PSDN is able to provide support to informal networks at national level that are operating in hostile social and legal environments.

The Independent Commission on AIDS in the Pacific has endorsed PSDN's strategic plan, describing it as "a sound platform for the promotion of effective national policies and interventions". The Commission observed:

To be effective, this strategic plan requires a clear commitment in national plans to targeted, peer-driven education; improved capacity and meaningful engagement of MSM and transgender people in national planning; improved knowledge and understanding of MSM and transgender sexual health; efforts to reduce stigma and discrimination; and removal of colonial era laws criminalizing sex between men.²²⁴

In Tonga, Samoa and Cook Islands there are CBOs representing MSM and transgender populations (Tonga Leiti Association, Samoa Fa'afaife Association, Samoa AIDS Foundation and Te Tiare Association). The Tonga Leiti Association and the Te Tiare Association sit on the national HIV committees of their respective countries. Tonga Leiti Association has participated in training of police to sensitize them to the rights of MSM and *leiti*.

In PNG, there are small informal MSM networks in Port Moresby and some other urban areas. A transgender peer support and advocacy group has recently been formed, known as Huon Buddies.

The *Poru Sapot* project of Save the Children PNG has worked with MSM and police to support prevention interventions and gathered information relating to treatment of MSM by police (see box).

Australian Federation of AIDS Organisations has worked in partnership with *Poru Sapot* to support community-based advocacy and leadership in arguing for decriminalization of homosexuality and sex work.

224 Commission on AIDS in the Pacific (2009) *op cit* f.n.6, p.41

Training Police to Respect Rights: The Poro Sapot Project, Save the Children, Papua New Guinea

In PNG, there is a history of police harassment and abuse of MSM and sex workers. The *Poro Sapot* Project (PSP) has successfully broken down some barriers by distributing condoms and educational materials, providing training in gender and child rights, performing public service activities jointly with police, and conducting sensitization sessions in police offices, stations and barracks.

PSP has developed a relationship with the nation's central training center for police, the Bomana Police College. PSP has been invited to resource the training of new recruits on four occasions. Staff and volunteers (who are themselves MSM and/or sex workers) provide basic information about HIV and introduce the young police to issues faced by MSM, sex workers and people living with HIV.

Recruits work in small groups to write down their thoughts on MSM and sex workers. These are shared with the assembly for reflection. PSP perform role plays showing unfair treatment by MSM at a police station and other abuses. After discussing the role plays, MSM (including MSM living with HIV) talk about their lives in the third person, because sex between men is illegal. After more discussions and distribution of information materials, time is set aside for informal interactions so that recruits can raise questions one-to-one or in smaller groups.

Such sessions are effective because they establish a public health rather than a moralistic point of view, explain the role of police in protecting human rights, allow the police to state their experiences and prejudices, and use personal stories that touch the heart. The Project plans to work with the College to incorporate sensitization information into its standard curriculum. Lessons learnt include the importance of working within the police hierarchy, starting at the top—but not neglecting constables on the ground, adapting different techniques for different settings, and ensuring that MSM or sex workers (including people living with HIV) lead the sensitization process.

PSP has direct contact with several hundred police each year and makes a unique contribution to greater understanding between police, MSM and other marginalized groups. PSP's work is endorsed by the PNG's Police Commissioner.

Information provided by Christopher Hershey, Save the Children PNG, 2010.

5.3.2 Government

Australia

Gay and Lesbian Liaison Officers (GLLOs) operate in Australia's police services.²²⁵ The GLLOs role includes:

- assisting the gay, lesbian, bisexual, transgender and intersex communities;
- supporting people in the police service who may have gay, lesbian, bisexual, transgender or intersex concerns or issues;
- providing advice to managers when dealing with sensitive sexual diversity issues.

The network of GLLOs are active on committees and working parties that develop policies and protocols that may impact on GLBT communities, such as search procedures for transgender persons. GLLO networks work in partnership with HIV organizations. For example, in the Australian Capital Territory, the CBO AIDS Action Council works in partnership with the Australian Federal Police. Since 2000, the AIDS Action Council has been educating new recruits to the Australian Federal Police on HIV and sexual diversity.

Fiji

MSM and transgender people are a priority population for prevention under the *National Strategic Plan on HIV and AIDS 2007-2012*. However, funds had not been allocated for implementation activities at the time of writing. The draft *HIV Decree* (due to become law in 2010) defines vulnerable groups to include MSM and transgender people and requires application of universal human rights standards. The *HIV Decree* states that other laws are invalid to the extent of any inconsistency with the *HIV Decree* and provides for a right to access to means of protection from HIV. It is hoped that this provision will prevent police from removing condoms from sex workers as evidence of an offence.

PNG

A strategic objective of the *National HIV Prevention Strategy 2010-2015* is to "ensure a legal and policy environment supportive of HIV prevention, treatment and care". The Strategy states a commitment to decriminalization of male-to-male sex in the following terms:

Advocate for and support changes to current laws that criminalise sex work and same sex practices

Laws that criminalise same-sex practices and sex work create barriers to accessing services and reinforce factors of vulnerability, including stigma and discrimination. Greater advocacy is needed to support plans for introducing reforms to legislation that aim to decriminalise same-sex practices and sex work. Health and law enforcement agencies need to work closely together to address HIV-related discrimination that affects the availability, accessibility, and delivery of services for vulnerable populations. This would include expanding and supporting HIV prevention partnerships with police to reduce police harassment, violence, and stigmatisation of men with same-sex partners and

225 Arblaster W. (2006) Psychological components of the Australian Federal Police's Gay and Lesbian Liaison Officer Network *InPsych* Australian Psychological Association (April 2006).

women and men involved in sex work, and to enhance HIV prevention among police and their partners.

In 2009, the National AIDS Council Secretariat (NACS) and PNG's Minister for Community Development initiated a process for decriminalization of sex work and homosexuality, with a view to introducing legislation to amend the *Criminal Code*. The Director of NACS is chairing the Reference Group which is planning the decriminalization process and encouraging dialogue on decriminalization options. The Minister for Community Development will co-chair the Reference Group and sponsor the amending legislation. The Reference Group has multi-sectoral representation, including from the religious community and the Ombudsman's office.

Development of reform proposals has been informed by New Zealand and Australian legislative experiences. The work involves lobbying interest groups such as the media, religious organizations and parliamentarians. NACS and the Minister for Community Development are arguing that the *Criminal Code* provisions are based on out-dated colonial laws that need to be modernized to take into account the HIV epidemic. There has been a strategy of avoiding media attention to decriminalization issues to avoid polarized moralistic debates.

Tonga

MSM and transgender people are priority populations for prevention under the *National Strategic Plan on HIV and AIDS*.

Pacific political leadership

Although the laws and police practices of some Pacific island states are repressive towards MSM and transgender people, there have been statements from a number of prominent leaders of Pacific island countries in support of a human rights-based response to HIV, including:

- Ratu Epeli Nailatikau LVO, OBE, MSD, OStJ, President of Fiji;
- Hon. Dame Carol Kidu DBE, Minister for Community Development, Papua New Guinea;
- Hon. Mr Misa Telefoni Retzlaff, Deputy Prime Minister of Samoa; and
- HRH Princess Pilolevu Tuita, the Princess Regent of Tonga.

Hon . Dame Carol Kidu M.P. on the Human Rights Reality in Papua New Guinea

As with sex work, there are many documented cases of police brutality, harassment and blackmail against MSM, although cases are rarely taken to court. Because of the stigma associated with male-to-male sex, much of this sexual activity takes place furtively, and many of the men involved also have a wife and family. The need to maintain secrecy, due to the threat of criminal sanctions, heightens the vulnerability of these men and their families to HIV infection. It is very difficult to carry out effective HIV prevention work when the people one needs to reach are subject to such a level of stigma, police harassment and potential criminal sanctions.

Charges have rarely been laid under the sections of the *Criminal Code* in recent years, so their repeal is unlikely to have significant legal consequences in practice. It is acknowledged that many people within PNG have strong moral objections to male-to-male sex, even where it takes place between consenting adults. The proposal does not seek to challenge these moral views, nor to undermine the position that Church leaders and others may wish to adopt in relation to male-to-male sex. Rather, the recommendation for decriminalisation of consensual male-to-male sex is driven by the over-arching imperative to ensure that PNG is able to act effectively to reduce vulnerability to HIV infection across the community.

Ensuring that MSM have good access to HIV prevention, treatment and support services is an important part of an effective response, and this cannot happen under the cloud of the criminal law.

Decriminalization of homosexuality (and sex work) would actively empower both of these community groups, considered to be at high risk of both violence and HIV, in mobilising a strong response to address HIV and violence in their communities. It would do so by:

- Reducing practices of police corruption, violence and abuse of police powers.
- Reducing the barriers MSM face in reporting crimes against them (including sexual violence).
- Improving the capacity of service providers to access highly marginalised and elusive communities.
- Empowering MSM to be proactively engaged in representation informing the development and implementation of strategies to reduce risk of HIV and violence.
- Underpinning and facilitating responses to the stigma, violence and discrimination that increases the risk of HIV and violence in the lives of MSM.

Continues...

