

**Legal environments, human rights and HIV responses among sex
workers in Asia and the Pacific**

Consultation Draft : Pacific region

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1 Introduction

1.1 Objectives and method

The objectives of this study are to:

- i. describe the diversity of laws that affect HIV responses among sex workers in the Asia Pacific region;
- ii. assess the impact of laws, legal policies and law enforcement practices on HIV responses for sex workers; and
- iii. provide recommendations for actions required to create enabling legal and policy environments for HIV responses among sex workers.

The report is intended to provide an evidence-base for: policy makers working in government, regional and multilateral organizations; parliamentarians; members of the judiciary; civil society organizations; donor agencies; and sex workers and their organisations engaged in advocacy to improve the legal and policy enabling environment for HIV responses.

The first Asia and the Pacific Regional Consultation on HIV and Sex Work (2010) highlighted the need to document laws and enforcement practices so as to inform advocacy and programming to address the human rights of sex workers.¹

The study focuses on 48 countries of the Asia Pacific region. The study method involves: review of legislation, cases, published research and grey literature;² consultations with sex workers, technical experts and UN agencies; and analysis.

This consultation draft relates to the Pacific region, Australian and New Zealand. Separate consultation reports have been prepared for the Asian regions.

The study focuses on laws and law enforcement practices affecting adults engaged in sex work. The study does not aim to map laws relating to children who are sexually exploited. Although the study considers the relevance of trafficking laws particularly as it affects adults voluntarily engaged in sex work, it does not map all trafficking legislation in detail.³

The report summarizes laws and law enforcement practices that affect the human rights of sex workers and which may be detrimental to HIV responses, including:

- criminal offences applying to adult sex work and the sex industry;
- public order, vagrancy and other offences selectively enforced against sex workers;
- trafficking laws that are enforced against sex workers, rather than traffickers.

In addition, the report identifies examples of civil and administrative laws and regulations that affect HIV responses among sex workers, such as brothel and entertainment establishment registration/licensing laws, tenancy laws, censorship laws and laws affecting rights of citizenship, such as birth registration and access to ration cards.

The report also summarizes protective and enabling laws and practices that are supportive of HIV responses, including:

¹ *Creating an Enabling Legal and Policy Environment for Increased Access to HIV & AIDS Services for Sex Workers*, Paper for the 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, 12-15 October 2010, Pattaya, p.5; APNSW, UNFPA, UNAIDS, (2011) *Building partnerships on HIV and sex work, Report and recommendations from the first Asia and the Pacific Regional Consultation on HIV and Sex Work* p.7.

² Utilizing databases of: UNAIDS HIV and AIDS data hub for Asia Pacific (www.aidsdatahub.org); AIDSlex (www.aidslex.org); Paulo Longo Research Initiative (www.plri.org); and google searches of peer review and grey literature published since 2000.

³ Laws relating to trafficking are detailed in other studies e.g. Thomas S. (2011) *Legal and Policy Review: Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka*, New Delhi: UNODC ROSA.

- community mobilization of sex workers, sex worker unions and self-regulatory initiatives;
- labour laws regulating the sex industry as an occupation;
- anti-discrimination laws; and
- legal recognition of the human rights of sex workers, under constitutional provisions or other human rights legislation.

Laws and law enforcement practices relating to narcotic drugs affect sex workers who are also drug users. Laws and law enforcement practices relating to homosexuality and transgender people also affect male and transgender sex workers.⁴ While this study recognizes these overlaps, analysis of laws and practices relating to narcotic drugs, men who have sex with men, and transgender people are not the central concern of this study.

The report recognizes that legal environments comprise not only written laws, but also law enforcement practices of police, public security and military personnel, legal institutions (including the judiciary and the formal, religious and informal customary courts), systems for documenting and addressing human rights violations, and delivery of legal aid and community legal education. Legal environments set the overall context for HIV responses of government and civil society and influence the social climate in which prevention, treatment, care and support programmes operate. Legal environments that are coercive and punitive can contribute significantly to stigma. Legal environments that are protective and empowering can help combat stigma and underpin health promotion efforts that rely on the voluntary cooperation of populations in changing behaviours and accessing prevention, testing, treatment and care services.

5 Pacific

5.1 Overview

The study reviewed the laws of the 22 Pacific island countries and territories, and also of Australia and New Zealand, which are members of the Pacific Community. Compared to Asia, relatively little research has been undertaken in relation to the legal environments of sex work in the Pacific islands.

There is wide diversity in the legal environments for sex work across these countries. Pacific island countries can be categorized as follows:

- (i) countries influenced by laws of the USA, in which both sex work itself as well as activities associated with sex work are illegal (American Samoa, Marshall Islands, Palau, Northern Mariana Islands, Chuuk and Kosrae states of Federated States of Micronesia)
- (ii) former British colonies in which the act of sex work is not itself illegal, but offences exist for associated activities such as keeping a brothel, soliciting, or living on the earnings of sex work. (e.g. Samoa, Solomon Islands, Cook Islands, Kiribati).

For countries that were British colonies, or were territories of Australia or New Zealand, Penal Codes were modelled on English or Australian/ New Zealand precedents. As a result of this colonial legacy, many countries have laws that criminalize brothels, despite the fact that most Pacific island countries have no history of brothel-based sex work.

Guam is the only Pacific island country or territory that has introduced regulations to attempt to address HIV and sexual health in the sex industry, by requiring regular HIV and STI testing and certification of massage parlour workers. Compulsory testing approaches such as

⁴ See: 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.

this are stigmatising and are unlikely to be effective in HIV prevention given the window period during which a person who has been infected is yet to develop HIV antibodies. Certification may engender a false sense of security and lead to greater risk taking.

Since 2010 Fiji has introduced heavier penalties for people associated with the sex industry. There is a mounting evidence of the harm to HIV responses caused by enforcement of these new punitive laws.

There is an active debate about sex work law reform in Papua New Guinea (PNG), where sex work is currently criminalized.

States and territories of Australia and New Zealand have introduced a range of different legislative models for regulating the sex industry. The state of New South Wales and New Zealand have models that come closest to full decriminalization, although some segments of the industry remain criminalized in these jurisdictions.

The report of the Independent Commission on AIDS in the Pacific observed:⁵

Commercial sex ... is most visible and organized in the largest towns and cities (including at sporting and cultural events) and around rural industries with mobile male populations (such as mines and logging camps in Papua New Guinea and Solomon Islands). Foreign sex workers are becoming more numerous in Fiji, where they also often work in local factories, and in the Marshall Islands.

... Much less visible, but more widespread, is unorganized, transactional sex - namely sex exchanged for food, clothing or other resources, or for a 'good time' or the attentions of a 'boyfriend'. Anecdotal evidence suggests that many women and some men exchange sex for money or gifts in all Pacific countries. Studies in PNG, particularly, have found some women partly or fully support themselves and their families by selling sex but do not identify themselves as sex workers.

⁵ Commission on AIDS in the Pacific (2009) *op cit.* fn.6., p.39.

Overview

Sub-region/ country/ territory	Sex work	Soliciting	Brothels	Applicable laws
Polynesia				
American Samoa	Illegal	Illegal	Illegal	<i>American Samoa Code</i> , Title 46 Chapter 37 provides offences for prostitution (46.3702), patronizing prostitution (46.3703), promoting prostitution (46.3705). Brothels are illegal and considered ‘public nuisances’. (46.3703)
Cook Islands	Legal	Illegal	Illegal	<i>Crimes Act 1969</i> provides offences for: brothel keeping (defined to include any place used for the purposes of prostitution, whether by one woman or more) (section 160); living on earnings of prostitution (section 161); procuring (section 162); and soliciting (i.e. being a common prostitute who loiters and importunes persons in any public place for the purpose of prostitution (section 163).
French Polynesia	Legal	Illegal	Illegal	Assumed to apply the law of French Republic, under which sex work is legal. Soliciting, owning or operating a brothel and procuring are illegal.
Niue	Legal	Illegal	Illegal	<i>Niue Act 1966</i> provides that it is an offence to ‘loiter and importune’ any person in any public place for the purpose of prostitution (s.220) and to keep a brothel (s.175).
Pitcairn Islands (territory of the United Kingdom)	Legal	Illegal	Illegal	The <i>Sexual Offences Act</i> (UK) provides offences for soliciting (section 51A); causing or inciting prostitution for gain (section 52); Controlling prostitution for gain (s.53); and keeping a brothel used for prostitution (section 33A).
Samoa	Legal	Illegal	Illegal	<i>Crimes Ordinance 1961</i> provides offences for brothel keeping, (brothel defined as any place used for the purposes of prostitution, whether by one woman or more) (section 58K); living on earnings of prostitution (section 58L); and procuring (section 58M).
Tokelau (part of New Zealand)	Legal	Illegal	Not illegal	Rule 25 of the <i>Crimes, Procedure and Evidence Rules 2003</i> provide that any person who loiters and importunes any person in any public place for the purpose of prostitution commits an offence
Tonga	Legal	Illegal	Illegal	The <i>Criminal Offences Act</i> provides offences for keeping a brothel (section 80); trading in prostitution, including knowingly living on the earnings of prostitution, exercising control, direction or influence over a prostitute's movements in a way which shows she is aiding, abetting or compelling her prostitution, soliciting for immoral purposes

