Laws affecting
HIV responses among men who have sex with men
and transgender people in Asia and the Pacific:
an agenda for action

DRAFT FOR DISCUSSION
High-level dialogue - Punitive laws, human rights and HIV prevention
among men who have sex with men the Asia Pacific Region
17 May 2010
Center for Comparative and Public Law at the Faculty of Law
The University of Hong Kong

NOT TO BE CITED

United Nations Development Programme (UNDP)
Asia Pacific Coalition on Male Sexual Health (APCOM)
# Contents

Acknowledgements ........................................................................................................ iii

Acronyms ......................................................................................................................... iv

Key messages .................................................................................................................... 1

1 Introduction .................................................................................................................... 3

2 South Asia ..................................................................................................................... 8
   2.1 Criminal laws and police practices ................................................................. 8
   2.2 Legal protections from discrimination ............................................................ 12
   2.3 Other laws affecting HIV responses among MSM and transgender people .... 13
   2.4 Improvements in the South Asia legal environment ........................................ 14
   2.5 Examples of supportive policy and programme responses ............................ 16

3 East Asia ....................................................................................................................... 18
   3.1 Criminal laws and police practices ................................................................. 18
   3.2 Legal protections from discrimination ............................................................ 19
   3.3 Other laws affecting HIV responses among MSM and transgender people .... 20
   3.4 Improvements in the East Asia legal environment ......................................... 21
   3.5 Examples of supportive policy and programme responses ............................ 22

4 South East Asia ........................................................................................................... 23
   4.1 Criminal laws and police practices ................................................................. 23
   4.2 Legal protections from discrimination ............................................................ 28
   4.3 Other laws affecting HIV responses among MSM and transgender people .... 28
   4.4 Improvements in the South East Asia legal environment ............................... 30
   4.5 Examples of supportive policy and programme responses ............................ 31

5 Pacific ........................................................................................................................... 34
   5.1 Criminal laws and police practices ................................................................. 34
   5.2 Legal protections from discrimination ............................................................ 36
   5.3 Other laws affecting HIV responses among MSM and transgender people .... 37
   5.4 Improvements in the Pacific legal environment .............................................. 37
   5.5 Examples of supportive policy and programme responses ............................ 38
Recommendations for an Agenda for Action ................................................................. 42

Appendix I: Consultation participants ........................................................................ 49
Appendix II: Glossary of Terms .................................................................................. 50
Appendix III: Endnotes ............................................................................................. 52
Acknowledgements

This study and consultations were supported by the UNDP Asia Pacific Regional Center and the UNDP Pacific Center, in partnership with the Asia Pacific Coalition on Male Sexual Health (APCOM). Our special thanks for the following panels which provided technical guidance and inputs on the draft:

Technical Advisory Panel
Prof. Dennis Altman La Trobe University (Australia)
Prof. Douglas Sanders Chulalongkorn University (Thailand)
George Hwang Human Rights Lawyer, MARUAH - Singapore Working Group for ASEAN Human Rights Mechanism (Singapore)
Hon. Michael Kirby Retired Judge of the High Court of Australia (Australia)
Prof. Viti Muntarbhorn Faculty of Law, Chulalongkorn University (Thailand)

Community Advisory Panel
Alexander Su’a Pacific Sexual Diversity Network (Samoa)
Andrew Tan Malaysian AIDS Council (Malaysia), APN+ member; APCOM Executive Committee Member
Ashok Row Kavi Technical Officer, Sexual Minorities, UNAIDS (India)
Dede Oetomo GAYa Nusantara (Indonesia); APCOM Board Member
Hua Boonyapisomparn Transgender Activist (Thailand); APCOM Board Member
Jonas Bagas Convenor, Project Equality (Philippines)
Roshan De Silva Independent Activist (Sri Lanka)
Shivananda Khan Chief Executive, Naz Foundation International, Regional Office (India); APCOM Interim Chair,
Stuart Koe Chief Executive Officer, Fridae.com (Singapore)
Suben Manisha Dhakal Blue Diamond Society (Nepal)
Zhen Li China MSM Forum & CIDA Civil Society Programme Coordinator (China); APCOM Board Member

UNDP reviewers
Mandeep Dhaliwal Cluster Leader: Human Rights, Gender & Sexual Diversity, UNDP
Vivek Divan Consultant, Human Rights and Law, UNDP HIV/AIDS Practice
Edmund Settle HIV Policy Specialist, UNDP Asia Pacific Regional Center

In addition, we would like to acknowledge the substantive contributions from the following: Jeff O’Malley, UNDP; Alka Narang, UNDP India; Hon. Sunil Pant, Nepal; Wan Yanhai, Aizhixing, China; Anand Grover, Lawyers Collective, India; Venkatesan Chakrapani, India; Raymond Tai, Malaysia; Christopher Hershey, SCF Papua New Guinea; Sam Avrett, USA; Javed Abbas, NFI India; Wep Kanawi, National AIDS Council Secretariat, Papua New Guinea; Hon. Dame Carol Kidu, Minister for Community Development, Papua New Guinea; Hon. Jamie Maxton Graham, Chairman, Special Parliamentary Committee on HIV/AIDS, Papua New Guinea; Dr. Nii K Plange, Policy Adviser, Papua New Guinea; Peterson Magoola, HIV Programme Specialist, UNDP Papua New Guinea.

Author and project consultant
John Godwin

Project Manager
Edmund Settle, HIV Policy Specialist, UNDP Asia Pacific Regional Center
Acronyms

AIDS Acquired Immunodeficiency Syndrome
APN+ Asia Pacific Network of Positive People
APCOM Asia Pacific Coalition on Male Sexual Health
ASEAN Association of South East Asian Nations
AusAID Australia Agency for International Development
CBO Community-based organization
CCM Country Coordinating Mechanism
CCPL Center for Comparative and Public Law at the Faculty of Law, the University of Hong Kong
HIV Human Immunodeficiency Virus
LGBT Lesbian, gay, bisexual and transgender
MSM Men who have sex with men
NACO National AIDS Control Organization
NFI Naz Foundation International
NGO Non-governmental organization
PSI Population Services International
SAR Special Administrative Region (China)
UNAIDS United Nations Joint Programme on HIV/AIDS
UNDP United Nations Development Programme
USAID United States Agency for International Development
WHO World Health Organization
Key messages

More than 90 percent of men having sex with men (MSM) in Asia Pacific do not have access to HIV prevention and care services. HIV prevalence has reached alarming levels among MSM and transgender populations in many countries of Asia and the Pacific. If countries fail to address the legal context of the epidemic, this already critical situation is likely to become worse. To implement effective, human rights-based national HIV responses requires governments to consider the effect of laws and law enforcement practices on the health of MSM and transgender people.

The study identifies the diversity of laws affecting HIV prevention, care, support and treatment services for MSM and transgender people. Many of these are punitive laws that are detrimental to HIV responses, including:

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

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

- anti-discrimination laws and equality protections; and
- legal recognition of gender reassignment and “third sex” or “third gender” status.

Consensual sex between adult males is criminalized in 19 of 48 countries and territories of the Asia Pacific region. The degree to which these criminal laws are actually enforced is highly variable. In many countries, even where there are no specific offences for male-to-male sex, MSM and transgender people are subject to police abuses and are targeted by police for other offences relating to public order, vagrancy, prostitution and obscenity.

Many examples were found of how law enforcement has harmed HIV responses. HIV prevention work has been interrupted by police harassment of outreach workers. HIV prevention activities have been restricted by police on the grounds that the activities aid and abet illegal acts. Condoms have been confiscated by police as evidence of illegality. HIV materials have been censored, and police raids have occurred on events and venues where HIV education takes place. Police abuses have increased stigma, with the result that people at risk are more difficult to reach with information, education and HIV services. In countries with repressive legal environments, MSM and transgender people are reluctant to identify themselves to providers of HIV services for fear of discrimination or privacy violations.

In most countries of the region, the law does not enable transgender people to legally change their sex or gender, or to be recognized as transgender. Low visibility of MSM and transgender people in society can mean their numbers are under-estimated and few resources are invested in services to address their needs. Lack of legal recognition of same-sex relationships and of transgender status contributes to low self-esteem and social marginalization. People with low self-esteem may fail to protect themselves or their partners from HIV infection and avoid identifying themselves to health and welfare services.

The study found that there are some recent examples of protective laws, judicial and policy actions to improve the legal environment for MSM and transgender people, including important court judgments in Nepal, India, Pakistan, Philippines, Fiji, South Korea and Hong Kong. However, these are exceptional developments and action is required to improve the legal environment in all countries.