- Enhancing community belonging, harmony and inclusion, through the promotion of human rights and HIV prevention, care and treatment as a shared community responsibility, rather than the discord and disharmony that erupts with segregation, blaming, and criminalisation.
- Removing the evidentiary use of HIV prevention tools as proof of crime (including HIV prevention information, education, and safer sex equipment such as condoms), and facilitate the promotion of safer sex equipment vital to the prevention of HIV and other STIs.

The MSM community through the Poro Support project and sex workers through Friends Frangipanni project have been proactively involved in the HIV prevention and management response strategy of PNG. And yet they are legally “criminals” under outdated legislation.

It is time to change the law. The challenge will be to move away from polarised moralistic arguments to dialogue based on facts, human rights and access to services for all.

Presentation of Dame Carol Kidu M.P. to *Overcoming Legal Barriers to Comprehensive Prevention among Men Who Have Sex with Men and Transgender People in Asia and the Pacific—Symposium of the 9th International Congress on AIDS in Asia and the Pacific*, Bali, Indonesia, 11 August 2009.

Hon. Mr Misa Telefoni Retzlaff, Deputy Prime Minister of Samoa

Hon. Mr Misa Telefoni has spoken on HIV and human rights at the Commonwealth Law Association Conference and regional United Nations meetings, and was a keynote speaker at the launch of the Pacific Sexual Diversity Network (PSDN) at the Bali ICAAP, 2009. He has praised the work of PSDN for its role in advocating capacity development of MSM and transgender people to respond to HIV. He also chaired the Independent Commission on AIDS in the Pacific.

Sir Paulius Matane, Governor General of Papua New Guinea²²⁶

Sir Paulius Matane made the following remarks at the 2010 launch of PNG’s HIV Prevention Strategy and the *Report of the Commission on AIDS in the Pacific*:

countries must provide legislative protection and enforcement for people living with HIV and their families and repeal legislation that criminalizes behaviours. There can be no effective response to HIV so long as some parts of the population are marginalized and denied basic health and human rights—people living with HIV, sex workers, men who have sex with men...Legislation can stand in the way of scaling up towards universal access, when vulnerable groups are criminalized for their lifestyles and the human rights of HIV positive persons are not protected.

226 Speech of Governor General of Papua New Guinea, Sir Paulius Matane, *Launch of the Report of the Commission on AIDS in the Pacific and the National HIV Prevention Strategy*, Parliament House Port Moresby, Papua New Guinea, 11 March 2010.

5.3.3 Donors and multilateral agencies

UNAIDS helped to establish PSDN as the regional representative group of MSM and transgender people in the Pacific. There is a proposal for UNAIDS to allocate funding to support implementation of the PSDN Advocacy Strategy in the 2010-2012 period through support to activities at country level in two to three countries.

In Fiji, UNDP supported research in 2009 to understand and map networks of MSM, looking at HIV-related knowledge, attitudes, practices, and behaviors, potential entry points for HIV interventions, and indicators for monitoring and evaluation of HIV programmes, to contribute to development of a comprehensive strategy for HIV among MSM, including recommended health and rights interventions.

In PNG, UNDP helped initiate a desk review in 2009 of literature and discussions with partners to compile and examine the data and issues related to HIV among MSM. Furthermore, UNDP is supporting an in-depth and comprehensive analysis of laws and practices that create barriers to effective HIV responses focusing on men who have sex with men and sex workers. Based on the findings and recommendations from the study, leadership development trainings will then be conducted at the national and municipal levels with multi sector stakeholders to encourage effective delivery of HIV responses.

The Australian Government through AusAID has provided small-scale funding of a partnership between PSDN and Australian NGOs (ACON and the Australian Federation of AIDS Organisations). PSDN also benefits from a partnership with New Zealand AIDS Foundation, jointly funded by Australian Agency for International Development (AusAID) and New Zealand Agency for International Development (NZAID) through the Pacific HIV and STI Response Fund.

Independent Commission on AIDS in the Pacific

An important initiative that raised the profile of MSM and transgender issues as policy priorities was the Independent Commission on AIDS in the Pacific. In its 2009 Report, the Commission recommended that Pacific island countries undertake progressive legislative reform to repeal legislation that criminalizes high-risk behavior and promotes HIV-related discrimination.²²⁷ The Commission's report observes:

Despite the evident link between unprotected sex between men and relatively high rates of HIV infection in Papua New Guinea, Fiji, New Caledonia, French Polynesia and Guam, none of these countries has conducted recent behavioral surveillance surveys or qualitative studies about the characteristics of these men, or initiated targeted campaigns to encourage them to use safer sexual practices.

Major obstacles to making such campaigns effective remain, both with the social stigma and the illegal status of homosexual activity. Not only are men ashamed of or embarrassed about disclosing their sexual activity, they are also deterred from finding out what they need to know to reduce their risk or to buy condoms. Boys and men in institutionalized settings, notably prisons, are particularly vulnerable, as they have limited or no choice about safe ways to express their sexuality. Almost half of surveyed men who had sex with men (in PNG) reported facing stigma and discrimination in their workplace; one in five had been beaten because of sexual orientation and 60 percent had been raped.²²⁸

227 Commission on AIDS in the Pacific (2009) *op cit.* f.n.6, p.89.

228 *Ibid.* p.40.

5.4 Conclusions

Male-to-male sex is illegal in nine of the 24 Pacific Community countries and territories reviewed. Eight of these countries criminalize sodomy under criminal laws inherited from British colonial rule (the ninth country is Palau, which bases its criminal code on laws of the USA, which draw from common law traditions). These Pacific island countries rarely enforce their sodomy laws. However, the existence of these criminal offences contributes to stigma and is harmful to HIV responses. In PNG, the existence of the sodomy offence provides an environment in which police harassment and violence towards MSM occurs.

The work of the *Poro Sapot* project, which involves MSM in efforts to educate and work in partnership with police to reduce HIV vulnerability in PNG, provides an important example for other Pacific island countries. Partnerships between HIV organizations and police services in Australia also demonstrate how police can support HIV responses for MSM and transgender people.

Protective legislation in Australia and New Zealand has provided an enabling environment in which HIV prevention services reach a high proportion of gay men. However, despite supportive legal environments, in some parts of Australia HIV incidence has been increasing among gay men in recent years due to a complex range of behavioral and contextual reasons.²²⁹

Although anti-discrimination laws in Australia and New Zealand provide useful models for consideration by Pacific island countries, it should be acknowledged that the economic, social and cultural settings of these two countries are very different from Pacific island countries. It is necessary to develop legislative models and HIV prevention responses that reflect Pacific island cultures. The human rights of *fa'afafine*, *leiti* and the other unique minorities of Pacific island countries require specific protective provisions within Constitutions and national human rights legislation.

In 2007, donors, UN agencies, SPC and country representatives from 15 Pacific island states attending the High Level Meeting on HIV, Human Rights and the law endorsed the *Auckland Declaration on HIV and the Law, Ethics and Human Rights*. The *Auckland Declaration* noted the importance of:

facilitating public consultations and reviews on existing legal frameworks on sex work and sodomy; establishing clear legal remedies for violence and discrimination against marginalized groups; making policy changes to reduce people's vulnerability to HIV; and examining how to reduce or remove legal and other barriers which impede access to rights-based and ethical prevention.²³⁰

Pacific island governments have been slow to act to implement the *Auckland Declaration*. Political leadership is required at country level as well as through regional bodies such as the Pacific Islands Forum. In addition, the churches and media can help promote a social climate supportive of law reform and reduced stigma and discrimination. Religion plays a central role in Pacific island communities. Faith based organizations and media organizations need to be more engaged in efforts to combat stigma and improve the social, legal and policy environments for MSM and transgender people in the Pacific.

229 See e.g. *6th National HIV Strategy 2010-2013*, Department of Health and Ageing (Australia) p.8.

230 See: <http://www.undppc.org.fj/userfiles/file/Auckland-Declaration-on-HIV-Law-and-Human-Rights.pdf>.

6 Asia Pacific regional responses

Asia Pacific Coalition on Male Sexual Health (APCOM)

The Asia Pacific Coalition on Male Sexual Health (APCOM) was formed in 2006 as a regional advocacy coalition of MSM and HIV CBOs, the government sector, donors, technical experts and the UN system. APCOM's primary purpose is advocating for political support and increased investment and coverage of HIV services for MSM and transgender people.

APCOM is directed by a Governing Board comprised of community representatives from eight sub-regions: China, Developed Asia, Greater Mekong (not including China provinces), India, Insular Southeast Asia, Pacific, South Asia (not including India), Australasia and two region-wide community constituencies ((i) MSM who are living with HIV and (ii) transgender people). In addition, the Governing Board includes representatives from the government sector, donor/development agencies, international NGOs, technical experts and advisors, and the UN system (e.g. for 2009: UNDP, UNESCO and UNAIDS).

MSM-Asia is an electronic forum for sharing information that is used to inform advocacy strategies.