				in a public place (section 81(1)-(4)). It is an offence for a male person who, whilst soliciting for an immoral purpose, in a public place with intent to deceive any other person as to his true sex, to impersonate or represents himself to be a female (section 81(5)).
Tuvalu	Legal	Illegal	Illegal	The <i>Penal Code</i> provides offences for a male person living on earnings of prostitution or persistently soliciting for immoral purposes (section 145); a woman exercising control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution (section 146); use of premises for purposes of prostitution, and living wholly or in part on the earnings of a prostitute, or is exercising control, direction or influence over the movements of the prostitute, (section 147); keeping a brothel (section 148).
Wallis and Futuna	Legal	Illegal	Illegal	Assumed to apply the law of French Republic, under which sex work is legal. Soliciting, owning or operating a brothel and procuring are illegal
Melanesia				
Fiji Islands	Legal	Illegal	Illegal	The <i>Crimes Decree 2009</i> provides offences for procuring any person to become a common prostitute (section 217); knowingly living on the earnings of prostitution; soliciting (sections 230, 231); seeking or using the services of a prostitute in a public place (section 231); and brothel keeping (section 233).
New Caledonia	Legal	Illegal	Illegal	Assumed to apply the law of French Republic, under which sex work is legal. Soliciting, owning or operating a brothel and procuring are illegal.
Papua New Guinea	Illegal	Not illegal	Illegal	The <i>Summary Offences Act 1977</i> provides offences for living on the earnings of prostitution (section 55); keeping a brothel (section 56); and letting or permitting premises to be used for the purposes of prostitution (section 57). The <i>Criminal Code</i> provides offences for keeping a house, room, set of rooms or place of any kind for purposes of prostitution (section 231).
Solomon Islands	Legal	Illegal	Illegal	The <i>Penal Code</i> provides offences for procuring a woman or girl to become a prostitute (section 144); knowingly living on the earnings of prostitution; persistently soliciting or importuning for immoral purposes in a public place; or exercising control, direction or influence over the movements of a prostitute in such a manner as to show that he or she is aiding abetting or compelling her prostitution with any other

				person or generally (section 153); brothel keeping, or permitting premises to be used as a brothel or for the purposes of habitual prostitution; or letting premises to be used as a brothel (section 155).
Vanuatu	Legal	Illegal	Not illegal	The <i>Penal Code</i> provides offences for procuring, aiding or facilitating the prostitution of another person or sharing in the proceeds of prostitution whether habitual or otherwise, or being subsidised by any person engaging in prostitution (section 101); soliciting for immoral purposes in a public place (section 148).
Micronesia				
Guam	Illegal	Illegal	Illegal	<i>Criminal and Correctional Code (Guam Code Title 9)</i> , provides offences for sex work (which criminalize both the sex worker and the client); soliciting to engage in sex work; and promoting or abetting sex work (Chapter 28.10, 28.15, 28.20). Section 28.10 (b)(3): A person convicted of prostitution who is determined to have known that he or she was infected with either HIV or AIDS at the time of the commission of the act is guilty of a felony of the first degree. Workers in massage parlors are required to be tested for HIV and STIs every 3 months and to obtain Health Certificates: <i>Regulations on Sanitary Operation of Massage Parlors</i> (1984), <i>Health Certificates</i> (1989), <i>Issuance of Health Certificates</i> (2001).
Federated States of Micronesia	Illegal (Chuuk & Pohnpei)	Illegal (Chuuk & Pohnpei)	Illegal (Chuuk & Pohnpei)	Prostitution is illegal in Chuuk and Pohnpei, but not in Yap and Kosrae. Chuuk criminalises clients and sex workers (Title 12 Cap 28 §9025). 'Prostitution' is defined as 'the act of performing, or offering or agreeing to perform, a sexual act for hire, either as a prostitute or as a customer of a prostitute. Prostitution includes engaging in or agreeing or offering to engage in sexual conduct with another person, and engaging in any lewd act between persons, for money or other consideration, either as the person paying or the person receiving the money or other consideration'. In Chuuk and Pohnpei soliciting and the operation of organised premises for the purposes of prostitution are offences. ⁶
Kiribati	Legal	Illegal	Illegal	The <i>Penal Code</i> provides offences for procuring (section 136); Being a male person living on the earnings of prostitution (section 145); Being a woman controlling the prostitution of another woman (section 146); having suspicious premises where there is

⁶ Jivan V., Forster C., (2007) *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries* UNDP, UNIFEM 2007 p.54.

				reason to suspect that any house is used for purposes of prostitution (section 147); keeping or permitting the use of premises for a brothel (section 148); a common prostitute behaving in a disorderly or indecent manner in any public place (section 167(c)); soliciting for immoral purposes in any public place (section 167(f))
Marshall Islands	Illegal	Illegal	Illegal	The <i>Prostitution Prohibition Act 2001</i> criminalises engaging in prostitution; the aiding and abetting of prostitution and the operation of organised premises; promoting prostitution (Section 503); and regular use of any room, building or other place for prostitution (Section 504).
Nauru	Legal	?	Illegal	<i>Criminal Code</i> Sections 217, 218 and 220 provide offences of procuring a prostitute. Sections 231 and 235 prohibit the keeping of a house, room, set of rooms or place of any kind for purposes of prostitution. A person who at the time of entry into Nauru is a reputed prostitute, or who is living on or receiving, or who prior to entering Nauru lived on or received, the proceeds of prostitution, is a prohibited immigrant under Section 10 of the <i>Immigration Act 1999</i> .
Northern Mariana Islands ⁷	Illegal	Illegal	?	The <i>Commonwealth Code</i> includes offences for prostitution and promoting prostitution
Palau	Illegal	Illegal	Illegal	The <i>Anti-Prostitution Act</i> (Chapter 36, <i>Code of Palau</i>) provides offences for prostitution, advancing or profiting from prostitution, soliciting or purchasing sex. “Advancing prostitution” is defined to include operating a “house of prostitution or a prostitution enterprise”.
Australasia				
Australia	Legal	Illegal with some exceptions	Regulated in some states and territories	See separate table of state and territory laws
New Zealand	Legal	Illegal	De-criminalised	<i>Prostitution Reform Act</i>

Table 4: Legality of adult sex work in the Pacific sub-region

⁷ See: Department of Public Safety, Commonwealth of The Northern Mariana Islands (2009) *Press release: joint operation bust. Twelve (12) Chinese females were arrested for promoting prostitution, permitting prostitution and prostitution in Garapan and Susupe.*

5.2 Fiji

5.2.1 Laws

The *Crimes Decree 2009* has broadened the scope of the criminal law relating to sex work by:

- (i) recognising that a sex worker may be either male or female, whereas previously a sex worker was defined only as female;
- (ii) criminalizing clients who seek the services of a sex worker in public as well as sex workers who solicit for clients in public (whereas previously clients could not be prosecuted);
- (ii) providing for heavier penalties e.g. for brothel-keeping and for third parties who are living on the earnings of sex work;
- (iv) introducing comprehensive anti-trafficking provisions.

The *HIV/AIDS Decree 2011* provides that it is unlawful to deny a person access, without reasonable excuse, to a means of protection from HIV. “Means of protection” includes awareness materials, condoms and lubricant. This provision may discourage police from confiscating condoms as evidence of sex work.

