

Pacific 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 countries of the Pacific sub-region with inputs from APCOM coalition member, PSDN (Pacific Sexual Diversity Network).

CRIMINAL LAWS AND POLICE PRACTICES

COUNTRY/TERRITORY/SAR	LEGALITY OF MALE-TO-MALE SEX	APPLICABLE LAWS
Polynesia		
American Samoa (territory of the United States)	Legal	
Cook Islands	Illegal	<i>Crimes Act 1969</i> Sections 154 and 155 provide offences of indecency between males, and sodomy. Penalty for sodomy is imprisonment for a term not exceeding seven years.
French Polynesia	Legal	
Niue	Legal	
Pitcairn Islands (territory of the United Kingdom)	Legal	
Samoa	Illegal	<i>Crimes Ordinance 1961</i> Section 58D prohibits indecent acts between males, regardless of consent. Section 58E prohibits sodomy and consent is not a defence. Penalty for sodomy of a male: imprisonment for a term not exceeding 5 years. Section 58J prohibits keeping of any premises used as a place of resort for the commission of indecent acts between males. Section 58N provides an offence for a male impersonating or representing himself to be a female.
Tokelau (part of the realm of New Zealand)	Legal	
Tonga	Illegal	“Sodomy” and indecent assaults upon males are illegal under Sections 136-140 of the <i>Criminal Offences Act</i> . Penalty: imprisonment for a period not exceeding ten years. <i>Criminal Offences Act</i> Section 81 provides an offence for a male to impersonate a female.
Tuvalu	Illegal	<i>Penal Code</i> [Cap 8] Section 153 prohibits ‘buggery’ or permitting buggery. Penalty: imprisonment for 14 years. Section 155 prohibits the commission of acts of gross indecency between males ‘whether in public or private’.
Wallis and Futuna	Legal	
Melanesia		
Fiji	Legal	
New Caledonia	Legal	

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>.

Continued

COUNTRY/TERRITORY/SAR	LEGALITY OF MALE-TO-MALE SEX	APPLICABLE LAWS
Papua New Guinea	Illegal	<i>Criminal Code 1974</i> Section 210 provides for the offence of sexual penetration against the order of nature. Penalty: Imprisonment for a term not exceeding 14 years. Section 212 provides for the offence of gross indecency between males. Penalty: Imprisonment for a term not exceeding 3 years.
Solomon Islands	Illegal	Illegal. Section 160 of the <i>Penal Code</i> criminalizes 'buggery' with another person; the permitting of a male person to commit buggery on him or her; and attempts. Penalty: imprisonment for fourteen years. The lesser offence of 'committing any act of gross indecency' by persons of the same-sex is at Section 161.
Vanuatu	Legal	
Micronesia		
Guam (unincorporated territory of the United States)	Legal	
Federated States of Micronesia	Legal	
Kiribati	Illegal	Sex between males is prohibited by the <i>Penal Code</i> . Section 153 of the <i>Penal Code</i> prohibits "buggery" and "permitting buggery". Penalty: Imprisonment for 14 years. Section 155 prohibits gross acts of indecency between males "whether in public or in private".
Marshall Islands	Legal	
Nauru	Illegal	Nauru adopted the <i>Criminal Code</i> of Queensland including offences of having carnal knowledge against the order of nature, and indecent practices between males (Sections 208, 211). Penalty for carnal knowledge against the order of nature: imprisonment with hard labour for 14 years.
Northern Mariana Islands	Legal	
Palau	Illegal	Sodomy is a crime under <i>Code of Palau</i> , Title 17 Cap 28 Section 2803. Penalty: imprisonment for not more than 10 years.
Australasia		
Australia	Legal	
New Zealand	Legal	

LEGALITY OF MALE-TO-MALE SEX IN THE PACIFIC SUB-REGION

Male-to-male sex between adults is illegal in nine of these 24 countries and territories.

Samoa and Tonga have criminal offences for female impersonation, although these are not enforced. This however is not to detract from the negative impacts that these laws nonetheless can have.

Punitive law enforcement practices were identified in Fiji and Papua New Guinea, which are likely to undermine the effectiveness of HIV prevention, treatment and care programmes.

Fiji

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

In the 2005 cases of *Nadan and McCoskar v The State*,² the High Court of Fiji ruled that *Penal Code* offences criminalizing consensual sexual acts between adult men in private were in breach of the Constitutional guarantees to personal privacy and equality. These rulings decriminalized homosexuality under the 1997 Constitution.