Asia Pacific Transgender Network (APTN)

The Asia Pacific Transgender Network (APTN) was launched in 2009. The mission of APTN is to enable transgender women in the Asia Pacific region to organize and advocate to improve their health, protect their human rights, and enhance their social wellbeing and the quality of their lives. The network is supported by the 7 Sisters Coalition of Asia Pacific Regional Networks on HIV/AIDS, APCOM and Asia Pacific Network of Sex Workers (APNSW).

Asia Pacific Forum of National Human Rights Institutions²³¹

In 2009, a Regional Workshop on sexual minority issues was hosted by the Indonesian National Human Rights Commission and co-organized with the Asia Pacific Forum (APF) of National Human Rights Institutions, bringing together participants from the national human rights institutions of Indonesia, Australia, Malaysia, Nepal, New Zealand, South Korea and Thailand. The goal was to increase understanding and implementation of the *Yogyakarta Principles* and how to better protect and promote the rights of gay, lesbian, bisexual and transgender people. All attending institutions agreed to "the importance of making use of their common functions, including investigating complaints, reviewing laws and policies, holding national inquiries and public education" in relation to sexual minority issues. It was recognized that advocates working with gay, lesbian, bisexual and transgender people can face intimidation and violence and require greater protection and promotion of their rights. There was a

231 http://www.asiapacificforum.net/issues/sexual_orientation

commitment to invite each APF member institution to provide a report on its activities in relation to sexual orientation and gender identity at their next annual meeting.

In 2010, delegates from governments of Bangladesh, India, Indonesia, Malaysia, Maldives, Mongolia, Nepal, Philippines, South Korea, Sri Lanka, Thailand and Timor-Leste attended an Asia regional HIV workshop for human rights institutions.²³² This included discussion of sexual orientation and gender identity issues. The meeting recommended that institutions play a stronger monitoring, investigation and inquiry role, including visiting HIV-affected populations in places of detention, hospitals and treatment centers to monitor the conditions and standards of services.

Regional comprehensive response framework

UNDP, WHO, UNESCO and UNAIDS, in partnership with ASEAN, USAID and APCOM convened the *Regional Consensus Meeting on Developing a Comprehensive Package of Services to Reduce HIV among MSM and Transgender Populations in Asia and the Pacific* in 2009 to agree a comprehensive package of services and programmes to support HIV prevention, treatment and care. The package includes an ongoing programme of work to identify and remove structural barriers that will reduce the effectiveness of HIV prevention and care. Areas of work identified that help to establish an enabling environment are:

- (i) reform of laws that might impede the HIV response among MSM and transgender people;
- (ii) reducing harassment, violence, stigma and discrimination experienced by MSM and transgender people;
- (iii) ensuring the continuity and consistency of the programmes and services through advocacy and leadership-building;
- (iv) supporting MSM and transgender people's CBOs and NGOs to play a key role in the design and delivery of programmes and services;
- (v) improving the quality and flow of strategic information on MSM and transgender people available to programme planners, implementers and leaders; and
- (vi) removing structural barriers to the use of services and programmes by MSM and transgender people.

In 2010, WHO released a publication to further define priority health sector HIV interventions for MSM and transgender people in the region, including supportive actions to address stigma and discrimination in health sector settings.²³³ WHO and partners are planning ongoing work to document case studies of best practice and support research to inform interventions.

232 Asia Regional Workshop on HIV and Human Rights for National Human Rights Institutions organized by the UN OHCHR and the Danish Institute for Human Rights, with the support of UNAIDS, UNDP and the Asia Pacific Forum of Human Rights Institutions, Bangkok, 12 March 2010.

233 WHO, UNDP, UNAIDS, APCOM and Department of Health of Hong Kong SAR (2010) *Priority HIV and sexual health interventions in the health sector for MSM and transgender people in Asia-Pacific Region*, Manila: WHO.

UN Economic and Social Commission for Asia and the Pacific (UNESCAP)

In 2010, UNESCAP issued a resolution on a regional call for action to achieve universal access to its membership of states of the region.²³⁴

The resolution noted:

... with particular concern, the continuing high prevalence of HIV among key affected populations, including sex workers, injecting drug users and men who have sex with men, as well as the extent of the legal and policy barriers that impede progress in developing and implementing effective ways of responding to HIV and related risks among them.

The resolution also called upon its member states:

To ground universal access in human rights and undertake measures to address stigma and discrimination, as well as policy and legal barriers to effective HIV responses, in particular with regard to key affected populations.

The resolution also requests the Executive Secretary of ESCAP:

To support members and associate members in their efforts to enact, strengthen and enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV and AIDS and other key affected populations, and to develop, implement and monitor strategies to combat stigma and exclusion connected with the epidemic;

To convene a high-level intergovernmental review for the Asian and Pacific region to assess progress against commitments in the Political Declaration on HIV/AIDS and the Millennium Development Goals and efforts to ensure universal access, and identify areas for regional cooperation, in particular in such areas as identifying and removing policy and legal barriers to universal access and promoting dialogue between health and other sectors, including justice, law and order and drug control.

Regional consultation on the role of police and law enforcement in AIDS response

UNAIDS Regional Support Team for Asia and the Pacific (UNAIDS RST AP) organized a regional consultation meeting entitled "Role of Police and Law Enforcement in AIDS Response in Asia and the Pacific" from 3–5 February, 2009, in Bangkok. The meeting aimed to engage police forces and law enforcement bodies in an accelerated HIV response including the issues of human rights and de-criminalization of most-at-risk populations of MSM, transgender people, sex workers and injecting drug users. The meeting had 76 participants from 14 countries of Asia and the Pacific region. Policy makers from ministries of interior, public security, home affairs, justice and human rights, and the HIV program focal persons from the ministries and the law enforcement departments were among the participants. The meeting recommended that UNAIDS RST AP coordinate formation of a police network, to foster exchange of information and learning across the countries in the region, and organize study tours for law enforcement agencies to observe best practices in HIV programming.

²³⁴ Economic and Social Commission for Asia and the Pacific (ESCAP) *Resolution 66/10 Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific Fifth plenary meeting*, 19 May 2010.

7 Findings and conclusions

Repressive legal environments and implications for HIV responses

- (i) The majority of countries of the region have legal environments that are repressive towards MSM and transgender people. Most HIV programmes for MSM and transgender people are in their early stages of implementation and operate in unsupportive or hostile legal environments.
- (ii) Criminal offences for consensual male-to-male sexual conduct exist in 19 Asia Pacific countries.
- (iii) Legal systems based on English common law and/or Islamic *Sharia* law are often associated with legal environments that are repressive towards MSM and transgender people.
- (iv) 16 ex-British colonies have offences for sodomy or unnatural sexual acts (Malaysia, Brunei, Myanmar, Singapore, Pakistan, Bangladesh, Sri Lanka, Maldives, Nauru, PNG, Samoa, Tonga, Kiribati, Solomon Islands, Tuvalu, Cook Islands). A further three countries that also have sodomy or unnatural sex offences did not inherit these laws directly as British colonies, but have legal systems strongly influenced by common law and 19th century British Penal Codes (Afghanistan, Bhutan, and Palau).
- (v) In addition to these 19 countries in which consensual male-to-male sex between adults is criminalized, there are reports of other criminal offences that are selectively enforced against MSM and transgender people in a further eight countries that do not have specific criminal offences for male-to-male sex (Cambodia, China, India, Indonesia, Mongolia, Philippines, Thailand, Vietnam).
- (vi) *Sharia* penalties for homosexual conduct are the most severe, and include death (Afghanistan, North West Frontier Province Pakistan), whipping (Afghanistan, Maldives, Malaysia, Brunei, Aceh, North West Frontier Province of Pakistan), and long prison sentences.
- (vii) Sodomy offences are rarely prosecuted in cases involving consenting adults, but nonetheless provide a basis for extortion, harassment, and violence directed towards MSM and transgender people by police and others.
- (viii) Other criminal laws have been enforced in a selective and discriminatory way. Public order, sex work, trafficking, obscenity and vagrancy offences have been applied against MSM and transgender people and used to extort money and as a basis for harassment and for perpetrating acts of violence (e.g. Bangladesh, Cambodia, China, Fiji, India, Indonesia, Malaysia, Pakistan, Philippines, Singapore).
- (ix) Four countries in the region criminalize cross-dressing (Afghanistan, Malaysia, Tonga and Samoa).