The *HIV/AIDS Decree 2011* provides that “where a person who knows he or she carries HIV acts in a manner which in the opinion of the Permanent Secretary may on the balance of probabilities transmit HIV to another person the Permanent Secretary may seek an injunction requiring the person to cease and desist from such behaviour.” A person who fails to comply with the injunction may be imprisoned for up to 6 months.

5.2.2 Law enforcement practices

Since the *Crimes Decree 2009* came into force, there have been reports of crackdowns on street based sex workers as well as massage parlours.⁸ There are concerns that street-based transgender sex workers are increasingly targeted.

By February 2011 managers of seven massage parlours have been charged under the *Crimes Decree 2009* with conducting illegal activities from their premises.⁹ Massage parlours reportedly hire Asian sex workers. In February 2011, police conducted raids and arrested nine Chinese nationals for visa violations.

The NGO Women’s Action for Change has expressed concern that the *Crimes Decree* has forced sex workers underground with the result that sex workers are even less willing to seek medical care, adding to the health risks they face, and that increased policing, harassment and exploitation of street-based sex workers are other possible unwanted side effects of criminalizing the sex trade.

McMillan and Worth have conducted research on the affect of the *Crimes Decree 2009* on sex work. Preliminary findings of the study include:¹⁰

- In areas where the new law is being enforced sex workers are being picked up and detained because they are in recognised 'hotspots', although they are seldom charged. There appears to be a law enforcement policy of publicly outing and shaming sex workers.

⁸ Police raid brothels, 7 charged, *Fiji Times*, 23 February 2011.

⁹ (2011) Fiji’s massage parlours operating as brothels, *Inewsone*, 28 February 2011

<http://www.inewsone.com/2011/02/28/fijis-massage-parlours-operating-as-brothels/31825>

¹⁰ McMillan K., Personal communication, July 2011; report to be published by University of New South Wales currently in press.

- Clients seek out younger sex workers as clients also risk prosecution. The agents of law enforcement are less likely to identify the younger workers as they work from different sites and are not known to police/military. This situation increases competition between the older and younger sex workers and the new sex workers do not get the benefit of the older groups knowledge about HIV prevention, access to resources etc. In the past, cooperation between sex workers has been a major resource for HIV prevention, facilitating the transfer of knowledge, fostering a culture of safe sex attitudes, providing information about access to resources, and effective condom distribution.
- There are now no regular outreach condom supplies. The NGO that had field workers regularly conducting outreach ceased these activities because of the Decree. The NGO also ceased its targeted sex worker programmes and activities. Sex worker HIV prevention education no longer takes place. At least one emerging sex worker organisation has decided not to engage in advocacy activities at this time, feeling too vulnerable as a result of the Decree.
- The dispersal of the sex worker community and a decrease in opportunity and outside support for cooperation between sex workers are adversely affecting HIV prevention. The Decree brought about the end of the only regular targeted sex worker program. There is a reduction in condom access on the streets. The vulnerability of new sex workers is increased due to lack of access to sex worker targeted HIV prevention programs, reduction in street distribution of condoms, no interaction with outreach educators and reduced opportunities for engagement with more experienced and condom-positive sex workers.

McMillan and Worth conducted an earlier study involving interviews with 40 female and transgender sex workers in Suva, Nadi, Lautoka and Labasa in 2009. Their findings provide an assessment of the context of sex work prior to commencement of the *Crimes Decree 2009*.¹¹ Findings included:

- Activities aimed at reducing stigma and discrimination among police and health service providers and the surrounding community are also undertaken... In Labasa, where the program has been running for a shorter time, participants report an improved understanding by the police of the need to carry condoms and better access to counselling and testing services. Sex workers also report that belonging to an organisation bolsters beliefs in and experiences of self-efficacy and the ability to gain some control over one's life, and reduce the sense of isolation.¹²
- Participants' stories indicate that in recent years advances have been made with respect to the attitude and behaviour of police as well as some health service providers. This has facilitated condom use and service access.¹³
- Some participants, ... most commonly those who worked from the streets, reported police harassment, but mostly this was limited to being chased from the streets. Sex workers said that there was now less police brutality than had been the case up to five years ago. However, in Nadi there were numerous reports of extortion: sex workers having to pay money to police, usually alluded to as 'grog money'. In and around Suva the descriptions of police response are more mixed. Mostly participants describe the policing of the streets: 'chasing' sex workers away, telling them to go home, or threatening them with arrest. Some transgender reported being forced to provide oral

¹¹ McMillan K., Worth H., (2010) *Risky Business: Sex work and HIV prevention in Fiji*, Sydney: University of New South Wales.

¹² Ibid.,p.14.

¹³ Ibid.,p.20.

sex. Interestingly, there were no claims of corruption or brutality in Lautoka and Labasa, where sex worker organisations have been securely established and engage in building community and liaise with the police to improve understanding about HIV prevention.¹⁴

- Reports of police corruption and harassment, along with violence and brutality from clients, were greater in Nadi than in the other centres. Unlike the other study sites, sex workers in Nadi were reluctant to carry more than one condom with them at any time. This was because carrying condoms would give police reason to harass them. Consequently, sex workers were unlikely to be able to provide condoms to others.¹⁵
- (F)ear of brutality and harassment from the public or the police reduces opportunity for negotiation, including condom negotiation, and concern about the risk of HIV infection is displaced by other more immediate concerns. In addition, desperation for money, and fear of not getting another client, is an incentive to comply with a client's wishes for sex without a condom. Competition for business puts pressure on prices, and makes negotiating condom use with a client more difficult. A culture of cooperation and sharing is one of the greatest HIV prevention resources within the sex work community. Sex worker support organisations and networks increase this resource and its utility for HIV prevention purposes. Most commonly sex workers in this study had learnt about condoms and HIV prevention from other sex workers and peer educators...as the law and police crack-downs are used to attempt to eradicate sex work, the conditions under which sex is sold will change. Rather than prevent sex work occurring, these changes will drive sex work underground, and will be detrimental to efforts to reduce HIV transmission risk.¹⁶

5.2.3 Efforts to improve the legal environment

In June 2011, a Dialogue was convened to discuss sex workers' rights in Fiji. Participants included a former High Court judge, Legal Aid office Director, a police representative, a senior officer from the Attorney-General's office and representatives of sex worker groups such as the Survival Advocacy Network, the national sex workers' network. The dialogue was organised for discussions on the impact of the law, legal aid services, sex workers rights while been detained, Police policies regarding sex workers and sex workers' health and violence.¹⁷

Survival Advocacy Network (SAN) is a network of sex workers that advocates for the rights of sex workers. SAN was established as a project of Women's Action for Change, however it operates as an independent project with our own guidelines and Roles of Management. The project is run by a Management Collective made up of sex workers.

In 1999, the Fiji Law Reform Commission recommended that sex work be decriminalised and instead be subject to a system of regulation and licensing to prevent the industry becoming a vehicle for public nuisance or criminal activity.¹⁸

5.3 Guam

Although sex work is illegal, there is an active sex industry in Guam, comprised of street workers and workers operating from entertainment establishments such as massage parlours,

¹⁴ Ibid., p.15.

¹⁵ Ibid., p.16.

¹⁶ Ibid.,p.1.

¹⁷ Rina S., Sex trade persistent, *Fiji Times Online*, 6 June 2011.

¹⁸ Fiji Law Reform Commission (1999) *Reform of the penal code and criminal procedure code: The sexual offences report*, Suva: FLRC, p.79.

karaoke clubs and strip bars.¹⁹

Quarterly screening of massage parlour workers is required by the *Massage Parlour Regulations*. The regulations require massage parlour managers to ensure that workers are certified to be free of STIs and HIV.²⁰ There is reportedly poor compliance with the regulations. A review of departmental records found that of the 68 female parlour workers who obtained health certificates in the period 2000-2003, only 12% complied consistently with the requirement for repeat testing every three months.²¹ Over 80% of massage parlour workers are Korean women.

The Department of Public Health is working with community-based organizations to implement a 100% CUP among massage parlour workers. The Department has stated that sex worker populations are difficult to penetrate because of fear of prosecution. The *Massage Parlour Regulations* assist the Department to monitor STI outbreaks.²²

There has been an active debate in Guam about formally establishing a red-light district. In 2006, a government task force, composed of representatives from the Guam Visitors Bureau, Department of Public Health and Social Services, Guam Police Department, and Department of Revenue and Taxation, considered legal options.²³ In 2010, a Bill was introduced that proposed special zoning restrictions for adult entertainment establishments, which would have provided a legislative basis for a specified red light district.²⁴ The Bill would require strip bars and massage parlours to relocate within five years to industrial zones. This was supported by the Mayors Council but not enacted.²⁵ The main concern of this proposal was to address the concern that adult entertainment establishments located in the town centre represent a deterrent to family oriented tourists.

