

Regional Issues Brief:

LAWS AND PRACTICES RELATING TO CRIMINALIZATION OF PEOPLE LIVING WITH HIV AND POPULATIONS VULNERABLE TO HIV

For the Asia-Pacific Regional Dialogue
of the Global Commission on HIV and the Law

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The Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law was hosted by the United Nations Development Programme (UNDP), United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). The Regional Advisory Group, comprised of regional civil society advocacy networks and UN organizations, reviewed the content, collected comments from various regional thematic working groups and provided inputs into each of the Regional Issues Briefs.

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Download the Report of the Regional Dialogue and four accompanying Issues Briefs at:
<http://asia-pacific.undp.org/practices/hivaids/Publications.html>

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1. Introduction

This Regional Issues Brief has been written to provide an overview of an area of enquiry that the Global Commission on HIV and the Law is examining – laws and practices that effectively criminalise persons living with HIV and those most vulnerable to HIV. It has been undertaken through a literature review of laws and documentation of their enforcement in the context of Asia and the Pacific. It serves as an information resource and complements the report of the Regional Dialogue for Asia and the Pacific that was held under the auspices of the Global Commission on HIV and the Law in Bangkok on 16 and 17 February 2011.

The HIV epidemics of Asia and the Pacific disproportionately affect key populations of sex workers, people who use drugs, men who have sex with men (MSM) and transgender people. In many countries, the behaviors of these populations are criminalized. It is particularly important to assess the role of law and law enforcement in influencing the HIV vulnerability of these populations.¹

Police, public security officials and other authorities use a range of laws as a basis to harass, arrest and detain populations living with HIV and key populations. Consideration needs to be given to legislation, regulations, by-laws, ordinances and other instruments in a broad range of legal areas such as criminal, zoning, employment and public health law.² This paper provides an overview of these laws in Asia and the Pacific, law enforcement practices and evidence of harms to health and human rights caused by punitive laws and practices. It also provides examples of action taken to protect and empower key populations.

The Regional Dialogue of the Global Commission on HIV and the Law builds on the following regional events and processes:

- (i) In 2010, member states of the Economic and Social Commission for Asia and the Pacific (ESCAP) agreed to a resolution to put in place “measures to address stigma and discrimination, as well as policy and legal barriers to effective HIV responses, in particular with regard to key affected populations.”³ ‘Key affected populations’ refers to sex workers, MSM, transgender people, and people who use drugs.
- (ii) In 2009-2010, consultations were held in Bali, Suva and Bangkok and a high-level dialogue was convened in Hong Kong by UNDP and the Asia Pacific Coalition for Male Sexual Health (APCOM) on legal environments affecting HIV responses among MSM and transgender people.⁴
- (iii) In 2010, the *First Asia Pacific Regional Consultation on HIV and Sex Work* was convened in Pattaya, which made recommendations on legal responses to sex work.⁵
- (iv) The UN Regional Taskforce on HIV/AIDS and Injecting Drug Use in Asia Pacific has conducted reviews of the law and policy environment, and in 2010 UNAIDS, UNODC and ESCAP conducted a *Regional Consultation on Compulsory Centres for Drug Users in Asia and the Pacific in Bangkok*.⁶
- (v) The Commission on AIDS in Asia published its report in 2008 and the Commission on AIDS in the Pacific published its report in 2009.⁷ Both Commissions identified the need to address the role of the law and in particular the obstacles presented by criminalisation of vulnerable populations as major challenges to effective HIV responses in the region.

1 Csete J, Dube S. An inappropriate tool: criminal law and HIV in Asia *AIDS* Sept 3 S80-85 2010.

2 United Nations OHCHR and UNAIDS. (2004) *Recommendations on integrating human rights into HIV/AIDS responses in the Asia-Pacific region*, June 2004

3 ESCAP Resolution 66/10.

4 Godwin, J. (2010), ‘Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action’, Bangkok: UNDP.

5 *Draft Declaration on Sex Work in Asia-Pacific*. <http://plri.wordpress.com/2010/10/15/pattaya-draft-declaration-on-sex-work-in-asia-and-the-pacific-2010/>; *Creating an enabling legal and policy environment for increased access to HIV and AIDS services for sex workers, Thematic Discussion Paper for 1st Asia and the Pacific Regional Consultation on HIV and Sex Work*, 12 – 15 October 2010 Pattaya.

6 UNODC, UNESCAP, UNAIDS, Report of the Regional Consultation on Compulsory Centres for Drug Users in Asia and the Pacific, 14-16 December 2010, Bangkok.

7 Commission on AIDS in Asia (2008) *Redefining AIDS in Asia: Crafting an Effective Response* Oxford University Press; Commission on AIDS in the Pacific (2009) *Turning the Tide: An OPEN Strategy for a Response to AIDS in the Pacific*.

2. Alignment of health and legal policy responses

Many health ministries in the region have policies that emphasize the importance of providing HIV services to vulnerable populations such as sex workers, people who use drugs, MSM and transgender people. However, very few law ministries have policies requiring action to ensure that laws, policies and law enforcement practices support the HIV policies and programmes of health ministries. Greater coordination between legal and health sectors is crucial to ensure HIV services reach those who are most at risk. For example, some health departments pursue harm reduction policies, while law ministries maintain contradictory 'zero-tolerance' policies toward sex work and drug use. Recent analyses have identified lack of alignment of legal sector policies and approaches with those of the health sector as a significant obstacle to HIV responses for many countries in the region.⁸

The following countries have demonstrated progress in aligning legal and health sector responses to HIV through national planning:

- Papua New Guinea has developed a national HIV Prevention Strategy that specifically addresses the need for an enabling legal environment for HIV responses for MSM, transgender people and sex workers (see Annex I).⁹
- Nepal's *National HIV/AIDS Plan 2006-2011* sets a target of ensuring the human rights of affected populations through an effective legislative framework by 2011.
- The Timor Leste *National HIV/AIDS/STI Strategic Plan 2006–2010* makes specific commitments relating to access to justice. The Strategy states:¹⁰
 - respect for human rights is a principle underlying the Strategy;
 - it is necessary to ensure that appropriate and accessible legal remedies are available to people living with HIV and those most vulnerable to HIV;
 - the current resources available in Timor-Leste to provide legal and human rights remedies for people living with HIV will be reinforced, including the Office of the Ombudsman for Human Rights, and civil and criminal remedies;
 - the human rights focal point of the Ministry of Health will receive special training on HIV issues.
- Australia accords priority to an enabling legal environment in its National HIV Strategy, with a focus on laws relating to sex work, criminalization of transmission and harm reduction.¹¹

Services that provide access to justice for people living with HIV and vulnerable populations whose behaviors are criminalized are very limited in Asia and the Pacific. There are a few isolated examples of services that provide targeted legal aid and community legal education for people living with HIV and populations vulnerable to HIV (e.g. Community Legal Aid Institute (Indonesia), Lawyers Collective HIV/AIDS Unit (India), Korekata AIDS Law Center (China), Yunnan University Legal Aid Center (China), LAC/PT/MAC Legal Clinic (Malaysia), Center for Consulting on Law and Policy in Health and HIV/AIDS (Vietnam) and HIV/AIDS Legal Centre (Australia)).¹²

8 *Creating an enabling legal and policy environment for increased access to HIV and AIDS services for sex workers, Thematic Discussion Paper for 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, 12 – 15 October 2010 Pattaya, p.5., and see Godwin, J. (2010), op cit. Executive Summary.*

9 An objective of the PNG *National HIV Prevention Strategy 2010-2015* is to "ensure a legal and policy environment supportive of HIV prevention, treatment and care". The Strategy states a commitment support changes to laws that criminalize sex work and same sex practices. See also: *National Strategic Framework and Operational Plan on HIV/AIDS and STI for MSM 2008-2011*.

10 Ministry of Health Timor-Leste (2006) *National HIV/AIDS/STI Strategic Plan 2006–2010*

11 Department of Health and Ageing (Australia) (2010) *6th National HIV Strategy 2010-2013*, p.39: "Taking a human rights approach to HIV means creating a supportive social and legal environment where rights are respected and protected and the equitable right to health is fulfilled. A commitment by governments to human rights is particularly important in seeking to establish the cooperation and trust of communities that are marginalised and disadvantaged and that may be subject to legal sanction."

12 Stephens D., Urbano M., (2010) *HIV and Legal Empowerment*, IDLO.

3. HIV transmission, exposure and non-disclosure

3.1 Laws

Prosecutions for HIV exposure, transmission, or non-disclosure of HIV status to sexual partners are possible under different types of laws, including public health laws relating to infectious or communicable diseases, criminal laws (contained in Penal Codes, Crimes Acts etc) and HIV-specific legislation. A number of countries in the region have enacted HIV-specific provisions that criminalize HIV exposure, transmission or non-disclosure. These countries include Australia, Cambodia, China, Marshall Islands, Singapore and Vietnam.¹³

A review of legislation of Pacific island countries for the Pacific Islands AIDS Foundation (PIAF) found that although countries had preferred not to create HIV-specific offences, a range of different existing offences in the criminal law could be applied to HIV exposure or transmission.¹⁴ Another review commissioned by UNDP identified that only the Marshall Islands has an HIV-specific offence. Public health legislation in the Marshall Islands provides that any person knowingly infected with HIV who purposefully or through gross negligence transmits the disease is guilty of an offence.¹⁵

The PIAF review concluded that HIV-specific offences are not justified in the Pacific:

“Reforming the criminal law to create an HIV-specific offence is neither a principled nor a pragmatic solution to a very complex problem. Prosecuting people living with HIV, or thinking that prosecuting people living with HIV can effectively stop HIV transmission, is a quick-fix solution that ignores the greater socio-political problems that allow a disease like HIV/AIDS to flourish.”

