ADVANCING SEXUAL HEALTH AND HUMAN RIGHTS IN THE WESTERN PACIFIC

Simone Cusack

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## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
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<tr>
<td>ART</td>
<td>Assisted reproduction technology</td>
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<td>ARV</td>
<td>Antiretroviral</td>
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<td>Austl.</td>
<td>Australia</td>
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<tr>
<td>Brunei</td>
<td>Brunei Darussalam</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>CEDAW Committee</td>
<td>Committee on the Elimination of Discrimination against Women</td>
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<td>CESCRC</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>C.I.</td>
<td>Cook Islands</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRC Committee</td>
<td>Committee on the Rights of the Child</td>
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<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>FGM/FGC</td>
<td>Female genital mutilation/female genital cutting</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<td>H.K.</td>
<td>Hong Kong</td>
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>Jap.</td>
<td>Japan</td>
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<td>Kirib.</td>
<td>Kiribati</td>
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<tr>
<td>Lao P.D.R.</td>
<td>Lao People's Democratic Republic</td>
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<td>M.I.</td>
<td>Marshall Islands</td>
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<td>N.Z.</td>
<td>New Zealand</td>
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<td>Phil.</td>
<td>Philippines</td>
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<td>P.N.G.</td>
<td>Independent State of Papua New Guinea</td>
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<td>Sam.</td>
<td>Samoa</td>
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<td>Sing.</td>
<td>Singapore</td>
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<td>S.I.</td>
<td>Solomon Islands</td>
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<tr>
<td>Sth. Kor.</td>
<td>Republic of Korea (South Korea)</td>
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<td>STI</td>
<td>Sexually transmitted infection</td>
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<td>Tuv.</td>
<td>Tuvalu</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>Van.</td>
<td>Vanuatu</td>
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<tr>
<td>Viet.</td>
<td>Viet Nam</td>
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<td>WHO</td>
<td>World Health Organization</td>
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1. Executive Summary

1. In order to achieve the highest attainable standard of sexual health, people must be able to exercise and enjoy their human rights and fundamental freedoms such that they can control their own sexual (and reproductive) lives and access related health services and information. Where human rights and fundamental freedoms are denied or impaired, sexual health is compromised leading, inter alia, to unwanted pregnancies, unsafe abortion, maternal mortality, Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) and other sexually transmitted infections (STIs), infertility, sexual dysfunction, and gender-based violence.

2. Important strides have been made in the Western Pacific Region with respect to the recognition, understanding, and application of human rights norms and standards related to sexuality and sexual health. The laws highlighted in this report show, for instance, that there is now greater protection against certain forms of discrimination, legal recognition of post-operative transsexuals has improved, and legal protections against violence related to sex, gender and sexuality have been strengthened. In addition, there is increased protection of the rights to privacy and sexual autonomy evidenced, for example, in the trend toward decriminalization of adultery and the increasing number of Western Pacific states that have decriminalized private sexual conduct between consenting persons of the same sex. Increasingly, Western Pacific states are recognizing in their laws and jurisprudence that the advancement of sexual health requires more than the absence of disease, dysfunction or infirmity. As demonstrated in the legal frameworks put in place in many Western Pacific states, a holistic approach to sexual health requires the sexual rights of all persons to be respected, protected and fulfilled.

3. Notwithstanding these and other important strides, significant gaps and discrepancies exist in the recognition and application, by Western Pacific states, of human rights norms and standards related to sexuality and sexual health. For example, states that have introduced legal protections against discrimination on the ground of sexual orientation have not always applied those protections consistently. This report shows that, in many Western Pacific states, same sex couples face entrenched discrimination in access to adoption and assisted reproduction technology (ART) services. Same sex couples are denied the opportunity to enter lawfully into marriage in all parts of the Region, and are permitted to enter into civil unions and/or register their relationships in a limited number of jurisdictions only. Protections against discrimination on the ground of gender identity are minimal, despite evidence that the lives of transsexuals and transgendered persons are marked by discrimination, limited legal recognition of their true gender identity, and other human rights violations. Western Pacific laws regularly reinforce gender stereotypes, including sex-role stereotypes that ascribe certain roles and behavior to men and women and sexual stereotypes that “endow men and/or women with specific sexual characteristics or qualities that play a role in sexual attraction and desire, sexual initiation and intercourse, sexual intimacy, sexual possession, sexual assault, transactional sex ... and sexual objectification and exploitation.” Widespread criminalization of sex work has had the effect of undermining the sexual health of sex workers, for instance by preventing them from accessing health care services for fear of criminal prosecution if found to be a sex worker. Moreover, laws permitting mandatory HIV or STI testing of sex workers and mandating disclosure of private health information to employers sanction direct interference in the private lives of sex workers.

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2 Rebecca J. Cook and Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (2010), at 27.
A holistic understanding of sexual health as a state of physical, emotional, mental and social well-being in relation to sexuality—and not merely the absence of disease, dysfunction or infirmity—and improved recognition, understanding, and application, by Western Pacific states, of the full range of human rights are needed to ensure the advancement of sexual health in the Region. The exercise and enjoyment of the highest attainable standard of sexual health requires that Western Pacific states adopt measures that ensure a positive and respectful approach to sex, gender, sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. While many Western Pacific states are to be congratulated for the important strides they have made toward the fulfillment of sexual health, the laws and jurisprudence discussed in this report show that much progress remains to be made.

Non-Discrimination and Equality

The nature and extent of protections in the Western Pacific against discrimination vary depending on the ground of discrimination. Protection against discrimination on the ground of sex is commonplace. In addition to general prohibitions against that form of discrimination, many Western Pacific states have enacted laws that require the elimination of discrimination against women, in recognition of the fact that women continue to experience discrimination because they are women. Western Pacific states have also enacted robust protections against discrimination on the basis of the HIV/AIDS. Many Western Pacific states have strengthened laws that prohibit discrimination on the ground of HIV/AIDS by proscribing mandatory HIV testing. Strides have been made in the Western Pacific Region toward the elimination of discrimination on the ground of sexual orientation. However, protection against that form of discrimination is not widespread and research suggests that discrimination on the ground of sexual orientation is often entrenched in laws on adoption, ART, and marriage. For example, no Western Pacific state has recognized the legal validity of marriages between persons of the same sex, although a small number of states permit persons of the same sex to enter into civil unions and/or register their relationships. Protection against discrimination on the ground of gender identity is rare in the Western Pacific, revealing a significant gap in the application of human rights norms and standards. Protection against discrimination on the ground of marital status exists in a handful of Western Pacific states. However, the nature and scope of those protections vary depending on the definition of “marital status.” Moreover, as in the case of discrimination on the ground of sexual orientation, protections against discrimination on the ground of marital status are sometimes limited in the areas of adoption and ART. Certain Western Pacific states characterize sexual harassment as a form of discrimination, while others have enacted laws that make sexual harassment unlawful or certain types of sexual harassment a criminal offense.

Marriage and Family Relations

Recognition of the rights to marry and to found a family is widespread in the Western Pacific. As in other Regions, however, these rights are sometimes restricted. Minimum legal ages of consent for marriage are common throughout the Western Pacific, although minimum marriageable ages vary widely across the Region and, in some instances, within jurisdictions. Western Pacific states also regularly condition the rights to marry and to found a family on the free and full consent of the contracting parties. There is a trend in the Western Pacific Region toward prohibiting or, at the very least, restricting the practice of polygamy. Polygyny is permitted in specified circumstances under the customary or religious laws of certain Western Pacific states. Decriminalization of adultery is common in the Western Pacific, reflecting changing social attitudes in the Region.

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4 See ibid.
toward adultery and a relaxation of state control over sexual relations and behavior outside marriage. Nonetheless, adultery is still criminalized in a number of Western Pacific states. Criminalization of incest is widespread in the Western Pacific, although the nature and scope of criminal offenses vary, including with respect to the types of relationships and sexual activities proscribed.

**Gender Identity, Gender Expression and Intersex**

7. Western Pacific states have adopted diverse approaches to the legal recognition of sex/gender on birth certificates and in civil registries. Those approaches range from limiting the ability to change the record of sex/gender to intersex persons to permitting the record of sex/gender to be altered if there is a certain degree of permanent change in one’s sex/gender (meaning that alteration of a record is not contingent on complete sex affirmation surgery). There are conflicting trends in the Western Pacific regarding the legal recognition of sex/gender for the purposes of marriage. Certain states recognize the legal validity of marriages involving a post-operative transsexual and a person of the opposite sex/gender, while other states deny such recognition. There are limited examples of Western Pacific states applying human rights norms and standards to guarantee access to health care services for transgendered, transsexual and intersex persons, although such persons may be able to access certain health care services in the same way as the general population. Some states have recognized the right of children to live with a transgender/transsexual identity free from discrimination and, on that basis, have granted minors access to medical treatment and procedures to enable them to live in their true gender identity.

**Sexual Expression and Non-Violent Sexual Behavior**

8. Western Pacific states regulate and/or restrict sexual expression and non-violent sexual behavior in certain circumstances. A number of states criminalize private sexual conduct between consenting persons of the same sex, whereas others have applied human rights norms and standards to invalidate such offenses. It is common amongst Western Pacific states to criminalize the intentional transmission of HIV, either through offenses related specifically to HIV or general criminal law offenses. Certain states require persons living persons with HIV/AIDS to disclose their health status to sexual partners, while other states only require such persons to take reasonable precautions to prevent the transmission of HIV (e.g., by adopting safe sex practices). Western Pacific states commonly limit the expression of sexuality by criminalizing indecent acts and indecent exposure and by prescribing minimum ages of consent for lawful sexual conduct.

**Criminalization of Violence Related to Sex and Sexuality**

9. Protection against violence related to sex and sexuality is commonplace in the Western Pacific, although the strength of those protections varies greatly depending on the nature and type of violence regulated. For instance, while protection against domestic violence/intimate partner violence, sexual violence and trafficking for forced prostitution is widespread in the Region, certain Western Pacific states criminalize domestic violence between heterosexual couples only and provide immunity for marital rape. In addition, while some Western Pacific states have enacted laws that criminalize hate crimes or female genital mutilation/female genital circumcision (FGM/FGC), offenses of this kind are not prevalent in the Region.

**Access to Health Care Services Related to Sex and Sexuality**

10. Access to contraceptives and related health information is guaranteed in the laws (and policies) of a large number of Western Pacific states. Certain states also promote shared responsibility for family planning and guarantee men and women the same rights to decide freely on the number
and spacing of their children. China is the only Western Pacific state to impose a mandatory limit on childbearing, although a handful of states have introduced or are seeking to introduce non-enforceable ideal family sizes. Access to abortion without restriction as to reason, at least during certain periods of pregnancy, is guaranteed in certain jurisdictions in the Region. More commonly, however, Western Pacific states criminalize abortion with exceptions for specific indications such as life, health and sexual assault. Equal access to quality and affordable health care services and information for people living with HIV/AIDS is required in a wide range of Western Pacific laws. Voluntary HIV testing is also supported by a number of Western Pacific states.

Education, Information and Expression

11. Access to education and information related to sex, sexuality and sexual health is guaranteed in a number of Western Pacific laws (and policies), including on education, HIV/AIDS, sex work and equality. Consistent with international human rights law, certain of those laws require education and information to be accurate and evidence-based. At the same time, however, Western Pacific states exercise a high degree of control over information/material with sexual content (commonly referred to as “obscene” or “indecent”). Those Western Pacific states that exercise a higher degree of control over information/material with sexual content have a greater impact on the ability (or inability) of individuals to express themselves and access certain types of information with sexual content.

Sex Work

12. Sex work is a criminal offense in the majority of Western Pacific states. States’ preference for criminalization of sex work means there are few laws in the Region that seek explicitly to protect and promote the sexual health and human rights of sex workers or their clients, or address public health imperatives, including prevention of transmission through sex work of HIV/AIDS or other STIs. Examples of a health and human rights approach to sex work can be found in Western Pacific jurisdictions where sex work has been decriminalized. Sexual health and human rights are advanced in those jurisdictions through legal frameworks that, inter alia, promote safe sex practices, protect sex workers against violence and exploitation, and guarantee sex workers access to sexual health care services and information.
2. **Scope and Methodology of Report**

2.1 **WHO Project on Advancing Sexual Health and Human Rights**

13. In 2008, the World Health Organization (WHO) established a global project on sexual health and human rights. The aim of the project was to improve the recognition, understanding and application of human rights and fundamental freedoms related to sexuality and sexual health, by identifying and mapping a wide range of national, regional and international laws that protect and promote (and, conversely, fail to protect and promote) the exercise and enjoyment of those rights and freedoms and, ultimately, improve sexual health. In conceiving the project, the WHO hypothesized that health and sexuality related interventions could be strengthened through the application of human rights supported by authoritative global, regional and national legal standards. The WHO posited that identifying and mapping states’ application of human rights and fundamental freedoms related to sexuality and sexual health would provide useful guidance on the meaning and content of those rights and freedoms, which would, in turn, facilitate state’s efforts to respect, protect and fulfill those rights and freedoms, with a view to improving sexual health.

14. The WHO commissioned an international report and seven regional reports (Africa, the Americas (excluding North America), Eastern Mediterranean, North America, Europe, South East Asia and the Western Pacific). The international report documents and explains existing international human rights norms and standards related to sexuality and sexual health. Each regional report explores how those norms and standards have been applied in domestic laws and jurisprudence and, where appropriate, in regional human rights systems. The international and regional reports will serve as the foundation for a forthcoming global report, to be published by the WHO, which will seek to bring together and analyze the information collated in those reports.

15. Authors of the WHO reports organized their reviews of international, regional and national legal standards related to sexual health and human rights around eight topics, namely:

- discrimination and inequality;
- marriage and family relations;
- gender identity, gender expression and intersex;
- sexual expression and (non-violent) sexual behavior;
- violence related to sex and sexuality;
- access to health care services related to sex and sexuality;
- education, information and expression related to sex and sexuality; and,
- sex work.

The topics were chosen, refined and elaborated through extensive discussions during three successive WHO technical consultations. While the eight common topics and their sub-topics appear in the international and regional reports, authors were given discretion to develop sub-topics as relevant to their regional and national contexts.

16. The eight topics (and their sub-topics) were chosen having regard to four criteria, namely:

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• demonstrated causal importance to sexual health and well-being;
• relevance to core WHO goals of promoting sexual health for all persons, with particular consideration to the protection and promotion of gender equality;
• prioritization of poor and underserved populations and groups; and,
• examination of laws that intersect with fundamental questions of human rights.

In choosing the eight topics, and in their ensuing research, the authors of the international and regional reports identified themes of global significance to rights and health in relation to sexuality, while attending carefully to regional diversity, as well as national and local specificity (including legal, cultural, political, social, economic and historical concerns). In addition, the eight topics are further contextualized within an empirical literature on sexuality and sexual health. Moreover, as research into the eight topics progressed in each region, authors were given flexibility in their treatment of each of the topics and sub-topics. Thus, while there is consistency in the overall framework of the eight topics, readers will notice variation in how laws and authoritative standards relevant to sexual health are treated in the regional reviews. This is a strength of the project, as the WHO seeks to ensure that policy makers in many different settings find the materials produced relevant and useful.