Guam has enacted a highly stigmatizing legal provision that creates heavy penalties for sex workers who are working while knowing that they have HIV.

5.4 Kiribati

Sex work is not illegal, however police may detain sex workers on other public order offences.

The term *ainen matawa* refers to women and girls who board foreign (usually Korean) fishing vessels and engage in sex for money and goods with seafarers. When women and girls board private fishing vessels, police are unable to arrest or detain them for offences such as public disorder, loitering or drunkenness, as they are not in a public place.

In 2003, the Government of Kiribati banned Korean fishing boats from coming into the Betio harbour after a Korean newspaper reported 30-50 mostly underage girls having sex with Korean fishermen. In 2005, a South Korean government team visited Kiribati and concluded that parents encouraged their daughters because they received US dollars, fish, and expensive items. Once the ban was lifted in 2006, the practice of Kiribati girls selling sex to Korean

¹⁹ Should prostitution be legalized on Guam? www.kuam.com, 29 October 2009.

²⁰ *Regulations on Sanitary Operation of Massage Parlors*, February 13, 1984; *Health Certificates*, December 26, 198; *Issuance of Health Certificates*, March 21, 2001; Schumann B., (2004) *Screening Guam's Massage Parlor Workers: How Often Should they Be Screened*, Presentation to 2004 National STD Conference.

²¹ Schumann B., (2004), *op cit.*

²² UNFPA/WHO (2006) *Report of the joint UNFPA/WHO Meeting on 100% Condom Use Programme*, Manila: WHO WPRO.

²³ Red light district plan for Guam still on, *Pacnews*, 16 March 2006.

²⁴ Bill No. 314-30 (COR) - B.J.F. Cruz *An act amending Title 21 GCA Chapter 61, the Zoning Law of the Territory of Guam, pertaining to adult entertainment businesses and establishments.*

²⁵ Mayors give red light zone the green light, *Marianas Variety*, 21 January 2010.

seafarers continued.²⁶

UNICEF report evidence that the *ainen matawa* are becoming more organized as a community. UNICEF researchers found that the *ainen matawa* had several organisations, that their movements were guided by information on ship schedules, that they were in communication with police.²⁷

In 2010, McMillan and Worth²⁸ conducted qualitative research into the context of HIV vulnerability and risk for i-Kiribati women who engage in sex work on board foreign boats. Interview data were gathered from 25 women. McMillan and Worth estimated there to be approximately 130 *ainen matawa* in 2010. They also found that there is an additional, separate population of sex workers who do not board fishing vessels.²⁹ The study highlighted the need for protections from violence perpetrated by police and others to reduce women's vulnerability to HIV:

The participants' narratives indicate that identification as an *ainen matawa* renders the women vulnerable to violence from family, sexual abuse from local men and local boatmen, and sometimes deters them from laying complaints with the police when these assaults occur... Women who are identified as *ainen matawa* suffer from marginalisation and discrimination.³⁰

Ainen matawa are at risk from non-consensual sex, especially gang-rape and other violence. ... The interviewees told of situations where local boatmen demanded sex from *ainen matawa* and abandoned them on small islets if they refused. Others also told of policemen requesting sex in return for ignoring their presence on the boats or releasing them from custody.³¹

... their very identity as *ainen matawa* renders them vulnerable to rape and sexual abuse from certain other seafarers, and from local men, including the police. In addition, experiences of marginalisation and fear of discrimination and stigmatisation often deter *ainen matawa* from using HIV and STI testing and treatment services.³²

Issues of sexual violence render *ainen matawa* even more vulnerable than other groups of women because of marginalisation. A police liaison program would both encourage the report and prosecution of gang-rapes on land or on boats and further the integration and acceptance of these young women as valued members of local society. It is necessary to ensure that the police themselves do not engage in any abuses, sexual coercion or exploitation of *ainen matawa*.³³

Prosecutions for rape are reportedly infrequent in Kiribati, due to cultural taboos on reporting sexual crimes and police attitudes encouraging reconciliation over prosecution.³⁴

²⁶ UNICEF (2010) *I feel I can never get infected, Understanding HIV and AIDS risk and vulnerability among Kiribati islands youth*. UNICEF EAPRO, p.95.

²⁷ UNICEF (2010) *ibid.*, p.58.

²⁸ McMillan K., Worth H. (2010) *Risky Business Kiribati: HIV prevention amongst women who board foreign fishing vessels to sell sex*. International HIV Research Group, UNSW, Sydney.

²⁹ *Ibid.*, and see: Tabureka I., (2008) *Sex trade, well organized illegal activity on Tarawa*. Available at: <http://www.kango.org.ki/Views%20Features%20Analysis.php>

³⁰ McMillan K., Worth H. (2010) *op cit.* p.7.

³¹ McMillan K., Worth H. (2010) *op cit.* p.8.

³² McMillan K., Worth H. (2010) *op cit.* p.11.

³³ McMillan K., Worth H. (2010) *op cit.* p.14.

³⁴ US Government State Department (2010) Country Reports on Human Rights Practices: Kiribati.

5.5 Papua New Guinea³⁵

5.5.1 Laws

The *Criminal Code* criminalises sex work, brothel-keeping and procurement of women and girls for sex work.

In 1975, the Papua New Guinea (PNG) Law Reform Commission recommended that the offence of ‘soliciting’ should not be included in the new *Summary Offences Act*. The Commission’s intention was that sex work should be decriminalized but others profiting from sex work (e.g. pimps) should remain criminalized.

Sex work was criminalized as a result of a 1978 court decision that interpreted the scope of the 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.³⁶

In 1980 the National Court heard the appeals of three women against their convictions for living on the earnings of sex work.³⁷ The judge held that proof of repeated earnings from sex work are required, rather than a single act of sex work.

The *HIV/AIDS Management and Prevention Act 2003* provides that it is unlawful to deny a person access, without reasonable excuse, to a means of protection from HIV. “Means of protection” includes awareness materials, condoms and lubricant.

5.5.2 Law enforcement practices

Stewart identifies the following categories of sex work that have been identified by studies conducted in PNG:³⁸

- the *tu kina meri* (‘two-kina girl’) street workers;
- the *disko meri* (‘disco girls’) who find their partners at discos, clubs and hotels,;
- escorts kept in high-class houses;
- working women who sell sex occasionally to top up their incomes;
- women who are not motivated by economic need, but who deliberately sell sex as revenge against the perceived wrongdoing of husbands or male kin; and
- the *pasindia meri* (‘passenger girls’) who travel extensively, receiving transport, subsistence and temporary protection in return for sex.

Within these categories, there is a range of local variations. Some sex work occurs in guesthouses or hotels, but brothels are rare. There is no large scale organised sex industry comparable to that found in Indonesian Papua or elsewhere in Asia. According to Stewart, although many street workers have a *wasman* who guards her area and assists in money collection, these assistants do not exert coercion in the way that pimps and brothel-keepers in other countries may. According to Stewart, forced sex trafficking was unknown in 2006.³⁹ There are more recent reports of migrant women and girls being trafficked from Malaysia, Thailand, China and the Philippines to PNG’s logging and mining camps, fisheries, and

³⁵ Bruce E, Bauai L., Sapuri M., Kaldor J., Fairley C., Keogh LA. *Int J Womens Health*. 2011 Feb 15;3:53-61. HIV knowledge, risk perception, and safer sex practices among female sex workers in Port Moresby, Papua New Guinea.

³⁶ *Anna Wemay and Others. v. Kepas Tumdual and Others* [1978] PNGLR 173.

³⁷ *Monika Jon and Others v Dominik Kuman and Others*. 8 August 1980. National Court, Papua New Guinea (Unreported).

³⁸ Stewart C., (2006) *Prostitution and Homosexuality in Papua New Guinea: Legal, Ethical and Human Rights Issues Human Rights Issues* Working Paper No. 19, Gender Relations Centre Research School of Pacific and Asian Studies, Australian National University.