- (x) In all countries of the region, MSM and transgender people face stigma and violence, but with few exceptions there is no protective legislation in place to protect from or mitigate the effect of discrimination and violence.
- (xi) The fact that male-to-male sexual behaviors are stigmatized and hidden means that efforts at law reform to protect the human rights of MSM are uncommon and unpopular. Acts of discrimination and violence are also often hidden. Denial of the existence of stigma and discrimination against MSM and transgender people perpetuates the HIV epidemic.
- (xii) Legal systems based on European civil law do not criminalize sodomy and are associated with legal environments that are generally less repressive towards MSM and transgender people than common law and *Sharia* legal systems.
- (xiii) Prosecutions for consensual male-to-male sex and selective enforcement of laws against MSM and transgender people undermine the enjoyment of the human right to the highest attainable standard of health and may violate other fundamental human rights, such as rights to privacy, equality, freedom of expression and association, the right to assembly, and the principle of non-discrimination.
- (xiv) National HIV policies of 22 countries in the Asia and Pacific region have identified MSM as a most-at-risk or priority population for the purposes of HIV prevention and four countries have specific national strategic plans or action plans on MSM and HIV (Cambodia, China, Indonesia and India). Actions by legislators and the justice sector in support of HIV policy priorities are often absent or lag behind the health sector response to HIV among MSM and transgender people. This indicates the need for greater alignment and coordination between health and justice sectors within government.
- (xv) Repressive legal environments can result in a range of adverse consequences for HIV prevention, care, support and treatment services. Direct adverse impacts include:
 - a) HIV prevention outreach workers harassed, threatened or detained by police (India, Sri Lanka, Bangladesh and China).
 - b) Condoms confiscated as evidence of sex work or illegal same-sex sexual conduct (Bangladesh, Cambodia, Fiji, India, Malaysia, Mongolia, Nepal, Philippines, Papua New Guinea, Thailand).
 - c) HIV education materials censored (China, Malaysia, Singapore).
 - d) Police raids on events where HIV education takes place (China, Singapore).
- (xvi) Indirect adverse impacts, which are often more profound and pervasive than direct impacts, include:
 - a) High levels of stigma associated with homosexuality and gender variance, which drives MSM and transgender people underground and makes them difficult to reach by HIV services.
 - b) Under-representation of identified MSM and transgender people in policy development and in management of HIV programs, leading to lack of resourcing for research and targeted programmes.
 - c) Lack of appropriate HIV services for MSM and transgender people catering to their specific needs, as a result of lack of funding, research and appropriate policies.

- d) Legitimization of discrimination and unethical treatment by health care workers, including aversion 'therapy' for homosexuality and maintaining diagnostic criteria that stigmatize transgender status as a 'disorder'.
- e) Low self-esteem among MSM and transgender people, meaning that they fail to protect themselves or their partners from HIV and do not access HIV services.
- f) Failure of schools to address sexual orientation and gender identity issues in the curriculum.
- g) Lack of legal protections from discrimination, and poor education and work opportunities for MSM and transgender people, with the result that many may turn to sex-work, greatly increasing their vulnerability to HIV.

Protective and enabling laws, and improvements to the legal environment for HIV responses

- (i) Proposals for protective laws including discrimination protections, legal recognition of same-sex relationships and constitutional guarantees for MSM and transgender people are being considered by the government of Nepal.
- (ii) Eight jurisdictions have extended some constitutional protections of rights to sexual minorities and/or transgender people (Fiji – until the 2009 abrogation of the Constitution, Hong Kong SAR, India, Nepal, Pakistan, Philippines, Pitcairn Islands, South Korea).
 - a) Judgments in Fiji, Hong Kong SAR, Philippines, Nepal and Delhi (India) have interpreted constitutional rights to equality before the law, non-discrimination and/or to privacy to apply to the protection of the rights of homosexual people. In India, Fiji and Hong Kong SAR, laws criminalizing sex between adult men have been held to be invalid due to violation of rights to privacy and/or equality. Only Pitcairn Islands explicitly prohibits discrimination on the grounds of sexual orientation in its Constitution.
 - b) Judgments in Pakistan, Nepal and South Korea have interpreted constitutional rights to equality before the law to apply to protection of the rights of transgender people.
- (iii) Specific anti-discrimination legislation that includes the ground of sexual orientation exists in eight jurisdictions:
 - a) Hong Kong SAR (public sector)
 - b) Fiji
 - c) Philippines (police and social work)
 - d) South Korea
 - e) Taiwan (education and employment)
 - f) Timor-Leste (employment)
 - g) Australia
 - h) New Zealand.
- (iv) Specific anti-discrimination legislation relating to transgender status exists in two countries (Australia and New Zealand).

- (iv) Countries that have laws to protect MSM and transgender people from discrimination generally also reach a higher proportion of MSM and transgender people with HIV services, compared to those countries that criminalize homosexual behaviors.
- (v) Laws enabling transgender people to change their sex for legal purposes in prescribed circumstances have been introduced in China, Indonesia, Japan, Pakistan, Singapore, South Korea, Tamil Nadu (India), Australia and New Zealand.
- (vii) The regulations establishing the Welfare Board for Aravanis established by Government of Tamil Nadu (India) provides a useful model of protective legislation for transgender people.
- (viii) The governments of Cambodia and Papua New Guinea have developed national policy documents that specifically address the need for an enabling legal environment for HIV responses for MSM and transgender people. Most countries do not have such policies.
- (xi) In some settings, police are working in partnership with communities of MSM and transgender people to support HIV prevention (e.g. Tamil Nadu (India), Papua New Guinea).
- (x) Effective community-based responses to law enforcement issues are characterized by involvement of MSM and transgender people in planning and delivering training and sensitization for law enforcement personnel (e.g. Tamil Nadu (India), Papua New Guinea), and provision of access to legal aid for people whose rights have been violated (e.g. Tamil Nadu).
- (xi) Laws providing legal recognition to same-sex relationships have been welcomed by gay communities in Australia and New Zealand and are perceived to be reducing social marginalization of gay men and other MSM.

Degrees of prohibition and protection: categorization of legal environments

In a UNAIDS-commissioned report on legal frameworks and sexual diversity, Caceres et. al. propose a categorization of the treatment of sexual diversity by legal systems. The categories proposed are: highly prohibitive, moderately prohibitive, neutral, protective (with anti-discrimination laws) and protective with recognition (i.e. positive measures such as same-sex civil unions and transgender rights recognition).²³⁵

The categories proposed by Caceres et. al. are helpful as a basis for comparative analysis, but have a limitation in that they are based on laws, rather than law enforcement practices. Many countries of Asia and the Pacific have sodomy laws that are rarely enforced. On the other hand, other more minor offences may be selectively enforced. Categorization needs to capture the effects of law enforcement. Legal environments can become more protective and enabling if agreement is reached with police not to enforce repressive laws. Adapting the categories proposed by Caceres to take into account law enforcement practices, based on available information, countries and territories of Asia and the Pacific may be grouped in the following categories:

235 Caceres C., Pecheny M., Frasca T. et al (2009) *Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle-Income Countries: Study Commissioned by UNAIDS* Geneva: UNAIDS.

1. Prohibitive: Legal systems whose laws prohibit sexual intercourse between people of the same sex or which have criminal laws that are selectively enforced against MSM and transgender people.

1.1 Highly prohibitive – countries whose laws provide that male-to-male sex is a crime and impose severe penalties such as death, whipping, hard labor, imprisonment for five years or more. This category potentially includes Afghanistan, Brunei, Bangladesh, Cook Islands, Kiribati, Maldives, Malaysia, Myanmar, Nauru, Pakistan, Pala, Papua New Guinea, Solomon Islands, Samoa, Tonga, Tuvalu. Of these countries, there are recent reports of arrests and prosecutions in Pakistan, Malaysia and Maldives.

1.2 Moderately prohibitive – countries in which male-to-male sex is a crime and which impose penalties of less than five years, and countries which enforce criminal laws selectively against MSM and transgender people and impose penalties of less than five years imprisonment or fines. This category includes Singapore, Sri Lanka, India, Bhutan, Marshall Islands, Northern Mariana Islands. Due to selective policing practices, Mongolia, Philippines, Cambodia, China, Indonesia and Vietnam may also fall into this category. Fiji will fall into this category if newly enacted sex work offences are enforced selectively. India will fall into this category if decriminalization is confirmed by the Supreme Court—otherwise, as the penalty for sodomy under the *Indian Penal Code* is up to 10 years imprisonment, it should be categorized as highly repressive. India will fall into the category of neutral if decriminalization is confirmed and selective law enforcement practices cease.

2. Neutral: Legal systems which do not have any legal prohibition of same-sex behavior and which do not selectively enforce criminal laws against MSM and transgender people. This category includes Thailand, Lao PDR, Japan, American Samoa, New Caledonia, French Polynesia, Guam, Northern Mariana Islands, Marshall Islands, Niue, Tokelau, Vanuatu and Federated States of Micronesia.

3. Protective: Legal systems which do not criminalize consensual sex between adult males and which prohibit discrimination on grounds of sexual orientation and/or gender identity, in the Constitution or legislation, with or without positive measures of recognition.

3.1. Protective, with protection measures – legal systems whose laws prohibit discrimination on the grounds of sexual orientation and/or transgender status, without any positive measures of recognition.

This category includes Nepal, Fiji, Hong Kong SAR, Taiwan and Timor-Leste.

3.2. Protective, with recognition measures – legal systems whose laws include an explicit prohibition of discrimination on the grounds of sexual orientation and/or gender identity, with positive measures such as same-sex civil unions or transgender rights recognition.

This category includes Australia, New Zealand and Pitcairn Islands. South Korea's recognition of transgender people's equality rights means that it arguably falls into this category, although there are no enforceable prohibitions on discrimination related to sexual orientation or transgender status, and military law criminalizes male-to-male sex. Nepal will enter this category if recognition measures are enacted in legislation, as called for by the Supreme Court.