Legislation in Papua New Guinea has clarified that existing *Criminal Code Act* provisions apply to HIV transmission. The *HIV/AIDS Management and Prevention Act 2003* provides that the intentional transmission or attempted transmission of HIV to another person is to be prosecuted under the *Criminal Code Act* provisions relating to assault or attempted assault occasioning bodily harm, or unlawful homicide where death has occurred. The Act also defines defences as follows:

“It is a defence to a charge of an offence relating to the intentional or attempted transmission of HIV to another person that—

- (a) the other person was aware of the risk of infection by HIV and voluntarily accepted that risk; or
- (b) the other person was already infected with HIV; or
- (c) where the transmission or attempted transmission is alleged to have occurred by sexual intercourse—
 - (i) a condom or other effective means of prevention of HIV transmission was used during penetration; or
 - (ii) the accused person was not aware of being infected with HIV.”¹⁶

13 Article 38, *Regulations on AIDS Prevention and Treatment 2006* (China) People with HIV are required to inform their sexual partners of their status and are prohibited from spreading the infection, on purpose, to others; Section 23 *Infectious Diseases Act* (Singapore) People with HIV are required to inform their partners of their status; and a person who does not know their HIV status and has “reason to believe” they may have the virus is prohibited from having sex without informing a sexual partner or taking reasonable precautions to protect them. Penalty \$50,000 or 10 years in prison; see also *Criminal Law of China 1997*, article 332: obligation to take necessary precautions to prevent the transmission of HIV through sexual intercourse and the prohibition against intentionally infecting other persons with HIV. In Vietnam, the *Law on HIV/AIDS Prevention and Control 2006* article 8 provides an offence for “Purposefully transmitting or causing the transmission of HIV to another person”. In Cambodia, *Law on the Prevention and Control of HIV/AIDS, 2002* Article 18 provides: Any practice or acts of those who are HIV positive, which have the intention to transmit HIV to other people, shall be strictly prohibited. Any person, who violates the Article 18 of this law, shall be punished to imprisonment for 10 to 15 years; See also: *Penal Code 1997* (Malay.), ss 269-270; *Prevention and Control of Infectious Diseases Act 1988* (Malay.), ss10(1)-(2), sch 1:s 24(a)(b)(c), sch 2: pt. I(1), (7), (15), pt. II; *Penal Code of 1985* (Sing.), ss 269, 270. In Australia, HIV specific offences of state and territory legislation include section 13(1) *Public Health Act 1991* (NSW), section 143 *Public Health Act 2005* (Qld), regulation 21 *Public Health Regulations 2000* (ACT), section 20 *HIV/AIDS Preventive Measures Act 1993* (Tas).

14 Peavoy, D. (2006) *The Criminalisation of HIV/AIDS in the Pacific Islands: Why using the criminal law to fight HIV/AIDS is not the answer*, Paper prepared for Pacific Islands AIDS Foundation (unpublished): See for example, *Cook Islands Crimes Act*, 1969, s. 209(1); *Kiribati Penal Code* [Cap 67] ss. 218 and 220, *Samoa Crime Ordinance*, 1961 s. 79, *Solomon Islands Penal Code* [Cap 26] ss. 224 and 226.

15 *Communicable Diseases Prevention and Control Act 1988* §1511 (Marshall Islands).

16 *HIV/AIDS Management and Prevention Act* Section 23(3) (PNG)

India,¹⁷ Bangladesh¹⁸ and Sri Lanka¹⁹ have similar provisions in their Penal Codes that make it unlawful to spread diseases dangerous to life. Nepal amended its rape law such that the maximum penalty for rape with the knowledge of being infected with HIV is one year greater than the maximum sentence for rape without such knowledge.²⁰ In India, a draft HIV/AIDS Bill has been proposed that includes a provision requiring people living with HIV to take all reasonable measures to prevent the transmission of HIV. The Bill provides an exception for people who fear violence or abandonment should they disclose their status, as follows:

“There shall be no duty to prevent transmission, particularly in the case of women, where there is a reasonable apprehension that the measures and precautions may result in violence, abandonment or actions which may have a severe negative effect on the physical or mental health and safety of the HIV-positive person, their children or someone who is close to them.”²¹

3.2 Law enforcement practices

There have been very few reported cases of prosecutions for HIV exposure, transmission or non-disclosure in Asia. There has been one prosecution in Singapore under the *Infectious Diseases Act* of a man for having sex without disclosing his HIV-positive status. The case involved oral sex and HIV was not transmitted.²² In India, a woman who claimed she was infected with HIV due to her husband's failure to disclose his HIV status sought to prosecute her husband under provisions of the *Indian Penal Code* relating to willful cheating. The claim failed because the offence was only intended for property-related matters.²³ In Tamil Nadu, India, a man was charged with rape in a case involving sexual assault causing HIV transmission to minors.²⁴ The only reported Cambodian case relates to a man living with HIV charged with raping his wife.²⁵

In Papua New Guinea, there have been several cases in which charges have been laid for HIV transmission but there have been no reported successful prosecutions.²⁶

In Australia, there have been 31 prosecutions related to HIV transmission, exposure or non-disclosure of HIV status. Sixteen convictions have been recorded. Prosecutions are occurring with increasing frequency.²⁷ Australia has introduced a system of public health management under health legislation as an alternative to prosecutions. Australia's *National Guidelines for the Management of People with HIV Who Place Others at Risk* provide a framework based on graduated levels of intervention, underpinned by the principle that preference should be given to strategies that are least restrictive of liberties, as these will be most effective in changing behaviours in the long term.²⁸ Prosecution is a last resort. The Guidelines promote the use of counselling, education and support, and require a panel of experts to consider case management options and provide support to health care providers to provide alternatives to prosecution.

In New Zealand there have been 11 prosecutions for HIV exposure or transmission. In 2005, a case found that people living with HIV are not required to disclose their HIV-positive status to sexual partners if a condom is properly used. The case also found that due to the low transmission risk associated with oral sex, HIV-positive people are not required to disclose their HIV status prior to oral sex.²⁹

3.3 Public health impacts

A number of HIV organizations in the region have raised concerns about the negative public health effects of prosecutions of people living with HIV. These include Igat Hope (Papua New Guinea), PIAF, National Association of

17 Sections 269 and 270 *Indian Penal Code*.

18 Sections 269 and 270, *Penal Code*, 1860 (Bangladesh).

19 Sections 262 and 263, *Penal Code*, 1883 (Sri Lanka).

20 Section 12, *An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006*.

21 HIV/AIDS Bill (India) Section 14. Bill prepared on request of MPs and the National AIDS Control Organisation by Lawyers Collective HIV/AIDS Unit.

22 Bloomberg, *Singapore Jails Man With HIV for Performing Oral Sex on Youth*

23 Junega S (2008) *HIV+ By Marriage - High Court Denies Rights*. <http://desicritics.org/2008/07/10/041006.php>

24 *Chennai: Two Minor Girls Fall Prey to HIV+ Rapist Chennai*, 20 April 2008 <http://www.daijiworld.com/news>.

25 Cameron S., Reynolds L., *Global Criminalisation Scan Report 2010*. Amsterdam: GNP+, p16.

26 See e.g. PNG MP could face AIDS charges. *The Age*, Australia, 23 March 2006; in *Nap v. Nap*, [2006] PGDC 22, the District Court PNG ordered the respondent to refrain from having sex with his wife until his HIV status had been confirmed as the respondent had failed to satisfy the legal obligation to take all reasonable steps to avoid contracting and spreading HIV. The Court found that, by engaging in extramarital affairs, the respondent had exposed his wife to the risk of HIV and thereby placed her life in jeopardy.

27 Cameron S. (2011) *HIV, crime and the law in Australia: options for policy reform. A law reform advocacy kit*. Sydney: AFAO.

28 *National Guidelines for the Management of People with HIV who Place Others at Risk* Australian Health Ministers' Conference, 18 April 2008.

29 *Police v. Dalley*, (2005) 22 CRNZ 495 (N.Z., District Court, Wellington). see: <http://www.ashm.org.au/HIVLegal/Default.asp?publicationID=2&SectionID=333>

People living with HIV/AIDS (NAPWA, Australia),³⁰ Australia Federation of AIDS Organisations (AFAO)³¹ and Lawyers Collective (India).³² Concerns include the additional stigma generated by criminal prosecutions and associated media attention, reluctance of people to come forward for testing and treatment as a result of fear of prosecution, and selective enforcement of laws against sex workers, migrants and MSM. Criminal sanctions can be a disincentive to HIV testing and disclosure. Contrary to the HIV prevention rationale of such laws, they may actually increase rather than decrease HIV transmission: "The likelihood that individualized legal actions undermine 'mutual responsibility' messages strikes at the heart of successful HIV prevention practice."³³ A study in Australia found that 42.4 percent of those surveyed reported being worried about disclosing their HIV status to sexual partners "because of the current legal situation".³⁴

Commentators in the region argue that HIV-specific offences are unjustified and that there is a very narrow category of circumstances in which prosecutions may be warranted under the general criminal law, involving deliberate and malicious conduct leading to actual transmission of disease.³⁵ An analysis of laws of WHO's Western Pacific region argues against the enactment of punitive laws that require disclosure of HIV status, arguing instead for a more balanced, human rights-based approach:

"Western Pacific laws that impose a duty to take reasonable precautions against, and to use reasonable care to avoid, transmission of HIV through sexual intercourse, but that do not require persons with HIV/AIDS to disclose their health status to sexual partners, strike a balance between public health and human rights objectives."³⁶

30 Cameron S, Rule J. (eds) (2009) *NAPWA Monograph: The Criminalisation of HIV Transmission in Australia: Legality, morality and reality*. Sydney: NAPWA.

31 Cameron S. (2011) *op cit*.

32 Lawyers Collective (2003) *Legislating an epidemic: HIV/AIDS in India*, Delhi: Lawyers Collective, p.264ff.

33 Cameron S., (2011) Australian criminal law and the sexual transmission of HIV: a contemporary policy response. *HIV Australia* Vol. 8:(4).

34 Grierson J, Power J, Croy S, Clement T, Thorpe R, McDonald K, Pitts M. *HIV Futures 6: Making Positive Lives Count*. (2006) The Living with HIV Program. Melbourne: The Australian Research Centre in Sex, Health and Society, La Trobe University.

35 Cameron S. (2011) *HIV, crime and the law in Australia: options for policy reform. A law reform advocacy kit*. Sydney: AFAO p.15, and see United Nations Human Rights Council (2010) *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*.

36 Cusack S., (2010) *Advancing sexual health and human rights in the Western Pacific*. International Council on Human Rights Policy, p.63.

4 Men who have sex with men (MSM) and transgender people

4.1 Laws

UNDP and APCOM conducted a review of laws affecting MSM and transgender people in 48 countries of the Asia Pacific region in 2010. The review found that consensual sex between men is illegal in nineteen countries: Malaysia, Brunei, Myanmar, Singapore, Pakistan, Bangladesh, Sri Lanka, Maldives, Nauru, PNG, Samoa, Tonga, Kiribati, Solomon Islands, Tuvalu, Cook Islands, Afghanistan, Bhutan and Palau.³⁷ However, in India, as a result of the *Naz Foundation case*³⁸ sex between men has been decriminalized.

Many countries of South Asia, South East Asia and the Pacific have offences for sodomy, buggery and gross indecency applicable to sex between men in their criminal codes, inherited from the British colonial era. Some offences are drafted so that they appear to be neutral (such as the offence of “unnatural sex” or “carnal intercourse against the order of nature”), but in effect are discriminatory because they are only enforced against MSM and, in some cases, transgender people. *Sharia* penalties for sex between men are severe, and include death (in certain districts of Pakistan), whipping or caning (Maldives, Malaysia, Brunei and parts of Pakistan, and proposed in Aceh, Indonesia), and imprisonment. While there is no specific sodomy offense in Indonesia, some municipal governments have adopted *Sharia* law, applying only to Muslim citizens, which bans homosexuality.

