

Executive summary

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

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

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

Key findings

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

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

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

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

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

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

Repressive legal environments are characterized by:

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

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

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

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

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

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

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

Impeding prevention activities

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

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

Driving MSM and transgender people away from HIV services

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

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

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

Reduced self-esteem and increased risk-taking behaviors

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

Legitimizing discriminatory and inhumane health services

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

Recommendations

Priority actions for the Asia Pacific region

Governments should:

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

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

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

A. Improvements to the legal environment for HIV responses

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

Improvements to health sector HIV services and increased social protection

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