8 Recommendations for an agenda for action

The following recommendations draw from consultations with civil society representatives and technical experts in the Asia Pacific region. The recommendations are not intended to apply equally to all countries. The consultations indicated the need for country-specific advocacy and policy plans. Some countries are already making good progress in many of the areas outlined below. The recommendations are intended to be a reference for actors at the country-level that helps them to define a national agenda for action, tailored to local conditions. Country-specific cultural, religious and political factors need to be taken into account in prioritizing recommendations for each country.

A. Recommendations relating to the legal environment (advocacy, law reform, law enforcement and legal services)

1. Support to leadership, community empowerment and advocacy to improve the legal environment and address stigma

- 1.1 Governments and donors should support MSM and transgender people and their organizations to engage in advocacy on legal and human rights issues. Capacity building for MSM and transgender advocates is required at the national and regional levels. This should include training in legal literacy, human rights and advocacy skills. MSM and transgender CBOs should be resourced to provide peer-based advocacy on legal and human rights issues.
- 1.2 Specific capacity building and advocacy strategies should be developed for the human rights of transgender people, through a process led by transgender people and their organizations.
- 1.3 Governments and donors should engage with national, sub-regional and regional networks of MSM and transgender organizations and activists, including APCOM, Asia Pacific Transgender Network, Pacific Sexual Diversity Network, Purple Sky Network, Insular South East Asia MSM and HIV Network, and Developed Asia MSM Network.
- 1.4 A regional network of prominent judicial and parliamentary figures should be established in the Asia and Pacific region to support efforts for improving legal and human rights environments for HIV responses among MSM and transgender people.
- 1.5 Advocacy networks on sexual orientation, gender identity and HIV should provide platforms for dialogue among progressive faith-based leaders and thinkers. This is particularly important for Muslim and Christian communities. For example, in relation to Muslim leadership, dialogues could be held that include activists, researchers, progressive clerical leaders and/or heads of national AIDS coordinating

authorities in countries with large Muslim populations such as Indonesia, Malaysia, Maldives, Pakistan, Bangladesh and India.

2. Improvements to law enforcement practices and support to judiciary

- 2.1 Governments should ensure that parliamentarians, police, judges and justice ministry officials are provided evidence-based information on the epidemiology of HIV and sensitized about the harmful public health and human rights impacts of punitive laws, policies and practices relating to MSM and transgender people.
- 2.2 Governments should introduce training for police and public security personnel on HIV, human rights, MSM and transgender issues to improve the overall treatment of MSM and transgender people by law enforcement officials.
- 2.3 Law enforcement agencies should develop good practice guidelines in relation to protecting the human rights of MSM and transgender people and support the sharing of good practices between different countries.
- 2.4 Governments should ensure that transparent and independent police complaint mechanisms are in place that can help prevent and remedy instances of police exceeding their authority in policing of MSM and transgender people. Police departments should ensure disciplinary proceedings and prosecutions are brought against police involved in harassment, extortion and violence towards MSM and transgender people.
- 2.5 Governments and national human rights institutions should ensure that all allegations of human rights violations perpetrated against MSM and transgender people are investigated thoroughly by independent bodies, and that those responsible are held accountable for their actions.
- 2.6 Governments should ensure that NGOs, CBOs, MSM and transgender people are able to use the internet for health promotion and HIV prevention. Governments should not restrict or arbitrarily interfere with the use of the internet in ways that impede HIV prevention efforts and violate rights to information, freedom of expression and privacy. Police and government authorities should not engage in monitoring and surveillance of MSM and transgender people or CBOs involved in HIV prevention.
- 2.7 Justice Ministries and professional associations should include reference to human rights-based responses to HIV, MSM and transgender people in training of magistrates and judges.
- 2.8 Governments and donors should provide resources to enable training of magistrates, judges, police and national human rights institutions on how best to address violence and discrimination directed at MSM and transgender people through supportive laws, policing, education and care. This will require raising awareness of police, judiciary and officials that protection of the human rights of MSM and transgender people requires challenging accepted notions of sexual orientation and gender identity to combat discrimination.
- 2.9 Ministries of Police and Justice should work cooperatively with other Ministries involved in the HIV response (e.g. Health, Welfare, Education, Information,

Communication/Media) to ensure that law enforcement approaches are supportive of HIV prevention and health promotion efforts.

3. Law reform

- 3.1 Governments should review and reform or repeal all legislation that could result in discrimination against, or punishment of, people solely on the grounds of their sexual orientation or gender identity. This includes:
 - 3.1.1 laws explicitly criminalizing consensual sexual conduct between adults of the same sex;
 - 3.1.2 laws that impose discriminatory age-of-consent to same-sex sexual activity;
 - 3.1.3 public order and sex work offences that are selectively enforced and are used as a pretext for extortion or for harassing, assaulting, detaining and punishing MSM and transgender people.
- 3.2 Governments should ensure that HIV service providers, MSM and transgender people are not prosecuted on the basis of evidence of possession of materials properly used in promoting sexual health, such as safe sex literature, condoms and lubricant.
- 3.3 Governments should remove legal barriers to the distribution of sexual health information, including by providing exceptions to obscenity offences for health promotion materials.
- 3.4 Governments should enact legal protections from hate crimes, and prohibit vilification and discrimination on the grounds of gender identity and sexual orientation, particularly in areas of: employment; access to services including health care; education; accommodation; provision of identity documents; and access to welfare services.
- 3.5 Governments should enact laws that recognize same-sex relationships and relationships of transgender people in the context of inheritance, property, health care and family matters. (This recommendation is likely to be viewed as controversial in some countries and should not be pursued if it jeopardizes decriminalization proposals, but may be a priority in some jurisdictions where male-to-male sex is not criminalized).
- 3.6 Governments should introduce laws that make sexual assault of males a criminal offence, where they do not exist.
- 3.7 Governments should recognize the gender identity of transgender individuals who have and have not gone through sex reassignment surgery and accord them the same legal rights as other citizens. Transgender people should have equal rights to passports and other identification documents that recognize the persons' gender identity, and transgender people should have the right to marry.
- 3.8 Male-to-female transgender people should have the legal right to be placed in a women's prison.

- 3.9 Governments should repeal any laws that prohibit or criminalize the expression of gender identity or expression, including through dress, speech or mannerisms, or that deny to individuals the opportunity to change their bodies as a means of expressing their gender identity.
- 3.10 Governments should provide legal protections for MSM and transgender people from being subject to treatment without consent, including aversion therapy or other medical interventions that purport to control or alter sexual orientation or gender identities.
- 3.11 Governments and the medical profession should discourage use of diagnostic categorizations, such as “gender identity disorder” which stigmatize transgender people as mentally ill and undermine the legitimacy of sex reassignment procedures. Governments and professional medical associations should encourage removal of such categories from the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and the World Health Organization’s International Classification of Diseases.²³⁶
- 3.12 Governments should decriminalize sex work and support peer-based HIV prevention services for male and transgender sex workers.

4. Legal services

- 4.1 Governments should ensure provision of legal aid for MSM and transgender people who require legal advice and representation in relation to police matters, discrimination or other human rights violations.
- 4.2 Ministries of Justice working in partnership with the legal profession should ensure:
 - 4.2.1 provision of community legal education to MSM and transgender people regarding their human rights and legal rights, and practical options for claiming and enforcing their legal rights; and
 - 4.2.2 the creation of a trained and sensitized legal work force that has expertise in providing legal services to MSM and transgender people including representing MSM and transgender people to defend prosecutions, to complain against excessive police conduct or discrimination and to seek justice if subjected to violence and abuse.

5. Research, evidence and monitoring

- 5.1 Research organizations and donors should broaden their HIV research agendas to include the impact of punitive and protective legal environments on HIV risk and vulnerability, and on the uptake of and access to HIV services.
- 5.2 Donors and national AIDS authorities should support research and documentation of the effects on HIV programmes of discrimination, criminalization, and other human rights violations against MSM and transgender people. Human rights violations against MSM and transgender people need to be systematically documented so that accounts can be used for advocacy with policy and decision-makers.

236 See Annex III.

- 5.3 National AIDS authorities should promote the sharing of evidence of successes and lessons learnt from programmes that support groups of MSM and transgender people to advocate for their human rights and improved legal environments for effective HIV responses.
- 5.4 Governments should ensure that judges, parliamentarians and human rights institutions have access to evidence about the adverse HIV impacts of punitive laws and law enforcement approaches so that this can inform their work.

6. National planning of HIV responses

- 6.1 In countries where male-to-male sex is criminalized, governments should ensure that national HIV Strategies and Plans recognize the importance of decriminalization of male-to-male sex to support effective HIV responses.
- 6.2 National HIV Strategies and Plans should include costed, comprehensive components for advocacy and improvements to the enabling legal environment.
- 6.3 National HIV Strategies and Plans should address the legal and policy environment for MSM and transgender people, including law reform priorities, participation of MSM and transgender people in legal reform and policy development processes, leadership to address stigma and discrimination, community legal education and access to legal and advocacy services.

7. National human rights institutions

- 7.1 National human rights institutions should ensure that resources are applied to protecting and promoting the human rights of MSM and transgender people, and to raising awareness of the HIV impacts of human rights violations of MSM and transgender people.
- 7.2 National human rights institutions should hold governments accountable for protection of MSM and transgender people from police harassment, abuse and violence.