Countries of East Asia (including China, Japan, North Korea, South Korea and North Korea), Timor Leste and the former French colonies of Asia and the Pacific generally have no legal restrictions on consensual sex between men. Jurisdictions in the Pacific that do not criminalize sex between men are: American Samoa, Australia, Federated States of Micronesia, Fiji, French Polynesia, Guam, New Caledonia, Marshall Islands, Northern Mariana Islands, New Zealand, Niue, Pitcairn Islands, Tokelau, Vanuatu and Wallis and Futuna.

The UNDP APCOM study found that in addition to sodomy laws other criminal offences (vagrancy and public order offences) are selectively enforced against MSM and transgender people in countries across the region. This includes countries where sodomy remains an offence as well as a further eight countries where there is no specific sodomy offence (Cambodia, China, India, Indonesia, Mongolia, Philippines, Thailand, Vietnam). Censorship laws may also criminalize dissemination of health information targeted at MSM. In Indonesia, the National AIDS Commission has reported to UNAIDS its concerns that the *Pornography Law 2009* restricts dissemination of prevention information to MSM and sex workers.³⁹

Four countries in the region criminalize cross-dressing (Afghanistan, Malaysia, Tonga and Samoa). In Malaysia, a *fatwa* was issued against cross-dressing and sex reassignment operations except for “hermaphrodites.” Non-Muslim *mak nyah*⁴⁰ can be charged with “indecent behaviour” for cross-dressing under the *Minor Offences Act 1955*.⁴¹ Transgender people across the region are also frequently charged or threatened with arrest under laws relating to sex work, loitering and vagrancy.⁴²

4.2 Law enforcement practices

The UNDP/APCOM study provides a detailed summary of the literature on law enforcement practices. Findings included:

- (i) Sodomy offences are rarely prosecuted in cases involving consenting adults, but nonetheless provide a basis for extortion, harassment, and violence directed towards MSM and transgender people by police and others.
- (ii) Other criminal laws have been enforced in a selective and discriminatory way. Public order, prostitution, trafficking, obscenity and vagrancy offences have been applied against MSM and transgender people and used to extort money and as a basis for harassment and for perpetrating acts of violence (e.g. Bangladesh, Cambodia, China, Fiji, India, Indonesia, Malaysia, Pakistan, Philippines, Singapore).

37 Godwin, J. (2010), *op cit.* p.109.

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

39 *Republic of Indonesia Country Report on the Follow up to the Declaration of Commitment On HIV/AIDS (UNGASS) Reporting Period 2008 – 2009*, p.119.

40 *Mak nyah* is a Malay term for a male-to-female transsexual.

41 Sood N. (2010). *Transgender People's Access to Sexual Health and Rights: A Study of Law and Policy in 12 Asian Countries*, ARROW, p14.

42 *Ibid.*

- (iii) In all countries of the region, MSM and transgender people face stigma and violence, but with few exceptions there is no protective legislation in place to protect from or mitigate the effect of discrimination and violence.
- (iv) In China, there are now no specific offences criminalizing male-to-male sex. However, the legal position of homosexual conduct is considered to be ambiguous, as there have been no clear policy statements confirming legality of male-to-male sexual conduct or relationships. A review of the status of MSM and transgender people in China conducted in 2009 observed:

“(T)here 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... Anecdotal evidence suggests that there are many incidents where LGBT people, once detained by the police, face harassment, blackmail and extortion.”⁴³

4.3 Public health impacts

The existence of sodomy offences creates an atmosphere of fear and intimidation in which MSM risk violence and abuse targeted against them, particularly if they are open about their sexuality. MSM report that police often use the threat of criminal prosecution to harass and extort money. MSM are highly stigmatised, and fear discrimination or prosecution if they identify themselves to health authorities. The UNDP and APCOM study referred to consistent reports from service providers that HIV services are more effective in reaching MSM and transgender people and meeting their needs when police harassment does not occur, when punitive laws are repealed or not actively enforced, and when protective and enabling laws and law enforcement practices are introduced.⁴⁴ The study reported that repressive legal environments can result in a range of adverse consequences for HIV prevention, care, support and treatment services.⁴⁵

Direct adverse impacts have been noted:

- (i) HIV prevention outreach workers are harassed, threatened or detained by police (India, Sri Lanka, Bangladesh and China).
- (ii) Condoms are confiscated as evidence of sex work or illegal same-sex sexual conduct (Bangladesh, Cambodia, Fiji, India, Malaysia, Mongolia, Nepal, Philippines, Papua New Guinea, Thailand).
- (iii) HIV education materials are censored (China, Malaysia, Singapore).
- (iv) Police raid events where HIV education takes place (China, Singapore).

Indirect adverse impacts, which are often more profound than direct impacts, have also been experienced:

- (i) High levels of stigma associated with sexual and gender variance drives MSM and transgender people underground and away from services.
- (ii) Under-representation of identified MSM and transgender people in policy development and in management of HIV programmes, leads to lack of resourcing for research and targeted programmes.
- (iii) Lack of appropriate HIV services for MSM and transgender people catering to their specific needs is the reality, as a result of lack of funding, research and appropriate policies.
- (iv) Legitimization of discrimination and unethical treatment by health care workers, includes aversion ‘therapy’ for homosexuality and maintaining diagnostic criteria that stigmatize transgender status as a ‘disorder’.
- (v) Low self-esteem among MSM and transgender people prevails, contributing to their failing to protect themselves or their partners from HIV and or accessing HIV and health services.
- (vi) Educational institutions fail to address sexual orientation and gender identity in the curriculum.
- (vii) Lack of legal protections from discrimination, and poor education and work opportunities for MSM and transgender people, results in many turning to sex work, greatly increasing their vulnerability to HIV.

4.4 Legal responses that protect and empower

Legal environments that support effective HIV responses are ones in which sex between consenting men or involving transgender persons has been decriminalized and in which police ensure violence protection. Progress has been made through this approach in Australia and New Zealand. These countries have also enacted laws

43 Mountford T. (2009) *The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China* at pp.18-21.

44 Godwin, J. (2010), *op cit*, p. 20.

45 *Ibid* p.110.

to prohibit discrimination on the grounds of sexual orientation⁴⁶ and transgender status⁴⁷ in areas such as employment, accommodation and education. Nepal's *National Human Rights Work plan 2011-2014* includes a sexual and gender minorities rights programme.

In some jurisdictions there has been progress in improving relations between police and MSM or transgender communities even though sex between men remains criminalized. There are examples where pragmatic approaches have been adopted and police have sought to develop constructive working relationships with MSM and transgender communities. For example, in parts of India and Papua New Guinea police participate in HIV education and sensitisation programmes delivered by MSM groups.⁴⁸

In some countries, although sodomy laws remain on the statute books, police and prosecutors have a policy of not actively enforcing the laws. For example, the Singapore government has indicated that it will not require police to enforce criminal laws against consenting adult men for sexual behaviour in private.⁴⁹ However, even in countries where offences are no longer actively enforced, the mere existence of the law adds to stigma.

The UNDP/APCOM report identifies the following improvements to the legal environment for HIV responses among MSM and transgender people:

- (i) Eight jurisdictions have extended some constitutional protections of rights to sexual minorities and/or transgender people (Fiji,⁵⁰ Hong Kong SAR,⁵¹ India,⁵² Nepal,⁵³ Pakistan,⁵⁴ Philippines,⁵⁵ Pitcairn Islands,⁵⁶ South Korea⁵⁷). Judgments in Fiji,⁵⁸ Hong Kong SAR,⁵⁹ Philippines,⁶⁰ Nepal⁶¹ and India⁶² have interpreted constitutional rights to equality before the law, non-discrimination and/or to privacy to apply to the protection of the rights of homosexual people. The judgments in the above cited cases in India, Fiji and Hong Kong SAR, held that laws criminalizing sex between adult men are invalid due to violation of rights to privacy and/or equality. The judgments in the above cited cases in Pakistan, Nepal and South Korea interpreted constitutional rights to equality before the law to apply to protection of the rights of transgender people. Proposals for protective laws including discrimination protections, legal recognition of same-sex relationships and constitutional guarantees for MSM and transgender people are being considered by the government of Nepal.
- (ii) Anti-discrimination legislation that includes the ground of sexual orientation exists in eight jurisdictions: Hong Kong SAR⁶³ (public sector); Fiji⁶⁴; Philippines (police and social work)⁶⁵; South Korea⁶⁶; Taiwan (education

46 See *Human Rights Act 1993 (N.Z.)*, *Employment Relations Act 2000 (N.Z.)*, s 105(1)(m); s 21(1)(m); *Fair Work Act 2009 (Cth.) (Austl.)*, s 351; *Discrimination Act 1991 (ACT) (Austl.)*, s 7(1)(b); *Human Rights Act 2004 (ACT) (Austl.)*, s 8(3); *Anti-Discrimination Act 1977 (NSW) (Austl.)*, Pt. 4C; *Anti-Discrimination Act 1992 (NT) (Austl.)*, s 19(1)(c); *Anti-Discrimination Act 1991 (Qld.) (Austl.)*, s 7(n); *Equal Opportunity Act 1984 (SA) (Austl.)*, s 29(1)(b); *Anti-Discrimination Act 1998 (Tas.) (Austl.)*, s 16(c); *Equal Opportunity Act 1995 (Vic.) (Austl.)*, s 6(l); *Charter of Human Rights and Responsibilities Act 2006 (Vic.) (Austl.)*, ss 3, 8; *Equal Opportunity Act 1984 (WA) (Austl.)*, Pt. II.B.

47 See *Discrimination Act 1991 (ACT) (Austl.)*, ss 2, 7(1)(c); *Anti-Discrimination Act 1977 (NSW) (Austl.)*, Pt. 3A. *Anti-Discrimination Act 1992 (NT) (Austl.)*, ss 4, 19(1)(c). *Anti-Discrimination Act 1998 (Tas.) (Austl.)*, ss 3, 16(c); *Equal Opportunity Act 1995 (Vic.) (Austl.)*, ss 4, 6(ac); *Charter of Human Rights and Responsibilities Act 2006 (Vic.) (Austl.)*, s.8.

48 Godwin (2010) *op cit* p.99.

49 Lee Hsien Loong, Speech on Section 377A, *Official Parliamentary Reports (Hansard)* 23 October 2007.

50 *Nadan and McCoskar v. State* [2005] FJHC 500

51 *Leung T.C. William Roy v. Secretary of Justice* [2006] 4 HKLRD 211 (C.A.); *Secretary for Justice v Yau Yuk Lung Zigo & Another* [2007] 3 HKLRD 903.

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

53 *Sunil Babu Pant and others v. Nepal Government and others* [2008] 2 NJA L.J. 261-286 http://www.njanepal.org.np/Anex_2.pdf; and see Art 24 Draft Constitution Constitution of the People's Federal Republic of Nepal, 2067. Unified Communist Party of Nepal (Maoist).