³⁹ *Ibid*.

entertainment sites.⁴⁰

Sex workers 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, systematic incidents of gang rape (police ‘line-ups’) and extortion.⁴¹ Police involvement in line-ups has been documented from a variety of sources prior to 2006 and appears to have been an institutionalised aspect of police culture.⁴²

In 2004, 76 alleged sex workers were arrested at a guest house. There were reports that the sex worker were forced to blow up condoms and swallow them while being marched to the police station. There are numerous reports of this incident. According to Jenkins:

The police taunted the women saying they were responsible for spreading AIDS. If the women couldn’t swallow the condoms they had the butt of a rifle smashed into their face. Some, mainly younger women, who were not rounded up as quickly, were raped at the guesthouse... Eventually all charges were dropped.⁴³

According to Stewart:

The Metropolitan Police Commander claimed that the raid was designed to prevent sex workers from contracting and spreading HIV. The women and girls arrested were charged with ‘living on the earnings of prostitution’. The evidence produced in support of this charge was that condoms had been found on the premises and in their possession, which supposedly proved that the premises were a brothel and the women were prostitutes.⁴⁴

Attitudes and behaviours of police present obstacles to HIV responses. Many police officers reportedly do not accept that a sex worker can be raped, due to a belief that sex workers attempt to lay charges for rape only when their customers have failed to pay for sex.⁴⁵

In a 2006 report, Human Rights Watch documented the following police abuses:

Police often use beatings and other forms of violence and humiliation to administer on-the-spot punishment for sex work. This is particularly evident in Lae during police raids on the old airstrip near the center of town, where sex work occurs openly. Homeless individuals live in some parts of the area; in other parts, people go there during the day but sleep elsewhere. Women, girls, and men described being beaten and robbed in police raids... Women and girls in Lae told us they were occasionally arrested, but arrest does not appear to be a main purpose of the raids.

... women and men still described being harassed by police in 2005 and 2006 for carrying condoms. Several persons reported being forced to chew, swallow, or inflate condoms. These actions by police and their reported accompanying comments suggest that they see condoms as implicated in the transmission of HIV, rather than as tools for its prevention, and an indication of promiscuity. Another man

⁴⁰ Department of State USA (2011), *Trafficking in Persons Report 2011: Papua New Guinea*, Washington: Department of State.

⁴¹ 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.

⁴² See e.g. Making Their Own Rules: Police Beatings, Rape, and Torture of Children in Papua New Guinea, *Human Rights Watch*, 17(8), p.37 ff; Still making their own rules: Ongoing Impunity for Police Beatings, Rape, and Torture in Papua New Guinea, *Human Rights Watch* 18(13(C)), pp.15, 27.

⁴³ Jenkins C., Sex Workers and Police in Port Moresby (1994–1998): Research and Intervention, in Luker V., Dinne S., (eds) *Civic Insecurity: Law, Order and HIV in Papua New Guinea* Canberra: ANU.

⁴⁴ Stewart C., Enabling Environments: the Role of the Law, in Luker V., Dinne S., (eds) *Civic Insecurity: Law, Order and HIV in Papua New Guinea* Canberra: ANU.

⁴⁵ McLeod A., Macintyre M. The Royal Papua New Guinea Constabulary in Luker V., Dinne S., (eds) *Civic Insecurity: Law, Order and HIV in Papua New Guinea* Canberra: ANU.

described a raid on the old Lae airstrip in May 2006, carried out by mobile squad officers in dark blue uniforms...Four other men and women in Lae also described police harassing them for carrying condoms, including forcing them to chew, swallow, or inflate condoms...another HIV/AIDS educator described trying to help a sex worker file a complaint with police in November 2005. The woman had been beaten up by a client when she refused to have sex without a condom. The HIV/AIDS educator went with her to Lae's Town police station. "The police made a joke, laughing, saying, 'You should have let him have sex with you because he is paying you a lot of money,'" she said. "I scolded them and told them to stop, but they didn't do any follow up on the beating. They said, 'You are promoting condoms and it brings HIV.'"

5.5.3 Efforts to improve the legal environment

The National AIDS Council advocates decriminalization of sex work. The PNG Constitutional Law Reform Commission is considering options for sex work law reform in 2011-2012. The *National HIV and AIDS Strategy 2011-2015* notes that "laws that criminalize sex work and same-sex practices create barriers to people accessing services and reinforce vulnerability, stigma, and discrimination" and recommends "legislative reforms to improve the environment for effective HIV and AIDS prevention, treatment and care" as a key strategic objective.⁴⁶

An objective of the *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 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.

Save the Children's Poro Sapot Project (PSP) supports sex workers to educate police about HIV and sex work. The program operates in four cities in three provinces. Trainings, sensitizations and review meetings are conducted with police officers on a range of topics including: HIV, human rights, national law, gender and violence, stigma and discrimination and other issues facing vulnerable populations. In a pilot intervention in January 2007, PSP staff and volunteers conducted a 4-day sensitization workshop for over 100 new recruits at PNG's national police college. PSP reported that a lesson learned from the pilot was that sensitisation is more effective when understood and supported by the police hierarchy, and when it involves members of vulnerable populations willing to testify about their experiences. Facilitation of an enabling environment for target groups complements the project's broader STI and HIV prevention activities. Police interactions with project target groups improved in those communities where police sensitization has taken place.⁴⁷ In 2009, PSP staff and

⁴⁶ National AIDS Council of Papua New Guinea (2010), *Papua New Guinea National HIV and AIDS Strategy 2011-2015*, p.52.

⁴⁷ David E., Kilei J., Mohave D., et al (2008) Working with police towards prevention of STIs and HIV amongst PNG's most vulnerable groups: female sex workers, men who have sex with men, people living with HIV, *AIDS*

volunteer peer educators reached over 438 new police and continued contact with over 800 police who had been reached by the project in previous years.⁴⁸ PSP's work is endorsed by PNG's Police Commissioner.

Since 2006, prevention of violence against women has been a priority for the Police Commissioner. The *Law and Justice Sector Gender Strategy 2005-2010* includes commitments to train police on the *HIV/AIDS Management and Prevention Act 2003* and to prioritize attention to any disciplinary offences within the police force that may contribute to the spread of HIV.⁴⁹

Friends Frangipani has been established as a national network of sex workers. In 2010, members came from eight provinces and included female, male and transgender sex workers. Friends Frangipani is working with Law and Justice Sector Agencies, Department of Community Development Family and Sexual Violence Action Committee to advocate for law reform.⁵⁰

Dame Carol Kidu (Minister for Community Development) and the National AIDS Council Secretariat have been leading a sex work law reform process 2009-2011, described by Dame Kidu as follows:⁵¹

A Reference Group to seek the decriminalization of sex work ... is comprised of public and private sector representatives and civil society organizations. It includes sex workers, MSM, people living with HIV/AIDS (PLHIV) and transgender representatives, and is chaired by the Director of the National AIDS Council Secretariat. Informed by initial research and participatory dialogue in the Reference Group, a multi-pronged strategy of advocacy, and a submission to the National Executive Council (Cabinet) was agreed upon... (in 2010) The National Executive Council declined to make a decision, as requested by the submission, on moral, religious, and customary grounds. However, it directed the Attorney General to refer the issues to the national Constitutional Law Reform Commission (CLRC).

Hammar argues that it would not be feasible to address HIV in PNG through regulating brothels because most sex work occurs outside of brothels (e.g. through street based sex work) and the government lacks the resources to implement a brothel-based model. Hammar emphasises the weak nature of government institutions. He also notes that resources would be required for 'policing the police' to ensure protection of women from police abuses.⁵²

5.6 Solomon Islands

In 2010, media reports quoted the Police Commissioner as stating that it was not a priority for the police to "go out looking for prostitutes... the Police force will not chase or hunt down prostitutes as a pro-active stance against the issue."⁵³

Law enforcement appears to focus on identifying businesses that employ Chinese women

2008 - XVII International AIDS Conference Abstract no. WEPE1094.

⁴⁸ Reid E., (2010) Putting values into practice in PNG: Poro Sapot Project and aid effectiveness, *Journal of the Australian Association for the Advancement of Pacific Studies*, Issues 1.2 and 2.1, April 2010.

⁴⁹ AusAID (2008) Violence against women in Melanesia and East Timor, Canberra: AusAID, p.109; Government of PNG, *Law and Justice Sector Gender Strategy 2005-2010*.