17. Analysis of the eight topics and their importance for sexual health relies on the contemporary understanding that health and well-being are influenced by material and social conditions. Health services, and health systems as frameworks organizing and ensuring the appropriate delivery for those services (as well as other key goods and services), are clearly essential for health. However, they are not the only services and systems that matter for health. Legal and educational systems are clearly part of ensuring the highest attainable standard of physical and mental health. Thus, this project incorporates topics for investigation in light of the understanding that health is shaped by structural conditions, as well as law and policy, and not only by the most obvious physical processes of disease, aging, reproduction, nutrition, exposure to environmental toxins, injury, etc. It is well accepted that the social determinants of health have effects at individual, group and population levels. The international and regional reports stress, however, that these social determinants are themselves often produced by state action through law and authoritative policy. Thus, many key material factors affecting sexual health are often not inevitable or unchangeable, but rather represent discrete choices made by legislators, administrators, courts and executives.

18. The legal frameworks and standards that determine so many of the key factors of health may be in alignment, tension, or contradiction with human rights principles. The promotion of sexual health is inextricably tied to the promotion of fundamental human rights, such as the rights to non-discrimination, participation, and access to information, and the freedoms from violence and arbitrary interference in private life, and to expression and association. In regard to sexual health, states have made legal and political commitments to protect the health of people, including sexual health, through the application of human rights principles, expressed through their national laws, and through commitments to international and regional human rights treaties and consensus documents. The international and regional reports, therefore, proceed from the premise that law can have strong effects on sexual health as well as on rights, and that there is a dynamic relationship between the promotion of human rights and the promotion of sexual health.

19. For each of the topics and sub-topics, the international and regional reports highlight laws that promote sexual health, and note laws that are likely to impede or diminish it. The analysis in the reports focuses solely on the formal content of statutes, judicial decisions or other duly enacted laws; the reports do not assess their implementation. Therefore, the regional reports do not evaluate which regions or states have succeeded in promoting sexual health and human rights in each of the eight topic areas. Rather, the authors examine contemporary law as representing different paths through which the social and material conditions that promote (or impede) sexual
health and rights exist. Although the international and regional reports do not assess the implementation of laws, it is hoped that this mapping exercise will strengthen understanding of the application of relevant human rights, and serve to reinvigorate the efforts of states to respect, protect and fulfill those rights.

20. Many policy makers concerned with sexual health are accustomed to reviewing laws that explicitly address health (i.e., the regulation and content of health services) for their health and human rights impacts. The reports address these aspects of health in sections on access to health services and health issues that arise in the context of other human rights concerns (e.g., mandatory HIV testing). In addition, the reports analyze laws affecting human rights and material conditions that do not on their face address health, but which, social determinants-based analysis shows, have an effect on health. These include laws on discrimination, marriage and family relations, state responses to violence, whether perpetrated by the state or requiring state response to violence perpetrated by others, and access to information. Moreover, the reports highlight several topics where the issues of sexuality and gender are explicitly conjoined in the law, such as the regulation of sexual activity through criminal law, and including the specific focus on exchange of sex for money or the regulation of gender expression and identity. Specific chapeaus in each of the sections of the reports further elaborate why these issues are important focal points for policy makers wishing to understand how to use law to promote sexual health.

21. A human rights-based analysis of laws related to each of the eight topics asks questions about the relationship between a law’s focus and scope, as well as its historical development, to analyze the law’s actual or potential implications for the health and human rights of a wide range of people. At all times, the authors of the international and regional reports were concerned about laws’ impacts on the health of all people. The reports explore the relationship between specific laws and the workings of social processes (such as inclusion and exclusion, stigma, and barriers created by threats of violence for each topic).

22. State responsibility is a key aspect of law that is made visible in the international and regional reports. The reports identify laws through which states themselves promote or violate rights. Laws that expressly provide gender-neutral protection from sexual assault, for example, promote the sexual health of all by recognizing that women, men and children need protection from sexual violence, and break free of historical stereotypes that connect the harm of rape to women only. They also reinforce states’ obligations to respect rights and to protect against abuse by others. In contrast, laws criminalizing consensual sexual activity between adults, for example, both violate the internationally accepted freedom from arbitrary interference in private life (among other rights and freedoms) and also drive underground persons afraid to seek information that will protect their health. Law itself may also authorize penalties that, under human rights analysis, would be deemed arbitrary or excessive acts of violence, such as capital punishment, flogging, or arbitrary imprisonment for non-violent sexual activity (so called “morals offenses”).

23. States are also responsible for ensuring that they use due diligence to protect against harms by others. Laws that fail to provide an effective response to coercive sex or marital rape by husbands diminish women’s rights to bodily integrity and decision-making, and their control over the conditions of safer and desired sexual activity within marriage. States’ failure to secure human rights leads to bad health outcomes, as coerced sex is often unprotected sex, with negative results (e.g., unwanted pregnancy, HIV, feelings of anger, insecurity, mental health deficits and unremedied physical injuries) for the woman.

24. A key way in which law can support sexual health is by guaranteeing broad access to effective health care. Analyzing how health care can support (or impede) sexual health for all persons

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requires, therefore, an examination of the general structure of health services relevant to sexual health (how are they provided, financed and dispensed, with regard to availability to all?). In addition, the analysis of health service laws must consider the barriers that specific populations and marginalized sub-groups may face: Does the law, on its face or in practice, exclude unmarried women from accessing contraception, for example? Does the law provide for information in ways that will reach men who have sex with men? Is the privacy of persons seeking information and services protected explicitly or does the law subordinate their rights to police registries of HIV status, for example, of people in sex work? Are there other laws penalizing behavior, such that a man seeking care would be reluctant to disclose his actual sexual practices?

25. In sum, there are many topics upon which the law acts that may have relevance to sexual health. This report presents eight issues, with numerous related sub-topics that the authors involved in the WHO project on sexual health and human rights believe are critical to building the best legal frameworks that can sustain sexual health. The analyses contained in the international and regional reports are built from a synthesis of the best of public health practice with the insights of international human rights law and best practices across all the WHO regions.

2.2 Western Pacific Report

26. This report represents one part of the WHO’s global project on sexual health and human rights. It focuses exclusively on the WHO “Western Pacific Region,” a region comprised of 37 member states and approximately 1.6 billion people, or roughly one third of the world’s population. Its membership consists of American Samoa, Australia, Brunei Darussalam, Cambodia, China, Cook Islands, Fiji, French Polynesia, Guam, Hong Kong, Japan, Kiribati, the Republic of Korea (South Korea), Lao People’s Democratic Republic, Macao, Malaysia, the Marshall Islands, the Federated States of Micronesia, Mongolia, Nauru, New Caledonia, New Zealand, Niue, the Commonwealth of the Northern Mariana Islands, Palau, Papua New Guinea, the Philippines, the Pitcairn Islands, Samoa, Singapore, the Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, Viet Nam, and Wallis and Futuna. Unlike many of the other regions considered as part of the WHO’s project on sexual health and human rights, there is no regional human rights system in the Western Pacific.

27. This report seeks to identify and map how Western Pacific states have applied human rights norms and standards related to sexuality and sexual health in their national legal frameworks, while recognizing that those norms and standards are evolving, fluid and contested. As explained in section 2.1 above, it is not the aim of this report to comprehensively review or analyze the effectiveness of domestic legal frameworks, as they relate to sexuality or sexual health. Rather, this report is intended to foster awareness of the extent to which, and diverse ways that, Western Pacific states protect and promote human rights related to sexuality and sexual health.

28. This report highlights specific examples of how human rights norms and standards have been applied in laws and jurisprudence across the Western Pacific Region. The selection of laws and jurisprudence highlighted is based on extensive research into primary legal materials in the Western Pacific. Laws and jurisprudence of Western Pacific states are highlighted because of their application of human rights norms and standards related to sexuality and sexual health. At times, laws and jurisprudence were chosen because they apply human rights and fundamental freedoms in ways that respect and protect sexual autonomy, protect and promote freedom and diversity of sexual expression, and enable individuals to exercise and enjoy the highest attainable standard of sexual health. At other times, legislation and jurisprudence were chosen because of the ways in which they control or limit sexuality or compromise sexual health. Still, at other times, laws and jurisprudence were selected to highlight regional trends, and also to draw attention to gaps and discrepancies in the application of human rights norms and standards within jurisdictions and across the Region.
29. Attempts were made to ensure that the report, on the whole, considers laws and jurisprudence from a diverse range of states in the Western Pacific Region. However, not all Western Pacific states are represented, or represented to the same degree, in the report. This is due, in part, to the frequency and extent to which different Western Pacific states apply human rights norms and standards related to sexuality and sexual health in their domestic laws and jurisprudence. Other factors that have influenced the representation of Western Pacific laws and jurisprudence in this report include language barriers, difficulties in obtaining official English versions of laws and jurisprudence, and time and space constraints. Notwithstanding such barriers, an effort has been made to ensure equitable geographical distribution and representation of diverse legal, political and religious cultures, and varied approaches to sexuality and sexual health.

30. This report is based largely on primary legal materials. Laws and jurisprudence related to sexuality and sexual health were identified and obtained through international and national legal repositories and legal databases. Where necessary, secondary materials, including academic scholarship and government and non-government reports and materials, were consulted to help identify and understand relevant laws and cases. Secondary materials were also relied on to understand how different legal systems in the Western Pacific Region operate. With few exceptions, the nature and content of state policies on sexuality and sexual health were not examined. The decision to exclude policies from this review was a decision made collectively by the authors of the international and regional reports in conjunction with the WHO. It was based, in large part, on difficulties authors had in accessing current and authoritative English versions of state policies. On rare occasions, such as in the case of Viet Nam, policies are considered, but only because of their unique position and status in the relevant legal system.

31. An effort was made in the research and drafting of this report to obtain materials current as of September 2009, although, in some rare instances, more recent materials have been included because of their significance and relevance to the project. Owing to the constantly evolving nature of laws and jurisprudence in the Western Pacific, the sheer volume of laws and jurisprudence that have been reviewed and analyzed for this report, and the unstable legal and political situation in some Western Pacific states, errors might be present in this report. Readers are therefore strongly urged to confirm the status of laws and jurisprudence before relying on them in their own work.

32. This report is divided into eight substantive sections, each representing one of the eight topics related to sexuality and sexual health. It begins in section 3 by examining legal prohibitions in the Western Pacific Region against discrimination on the grounds of sex, sexual orientation, gender identity, marital status and HIV status. Section 3 also examines the legal regulation of sexual harassment. Section 4 considers the application of human rights norms and standards in laws regulating marriage and family relations. It discusses requirements regarding consent to marriage, and the regulation of polygamy, adultery and incest. In section 5, the report examines Western Pacific laws that regulate or impact gender identity and gender expression and also intersex persons. More specifically, it examines laws that govern the legal recognition of sex/gender on birth certificates and for the purposes of marriage, and considers laws that guarantee access to health services for trans and intersex persons. Section 6 explores the regulation/criminalization of sexual expression and (non-violent) sexual behavior. It addresses private sexual conduct between consenting persons of the same sex, transmission of HIV through sexual intercourse, and indecent acts and indecent exposure. It also addresses the legal ages of consent for sexual conduct. Section 7 of the report examines the criminalization of violence related to sex and sexuality, including domestic violence, sexual violence, FGM/FGC, hate crimes, so-called “honor crimes” and sexual exploitation. In section 8, the report considers the application of human rights norms and standards in laws regulating access to health care services, specifically those related to contraceptives, abortion, and HIV/AIDS. Section 9 identifies how human rights have been applied in laws regulating access to sex education and education and information on sexual health, more generally, as well as laws regulating information with sexual content. Section 10 looks at the
(de)criminalization of sex work and the regulation of sex workers’ access to health care services and information. Finally, section 11 lists the key documents and sources used in the research and writing of this report.
3. **NON-DISCRIMINATION AND EQUALITY**

33. The rights to non-discrimination and equality are fundamental principles underpinning all human rights. They are the obligation of the state both to ensure equal protection of the law and to take steps to eliminate discrimination by others, in order to achieve equality. Section 3 focuses primarily on protections against discrimination in law and their positive effects for sexual health. It also highlights laws that fail to offer sufficient guarantees to ensure diverse people equal access to the resources and services needed to enjoy the highest attainable standard of sexual health. Later sections of the report address more indirect (but no less causal) forms of discrimination, such as laws that fail to ensure that police respond equally to abuse committed against sex workers.

34. The rights to non-discrimination and equality have multiple associations with sexual health. Inequality among and between persons and groups is a strong predictor of the burdens of ill-health, including sexual health. Inequalities are manifest through differential access to services and resources, and in people’s abilities to participate in the policies and laws that govern their lives and seek remedies for abuses committed against them.

35. Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors of sex, age, class, race, caste, sexual orientation, marital status, national status, disability and health status, including HIV status, among others. For example, rape laws that exclude women married to perpetrators from protection, or which include or exclude access to health services based on women’s marital status, deny women’s bodily integrity and decision-making, including in regard to unwanted sex, all of which contributes to the burden of ill-health many women face. Poor women and girls, as well as ethnic minority members, are often doubly burdened by these exclusions: the law may be sex-specific but, in addition, racial or social status can exacerbate sex/gender discrimination. Thus, while denial of access to safe and legal abortion affects all women, poorer or minority women with fewer resources are more likely to face the health consequences of unsafe abortion.

36. Laws that discriminate—or fail to protect against discrimination (on the basis of sexual orientation, marital status, or sex, for example)—in access to health services or housing can result in people being excluded from vital treatment for STIs and other diseases, as well as contributing to the possible homelessness and deprivation of social capital among stigmatized people. These deprivations in turn make breaks in accessing critical sexual health services and treatment more likely.

37. Laws that both reserve key social relationships like marriage to a specific pool of adults, and then condition core rights (to insurance or social benefits, for instance) on entering into marriage have discriminatory impacts. Persons excluded from marriage, such as same sex couples, are thereby excluded from social benefits and services, including health care linked to insurance, which are essential to sexual health. Excluding same sex partners from health benefits or other legal entitlements deprives them of services and conditions essential to the highest attainable standards of sexual health because of relationship status or sexual orientation.

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8 See Section 10 on Sex Work.
9 Notably, some state regimes allocating social benefits conditional to marriage may also deny unmarried, cohabiting heterosexual partners access to benefits; others accept unmarried cohabiting heterosexual partners as akin to spouses (if meeting other conditions such as duration of cohabitation) for the purpose of benefits. Such disparate treatment – particularly in regard to pensions, access to housing and other conditions for health – has been determined to be discriminatory. See Young v. Australia, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003) (Human Rights Committee).
The inability of many sexually stigmatized persons (e.g., rape victims/survivors who may be viewed as dishonored or complicit and sex workers who may be viewed as criminals or socially unclean) to participate in making and assessing laws that affect their lives, results in law-making divorced from the needs of those most at risk. Indeed, such laws may exacerbate exclusion and ill-health, as with laws that require extra corroboration for the testimony of rape victims/survivors, thus making prosecutions less successful and services for post-assault rape victims/survivors harder to access.