Legislation and law enforcement often lags behind national HIV policy, with the result that the reach and effectiveness of programs for MSM and transgender people are undermined. This indicates the
need for greater coordination between health and justice sectors within government. There has been growing awareness among national policy makers of the need to identify MSM as a key population to be addressed by national HIV programmes. Many national HIV policies now accord a priority to MSM, even though the legal environment remains repressive. 22 national HIV responses1 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 strategic plans or action plans on MSM and HIV (Cambodia, China, Indonesia and India). Furthermore, a regional proposal to the Global Fund to Fight AIDS, Tuberculosis and Malaria on MSM and HIV has been endorsed by seven countries in South Asia.

The study makes wide-ranging recommendations to governments including: to repeal laws that criminalize sex between adult males; train law enforcement personnel on HIV, gender, sexuality and human rights; introduce supportive laws that protect from discrimination and recognize transgender status; address discrimination by health care services; conduct public education programs to raise awareness of the rights and needs of MSM and transgender people; and to combat stigma.
1 Introduction

**Purpose**
The purpose of this Discussion Draft is to inform a high level dialogue on laws affecting HIV responses among men who have sex with men (MSM) and transgender people, convened by United Nations Development Programme (UNDP), the Asia Pacific Coalition on Male Sexual Health (APCOM) and the Centre for Comparative and Public Law (CCPL) at Law Faculty of the University of Hong Kong in Hong Kong SAR (China) on 17 May 2010.

These preliminary findings are from a study commissioned by UNDP and APCOM, which reviewed laws affecting HIV responses among MSM and transgender people in countries of the Asia and Pacific region. The study was conducted from December 2009 - May 2010. The study considered published research, legislation, cases, and grey literature, and drew from consultations with community representatives and legal experts. A comprehensive and final Published Report of the study’s findings will be delivered at the XVIII International AIDS Conference, Vienna, at the session on Criminalizing Homosexual Behaviour: Human Rights Violation and Obstacle to Effective HIV/AIDS Prevention, 20 July 2010.

**Approach**
This report applies a human rights approach to the 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.

The human rights-based approach asserts that HIV responses are most effective if the rights of people living with HIV and those most at risk of HIV (including MSM and transgender people) are protected by supportive laws and policies. It is this approach that informed the development of the *International Guidelines on HIV/AIDS and Human Rights*. With legal and policy protections in place, most at risk populations are more likely to participate in community prevention efforts, access testing, treatment and care services and disclose their risk behaviors to health authorities. HIV services can operate more effectively when most at risk populations can access services openly and without fear of adverse legal consequences. With supportive laws 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 accessible and acceptable to their communities.

It is acknowledged that applying a human rights-based approach to the situation of MSM and transgender people and the HIV epidemics in Asia and the Pacific may be considered controversial. In the past, some Asian politicians have argued that a rights-based approach to homosexuality is an inappropriate imposition of Western concepts, which conflicts with ‘Asian values’. 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) also place a greater emphasis on order and discipline than on individual liberties.

A human rights-based approach to homosexuality has also been argued to conflict with conservative Christian values of Pacific island communities and some Asian communities.

The human rights-based approach to sexuality and gender diversity is viewed 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. These issues may therefore require different legal and policy responses than in the West.\(^7\) Sexuality is seen as more fluid in many Asian and Pacific island cultures than in the West. 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 homosexual lifestyles as long as there is an effort made to be discreet. This can clash with an approach that encourages assertion of rights to equality and visibility.

This report accepts 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 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.\(^8\)

**Key findings**

Studies confirm HIV prevalence among MSM has been rising for several years in cities in China and Thailand and this is projected to be the trend in many other Asian countries.\(^9\) HIV prevalence among MSM in Asia is consistently higher than HIV prevalence among adults in the general population. A serious epidemic among MSM can potentially account for between 10 and 30 percent of new HIV infections in a typical Asian country, making HIV among MSM a significant factor in the overall epidemic.\(^10\) Surveys have found HIV prevalence at the following levels among MSM surveyed in Asian cities:

<table>
<thead>
<tr>
<th>HIV Prevalence (%)</th>
<th>City</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>30.8</td>
<td>Bangkok</td>
<td>2007</td>
</tr>
<tr>
<td>29.3</td>
<td>Yangon</td>
<td>2007</td>
</tr>
<tr>
<td>17.0</td>
<td>Mumbai</td>
<td>2006</td>
</tr>
<tr>
<td>13.2</td>
<td>Kunming</td>
<td>2007</td>
</tr>
<tr>
<td>9.1</td>
<td>Chengdu</td>
<td>2007</td>
</tr>
<tr>
<td>8.7</td>
<td>Phnom Penh</td>
<td>2005</td>
</tr>
<tr>
<td>8.1</td>
<td>Jakarta</td>
<td>2008</td>
</tr>
<tr>
<td>5.8</td>
<td>Beijing</td>
<td>2006</td>
</tr>
<tr>
<td>5.6</td>
<td>Vientiane</td>
<td>2007</td>
</tr>
<tr>
<td>4.7</td>
<td>Kathmandu</td>
<td>2005</td>
</tr>
<tr>
<td>4.03</td>
<td>Hong Kong</td>
<td>2006</td>
</tr>
<tr>
<td>5.0</td>
<td>Karachi</td>
<td>2005</td>
</tr>
<tr>
<td>2.6</td>
<td>Singapore</td>
<td>2008</td>
</tr>
</tbody>
</table>

**HIV prevalence in samples of MSM in Asian cities**

In Asian cities, HIV prevalence among samples of transgender people is reported to be even higher than among MSM (e.g. 25% in Surabaya, 34% in Jakarta, 42% in Mumbai).\(^{25}\)
A 2005 survey of 11 Asian countries concluded that targeted HIV prevention programmes reached only 8 percent of MSM. Legal and policy barriers that marginalize MSM and transgender people contribute to low levels of access to HIV services. Countries where anti-discrimination laws exist show greater coverage of prevention services among MSM. 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, compared with 38 percent in countries that did not have legal protections in place.

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, approximately half of the reported HIV cases in Pacific island countries are through male-to-male sex. A high proportion of MSM HIV diagnoses in the Pacific have been in French Polynesia and the US territories.

Despite the epidemiologic evidence for giving MSM and transgender people a high priority in national HIV responses, with few exceptions there is neglect of MSM and transgender people in the implementation of national HIV policies and plans, and failure to allocate sufficient resources to programmes and research. Reluctance to address MSM and transgender issues is influenced by repressive legal environments, which reinforce punitive social attitudes.

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 related to allegations of breach of public order, prostitution 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;
vii. absence of legal recognition of same-sex relationships.

Male-to-male sex between adults is criminalized in 19 of the 48 countries and territories of the Asia Pacific region that were reviewed by this study. MSM and transgender people are highly stigmatized in many countries of the region. The degree of social acceptance of male-to-male sex and of transgender people varies depending on cultural, religious and political contexts, which in turn influence the legal environment.

In many countries where male-to-male sex is legal, MSM and transgender people are nonetheless targeted by police on the grounds of breach of offences relating to public order or involvement in sex work. There are reports of law enforcement practices from many countries that are harmful to HIV responses among MSM and transgender people.

There are also some recent examples of protective laws, judicial and policy actions to improve the legal environment for MSM and transgender people. Recent court judgments have played a significant role in improving the legal environment in a range of countries including Nepal, India, Pakistan, Philippines, Fiji, South Korea and Hong Kong SAR of China. However, these are exceptional developments, and examples of high level political action to address repressive legal environments through legislation are rare.

MSM and transgender people experience discrimination in access to health care services and in other areas of public life, such as education, employment and access to justice. It its extreme form this includes violence perpetrated by health care workers (2.2 below) and police. No low or middle-
income country in the region has introduced comprehensive legal protections from discrimination on the grounds of sexual orientation or gender identity. Nepal is providing leadership in addressing this gap. Nepal’s *Interim Constitution* has been interpreted by its Supreme Court as guaranteeing equal rights to people regardless of sexual orientation or gender identity. Nepal is considering proposals to introduce comprehensive legal protections from discrimination in the context of the drafting of a new Constitution.

The experience of many countries of Asia and the Pacific is that repressive legal environments affecting MSM and transgender people 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 information on safer sex practices for MSM is restricted on the grounds that it may be considered to be in breach of obscenity laws, even though focused on health promotion.
- The existence of sodomy offences 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 prevention, testing, treatment, care or support services for fear of discrimination or information regarding sexual orientation or gender identity being recorded or disclosed to police.
- 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 programs 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 have no legal status. This lack of legal recognition contributes to social invisibility and lack of influence on policy makers and officials responsible for allocation of resources. Low visibility of MSM and transgender people in society can mean their numbers are under-estimated and inadequate resources are invested in targeted programs 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 programs 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. Many turn to sex work for income, which can greatly increase their vulnerability to HIV if they have no access to HIV prevention information, peer education, condoms and sexual health services.

**Legitimating discriminatory and inhumane health services**

- HIV positive MSM 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 service providers.
- 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.