54 *Dr Muhammad Aslam Khaki & Almas Shah v. SSP Rawalpindi & others*, Supreme Court, (2009)

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

56 Section 23 of the Constitution of Pitcairn 2010

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

58 *Nadan and McCoskar v. State* [2005] FJHC 500

59 *Leung T.C. William Roy v. Secretary of Justice* [2006] 4 HKLRD 211 (C.A.); *Secretary for Justice v Yau Yuk Lung Zigo & Another* [2007] 3 HKLRD 903.

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

61 *Sunil Babu Pant and others v. Nepal Government and others* [2008] 2 NJA L.J. 261-286 http://www.njanepal.org.np/Anex_2.pdf; and see Art 24 Draft Constitution Constitution of the People's Federal Republic of Nepal, 2067. Unified Communist Party of Nepal (Maoist).

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

63 Article 22 of the Hong Kong Bill of Rights Ordinance 1991.

64 *Human Rights Commission Decree 2009* prohibits discrimination on the grounds of actual or supposed sexual orientation in employment, education, accommodation, access to places and provision of services.

65 *An Act Providing for a Magna Carta of Social Workers*, Rep. Act No. 9432, 11 April 2007, Section 17(a). 184 10th Congress of the Philippines. Fifth Special Session, 1998. Republic Act No. 8551: *An Act Providing for the Reform and Reorganization of the Philippine National Police and for Other Purposes*, Section 59.

66 Article 14 of the *Gender Equity Education Act 2004*

and employment)⁶⁷; Timor-Leste (employment)⁶⁸; Australia (state and territory laws) and New Zealand.⁶⁹Anti-discrimination legislation relating to transgender status only exists in Australia and New Zealand.

- (iii) Countries that have laws to protect MSM and transgender people from discrimination generally also reach a higher proportion of MSM and transgender people with HIV services, compared to those countries that criminalize homosexual behaviors.
- (iv) Laws enabling transgender people to change their sex for legal purposes in prescribed circumstances have been introduced in China, Indonesia, Japan, Pakistan, Singapore, South Korea, Tamil Nadu (India), Australia and New Zealand. The regulations establishing the Welfare Board for *Aravani*s established by Government of Tamil Nadu provides a useful model of protective legislation for transgender people.⁷⁰
- (v) In some settings, police are being trained to work in cooperation with communities of MSM and transgender people to support HIV prevention (e.g. Tamil Nadu (India), Papua New Guinea).
- (vi) Effective community-based responses to law enforcement issues are characterized by involvement of MSM and transgender people in planning and delivering training and sensitization for law enforcement personnel (e.g. Tamil Nadu, Papua New Guinea), and provision of access to legal aid for people whose rights have been violated (e.g. Tamil Nadu).
- (vii) The *Cambodia National Strategic Framework and Operational Plan on HIV/AIDS and STI for MSM 2008-2011* provides a useful model, in that it addresses the need for anti-discrimination laws and sensitization of police.

67 *Employment Services Act 1992* was amended in 2007 to include sexual orientation as a prohibited ground of discrimination.

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

69 *Human Rights Act 1993 NZ* makes discrimination on the grounds of sexuality unlawful. New Zealand's Human Rights Commission accepts complaints from transgender people as 'sex' discrimination.

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

5. Sex work and the sex industry

5.1 Laws

Almost all countries of Asia and the Pacific criminalize aspects of the sex industry, such as soliciting in public or keeping a brothel.⁷¹ Criminal laws focus on a range of people associated with the sex industry. These include offences for encouraging others to become sex workers, living off the earnings of sex work and use of premises for sex work. Some countries also directly criminalize the act of sex work itself (e.g. China), and many countries apply vagrancy and public order offences against sex workers operating in public places.

An analysis of sex work laws in Asia, found that countries can be classified in three broad categories based on the policy environment:⁷²

“One (China and Vietnam) in which sex work is illegal and there is a strong clamp down by the government and its agencies. Second category of countries (like Cambodia⁷³ and Thailand) where sex trade is illegal per se, but the government is often seen as pragmatic in dealing with the sex trade and sex industry, the sex trade is widely tolerated and regulated in these places. In the third group of countries (India, Indonesia and Bangladesh) the sex work per se is not illegal but due to the complexity and ambiguity of the laws the sex workers are marginalized and prone to discrimination from different agencies and through the divergent interpretation of the laws.”

New Zealand and the Australian state of New South Wales have reformed their laws to decriminalize sex work and most aspects of the sex industry.

Types of criminal laws applied to sex work include laws dealing with sexual offences, vagrancy and public order offences, and human trafficking offences. In Indonesia, crimes against decency or morality are enforced against sex workers. In Nepal there is a history of enforcement of anti-trafficking laws against sex workers and sex workers are prosecuted for public order offences under the *Public Offences and Punishment Act*. In Sri Lanka, the *Vagrancy Ordinance* is used for arresting sex workers for loitering.⁷⁴

In Bangladesh the selling of a woman for sex work is an offence. However, it is the brothel operators who are punishable, not the sex worker. In the *Bangladesh Society for the Enforcement of Human Rights case (2000)*⁷⁵, the Society challenged the forcible eviction by police of sex workers in the Supreme Court. The Court held that sex workers have a right to work and are not to be treated as beggars or vagrants. Sex workers enjoy the constitutional protections of their human rights to privacy, dignity, life and liberty. The Court also observed that although sex work is not illegal, it is not encouraged, as the Constitution provides that the State shall endeavour to prevent prostitution.

Nepal has also made progress towards recognition of sex worker rights. The *Trafficking and Transportation (Control) Act 2007* removed penalties for sex work but criminalizes clients of sex workers. Nonetheless, there continue to be reports of raids and detention of sex workers for public order offences.⁷⁶ In 2002, the Supreme Court of Nepal stated that “prostitution is a profession or occupation irrespective of whether or not it is legal”. Given the Constitutional rights to equality and to choose one’s own profession, the Court held that sex workers should not be discriminated against in the criminal law with respect to rape.⁷⁷

71 For a global map of countries that criminalize sex work, see <http://chartsbin.com/view/snb>

72 Jana S., Sharma P (2004) *Barely Human: HIV/AIDS, Human Rights and Sex Workers: paper for the Expert Meeting on HIV/AIDS and Human Rights in Asia-Pacific, 23 – 24 March 2004, Bangkok* p.8.

73 This analysis predated the 2008 crackdown on sex work in Cambodia.

74 Kendall M (2009) *Law, policy and HIV in Asia and the Pacific: Implications on the vulnerability of men who have sex with men, female sex workers and injecting drug users*. HIV and AIDS Data Hub for Asia-Pacific, p.5.

75 *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and Ors v. Government of Bangladesh and Ors* 53 DLR (2001) 1.

76 *Sex workers, clients arrested from Thamel*, 19 December 2009. <http://www.ekantipur.com/2009/12/19/capital/sex-workers-clients-arrested-from-thamel/304776.html>

77 Shreshta P., *Prostitution and Public Health: Various Forms of Regulating Methods - An Analysis of Current Legal Responses to Prostitution in Nepal*. Available at: www.fwld.org/pdf_files/prostitution.pdf

In 2010, a review of HIV-related laws of Commonwealth countries found as follows:⁷⁸

- Some countries (such as Brunei, Malaysia, Maldives and some districts of Pakistan) incorporate *Sharia*⁷⁹ principles into criminal law for Muslim citizens, which can result in severe penalties for sex work, including whipping/caning.
- In South Asia most aspects of the organised sex industry, such as operating a brothel, are illegal. In Bangladesh selling a woman for sex is illegal. In India it is legal to engage in sex work in private, but soliciting in public is illegal, and trafficking and public order offences are used against sex workers. In Sri Lanka there is no specific offence for sex work, but acts of soliciting in public are criminalized by the *Vagrancy Ordinance* and brothels are illegal. In Pakistan all extra-marital sex is illegal, and selling a person for sex or buying sex is illegal.
- In many Pacific island countries, while the act of sex work is not itself a crime, activities surrounding sex work, such as keeping a brothel, soliciting or using the proceeds of sex work, are criminalized.⁸⁰ In Papua New Guinea, sex work itself has been criminalized as a result of a court decision that interpreted the scope of the criminal offence of living on the earnings of prostitution to include sex workers, as well as pimps and other persons who profit from employing sex workers.⁸¹

In China, both the act of sex work and involvement in the sex industry are illegal. Harsher penalties apply for sex workers with HIV or an STI.⁸² Laws in China, Cambodia and Vietnam provide for detention of sex workers in special facilities for 'rehabilitation' or 're-education through labor.'⁸³ The approach in these facilities is to punish sex workers for engaging in behaviour that is regarded as a social evil, rather than to offer health care or support.

In Thailand, the *Prostitution Prevention and Suppression Act (1996)* decriminalized the act of sex work, but created offences for soliciting, pimping, advertising, procuring sex workers and managing sex work establishments.

Some countries have introduced harmful laws that fail to distinguish between consensual participation in sex work and coercive trafficking of people to work in the sex industry. Therefore sex work is directly equated with trafficking. These laws deny the autonomy of sex workers. For example, Cambodia's *Law on the Suppression of Human Trafficking and Sexual Exploitation (2008)* equates sex work with trafficking. This law criminalizes public solicitation, procurement and management of sex work and the management of establishments for sex work.

5.2 Law enforcement practices

Sex workers from many countries report police roundups, sometimes accompanied by violence and abuse from law enforcement officers and other government officials. Some report being sexually assaulted by police when in detention as a form of humiliation, and being coerced into providing sex to police.⁸⁴ Sex workers in Papua New Guinea report being picked up by police and forced into sex under threat of prosecution, sometimes amounting to serious gang rape. Police are reported in some cases to exploit the illegal status of sex workers by subjecting them to violence, gang rape ('line-ups') and extortion.⁸⁵ A study in 2006 found that one third of a sample of sex workers in Phnom Penh were gang-raped by police in the past year and one half were beaten by police.⁸⁶

Research in Cambodia found that police extortion and demands for bribes are common and police officers sometimes force sex workers to have sex with them in exchange for being released. Sex workers reported incidents of arbitrary detention, violation of due process rights, beatings, physical violence, rape, sexual harassment, forced labor, extortion, confiscation of their belongings, and other ill-treatment. Perpetrators included police officers,

78 International HIV/AIDS Alliance and Commonwealth HIV/AIDS Action Group (2010) *Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth*, London: International HIV/AIDS Alliance, p.26ff.

79 *Sharia* refers to traditional Islamic law derived from the Koran.

80 Lemisio, M. (2008), 'Should prostitution be decriminalized in the Pacific? The pros and cons', *Journal of South Pacific Law* 12(1): 101–4.