Beliefs about appropriate gender roles that, in turn, dictate expected sexual conduct, are significant sources of legal discrimination, particularly against women. Other laws discriminate against people who transgress social norms related to feminine or masculine social behavior (i.e., gender expression) or socially accepted forms of sexuality and sexual conduct (e.g., sex without reproduction, sex outside of marriage, or gender-non-conformity in regard to sexual practices). Many laws that discriminate against women, for example, follow gender-based distinctions that are often tightly linked to legal and cultural norms about women’s sexuality, as when a woman’s marital status is a barrier to accessing family planning, ART, or adoption services, or when the law treats women with a “good” reputation (i.e., chaste) differently and more favourably than women with a “bad” reputation (i.e., sexually promiscuous). Men may also run foul of these laws, when they fail to conform to stereotypes related to masculinity, confront gender-based dress regulations, or face laws criminalizing their same sex sexual behavior. Such laws tend to produce both stigmatized persons (whose mental and physical health may suffer) and render health services less accessible for those persons.

At national and international levels, one of the critical developments in anti-discrimination law is the recognition that sexual harassment (unwanted sexuality-based verbal or physical activities in workplace or educational settings, which create a hostile environment) functions as a barrier to equality, and as such counts as a form of discrimination. Sexual harassment can have health effects in two ways: first, the harassment itself can be coercive or abusive enough to have direct mental or physical health effects; second, in driving the harassed workers out of their employment, it may remove them from a key source of health benefits. Women are disproportionately the targets of this form of harassment, although men may also face this abuse.

While states are obligated, under the rights to non-discrimination and equality, to treat the similar interests of individuals in the same way, they must also treat their significantly different interests in ways that adequately respect and accommodate those differences, in line with the principles of autonomy and respect for diversity, and regardless of stereotypes. The assumption that all persons can be reached by the same public health messages about STIs constitutes one example of failed formal equality: married adolescent girls, unmarried women, and men who have sex with men may all need specific, tailored outreach and actions to obtain equivalent health information.

Section 3 of this report explores protections against discrimination in the Western Pacific Region. Section 3.1 examines the legal response of Western Pacific states to discrimination on the ground of sex. Section 3.2 considers the legal regulation of discrimination on the ground of sexual orientation, including in the context of employment, adoption and ART. It also examines the legal recognition of same sex marriages. Section 3.3 highlights legal prohibitions against discrimination on the ground of gender identity. Next, section 3.4 addresses marital status discrimination and the different ways in which Western Pacific states have sought to eliminate this wrong, including in the areas of employment, adoption and ART. Section 3.5 examines the legal protections available against discrimination on the ground of HIV status. Last, section 3.6 addresses the legal regulation of sexual harassment in the Western Pacific. It highlights the different responses of Western Pacific states to sexual harassment, which, in addition to the characterization of sexual harassment

as a form of discrimination, include the adoption of legal prohibitions against this wrong and the
criminalization of certain forms of sexual harassment.

### 3.1 Sex

43. There is widespread regional support in the Western Pacific Region for the elimination of
discrimination on the ground of sex. A significant number of states have enacted constitutional and/or legislative prohibitions against this particular form of discrimination. For example, the Constitution of Japan of 1946 provides that all people “are equal under the law and there shall be no discrimination in political, economic or social relations because of ... sex ....” The constitutional prohibition against sex discrimination is strengthened by the Basic Law for a Gender Equal Society of 1999, which aims to comprehensively and systematically promote a society based on equal respect for the human rights of men and women. In Hong Kong, the Basic Law of Hong Kong of 1990 enshrines the right of all Hong Kong residents to equality before the law, and, drawing on articles 2, 3 and 26 of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance of 1991 guarantees the right to non-discrimination on the ground of sex. In addition, the Sex Discrimination Ordinance of 1995 makes certain kinds of sex discrimination unlawful.

44. Viet Nam provides a further illustration of a state that has enacted constitutional and legislative protections against discrimination on the ground of sex. The Constitution of the Socialist Republic of Viet Nam of 1992 guarantees all citizens equality before the law and establishes a right to “sexual equality.” It provides that men and women have equal rights in family life and in the political, economic, social and cultural fields, and requires the adoption of measures to ensure the necessary conditions for the full advancement of women. The Law on Gender Equality of 2006, Viet Nam’s primary law on gender equality, prohibits discrimination on the basis of gender and establishes a right to substantive equality. It also guarantees equality in a number of specific fields. In the health context, it establishes an equal right to participate in education on health care and to use health services, and an equal right to decide on the use and type of measures to ensure safe sex.

45. In recognition of the fact that women continue to experience discrimination because of their status as women, a number of Western Pacific states have introduced laws that require the elimination of discrimination against women. For example, in 1992, China strengthened its constitutional
guarantees of equality by enacting the Law of the People’s Republic of China on the Protection of Women’s Rights and Interests, which is formulated to protect women’s rights, promote equality, and enable women’s full participation in society. In 2009, the Philippines supplemented its domestic protections against sex discrimination by introducing the Magna Carta of Women, which requires the elimination of discrimination against women and the realization of substantive equality. Committing the Philippines to take steps to ensure substantive equality, the Magna Carta provides that the State shall promote empowerment of women and pursue equal opportunities for women and men and ensure equal access to resources and to development results and outcome. Further, the State realizes that equality of men and women entails the abolition of the unequal structures and practices that perpetuate discrimination and inequality. To realize this, the State shall endeavor to develop plans, policies, programs, measures, and mechanisms to address discrimination and inequality...

46. The Magna Carta affirms women’s rights and obligates the Philippines to “intensify its efforts to fulfill its duties under international and domestic law to recognize, respect, protect, fulfill, and promote all human rights and fundamental freedoms of women ....” In addition to the general prohibition against discrimination, the Magna Carta enumerates a number of specific rights for women, including the rights to equal treatment before the law, equality in marriage and family relations, and access information and services relating to women’s health.

Concluding Remarks

47. A review of Western Pacific laws reveals a strong level of commitment to the elimination of discrimination on the ground of sex, with a significant number of states enacting constitutional and/or legislative protections against that particular form of discrimination. The strength of those protections vary, however, with only some states (e.g., Viet Nam) establishing robust legal frameworks that require the elimination of sex discrimination and the achievement of substantive (i.e., de facto) equality of men and women. Consistent with their international human rights obligations, those Western Pacific states that also require the realization of substantive equality have acknowledged that it is important, but not sufficient, to adopt a formal (i.e., de jure) approach to equality of men and women. Those states recognize that, in addition to treating men and women identically when their interests are the same, they must also address past discrimination against women, accommodate biological, socially and culturally constructed differences between men and women, and eliminate the root causes of sex discrimination.

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24 Magna Carta of Women of 2009 (Phil.), s 4(b) (defining discrimination against women as “any gender-based distinction, exclusion, or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civic, or any other field.”).
25 Ibid., s 4(e) (defining substantive equality as “the full and equal enjoyment of rights and freedoms contemplated under this Act. It encompasses de jure and de facto equality and also equality in outcomes.”).
26 Ibid., s 2.
27 Ibid.
28 See ibid., s 12.
29 See ibid., s 19.
30 See ibid., s 17.
48. Notwithstanding strong support for the elimination of discrimination on the ground of sex, Western Pacific states that condone marital rape,\(^{34}\) deny women access to safe and lawful abortion,\(^{34}\) criminalize sex work\(^{35}\) or, for example, permit FGM/FGC\(^{36}\) undermine the effective operation of constitutional and legislative protections against sex discrimination and impede the achievement of substantive equality in practice. A health and human rights approach requires Western Pacific states to review and reform laws that undermine protections against sex discrimination, and implement laws (e.g., domestic violence laws) that promote de facto equality.

### 3.2 Sexual Orientation

49. Consistent with international human rights law,\(^{37}\) a handful of Western Pacific states have enacted laws that prohibit discrimination on the ground of sexual orientation.\(^{38}\)

50. In 1997, Fiji was one of the first countries in the world to prohibit discrimination on the ground of sexual orientation. The Fijian Constitution provides that "[a] person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her actual or supposed personal characteristics or circumstances, including ... sexual orientation ...."\(^{39}\) Since its enshrinement into the Constitution, the prohibition has been applied to invalidate laws that discriminate on the ground of sexual orientation, including provisions of the Penal Code 1945 that criminalized private sexual conduct between consenting persons of the same sex.\(^{40}\) Following a political coup and suspension of the Fijian Constitution in 2009,\(^{41}\) the status and future application of Fiji’s prohibition against sexual orientation discrimination are uncertain.

51. In Hong Kong, the rights to non-discrimination and equality are enshrined in the Basic Law of Hong Kong of 1990 and the Hong Kong Bill of Rights Ordinance of 1991. Article 25 of the Basic Law guarantees all Hong Kong residents equality before the law, and article 22 of the Bill of Rights Ordinance establishes a freestanding right to non-discrimination and equality (based on article 26 of the International Covenant on Civil and Political Rights) that provides that

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\text{[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.}
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Article 1 of the Bill of Rights (which is grounded in articles 2 and 3 of the International Covenant on Civil and Political Rights) further provides that "[t]he rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or..."
other opinion, national or social origin, property, birth or other status. Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights.”

52. Sexual orientation is not listed as an express ground of discrimination in either the Basic Law or the Bill of Rights Ordinance. However, in Leung v. Secretary for Justice, \(^{42}\) a unanimous Court of Appeal of Hong Kong held that the prohibition against discrimination in those laws includes sexual orientation. In Secretary for Justice v. You Yuk Zigo and Anor., \(^{43}\) the Court of Final Appeal of Hong Kong affirmed the Court’s finding in Leung that the rights to non-discrimination and equality encompass sexual orientation. In finding that the criminalization of homosexual, but not heterosexual, buggery otherwise than in private violated the rights to non-discrimination and equality, Chief Justice Li explained that “[d]iscrimination on the ground of sexual orientation would plainly be unconstitutional under both art. 25 of the Basic Law and art. 22 of [the Bill of Rights Ordinance] in which sexual orientation is within the phrase ‘other status’.\(^{44}\)

53. Notwithstanding the prohibition against discrimination on the ground of sexual orientation, same-sex couples in Hong Kong are denied the right to lawfully adopt and access ART services.\(^{45}\) The Human Reproductive Technology Ordinance of 2007, for instance, explicitly prohibits the provision of ART services to persons who are not married.\(^{46}\) Since marriage is restricted, under the Marriage Ordinance of 1876, to heterosexual couples, it is not possible for same sex attracted persons to satisfy the legislative criteria to access ART services.

54. In New Zealand, the Human Rights Act 1993 prohibits discrimination on the ground of sexual orientation, which is defined to mean “a heterosexual, homosexual, lesbian, or bisexual orientation.”\(^{47}\) The general prohibition against sexual orientation discrimination extends to a number of areas of public life,\(^{48}\) including accommodation, education, employment and the provision of goods and services, such as ART services.\(^{49}\) The general prohibition in the Human Rights Act 1993 against discrimination on the ground of sexual orientation is strengthened by the Employment Relations Act 2000, which provides that it is unlawful for an employer to directly or indirectly discriminate in employment on the ground of sexual orientation.\(^{50}\) The prohibition is further strengthened by the Status of Children Act 1969, which affords legal recognition as parents to lesbian partners of women who give birth to a child conceived using ART.\(^{51}\) In contrast to ART, adoption is limited to single persons or persons in heterosexual relationships,\(^{52}\) which has the effect of denying same sex couples the right to found a family through adoption.

55. In Australia, it is unlawful to discriminate on the ground of sexual orientation in state,\(^{53}\) but not federal,\(^{54}\) jurisdictions. The absence of a federal prohibition against discrimination on the ground

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\(^{42}\) Leung v. Secretary for Justice, [2006] 4 HKLRD 211 (H.K., Court of Appeal) (Leung II).

\(^{43}\) Secretary for Justice v. You Yuk Lung Zigo and Anor., [2007] HKCFA 50 (H.K., Court of Final Appeal).

\(^{44}\) Ibid., at para. 11.

\(^{45}\) See Adoption Ordinance of 1956 (H.K.), s 4; Human Reproductive Technology Ordinance of 2007 (H.K.), s 15(5).

\(^{46}\) See Human Reproductive Technology Ordinance of 2007 (H.K.), s 15(5).

\(^{47}\) Human Rights Act 1993 (N.Z.), s 21(1)(m).

\(^{48}\) See ibid., Pt. 2.


\(^{50}\) See Employment Relations Act 2000 (N.Z.), s 105(1)(m).


\(^{52}\) See Adoption Act 1995 (N.Z.).

of sexual orientation has allowed discrimination against gays and lesbians and lead to several international decisions against Australia, including the well-known cases of Toonen v. Australia56 and Young v. Australia.58 In 2008, the Federal Government enacted a suite of legislative reforms that amended approximately 100 laws that discriminated against same-sex couples in relation to financial and work-related benefits and entitlements.57 However, the Federal Government has not enacted a national prohibition against sexual orientation discrimination and that form of discrimination remains entrenched in a number of laws, including the Marriage Act 1961 (Cth.), which limits marriage to the union of a man and a woman.

56. Access to ART and adoption is regulated under state and territory law in Australia. Lesbians are able to access ART lawfully in the majority of Australian states and territories59 and, increasingly, legal recognition as parents has been afforded to lesbian partners of women who give birth to a child conceived using ART.59 The effect of such recognition is that non-biological lesbian co-parents are acknowledged as legal parents, with all the rights and responsibilities that attach to that status. Australian states and territories have generally adopted a more restrictive approach to adoption for same-sex couples, as compared to ART. Same-sex couples are only eligible to adopt children in the Australian Capital Territory, Tasmania and Western Australia.60 Notwithstanding state prohibitions against discrimination on the ground of sexual orientation, the remaining Australian states and territories deny same-sex couples access to adoption, usually through restrictive definitions of terms such as “couple” or “spouse” or use of such exclusionary language as “husband and wife” or “a man and a woman.”61 Excluding same-sex couples from adoption in this way has the effect of denying them their right to found a family, among other rights.

57. In 2009, the Philippines enshrined limited protection against discrimination against lesbians. The Magna Carta of Women of 2009 provides that “[a]ll individuals are equal as human beings by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of … sexual orientation ….62 However, section 2 of the Magna Carta,
which affirms women’s rights as human rights and commits the Philippines to “intensify its efforts to fulfill its duties under international and domestic law to recognize, respect, protect, fulfill, and promote all human rights and fundamental freedoms of women ... without distinction or discrimination,” omits sexual orientation from its list of prohibited grounds of discrimination. The effect of that omission is to render less certain the application of the Magna Carta to discrimination on the ground of sexual orientation. Aside from the Magna Carta, the Philippines has not enacted a general prohibition against sexual orientation discrimination that affords protection to all people of all sexual orientations. In addition, a number of Filipino laws, including the Domestic Adoption Act of 1998 and the Inter-Country Adoption Act of 1995, which restrict eligibility for adoption to single persons or persons in a heterosexual relationship, have institutionalized discrimination on the ground of sexual orientation.

58. Same sex marriage has not been recognized in any state in the Western Pacific Region. Some states (e.g., China) restrict the ability of same sex attracted individuals to marry, by defining marriage, whether implicitly or explicitly, as a union between a man and a woman. Other states (e.g., the Cook Islands, Singapore, Viet Nam) have expressly prohibited same sex marriage. Civil unions between same sex attracted persons are permitted in New Zealand and in some jurisdictions in Australia, and relationship registration schemes operate in a handful of Western Pacific jurisdictions. However, civil unions and registered relationships are not afforded equal recognition with marriage.