**Recommendations**

Recommendations for an agenda for action are set out in Chapter 6 and relate to the following areas:

**A. Improvements to the legal environment for HIV responses**

1. Community empowerment and advocacy for improved legal environments.
2. Improvements to law enforcement practices of police and support to judiciary.
3. Repeal of laws that criminalize male-to-male sex between adults, enactment of anti-discrimination laws and other protective laws, legal recognition of gender reassignment and third sex/gender status, such legal reforms to be achieved by legislative and judicial action.
4. Incorporating actions to address the legal environment in national policies and plans.
5. Actions to address the legal environment by donors and multilateral organizations.
6. Research and monitoring of the legal environment.
7. Recommendations for donors and multilateral organizations.

**B. Improvements to HIV services and the broader social environment**

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 programs and use of the public media to raise awareness of the human rights of MSM and transgender people and to combat stigma.
3. Employment and income-support programmes for socially and economically marginalized MSM and transgender people.
## South Asia

### Criminal laws and police practices

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

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 Delhi High Court decision. Bangladesh, Pakistan and Sri Lanka still apply laws first enacted during the British colonial era that criminalize male-to-male sex. Bhutan’s sodomy law draws from the Indian Penal Code, which was inherited from British colonial law. Maldives, Afghanistan and parts of Pakistan apply Islamic Sharia laws that criminalize male-to-male sex.

The offences listed in Table 1 and a range of other more minor offences have been used by police to target MSM and transgender people. Across the South Asia sub-region, minor police offences have been used to target MSM and transgender people for harassment, extortion and assault. In many cases men have been detained for the purpose of extorting payments, but not prosecuted. These offences include vagrancy and public nuisance offences, indecent behaviour in public, breach of the peace, obscenity, soliciting, prostitution, abetment and conspiracy.

Evidence has been gathered through social research that demonstrates harm caused by police practices to MSM and transgender people 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. There have been numerous such cases documented from India and Bangladesh, from Nepal prior to 2008 and there are anecdotal reports from Sri Lanka.

Law enforcement in India, Nepal and Bangladesh over the last decade has included incidents of police harassment, assaults and detention of HIV prevention workers and censorship of prevention materials.30

**Bangladesh**

In Bangladesh, arrests of MSM have occurred under the *Code of Criminal Procedure*, which provides for arrests without warrant. Arrests are rarely followed by prosecutions. The sodomy offence of the *Bangladesh Penal Code* is rarely enforced against MSM, but there have been incidents of harassment by vigilante groups and local *fatwas* have been issued against MSM which influences application of Sharia law by informal courts.31

According to the NGO Bandhu Welfare Society, in Bangladesh the police frequently stop, harass and arrest MSMs under ‘suspicious behaviour’ laws. Such laws have prevented Bandhu Welfare Society’s staff from handing out condoms in public places.32

A study of *hijras* (male-to-female transgender persons) 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.33

A 2003 Human Rights Watch report found that the police actively interfered with outreach work among MSM, including confiscation of condoms.34

**India**

Although decriminalization of homosexuality in Delhi in 2009 was an important step forward, there is a risk of repressive police practices continuing if measures are not taken to change community attitudes, educate police and implement policies that require supportive and ethical policing. Male and transgender sex workers in India (many of whom are originally from Nepal) are also targeted for prosecution under state summary offences legislation and laws that criminalize the sex industry, such as India’s *Immoral Traffic (Prevention) Act 1986.*

**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. The police then forced him to call several of his friends, who were arrested because of their perceived sexual orientation.35 This led to *kothis* avoiding public meeting sites for fear of attracting police attention. After the arrests, for a period of time the NGO Bharosa Trust stopped holding its regular HIV prevention workshops, through which peer educators promote safe sex in public parks.

**IAVI Study: Maharashtra, Andhra Pradesh and Tamil Nadu (2008)**36

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. Stigma and discrimination experienced by transgender people from health care providers in the public hospitals dissuaded many of them from using health services. Findings from the study’s qualitative interviews suggest that, as a result of discrimination, many turned to the local unqualified providers.

Chennai study (2005-2006)³⁷
A study of vulnerability of kothis (effeminate MSM) in Chennai was conducted in 2005-2006. Findings of the 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 records that police harassed and obstructed HIV outreach workers. A key informant 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].

The study concluded:

  These activities on the part of the police pose substantial obstacles to outreach workers and directly obstruct their ability to implement HIV prevention activities in the field.

Chennai study (2006)³⁸
Of 62 MSM outreach workers surveyed, 85 percent of the sample reported having experienced varying levels of harassment from police, and 86 percent reported varying levels of harassment from others.

Study of Chennai, Hyderabad, Kolkata, Lucknow and Pune in India, and Dhaka (Bangladesh)³⁹
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).
- 75 percent who reported being sexually assaulted or raped by either policemen or goondas, stated that this occurred because they were effeminate.
- 70 percent reported facing harassment from police, ranging from extortion, blackmail, beatings, restrictions to movement, and disclosure of sexual practices to goondas and family members.
- 50 percent of respondents stated that fellow students or teachers harassed them in school or college because they were effeminate.
- 70 percent of respondents stated that the fact that they had sex with other males has had a negative impact on their economic prospects.
45 percent of respondents stated that their effeminacy had affected their work opportunities.

82 percent of respondents stated that if they were not kothis, they would have better job opportunities.

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

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 survey found that the primary motivation of the police is to extort money. Police also demand 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.

Bangalore (2008)

Sangama, an LGBT organization in Bangalore, reported arrest of activists and human rights defenders in 2008:

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.

Nepal

There is a history of abuse directed at MSM and transgender people. However, the legal and political environment has improved since 2007 as a result of the Supreme Court decision in the Sunil Babu Pant Case (2.4 below), 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. 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.

Pakistan

There is little published research data on MSM and transgender people in Pakistan. Anecdotal information describes fear, secrecy, isolation, suicides, forced marriage and community pressure to conform to heterosexual norms. 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. 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. 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. There are no reports of the death penalty for homosexual sex being applied in recent decades, although in 2005 when two men participated in a “marriage” ceremony the local tribal council told the couple to leave the area or be killed for breaking tribal laws.

A 2002 study reported that police abuses of transgender people (zenanas) in Lahore were common and frequent. The Supreme Court case on transgender rights (see 2.4, below) identified police abuses against hijras and made orders directing improved police treatment of transgender people. There is a growing civil society movement in support of MSM and transgender rights. For example, in
Karachi, a group called Participatory Organization for Empowerment of Transgender (POET) has been formed to pressure the government.

**Sri Lanka**

The sodomy offence is rarely prosecuted. The *Vagrants Ordinance of 1842* has reportedly been used to harass MSM and male sex workers. 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 Legal protections from discrimination

Adding to the environment of criminalization in much of South Asia is the absence of laws and protocols to protect MSM and transgender people from discrimination and unethical treatment. Laws are required to protect from unfair treatment in employment, access to health care, education and other aspects of public life. 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) 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 2.4 below).

In the *Naz Foundation (India) Trust Case*, the Delhi High Court ruled that sexual orientation is a ground analogous to sex, and that laws that discriminate on the basis of sexual orientation are not permitted by Article 15 of the *Constitution of India*.

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. 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 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 be effective to promote equality for MSM and transgender people and provide remedies for individuals who have experienced discrimination. 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.
2.3 Other laws affecting HIV responses among MSM and transgender people

There are no laws that give same-sex relationships legal status in South Asia, although proposals are under development in Nepal.

There are recent examples of laws recognizing the legal status of transgender people in India, Pakistan and Nepal for the purpose of electoral registration and other forms of legal identification. These help to reduce the social marginalization of transgender people.

India

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 some hijras to apply for a new passport as ‘female’ or to change the sex in the previous passport from ‘male’ to ‘female’. The latter can be done if a hijra submits a sworn affidavit and a medical certificate from the hospital where the person has undergone a sex change operation. In relation to passport applications, hijras who have not undergone a sex change operation can choose ‘other’ box in the three boxes (male, female and other) in the ‘sex’ column.53

The Indian electoral law was changed in 2009 to enable transgender people to register as third sex. Apart from in 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 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 eunuchs 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 suitable 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 ID Cards and ration cards and other problems are to be addressed.

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 and a special state Welfare Board has been established for aravanis to promote their equality and security through welfare schemes.

Other Indian states are considering replicating the experience from Tamil Nadu, 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, 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 “emasculating” (Section 320, Indian Penal Code, which punishes “grievous hurt”). As a result, eunuchs are denied safe medical facilities for castration.

Nepal
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.

2.4 Improvements in the South Asia legal environment

There have been significant improvements to the legal environment since 2007 as a result of court judgments in India, Nepal and Pakistan. These judgments place an emphasis on the role of the law in assuring equality, human dignity and inclusiveness and signal a trend towards a less repressive legal environment.

Improvements in the legal status of MSM and transgender people as a result of these developments will reduce social marginalization and support efforts to scale-up HIV services. The progress in these three countries contrasts with the other five countries of South Asia. 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 repressive criminal laws are actually enforced.