81 *Anna Wemay and Others. v. Kepas Tumdual and Others* [1978] PNGLR 173

82 Sex work and the sex industry in China are criminalized as a result of: 1987 *Security administration punishment regulations*, 1991 *Decision on Strictly Forbidding the Selling and Buying of Sex*, 1991 *Decision on the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women and Children*, 1992 *Law on Protecting the Rights and Interests of Women*, 1997 *revision of Criminal Law of the PRC*, and 1999 *Regulations concerning the management of public places of entertainment*. See: Prostitution in People's Republic of China, http://en.wikipedia.org/wiki/Prostitution_in_the_Peoples_Republic_of_China; Yu Dongbao, et al. (2009). *Decriminalizing Sex Work: Implications for HIV Prevention and Control in China*, in *Gender Policy and HIV in China* (2009).

83 Human Rights Watch. (2010) *Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia*; Oanh K. (2007) *HIV/AIDS Policy in Vietnam A Civil Society Perspective*. New York: OSI; Yu Dongbao, et al. (2009). *Decriminalizing Sex Work: Implications for HIV Prevention and Control in China*, in *Gender Policy and HIV in China* (2009).

84 Godwin, J. (2010) *op cit*, p. 109.

85 Commission on AIDS in the Pacific (2009) *Turning the tide: an open strategy for a response to AIDS in the Pacific. Report of the Commission on AIDS in the Pacific*, UNAIDS, p. 55.

86 Policy Project. *Violence and exposure to HIV among sex workers in Phnom Penh, Cambodia*. Washington, DC: U.S. Agency for International Development, 2006.

municipal park guards, district security guards, and staff and guards at Social Affairs offices and centers. Municipal authorities have publicly stated that sex workers are arrested and detained in order to prevent the spread of HIV.⁸⁷ Sex workers report widespread abuses in detention centres including sexual violence.

Many sex workers also report that they are subjected to police abuses during street clean-up operations, police-led brothel closures or “rescue operations”.⁸⁸ Particular problems arise due to police action against sex workers justified on the basis of anti-trafficking crackdowns.

In India the *Immoral Trafficking Prevention Act* is used as a basis for prosecuting sex workers and to justify orders to demolish red-light districts. It has been reported that over 90% of those arrested under the Act are female sex workers.⁸⁹

100% condom use programmes have been implemented in Thailand, Cambodia, Laos, Mongolia, the Philippines, Vietnam, Indonesia and parts of China. Although implementation approaches vary in each country, 100% condom use programmes often involve registration of sex workers and compulsory health checks. The Network of Sex Work Projects (NSWP) reports that the reality of these programmes is frequently compulsory registration of sex workers with law enforcement authorities, mandatory health examinations, including HIV tests, with sex workers sometimes escorted to clinics by police, and generally greater power over sex workers in the hands of police.⁹⁰

Sex worker advocates oppose compulsory HIV or STI testing on the grounds that it is contrary to best practice models of voluntary testing and self regulation of sexual health amongst sex workers; it endorses a false sense of security in the form of a ‘certificate,’ which, due to window periods does not actually confirm a sex workers’ sexual health status; it overloads sexual health services denying access to sex workers with symptoms; leads to sex workers hiding their profession from medical experts or avoiding the health system altogether; and has the unintentional consequence of endorsing stigma.⁹¹

In Cambodia, the 100% condom use programme had contributed to an increase in condom use in the organized sex industry. However it had also been criticized for its strict rules on registration of sex workers for STI management, threats to brothel owners to enforce condom use, and heavy handed monitoring by a local committees of stakeholders including police, community leaders and health officials.⁹² A 2003 evaluation of the programme raised concerns that sex workers’ confidentiality had been breached, quality STI care had not been provided, that there had been a failure to address the larger context of the sex worker’s life, and there was inattention to the role of clients.⁹³ As a result of enforcement of the enforcement of the *Law on the Suppression of Human Trafficking and Sexual Exploitation* in 2008, Cambodian sex workers lost confidence in authorities and the 100% Condom Use Programme reportedly collapsed.

It is counter-productive to recommend the engagement of police in 100% condom use programmes unless there are protections against police abuse and efforts to ensure participation of sex workers in the design of programmes.⁹⁴ The *Draft Declaration on Sex Work* prepared at the First Regional Consultation on Sex work and HIV, states:

“[T]he starting point for a rights-based approach to HIV and sex work is the formation of a partnership in which sex workers’ contributions to policy and program development is encouraged, supported, recognized and valued. This cannot occur in coercive environments such as those created by the 100% Condom Use Program or where sex work is governed by laws that address trafficking.”⁹⁵

5.3 Public health impacts

Adverse public health impacts of punitive approaches

Across the region, efforts intended to rescue and rehabilitate sex workers by law enforcement agencies and NGOs sometimes lead to very harmful consequences, including separating sex workers who are voluntarily participating

87 Human Rights Watch (2010) *Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia*. New York: Human Rights Watch.

88 International HIV/AIDS Alliance (2008), ‘Sex work, violence and HIV: a guide for programmes with sex workers.’

89 Kendall M. (2009) *op cit*. p.6.

90 Canadian HIV/AIDS Legal Network (2007) *op cit*, p.12.

91 Scarlet Alliance (2007) *Mandatory or compulsory testing of sex workers for HIV and/or sexually transmissible infections in the Australian context*.

92 <http://www.icrw.org/files/publications/Gender-Based-Violence-and-HIV-AIDS-in-Cambodia.pdf>

93 Lowe D. (2003) *Perceptions of the Cambodian 100% Condom Use Program: Documenting the Experience of Sex Workers*. Phnom Penh: POLICY Project.

94 Canadian HIV/AIDS Legal Network (2007) *op cit*, p.13.

95 *Draft Declaration on Sex Work*, *op cit*; and see: Lowe D., (2003) *op cit*.

in sex work from their livelihood and families.⁹⁶ Police raids and “rescue operations”⁹⁷ in brothel areas can adversely affect outreach work to provide health and support services to sex workers, as has been reported recently from Malaysia, for example.⁹⁸ There are also documented cases of successful HIV prevention programmes among sex workers that have been undermined by “rescuing” of sex workers in India, Thailand and Cambodia.⁹⁹

Reports from sex worker organizations show that where sex workers are regularly targeted for arrest and prosecution, sex workers are less likely to access health services, and condom use and HIV testing tend to be lower. The First Regional Consultation on HIV and Sex Work in 2010 heard that, in numerous countries, the possession of condoms has been assumed by police to be evidence of prostitution related activities. In some countries, health service providers and outreach workers are harassed or jailed when reaching out to sex workers.¹⁰⁰ In communities where sex work is criminalized, sex workers are often reluctant to report experiences of rape to police for fear of further abuse at the hands of the police or prosecution for sex work. This increases their vulnerability to HIV.

In China, sex workers are administratively detained in re-education through labour centres, whereas their clients are fined and set free.¹⁰¹ Police crackdowns present obstacles to outreach work, make sex workers reluctant to carry condoms and force sex workers to move to new cities and counties, which can add to the spread of HIV.¹⁰² It has been argued that creating devoted medical services and legal aid for incarcerated sex workers is important in curbing the spread of HIV in China.¹⁰³

In Indonesia, the National AIDS Commission reports that local government by-laws closing prostitution complexes (*localisasi*) have resulted in the spread of street prostitution and made it difficult for local health departments to provide services for STI control and condom promotion.¹⁰⁴

In Fiji, a recent study has documented adverse health impacts of policing as follows:

“...fear of police harassment or arrest is a disincentive to sex workers to carry condoms. Similarly, fear of brutality and harassment from the public or the police reduces opportunity for negotiation, including condom negotiation.”¹⁰⁵

A paper presented to the 1st Asia and the Pacific Regional Consultation on HIV and Sex Work in 2010 argued:

“Punitive laws and law enforcement practices increase vulnerability to HIV by fuelling stigma and discrimination, limiting access to health services and condoms and generally limiting sex workers’ self-esteem and ability to make informed choices. They keep the sex industry ‘hidden’ or operating in disguise. Condoms are avoided or prohibited by management lest they be used as evidence of prostitution offenses having been committed.

Criminalization of sex work and related practices forms a potent barrier to the mechanisms that protect other workers such as occupational health and safety standards and labor rights. Poor working conditions for sex workers increase their HIV risk and vulnerability. Lack of access to water, rest, security, safety equipment, and sick leave means that many sex workers are exposed to violence and other threats to their health where they work. Most sex worker groups demand a legal framework that recognizes sex work as an occupation that can be regulated in ways that protect workers and customers.

In many countries, discriminatory enforcement and stigmatizing practices drive sex work underground, hindering efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programs.”

In Cambodia, the *Anti-trafficking Law* (2008) led to significant decreases in the number of sex workers attending

96 Empower (2004) *Report by Empower Chiang Mai on the human rights violations women are subjected to when “rescued” by anti-trafficking groups who employ methods using deception, force and coercion.*

97 The term “rescue operations” refers to efforts of NGOs, police or other authorities to remove sex workers from their workplace. Those carrying out rescue operations generally assume that the sex workers being rescued are engaged in their work involuntarily, which is often not the case.

98 Asia Pacific Network of Sex Workers (2010), ‘Brothel broken: brothel raids in Kuala Lumpur’. Available at www.plri.org/resource/brothel-broken-brothel-raids-kuala-lumpur

99 Canadian HIV/AIDS Legal Network (2007) *A Human Rights-based Commentary on UNAIDS Guidance Note: HIV and Sex Work (April 2007)*, p.13-14.

100 *Creating an Enabling Legal and Policy Environment for Increased Access to HIV & AIDS Services for Sex Workers*, 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, 12-15 October 2010. Pattaya, p.4.

101 Burris S., Xia G. (2009) The “Risk Environment” for Commercial Sex Work in China: Considering the Role of Law and Law Enforcement Practices, in: Poston et al eds. *Gender Policy and HIV in China* Springer.

102 Ibid.

103 Tucker S., Ren X. (2008) Sex worker incarceration in the People’s Republic of China *Sex Transm Infect* 84:34-35; Goodyear M. (2008) Incarceration of female sex workers in China and STI/HIV. Programmes that are not rights-based are doomed to fail *Sex. Transm. Infect.*84:1.

104 National AIDS Commission (Indonesia) (2010) *National Composite Policy Index Survey: Indonesia.*

105 McMillan K., Worth H. (2010) *Risky business* Sydney: UNSW.

health services. Hundreds of sex workers reported being arbitrarily arrested and detained. In most instances, the only evidence justifying the arrests was 'carrying condoms'.¹⁰⁶ According to a report:¹⁰⁷

"...a sex workers' outreach worker distributing condoms could be liable for prosecution. The broad scope of (the law) risks criminalizing the legitimate exercise of fundamental rights, such as advocacy on the part of sex workers...The overly-broad scope of the offence of procurement means that peer educators, or family and friends of sex workers who try to intervene in police raids are potentially liable for punishment. Human Rights Watch heard reports from some NGOs that police are using this provision as an excuse to threaten and obstruct efforts by outreach workers... Throughout 2008 HIV/AIDS activists, health workers, and sex worker groups voiced concerns about increased abuses by authorities, and their difficulty in accessing sex workers—many of whom were driven underground because they feared arrest. Raids and brothel closures meant many sex workers moved from working in brothels to working on the streets or in entertainment venues such as bars, karaoke, or massage parlors. This makes it more difficult for outreach workers to contact sex workers."