8. Recommendations to donors and multilateral organizations

- 8.1 Diplomatic initiatives addressing the criminalization of consensual adult homosexuality should be introduced and expanded by diplomatic missions of countries of the Asia and Pacific region and of donors active in Asia and the Pacific. For example, the British Government has developed a strategy and guidelines for its missions to address homosexuality and transgender issues, including legal reform.²³⁷
- 8.2 Donors and governments should recognize and support the important role played by human rights NGOs in monitoring and documenting violations of human rights, and advocating for legal protections for MSM and transgender people.

237 Foreign and Commonwealth Office (2007) *An FCO programme for promoting the human rights of LGBT people* London. <http://www.fco.gov.uk/resources/en/pdf/3849543/human-rights-lgbt>

- 8.3 The ASEAN Intergovernmental Commission on Human Rights should take proactive measures to promote and protect the human rights of MSM and transgender people and ensure that member states commit to action to review discriminatory laws and policies, with priority to repeal of laws criminalizing male-to-male sex.
- 8.4 The Global Fund should implement commitments of its *Sexual Orientation and Gender Identities Strategy* in Asia and the Pacific, including to:
 - use advocacy to progress discussions around criminalization;
 - monitor and communicate cases where funding proposals have been, or might be, rejected in part due to policy environments where rights violations are impeding implementation– including support to local advocacy voices.
- 8.5 In line with the UNAIDS *Outcome Framework 2009-11* and the *UNAIDS Action Framework on Universal Access for MSM and Transgender People*, the UNAIDS Secretariat and the Cosponsors should:
 - 8.5.1 document and respond to the ways that human rights are, or are not, respected, protected and fulfilled by States and non-State actors (encompassing community, faith-based and social institutions) in Asia Pacific.
 - 8.5.2 develop, strengthen and promote rights-based norms and standards for the integration of MSM and transgender people into national AIDS responses in Asia Pacific;
 - 8.5.3 develop and implement a system for the UN to address emergency human rights situations in the Asia Pacific region, including through links to broader efforts to address lesbian, gay, bisexual and transgender rights;
 - 8.5.4 encourage and assist States to remove punitive laws, policies and practices, and to introduce programmes for the empowerment of MSM, sex workers and transgender people to protect themselves from HIV and to fully access antiretroviral therapy.
- 8.6 Member States and institutions of the Commonwealth of Nations should provide leadership in condemning human rights violations against MSM and transgender people as a result of failure to reform criminals laws (sodomy and unnatural act offences) inherited from the British colonial era.

B. Recommendations relating to HIV services and the broader social environment

Consultations stressed the importance of a broad range of strategies to reduce the HIV vulnerability of MSM and transgender people and addressing the social environment, in addition to addressing the legal environment.

9. HIV prevention, treatment, care and support services

- 9.1 Governments should develop comprehensive National HIV Strategies and Plans that specifically address the needs and rights of MSM and transgender persons and

allocate sufficient resources to services that address their needs and rights. Resource allocations should be informed by research on needs and epidemiological data.

National HIV programmes should:

- 9.2 Establish and scale-up HIV prevention programs, including condom and lubricant provision, peer education and outreach, counseling and community development for MSM and transgender people.
- 9.3 Develop prevention and care programmes for HIV-positive MSM and transgender persons. Ensure equity in access to treatments and health care for HIV-positive MSM and transgender people.
- 9.4 Expand care, treatment and support facilities for HIV-positive MSM and transgender people.
- 9.5 Build the capacity of MSM and transgender CBOs to carry out HIV prevention, treatment, care and support programmes. Involve MSM and transgender community groups in designing, implementing, and evaluating HIV programmes.
- 9.6 Improve HIV sero-surveillance and behavioural surveillance of MSM and transgender people. Governments should share epidemiological data with local authorities and community-based organizations to alert them to the needs of MSM and transgender people.
- 9.7 Ensure that all sexual and reproductive health services respect the diversity of sexual orientations and gender identities.
- 9.8 Reduce stigma and discrimination in healthcare settings to increase access to health services by MSM and transgender people, including through professional education, training and sensitization activities involving MSM and transgender people.
- 9.9 Include HIV prevention, treatment, care and support of MSM and transgender people in the broader context of national health policy, national youth policy, national gender policy, national education policy and other relevant national policies.
- 9.10 Develop prevention programmes for different sub-populations of MSM and transgender people who are hard-to-reach through community outreach. This may require a variety of strategies, including mass-media campaigns.
- 9.11 Recognize the importance of identities and sub-cultures among MSM and transgender populations in HIV prevention, treatment and care programs. Identities are important in relation to community mobilization, and the support provided by the presence of communities. Prevention, treatment, care and support programmes should respect the identities chosen by MSM and transgender people.
- 9.12 Ensure that HIV prevention, treatment, care and support programmes for different sub-populations of MSM and transgender people are culturally appropriate.

- 9.13 Provide accessible counseling programmes, including for young MSM and transgender people, and their families.

10. Education and media

- 10.1 Ministries of Education should provide non-discriminatory sex education to address cultural and other taboos surrounding adolescent sexuality, gender identity and gender expression and provide adolescents with access to information, support and protection. Advocacy needs to occur with educational institutions to address institutionalized homophobia and irrational fear of variance in sexual orientation and gender identity.
- 10.2 National AIDS authorities and Ministries of Health should support public education programmes to combat stigma and discrimination faced by MSM and transgender people.
- 10.3 There needs to be educational work (e.g. in schools and universities, and in colleges for the health care professions) on masculinity and gender, which addresses the way stereotypes contribute to stigma and affect the health and wellbeing MSM and transgender people. Education needs to counter notions that violence against feminized males and females is socially permissible.
- 10.4 Media needs to be utilized by governments, public health agencies and NGOs for education (e.g. through soap operas and other popular media) to address stigma and discriminatory attitudes towards MSM and transgender people including those living with HIV, and to help provide a supportive social climate for law and policy reform.

11. Employment and income security

- 11.1 Governments should ensure equity in access to economic empowerment opportunities for MSM and transgender people, including income-generation projects and inclusion in existing social protection schemes.
- 11.2 Labor unions and industry bodies should educate their members on stigma and discrimination and other issues affecting MSM and transgender people.

Annex I: Glossary of terms

Gender, sex and gender identity

‘Gender’ refers to socially constructed roles and relationships, personality traits, attitudes, behaviours, values, relative power and influence that society ascribes to the two sexes on a differential basis. Whereas biological sex is determined by genetic and anatomical characteristics, gender is an acquired identity that is learned, changes over time, and varies widely within and across cultures. Gender is relational and refers not simply to women or men but to the relationship between them.²³⁸

‘Sex’ refers to the biological characteristics that distinguish females and males.

‘Gender identity’ refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the person’s biological sex at birth including the personal sense of the body (which may involve modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.²³⁹

There is great diversity in sexualities, sexual expression and gender identities across the Asia Pacific region.

MSM (men who have sex with men)

‘MSM’ refers to all males who have sex with other males, regardless of their sexual identity or sexual orientation, and regardless of whether they also have sex with women. MSM refers to a behavior rather than a single identifiable community. MSM includes sexually active men who identify as homosexual (gay) or bisexual, or who identify with a community of feminized males. MSM includes men with masculine characteristics who are not perceived as homosexuals and do not self-identify as homosexual or gay, but who have sex with other males.²⁴⁰

For the purposes of this report, ‘men’ (in the term MSM) refers to males regardless of age. It is noted that, in some cultures, males may not be described as ‘men’ until married.

Transgender

Transgender is a term used to describe individuals whose gender expression and/or gender identity differs from conventional expectations based on the physical sex into which they were born. Transgender people include female-to-male and male-to-female sexually reassigned

238 *Gender Equality Strategy*, Global Fund to Fight AIDS, Tuberculosis and Malaria 2008.

239 *Yogyakarta Principles*. *op cit* fn.1.

240 See APCOM, *Defining MSM* <http://www.msmasia.org/index.html>.

persons, cross-dressers and a range of cultural identities where a person identifies to be of a different gender than the gender associated with their biological sex at birth.²⁴¹

The term 'transgender people' in this document refers primarily to people who were born biologically male but who identify as female, or who have characteristics that are usually considered female. 'Male to female' transgender people have much higher rates of HIV infection than 'female to male' transgender people.

There are transgender people in all countries, and in some Asia Pacific countries there are specific transgender or 'third gender' groupings that have unique cultural identities. Some of these identities have a long history and are recognized by tradition. Others have recent origins. Expressions of gender diversity are shaped by the specific contexts of each culture. The following is a non-exhaustive list of terms used in some countries of the Asia Pacific region to refer to culturally specific sub-populations that include feminized men, third gender and/or male-to-female transgender people:

Bangladesh: *hijra, kothi*
Cambodia: *sak veng, kteuy*
Cook Islands: *laelae, akavaine*
Fiji: *vakasalewalewa*
India: *hijra, kothi, aravani*
Indonesia: *waria*
Lao PDR: *phom yao, kathoey*
Malaysia: *mak nyah*
Myanmar: *apwint, au chuuk*
Nepal: *meti*
Pakistan: *zenana*

Papua New Guinea: *palopa*
Philippines: *bakla, báytot*
Samoa: *fa'afafine*
Sri Lanka: *nachchi*
Tahiti: *mahu*
Thailand: *kathoey, sap prophet song (transgender), phet thi sam (third gender)*
Tonga: *leiti*
Tuvalu and Kiribati: *pinapinaaine*
Vietnam: *bong lo*

These terms generally refer to individuals who were born as male or, in some cases, intersex, and present themselves as feminine males or females, or in some cases as a third gender or third sex.