**India**

**Decriminalization of homosexuality (2009)**

In 2009, the Delhi High Court judgment in the *Naz Foundation (India) Trust v. Government of NCT Delhi*⁵⁸ (*Naz Foundation (India) Trust Case*) decriminalized sex between consenting adult males in private in India’s National Capital Territory. The application of the 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 judgement will have national application.

In this case, 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 behaviour 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 was 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 makes it obligatory on the State “to fulfil everyone’s right to the highest attainable standard of health.” 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.

The judgment in the *Naz Foundation (India) Trust Case* accepted the argument that criminalization is harmful to HIV responses. Decriminalization will likely provide a greatly improved legal environment for HIV responses, enabling MSM and transgender people to be open with health care providers regarding their sexual health needs.

**Nepal**

**Granting of equality rights to people of different sexual orientations and gender identities (2007)**

In the case of *Sunil Babu Pant and others v Government of Nepal and others* (2007), the Supreme Court of Nepal directed the Government of Nepal to:

- enact all necessary laws for same-sex partners in a relationship to jointly own property and have inheritance rights;
- enact new laws and amend all existing discriminatory laws so that all individuals with different sexual orientations and gender identities can exercise rights on an equal basis as any other citizens of Nepal;
• form a committee to study same-sex partnership laws in other countries and take initiatives as recommended by that committee;
• not penalize cross-dressing, as to do so infringes freedom of expression;
• ensure equal rights, identity and expression for transgender people regardless of their sex at birth.

Currently, Nepal is drafting a Constitution and there are proposals to promote equality in relation to sexual orientation and gender identity. Proposals include laws that grant citizenship to all citizens according to their gender identity, legal protection from discrimination on the grounds of sexual orientation and gender (including third gender), affirmative action obligations on the state to improve the situation of marginalized people (including sexual and gender minorities), social security and social justice legal provisions that are inclusive of sexual and gender minority and definitions of rights to family, marriage, labour and pay that are formulated in gender neutral language.

**Pakistan**

**Recognition of transgender equality rights (2009)**

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. The case was filed after police arrested several transgender people (eunuch-transvestites). 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 prostitution. 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 a mechanism be established to protect transgender people from police harassment and to help them with inheritance rights.

### 2.5 Examples of supportive policy and programme responses

MSM and transgender people have been included as priority populations in the national HIV and AIDS strategies and plans of India and Nepal. India’s *National Strategy and Implementation Plan for MSM* 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*.

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 successfully 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.
Nepal’s *National HIV and AIDS Strategy 2006-2011* sets a target of ensuring the human rights of affected populations (including MSM) through an effective legislative framework by 2011. The *National Strategy* identifies the need to address “institutional and policy stigma and discrimination” as a priority.

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 (Companions on a Journey and Community Strength Development Foundation) and the UN system. This initiative is mapping ‘hot spots’ for MSM are 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 and estimation of the size of the population of MSM).

The Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) is supporting efforts to address the legal and policy environment through a multi-country project in South Asia. From 2010-2015, Naz Foundation International (NFI), UNDP Asia Pacific Regional Center and Population Services International (PSI) Nepal are jointly implementing a Global Fund project focused on MSM in Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka. The project will 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 law and policies, provide technical support and multi-country research on the vulnerability of MSM and transgender people.
3 East Asia

3.1 Criminal laws and police practices

<table>
<thead>
<tr>
<th>Country/Territory/SAR</th>
<th>Legality of male-to-male sex</th>
<th>Applicable laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>Legal</td>
<td>Homosexual or heterosexual sex involving three or more people may attract prosecution under Article 301 of the Criminal Law of China, 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.</td>
</tr>
<tr>
<td>Hong Kong SAR (China)</td>
<td>Male-to-male sex was decriminalized in Hong Kong SAR in 1991.</td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Macao SAR (China)</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Mongolia</td>
<td>Legal</td>
<td>Legal since 2002.</td>
</tr>
<tr>
<td>North Korea</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>South Korea</td>
<td>Legal</td>
<td></td>
</tr>
</tbody>
</table>

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

Hong Kong is the only East Asia jurisdiction that inherited a sodomy offence from British colonial rule, which has been repealed. The other countries of this sub-region have a civil law tradition and do not criminalize male-to-male sex.

In all countries of the region, sex between men is stigmatized, although to varying degrees. The social environment in most countries of this sub-region has improved for MSM and transgender people over the last decade. However, in some countries there are recent reports of police harassment of MSM and transgender people, including some allegations of serious violence and abuse perpetrated by police.

China

The social environment for MSM and transgender people has improved in China over the last decade, particularly in urban areas, although stigma and discrimination are still widespread and legal protections from discrimination and vilification are absent. Further relaxation of regulatory constraints to publication of positive portrayals of homosexuality would greatly improve the environment for HIV responses. Hundreds of community-based MSM organizations have been established in recent years. The role of community-based organizations in responding to HIV among MSM could be further supported by reducing bureaucratic hurdles for registration of NGOs.

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.\textsuperscript{50}

Some MSM and transgender people come to police attention due to suspected involvement in prostitution, which is illegal in China.

\textit{Guangzhou incidents} \textsuperscript{61}
In March–April 2009, in People’s Park (\textit{Renmin Gongyuan}), 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 eject 100 men from the park as well as 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 otherwise invisible populations.

\textit{Beijing incidents} \textsuperscript{62}
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.

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 prostitution. This incident came after previous detentions of Aizhixing volunteers in 2007.

\textit{Mongolia}
Youth for Health NGO reports that stigma and discrimination against MSM in Mongolia, including mistreatment by police, contributes to vulnerability. Men searched by police and found to have lubricant (considered a sign of homosexuality) have been subjected to violence and abuse.\textsuperscript{63}
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.\textsuperscript{64}

3.2 Legal protections from discrimination

\textbf{Greater China}
There are no national laws protecting people from discrimination on the grounds of sexual orientation or transgender status in China. A study in Chengdu in 2009 found that stigma and discrimination from health care personnel is one of the major reasons MSM do not use health services. The study observed:

\begin{quote}
\textit{fear of discovery is still a major force that keeps the homosexual population hidden, denying them access to information and intervention programs. MSM tend to disguise their true identities when they are involved in community activities, making outreach more difficult.} \textsuperscript{65}
\end{quote}
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 "other status". In the case of *Leung T. C. William Roy v. Secretary for Justice*, this phrase was interpreted to include sexual orientation. The *Hong Kong Bill of Rights Ordinance* protects against discrimination by government authorities.

In Taiwan, Article 5 of the *Employment Service Act of 1992* was amended in 2007 to include sexual orientation as a prohibited ground of discrimination. 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.

**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 sexual orientation. Although the Human Rights Commission can recommend actions and pressure the government, its recommendations are not binding.

### 3.3 Other laws affecting HIV responses among MSM and transgender people

**China**

(i) *Media censorship*

In the past, there has been censorship of HIV prevention materials and restrictions on HIV activists. In 2005, Human Rights Watch documented the actions of Chinese authorities in shutting down web sites offering health promotion information to MSM and transgender people. 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 obtaining information about health and sexuality. Government regulation of pornographic materials on the internet includes lesbian and gay websites with images considered pornographic.

Laws continue to define homosexuality as ‘abnormal’ and fail to differentiate between explicit and non-explicit gay content in broadcasts, television programmes and films.

The ban on the publication of stories or research on MSM and transgender people means that their needs are poorly understood by the public. With few exceptions, images on TV, media and at cultural events portray MSM and transgender people negatively. The *Film Censorship Regulation* states at Article 10 “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 applies to “any portrayal in detail of pornography, rape, prostitution or homosexuality.” Although male-to-male sex is not clearly stipulated to be either legal or illegal in China, there is a tendency to continue to view homosexuality as an abnormality and to include homosexuality in the parts of regulations which deal with criminal sexual activity.

(ii) *NGO registration*

Under the current laws and regulations, to register as an organization an NGO needs to obtain the approval of administrative authorities above county level. For HIV and MSM groups, approval of the Ministry of Health Centre for Disease Control is required at provincial level. Secondly, approval of the local civil affairs administration is required. This double management system is a barrier to MSM and transgender NGOs registering their organizations. Volunteers working inside the MSM and transgender NGOs are not provided with identity documents for when they conduct outreach work, which could ensure that they avoid harassment by police or other public security officials. To rectify
this situation, easier NGO registration is required. NGOs argue that volunteers should be able to be issued with special cards to identify them when they work in dangerous environments.

**Laws in relation to transgender status**

**China**
In 2003, a circular issued jointly by the Supreme People’s Court and the Ministry of Health allowed transsexuals to change their gender designation in their household registry and marry a person of their previous sex.\(^{71}\) 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 their marriages after sex reassignment surgery.