59. In New Zealand, same sex attracted individuals can enter into civil unions but are unable to contract marriage. The question of whether or not the Marriage Act 1955, which is silent on the meaning of the term “marriage,” permits same sex marriages was determined in Quilter v. Attorney-General. That case concerned the refusal of the Registrar of Births, Deaths and Marriages to grant marriage licenses to the appellants, three lesbian couples, on the ground that the Marriage Act 1955 does not apply to same sex marriages. The appellants claimed that the refusal to allow them, as same sex couples, to marry amounted to discrimination on the ground of sexual orientation, in contravention of section 19 of the New Zealand Bill of Rights Act 1990 and section 21(2) of the Human Rights Act 1993.

60. The Court of Appeal of New Zealand held that, although the Marriage Act 1955 was silent as to the meaning of the term “marriage,” its wording and scheme reflected the traditional common law understanding of marriage as the union of a man and a woman. The Court reasoned that, in the absence of any ambiguity, it was for the Legislature and not the courts to interpret the term marriage to include same sex unions. In dismissing the appellants’ claim of discrimination on the ground of sexual orientation, President Richardson, Judge Keith and Judge Gault held that the right to non-discrimination in section 19 of the New Zealand Bill of Rights Act 1990 does not require equal legislative recognition of opposite sex and same sex marriages. Taking a different legal route, Judge Tipping concluded that denying same sex couples the right to marry does amount to prima facie discrimination, but does not contravene section 19 because it was permitted under New Zealand law, namely the Marriage Act 1955. Dissenting on the issue of discrimination, Judge Thomas determined that denying same sex couples the right to marry does violate the right

63 See, e.g., Marriage Amendment Act 2004 (Cth.) (Austl.), sch. 1 cl. 1; Marriage Act 1961 (Ch.) (Austl.), ss 5, 86EA; Family Law Act 1975 (Ch.) (Austl.), s 43(a); Marriage Act 1969 (Fiji), s 15; Marriage Act 1955 (N.Z.); Family Code of the Philippines of 1987 (Phil.), art. 1; Code of Muslim Personal Laws of 1977 (Phil.), art. 16.
64 See Marriage Act 1971 (C.I.), s 15A(1); Marriage Amendment Act 2007 (C.I.), s 2; Women’s Charter of 1961 (Sing.), s 12(1); Women’s Charter (Amendment) Act of 1996 (Sing.); Marriage and Family Law of 2000 (Viet.), art. 10(5).
65 See, e.g., Civil Union Act 2004 (N.Z.); Civil Partnerships Act 2008 (ACT) (Austl.).
66 See, e.g., Civil Partnerships Act 2008 (ACT) (Austl.); Relationships Act 2003 (Tas.) (Austl.);
68 See ibid., at 556, 571-572 (Keith J.), at 527 (Richardson P. and Gault J.), 542-544 (Thomas J.), 582 (Tipping J.).
69 See ibid., at 527 (Richardson P.), 557 (Keith J.) and 527-529 (Gault J.).
70 See ibid., at 576-577 (Tipping J.).
to non-discrimination. Same sex couples, Judge Thomas explained, are denied the right afforded to opposite sex couples to marry the person of their choice, excluded from full membership of society, and denied equality of and before the law.\(^{71}\) However, Judge Thomas concluded that even if the Marriage Act 1955 was interpreted consistently with the right to non-discrimination, it was not possible to construe the Act in a way that included same sex unions.\(^{72}\)

61. A communication was subsequently submitted to the UN Human Rights Committee alleging that the failure to recognize same sex marriage violated the rights in the International Covenant on Civil and Political Rights to non-discrimination on the grounds of sex and sexual orientation, to recognition as persons before the law, and to marry and found a family, as well as the freedom from arbitrary interference with private and family life. In Joslin v. New Zealand,\(^{73}\) the Committee decided that mere refusal to provide for same sex marriage did not amount to a violation of the Covenant.\(^{74}\) Grounding its decision in article 23(2), which establishes a right for “men and women” to marry, the Committee concluded that the Covenant only requires States Parties to recognize as marriage a union between opposite sex couples. It reasoned that “[u]se of the term ‘men and women’, rather than the general terms used elsewhere in … the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.”\(^{75}\) In a Concurring Opinion, Committee members Lallah and Scheinin concluded that article 23(2) does not require States Parties to recognize same sex marriage but nor does it prevent them from affording such recognition.\(^{76}\)

62. Following the HRC’s decision in Joslin v. New Zealand, New Zealand enacted the Civil Union Act 2004, which permits two people, whether of the same or opposite sex, to enter into a civil union.\(^{77}\) To be eligible to enter into a civil union, a person must have attained 16 years of age;\(^{78}\) if one of the parties is aged 16 or 17, he or she must obtain the consent of each of his or her guardians before the union can take place.\(^{79}\) As in the case of marriage, civil unions are prohibited if one or both of the parties to the union are already married or in a civil union, or if both parties are within the prohibited degrees of civil union.\(^{80}\) Civil unions are registered in accordance with the Births, Deaths, Marriages, and Relationships Registration Act 1995,\(^{81}\) and may be dissolved or declared void on the same grounds as marriage (e.g., duress, mistake, absence of consent).\(^{82}\)

Concluding Remarks

63. Steps have been taken in some parts of the Western Pacific Region to protect against discrimination on the ground of sexual orientation. Certain states have enacted constitutional and/or legislative protections against that form of discrimination (e.g., Fiji and New Zealand) or interpreted protections against discrimination on the ground of “other status” to include sexual orientation (e.g., Hong Kong). However, such protections have not always been applied consistently in those states. For example, many Western Pacific states that prohibit discrimination on the ground of sexual orientation still deny persons access to ART and adoption services on the basis of their sexual orientation (e.g., the Philippines), contrary to the rights to, inter alia, non-
discrimination and equality, found a family, sexual autonomy and self-determination, and the highest attainable standard of health. A health and human rights approach requires protections against discrimination on the ground of sexual orientation to be applied consistently in all areas of life. It further requires those Western Pacific states that have not already enacted protections against that form of discrimination to take immediate steps to do so.

64. In the Western Pacific, as in other Regions, marriage is considered to be an important social institution. Western Pacific states have reserved the power to regulate marriage, including determining the requirements of a valid marriage and the capacity of persons to enter into marriage. In exercising that power to regulate sexuality, Western Pacific states have denied legal recognition of same sex marriages. The consequences of this denial, which privileges heterosexuality over homosexuality (and other expression of sexuality), are significant. The immediate effect is to exclude same sex attracted persons from the social institution of marriage, and deny them access to the social and other benefits that attach to marriage, many of which (e.g., insurance or social benefits) are essential to sexual health. In addition, Western Pacific marriage laws marginalize persons who do not conform to heterosexual norms, and send a message that their capacity for love and commitment, and the need for affirmation and protection of their intimate sexual relations, is less than for heterosexuals. Exclusion of same sex couples from the institution of marriage has had the effect of entrenching discrimination against persons who do not conform to heterosexual norms and denying them their rights to sexual autonomy, self-determination, and to enter into marriage with a partner of their own choice, as well as the freedom from arbitrary interference in private life. A health and human rights approach to marriage calls for legal recognition of heterosexual and homosexual relationships as marriage.

3.3 Gender Identity

65. Protections against discrimination on the ground of gender identity are extremely limited in the Western Pacific Region, revealing a significant gap in the protection and promotion of human rights as applied to sexual health. In Australia, legislative protections against discrimination on the ground of gender identity have been introduced at the state (but not the federal) level, and those protections have been applied to uphold the right of persons not to be discriminated against based on that identity. However, the terms that Australian states and territories use to describe discrimination on the ground of gender identity (i.e., "transsexuality," "transgender," "sexuality," "sexual orientation" and "gender identity"), and the meanings ascribed to those terms, vary widely. The effect of those discrepancies is to render uncertain the nature and extent of protections against gender identity discrimination in Australia. Moreover, a review of state and federal laws reveals that discrimination on the ground of gender identity is entrenched in a

83 See [citation omitted].
84 The term “gender identity” is used in this report to refer to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.” Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007), prmb.
85 See Section 5 on Gender Identity, Gender Expression and Intersex (discussing the legal regulation of gender identity and expression).
86 See, e.g., [citations omitted].
88 See Anti-Discrimination Act 1977 (NSW) (Austl.), Pt. 3A.
90 See Anti-Discrimination Act 1998 (Tas.) (Austl.), ss 3, 16(c).
number of Australian laws. Requiring persons to undergo complete sex affirmation surgery before they can change the record of sex/gender on their birth certificate, for example, institutionalizes discrimination on the ground of gender identity and undermines the full exercise and enjoyment of the rights to non-discrimination and equality.

**Concluding Remarks**

66. Protections against discrimination on the ground of gender identity are relevant to all persons, since all persons possess a gender identity. Nevertheless, it is often persons with marginalized gender identities who benefit most from those protections—for example, in the employment, education and health sectors—and who are further marginalized and excluded from society when they are discriminated against and are unable to seek legal recourse to vindicate their rights to non-discrimination and substantive equality. Sexual health is compromised where protections against discrimination on the ground of gender identity are unavailable (as in the case of almost all Western Pacific states) or their operation is uncertain (as in some Australian jurisdictions), or where discrimination on the ground of gender identity is entrenched in domestic legal frameworks, including public health laws.

67. Notwithstanding the absence of widespread protections against discrimination on the ground of gender identity, strides have been made in the Western Pacific Region toward the advancement of sexual health and human rights related to gender identity. For example, as explained in section 5 on gender identity and expression, in Republic of the Philippines v. Cagandahan, the Supreme Court of the Philippines recognized the right of intersex persons to make changes to the legal record of their sex/gender to align the legal recognition of their sex/gender with their true gender identity. In reaching this determination, Justice Quisumbing reasoned that the Supreme Court should not impose its views about sex/gender on intersex persons or force such persons to undergo surgery to align their sex with the sex assigned to them at birth. The effect of those strides has been to address certain elements of Western Pacific laws and jurisprudence that discriminate on the ground of gender identity, while leaving persons vulnerable to other forms of gender identity discrimination in the future due to the absence of a general prohibition against that form of discrimination. A health and human rights approach requires Western Pacific states to prohibit discrimination on the ground of gender identity and take all appropriate steps to ensure that this protection is realized in practice.

### 3.4 Marital Status

68. It is unlawful, under international human rights law, to discriminate against a person based on their marital status. Discrimination on the ground of marital status refers to the differential treatment of a person because of his or her marital or relationship status. Although defined differently across jurisdictions, the term “marital status” can include discrimination because a person is single, married, in a civil union or de facto relationship, widowed, divorced or separated.
Several Western Pacific states (e.g., Hong Kong, New Zealand, the Philippines, Australia) have enacted total or partial prohibitions against this form of discrimination.

69. In Hong Kong, it is unlawful to discriminate directly or indirectly on the ground of marital status in areas such as employment, education and the provision of goods, facilities or services. The term “marital status” is defined in the Sex Discrimination Ordinance of 1995 to mean “the state or condition of being – single; married; married but living separately and apart from one’s spouse; divorced; or widowed.” The term does not, however, apply to the state or condition of being in a civil union (which is not permitted in Hong Kong) or a de facto relationship. Consistent with international human rights law, the Ordinance stipulates that the adoption of special measures reasonably intended to ensure that persons of a particular marital status have equal opportunities with persons of different marital statuses do not constitute unlawful discrimination. However, the Ordinance carves out general exceptions related to the provision of ART and adoption, thereby denying single persons access to ART services and restricting their ability to adopt.

70. In New Zealand, marital status discrimination is prohibited under the Human Rights Act 1993 and the Employment Relations Act 2000. Marital status is defined in the Human Rights Act 1993 as being: single; married; in a civil union; in a de facto relationship; the surviving person of a marriage, civil union or de facto relationship; separated; or, a party to a marriage or civil union that is dissolved or to a de facto relationship that has ended. The definition of marital status in New Zealand differs from the definition in Hong Kong in two important respects. First, the Human Rights Act 1993 defines marital status discrimination to include civil unions between persons of the same or opposite sex and, as such, goes beyond traditional understandings of marital status. Second, it defines marital status discrimination to include de facto relationships, thereby affording protection against discrimination to couples that live with one another but who are not lawfully married under New Zealand law. In addition to the prohibitions against discrimination on the ground of marital status in the Human Rights Act 1993 and the Employment Relations Act 2000, New Zealand law affords single and married persons equal rights to adopt and access ART.

71. Although the Philippines has not enacted a general prohibition against discrimination on the ground of marital status, protection against this form of discrimination is enshrined in a number of domestic laws. For example, the Magna Carta of Women of 2009 prohibits discrimination against women, including on the basis of their marital status, and guarantees equal rights for men and women in all matters relating to marriage and family relations. In the military and law enforcement context, the Magna Carta provides that “[w]omen in the military, police, and other similar services shall be provided with the same right to employment as men on equal conditions. Equally, they shall be accorded the same capacity as men to act in and enter into contracts, including marriage.” With respect to education, the Magna Carta guarantees the right of pregnant girls and women to access education regardless of their marital status, providing that “[e]xpulsion and non-readmission of women faculty due to pregnancy outside of marriage shall be

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97 See Sex Discrimination Ordinance of 1995 (H.K.), ss 2, 4-7, 48.
98 Ibid., s 2.
99 See Marriage Ordinance of 1876 (H.K.).
100 See Sex Discrimination Ordinance of 1995 (H.K.), s 48.
101 See ibid., ss 56B-56C, sch. 5, pt. 2.
102 See Human Reproductive Technology Ordinance of 2007 (H.K.), s 15(5).
103 See Adoption Ordinance of 1956 (H.K.), s 5(1).
107 See Adoption Act 1955 (N.Z.), s 4; Human Assisted Reproductive Technology Act 2004 (N.Z.), s 4(d).
108 See Magna Carta of Women of 2009 (Phil.), ss 4(b), 19.
109 Ibid., s 15.
outlawed. No school shall turn out or refuse admission to a female student solely on the account of her having contracted pregnancy outside of marriage during her term in school."

72. The Labor Code of the Philippines of 1974 affords women additional protection against discrimination on the ground of marital status. The Code states that

\[
\text{[It shall be unlawful for an employer to require as a condition of employment or continuation of employment that a woman employee shall not get married, or to stipulate expressly or tacitly that upon getting married, a woman employee shall be deemed resigned or separated, or to actually dismiss, discharge, discriminate or otherwise prejudice a woman employee merely by reason of her marriage.}\]

The Philippines Supreme Court has regularly upheld women’s right not to be discriminated against in employment on the basis of their marital status. For example, in Philippine Telegraph and Telephone Company v. National Labor Relations Commission and Grace De Guzman, the Supreme Court held that the Philippine Telegraph and Telephone Company had unlawfully terminated Grace de Guzman because she was married. Justice Regalado explained that the Company’s policy of not hiring or terminating married women (but not married men) not only contravened women’s right “to be free from any kind of stipulation against marriage in connection with her employment,” it also assaulted “good morals and public policy, tending as it does to deprive a woman of the freedom to choose her status, a privilege that by all accounts inheres in the individual as an intangible and inalienable right.”