The health impact of enforcement of this law has been summarized as follows:¹⁰⁸

"since passing of the law, there was an increase in the number of women selling sex on the street – many of whom are HIV positive – which further increases their vulnerability to trafficking, exploitation and HIV/STI infection and transmission, 31% reduction in the sale of condoms and the availability of condoms in entertainment establishments, a 26% reduction in the number of women seeking STI diagnosis and treatment at ...family health clinics, 15% reduction in number of referrals to STI clinics, a 10% reduction in contacts by NGO outreach workers, (and) targeting of entertainment workers reduced their ability to access ARV services."

In 2010 UNAIDS reported that it was working with the Government of Cambodia, Family Health International (FHI) and Population Services International (PSI) to develop guidelines for a community-police partnership to support HIV interventions for entertainment workers. The intent is that guidelines will define the role of police in supporting HIV prevention.¹⁰⁹ Sex worker advocates reject police having a role in implementing HIV prevention interventions, because they are considered likely to abuse their position.¹¹⁰

In Vietnam sex work is illegal and defined by law as a "social evil". Sex workers may be compulsorily detained in '05 centres'. UNFPA report that campaigns to "clean the streets of sex workers" have created an atmosphere in which HIV prevention activities have become difficult and sex work has been driven further underground.¹¹¹

Health benefits of decriminalization

Removing legal penalties for sex work assists HIV prevention and treatment programmes to reach sex workers and their clients. Rather than arresting sex workers and closing down brothels, a more effective approach to preventing HIV is to support sex workers to engage in sexual health promotion as peer educators and advocates. Involving sex workers directly in HIV prevention and sexual health promotion can raise their self-esteem and increase their trust and confidence in HIV and sexual health services.

Health and safety standards are not applied to sex work where it is an illegal activity. In decriminalized contexts, legally backed workplace standards can contribute to a reduction in HIV transmission and improvements in overall working conditions. Standards can require the use of condoms, proper lighting, sanitation and measures to ensure the personal security of sex workers.

Australia's *6th National HIV Strategy* refers to evidence that, under a decriminalized and deregulated legislative framework, sex workers have increased control over their work and are to achieve similar or better health outcomes without the expense and invasiveness of mandatory screening.¹¹² Decriminalization has been implemented in New Zealand and New South Wales, Australia. Evidence from those jurisdictions confirms that this has been a successful approach in reducing opportunities for police corruption and providing opportunities for health promotion.¹¹³

106 Keo C. (2009) *Consultancy Report to Cambodian Alliance For Combating HIV/AIDS (CACHA) Hard Life For A Legal Work: The 2008 Anti-Trafficking Law And Sex Work* http://ceps.anu.edu.au/publications/pdfs/keo-hard_life_2009.pdf

107 Human Rights Watch (2010) *Off the streets: Arbitrary detention and other abuses against sex workers in Cambodia*, New York: Human Rights Watch, p.23.

108 Singh U., *Case Study: Cambodia's law on suppression of human trafficking and sexual exploitation*. <http://healthdev.net/site/post.php?s=3840>.

109 AusAID (2010) *Scoping study on the legal and policy enabling environment: Asia*. Canberra: AusAID Health Resource Facility.

110 Global Network of Sex Work Projects (2010) *Only rights can stop the wrongs: The smart person's guide to HIV and sex work*. p.16.

111 UNFPA (2010) *Reducing HIV transmission among sex workers through stronger partnerships* <http://vietnam.unfpa.org/public/cache/offonce/pid/5922>

112 *Sixth National HIV Strategy 2010–2013* p.39, citing Abel G, Fitzgerald L & Brunton J, 2009, 'The impact of decriminalization on the number of sex workers in New Zealand', *Journal of Social Policy*, 38(2): pp. 515–531; Donovan B et al. 2008, The Law and Sex Worker Health (LASH) Project, Australasian Society for HIV Medicine Conference.

113 Harcourt C., Egger S., Donovan B. (2005) Sex work and the law *Sexual Health* 2(3):121-8; Harcourt C., O'Connor J., Egger S., Chen M., W and H, Fairley C. et al. (2010) The decriminalization of prostitution is associated with better coverage of health promotion programs for sex workers. *Aust NZ J Public Health*, in press; Donovan B., Harcourt C., Egger S. (2010) Improving the health of sex workers in NSW: maintaining success *NSW Public Health Bulletin* 21(3-4)74-77.

The decriminalization of sex work is associated with better coverage of health promotion programmes for sex workers.¹¹⁴ It is also supported by sex workers as an approach that reduces stigma and empowers them to take control of their own sexual health, as well as addressing other health and safety issues. Decriminalization enables sex workers to manage their work environment.

With knowledge of their employment rights, brothel workers are better able to assert these rights with brothel operators and clients. The relationship between sex workers and police also improves in decriminalized settings.¹¹⁵ Decriminalization has not led to an increase in the number of street-based sex workers. In New Zealand, decriminalization has led to sex workers being more willing to disclose their occupation to health workers, carry condoms and negotiate safe sex.¹¹⁶

5.4 Legal responses that protect and empower

Sex worker organizations drafted a *Pattaya Draft Declaration on Sex Work in Asia and the Pacific* in 2010, calling for states to recognize and regulate sex work as legitimate employment and an end to coercive programmes including mandatory medical treatment, raids, forced rehabilitation, or programmes implemented by police or based upon detention of sex workers.¹¹⁷ In addition to removing criminal sanctions, legal environments for HIV prevention can be improved by introducing legal protections from discrimination. Sex workers can face discrimination due to their employment status in accessing other forms of employment, accommodation, education and other services. In three jurisdictions in Australia, discrimination against lawfully employed sex workers is illegal.¹¹⁸ The ILO *Global Labor Standard on HIV/AIDS* (2010) includes sex workers in all areas of non-discrimination and access to health services and occupational safety.¹¹⁹

There are instances where progress is being made in improving the legal environment. In India a number of community-based initiatives have engaged with both sex workers and police to help improve the legal environment for HIV prevention and care. Interventions that mobilise sex workers to seek changes in law enforcement practices have proved effective in a variety of settings in India.¹²⁰

In Kolkata the Durbar Mahila Samanwaya Committee (DMSC) represents 60,000 sex workers. DMSC's political objectives are decriminalization of adult sex work, recognition of sex work as a valid profession, and establishing sex workers' right to self-determination. The project has used empowerment approaches, including community mobilisation, advocacy and micro-finance. Research has demonstrated a significant increase in condom use among sex workers who have participated in these empowerment interventions and a reduction in police raids, police harassment, exploitation from local gangs and violence. Sex workers also frequently report that they are now in a better position to negotiate health and work issues.¹²¹

The SHAKTI project in Bangladesh also involved sex workers in the design of empowerment approaches and led to increased condom use and stable law HIV prevalence.¹²²

In Thailand, EMPOWER is a sex worker organization that is recognized by government. EMPOWER advocates for sex work to be recognized as legitimate employment under the Thai labor law, social security legislation, and occupational health and safety codes. EMPOWER has worked with government agencies to address HIV and improve working conditions including Department of Non Formal Education and the Department of Public Health, and has worked together with the Ministry of Justice, the Ministry of Art and Culture and the Ministry of Human Resources and Development.¹²³

114 Harcourt C, O'Connor J, Egger S, et al. The decriminalization of prostitution is associated with better coverage of health promotion programs for sex workers. *Australian and New Zealand Journal of Public Health* (34)5, p.482–486, October 2010.

115 Abel, G., Fitzgerald, L., Healy, C. and Taylor, A. (eds) (2010), 'Taking the crime out of sex work: New Zealand sex workers' fight for decriminalization', Bristol: Policy Press.

116 Cameron, S., Reynolds, L. (2010), *The global criminalisation scan report 2010: documenting trends, presenting evidence*, Amsterdam: GNP+, p. 38.

117 *Draft Declaration on Sex Work in Asia-Pacific*. <http://plri.wordpress.com/2010/10/15/pattaya-draft-declaration-on-sex-work-in-asia-and-the-pacific-2010/>

118 Queensland, Australian Capital Territory and Victoria. Discrimination on the grounds of lawful sexual activity is also unlawful in Tasmania, but it is unclear if this covers sex workers. Rees N., Lindsay K., Rice S., (2008) *Australian anti-discrimination law: text, cases and materials* p.362

119 Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_141906.pdf

120 Biradavolu, M. et al. (2009), 'Can sex workers regulate police? Learning from an HIV prevention project for sex workers in southern India', *Social Science & Medicine* 68(8): 1541–47; Swendeman, D. et al. (2009), 'Empowering sex workers in India to reduce vulnerability to HIV and sexually transmitted diseases', *Social Science and Medicine* 69(8): 1157–66; Rao S. and Sluggett C. (2009). *Who stole the tarts? A critique of human rights as they apply to sex workers*. The Centre for Advocacy on Stigma and Marginalisation (CASAM). http://apnswdollahouse.files.wordpress.com/2009/09/who-stole-the-tarts_small.pdf

121 The Durbar Mahila Samanwaya Committee Theory and Action for Health Research Team (2007), *Meeting community needs for HIV prevention and more: intersectoral action for health in the Sonagachi red-light area of Kolkata*, WHO, p. 16.