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

**South Korea**
In the case of *In re Change of Name and Correction of Family Register*, the Supreme Court of South Korea held that the country’s statutory scheme and the Constitution require the government to legally recognize the change of sex of certain transgender persons. The majority of judges stated that “a transsexual has the right to enjoy the dignity and value of a human being, to seek happiness and to lead a humane life.”\(^{72}\) The Supreme Court held that transgender people who had undergone successful gender reassignment surgery have the right to declare themselves in their new gender in all legal documents. This includes the right to request a correction of their gender on file in government records such as the census registry.

### 3.4 Improvements in the East Asia legal environment

**Greater China**

**Right to education in China**
China’s *Regulations on the Prevention and Treatment of HIV/AIDS* (2006) protect the legal rights of people living with HIV, including the right to education. It directs NGOs "to participate in AIDS educational communication," and instructs local governments to "encourage and support relevant organizations and individuals to carry out educational communication, counseling and supervision on AIDS prevention and treatment to the HIV infection vulnerable groups..." MSM are prescribed as a vulnerable group for these purposes.\(^{73}\)

**Legal equality for homosexual men under the criminal law of Hong Kong SAR**
In *Leung’s Case* (2006),\(^{74}\) 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 and the Basic Law*. The Court of Appeal held that the laws were discriminatory and in breach of the *Bill of Rights*.

Concerns with HIV were included in the original decision of Justice Hartmann, the High Court Judge who originally heard the case that was taken on appeal to the Court of Appeal. Justice Hartmann had found that discriminatory age of consent prohibitions reduce the possibilities of providing 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.

...In so far as the risk of AIDS or similar diseases may rationally require some difference of treatment between anal intercourse and intercourse *per vaginam*, 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 section 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.75

In *Zigo Yau’s Case (2007)* 76 two men were charged with same-sex anal sex occurring “otherwise than in public,” 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*, 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.

### 3.5 Examples of supportive policy and programme responses

**Inclusion of MSM in national HIV policies: China**

In 2006, national technical guidelines for the control HIV/AIDS among and from MSM were developed. 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, with the support of the UN Technical Working Group on HIV and MSM in 2006. Additionally, financial support has been received from Bill and Melinda Gates Foundation and Global Fund Round 6 for the national MSM HIV programme. 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.77 Although there has been strong progress addressing policy for MSM and HIV, there has been very little recognition of the need for specific policy and programme responses for transgender people.
### South East Asia

#### 4.1 Criminal laws and police practices

<table>
<thead>
<tr>
<th>Country/Territory/SAR</th>
<th>Legality of male-to-male sex</th>
<th>Applicable laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>Illegal</td>
<td><em>Penal Code</em> Section 377. Carnal intercourse against the order of nature. Penalty: fine or prison sentence up to 10 years. Sharia law also operates, which criminalizes sexual relations between male persons (<em>Liwat</em>).</td>
</tr>
<tr>
<td>Cambodia</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>Legal, except in provinces or districts that have enacted local laws based on Sharia law (e.g. South Sumatra Province).</td>
<td></td>
</tr>
<tr>
<td>Lao PDR</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>Illegal</td>
<td><em>Penal Code</em> 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 Sharia law operates to criminalize sexual relations between males (<em>Liwat</em>) e.g. Section 82 <em>Syariah Criminal Offences Enactment 1995</em> (Sabah); Section 25 <em>Syariah Criminal Offences (Federal Territories) Act 1997</em>; <em>Syariah Criminal Offences (State of Penang)</em> 1996. Penalty: imprisonment for a term not exceeding three years or whipping not exceeding six strokes.</td>
</tr>
<tr>
<td>Myanmar</td>
<td>Illegal</td>
<td><em>Penal Code 1860</em> Section 377. Carnal intercourse against the order of nature. Penalty: up to 10 years imprisonment.</td>
</tr>
<tr>
<td>Philippines</td>
<td>Legal</td>
<td>Legal since 1823.</td>
</tr>
<tr>
<td>Singapore</td>
<td>Illegal</td>
<td><em>Penal Code</em> Section 377A. act of gross indecency by male with another male person. Since 2007, police do not proactively enforce the provision.</td>
</tr>
<tr>
<td>Thailand</td>
<td>Legal</td>
<td>Legal since 1956. Sex between men was criminalized from the early 1900s until 1956.</td>
</tr>
<tr>
<td>Timor Leste</td>
<td>Legal</td>
<td>Legal since 1975.</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Legal</td>
<td></td>
</tr>
</tbody>
</table>

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

Four countries of South East Asia have criminal sanctions for consensual sex between adult males (Brunei, Malaysia, Myanmar and Singapore). These countries continue to have criminal offences for male-to-male sex that were introduced during the British colonial era. However, prosecutions are understood to be rare or limited exceptional circumstances.

Sharia law, which operates in Brunei, Malaysia and parts of Indonesia and Philippines, also criminalizes MSM and transgender people.

The countries of this sub-region that have a civil law tradition do not criminalize male-to-male sex between adults (Cambodia, Timor Leste, Indonesia, Lao PDR, Philippines, Thailand and Vietnam).

The effect of legal frameworks on HIV responses is varied across the region. There are examples of law enforcement practices that significantly impede HIV prevention. In some countries there are reports of police harassment of MSM and transgender people, including allegations of serious
violence and abuse perpetrated by police. This contradicts improvements in national HIV policies to address MSM as a new priority.

In all countries of the region, sex between men is stigmatized, although to varying degrees, and the trend in most countries is towards greater acceptance. The social environment in most countries of this sub-region has improved for MSM and transgender people over the last decade.

**Cambodia, Lao PDR, Vietnam**

No laws specifically prohibit male-to-male sex in these three Mekong countries. In this respect, the former French colonies were the beneficiaries of the removal of sodomy offences from the law of France, effected 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 the civil law tradition. However, evidence suggests there is police action targeting MSM and transgender people, particularly those who are also sex workers.

In Cambodia, the *Law on the Suppression of Human Trafficking and Sexual Exploitation* (2008) has 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 have confiscated condoms as evidence of sex work. 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. In response, 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 without threat, extortion, or arrest.

In Vietnam, a national NGO meeting in 2008 reported a lack of consensus and support for a national MSM HIV prevention program from police and the Department of Social Evils Prevention, and stigma and discrimination against MSM and transgender people, particularly *bong lo* (feminized men/transgender people), in health and social services.

**Indonesia**

In Indonesia, the situation is complex due to the devolution of law-making powers to provinces and districts. The overall social and political climate is generally improving in Indonesian society for MSM and transgender people. However, at the local level there are examples of draconian laws that have been recently proposed or introduced and of selective policing targeting MSM and transgender people. Some provinces have introduced draconian measures influenced by conservative religious interests. Sharia-based laws such as those proposed in Aceh Province and enacted in South Sumatra create an intimidating atmosphere for MSM working in the small number of CBOs involved in HIV prevention and care.

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

> ... the Indonesian police regularly interpret laws concerning prostitution 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. It is common practice in many towns and cities in Indonesia for municipal police to “clean-up” public places such as parks, squares and major streets from homeless people and
street-based sex workers. Transgendered persons (waria), some of whom sell sex, are often targeted together with female sex workers during these clean-up activities. Members of the municipal police have reportedly used physical violence and verbal abuse during clean-ups, including sexual molestation of waria. In many cases, waria are then released only after payment of money without an official receipt. GAYa NUSANTARA report that police and administrative police often detain freelance female sex workers and transgender people for loitering and/or selling sex. This is disruptive to health 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 was severely tortured by police officers at the South Jakarta Resort Police. After being subjected to violence and abuse, and detention in solitary confinement, the sex worker was released without explanation. The Community Legal Aid Institute stated that this case “is only one of many examples of torture frequently experienced by transgender people”.

The Province of South Sumatra passed by-laws against prostitution in 2004. The Perda (by-law) on Eradication of Prostitution 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 or money or in other forms. The acts of ‘prostitution’ are defined to include homosexual acts and sodomy.

In September 2009, the legislature of Aceh passed the Qanun Jinayat (Islamic Criminal Law). The proposed law provides for 100 lashes for homosexual acts, or a penalty of 100 grams of gold and/or 8 months prison. The law also proposes stoning as a punishment for adultery. 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. It has been reported that human rights defenders are seeking to challenge the validity of the Qanun Jinayat in the Constitutional Court.

In March 2010, a regional Asia Conference of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), scheduled to be held in Surabaya, Indonesia, was cancelled due to threats from radical Islamic groups. Although not required by law, the conference organizing committee had obtained a police permit to hold the conference. The permit was withdrawn by the police on the grounds that attacks by Islamic groups were anticipated. The police claimed that they were unable to guarantee that 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.

Malaysia
There have been a number of prosecutions for sodomy in the last decade, before which Section 377 of the Penal Code was not commonly enforced. The legal environment for MSM and transgender people in Malaysia is considered by MSM groups to have deteriorated since 2000, with adverse consequences for HIV prevention and peer support services. Media coverage of prosecutions have 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. There have been numerous documented incidents of police harassment of MSM in public parks and police raids of social venues over the last decade. 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.
Human Rights Watch reported in 2002 that government inspectors forced HIV prevention groups in Malaysia to stop distributing condoms. In 2006 it was reported that business licensing board inspectors forced gyms, spas and massage businesses to remove condoms provided by the HIV NGO PT Foundation.