73. In Australia, discrimination on the ground of marital or relationship status is prohibited in a range of federal and state laws. The Sex Discrimination Act 1984 (Cth.), Australia’s primary sex discrimination law, prohibits direct and indirect discrimination on the ground of marital status, by which is meant the status or condition of being single, married, separated, divorced, widowed, or de facto. The Act states that direct discrimination occurs when, by reason of the marital status of the aggrieved person, or a characteristic that appertains generally to or is generally imputed to persons of that status, he or she is treated less favorably than a person of a different marital status. Indirect discrimination occurs when a person “imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital status as the aggrieved person.” In a number of states and territories, same sex relationships are included within the definition of “marital status” or “relationship status.”

74. Access to ART is regulated under state and territory law in Australia. In the state of Victoria, the Assisted Reproductive Treatment Act 2008 (Vic.) guarantees access to ART for single persons. The Act is guided by a number principles, including that “persons seeking to undergo treatment

\[\text{110 Ibid., s 13(c).}\]
\[\text{111 Labor Code of the Philippines of 1974 (Phil.), art. 136.}\]
\[\text{112 See, e.g., Philippine Telegraph and Telephone Company v. National Labor Relations Commission and Grace De Guzman, G.R. No. 118978 (May 23, 1997), [1997] 272 Sup. Ct. Reports Annotated 596 (Phil., Supreme Court). See also Zialcita et al. v. Philippine Air Lines, Case No. RO4-3-3398-76; February 20, 1977 (Phil., Supreme Court) (declaring a policy of Philippine Air Lines, which required prospective flight attendants to be single, in contravention of article 136 of the Labor Code and thus void).}\]
\[\text{113 Philippine Telegraph and Telephone Company v. National Labor Relations Commission and Grace De Guzman, ibid.}\]
\[\text{114 Ibid (per Regalado J) [citation omitted].}\]
\[\text{115 See Sex Discrimination Act 1984 (Ch.) (Austl.), ss 4(1), 6; Fair Work Act 2009 (Ch.) (Austl.), s 351(1).}\]
\[\text{117 See Sex Discrimination Act 1984 (Ch.) (Austl.), s 4(1).}\]
\[\text{118 See ibid., s 6(1).}\]
\[\text{119 Ibid., s 6(2).}\]
\[\text{120 See, e.g., Discrimination Act 1991 (ACT) (Austl.), Dict.}\]
procedures must not be discriminated against on the basis of their sexual orientation [or] marital status ...” and that “the health and wellbeing of persons undergoing treatment procedures must be protected at all times.” In addition to being guided by the rights to non-discrimination and health, the Act expressly provides that a woman does not need to be married or in a heterosexual de facto relationship in order to be eligible to receive ART services. However, the Act requires persons accessing ART to undergo a criminal records check. There is a presumption against providing treatment if the criminal records check reveals that “charges have been proven against a woman or her partner for a sexual offence ...” or “the woman or her partner has been convicted of a violent offence ....” Persons who are unable to conceive through sexual intercourse and who wish to access ART services are therefore obligated to disclose to the state personal information about their criminal histories. If those histories include convictions for certain offenses, specifically offenses of a sexual or violent nature, those persons may be denied access to ART. The same enquiries and disclosure obligations are not, however, imposed on persons who can conceive without the assistance of ART. Since women comprise the overwhelming majority of people seeking ART services, they typically bear the burden of increased state surveillance and control over reproduction.

Concluding Remarks

75. Positive examples of states prohibiting discrimination on the ground of marital status can be found in the Western Pacific Region, although the strength of those protections vary from jurisdiction to jurisdiction. For example, New Zealand includes de facto relationships and civil unions within its prohibition against marital status discrimination, which affords greater protection against marital status discrimination as compared to jurisdictions (e.g., Hong Kong) that exclude those relationships. Protections against marital status discrimination have not always been applied consistently in Western Pacific states. Certain states continue to deny unmarried persons access to ART and adoption services (e.g., Hong Kong) and, in the Australian state of Victoria, the introduction of legal guarantees of single and lesbian women’s access to ART has been accompanied by greater state surveillance and control of reproductive and sexual choices in the form of criminal records checks. Laws that make a person’s marital status a barrier to health services tend to produce stigmatized persons (whose mental and physical health may suffer) and render health services less accessible to those persons. A health and human rights approach requires protections against discrimination on the ground of marital status to be applied consistently in all areas of life, including in relation to adoption and ART. It further requires those Western Pacific states that have not already enacted protections against that form of discrimination to take immediate steps to do so.

3.5 HIV Status

76. Discrimination on the ground of HIV/AIDS is prohibited in a number of Western Pacific states, including Cambodia, China, Papua New Guinea, the Philippines, Pohnpei (Federated States of Micronesia) and Viet Nam. A number of other states (e.g., Australia, Hong Kong, New Zealand) include HIV/AIDS in their prohibitions against discrimination on the ground of disability.

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123 Ibid., s 10(1)(a).
124 See ibid., s 11(1)(c).
125 Ibid., s 14(1)(a).
Protections against HIV/AIDS discrimination are sometimes strengthened by prohibitions against mandatory HIV testing.  

77. In Papua New Guinea, HIV/AIDS is regulated under the **HIV/AIDS Management and Prevention Act 2003**, which aims to protect public health and ensure that human rights and fundamental freedoms are protected in efforts to prevent and manage the spread of HIV/AIDS.  

**Protections against discrimination and stigmatization on the ground of HIV/AIDS are a core component of that Act.**  

Consistent with international human rights law, the Act applies a substantive approach to equality, providing that the prohibition against HIV/AIDS discrimination does not preclude an act that is for the “special benefit, assistance, welfare, protection or advancement of any person or group...” The Act states, however, that it is not unlawful to discriminate on the ground of HIV/AIDS if “the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition.”

78. In *State v. Tutupsel*, the District Court of Justice of Papua New Guinea fined Rimux Tutupsel and ordered him to issue an apology, for unlawfully stigmatizing S.D. Tutupsel had pleaded guilty to a charge of unlawfully stigmatizing S.D. by abusing her and stating publicly that she was HIV positive. In sentencing Tutupsel, the Court affirmed S.D.’s right to privacy, noting that “[w]hether or not she was found to be positive or negative is a matter entirely within the confidence of her and those at the hospital who [deal] with her and is not the business of the defendant, let alone this court to inquire into.”

The Act states, however, that it is not unlawful to discriminate on the ground of HIV/AIDS if “the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition.”

The Court commended S.D. on her initiative to undergo HIV testing and stated that she, “like anyone else, must feel free and secure to undergo a test with confidence that his/her identity and privacy will be respected and protected ....” It explained that Tutupsel’s treatment of S.D. was a clear contravention of the prohibition against stigmatization: he intended to discredit S.D. by suggesting in a very public place frequented by large numbers of people that she was HIV positive. The Court imposed a high penalty on Tutupsel in an effort to deter him and other individuals from stigmatizing persons infected or affected by HIV/AIDS. In so doing, it emphasized the far-reaching consequences of such behavior, noting that S.D. may continue to be shunned or ridiculed, her family and friends may also face the same treatment and even in death her surviving relatives may continue to suffer therefore it would be correct to say that the Parliament may want to see the imposition of penalty or ranges of such to be strong and loud enough to send an unequivocal message ... that any repetition of such behaviour .... will be met with indecisive firmness from the courts.  

79. In the Philippines, it is unlawful to discriminate against a person on the ground of HIV/AIDS. The **Philippine AIDS Prevention and Control Act of 1998** requires the Philippines to “extend to every person suspected or known to be infected with HIV/AIDS full protection of his/her human rights and civil liberties.” Towards that end, the Act provides that “discrimination, in all its forms and subtleties, against individuals with HIV or persons perceived or suspected of having HIV shall be considered inimical to individual and national interest.” In addition to the general prohibition...
against discrimination, the Act establishes a number of specific prohibitions against HIV discrimination, including against discrimination on the ground of HIV-status in access to health care services. The Act provides, for example, that “[n]o person shall be denied health care services or be charged with a higher fee on account of actual, perceived or suspected HIV status.” In providing guidance on the steps required to implement this obligation, the Rules and Regulations Implementing the Philippine AIDS Prevention and Control Act of 1998 state that

[no] hospital or other health institution shall deny access to health care services to a [person living with HIV/AIDS] or those perceived or suspected to be HIV-infected, nor charge the said persons higher fees. Access to health services must be on an equal basis for all people, regardless of perceived, suspected or actual HIV status. Refusal to admit a person to a hospital or health care facility and refusal to provide health care or perform health services to a person in a hospital or health care facility on the basis of perceived, suspected or actual HIV status are prohibited acts.

The Act also stipulates that “[a]ll credit and loan services, including health, accident and life insurance shall not be denied to a person on the basis of his/her actual, perceived or suspected HIV status.” Further protections against discrimination are provided in the workplace and in schools, and in respect of travel, habitation, seeking public office, and burial services.

80. In 2006, Viet Nam enacted the Law on HIV/AIDS Prevention and Control to provide for the care, treatment and support of persons living with HIV/AIDS and to establish conditions for the implementation of HIV/AIDS prevention and control measures. Under the Law, it is unlawful to discriminate against or stigmatize persons with HIV or their family members. In an effort to ensure the elimination of discrimination and stigmatization, the Law provides that information and education on HIV/AIDS prevention and control must aim to fight discrimination and stigmatization against HIV-infected persons. Employers and communities are obligated to provide education on the unlawfulness of discriminating against or stigmatizing HIV-infected persons. In addition to the right to non-discrimination, the Law on HIV/AIDS Prevention and Control guarantees the rights of HIV positive persons to privacy, to education and, for example, to enjoy and refuse medical treatment and health care.

81. In Cambodia, the Law on the Prevention and Control of HIV/AIDS of 2002 prohibits all forms of discrimination against persons with, or affected by, HIV/AIDS, and explicitly guarantees them the same constitutional rights as all other Cambodian citizens. In addition to the general prohibition, the Law proscribes discrimination on the ground of HIV/AIDS in the health, employment, education and insurance sectors. In the health care context, the Law provides that “[d]iscrimination against person with HIV/AIDS in … hospitals and health institutions is strictly prohibited. No person shall be denied … public and private health care services or be charged with [a] higher fee on the basis of the actual, perceived or suspected HIV/AIDS status of the person or
his/her family members.”

Concluding Remarks

82. A significant number of Western Pacific states have enacted protections against discrimination on the ground of HIV/AIDS. A number of states (e.g., the Philippines, Viet Nam) have strengthened general protections against discrimination on the ground of HIV/AIDS by introducing additional protections aimed specifically at eliminating discrimination in areas such as health, education, employment, and insurance. General and specific protections against HIV/AIDS discrimination help to reduce the risk of HIV infection and ensure the equal exercise and enjoyment, by persons living with HIV/AIDS, of human rights and fundamental freedoms. Laws guaranteeing persons with HIV/AIDS access to health care services and information have also helped to advance the sexual health and human rights of those persons.

3.6 Sexual Harassment

83. Consistent with international human rights law, a number of Western Pacific states (e.g., Australia, Fiji, Hong Kong, New Zealand, South Korea), have characterized sexual harassment as a form of discrimination that state agents and officials are required to eliminate.

84. In New Zealand, the Human Rights Act 1993 and the Employment Relations Act 2000 identify sexual harassment as a form of unlawful discrimination that is prohibited in certain areas of public...
life, including in employment and education and in access to goods and services. Sexual harassment is defined broadly in both Acts, including in section 62 of the Human Rights Act 1993, which provides:

(1) It shall be unlawful for any person ... to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.

(2) It shall be unlawful for any person ... by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that –

(a) Is unwelcome or offensive to that person ...; and

(b) Is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied ....

In an example of good practice, the Human Rights Act 1993 expressly excludes from the determination of a sexual harassment complaint evidence of a complainant's prior sexual experience or reputation.

85. Apart from the characterization of sexual harassment as a form of discrimination that must be eliminated, Western Pacific states commonly criminalize certain types of sexual harassment (e.g., stalking, sexual assault, indecent assault), and a number of states have enacted laws that make it unlawful to sexually harass another person. Often prohibitions against sexual harassment extend only to the employment sector, as in the case of China, which prohibits sexual harassment against women (but not men) in the workplace. Although prohibiting sexual harassment in the employment sector is important, especially considering that sexual harassment commonly takes place in that sector, international human rights law requires that persons not be left vulnerable to sexual harassment regardless of where it takes place. Protection against sexual harassment in the Philippines extends beyond the workplace environment. In that jurisdiction, the prohibition against sexual harassment applies in the employment, education and training sectors. However, the prohibition is limited in other ways. For instance, it applies only to circumstances when a person with “authority, influence or moral ascendancy over another in a work or training or education environment, demands, requests or otherwise requires any sexual favor from the other ....” There is no legal protection against sexual harassment by a person of a lower or equal rank.


161 See also Employment Relations Act 2000 (N.Z.), s 108(1).


163 See, e.g., Crimes Act 1958 (Vic.) (Austl.), s 21A (stalking); Law on Proscribing Stalking Behavior and Assisting Victims of 2000 (Jap.) (stalking); Penal Code 1965 (Kirib.), s 133 (indecent assault of a woman); Penal Code 1997 (Malay.), ss 354 (assault or use of criminal force to a person with intent to outrage modesty), 509 (word or gesture intended to insult the modesty of a person); Penal Code of 1999 (Viet.), art. 121 (humiliating other persons).


166 See Anti-Sexual Harassment Act of 1995 (Phil.), s 2. See also Anti-Violence Against Women and Their Children Act of 2004 (Phil.); Magna Carta of Women of 2009 (Phil.), ss 4(k)(2), 9.

167 Ibid., s 3.

168 Compare Administrative Disciplinary Rules on Sexual Harassment Cases, Resolution No. 01-0940 (2001) (Phil.), which apply to Government officials and employees, and define sexual harassment more broadly to include unwelcome sexually determined behavior in both horizontal and vertical relationships.
Concluding Remarks

86. A number of Western Pacific states have introduced legislative protections against sexual harassment and others, such as Malaysia, have signaled their intention to introduce binding legislation prohibiting that form of harassment. Prohibitions against sexual harassment help to address one of the major barriers to equality and also help to protect against the physical and mental health effects of sexual harassment. However, protections against sexual harassment in the Western Pacific are by no means comprehensive, with protections sometimes limited to the employment sector or to specific relationships and, at other times, conspicuously absent.

4. Marriage and Family Relations

87. International human rights norms and standards recognize a fundamental right to marry and found a family, and reiterate the centrality of the family as a core unit of society.\textsuperscript{170} Marriage is an important institution in many societies, although in practice its structure is diverse. While marriage can be the basis of family, it is increasingly recognized that marriage is not the only basis of family; moreover, families can also take many forms.\textsuperscript{171} And while marriage and family are important institutions, persons wishing not to marry or found a family must be acknowledged as full participants in society and entitled to full rights, including sexual rights.