⁵⁰ *Friends Frangipani, the sex workers response to HIV in PNG*, 12 April 2010, conference presentation available at: http://hivconsortium.org.au/images/india/lahui_d.pdf

⁵¹ Kidu C., (2011) A National Response to the HIV Epidemic in Papua New Guinea, *UN Chronicle*, Vol. XLVII No. 1, 2011 (15.05.2011).

⁵² Hammar L., From Gift to Commodity ... and Back Again: Form and Fluidity of Sexual Networking in Papua New Guinea, in Luker V., Dinne S., (eds) *Civic Insecurity: Law, Order and HIV in Papua New Guinea* Canberra: ANU.

⁵³ Prostitution is here to stay: Commissioner Marshal, *Solomon Times*, 21 May 2010.

working as sex workers in the capital, Honiara.⁵⁴ Some local sex workers board fishing vessels to sell sex to Asian contract fishermen or exchange sex for goods.⁵⁵ There are reports of sex work and sexual exploitation of children at logging camps.⁵⁶

5.7 Vanuatu

According to WHO WPRO:

There appears to be no recognized, established, commercial sex industry in Vanuatu and there are no full-time brothels in Port Vila. It is speculated that casual freelance commercial sex occurs when cruise or navy ships come to Port Vila or Santo.⁵⁷

McMillan and Worth conducted research into sex work in Vanuatu in 2011. Interim findings are that no sex workers had been approached by, or had any interaction with police or the justice system as a result of their engagement in sex work. It was presented as a social/moral transgression rather than a legal one. The data from Vanuatu indicate that activities of sex workers become more covert after they are asked to commit to 'giving up' sex work by family, church, NGOs or sexual health services.⁵⁸

Vanuatu's National HIV Strategy has as a component of building an enabling environment and the review and revision of national policies, legislation and traditional laws that discriminate against vulnerable populations.

The review, amendment or correction of these existing laws and practices, with full support from State of Law office, high-level authority including politicians, to minimize the vulnerability of some groups of population could contribute to the prevention or escalation of HIV epidemic.⁵⁹

5.8 New Zealand

The *Prostitution Reform Act 2003* decriminalized soliciting, living off the proceeds of someone else's sex work and brothel-keeping. Section 3 of the Act states:

The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that—

- (a) safeguards the human rights of sex workers and protects them from exploitation;*
- (b) promotes the welfare and occupational health and safety of sex workers;*
- (c) is conducive to public health;*
- (d) prohibits the use in prostitution of persons under 18 years of age...*

Sex work is recognised as legitimate work by government. Workplace health and safety standards for sex work have been developed in consultation with the New Zealand Prostitutes' Collective and brothel operators.⁶⁰ Employment disputes can be referred to the Government's

⁵⁴ Hotels, casinos told not to support prostitution, *Solomon Star*, 13 February 2010; Sasako A. (2007) Are the Chinese triads taking over Honiara? *Islands Business*; Alleged sex trader faces additional charges, *Solomon Star* 15 January 2011.

⁵⁵ Lal B., Fortune K., (eds.) (2000) *The Pacific Islands: an encyclopedia*, University of Hawaii Press, Volume 1., p.415.

⁵⁶ Vitchek A. (2008) Paradise Lost: Logging and the Environmental and Social Destruction of the Solomon Islands, *Japan Focus*.

⁵⁷ Ministry of Health Vanuatu & WHO WPRO (2000) *STI/HIV antenatal clinic STI survey Port Vila*, Manila: WHO WPRO.

⁵⁸ McMillan K., personal communication, July 2011; report to be published by University of New South Wales currently in press.

⁵⁹ Ministry of Health Vanuatu, *National Strategic Plan on HIV & Sexually Transmitted Infections 2008-2012*, p.22.

⁶⁰ Department of Labour (NZ) (2004) *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* Occupational Safety and Health Service, Department of Labour, available at

Labour Inspectorate and Mediation Service. Sex workers are able to access tribunals to resolve work related disputes and employment discrimination complaints may be made by sex workers to the Human Rights Commission.⁶¹

There is an obligation on operators of sex work businesses to adopt and promote safer sex practices,⁶² and sex workers and clients must adopt safer sex practices.⁶³ The Ministry of Health is in charge of inspection and enforcement of workplace standards, rather than the police.

It is an offence to coerce a person to provide sexual services, or to engage in sex work while on a temporary visa.

The *Criminal Records (Clean Slate) Act 2004* allows sex workers to apply for previous convictions to be removed from the record. It is now easier for sex workers to find other jobs if they choose to exit because they are less likely to have a criminal record.

The national government provides a centralised framework and acts as a support to local administrative bodies. Local governments have the power to issue by-laws for zoning and advertising relating to sex work. In Auckland, laws have been proposed to exclude sex workers from specific localities.⁶⁴

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.⁶⁵ Decriminalization has not led to an increase in the number of street-based sex workers.

A review of the operation of the *Prostitution Reform Act 2003* was undertaken by a parliamentary committee (the Prostitution Law Review Committee) five years after the legislation had commenced. The Committee reviewed research into the health impacts of the Act and found that there were numerous examples of sex workers being able to negotiate safer sex by stating that it is against the law for them not to practice it. The Committee noted that there were reports of increased confidence, well-being and a sense of validation amongst sex workers, as a direct result of the new law. The Committee stated that such confidence would have a 'positive spin-off' in many areas, such as the improvement of employment conditions, and the ability to ensure that safer sex practices remain standard throughout the industry.⁶⁶ The Committee concluded that sex industry had not increased in size since the law had been enacted, and the vast majority of people involved in the sex industry were better off under the new law than they had been previously.⁶⁷

Research has shown that, following decriminalisation, sex workers found it easier to refuse clients when they did not want them. Around two thirds of participants who had been working

<http://www.osh.govt.nz/order/catalogue/pdf/sexindustry.pdf>

⁶¹ Lawyers Collective HIV/AIDS Unit (2010) *Sex Work Legislation: Solution or Problem? Report of the Satellite Session at the XVIII International AIDS Conference Vienna*, Lawyers Collective HIV/AIDS Unit, p.5.

⁶² Section 8.

⁶³ Section 9.

⁶⁴ The *Manukau City Council (Regulation of Prostitution in Specified Places) Bill 2010* if enacted would have effect across the Auckland Region and enable Auckland Council to regulate street prostitution in specified places.

⁶⁵ 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.

⁶⁶ *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* at chapter 4.1.1.

⁶⁷ *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, at chapter 14.

prior to decriminalisation reported that it was easier to refuse to have sex with a client since the law had changed.⁶⁸

Although decriminalisation has been beneficial, some sex workers, particularly migrant workers, remain marginalised and most vulnerable to HIV.⁶⁹

5.5 Australia

Laws

State / Territory	Legislation	Model	Requirements
Australian Capital Territory	<i>Prostitution Act 1992</i>	Registration	It is legal to work privately as a registered sole operator, or in a registered brothel. Street work is illegal.
New South Wales	<i>Disorderly Houses Amendment Act 1995</i>	Partial decriminalization	Working in a brothel is legal. Brothels require local government consent. Working as a sole operator is legal but subject to local government planning requirements. Street work is legal, except if within view of a dwelling, school, church or hospital.
Northern Territory	<i>Prostitution Regulation Act</i>	Licensing	Sex work is legal if delivered as part of a licensed escort service. Street sex work and soliciting are illegal. Brothels are illegal.
Queensland	<i>Prostitution Act 1999</i>	Licensing	Sex work is legal in a licensed brothel. To work in a licensed brothel, a sex worker needs to have a current sexual health certificate. Private sex workers (sole operators) are lawfully allowed to operate if they are working by themselves.
South Australia	<i>Summary Offences Act 1953; Criminal Law Consolidation Act 1976</i>	Criminalisation	Brothels are illegal. Receiving of money from sex work, soliciting and procuring are illegal.
Tasmania	<i>Sex Industry Offences Act 2005</i>	Partial criminalisation	Brothels and street-based sex work are illegal. Private sex work is legal if no more than two sex workers work together.
Victoria	<i>Prostitution Control Act 1994</i>	Licensing	Licensed brothels and licensed escort agencies are legal. Street sex work is illegal.
Western Australia	<i>Prostitution Act 2000, Criminal Code 1892</i>	Partial criminalisation	Sex work in private is legal. Brothels are illegal, but police allow sex workers to operate in certain areas. It is an offence if a person manages premises for the purpose of prostitution, lives (wholly or partly) off the earnings of prostitution, or procures a person for prostitution.