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. In 2007, police in Kuala Lumpur charged 37 men with gross indecency after a raid on a sex club.

Transgender persons have been detained and prosecuted under the Minor Offences Act 1955 for “indecent behavior” and in some instances 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.

Myanmar

Sodomy is an offence and police use public order laws against MSM suspected of involvement in sex work. Little is known about law enforcement practices or the effect of the law on HIV responses, although alarmingly high HIV prevalence among MSM has recently been reported in urban areas. In 2008, the 3rd National MSM Consultation and Capacity Building Meeting in Myanmar reported that behaviour change communication cannot be explicit because of government censorship policies and laws. The meeting concluded that advocacy work with the government and police and addressing censorship rules for providing sexual health information is needed. In relation to male sex workers “advocacy needs to be done with law enforcement agencies and personnel to reduce levels of harassment and abuse, including male-on-male rape and sexual violence.”

Philippines

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-prostitution laws (Revised Penal Code Article 202), anti-public scandal law (Revised Penal Code Article 200), the Anti-Trafficking in Persons Act and vague laws that pertain to moral turpitude. The vagueness of many of these laws makes it easy for law enforcement agencies to interpret them 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 the police to pick up and detain MSM and transgender people for extortion. The anti-public scandal law is used to arrest MSM and transgender people suspected to be having sex in public places (e.g. parks, cinemas). The police usually do not proceed to take the case to court and drop the case once a payment is made.

Police have used the presence of condoms, used or unused, as evidence to prove that male prostitution is encouraged in establishments such as gay clubs, bath houses, movie houses and bars. Condoms as evidence of prostitution are used to instigate police raids and threaten MSM and transgender people with legal charges. The enforcement of these laws creates a climate of stigma for MSM. 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 condoms possession 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, its gravity making it easier for the police to extort money for arrested individuals and owners of establishments accused of perpetuating prostitution.

**Singapore**

There were 113 convictions of men for ‘outrages on decency’ under Section 377A of the *Penal Code* between 2000 and 2006. There are no cases of police entrapment after 2004. Cases since 2001 only involve minors or extortion. 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. Prosecutions for male-to-male sex are also brought under other provisions, such as Section 354 *Penal Code* (‘molest’ or ‘outrage of modesty’) or 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:

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 programs 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 STIs 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 programs 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.

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 programs. 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.

Thailand
The rapid rise of HIV prevalence among MSM in Bangkok in the period from 2001 to 2006 illustrates the harm to HIV prevention efforts 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 in Bangkok. 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. This harassment effectively forced the removal of condoms at sex-on-premises venues for MSM because, although sex between men is not illegal in Thailand, prostitution is illegal and a condom can be used as evidence of prostitution.

In 2004, owners of gay saunas in Bangkok removed condoms from their businesses due to concerns that police would use condoms as evidence if they were charged with operating 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 venue closures was the concentration of young men moving on to parks or to the few sex venues operating illegally after hours. 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.

4.2 Legal protections from discrimination

Philippines
Legislation enacted in 2007 provides legal protection for public social workers from discrimination based on sexual orientation. Legislation enacted in 1998 prohibits discrimination on the basis of gender or sexual orientation in the Philippines National Police. There have been numerous unsuccessful attempts to enact more comprehensive national anti-discrimination laws relating to sexual orientation and gender identity. These have been opposed by the Catholic Church and socially conservative political parties.

The Philippines Constitution guarantees equality before the law. The Ang Ladlad Case (see 4.4 below) 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 people can be challenged under the Constitution, although the result of a challenge would depend on the circumstances of the case.

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

4.3 Other laws affecting HIV responses among MSM and transgender people

Indonesia
(i) 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 which 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*.  

(ii) Broadcast standards  
*Guidelines for Broadcast Behavior and Broadcast Program Standard* were issued by the Indonesian Broadcast Commission in 2004. Article 49 on Homosexuals/Lesbians states:  

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

Transgender women and men are not mentioned in Article 49. Transgender people are protected from humiliating depiction (together with people with different abilities etc.) in Article 51 of the *Guidelines*. 

**Laws in relation to transgender status**  
Cultural acceptance of transgender people varies significantly across the sub-region. Even in countries such as Thailand where there is widespread social acceptance of gender non-conformity, there has been little progress in formal legal recognition of transgender people’s rights to non-discrimination and gender identity. Singapore and Indonesia provide transgender people with the right to have their gender of choice recognized by law in certain circumstances. 

**Indonesia**  
The Department of Social Affairs classifies transgender people (*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. It is possible for inter-sex and post-operative transsexuals to legally change their gender on identity cards. Although a legal mechanism to change gender exists, it requires documentation that most *waria* do not have. Transgender people are often unable to acquire basic legal documentation. 

**Malaysia**  
Sex reassignment surgery and gender reassignment therapy are legal in Malaysia, although transgender people cannot change their identity cards to reflect their new gender. 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. 

**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.”
Singapore
The Women’s Charter was amended in 1996 to allow transgendered individuals who have completed their sex reassignment surgery the right to marry someone of the opposite sex. The same amendment also added a provision that voids same-sex marriages. In 1973, Singapore legalized sex-reassignment surgery. Government policy allows post-operative transsexual people to change the legal gender on their identity cards (but not their birth certificates).\textsuperscript{107}

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 18-20 year olds to have parental permission for a sex-change operation.

Vietnam
In 2008, a Government Decree was issued to allow sex-change operations in prescribed circumstances.\textsuperscript{108} 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 gender 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, and prohibits discrimination against, 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.

4.4 Improvements in the South East Asia legal environment

Indonesia
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 gay and transgender CBOs.\textsuperscript{109} Devolution of legislative powers in Indonesia is resulting in a diversity of local responses to HIV, MSM and waria.

Philippines
Right to equal protection under the law: Registration of political parties
Ang Ladlad, a national advocacy group for the rights of LGBT people, was denied registration by the Commission on Elections in 2009. Ang Ladlad applied to 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 stated that the application was rejected 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 is 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 directed the Commission on Elections to grant Ang Ladlad’s application for party-list accreditation.\textsuperscript{110} The Court held 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.\textsuperscript{111}

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.

\textbf{Vietnam}

\textit{Condom promotion by outreach workers} \textsuperscript{112}

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

\textit{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).

\section*{4.5 Examples of supportive policy and programme responses}

\textbf{Inclusion of MSM and transgender people in national HIV policies}

\textbf{Cambodia}

The \textit{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 \textit{National Strategic Framework and Operational Plan on HIV/AIDS and STI for MSM 2008-2011}.\textsuperscript{113} 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.

\textbf{Indonesia}

In a speech at the 2009 International Congress on AIDS in Asia Pacific 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.”\textsuperscript{114} High level recognition of the role of MSM and transgender people in the national HIV response is consistent with Indonesia’s \textit{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 intends to develop a National MSM Strategic Framework and Operational Plan in 2010, which will also encompass transgender people. The Ministry of Social Welfare has identified waria as an economically marginalized group and established training programs.

**Lao PDR**

**Malaysia**
The National Strategic Plan on HIV/AIDS 2006-2010 focuses on key population groups, which are defined to include, inter alia, MSM and ‘transsexuals’. The National Strategic Plan 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.

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.\(^\text{115}\)

**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 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, large numbers of MSM are being reached by prevention services financed by the Global Fund.

**Thailand**
MSM are a priority of the National Plan for the Prevention and Alleviation of HIV/AIDS in Thailand: 2007-2011.\(^\text{116}\) 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 outlined in the National Plan include:
- Build a policy-enabling environment that supports responses in MSM population groups.
- 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.
Indonesia

Successful response to police harassment and violence towards waria sex workers

After violent police ‘clean up’ operations in Surabaya, East Java, targeting sex workers in 2008, the Surabaya Association of Waria approached a local legal aid organization (LBH Kosgoro) and an HIV NGO (Genta Foundation) to ask for assistance in mediating with authorities. A meeting was held with officials from Provincial Social Services and police officers from different levels. As a result, the clean ups were carried out without physical or sexual violence for some months. The violence recurred in 2009. Another meeting was facilitated by the same organization with the same institutions. This succeeded in preventing further violent incidents.

