

East Asia Legal Environments for Men who have Sex with Men and Transgender People

This Policy Brief is adapted from the UNDP and APCOM report, titled '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',¹ covering 48 countries and territories of the Asia and Pacific region.

The study considered legislation, cases, published research, policy reports and press reports, and drew from consultations with community representatives, legal experts and UN agencies. The following summarizes findings and recommendations relating to East Asia with inputs from two of APCOM coalition members: Developed Asia Network (DAN) and China Male Tongzhi Health Forum (CMTHF).

CRIMINAL LAWS AND POLICE PRACTICES

COUNTRY/TERRITORY/SAR	LEGALITY OF MALE-TO-MALE SEX	APPLICABLE LAWS
China	Legal	Homosexual or heterosexual sex involving three or more people may attract prosecution under Article 301 of the <i>Criminal Law of China</i> , which provides that where an assembled crowd commits licentious activities, the ringleaders or other persons who participate several times shall be sentenced to imprisonment of not more than five years.
Macao SAR (China)	Legal	
Hong Kong SAR (China)	Legal	Male-to-male sex was decriminalized in Hong Kong SAR in 1991.
Taiwan (China)	Legal	
Japan	Legal	
Mongolia	Legal	Legal since 2002.
North Korea	Legal	
South Korea	Legal (except military)	Homosexual acts between soldiers are punishable by a maximum of one year imprisonment under the <i>Military Penal Code</i> .

LEGALITY OF MALE-TO-MALE SEX IN EAST ASIA

The legal environment in East Asia is generally more protective of human rights of MSM and transgender people than in other sub-regions of the Asia Pacific region, although some punitive laws and law enforcement practices remain and there are few protective laws in place. Male-to-male sex is not criminalized in East Asia. Post-operative transgender people can be legally recognized as their new sex on identity documents and can marry people of their former sex in China, Japan and South Korea.

Legislation of Taiwan (China) and court decisions in Hong Kong, SAR (China) prohibits discrimination on the grounds of sexual orientation in certain circumstances.

The role of the judiciary has been important in development of the law in Hong Kong SAR. As a result of recent judgments in criminal law cases, MSM now enjoy constitutional protection from discrimination on the grounds of sexual orientation under the *Bill of Rights Ordinance*.

¹ 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: United Nations Development Programme. Accessible at <http://www.snap-undp.org/elibrary/Publication.aspx?ID=629>.

Punitive law enforcement practices

In China and Mongolia there are recent reports of police targeting of MSM and transgender people for harassment and abuse. Such conduct contributes to stigma and undermines the effectiveness of HIV programmes in reaching marginalized populations.

In China, although there is no specific offence for consensual male-to-male sex, the legal position of homosexuality is considered to be ambiguous, as there have been no clear statements in law or policy confirming legality of homosexual conduct. Censorship laws equate homosexuality with criminal conduct and restrict publication of references to homosexuality. Relaxation of regulatory constraints to publication of positive portrayals of homosexuality in the media would greatly improve the environment for HIV responses.

Anecdotal evidence suggests that there are many incidents of police harassment, blackmail and extortion in China. Some MSM and transgender people come to police attention due to suspected involvement in prostitution, which is illegal in China.

Testimonies gathered by the Mongolian LGBT Centre suggest widespread and pervasive harassment, surveillance of MSM, monitoring social events and filming those in attendance, phone-tapping, arbitrary arrests, intimidation, threats, and physical and sexual assaults.

LAWS RELATING TO DISCRIMINATION

Greater China

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

Article 22 of the *Hong Kong Bill of Rights Ordinance 1991* guarantees citizens equal and effective protection against discrimination on any ground, including “other status”. In the case of *Leung T. C. William Roy v. Secretary for Justice*,² this phrase was interpreted to include sexual orientation. The *Hong Kong Bill of Rights Ordinance* protects against discrimination by government authorities.