88. While marriage and family are often treated as linked institutions in both law and in many social and religious systems, they also need to be considered separately to assess fully their impacts on the sexual health and human rights of all affected persons, such as parent(s), children, and guardian(s). Marriage and family law play a major role in promoting or restricting the health (including sexual health) and human rights of many people, both married and unmarried, and their children and other dependents. In addition, marriage regulations may promote or be detrimental to the physical, emotional or social well-being of spouses.

89. In contemporary human rights terms, marriage can generally be understood as a voluntary union that creates specific bonds of legal rights and responsibilities, and which, as a consensual union, can also be dissolved by decision of either partner with due process for the rights of partners. Importantly, under rights principles, the legal bonds of marriage are created through contracts made by persons endowed by law with equal powers of “free and full consent” to enter into marriage. In human rights, the focus on equal, free and full consent for all persons (female and male) to decide if, when, and whom to marry, and to dissolve marriage—as an aspect of their dignity and rights—has important consequences for sexual health.

90. Marriage partners have equal rights to determine their sexual conduct in marriage, and should have the means to act on their decisions, including through access to services and the support of the law, for voluntary sexual conduct. Equality of rights in marriage is an especially important aspect of rights for the sexual health of women, and it is important to note that equality between men and women in marriage may require affirmative action by the state.\textsuperscript{172} The equal right of men and women, therefore, underscores the importance of laws that promote: access to reproductive and sexual health information and services; men’s and women’s right to access and use family planning; and, ensure rights to legal and other remedies for any abuses that may occur within marriage and on its dissolution.

91. A health and human rights approach has implications for state practices that exclude adults from marriage or conversely allow persons to be coerced into marriage. Mandatory health tests (to determine HIV status), for instance, are unjustified interferences with privacy and impede core bodily integrity rights. Exclusion from marriage on these or other grounds linked to health and physical characteristics (disability, for example) violates the right to non-discrimination. Other laws that allow persons to be coerced into marriage by abuse or disadvantage, such as when an accused


\textsuperscript{172} CEDAW, for example, notes the importance of temporary special measures to ensure substantive equality between men and women, noting that equality does not mean identical treatment in many areas of public and private life: CEDAW Committee, General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, UN Doc. A/59/38 (2004).
or convicted rapist is absolved by marriage to his victim, should be seen to violate non-discrimination rights as well as being harmful to the personal well-being of the coerced person.

92. The focus on legally meaningful consent of adults as the basis of marriage has important implications for the rights and health of adolescents and young women in particular, as 18 years is now the internationally agreed upon minimum age for marriage.173 States must work toward the elimination of child marriage, as well as adequate legal, social and health supports for young married women. This is especially important for the girl child because early marriage has been linked to high rates of maternal mortality and morbidity, as young women enter into early childbearing through early marriage.174

93. While marriage is a key site for sexual activity for many people, rights and health protections must extend to consensual sexual conduct before or outside of marriage. In addition, procreative sex and reproduction are not limited to married couples, and the rights of children must be recognized regardless of the marital status of their parents.175

94. Increasingly, it is clear that a health and human rights approach to marriage invalidates constructions of marriage that require sexual activity between spouses as a matter of proprietary right. Obligatory or coerced sex in marriage has many negative health consequences, including unprotected and unsafe sex, unwanted pregnancy and HIV transmission, with implications for mental as well as physical health.176 Health and human rights-based approaches endorse the trend toward laws supporting consensual sexual activity within marriage,177 which is linked with each partner’s ability to demand and use condoms and have access to, and the means to use, comprehensive family planning, as well as access to comprehensive and accurate sexual health information.

95. A wide range of laws may regulate marriage in any given country: family, personal status, health regimes and criminal laws, as well as customary rules. In addition, an extensive set of legal rights may depend on marital status, such as rights to immigration, social security, health care, and insurance, and access to confidential medical records, inheritance, property disposition, custody and control of children, visitation rights, and decision-making for incompetent patients.

96. These various regimes have grave impacts on the sexual health and human rights of marriage partners, and are often gender-specific in their discriminatory effect. Many legal regimes governing marriage operate in ways that mean that women are regularly denied bodily autonomy and also face conditions that undermine their sexual health: when they are coerced into marriage, cannot refuse sex within marriage, or are compelled by custom or law to remain widowed or to remarry, or conversely when law or custom allows them to be shunned or otherwise socially ostracized after divorce or widowhood. In places where sexual activity outside of marriage is strongly stigmatized, divorced or widowed women who are constrained from marriage may in effect be excluded from the ability to enjoy sexual relations in the future. Of particular importance to sexual health are marriage regimes that treat married women as legal minors or dissolve their rights into the rights and privileges of the male spouse, particularly those regimes that: disallow women access to health care services (through requiring male or spousal consent); bar (in law or in

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174 See UNICEF Innocenti Research Centre, ibid.
175 See CRC, arts. 1-2.
176 See Section 7.2 on Sexual Violence (discussing marital rape).
177 These include laws such as marital rape laws, equality between women and men and laws providing for services for married women seeking to exercise their rights to speech, association, property etc. See generally Claudia Garcia-Morena et. al., WHO Multi-Country Study on Women’s Health and Domestic Violence against Women: Initial Results on Prevalence, Health Outcomes and Women’s Responses (2005).
practice) prosecution or other intervention against an abusive spouse; or, restrict widows or divorced women from equal powers over property, inheritance, or control or decisions over children, etc.\textsuperscript{178}

97. Health and human rights analyses increasingly highlight the need for recognition of alternative forms of family, as these varied forms of family provide important economic resources and social support to many people. States must ensure that access to appropriate services, and conditions of equality, security and freedom necessary for health for all family members, are available to all kinds of families. Families formed outside of marital or other intimate partner relationships, such as when a grandparent or other kin cares for children of their extended family, need recognition and support, including appropriate authority to make decisions in the child’s best interest, and access to the means to ensure their sexual health and freedom from abuse.

98. Because single women are often in this caregiver role in alternative families, sex-based discrimination against the caregiver has negative effects on the well-being of children. Same sex couples who are raising children and whose relationship is not recognized as a marriage also fall into this concern for alternative families. Conversely, persons in alternative families who face domestic violence or sexual exploitation also need to be recognized as persons deserving of legal interventions and safeguards such as protection or other orders intervening in the family. Such provisions are essential to promoting basic health and human rights, and specific sexual health concerns.

99. It is clear, however, that children have full rights regardless of the marital status of their parents.\textsuperscript{179} In many circumstances, the health of the child (including his/her sexual health and protection from abuse) requires respect and equal protection for parents’ ability and right, irrespective of marital status, to make decisions for and with the child, in their best interest, including on access to services, treatment and information. Under many circumstances, the rights of the child compel attention to the rights of parents and guardians living in non-traditional relationships (unmarried parents, especially women, and same sex partners) and laws recognizing those relationships are essential to the child’s health.

100. Criminal laws proscribing incest are found in many jurisdictions, but they reflect extremely diverse conceptions of kinship, social appropriateness, and risk. Prohibitions against incest vary greatly regarding the type of kin one must avoid having sexual relations with, reflecting important social principles of proximity and distance rather than degrees of biological relatedness (indeed, some incest laws prohibit sexual relations between individuals who have no biological relationship whatsoever). Some incest laws prohibit sexual contact between adults and young people under the age of consent (in which case the sexual contact could not be seen as consensual), while others more expansively forbid sexual conduct between persons in specified kinship relationships, even if they are all adults. Laws criminalizing adult behavior among kin are often challenged in regard to their impact on privacy rights.

101. Section 4 examines how Western Pacific states regulate marriage and family relations and, in so doing, explores some of the different ways in which Western Pacific states limit the rights to marry and to found a family. Section 4.1 examines Western Pacific laws that establish a minimum legal age of marriage (i.e., “marriageable age”) and condition the right to enter into marriage on the free and full consent of the contracting parties. Section 4.2 explores how Western Pacific states often limit the institution of marriage to monogamous unions, by prohibiting or restricting the practice of polygamy. Section 4.3 considers the criminal restrictions that some Western Pacific states place on adultery. Last, section 4.4 looks at the criminalization of incest in the Western Pacific Region.

\textsuperscript{179} See CRC, arts. 1-2.
4.1 Consent to Marriage

102. The minimum legal age of consent to marriage varies across the Western Pacific Region. In Australia, Kiribati and New Zealand, a person is of marriageable age if he or she has attained the age of 18 years.\(^{183}\) The minimum legal age of marriage is also 18 years in the Philippines and Singapore,\(^{181}\) except where the marriage is contracted under religious law. In such cases, a boy or girl as young as 15 or 16 can marry in the Philippines and Singapore, respectively.\(^{182}\) In Fiji, Japan, Malaysia, the Marshall Islands, Papua New Guinea, Samoa and Vanuatu, the minimum age of marriage is 18 years for boys and 16 years for girls, and in Viet Nam the minimum age is 20 for boys and 18 for girls.\(^{183}\) Some of the youngest marriageable ages in the Western Pacific have been established in the Cook Islands (16 years), Hong Kong (16 years), the Solomon Islands (15 years) and Tuvalu (16 years).\(^{184}\) In contrast, China encourages late marriage and, at 22 years of age for boys and 20 years of age for girls, has one of the oldest minimum legal ages of marriage in the Region.\(^{185}\) Western Pacific states do, in certain circumstances, permit individuals who are below the legally mandated age to marry, including where permission has been obtained from a specified state, religious or family authority.\(^{186}\)

103. It is common for Western Pacific states to treat a marriage as legally void if one or both of the parties were below the legally mandated age at the time of marriage. For example, in Hong Kong, the Marriage Ordinance of 1876 provides that “[a] marriage shall be null and void if at the time of its celebration any party is under 16 years of age.”\(^{187}\) In cases of invalidation of marriage based on the age of the parties, care should be exercised to ensure that the rights of parties to the voided marriage, especially minors, are safeguarded. The rights of any children of the marriage should also not be harmed by its invalidation.

104. In addition to establishing a minimum legal age of marriage, it is common practice for Western Pacific states to require free and full consent as a precondition of marriage. In China, for example, marriage must be based on the complete willingness of both parties and no party may be coerced into the marriage.\(^{188}\) The absence of free and full consent generally renders a marriage void or is grounds for annulment.\(^{189}\) The circumstances in which a marriage is legally void due to an absence of consent vary between Western Pacific jurisdictions, but include those where a person’s consent to marriage was obtained through: duress or fraud;\(^{190}\) deceit or misrepresentation;\(^{191}\) and, violence, force, coercion or intimidation.\(^{192}\) They also include cases involving mistaken identity,\(^{193}\)

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\(^{183}\) See Marriage Act 1961 (Cth.) (Austl.), s 11; An Act to Amend the Marriage Ordinance 2002 (Kirib.), s 2; Marriage Ordinance 1977 (Kirib.), s 5; Marriage Act 1955 (N.Z.), ss 2, 18.

\(^{181}\) See Family Code of the Philippines of 1987 (Phil.), art. 5; Women’s Charter of 1961 (Sing.), ss 9, 17(2)(c).

\(^{182}\) See Code of Muslim Personal Laws of 1977 (Phil.), art. 16(1); Administration of Muslim Law Act of 1968 (Sing.), ss 96(4).

\(^{183}\) See Marriage Act 1969 (Fiji), s 12; Civil Code of 1896 (Jap.), art. 731; Islamic Family Law (Federal Territory) Act 1984 (Malay.), s 8; Births, Deaths and Marriages Registration Act 1988 (M.I.), s 426(a); Marriage Act 1963 (P.N.G.), s 7(1); Marriage Ordinance 1961 (Sam.), s 9; Control of Marriage Act of 1966 (Van.), s 2; Marriage and Family Law of 2000 (Viet.), art. 9(1).

\(^{184}\) See Marriage Act 1973 (C.I.), s 17(1); Marriage Ordinance of 1876 (H.K.), ss 3, 27; Islanders Marriage Act 1945 (S.I.), s 10(1); Marriage Ordinance 1968 (Tuv.), s 5.

\(^{185}\) See Marriage Law of the People’s Republic of China of 1980 (China), art. 5.

\(^{186}\) See, e.g., Marriage Act 1955 (N.Z.), ss 18(2).

\(^{187}\) See, e.g., Control of Marriage Act of 1966 (Van.), ss 4(4), 6.

\(^{188}\) See, e.g., Family Law Act 2003 (Fiji), s 32(2)(d)(i); Matrimonial Causes Act 1985 (Fiji), s 6(d)(i); Code of Muslim Personal Laws of 1977 (Phil.), art. 32(c); Code of Muslim Personal Laws of the Philippines of 1987 (Phil.), arts. 45(3), 46; Civil Code of 1896 (Jap.), art. 747(1); Control of Marriage Act of 1966 (Van.), s 1(a); Marriage Act 1963 (P.N.G.), s 17(1)(d)(i); Islanders Divorce Act 1960 (S.I.), s 12(b).

\(^{189}\) See, e.g., Code of Muslim Personal Laws of 1977 (Phil.), art. 32(c).

\(^{190}\) See, e.g., Marriage Law of the People’s Republic of China of 1980 (China), arts. 3-4, 11; Marriage and Family Law of 2000 (Viet.), art. 9(2).

\(^{191}\) See, e.g., Marriage Act 1961 (Cth.) (Austl.), s 23(1)(d), 23B(1)(d); Family Law Act 2003 (Fiji), s 32(2)(d); Matrimonial Causes Act 1985 (Fiji), s 6(d).
mistake as to the nature of the ceremony performed,\textsuperscript{194} and a person’s lack of mental capacity to understand the nature and effect of the marriage ceremony.\textsuperscript{195}

105. In the case of \textit{In the Marriage of S},\textsuperscript{196} the Family Court of Australia declared a marriage legally void on the ground that the applicant, a 16-year-old girl, had been coerced into the marriage, in breach of the \textit{Marriage Act 1961} (Cth.). The central issue for determination by the Court was when duress will vitiate consent for the purposes of declaring a marriage void. The Family Court rejected the traditional conceptualization of duress as a form of oppressiveness evidenced by constraint or threat of violence only, and held that mental oppression could give rise to duress.\textsuperscript{197} It found that the applicant had been coerced into marrying the respondent as a result of mental oppression brought about by family and cultural pressures. The Court reasoned that the applicant had been a victim of family loyalty and concern, below the age of majority and on her evidence unable to initiate advice from outside her family. She went on with the wedding not because of terror but because of love [for her family], not because of physical threat to herself but because of concern for her younger sisters [that they would not be able to marry if she, as the oldest child, did not]. She was caught in a psychological prison of family loyalty, parental concern, sibling responsibility, religious commitment and a culture that demanded filial obedience. If she had “no consenting will” it was because these matters were operative – not threats, imprisonment or physical constraint.\textsuperscript{198}

The non-violent but controlling family and culture pressure was therefore sufficient to invalidate the applicant’s consent and render the marriage a nullity.

106. In Papua New Guinea, a marriage may be declared legally void if consent was obtained through duress or fraud, among other grounds.\textsuperscript{199} This is not true of customary marriages, however, which are exempt from the conditions of marriage enumerated in the \textit{Marriage Act 1963}.\textsuperscript{200} Thus, where a person has been coerced or deceived into marrying another person under customary law, that marriage cannot be voided in the usual way. The \textit{Marriage Act 1963} does empower District Court Magistrates to forbid the customary marriage of a woman if she objects to it and it can be shown that “excessive pressure has been brought to bear to persuade her to enter into marriage” or “it would be a hardship to compel her to conform to custom.”\textsuperscript{201} Yet forbidding such a marriage is dependent on the intended bride being able to access the District Court in a timely manner and her being able to establish “excessive pressure” or “hardship” to the Court’s satisfaction.