In 2010, the *Crimes Decree* replaced the *Penal Code*. The *Crimes Decree* does not criminalize sex between adult males, although it does impose stricter criminal prohibitions on sex work than had existed previously. There are concerns that this may provide an environment in which police can harass sex workers, including male and transgender sex workers, and that sex workers and their clients will be difficult to reach by prevention workers.

Papua New Guinea

The continued existence of sodomy and prostitution offences provides opportunities for police to overstep their authority. Police violations of the rights of MSM and transgender people have been documented and there are reports of police harassment of HIV peer education workers and sex worker action groups.³ There are reports of many cases of police brutality, harassment and blackmail against MSM and transgender people.

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

LAWS RELATING TO DISCRIMINATION

Legislation in Fiji protects from discrimination on the grounds of sexual orientation in the workplace. Sections 6, 75 and 77 of the *Employment Relations Promulgation 2007* prohibit discrimination against workers or prospective workers on grounds including gender, sexual orientation, and actual or supposed HIV/AIDS status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.

Discrimination on the grounds of sexual orientation is unlawful under the *Constitution of Pitcairn Islands*.

New Zealand's *Human Rights Act 1993* makes discrimination on the grounds of sexuality unlawful. New Zealand's Human Rights Commission accepts complaints from transgender people as 'sex' discrimination. In 2008, New Zealand's Human Rights Commission conducted a comprehensive inquiry into discrimination experienced by transgender people.

In Australia there is legislation at the state and territory level that provides protections from discrimination in areas such as employment, accommodation, education and access to services.

LEGAL STATUS OF TRANSGENDER PEOPLE

No laws of Pacific islands countries and territories were identified that provide legal recognition of transgender status.

Legislation and policy in Australia and New Zealand recognizes the rights of transgender people to change their legal sex. In these countries, transgender people can apply for a passport that identifies their sex as corresponding to their gender identity (regardless of whether the person has had gender reassignment surgery).

In New Zealand, a post-operative transgender person's change of sex is recognised by the law for the purpose of the validity of a marriage.⁴

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

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

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

Family Court of Australia's judgment in the case *In re Kevin*⁵ confirmed that post-operative transgender people can marry according to their new sex.

SAME-SEX RELATIONSHIPS

Of the Pacific islands, three jurisdictions provide for legal registration of same-sex relationships. In 2009, the French Government approved the application of the French law recognising same-sex civil unions to the collectivities of New Caledonia and Wallis and Futuna. Pitcairn Islands applies English statute law including England's same-sex partnership legislation enacted in 2004. Guam's legislature is debating a *Same-sex Civil Union Bill 185* in 2010.⁶ Although same-sex partners cannot marry, same-sex partnerships can be registered in New Zealand and three Australian state and territory jurisdictions.

EFFORTS TO IMPROVE THE LEGAL ENVIRONMENT

Save the Children's *Porosapot* project has supported prevention interventions in PNG and gathered information relating to treatment of MSM by police. *Porosapot* conducts training of police on HIV and the human rights of MSM and transgender people. The project encourages dialogue between MSM, sex workers and local police to change police attitudes and to educate police regarding the impact of policing on HIV prevention efforts. The Project plans to work with the Police College to incorporate sensitization information into its standard curriculum. Lessons from the Project include the importance of working within the police hierarchy, starting at the top but not neglecting constables on the ground, adapting different techniques for different settings, and ensuring that MSM and/or sex workers (including people living with HIV) lead the sensitization process. The project has direct contact with several hundred police each year and makes a unique contribution to greater understanding between police, MSM and other marginalized groups. The project's work is endorsed by the country's Police Commissioner.

PNG National HIV Prevention Strategy 2010-2015

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

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

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

CONCLUSIONS

Male-to-male sex is illegal in nine of the twenty four Pacific community countries and territories reviewed. Eight of these countries criminalize sodomy under criminal laws inherited from the British colonial era (the ninth country is Palau, which bases its criminal code on laws of the USA, which draw from common law traditions). These Pacific island countries rarely enforce these sodomy laws. However, the existence of these criminal offences contributes to stigma and is harmful to HIV responses. In Papua New Guinea, the existence of the sodomy offence provides an environment in which police harassment and violence towards MSM occurs.

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

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

Many Pacific island countries are strongly influenced by Christian religious values, and some Christian churches have been vocal opponents of decriminalization of male-to-male sex.

It is important that legislative responses are informed by the unique contexts of these Pacific island cultures.