Many transgender people participate in sex work in low-income countries due to their inability to obtain other employment, and may be targeted for police harassment as a result. Employment options may be limited due to social marginalization and discrimination in education and employment.

Relevance of gender to the vulnerability of MSM and transgender people

It is important that analysis of the status of MSM and transgender people is informed by a gender perspective. Culturally determined concepts of masculinity and male behavior contribute to marginalization of MSM and transgender people. For some MSM in Asia, their homosexuality is not considered the most significant defining factor of their identity. Rather, it is feminized behavior that is the primary defining characteristic with which they identify. This

241 Towards an Asia and the Pacific Coalition (or Task Force or Alliance) on MSM and Transgender Organisations working with HIV Prevention, Treatment, Care and Support Paper for Risks and Responsibilities Conference, New Delhi 2006. http://www.nfi.net/downloads/Risks_Responsibilities/RR%20AP%20Coalition.pdf and see the extensive discussion of definitional issues at <http://en.wikipedia.org/wiki/Transgender>.

feminine identity sometimes causes exposure to harms, including violence, sexual abuse, rape and harassment, because feminized males do not conform to masculine norms.

Legal systems of Asia Pacific

Legal systems of Asia Pacific can be considered as falling into the following categories:

Common law: legal systems derived from England that combine laws made by or under the authority of parliament and defined by judges' decisions in court cases. The former British colonies and current and former US territories still use or are strongly influenced by common law traditions. Common law jurisdictions include Australia, American Samoa, Bangladesh, Brunei, Cook Islands, Guam, Fiji, Hong Kong SAR, India, Kiribati, Malaysia, Marshall Islands, Nepal, New Zealand, Niue, Federated States of Micronesia, Northern Mariana Islands, Nauru, Pakistan, Palau, Pitcairn Islands, Samoa, Singapore, Solomon Islands, Tokelau, Tonga.

Civil law: legal systems derived from continental Europe that rely on codified collections of legislation, including China, Indonesia, Thailand, Cambodia, Lao PDR, Vietnam, Philippines.

Customary law: in this report, customary law is used to refer to traditional village-based legal systems developed in pre-colonial times. Customary law forms a part of the legal systems of most Pacific island countries and some Asian countries.

Sharia law: Islamic religious law, which operates in Brunei, Afghanistan, Maldives, Malaysia and parts of Pakistan, Philippines and Indonesia. Informal *Sharia* courts operate outside the formal legal system in Bangladesh, and play an important role in some rural areas. Homosexual acts are prohibited by *Sharia* law.

Mixed systems: countries that draw on common law and/or civil law traditions, mixed with customary or religious laws. For example: Sri Lanka, Thailand and Philippines combine elements of common law and civil law traditions; the *Sharia* law jurisdictions referred to above operate alongside civil or common law systems; most Pacific island countries recognize customary law as well as common law; and Nepal combines Hindu legal concepts and common law.

Annex II: Consultation participants

Symposium: Overcoming legal barriers to comprehensive prevention among MSM and transgender people in Asia and the Pacific

9th ICAAP, Bali – 11 August 2009

Hon. Michael Kirby	Former Judge of the High Court of Australia
Hon. Dame Carol Kidu	Minister for Community Development, Papua New Guinea
Prof. Vitit Muntarbhorn	Faculty of Law, Chulalongkorn University, Thailand
Anand Grover	Lawyers Collective and UN Special Rapporteur on Right to Health, India
Shivananda Khan, OBE	Chair, Asia Pacific Coalition on Male Sexual Health
John Godwin	HIV and Development Consultant
Jeff O'Malley	Director, HIV/AIDS Practice, UNDP New York
Edmund Settle	Regional HIV Policy Specialist, UNDP Asia Pacific Region

Pacific Community Consultation

Suva, Fiji – 12 December 2009

Alexander Sua	Samoa
Joey Mataele	Kingdom of Tonga
Jason Lavare	Papua New Guinea
Niraj Singh	Fiji
Matautia Phineas Hartson	Australia/Samoa
Jone Vakalalabure	UNAIDS Fiji
John Godwin	HIV and Development Consultant

South, South East and East Asia Community Consultation

Bangkok – 21 December 2009

Andrew Tan	Malaysia
Dede Oetomo	Indonesia
Douglas Sanders	Thailand
Jonas Bagas	Philippines
Roshan De Silva	Sri Lanka
Stuart Koe	Singapore
Suben Dhakal	Nepal
Zhen Li	China
Rachmat Irwansjah	ASEAN
Paul Causey	APCOM
Shivananda Khan	APCOM
Ashok Row Kavi	UNAIDS India
Vivek Divan	UNDP New York
John Godwin	HIV and Development Consultant

Sri Lanka UN Joint Team on AIDS Country Review

Colombo – 9 March 2010

David Bridger	UNAIDS Country Coordinator
Dr Dayanath Ranatunga	UNAIDS
Milinda Rajapaksa	UNDP
Revati Chawla	UNFPA

Papua New Guinea UN Joint Team Country Review

Port Moresby – 27 April 2010

Hon. Dame Carol Kidu	Minister for Community Development
Hon. Jamie Maxton Graham	Chair, Special Parliamentary Committee on HIV/AIDS
Wep Kanawi	Director, National AIDS Council Secretariat
Dr. Nii K Plange	Policy Adviser, AusAID HIV Programme
Peterson Magoola	HIV Programme Specialist, UNDP PNG

High-level Dialogue – Punitive Laws, Human Rights and HIV

The University of Hong Kong, Hong Kong SAR (China) – 17 May 2010

Hon. Ajit Prakash Shah	Former Judge of the High Court of Delhi, India
Hon. Michael Kirby	Former Judge of the High Court of Australia
Hon. Dame Carol Kidu	Minister for Community Development, PNG
Prof. Johannes Chan	Dean, Faculty of Law, University of Hong Kong
Shivananda Khan, OBE	Chair, Asia Pacific Coalition on Male Sexual Health
John Godwin	HIV and Development Consultant
Dr. Mandeep Dhaliwal	Cluster Leader–Human Rights, Gender & Sexual Diversity, UNDP New York
Edmund Settle	Regional HIV Policy Specialist, UNDP Asia Pacific Region

Annex III: International legal and policy developments

An important legal milestone was the decision in the 1994 case of *Toonen v. Australia* (*Toonen's case*).²⁴² In *Toonen's case*, the United Nations Human Rights Committee found that the law of the Australian state of Tasmania, which criminalized consensual homosexual conduct between adults, violated the right to privacy guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR). A majority of countries of the Asia Pacific region have ratified the ICCPR.²⁴³ Article 17(1) of the ICCPR provides in part “no one shall be subjected to arbitrary or unlawful interference with his privacy”.

Toonen's case sets an important precedent, although it does not establish a universal rule. In determining whether legislation complies with the ICCPR, the specific circumstances of the legislation must be assessed. Legislation is considered to be in breach of the ICCPR if it arbitrarily interferes with privacy. A law that criminalizes homosexuality is not considered arbitrary and in breach of the ICCPR if the law is found to be reasonable in the circumstances, in that it is proportional to the end sought and necessary in the circumstances of any given case. In *Toonen's case*, the law was found to be unreasonable in the circumstances, because:

- i. no link was shown between the continued criminalization of homosexual activity and the effective control of the spread of HIV in Tasmania; and
- ii. with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia, and in Tasmania the law was not being enforced.

The Human Rights Committee rejected this argument that criminalization was necessary for HIV prevention, and concluded:

...criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS ... by driving underground many of the people at risk of infection ... [it] would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention.”²⁴⁴

The critical importance of tackling the legal barriers that are impeding a scaled-up response to HIV among MSM and transgender people is recognized by the *International Guidelines on HIV/AIDS and Human Rights*. In 1997, thirty five international experts in HIV and human rights agreed the *International Guidelines on HIV/AIDS and Human Rights*, which recommend repeal of sodomy laws and enactment of anti-discrimination laws and other protective legal and policy measures.²⁴⁵

242 United Nations Human Rights Committee, *Views on Communication, No 488/1992, adopted 31 March 1994*.

243 The following Asia Pacific countries have signed but not ratified the ICCPR: China, Lao PDR, Nauru, Pakistan. The following have neither signed nor ratified ICCPR: Bhutan; Brunei; Cook Islands; Myanmar; Fiji; Kiribati; Malaysia; Marshall Islands; Micronesia; Niue; Palau; Singapore; Solomon Islands; Tonga; Tuvalu.