107. The National Court of Justice of Papua New Guinea exercised its power to prevent a forcible customary marriage in the \textit{Miriam Willingal} case.\textsuperscript{202} Judge Injia held that the custom of giving women away as “head pay” (i.e., compensation) and forcing them into customary marriages violated the prohibition in the \textit{Marriage Act 1963} against forced customary marriages as well as the constitutional right to non-discrimination on the ground of sex and the freedom based on law. Judge Injia reasoned that requiring Miriam Willingal to find a husband from within the Konumbuka tribe denied her the opportunity afforded to men to choose if, when and whom to marry. “There is no evidence,” the Judge said, “that the same custom, which targets young women from the deceased’s tribe, also targets eligible men from the deceased’s mother’s tribe."\textsuperscript{203} Judge Injia further held that the custom, which imposed lifetime obligations on Willingal and other similarly

\textsuperscript{194}See, e.g., \textit{ibid.}
\textsuperscript{195}See, e.g., \textit{Control of Marriage Act of 1966} (Van.), s 1(a).
\textsuperscript{196}\textit{In the Marriage of S}, [1980] 5 Fam. LR. 831 (Austl., Family Court).
\textsuperscript{197}\textit{Ibid.}, at 839.
\textsuperscript{198}\textit{Ibid.}, at 838.
\textsuperscript{199}See \textit{Marriage Act 1963} (P.N.G.), s 17(1)(d)(i).
\textsuperscript{200}See \textit{ibid.}, s 4.
\textsuperscript{201}\textit{Ibid.}, s 5(1).
\textsuperscript{203}\textit{Ibid.}
situating women and subjected young women to pressure and fear of forced marriage, violated the obligation in the *Customs Recognition Act 1963* to recognize only those customs that are in the public interest or consistent with justice. According to the Judge, it was unjust for young women to live under those circumstances of compulsion and fear, while men (and women from other parts of Papua New Guinea) could marry freely.\(^{204}\) The custom was also found to be repugnant to the general principles of humanity, since “[l]iving men or women should not be allowed to be dealt with as part of compensation payment under any circumstances.”\(^{205}\)

**Concluding Remarks**

108. As explained previously, the internationally agreed upon minimum age of marriage is 18 years for both men and women.\(^{206}\) In the laws examined in this section, ages of consent range from 15 to 22 years of age. Those laws that establish a minimum marriageable age at the lower end of the spectrum give rise to concerns regarding the intellectual maturity and capacity of the parties to provide full and meaningful consent to enter into marriage. They also raise particular concerns regarding the reproductive and sexual health of young girls, since early childbearing (which bears a significant risk of maternal mortality and morbidity) often follows marriage. Those laws that establish a minimum marriageable age at the upper end of the spectrum have the effect of limiting the freedom of young persons, including persons over the age of 18 years, to enter into marriage with a person of their choice. A number of Western Pacific states have established lower marriageable ages for girls than boys, thereby falling short of their international human rights obligations. In contrast, those laws that specify a minimum legal age of marriage that is the same for boys and girls help to discourage and prevent child marriage, for instance, by helping to ensure that girl children are not prepared prematurely for marriage by being stereotyped into subordinate, childbearing or childrearing roles.

109. The established practice in Western Pacific states of requiring the free and full consent of both parties to a marriage is consistent with the rights to choose whether or not and whom to marry, sexual self-determination, and autonomy. It also helps to safeguard against violence, sexual exploitation, and abuse. How Western Pacific states characterize “free and full consent” can directly limit or advance sexual health. Where, for example, as in the case of Fiji, coercion is defined narrowly to mean only physical coercion,\(^{207}\) the full range of factors that may invalidate the consent of a party to a marriage are ignored. Caution must be exercised, however, to ensure that the full and informed consent of parties is not invalidated on the basis of over-broad definitions of consent or, for example, gender stereotypes concerning women’s capacity to make rational and informed decisions for themselves regarding marriage partners.

### 4.2 Polygamy

110. Western Pacific states have adopted different legal approaches to polygamy, by which is meant the simultaneous union of either a man or woman to multiple spouses.\(^{208}\) Certain Western Pacific states have prohibited polygamy under their secular laws, while at the same time permitting persons to enter into polygamous marriages under their customary (e.g., Kiribati, Papua New

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\(^{204}\) See ibid.

\(^{205}\) Ibid.


111. Some states that prohibit the practice of polygamy do, however, recognize polygamous marriages validly entered into in foreign jurisdictions. For example, notwithstanding criminalization of polygamy in New Zealand,212 the term “marriage” is defined to include “a union in the nature of marriage that is at any time polygamous, where the law of the country in which each of the parties is domiciled at the time of the union then permits polygamy.”213 Affording legal recognition to polygamous marriages validly contracted in foreign jurisdictions affords certainty to the legal validity of those relationships and helps to ensure that the rights of person in validly contracted polygamous marriages and their children (if any) are respected, protected and fulfilled.

Concluding Remarks

112. There is an overall trend in the Western Pacific Region toward prohibiting or, at least, restricting the practice of polygamy. Those laws that prohibit polygamy elevate (either directly or indirectly) the norm of monogamy over other types of sexual relationships.214 It could be argued that, on that basis, those laws unreasonably limit the right to choose a sexual partner or partners of one’s choice. However, while certain religious and customary laws permit polygamous marriages (and therefore, it could be said, promote choice of sexual partners, sexual self-determination, and sexual expression), closer inspection reveals that those laws allow men to marry multiple wives, while denying women the right to marry multiple husbands, and men and women the right to concurrently marry multiple persons of the same and different sex. Religious laws that permit polygyny only thus have the effect of privileging male heterosexual sexuality over other types of sexual relationships, rather than promoting the rights to sexual self-determination and to choose

209 See Penal Code 1965 (Kirib.), s 163; Marriage Ordinance 1977 (Kirib.), s 6; Criminal Code Act 1974 (P.N.G.), s 360; Marriage Act 1963 (P.N.G.), s 57; Matrimonial Causes Act 1963 (P.N.G.), s 38; Penal Code 1966 (S.I.), s 170(1); Islander Marriage Act 1945 (S.I.), s 14; Penal Code 1978 (Tuv.), ss 6, 163.

210 See Penal Code 1997 (Malay.), s 494; Islamic Family Law (Federal Territory) Act 1984 (Malay.), s 23; Revised Penal Code of the Philippines of 1930 (Phil.), art. 349; Code of Muslim Personal Laws of 1977 (Phil), art. 27; Penal Code of 1985 (Sing.), s 494; Administration of Muslim Law Act of 1968 (Sing.), s 96. Typically religious laws limit the circumstances in which a man can practice polygamy. See, e.g., Islamic Family Law (Federal Territory) Act 1984 (Malay.), s 23 (stating that a Muslim man may enter into a polygynous marriage provided that he obtains prior permission from the Syariah Court. Before the Court will grant an application for a polygamous marriage, it must be satisfied that the proposed marriage is “just and necessary,” the husband can financially provide for and equally treat each of his wives, and the proposed marriage will not cause harm or danger to his existing wife or wives.).

211 See Marriage Act 1961 (Cth.) (Austl.), ss 23(1)(a), 23B(1)(a), 88D(2)(a), 94(1); Family Law Act 1975 (Cth.) (Austl.), ss 6, 88C(1)(a); Marriage Law of the People’s Republic of China of 1980 (China), arts. 2, 3, 10, 32, 45, 46(1)-(2); Criminal Law of the People’s Republic of China of 1979 (China), arts. 180-181; Crimes Act 1969 (C.I.), ss 227-228; Crimes Decree 2009 (Fiji), s 204; Marriage Act 1969 (Fiji), s 15; Penal Code of 1907 (Jap.), art. 184; Civil Code of 1896 (Jap). arts. 732, 744; Offences Against the Person Ordinance of 1865 (H.K.), s 45; Criminal Code 1966 (M.I.), s 117; Family Proceedings Act 1960 (N.Z.), ss 2, 31; Crimes Act 1961 (N.Z.), ss 205-206; Crimes Ordinance 1961 (Sam.), ss 74A, 74B; Marriage Ordinance 1961 (Sam.), ss 28, Divorce and Matrimonial Causes Ordinance 1961 (Sam.), s 9(2)(1); Marriage and Family Law of 2000 (Viet.), arts. 2, 10(1); Civil Code of 1996 (Viet.), art. 35; Penal Code of 1999 (Viet.), s 147.

212 Polygamy is often also addressed in a range of other laws, including in the areas of immigration and welfare. Time and space constraints prevented an examination in this report of how Western Pacific states regulate polygamy in those laws.


214 Family Proceedings Act 1980 (N.Z.), s 2. See also s 31(2).

marital partners *per se*. Because of the way polygamy is practiced in certain areas of the Western Pacific, it is women’s sexual health that is most at risk of being compromised.\(^{216}\)

### 4.3 Adultery

113. The term “adultery” refers to consensual sexual intercourse between a married person and a person who is not his or her spouse. Historically, it was common for Western Pacific states to criminalize adultery. Today, adultery remains a criminal offense in a number of states (e.g., Cambodia, the Lao People’s Democratic Republic, Malaysia, the Philippines, Samoa, Singapore and South Korea\(^{217}\)), however, state practice reveals a trend toward decriminalization\(^{218}\) and a corresponding relaxation of state control over private consensual sexual relations between married persons and persons who are not their spouse. Changing social attitudes and norms regarding adultery, rather than human rights concerns *per se*, appear to have precipitated the decriminalization of adultery in the Western Pacific Region. Nevertheless, laws that decriminalize adultery are consistent with a range of human rights and fundamental freedoms, including the rights to sexual autonomy and self-determination (which includes the ability to choose sexual partners) and the freedom from arbitrary interference with private life.

114. In 2008, the Constitutional Court of South Korea narrowly upheld the validity of article 241 of the *Criminal Act* of 2004, a provision that criminalizes adultery.\(^{219}\) The Court (four out of nine judges) held that the criminalization of adultery is in pursuit of a legitimate purpose, namely the protection of marriages and the preservation of social order, and that, while the excessiveness of the provision could be questioned, the decision to imprison adulterers falls within the Legislature’s margin of appreciation.\(^{220}\) The Court further held that article 241 does not amount to an arbitrary or excessive interference with the constitutional rights to privacy or sexual autonomy, since it merely seeks to avoid the harms of adultery.\(^{221}\) In its view, the harms caused by the criminalization of adultery were insignificant when compared to the public interest in preventing adultery.\(^{222}\) However, in holding that article 241 does not constitute excessive interference with the constitutional rights to privacy or sexual autonomy, the Court failed to consider whether or not there were less restrictive means available to the state to achieve its purpose of protecting marriages and preserving social order. The Court also failed to consider the negative health (including sexual health) ramifications of imprisoning persons for adulterous behavior.

115. Five out of nine Constitutional Court judges determined that article 241 does violate the constitutional rights to privacy and sexual autonomy.\(^{223}\) Those five judges reasoned that the criminal law is an inappropriate vehicle through which to regulate acts of morality, and is ineffective in protecting marriages against the infidelity of one or both spouses.\(^{224}\) They further reasoned that article 241 is a disproportionate response to the aim of protecting marriages, insofar

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\(^{218}\) See, e.g., *Adultery and Enticement Act 1988* (P.N.G.); *Application by Non*, [1991] *PNGLR 84* (P.N.G., National Court of Justice) (explaining that the *Adultery and Enticement Act 1988* “was an attempt by the Parliament to remove the criminal element in the old adultery legislation” and put a “strong emphasis on mediation in adultery situations[,] realising that adultery situations may have arisen out of other family problems.”).


\(^{220}\) Ibid.

\(^{221}\) Ibid.

\(^{222}\) Ibid.

\(^{223}\) Ibid.

\(^{224}\) Ibid.
as it interferes in the private and intimate domain of sexual relations and by excessively restricting
the basic right to sexual autonomy by imprisoning persons for their consensual sexual behavior. Nevertheless, in order to invalidate a South Korean law, a minimum of six Constitutional Court judges must oppose it. Thus, while a majority of judges (i.e., five out of nine) determined that the criminalization of adultery was unconstitutional on human rights grounds, that finding was not sufficient to invalidate article 241 of the Criminal Act of 2004. Still, it is significant that a majority of Constitutional Court judges found that a provision criminalizing adultery violates the rights to privacy and sexual autonomy. Only time will tell if future challenges to article 241 of the Act will be upheld on human rights grounds.

Concluding Remarks

116. Western Pacific laws and jurisprudence, such as South Korea’s Criminal Act of 2004, that criminalize adultery appear to be based primarily on moral, cultural, and religious views regarding the inappropriateness of married persons having sexual intercourse with persons to whom they are not married. Although states may disapprove of adulterous behavior, a health and human rights approach to marriage and family relations requires states to take steps to implement legal and policy frameworks that are supportive of healthy expressions of sexuality within marital relations, but which do not arbitrarily interfere in the private sexual relations of consenting individuals, even if one of the parties is engaging in adultery.

117. Research for this report revealed no reliable evidence to suggest that adultery laws have been effective in the Western Pacific Region in deterring persons from adulterous behavior. Even the Constitutional Court of South Korea in the Adultery Case did not point to any concrete evidence to suggest that the penalty of imprisonment was an effective deterrent to engaging in adultery or that criminalization of adultery was effective in protecting marriages and preserving social order. Rather than promoting sexual health, adultery laws may in fact impede access to health services and information, as persons who commit adultery may decide not to access sexual health care services and information, fearing criminal prosecution if their adultery is discovered. Such fear may contribute, inter alia, to unsafe sex practices or unwillingness on the part of rape victims/survivors to seek redress for the harms they have suffered. Moreover, the inability of states to fairly investigate and prosecute all persons who are alleged to have violated adultery laws gives rise to concerns that such laws may be invoked selectively to target the sexual behavior of marginalized and vulnerable persons (e.g., married men who have sex with men or married sex workers).

4.4 Incest

118. It is common state practice in the Western Pacific Region to criminalize incest, meaning sexual activities between persons who are related (often, but not always, by blood). Australia, Cambodia, the Cook Islands, Fiji, Hong Kong, Kiribati, Malaysia, New Zealand, Papua New Guinea, Samoa, Singapore, the Solomon Islands, Tuvalu, Vanuatu and Viet Nam have, for example, all prohibited incest.

119. The nature and scope of criminal prohibitions against incest vary widely across the Region, including in respect of the sexual activities proscribed. Western Pacific states that criminalize incest employ terms such as “sexual penetration,” “sexual intercourse,” “sexual

225 Ibid.
228 See, e.g., Crimes Act 1958 (Vic.) (Austl.), s 44; Criminal Code Act 1974 (P.N.G.), s 223.
connection," and "carnal knowledge" to describe the types of sexual activities that are prohibited between related persons. Certain Western Pacific states, including Australia, New Zealand, and Papua New Guinea, have defined sexual intercourse broadly to mean to: introduce a penis into the vagina, anus or mouth of another person; introduce an object or body part (other than the penis) into the vagina or anus of another; or, perform oral sex. This conceptualization transcends the traditional understanding of heterosexual intercourse, in which a man penetrates a woman's vagina with his penis. A person who engages in sexual intercourse with a closely related person of the same sex, or who engages in traditional or non-traditional forms of heterosexual intercourse, with a related person, will thus be found in violation of the criminal prohibition against incest.