⁶⁸ Abel, G., Fitzgerald, L., & Brunton, C., (2007). *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers*. Christchurch School of Medicine. pp.116-117.

⁶⁹ UNDP (2011) *Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law*, Bangkok: UNDP, p.29.

Sex work is primarily regulated by state and territory laws. Federal laws criminalize human trafficking. In most jurisdictions, law reform has occurred over the last 25 years to enable parts of the sex industry to operate lawfully.

Each of Australia's eight states and territories have a different legislative framework for sex work (see Table). The states of South Australia and Western Australia criminalise much of the industry and do not license brothels. The states of Victoria and Queensland provide for a strict regulatory environment, requiring brothels to have both town planning permission and to be licensed by a separate licensing authority.

The state of New South Wales has decriminalised most of the sex industry. There is no licensing system and brothels only need town planning permission. The state has published workplace health and safety guidelines for brothels.⁷⁰ The guidelines provide brothel proprietors with minimum standards for a safe and healthy environment for sex workers, other employees, clients and visitors. Under state health and safety legislation, brothel proprietors have legal duties with regard to employees and other visitors in the workplace.

Some Australian jurisdictions have specific legislative provisions related to prevention of STIs including HIV. For example, legislation in Tasmania requires the following practices:

12. Sex workers and clients to adopt safe sex practices

1. *A person must not, in a sexual services business, provide or receive any sexual services that involve sexual intercourse, or any other activity with a similar or greater risk of acquiring or transmitting a sexually transmissible infection, unless a prophylactic is used.*
2. *A person, while providing or receiving, in a sexual services business, sexual services that involve sexual intercourse, or any other activity with a similar or greater risk of acquiring or transmitting a sexually transmissible infection, must not –*
 - (a) *discourage the use of prophylactics; or*
 - (b) *misuse, damage or interfere with the efficacy of any prophylactic used; or*
 - (c) *continue to use a prophylactic that he or she knows, or could reasonably be expected to know, is damaged.*
3. *A person who provides or receives sexual services in a sexual services business must take all reasonable steps to minimise the risk of acquiring or transmitting a sexually transmissible infection.*⁷¹

The Queensland *Criminal Code* was amended in 1992 so that the presence or possession of condoms is not admissible as evidence that a place is being used 'for the purposes of prostitution'. Section 229N of the *Criminal Code* provides that the use of a place for the purposes of prostitution may be inferred from evidence of 'the condition of the place, material found at the place and other relevant factors and circumstances', but 'evidence of condoms and other material for safe sex practices is not admissible'.

In the Australian Capital Territory (ACT), an offence exists for providing a commercial sexual service while knowingly infected with a sexually transmitted disease.⁷² An HIV-positive male sex worker was sentenced to two-and-a-half months in prison in 2008 for breach of this provision. The national sex workers association, Scarlet Alliance, argued that section 25 should be reviewed because an HIV positive person being a sex worker does not

⁷⁰ Workcover NSW (2001), *Health and safety guidelines for brothels*. Available at: http://www.workcover.nsw.gov.au/formspublications/publications/Documents/brothels_health_safety_guidelines_English_0120.pdf

⁷¹ *Prostitution Offences Act 2005* (Tas) s.12.

⁷² Section 25 of the *Prostitution Control Act*.

present a higher risk to the community. Universal condom use in the industry minimizes risk. Scarlet Alliance reported that after the prosecution sex workers fear of testing increased, with the regular monthly outreach clinics figures dropping from 40 a month to two per month as a result of this prosecution.⁷³

Drawing from lessons learned from the different approaches of states and territories, the Australian Federation of AIDS Organisations has identified *Principles for Model Sex Industry Legislation*.⁷⁴ These can be summarized as follows:

Principle 1: Decriminalization, & Principle 2: Sex work is legitimate employment

All laws criminalizing the sex industry should be removed and the industry should be regulated through standard business, planning and industrial codes/laws. A decriminalized industry is more open to scrutiny as it is more accessible. Specific sex industry regulations may be considered under certain circumstances where the benefits are the support of occupational health and safety and rights for sex workers.

Principle 3: Choice of employment

That laws regulating the sex industry should include all sectors of the sex industry and not be directed at forcing sex workers to operate in a limited legal framework. Areas of the sex industry which should be lawful: street, brothel (small and large), escorts, and private work.

Principle 4: Occupational Health and Safety

The aim of sex industry legislation should be to maximize occupational health and safety provisions for sex workers. In order to maximize occupational health and safety in the sex industry all that is required is the development of guidelines or a legally enforceable code of practice. Occupational health and safety standards cannot be implemented in illegal sectors of the sex industry.

Principle 5: Public Health - No Compulsory Testing

That public health concerns be met through removing criminal sanctions, so that sex workers can confidentially access health services and promote safe sex practices as an industry standard.

Principle 6: Local Planning Laws and Zoning

Under local planning laws sex industry businesses should be treated in a similar manner to other commercial enterprises. This means consistency and continuity in local authority planning decisions. Red-light zones are not acceptable as they segregate the sex industry into poorly lit, under-resourced and unsafe work areas.

Principle 7: Community Attitudes to the Sex Industry

It has been shown that the community generally supports sex industry reforms and is realistic about the consequences of attempting to suppress its operation.

Anti-discrimination laws

In four jurisdictions in Australia, discrimination against lawfully employed sex workers is illegal.⁷⁵ However, these laws do not protect sex workers who operate outside of the legal sex industry (e.g. as street-based workers or in unlicensed establishments). A federal law, the *Fair Work Act 2009*, has general protections provisions that cover contractors and sub-contractors that apply to sex workers regardless of employee or contractor status.⁷⁶ The *Fair Work Act 2009* provides opportunities for sex workers and their organisations to seek remedies in an industrial tribunal.

⁷³ Menadue D., (2008) Outrage over HIV positive sex worker's sentence *Positive Living* 25 November 2008. <http://napwa.org.au/pl/2008/11/outrage-over-hiv-positive-sex-worker's-sentence>.

⁷⁴ Banach L., Metzenrath S. (2000), *Principles for Model Sex Industry Legislation* Sydney: AFAO.

⁷⁵ 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

⁷⁶ Section 342.

Impact of laws on the health 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 able to achieve similar or better health outcomes without the expense and invasiveness of mandatory screening.⁷⁷ Evidence confirms that decriminalisation has been a successful approach in reducing opportunities for police corruption and providing opportunities for health promotion.⁷⁸ In order to assess whether the law has an impact on the delivery of health promotion services to sex workers, researchers compared health promotion programs in three Australian cities. The cities were Melbourne (brothels legalized if licensed, unlicensed brothels criminalized), Perth (criminalization of all forms of sex work) and Sydney (sex work largely decriminalized, without licensing). Research comparing the situation in states with different legal models concluded that the decriminalization of sex work is associated with better coverage of health promotion programmes for sex workers.⁷⁹

⁷⁷ *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 presentation.

⁷⁸ 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., et al. (2010) The decriminalization of prostitution is associated with better coverage of health promotion programs for sex workers. *Aust NZ J Public Health*, 34(5): 482-6; 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.

⁷⁹ Harcourt C., O'Connor J., Egger S., et al. (2010) *ibid*.

7 Draft recommendations for an agenda for action

The following draft recommendations are proposed as a basis for discussions and are subject to consultations with sex workers and their organizations, UN partners and technical experts in the Asia Pacific region.

The draft recommendations are not intended to apply equally to all countries. A priority should be given to in-country work to further map the issues and to develop country-specific advocacy plans with active participation of sex workers and their organizations.

Some communities are already making good progress in areas outlined below. The recommendations are intended to be a reference for actors at the country-level that helps them to define a national agenda for action, tailored to local conditions. Country-specific cultural, religious and political factors need to be taken into account in determining which recommendations should be accorded a priority in each country.

1. Support to leadership, community empowerment and advocacy

1.1. Governments and donors should support sex workers and their organizations to participate in law reform processes and to engage in advocacy on legal and human rights issues. Capacity building for sex workers should include training in legal literacy, human rights and advocacy skills. Sex workers' organisations should be resourced to provide peer-based advocacy on legal and human rights issues.