122 Jana S., Sharma P (2004) *op cit* p.17.

123 Short P. (2010) *25 years in Thailand's sex industry* CNNGo.com.

In Hong Kong SAR, after advocacy from sex worker groups and documentation of police abuses, the police set up a special taskforce to help sex workers. The police began to meet regularly with sex workers and sex workers groups and exchange crime information with them.¹²⁴

A recent review defines four broad approaches to sex work law reform (below), noting that some jurisdictions may apply aspects of more than one model concurrently.¹²⁵ Sexual health experts and sex workers' organizations argue that full decriminalization results in the best health outcomes for sex workers and their clients.¹²⁶

i. Full decriminalization

Decriminalization refers to the removal of all criminal laws related to the operation of the sex industry. Decriminalization enables occupational health and safety issues to be addressed through existing general employment laws. Under this model, sex work is treated as a legitimate form of work, and the sex industry is subject to the same general laws related to workplace health and safety as other industries. These laws may enable specific guidelines on workplace health to be developed for the sex industry. This model has been adopted in New Zealand and New South Wales, Australia. To achieve full decriminalization in New Zealand, amendments were required to taxation, social security and planning laws. Decriminalization also enables peer-based sex worker organizations to register as NGOs and advocate for policies and programmes to improve the health and human rights of their members.

ii. State regulation and licensing

This model involves a government body regulating the licensing of sex industry businesses, operators, managers and, in some cases, sex workers. It has been adopted in some jurisdictions in Australia.¹²⁷ Licensing is often accompanied by strict criminal penalties for sex industry businesses that operate outside the legal framework. The experience of jurisdictions with this model has been very mixed. Regulation can introduce safety standards in brothels and during sexual acts. However, where licensing conditions are burdensome, it can result in a small percentage of the industry operating legally but the remainder of the industry continuing to operate illegally. Many sex workers may have little choice but to operate outside of the licensed industry if it becomes over-regulated. The model may deliver benefits to some sex workers but has proved problematic when licensing conditions are too complex and costly to comply with. Particularly in countries where the rule of law is weak, police or licensing authorities responsible for monitoring compliance may abuse their authority, demand bribes or sexual services.

iii. Partial prohibition

In India, a partial prohibition model that would decriminalize soliciting but criminalize clients of sex workers was proposed in 2006.¹²⁸ This proposal was opposed by advocates for sex workers rights, as it would drive sex work underground. Many countries do not criminalize the act of sex work itself. However, other aspects of the sex industry, such as operating a brothel or living on the earnings of sex work, are illegal (e.g Bangladesh).

iv. Non-prosecution policies

In countries where decriminalization of sex work is not a realistic political option in the short term, other pragmatic options can be considered in advance of law reform. Prosecution policies can prohibit use of the possession of condoms or HIV education materials as evidence of the commission of a sex work offence. A policy decision not to arrest or prosecute sex work in particular localities can allow health promotion to occur openly within the industry.

124 JJJ Association and Zi Teng. Fighting for our rights: How sex workers in Hong Kong are negotiating for more respect and protection (2010). *Research for sex work*. Issue 12. p.13.

125 International HIV/AIDS Alliance and Commonwealth HIV/AIDS Action Group (2010) *op cit* p.27.

126 Abel, G., Fitzgerald, L., Healy, C. and Taylor, A. (eds) (2010), 'Taking the crime out of sex work: New Zealand sex workers' fight for decriminalization', Bristol: Policy Press; Harcourt, C., Egger, S., Donovan, B. (2005), 'Sex work and the law', *Sexual Health* 2(3): 121–8; Donovan, B., Harcourt, C., Egger, S., Fairley, C. (2010), 'Improving the health of sex workers in NSW: maintaining success', *NSW Public Health Bulletin* 21(3–4): 74–7; Jeffreys, E., Matthews, K. and Thomas, A. (2010), 'HIV criminalisation and sex work in Australia', *Reproductive Health Matters* 18(35): 129–36.

127 States of Queensland and Victoria.

128 *Immoral Traffic Prevention (Amendment) Bill*, 2006 (India).

6 Drug use

6.1 Laws

People who use illicit drugs are criminalized as a result of a range of offences, including possession of drugs, self-administration of drugs and possession of equipment for drug use, such as syringes. All countries of the region criminalize supply of illicit drugs. Most also criminalize possession and use of illicit drugs. The penalties for possession or use can be disproportionate to the behaviour involved. Laws often make little distinction between trafficking and possession. Countries with the death penalty for drug offences (usually restricted to trafficking cases) include Bangladesh, Cambodia, China, India, Lao PDR, Malaysia, Myanmar, Pakistan, Philippines, Singapore, Sri Lanka and Vietnam.^{129 130}

Providing clean needles to people who use drugs can be prosecuted in nearly all jurisdictions on the basis of inciting, aiding or abetting an offence. Sri Lanka penalizes possession of injection equipment. In the Philippines, the *Comprehensive Drug Act of 2002* makes it illegal for anyone who is not a medical practitioner to be in possession of injection paraphernalia.¹³¹ The provision of needles and syringes to people who inject drugs is prohibited in Thailand, Sri Lanka, the Philippines, Lao PDR, Japan, Bhutan and Bangladesh.¹³²

Laws in Cambodia, China, Indonesia, Laos, Myanmar, Thailand and Vietnam require people who use drugs to be compulsorily detained at drug detention centres (also referred to as compulsory 'detoxification', 'treatment' or 'rehabilitation' centres), which are supervised by law enforcement or security personnel with little involvement of specialized medical staff. China and Vietnam have decriminalized use of certain narcotics such as heroin, however the legal response is still punitive.¹³³ In these countries, people who repeatedly use illicit drugs may be administratively detained in special facilities for lengthy periods (e.g. two years in China), rather than being processed through the criminal justice system to prison. This can mean that 'due process' protections are reduced, because of the lack of an open court process to confirm the legality of detention.

Several countries including Bangladesh, Indonesia, Malaysia, Myanmar and Pakistan mandate reporting to authorities of people who use illicit drugs by physicians, family or the user. People who use illicit drugs can be legally compelled to undergo detoxification in Bangladesh, China, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar and Thailand.¹³⁴

Laws often restrict access to substitution drugs, such as methadone and buprenorphine. Buprenorphine is legally available in some parts of India, Pakistan and Nepal.¹³⁵ In South Asia, access to Opioid Substitution Therapy (OST) is obstructed by onerous approval and regulatory procedures relating to supply of methadone and buprenorphine. Countries in which methadone may be lawfully supplied include China, Indonesia, Malaysia, Myanmar and Vietnam. Pilot methadone programmes exist in Cambodia, India and Bangladesh.¹³⁶

6.2 Law enforcement practices

Relationships between health services and law enforcement agencies are undermined by police crackdowns on people who use illicit drugs. Police crackdowns impact the capacity of harm reduction services to maintain continuity of services and retain clients. In Malaysia, more than 2,500 people were arrested in and around needle

129 Regional legal summaries on illicit drug use include: UNODC, Lawyers Collective HIV/AIDS Unit (2007) *Legal and Policy concerns related to IDU harm reduction in SAARC countries*; AusAID (2009) *HAARP Law and Policy Review* AusAID HIV/AIDS Asia Regional Program (HAARP); Lawyers Collective HIV/AIDS Unit (2009), *A Preview of Law and Policy in South and South East Asia: Drugs, Treatment and Harm Reduction*. Background Paper for Response Beyond Borders Conference.

130 Gallahue P., Lines, R. (2010) *The death penalty for drug offences: global overview 2010*, London: IHRA.

131 Kendall M. *op cit*, p.7.

132 Ibid.

133 E.g. *Narcotics Control Law* (China) requires drug users to undergo community-based detoxification, and provides for public security departments to provide 'direct forced isolation treatment' for non-compliance with community detoxification; and see: Harvard Medical School AIDS Initiative in Vietnam (2009) *Decriminalization of drug use in Vietnam*.

134 See http://www.idpc.net/sites/default/files/library/WHO_Asia_Compulsory_Treatment.pdf

WHO WPRO (2009) *Assessment of compulsory treatment of people who use drugs in Cambodia, China, Malaysia and Viet Nam: An application of selected human rights principles*.

135 Kendall M. *op cit*, p.7.

136 Regional UNODC Office for South Asia (2008), South Asia Newsletter Issue VIII; *Cambodia: Government opens first methadone clinic*. 17 September 2010 (IRIN News) <http://www.irinnews.org/report.aspx?ReportID=90507>.

exchange programmes in 2009, many for carrying a used syringe or a small amount of drugs.¹³⁷

Regional drug control policies remain heavily influenced by the 'War on Drugs' law enforcement paradigm.¹³⁸ The ASEAN and China Cooperative Operations in Response to Dangerous Drugs agreement (ACCORD) has been endorsed by 36 countries with a target of a 'drug free ASEAN' by 2015. The ACCORD Plan of Action addresses the role of law enforcement in drug control. The ASEAN Senior Officials on Drug Matters (ASOD) group and the Mekong Memorandum of Understanding on Drug Control also set law enforcement policy priorities. Harm reduction interventions such as needle and syringe programmes are generally absent from these frameworks.¹³⁹

6.3 Public health impacts

Harm reduction services cannot operate effectively when drug use is heavily penalized and subject to harsh law enforcement. People who inject drugs may not carry sterile syringes or other injecting equipment because of fear of arrest or other negative consequences that can follow from identification as a drug user, such as harassment and violence or dismissal from employment. Many do not seek treatment or attend harm reduction services for fear of arrest.

Criminal laws, disproportionate penalties, and punitive law enforcement practices result in negative health outcomes. This was demonstrated by the crackdown on people who use illicit drugs in Thailand in 2003, as a result of which it is estimated 2,800 people were subject to extra-judicial killings as suspected drug traffickers. Many people who use drugs avoid treatment at public hospitals in Thailand for fear that their drug use history will be shared with police. Public hospitals and drug treatment centres collect and share information about individuals' drug use with law enforcement officials.¹⁴⁰

Legal prohibitions on the provision of needles and opioid substitution therapy (OST)¹⁴¹ directly impede HIV prevention efforts. Some drug control efforts have resulted in human rights abuses, including extra-judicial killings, police mistreatment, arbitrary detention, and denial of health services.

Laws that create criminal penalties for incitement to use drugs, or aiding and abetting drug use, can criminalize outreach workers. Offences for possession of drug use equipment (e.g. Sri Lanka) can deter harm reduction services from providing clean injecting equipment. Providers of harm reduction services sometimes face charges for aiding and abetting possession or use of drugs, or allowing premises to be used for an offence. Police presence at or near needle and syringe programmes or drug treatment centres drives people away from these services due to fear of arrest or police harassment. Police practices affect the context in which drugs are injected, and can lead to risk behaviour if people inject hurriedly in unsafe places to avoid arrest or resort to hasty and unsafe storage of injecting equipment to avoid detection.¹⁴²

Indonesia's National AIDS Commission has reported to the United Nations that the punitive nature of the *Law on Narcotics* does not support harm reduction services. Special arrangements and negotiations with the local police are needed to enable needle and syringe programmes to be provided.¹⁴³ In a positive development, in 2009 the Supreme Court issued a memorandum to judges ordering them to send drug users to drug treatment centres instead of prison. Arrestees are eligible for treatment if the amount of drugs in the person's possession is below certain 'personal use' quantities.¹⁴⁴

In some Asian countries people spend years in drug detention centres, regardless of whether they need treatment, and with limited legal oversight of the grounds of detention or conditions of confinement. "Treatment" provided at these centres may include military drills, hard labour and forced exercise. Compulsory drug detention centres have been associated with allegations of torture and other severe human rights violations in China, Cambodia, India, Singapore, Vietnam and Malaysia.¹⁴⁵ A recent report included the following findings:¹⁴⁶

137 Woolfe D. (2010) Breaking the Chains? How Police Practices Are Constraining HIV Efforts. *OSI Blog*.

138 China, ASEAN step up war against drugs, *China Daily*, 21 October 2005.

139 AusAID (2009) *HAARP Law and Policy Review*. P12.

140 Cohen, J. (2004) Not enough graves: the war on drugs, HIV/AIDS, and violations of human rights. *Human Rights Watch* 16(8(C)): 36-42. And see: http://www.ihra.net/files/2010/11/01/IHRA_BriefingNew_2.pdf

141 OST refers to the administration under medical supervision of a prescribed psychoactive substance pharmacologically related to the substance producing dependence. For example, methadone may be prescribed to people who are dependent on heroin.