244 *Toonen v. Australia* (488/1992), CCPR/C/50/D/488/1992 (1994); 1-3 IHRR 97 (1994) at para. 8.5; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Commission on Human Rights, 16 February 2004, E/CN.4/2004/49 at para. 38.

245 OHCHR, UNAIDS (2006) *op cit*. fn.2. pp.29, 37.

UN member states committed to removing legal barriers to HIV responses and passing laws to protect vulnerable populations through endorsement of the UN *Political Declaration on HIV/AIDS* in 2006.

In 2008, Ban Ki-moon, UN Secretary-General, made a highly significant statement on the link between the law, human rights of MSM and other key populations, and effective HIV responses:

In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment and fewer deaths. Not only is it unethical not to protect these groups; it makes no sense from a health perspective. It hurts all of us.²⁴⁶

UN agencies and a number of national human rights institutions of Asia Pacific countries endorsed the *Yogyakarta Principles* in 2007.²⁴⁷ The principles summarize UN Human Rights Committee documents and cases regarding the rights of MSM and transgender people, including the human right to the highest attainable standard of health guaranteed by the *International Covenant on Economic, Social and Cultural Rights* and to civil liberties such as freedom of movement and association pursuant to the *International Covenant on Civil and Political Rights*.

The *Yogyakarta Principles* outline states' obligations to refrain from impeding "the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity" and to "provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide protection." The *Yogyakarta Principles* acknowledge human rights violations caused by criminalization, and state that all laws that criminalize consensual sexual activity among persons of the same sex who are over the age of consent should be repealed. The *Yogyakarta Principles* also call on governments to repeal any laws that criminalize the expression of gender identity, including through dress, speech or mannerisms.

Sixty seven member States of the UN, including five Asia Pacific countries (Nepal, Timor-Leste, Japan, Australia and New Zealand), have signed a proposed *United Nations Declaration on Sexual Orientation and Gender Identity* which was presented to the UN General Assembly in 2008. The Declaration remains open for signatures and has not yet been officially adopted by the United Nations General Assembly. The Declaration includes a condemnation of violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity. It also includes condemnation of killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights. The Declaration urges states to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties.

²⁴⁶ Address by the UN Secretary General to the Opening of the XVII International AIDS Conference, Mexico City, 3 August 2008.

²⁴⁷ *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007). <http://www.yogyakartaprinciples.org>.

In 2008, the Independent Commission on AIDS in Asia highlighted the rapid growth in MSM epidemics in Asia and called for legal barriers that hinder the delivery of HIV services to MSM to be removed. The Independent Commission recommended repeal of sodomy laws and provision of immunity from prosecution for providers of HIV services and beneficiaries of HIV services.²⁴⁸ Similarly, in 2009 the Independent Commission on AIDS in the Pacific recommended repeal of colonial era laws of Pacific island countries criminalizing sex between men.²⁴⁹

In 2009, a high level body of the United Nations, the Economic and Social Council, passed a resolution on HIV/AIDS, which specifically calls for action on MSM issues, stating that it:

...welcomes the promulgation of the *“UNAIDS Action Framework: Universal Access for Men who have Sex with Men and Transgender People”*... and calls on UNAIDS... to address the political, social, legal and economic barriers to universal access.²⁵⁰

A Guiding Principle of the *UNAIDS Action Framework*, published in 2009, is that:

Actions must be grounded in an understanding of, and commitment to, human rights.

... Discriminatory laws, attitudes and behaviors undermine effective programming and must be challenged and revised when the opportunity arises. A rights-based approach will ensure that men who have sex with men, transgender people and their female sexual partners can exercise their right to information and commodities, enabling them to protect themselves against HIV and other sexually transmitted infections, as well as the right to access appropriate and effective HIV prevention, treatment, care and support of the highest possible quality, delivered without discrimination.

In 2009, UNAIDS also published *Joint Action for Results: UNAIDS Outcome Framework 2009-11*,²⁵¹ which defines the priorities of UNAIDS to include:

We can empower men who have sex with men, sex workers and transgender people to protect themselves from HIV infection and to fully access antiretroviral therapy: by ensuring that men who have sex with men, sex workers and transgender people are empowered to both access and deliver comprehensive and appropriate packages of HIV prevention, treatment, care and support services and by ensuring that law enforcement agencies and the judicial system protect their rights. Currently, access to prevention, treatment, care and support services is limited compared with the share of the burden faced by these populations.

We can remove punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS: By collaborating with civil society and all stakeholders to uphold non-discrimination in all efforts, countering social judgment and the fear that feeds stigma, delivering on the broader human rights agenda, including in the areas of sex work, travel restrictions, homophobia and criminalization of HIV transmission, ensuring access to justice and use of the law by promoting property and inheritance

248 Commission on AIDS in Asia, *op cit.* f.n.6, p. 203.

249 Commission on AIDS in the Pacific, *op cit.* f.n.6, p.89.

250 ECOSOC (2009) Economic and Social Council Resolution E/2009/L.23 adopted 24 July 2009.

251 UNAIDS (2010) *Joint Action for Results: UNAIDS Outcome Framework 2009-11* Geneva: UNAIDS.

rights, protecting access to and the retention of employment and protecting marginalized groups and reinforcing the work of UN Plus.

The UN Special Rapporteur on the right to health presented a report to the Human Rights Council in 2010, which presents a detailed justification for decriminalization of private, consensual sexual behaviour between adults.²⁵² The Report of the Special Rapporteur calls upon States to decriminalize consensual same-sex conduct, to repeal discriminatory laws relating to sexual orientation and gender identity, to repeal laws criminalizing sex work and to provide human rights education for health professionals. The report concludes:

The criminalization of private, consensual same-sex conduct creates an environment that is not conducive to affected individuals achieving full realization of their right to health. Health services must be accessible for all, without discrimination, especially for the most vulnerable or marginalized sections of the population. The repeal of laws criminalizing consensual same-sex conduct between adults helps to ensure compliance with this State obligation.

Criminalization is not only a breach of a State's duty to prevent discrimination; it also creates an atmosphere wherein affected individuals are significantly disempowered and cannot achieve full realization of their human rights. For instance, States are bound to take steps to establish prevention and education programmes for behaviour-related health concerns such as HIV/AIDS. Decriminalization facilitates the achievement of this obligation because a social atmosphere wherein adult consensual same-sex conduct is accepted constitutes an essential part of structural prevention of HIV/AIDS. A legal framework promoting an enabling environment has been noted as one of the most important prerequisites to achieve this goal, along with combating both discrimination and structural violence.

Psychiatric classifications of homosexuality and transgender identities

National policy contexts are influenced by categorizations applied to homosexuality and transgender people by the psychiatric professions. Until the second half of the 20th century, it was standard for psychiatry to view homosexuality as a mental illness. However, no scientific basis was found for regarding homosexuality as an illness or mental disorder. The research and clinical literature demonstrate that same-sex sexual behaviors are normal and positive variations of human sexuality. WHO's International Classification of Disease-9 (ICD-9) (1977) listed homosexuality as a mental illness. It was removed from the ICD-10, endorsed by the Forty-third World Health Assembly in 1990. (The Chinese Society of Psychiatry removed homosexuality from its Classification of Mental Disorders in 2001 after five years of study by the association.)

Gender Identity Disorder (GID) is the term used to diagnose transgender persons who meet a specific set of criteria. GID appears in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) of the American Psychiatric Association and WHO's *International Classification of Diseases 10th Revision* (2007) (ICD-10), similarly classifies a group of related diagnoses under Mental and Behavioral disorders. The criteria for these diagnoses have been debated in recent years. The National Board of Health and Welfare in Sweden has removed gender identity disorder of

²⁵² *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover Human Rights Council 14th Session A/HRC/14/20.76.

childhood, dual-role transvestism, and several other diagnoses relating to sexual and gender diversity from its version of the ICD-10. France has removed transsexualism from the list of psychiatric disorders.²⁵³

Service providers who work with transgender persons are arguing for removal of GID as a category because a psychiatric diagnosis is inappropriate and stigmatizing. The current categorization of GID results in pathologization of identity. It promotes the idea that male-to-female transgender people are still men—men with disordered minds—and since they are mentally disordered, they are not to be trusted with control over their own health care. Advocates argue that global reform is required to eliminate risk from psychiatric labeling, and that policies must ultimately be driven by the active participation of transgender persons in key decision-making processes.²⁵⁴ Some argue that gender identity variance should be classified as a medical condition to accommodate the needs of those gender identity variant people who require medical care for their condition, but without the stigma attached to mental disorder.²⁵⁵

253 See: Winter S. *Moving towards de-psychopathologisation: a global chorus* <http://web.hku.hk/~sjwinter/TransgenderASIA/index.htm>.

254 See e.g. Global Forum on MSM and HIV (2010), *The Global Forum on MSM & HIV (MSMGF) supports worldwide advocacy efforts to depathologize transgender identities*. <http://web.hku.hk/~sjwinter/TransgenderASIA/msm-gig-statement.pdf>

255 *Moving from Intentions to Action: Report of the Second International Experts Meeting on HIV Prevention for MSM, WSW and Transgenders*, Amsterdam, November 5-6, 2009.

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