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

#### 5.1 Criminal laws and police practices

<table>
<thead>
<tr>
<th>Sub-region / Country/Territory</th>
<th>Legality of male-to-male sex</th>
<th>Legality of male-to-male sex</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Polynesia</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>American Samoa (territory of the United States)</td>
<td>Legal</td>
<td>Crimes Act 1969 Sections 154 and 155 provide offences of indecency between males, and sodomy. Penalty for sodomy is imprisonment for a term not exceeding seven years</td>
</tr>
<tr>
<td>Cook Islands</td>
<td>Illegal</td>
<td>Crimes Ordinance 1961 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.</td>
</tr>
<tr>
<td>French Polynesia</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Niue</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Pitcairn Islands (territory of the United Kingdom)</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Samoa</td>
<td>Illegal</td>
<td></td>
</tr>
<tr>
<td>Tokelau (part of the realm of New Zealand)</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Tonga</td>
<td>Illegal</td>
<td>“Sodomy” and indecent assaults upon males are illegal under Sections 136-140 of the Criminal Offences Act. Penalty: imprisonment for a period not exceeding ten years. Criminal Offences Act Section 81 provides an offence for a male to impersonate a female.</td>
</tr>
<tr>
<td>Tuvalu</td>
<td>Illegal</td>
<td>Penal Code [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’.</td>
</tr>
<tr>
<td>Wallis and Futuna</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td><strong>Melanesia</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fiji</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>New Caledonia</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>Illegal</td>
<td>Criminal Code 1974 Section 210 provides for the offence of sexual penetration against the order of</td>
</tr>
<tr>
<td>Country</td>
<td>Status</td>
<td>Description</td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>--------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Solomon Islands</td>
<td>Illegal</td>
<td>Sexual acts between males illegal. Section 160 of the Penal Code 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. The lesser offence of ‘committing any act of gross indecency’ by persons of the same-sex is at Section 161.</td>
</tr>
<tr>
<td>Vanuatu</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Micronesia</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guam (unincorporated territory of the United States)</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Federated States of Micronesia</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Kiribati</td>
<td>Illegal</td>
<td>Sex between males is prohibited by the Penal Code. Section 153 of the Penal Code 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”.</td>
</tr>
<tr>
<td>Marshall Islands</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Nauru</td>
<td>Illegal</td>
<td>Nauru adopted the Criminal Code 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.</td>
</tr>
<tr>
<td>Northern Mariana Islands</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>Palau</td>
<td>Illegal</td>
<td>Sodomy is a crime under Code of Palau, Title 17 Cap 28 Section 2803. Penalty: imprisonment for not more than 10 years.</td>
</tr>
<tr>
<td>Australasia</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>Legal</td>
<td></td>
</tr>
<tr>
<td>New Zealand</td>
<td>Legal</td>
<td></td>
</tr>
</tbody>
</table>

**Table 4: Legality of male-to-male sex in the Pacific sub-region**

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. There is wide diversity in the legal environments for HIV responses across these 24 countries. Of the 24 countries and territories reviewed, male-to-male sex is illegal in nine.

**Fiji**

Homosexuality has been decriminalized in Fiji as a result of the Nadan and McCoskar case (4.4 below) and the Crimes Decree 2010. However, 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* introduces stricter prohibitions on prostitution than have previously applied. There are concerns that by driving the sex industry underground this may provide an environment in which police can harass sex workers, including male and transgender sex workers, and that these populations will be difficult to reach by prevention workers.\(^{117}\)

**Papua New Guinea**

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.\(^{118}\) Human Rights Watch reported in 2008:\(^{119}\) 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. However, the existence of sodomy and prostitution offences (e.g. *Criminal Code* Section 231: keeping rooms for the purposes of prostitution) 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.\(^{120}\) Local NGOs report that there have been 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.\(^{121}\)

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 Legal protections from discrimination

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 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 the grounds of, inter alia, 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.

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 were first introduced in 1992 (Australian Capital Territory), and since 2003 have been in place in all states and territories.

5.3 Other laws affecting HIV responses among MSM and transgender people

Recognition of transgender legal status and same-sex relationships

Legislation and policy in Australia and New Zealand recognizes the rights of transgender people to change legal gender status. 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 gender reassignment surgery).122

In New Zealand, a transgender person’s change of sex is recognised by the law for the purpose of the validity of a marriage.13

The decision of the Family Court of Australia in In re Kevin124 was the first case in Australia to deal directly with the question of whether a transgender person could marry under Australian law. Prior to In re Kevin, the Australian courts relied upon biological factors. In re Kevin confirmed that transgender people can marry according to their new gender.

Same-sex relationships 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 matters relating to welfare entitlements, finance, property and inheritance in Australia and New Zealand.

Of the Pacific islands, three jurisdictions provide for legal 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. England enacted same-sex partnership legislation in 2004. Guam’s legislature is debating a Same-sex Civil Union Bill 185 in 2010.125

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.

5.4 Improvements in the Pacific legal environment

Decriminalization of homosexuality in Fiji

In the 2005 cases of Nadan and McCoskar v The State,126 the High Court of Fiji ruled that laws against consensual sexual acts between adult men in private were in breach of the Constitutional guarantee to personal privacy. These rulings decriminalized homosexuality under the 1997
Constitution. The 1997 Constitution was abrogated in 2009. In 2010, the Crimes Decree 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.

The 2005 cases arose after two men were charged with carnal knowledge against the order of nature and gross indecency under the Fijian Penal Code. 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:

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 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 recognized the views of some members of the community that any change in the law to decriminalize homosexual conduct would seriously damage the moral fabric of society. However, 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.

5.5 Examples of supportive policy and programme responses

PNG National HIV Prevention Strategy 2010-2015
A strategic objective of the National AIDS Council HIV Prevention Strategy 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 decriminalize 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 women and men involved in sex work, and
to enhance HIV prevention among police and their partners.

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 behaviour and promotes HIV-related discrimination. 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 behavioural 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.

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
countries in support of a human rights-based legal response to HIV, including:

- Ratu Epeli Nailatikau, President of Fiji;
- Dame Carol Kidu, Minister for Community Development, Papua New Guinea;
- H.E. Sir Paulius Matane GCL, GCMG, KStJ, Kt, CMG OBE Governor General of Papua
  New Guinea;
- Hon. Mr Misa Telefoni, HT, Deputy Prime Minister of Samoa; and
- HRH Princess Pilolevu, the Princess of Tonga.

Hon. Mr Misa Telefoni, HT, 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 2009 Bali International Congress on AIDS in Asia
Pacific. 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.

Dame Carol Kidu MP’s leadership on efforts to decriminalize male-to-male sex in Papua New
Guinea
Since 2009, the Director of the National AIDS Council Secretariat (Mr Wep Kanawi) and the Minister
for Community Development (Dame Carol Kidu) have been leading a Reference Group to make
submissions to Parliament on the decriminalization of male-to-male sex and sex work. Membership
includes religious and civil society organizations, the health profession and the Ombudsman’s office.
Efforts are ongoing by concerned civil society organizations towards the creation of an enabling
environment for MSM and sex workers. In partnership with the Department of Community
Development and the National AIDS Council, the broad-based Reference Group with multi-sectoral representation was formed to deliberate on the issues, plan a way forward and make representations to Government.

The Reference Group was formed in 2006 when the Minister for Community Development was approached by concerned professionals and citizens to seek legislative reforms in several areas of sexual and reproductive health from a public health and human rights perspective. The Reference Group has undertaken to sensitize Parliamentarians, hold more consultations and prepare a submission to the National Executive Council. Sensitization programmes with parliamentarians have been held for legislators. These meetings were held for party leaders, members of parliament and the Parliamentary Committee on HIV and AIDS. Partnership between government and development partners is strong with funding for this area of work from the Australian International development Agency (AusAID), Australian Federation of AIDS Organizations and UN agencies.

In 2009, Dame Carol Kidu MP presented the arguments in favour of discrimination as follows: 130

There are many documented cases of police brutality, harassment and blackmail against men who have sex with men, although cases are rarely taken to court. Because of the stigma associated with male-to-male sex in Papua New Guinea, 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 around male-to-male sex, 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.

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;
- 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; and
- 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 facilitating the promotion of safer sex equipment vital to the prevention of HIV and STIs.

The MSM community through the Poro Support 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.

*Sir Paulius Matane, Governor General of Papua New Guinea*

131

---

Laws affecting HIV responses among MSM and transgender people: Discussion draft
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.

---

**Training Police to Respect Rights:**

**The Poro Sapot Project, Save the Children, Papua New Guinea**

In Papua New Guinea, 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, information 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 centre for police, the Bomana Police College. PSP has been invited to resource the training of new recruits on four occasions. Using a number of techniques, 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.

PSP assesses that 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 from the Project 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 and/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 country’s Police Commissioner.

*Information provided by Christopher Hershey, Save the Children PNG, 2010.*
6 Recommendations for an Agenda for Action

The following recommendations draw from consultations with civil society representatives 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 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 determining which recommendations should be accorded a priority in each country.

A. Recommendations relating to the legal environment (advocacy, law reform and law enforcement)

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 issues. This should include training in legal literacy, human rights and advocacy skills. Capacity building for MSM and transgender advocates is required at the national and regional levels. 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 support national, sub-regional and regional networks of MSM and transgender advocacy organizations so that they can influence national and regional legal and policy agendas, including APCOM, Asia Pacific Transgender Network, Pacific Sexual Diversity Network, Purple Sky Network, South Asian MSM and AIDS 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 advocate for improved legal and human rights environments for HIV responses among MSM and transgender people.