142 AusAID (2009) *HAARP Law and Policy Review op cit*; International HIV/AIDS Alliance and Commonwealth HIV/AIDS Action Group (2010) *op cit*.

143 National Composite Policy Index Survey: Indonesia (2010) http://data.unaids.org/pub/Report/2010/indonesia_2010_ncpi_en.pdf

144 *Indonesia to Treat Drug Users, Not Jail Them*. 26 March 2009.

145 OSI and IHRD (2009), '*Human rights abuses in the name of drug treatment: reports from the field*. *Public health factsheet*'.

146 International Harm Reduction Association (2010) *Briefing 4 : Human Rights and Drug Policy - Compulsory Drug Treatment* http://www.ihra.net/files/2010/11/01/IHRA_BriefingNew_4.pdf

"In Cambodia, people who use drugs – dependent or not - are routinely rounded up by police and sent to government- run drug detention centers, where arduous physical exercises and forced labor are the mainstays of their "treatment". ..they face torture and extreme physical cruelty – including sexual violence, and being shocked with electric batons and beaten with twisted electrical wire. ... There is no access to legal counsel while in police custody or during subsequent detention in the centers, no judicial authorization of detention, nor any opportunity for its review...

Individuals detained in Chinese drug detention centers are routinely beaten, denied medical treatment, and forced to work up to 18 hours a day without pay... According to UNAIDS, half a million people are confined in drug detention centers at any given time...In Vietnam, there are 109 detention centers... detaining up to 60,000 people who use drugs. Terms of detention are as long as five years: two of "treatment" and three of labor in facilities built near the detention centers. Detainees have no access to lawyers, no trial and no means of challenging their detention. Detainees are frequently denied evidence-based treatment for drug dependence, including during acute withdrawal...

Since 2003, thousands of people in Thailand have been coerced into "drug treatment" centers run by security forces... military drills on the orders of security personnel are a mainstay of so-called "treatment." Thailand's coerced treatment and rehabilitation policy has had long-term consequences on the health and human rights of drug users, as many continue to avoid drug treatment or any government-sponsored health services out of fear of arrest or police action."

A Regional Consultation on Compulsory Centers for Drug Users in Asia and the Pacific in 2010 listed concerns to include:¹⁴⁷

- (i) A lack of effectiveness to prevent high relapse rates;
- (ii) The potential to have negative impacts on public health, particularly on the transmission of HIV and other blood-borne diseases;
- (iii) High costs and a lack of sustainability of treatment outcomes;
- (iv) A lack of direct family and community support to people who use drugs; and
- (v) The potential to have negative impacts on governments' efforts to ensure universal access to prevention, treatment, care and support for people who use drugs and people living with HIV.

The meeting noted the limitations of the compulsory model in addressing drug dependence as a chronic relapsing health condition. Relapse rates of people after release are often close to 100 percent. In response, some countries are moving towards evidence-informed, community-based treatment. For example, Malaysia has recently shifted resources from drug detention centres to voluntary treatment services.¹⁴⁸

In 2009, WHO reported that the following services are available at detention centres:¹⁴⁹

- Cambodia:* The staff is mainly composed of law enforcement and administrative officials, with few health professionals. Drugs to treat people who use drugs and methadone are prohibited. HIV prevention, treatment and care are limited to a few educational brochures.
- China:* Few centres are attended by doctors or nurses, and most staff members are public security officials. The treatment provided is not entirely abstinence-based because the residents are provided with allopathic therapy as well as Chinese traditional medicine to ease withdrawal symptoms. HIV prevention education is offered in some centres. HIV testing is compulsory.
- Malaysia:* The availability of health professionals is limited and the centres are mainly staffed by people with limited skills in health. The treatment provided is abstinence-based. HIV prevention education is limited, but antiretroviral therapy has been introduced. HIV testing is compulsory.
- Vietnam:* Drug treatment is not readily available in the centres, a many have no treatment to deal with withdrawal and medical care is very limited. Some centres use a collection of analgesics, sedatives and other pharmacological means as well as non-traditional methods to assist with withdrawal.

147 UNODC, UNESCAP, UNAIDS, *Report of the Regional Consultation on Compulsory Centres for Drug Users in Asia and the Pacific*, 14-16 December 2010, Bangkok.

148 Woolfe D. (2010) *op cit*.

149 WHO (2009) *Assessment of compulsory treatment of people who use drugs in Cambodia, China, Malaysia and Viet Nam: Application of selected human rights principles*. WHO WPRO: Manila.

6.4 Legal responses that protect and empower

Supportive police attitudes are critical to the success of harm reduction programmes. Partnerships between police and public health services can occur where police use a community policing approach, with referral systems to health and welfare services, and training for police on HIV and human rights-based approaches.¹⁵⁰ On the Vietnam-China border, police support to harm reduction activities has been associated with improved HIV responses and a decline in HIV prevalence.¹⁵¹

Law reform options include decriminalisation of drug use, diversion of drug offenders from the prison system to community based treatment, and measures to facilitate lawful implementation of OST, needle and syringe programmes and medically supervised safe injecting facilities.

Mongolia's *Law on the Prevention of HIV and AIDS, 2004* imposes fines for breaching the obligation of health organizations to create conditions to prevent the spread of the HIV through the provision of needles, syringes, and other medical equipment.

China has a national OST programme. China's 2008 *Law on Drug Control* integrated methadone maintenance therapy into its drug control strategies. Studies in China demonstrate that when people enter methadone maintenance programs demand for drugs reduced and there is an immediate reduction in the money used to finance the buying and selling of illicit drugs. This results in economic benefits to everyone, including police. An evaluation of methadone maintenance therapy programmes in China found reduced illicit drug use, drug related crimes and HIV transmission; improved quality of life of drug users; shrinking heroin markets; and referrals to other health services (ARV, VCT).¹⁵² The *Responsive Measures for HIV/AIDS Prevention in Yunnan Province Law, 2004*, legalized needle and syringe programmes and required hotels to make condoms available. In Yunnan, police are instructed not to harass or arrest people who use drugs who are attending methadone or needle and syringe services.

Vietnam's *Decree on implementation of the HIV/AIDS Law* calls on all levels of government to launch harm reduction for all affected groups, including MSM, sex workers and people who use drugs, and directs all authorities, including police agencies, to support implementation of these interventions and prohibits them from hindering the implementation of harm reduction activities of outreach workers, or treating the provision of syringes and condoms by outreach workers or the treatment of addiction to opiate substances as illegal.

OST can result in behaviour change from injecting to oral administration of drugs and thereby reduces the spread of HIV, hepatitis C and other blood-borne diseases. OST can also decrease deaths from drug overdose. Legal barriers exist in many countries to provision of OST due to scheduling of methadone and buprenorphine as prohibited or controlled drugs. For OST programmes to operate, laws need to enable drug users to use these drugs and medical practitioners to prescribe and supply these drugs lawfully. OST has commenced in India and Bangladesh, but is small in scale. The Government of India is reviewing a bill that proposes immunity to providers and recipients of risk reduction services including needle and syringe programmes and oral substitution therapy. It also proposes to protect confidentiality of client records at needle and syringe programme sites and clinics, which may otherwise be confiscated by law enforcement officers.¹⁵³

The implementation of prison OST programmes benefits prisoners, prison staff and the community. OST reduces heroin use, associated deaths, HIV-risk behaviours and criminal activity. Prison OST programmes provide the benefit of reduced heroin use in prisons, with associated reductions in morbidity and mortality. Released offenders are more likely to remain in the community rather than re-offending. OST in prisons is also associated with improvements in inmate manageability and prison safety.¹⁵⁴ OST has been made available in many prison systems globally, including Australia, Malaysia and Indonesia. In India, a pilot OST programme has operated in Tihar prison, Delhi, since 2008. Initial success of the Tihar model has led to the programme being considered for replication in Sri Lanka and Maldives.¹⁵⁵

Prison needle and syringe programmes have been demonstrated as safe for prison officers and effective in preventing transmission of HIV and other blood borne viruses. They are provided in more than 60 prisons in 11

150 Report of the meeting on the development of the regional strategy for harm reduction in Asia and the Pacific 2010–2015: confronting HIV among people who inject drugs, 7–9 December 2009, Kuala Lumpur, Malaysia.

151 Hammett T., Bartlett N., Chen Y., et al. (2005) Law enforcement influences on HIV prevention for injection drug users: observations from a cross-border project in China and Vietnam. *Int J Drug Policy* 16:235-245; Des Jarlais D., Kling R., Hammett T., et al. (2007) Reducing HIV infection among new injecting drug users in the China-Vietnam Cross Border Project. *AIDS* 21 Suppl 8:S109-14

152 HAARP (2007) *Law Enforcement and Harm Reduction Advocacy and Action Manual* p.6.

153 HIV/AIDS Bill (India) *op. cit.*

154 Stover, H., Michels, I. (2010), 'Drug use and opioid substitution treatment for prisoners', *Harm Reduction Journal* 7:17.

155 UNODC, *Oral substitution treatment (OST) for drug users in Tihar prisons*. Available at: www.unodc.org/india/en/india_-tihar-jail-looking-beyond-the-bars.html

countries globally, but in no countries in Asia and the Pacific.¹⁵⁶

Medically supervised safe injecting facilities have been evaluated as a successful harm reduction measure, and exist in Sydney, Australia¹⁵⁷ and seven countries outside the region.¹⁵⁸ These facilities can be effective at reaching extremely marginalised people. Access is provided to other services through the facilities, such as needle exchange, HIV prevention information, medical care and counselling. Facilities have been demonstrated to reduce deaths and injuries from overdose, reduce public injecting and reduce transmission of hepatitis C and HIV.¹⁵⁹ Other innovative harm reduction practices yet to be piloted in Asia and the Pacific but which have been successfully implemented elsewhere include heroin prescription and prison needle and syringe programmes.¹⁶⁰

156 Wodak, A., (2010) 'AIDS incubators we can do without: HIV', *The Australian*, 24 April 2010; *Harm reduction in places of detention: briefing 3*, IHRA, 2009.

157 *Drug Misuse and Trafficking Amendment (Medically Supervised Injecting Centre) Act 2010 (NSW)*

158 Canada, Switzerland, Netherlands, Germany, Spain, Norway, Luxembourg.

159 Della Bosca, J. 'Medically supervised injecting rooms: speech to Legislative Council New South Wales', *Hansard*, 22 June 2010.

160 International HIV/AIDS Alliance and Commonwealth HIV/AIDS Action Group (2010) *op cit*, p.41.



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