In 2009, the Independent Commission on AIDS in the Pacific recommended that Pacific island countries repeal legislation that criminalizes high-risk behaviour and promotes HIV-related discrimination.⁷

Although the laws and police practices of some Pacific island states are repressive towards MSM and transgender people, there have been statements from a number of prominent leaders of Pacific countries in support of a human rights-based legal response to HIV, including:

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

It is sometimes argued that a human rights –based approach is incompatible with values of Asian and Pacific island communities. Legal and policy responses to issues of sexuality and gender need to be sensitive to local cultural and religious contexts. However, responses also need to be guided by universal principles of human rights. The argument that a human rights-based approach is incompatible with values of Asian and Pacific island communities is difficult to sustain given that the human rights approach has been accepted by the vast majority of governments of countries of Asia and the Pacific in the context of a range of other public policy issues.

The work of the *Poros Sapot* project, which involves MSM in efforts to educate and work in partnership with police to reduce HIV vulnerability in Papua New Guinea, provides an important example for other Pacific island countries. Partnerships between HIV organizations and police services in Australia also demonstrate how police can support HIV responses for MSM and transgender people.

Pacific island countries can develop protective laws that reflect Pacific cultures. The human rights of *fa'afafine*, *leiti* and the other unique minorities of Pacific island countries require specific protective provisions within Constitutions and national human rights legislation.

In 2007, donors, UN agencies, Secretariat of the Pacific Community (SPC) and country representatives from 15 Pacific island states attending the High Level Meeting on HIV, Human Rights and the law endorsed the *Auckland Declaration on HIV and the Law, Ethics and Human Rights*. The *Auckland Declaration* noted the importance of:

facilitating public consultations and reviews on existing legal frameworks on sex work and sodomy; establishing clear legal remedies for violence and discrimination against marginalized groups; making policy changes to reduce people's vulnerability to HIV; and examining how to reduce or remove legal and other barriers which impede access to rights-based and ethical prevention.

Pacific island governments have been slow to act to implement the *Auckland Declaration* and political leadership is required. The Churches and media influence community attitudes regarding sexuality and gender and can help promote a social climate supportive of law reform and reduced stigma and discrimination. Faith based organizations and media organizations need to be more engaged in efforts to combat stigma and improve the social, legal and policy environments for MSM and transgender people in the Pacific.

⁷ 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* Suva: UNAIDS Pacific Region p.89

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.

KEY 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.

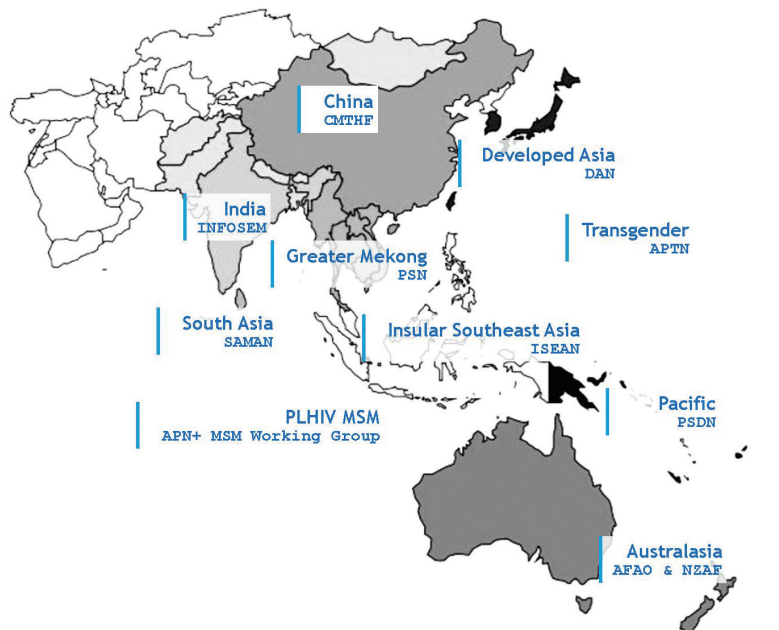
8. Support community-based education and advocacy regarding the human rights of MSM and transgender people, and access to legal aid for MSM and transgender people who have experienced human rights violations.

The Pacific Islands Forum should take proactive measures to promote and protect the human rights

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)



APCOM Secretariat
 Unit 201, 51/2 Ruamrudee III Building
 Soi Ruamrudee, Ploenchit Rd.
 Pathumwan
 Bangkok 10330
 Thailand

Tel: +66 22 55 44 10

Email: apcom@apcom.org

Website: www.apcom.org

Like us on Facebook: <https://www.facebook.com/apcom.org>