1.5. Advocacy networks on sexual orientation, gender identity and sexual health issues should be established among progressive faith-based leaders and thinkers. This is particularly important for Muslim and Christian communities. A Muslim advocacy network could include activists and researchers, progressive clerical leaders and/or National HIV Program leaders in countries with large Muslim populations such as Indonesia, Malaysia, Pakistan and Bangladesh.

2. Improvements to law enforcement practices of police and support to judiciary

2.1. Governments should introduce training for police and public security personnel on HIV, human rights, MSM and transgender issues to improve overall treatment of MSM and transgender people by law enforcement officials.

2.2. 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 best practices between police and military forces in different countries.
2.3. 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 treatment 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.

2.4. Governments and National Human Rights Institutions should ensure that all allegations of human rights violations perpetrated against MSM and transgender people are investigated promptly and thoroughly by police or other official bodies, and that those responsible are prosecuted in a manner that conforms to international human rights standards.

2.5. Governments should ensure that HIV NGOs, MSM and transgender people and their CBOs 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 prior censorship, monitoring and surveillance of MSM and transgender people and their organizations.

2.6. 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.

2.7. 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 MSM and transgender people’s human rights requires challenging accepted notions of masculinity and femininity to combat discrimination.

2.8. Ministries of Police and Justice should work cooperatively with other Ministries involved in the HIV response (e.g. Health, Welfare, Education) to ensure that law enforcement approaches are supportive of health promotion efforts.

3. **Law reform**

3.1. Governments should review and reform or repeal all legislation which could result in the discrimination, prosecution and punishment of people solely for 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 prostitution offences that are selectively enforced and are used as a pretext for harassing, assaulting, prosecuting and punishing MSM and transgender people;

3.2. Governments should ensure that providers of HIV services and beneficiaries of HIV services are not prosecuted on the basis of evidence of possession of materials properly used in promoting safe sex practices such as literature, condoms and lubricant.

3.3. Governments should remove legal barriers to the distribution of sexual health information including laws relating to obscenity that impede dissemination of sexual health information.
3.4. Governments should enact legislation that affords rights to MSM and transgender people to legal protections from discrimination, hate crimes and vilification. Governments should introduce legal protections from discrimination on the grounds of gender identity, sexual orientation, engagement in consensual same-sex practices, or marital or family status, 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 recognize same-sex relationships and relationships of transgender people in the context of inheritance, property and family matters. Governments should provide legal recognition of same-sex relationships, including removing discrimination in family laws on the basis of sexual orientation and gender identity. (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 gender reassignment surgery and accord them the same legal rights as other citizens. Legal rights to identity and citizenship should be provided to transgender people equal to those of others in the community.

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 denies 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 should prohibit diagnostic categorizations such as "gender identity disorder" and "transvestic fetishism" which stigmatize transgender people as mentally deficient, undermines the legitimacy of sex reassignment procedures and can potentially result in loss of liberty. Governments should encourage review of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association to remove such diagnostic categories.

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 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.

4.3. Donors should support programs to address community legal education and to ensure the creation of a trained and sensitized legal work force that has expertise in:
4.3.1. providing legal information, advice and representation for MSM and transgender people including those living with HIV;

4.3.2. 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 human rights of MSM and transgender people and the impact on HIV vulnerability 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 and used for advocacy work with policy and decision-makers.

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 impacts of punitive laws and law enforcement approaches on HIV responses so that this can inform their work.

6. National planning
6.1. In countries where male-to-male sex is criminalized, governments should ensure that national HIV and AIDS Strategies and Plans recognize the importance of decriminalization of male-to-male sex to support HIV responses.

6.2. National HIV and AIDS Strategic Plans should include costed, comprehensive responses for prevention, treatment, care and support for MSM and transgender people, and related components for advocacy and improvements to the legal enabling environment.

6.3. National HIV and AIDS Strategic 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.  

8.2. Donors and governments should recognize and support the important role played by international human rights NGOs in monitoring and documenting violations of human rights, and advocating for legal protections for MSM and transgender people.

8.3. The ASEAN Intergovernmental Human Rights Commission 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 requiring member states to repeal laws criminalizing male-to-male sex.

8.4. The Global Fund to Fight AIDS, Tuberculosis and Malaria should implement commitments of its Sexual Orientation and Gender Identities Strategy in Asia and the Pacific, with a priority to commitments relating to advocacy, 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 and impact of interventions – including support to local advocacy voices.

8.5. UNAIDS and its Cosponsors in Asia and the Pacific should implement commitments of the UNAIDS Action Framework on Universal Access for MSM and Transgender People to:

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.

8.6. 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, unnatural 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, in addition to addressing the legal environment.

9. Prevention, treatment, care and support services

9.1. Governments should develop comprehensive National HIV and AIDS Strategies and Plans for MSM and transgender persons and allocate resources to services that address their needs. Resource allocations should be informed by research on needs and epidemiological data.
National HIV programmes should:

9.2. Establish and scale-up prevention programs, including condom and lubricant provision, peer education and outreach, community development, mass media, STI treatment and individual counseling for MSM and transgender people.

9.3. Develop prevention and care programs 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. Address stigma and discrimination toward people living with HIV in MSM and transgender communities.

9.6. 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.

9.7. 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.

9.8. Ensure that all sexual and reproductive health services respect the diversity of sexual orientations and gender identities.

9.9. Address stigma and discrimination affecting access to health services by MSM and transgender people through sensitization of health care workers to the specific needs and human rights of MSM and transgender people.

9.10. Include HIV prevention, treatment, care and support of MSM and transgender people in the broader context of national health policy, national youth policy and national education policy and other relevant national policies.

9.11. Develop prevention programs 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.

9.12. Recognize the importance of identities and sub-cultures among MSM and transgender populations in prevention 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.

9.13. Ensure that the prevention, treatment, care and support programmes for different sub-populations of MSM and transgender people are culturally appropriate.


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 gender variance.

10.2. National AIDS authorities and Ministries of Health should support public education programs to decrease 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.

10.4. Education needs to challenge notions that violence against feminized males and females is socially permissible.

10.5. 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 provide opportunities for economic empowerment to MSM and transgender people, including income-generation projects.

11.2. Labor unions and industry bodies should educate their members on stigma and discrimination and other issues affecting MSM and transgender people.
Appendix I: Consultation participants

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/Samoan
Jone Vakalalabure UNAIDS Fiji

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

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

UNDP Papua New Guinea Country Review, Port Moresby – 27 April 2010
Hon. Dame Carol Kidu Minister for Community Development
Hon. Jamie Maxton Graham Chairman, Special Parliamentary Committee on HIV/AIDS
Wep Kanawi Director, National AIDS Council Secretariat
Dr. Nii K Plange Policy Adviser, AusAID HIV Programme
Peterson Magoola UNDP PNG
Appendix II: 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.133

‘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 sex assigned 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.134

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 also includes men who have sex with other men but who do not attach an identity to that behaviour. 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.135

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 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.136

The term ‘transgender people’ in this document refers primarily to transgender people who were born biologically male, but who identify as female or who have characteristics that are usually considered female. However, the term includes people whose initial gender identity was female but who now identify as male. ‘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 terms are used in 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
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.

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 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 behaviour that is the primary defining characteristic with which they identify. This feminine identity sometimes causes exposure to harms, including violence, sexual abuse, rape and harassment, because feminized males do not conform to masculine norms.
Appendix III: Endnotes


22 Hong Kong Special Preventive Programme, Centre for Health Protection, Department of Health “PReSM - HIV Prevalence and Risk behavioural Survey of Men who have sex with men in Hong Kong 2006” April, 2007.
29 USAID Health Policy Initiative and APCOM (2009) Investing in HIV prevention for men who have sex with men: Averting a 'Perfect Storm' Bangkok: USAID.
39 Khan S. and Bondyopadhyay A. (2006). 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. Naz Foundation International
40 Bondyopahay, 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.
43 Police assault metis at Ratna Park for carrying condoms Pukaar October 2007 Issue 59
46 Alefiyah Rajabali et. al. HIV and homosexuality in Pakistan The Lancet Infectious Diseases, Volume 8, Issue 8, Pages 511 - 515, August 2008.

Laws affecting HIV responses among MSM and transgender people: Discussion draft Page 53


Penang police arrest 37 men at "sex party". Fridae.com news. 6 Nov 2007.


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


Laws affecting HIV responses among MSM and transgender people: Discussion draft
Towards an Asia and the Pacific Coalition (or TaskForce or Alliance) on MSM and Transgender Organisations working with HIV Prevention, Treatment, Care and Support Paper for Risks and Responsibilities Conference, New Delhi 2006.