1.2. Governments, donors and UN agencies should engage with sex worker organizations, including national and regional networks of sex workers, as partners to inform policies and programmes relating to legal and human rights issues. Governments should work in partnership with sex worker organizations to develop non-judgmental, rights-based and evidence-based laws, policies and programmes.

2. Improvements to law enforcement practices and support to judiciary

2.1. Governments should prohibit law enforcement agencies from participating in coercive practices including mandatory HIV and STI testing, forced rehabilitation, or health promotion programmes implemented by police or based upon detention of sex workers.

2.2. Governments should ensure that sex workers, outreach workers, peer educators and HIV services are not prosecuted on the basis of evidence of possession of materials properly used in promoting sexual health, such as safe sex literature, condoms and lubricant.

2.3. The appropriate role for the police in enforcing laws against trafficking is to target traffickers rather than sex workers, and to ensure that enforcement of laws occurs in ways that protects the human rights of sex workers and reduces rather than exacerbates the HIV vulnerability of sex workers.

2.4. Governments should ensure that police and public security personnel receive training on HIV, human rights, and sex work, and should specifically address prevention of police abuses of sex workers including sexual violence and extortion.

2.5. Law enforcement policies and practices relating to 100% CUPs must be consistent with the human rights of sex workers, including rights to non-discrimination, privacy and autonomy in medical decision-making. Sex worker participation in designing

and evaluating 100% CUPs is critical. If sex worker participation and human rights protections cannot be guaranteed, alternatives to 100% CUPs that are rights-based and sex worker led should be considered.

- 2.6. Governments should ensure that transparent and independent police complaint mechanisms are in place that can help prevent and remedy police abuses. Police departments should ensure disciplinary proceedings and prosecutions are brought against police involved in harassment, extortion or violence towards sex workers.
- 2.7. Governments and national human rights institutions should ensure that all allegations of human rights violations perpetrated against sex workers are investigated thoroughly by independent bodies, and that those responsible are held accountable for their actions.
- 2.8. Justice Ministries and professional associations should include information on human rights-based responses to HIV and sex work in training of magistrates and judges. Governments and donors should provide resources to enable training of magistrates, judges, police and national human rights institutions on how best to address violence and discrimination directed at sex workers through supportive laws, policing, education and care.
- 2.9. Ministries of Police and Justice should work cooperatively with other Ministries involved in the HIV response (e.g. those with responsibility for health, welfare, education) to ensure that law enforcement approaches are supportive of HIV prevention, sexual health promotion and violence prevention strategies for sex workers.

3. Law reform

- 3.1. Governments should reform or repeal legislation that discriminates against people on the grounds of their occupation as a sex worker. This includes:
 - (a) laws explicitly criminalizing sex work or clients of sex workers;
 - (b) laws that criminalize activities associated with sex work such as soliciting or advertising of sexual services;
 - (c) laws that require mandatory HIV or STI testing or treatment of sex workers;
 - (d) trafficking laws that are enforced against sex workers;
 - (e) laws that authorize the detention of sex workers for the purposes of re-education, rehabilitation or correction;
 - (f) public order offences that are selectively enforced and are used as a pretext for extortion or for harassing, assaulting, detaining and punishing sex workers.
- 3.2. Governments should apply the ILO *International Labour Standard on HIV and AIDS* (2010)⁸⁰ to sex workers.
- 3.3. Laws should support sex workers who are living with HIV to access condoms and HIV and STI services without discrimination.
- 3.4. Governments should remove legal barriers to the distribution of sexual health information, e.g. by providing exceptions to obscenity offences for health promotion materials targeted at sex workers and their clients.

⁸⁰ International Labour Office (2010) *Recommendation concerning HIV and AIDS and the World of Work, 2010* (No. 200) Geneva: ILO.

- 3.5. Governments should prohibit vilification and discrimination on the grounds of a person's occupation as a sex worker particularly in areas of: employment; access to services including health care; education; accommodation; travel; provision of identity documents; and access to welfare services.
- 3.6. Legislation should provide sex workers with the right to comprehensive and quality sexual and reproductive health services, including for migrant sex workers regardless of their migration status.
- 3.7. In relation to sex workers identified as victims of trafficking:
 - (a) ensure that legislation does not permit the routine detention of victims of trafficking;
 - (b) ensure that irregular immigration status is not a justification for victim detention by providing foreign victims with a right to temporary residence and work permits.

4. Legal services

- 4.1. Governments should ensure provision of legal aid for sex workers who require legal advice and representation in relation to police matters, discrimination in accessing health services or other human rights violations.
- 4.2. Governments and/or donors should support provision of information and peer education to sex workers regarding their human rights and legal rights, and practical options for claiming and enforcing their legal rights;
- 4.3. Ministries of Justice and the legal profession should ensure the creation of a trained and sensitized legal work force that has expertise in providing legal services to sex workers including to defend prosecutions, to complain against excessive police conduct or discrimination and to seek justice for sex workers subjected to violence and abuse.

5. Research, evidence and monitoring

- 5.1. Detailed mapping of the legal environments of sex workers is required in each country to inform an agenda for action, using the rapid policy assessment and response methodology.⁸¹ Detailed mapping should be led by sex worker organisations where feasible and informed by qualitative studies on the impact of laws and law enforcement practices on the health and human rights of sex workers.
- 5.2. Donors and national AIDS authorities should support research and documentation of the effects on HIV responses of discrimination, criminalization, and other human rights violations against sex workers.
- 5.3. Human rights violations experienced by sex workers need to be systematically documented so that redress can be sought. Documentation should be used to inform planning of protective measures and for advocacy with policy and decision-makers to prevent future violations of rights from occurring.
- 5.4. National AIDS authorities should promote the sharing of evidence of successes and lessons learnt from programmes that support sex workers and their organizations to advocate for their human rights and improved legal environments for effective HIV responses.

⁸¹ Rapid Policy Assessment and Response (RPAR) methodology entails a desk review of legislation, academic literature and policy. It is being implemented in Fiji and Malaysia by Paulo Longo Research Initiative and has been implemented by Project Parivartan and the Lawyers Collective to map the legal environment for sex workers in Andhra Pradesh, India: http://cira.med.yale.edu/research/project_page.asp?projID=222.

6. National planning of HIV responses

- 6.1.** Governments should ensure that national HIV Strategies and Plans recognize the importance of ensuring non-punitive, enabling legal environments for HIV responses among sex workers and their clients.
- 6.2.** National HIV Strategies and Plans should address the legal and policy environment, including law reform priorities, participation of sex workers in legal reform and policy processes, support to the advocacy and policy role of sex worker organizations, community legal education and access to legal and advocacy services.

7. National human rights institutions

- 7.1.** National human rights institutions should ensure that resources are applied to protecting and promoting the human rights of sex workers, and to raising awareness of the HIV impacts of human rights violations of sex workers.
- 7.2.** National human rights institutions should hold governments accountable for protection of sex workers from police harassment, abuse and violence.

8. Recommendations to donors and multilateral organizations

- 8.1.** Donors and governments should recognize and support the important role played by national, regional and international sex worker networks in monitoring and documenting violations of human rights, participating in policy development processes relating to sex work and advocating for law reform and legal protections for sex workers.
- 8.2.** The ASEAN Intergovernmental Human Rights Commission should take proactive measures to promote and protect the human rights of sex workers and ensure that member states commit to action to review discriminatory laws and policies that undermine HIV responses among sex workers.
- 8.3.** The Global Fund should implement commitments of its Sexual Orientation and Gender Identities Strategy, including by promoting:
 - inclusion of sex worker-led activities to address legal environment issues in funding proposals;
 - sex worker participation in Country Coordinating Mechanisms; and
 - inclusion of people with expertise on human rights and sex work on the Technical Review Panel;
- 8.4.** UNAIDS and its Cosponsors should support country partners to include measures to improve the legal environment for HIV responses among sex workers in national HIV plans, in partnership with sex worker organizations.
- 8.5.** UNODC and other multilateral and regional agencies involved in the implementation of law enforcement responses to trafficking in support of Article 6 of CEDAW and the *Palermo Protocol* should ensure that the enforcement approaches adopted do not violate the human rights of sex workers and are consistent with the human rights based HIV policies of UNAIDS, UNDP, UNFPA and ILO.