In Taiwan, legislation was enacted in 2007 providing that discrimination based on sexual orientation in employment is unlawful. Discrimination on the grounds of sexual orientation in education has been prohibited since 2004 by Article 14 of the *Gender Equity Education Act 2004*.

South Korea

In 2001, the National Human Rights Commission of Korea was established by legislation with a mandate to address discrimination on the basis of sexual orientation. Although the Human Rights Commission can recommend actions and pressure the government, its recommendations are not binding.

LEGAL STATUS OF TRANSGENDER PEOPLE

China

In 2003, a circular issued jointly by the Supreme People’s Court and the Ministry of Health established the procedure for transgender people to change their gender designation in their household registry and marry a person of their previous sex. The government of China has adopted policies to allow transgender people to change their identification cards and to marry a person of their former sex (after sex reassignment surgery).

² William Roy. *Leung T.C. William Roy v. Secretary of Justice* [2006] 4 HKLRD 211.

Hong Kong SAR (China)

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

Japan

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

South Korea

In the case of *In re Change of Name and Correction of Family Register* (2004), the Supreme Court held that transgender people who had undergone successful gender reassignment surgery have the right to declare themselves in their new sex in all legal documents. The Court stated: “a transsexual has the right to enjoy the dignity and value of a human being, to seek happiness and to lead a humane life.”³ This includes the right to request a correction of sex in government records such as the census registry.

SAME-SEX RELATIONSHIPS

In 2009, a law introduced by Hong Kong SAR allows victims of domestic violence in same-sex cohabitation relationship to seek legal remedies to prohibit perpetrators of violence from entering or remaining in their residences. This is the only law identified in East Asia that gives legal recognition to same-sex relationships.

REFUGEE STATUS

In 2010, the Administrative Court of Seoul granted refugee status to a homosexual man on the grounds of a well founded fear of persecution due to homosexuality should he return to Pakistan, his country of origin. This decision is subject to Supreme Court review.⁴

CONCLUSIONS

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

Legal protections from discrimination in Hong Kong SAR (China) and Taiwan (China) provide useful models. As yet, there are no anti-discrimination protections for transgender people in East Asia.

China is providing leadership nationally and to the sub-region in developing a *National Strategic Plan on MSM and HIV*. Additional measures to ensure that the law and justice sector acts in support of this Plan would be beneficial to the HIV response. Education and sensitization of police to ensure that harassment

³ *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

⁴ Ji-Sook Bae. Homosexual's refugee status recognized *Korea Times* 3 January 2010.

of MSM does not occur and enactment of anti-discrimination laws relating to sexual orientation and transgender status would support implementation of the *National Strategic Plan*.

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

Repressive legal environments can result in a range of adverse consequences for HIV prevention, care, support and treatment services.

Direct adverse impacts include:

1. HIV prevention outreach workers harassed, threatened or detained by police.
2. Condoms confiscated as evidence of sex work or illegal same-sex sexual conduct.
3. HIV education materials censored.
4. Police raids on events where HIV education takes place.

Indirect adverse impacts, which are often more profound and pervasive than direct impacts, include:

1. high levels of stigma associated with homosexuality and gender variance, which drives MSM and transgender people underground and makes them difficult to reach by HIV services;
2. under-representation of identified MSM and transgender people in policy and management of HIV programs, leading to lack of resourcing for research and targeted programmes;
3. lack of provision of appropriate HIV services for MSM and transgender people, as a result of lack of funding, research and appropriate policies;
4. legitimization of discrimination and unethical treatment by health care workers, including aversion 'therapy' for homosexuality and maintaining diagnostic criteria that stigmatize transgender status as a 'disorder';
5. low self-esteem among MSM and transgender people, meaning that they fail to protect themselves or their partners from HIV and do not access HIV services;
6. failure of schools to address sexual orientation and gender identity issues in their curriculum;
7. lack of legal protections from discrimination, and poor education and work opportunities for MSM and transgender people, with the result that many turn to sex-work, greatly increasing their vulnerability to HIV.

RECOMMENDATIONS

Governments should:

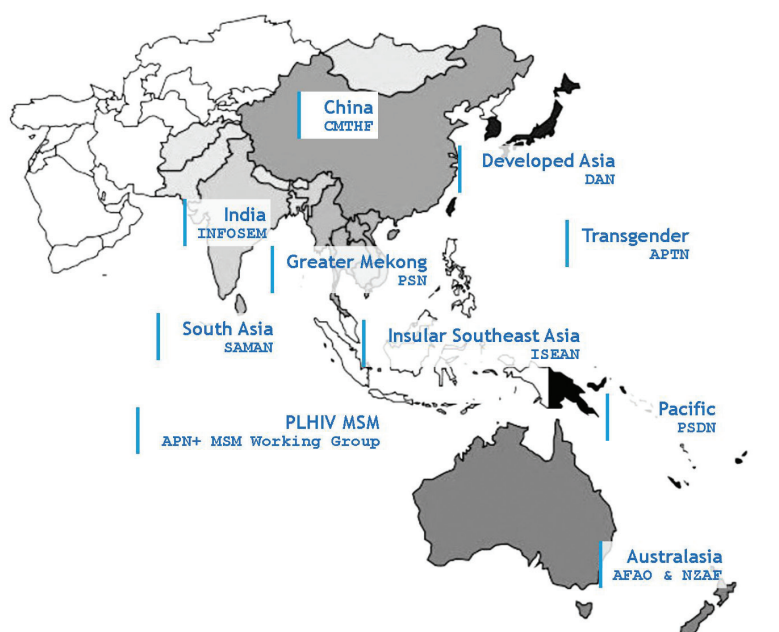
1. Repeal laws that criminalize sex between consenting adults.
2. Halt police harassment, violence and selective enforcement of prostitution, obscenity, vagrancy and other public order offences targeting MSM and transgender people.
3. Enact anti-discrimination laws in relation to sexual orientation and transgender status.
4. Provide legal recognition of gender reassignment and 'third sex' status.
5. Define justice sector responsibilities relating to the rights of MSM and transgender people in national HIV and AIDS plans.

6. Encourage National Human Rights Institutions to provide leadership on sexual orientation and transgender human rights issues.
7. Ensure parliamentarians, police, judges and justice ministry officials have access to evidence-based information and are trained on the epidemiology of HIV and the harmful public health impacts of punitive laws and law enforcement practices relating to MSM and transgender people.
8. Support community-based education and advocacy regarding the human rights of MSM and transgender people, and access to legal aid for MSM and transgender people who have experienced human rights violations.

About APCOM

The Asia Pacific Coalition on Male Sexual Health (APCOM) was launched at the 8th International Congress on AIDS in Asia and the Pacific (8th ICAAP, Colombo) in 2007. It is formed as a coalition composed of community, government and donor sector representatives, along with UN partner organizations. The community sector is composed of 8 sub-regional and 2 regional MSM and TG networks within Asia and the Pacific. The intention is to strongly advocate regionally and globally for increased investment in line with the need for scale up and increase coverage of MSM HIV intervention programming, research to address gaps in knowledge, and the promotion of individual rights for MSM and transgender people across Asia and the Pacific region.

SUB-REGIONS	ORGANISATIONS
Australasia	Australian Federation of AIDS Organizations (AFAO) and New Zealand AIDS Foundation (NZAF)
China	China Male Tongzhi Health Forum (CMTHF)
Developed Asia	Develop Asia Network (DAN)
Greater Mekong	Purple Sky Network (PSN)
India	India Network for Sexual Minorities (INFOSEM)
Insular Southeast Asia	Insular Southeast Asia Network (ISEAN)
Pacific	Pacific Sexual Diversity Network (PSDN)
South Asia	South Asian MSM and AIDS Network (SAMAN)
PLHIV MSM	APN+ MSM Working Group
Transgender	Asia Pacific Transgender Network (APTN)



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