120. The types of relationships in which sexual intercourse is prohibited also vary within and across Western Pacific jurisdictions. At a minimum, states typically proscribe sexual intercourse between parents and children, brothers and sisters (including half-brothers and sisters), and grandparents and grandchildren. In some states, the prohibition against incest extends to sexual intercourse between other persons, such as aunts/uncles and nieces/nephews, cousins, and adoptive parents and adopted children. States that include a wider class of related persons in their definition of incest, exercise greater control over individuals’ choice of related sexual partners with implications for sexual self-determination and the ability of two persons to engage in consensual sexual conduct.

Concluding Remarks

121. Western Pacific states overwhelmingly favor criminalization over other legal responses to incest. Those Western Pacific states that have applied the criminal law to the practice of incest tend not to cite human rights concerns as justification for its criminalization, perhaps reflecting, in part, the absence of international human rights norms and standards related to incest. Instead, laws criminalizing incest in the Western Pacific appear to be based primarily on moral, cultural, and religious views on the inappropriateness of sexual relations between related persons. Even so, Western Pacific laws that criminalize incest have the effect of protecting vulnerable persons—for example minors (often girls) who may not be in a position to refuse sexual intercourse with parents, grandparents etc. due to unequal power relationships in the family—against sexual abuse. For that reason, it could be argued, that laws that criminalize incest are consistent with the right to bodily integrity and freedom from sexual exploitation and abuse, among other rights and freedoms. However, it could also be argued that existing criminal offenses (e.g., statutory rape) are sufficient to protect against sexual exploitation and abuse in the family context and that further state intervention in private life in the form of criminal offenses against incest is not required.
122. Caution must be exercised when criminalizing incest to ensure that victims of incest (particularly persons under the legal age of consent for sexual conduct) are not exposed to the risk of criminal prosecution, since such exposure is likely to deter victims from reporting incest.\footnote{238} Fear of criminal prosecution, for instance in states such as Cambodia,\footnote{239} may have the effect of denying incest victims (usually girls) the opportunity to assert their sexual rights, thereby increasing the likelihood that the incest will continue with ongoing repercussions for the sexual health and human rights of victims. A health and human rights approach to incest may also require consideration on the part of Western Pacific states of the appropriateness of using the criminal law to prohibit consensual sexual relations between related persons who have attained the legal age of consent for sexual conduct.\footnote{240} In such cases, Western Pacific states should weigh their obligations to protect against sexual abuse against the rights to sexual autonomy and self-determination and the freedom from arbitrary interference in private life.\footnote{241}


\footnote{239} See \textit{Law on Monogamy} of 2006 (Camb.), arts. 5-6.

\footnote{240} See Section 6.4 on Ages of Consent for Sexual Conduct. Caution should be exercised, however, where the legal age of consent is below 18 years of age.

\footnote{241} See Westeson, \textit{European Report} (2010) (discussing a recent trend in some European states not to apply incest laws to adult family members who engage in consensual sexual conduct on the basis that the state should not interfere with the consensual sexual choices of adults.).
5. Gender Identity, Gender Expression and Intersex

Section 5 examines the ways that state regulation of gender identity and gender expression, and also intersex persons, influences the health of individuals and groups. Gender, gender relations, and gendered characteristics are important features through which health, including sexual health, is mediated. Gender identification can be assigned or assumed by individuals, the latter, in part, by acting in socially gendered ways (i.e., by exercising one’s right to expression by means of gendered speech, deportment, or identification/self-naming). When people express gendered conduct, it can conform to or clash with social conventions for male- or female-identified bodies.

To become fully human in society requires the acquisition of gender traits, so that persons are socially recognizable. No one lives untouched or outside of gender systems, yet all persons, regardless of their sex and ultimately their gender, should be able to enjoy all human rights equally. The inability to live one’s life fully and with security in accordance with one’s preferred gender expression and identity has a negative effect on well-being. In addition, state violence, discrimination, and efforts to mandate gender identity and expression exclude or diminish the access of gender non-conforming persons to the social institutions necessary to live a life with dignity: education; (regular) employment; marriage and family; and, health care.

Two streams of human rights-based work address gender as a place of health and human rights violations. The analysis of gender-based violations tends to focus on girls and women, while the work on gender identity or gender expression tends to focus on persons called “gender non-conforming” and “transgender,” by which is meant persons whose gender expression differs from that which is socially normative, based on their perceived body characteristics at birth (sex/gender assigned at birth). Both streams of human rights work challenge culturally stereotyped thinking, norms, and expectations about men and women, including but not limited to their sexual behavior.

Gender-based violence often functions to reinforce gender inequality and discrimination. Violence is directed at non-conforming persons, such as women who transgress local gender norms by enrolling in school or acting sexually outside of marriage, for example, or men who fail to behave in sufficiently masculine ways. State-sponsored violence and discrimination against gender non-conforming persons, toleration of such acts committed by non-state actors, including relatives and community members, or taking (or failing to) take steps to reduce and prevent discrimination and abuse are ways in which state action in the context of gender expression affects sexual health. Violence, especially sexual violence, is directed at gender non-conforming persons of all kinds and ages. It is prevalent globally, and committed with impunity, including by state authorities themselves, often but not only when gender non-conforming persons are in detention or state care. Non-sexual and sexual violence produces a host of physical and psychological injuries, as well as death. The harm of that violence is compounded when the sexual assault is not treated in the law seriously or when fear of violence drives gender non-conforming persons away from health services needed to treat the sequelae of violence.

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243 Some gender non-conforming persons seek to alter their bodies to conform to a chosen gender (often called transsexuality); others adopt speech, dress, or habits associated with one gender but do not alter or wish to alter their bodies.
244 Normative rules regarding masculinity and femininity (dress, appropriate work, modes of verbal and non-verbal expression, for example) are not uniform and vary across historical periods and cultures.
127. The social rules of gender are codified and maintained in law, so that there are legal consequences in transgressing the rules regulating gender. These laws can in themselves be abusive of the right to equality before the law and the freedoms of gender expression and from arbitrary interference in private life and association, with effects on the health of the gender non-conforming person. In addition, many gender rules seem to assume a connection between non-conforming gender expression and non-conforming sexual behavior: criminal laws regulating dress for women and men are often conflated with policies against homosexuality. Indeed, it is often wrongly assumed that gender non-conformity—such as cross-dressing, or a desire to take on masculine or feminine characteristics different from those culturally associated with one's assigned sex at birth—automatically indicates homosexual behavior.

128. States also regulate gender expression by permitting, mandating, controlling, or forbidding surgeries and medical interventions for the purpose of modifying the bodies of persons to align with specific expectations about gender. Current human rights claims include the freedom to access medical technologies and interventions for bodily modification, to better reflect the person's perceived or chosen gender, congruent with prevailing standards of professional practice and patient consent. In addition, claims include the ability to “transition” to a new gender without submitting to compulsory surgeries, particularly sterilization, or other state-mandated procedures that infringe on rights to reproduce and found a family and the freedom from arbitrary interference in private life. In addition, basic protections against discrimination in the right to access physical and mental health services must apply.

129. Contemporary health and human rights work on gender expression and transgendered persons imply corresponding state obligations, such as providing for the possibility to change one's name and legal sex/gender, and recognition of the right to marry or to remain married after assuming one's new sex/gender. Some legal systems simply disallow name changes or other measures supporting the ability of persons to determine and change their gender identity regardless of their sex at birth, through a range of civil and administrative laws, including regulations controlling birth registries, state identity cards, passports, and other socially important identity documents.

130. In many societies, the transgender population is marginalized through discrimination and violence, often pushed to the edges of survival with decreased access to basic health services, housing and employment. This exclusion is compounded for members of lower caste, class, and minority

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245 The social rules of gender, called gender systems, that organize the assignments and valuations of persons may vary between and within societies, and may also change historically. Nonetheless, they are implemented through powerful rules, incentives, and socialization, operating through social institutions (church, family, state, health and education, for example), which assign status, govern behavior, and determine access to resources and social legitimacy based on conformity to local gender norms. See Gayle Rubin, "The Traffic in Women: Notes on the ‘Political Economy’ of Sex," in Rayna R. Reitner, ed., Toward an Anthropology of Women (1975), 157–210.

246 While international human rights law has not fully responded to gender expression as a form of expression, the basic reasoning articulated in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (UN Doc. E/ CN.4/1985/4, Annex (1985)), which constrain the arbitrary use of state power to restrict expression, can be fruitfully applied. These principles would protect gender non-conforming non-verbal expression such as cross-dressing, and physical deportment as well as verbal expression of gender variance from state regulation, especially from penalization in the criminal law, as an unjustified and arbitrary interference with fundamental rights. State justification by recourse to broad claims of public health and morality, especially where such claims rest on gender stereotypes forbidden under article 5 of CEDAW, would not be sustainable.

247 The term “transgender” is “an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth, including cross-dressers, pre-operative, post-operative or non-operative transsexuals. Transgender people may define themselves as female-to-male (FTM, assigned a female biological sex at birth but who have a predominantly male gender identity) or male-to-female (MTF, assigned a male biological sex at birth but who have a predominantly female gender identity); others consider themselves as falling outside binary concepts of gender or sex. Transgender people may or may not choose to alter their bodies hormonally and/or surgically: the term is not limited to those who have the resources for and access to gender reassignment through surgery. Transgender is not about sexual orientation; transgender people may be heterosexual, lesbian, gay or bisexual.” Global Rights, Demanding Credibility and Sustaining Activism: A Guide to Sexuality-Based Advocacy (2008), 16.
groups. The attempts by transgendered persons to generate income through selling sex or engaging in other criminalized practices renders them more at risk of violence, including sexual violence. Many policing surveillance systems and morals and public decency regulations are used to harass and target them, for false arrest and extortion, sexual favors, and other abuses. Many persons of gender-variant behavior or identities are also highly mobile, in part to escape police surveillance and in part to seek out new communities outside the influence of their natal homes to find tolerance or acceptance. In these cases, travel is a resourceful strategy, but at times a risk factor for sexual ill-health, as transgendered persons move outside networks of regular care and information.

131. Human rights as a system has evolved to address many of the serious rights implications of laws and state practices regulating gender. First, it increased capacity to address gendered harms to women. More recently, formal human rights practice has recognized police abuse of transgender persons, or the unwillingness of the law to recognize “transition” from one sex/gender to another, or living with a gender that is not bounded in the fixed binary. In the last decade, many human rights courts at national and regional level have recognized privacy, health and non-discrimination rights in striking down laws that exclude transgendered persons from the basic protection of the law.\(^{248}\)

132. Persons under 18 who identify as transgender or are otherwise gender-variant face particular struggles and abuses. As they are still under the guidance and, in many countries, the legal control of their parents, their desires can be stymied by family; they may face serious abuse within families without access to advocates or intervention. Many face bullying or abuse in education and drop out of school and/or run away from home to escape the abuse and to live their lives in their chosen gender. Youth under these circumstances face additional barriers in seeking shelter or other support services, as they do not conform to the gender norms that many remand homes and shelters expect, and they may face additional abuse in the very system of juvenile care that is intended to protect them.

133. Persons born with genitalia or bodies deemed gender-ambiguous or gender non-conforming fall under the broad label of “persons with intersex conditions.” The causes of these developments are diverse, including a variety of genetic anomalies and hormonal over- and under-exposures, during fetal development, many of which are discovered shortly after birth or during childhood. Although most manifestations are not life-threatening, it has become common to alter the infant’s or child’s body, particularly sexual organs, to conform to gendered physical norms, including through (repeated) surgeries, hormonal interventions, and other measures. The rationale for sex/gender-reassignment or “normalizing” surgery for minors includes reducing gender confusion for the child and parents, responding to parental concerns that the child be normal and accepted, and to promote the child’s social integration and happiness. Until recently, states have generally given minimal attention to these interventions, requiring only parental consent (assumed to be motivated by the “best interests of the child”) and in conformity with locally accepted, general standards of medical care. Intersex advocates have emphasized the insufficiency of these conventional standards, highlighting the lack of the child’s consent for drastic interventions that are irreversible; life-long in their consequence for physical and mental health, particularly sexual response; and the absence of medical justification for imposing these interventions in childhood, before the person has the opportunity and mature judgment to determine the advantages and disadvantages of these procedures. Legally and politically, the claims of persons with intersex conditions engage not only with children’s rights, but also more generally with claims to the highest attainable standard of health, non-discrimination and autonomy-privacy rights around determining one’s own gender.

\(^{248}\) See, e.g., Sections 5.1-5.3 below.
134. Section 5 of this report explores if and how Western Pacific states have applied human rights norms and standards related to certain aspects of gender identity and expression, as well as to intersex persons. Section 5.1 examines the legal recognition of sex/gender in government documents and official records. Next, section 5.2 considers the legal characterization of sex/gender for the purposes of marriage. Last, section 5.3 explores legal guarantees relating to access to health care services and information for trans and intersex persons.

135. It should be reiterated that all persons possess gender identities and seek ways to express those identities. However, it is often those persons with non-conforming gender identities (e.g., cross-dressers, masculine women, feminine men, transgendered persons) who are marginalized in society and who, therefore, benefit most from laws that apply human rights norms and standards related to gender identity and expression. Reflecting Western Pacific laws and jurisprudence related to gender identity and expression, much of the discussion in section 5 is limited to the situation of post-operative transsexuals. Where relevant, examples of the application of human rights norms and standards to the rights of transgendered and intersex persons and pre-operative transsexuals are highlighted.

136. There is general confusion in the terminology used in Western Pacific laws and jurisprudence to describe different aspects of, or issues concerning, gender identities and gender expression. Some laws, for example, employ the term “sex change operations” while others use terms such as “sex affirmation surgery” or “sexual reassignment surgery.” The terms “sex” and “gender” are applied in Western Pacific laws regulating the record of a person’s sex/gender in official documents or for official purposes such as marriage. Terms such as “transgendered” and “transsexual” are sometimes applied inconsistently and without precision. It is not the intention of section 5 to define these terms or to prescribe which terms should be preferred in a particular situation. Rather, as in other sections of this report, an effort has been made to use the specific language adopted in the laws and jurisprudence of Western Pacific states, although some terms have been used for the sake of consistency (e.g., post-operative transsexual) or for shorthand purposes (e.g., sex/gender, sex affirmation surgery). Caution should therefore be exercised to identify the subjects and scope of operation of different laws.

5.1 Legal Recognition of Sex / Gender on Birth Certificates and in Civil Registries

137. Western Pacific states that permit changes to the record of a person’s sex/gender prescribe different preconditions for such changes. One state limits the ability to change or correct the record of sex/gender to intersex persons. Some states permit changes to the record of sex/gender only if it is established that the record contains a clerical error or an error of fact or substance. Other states limit the ability to make changes to situations where there is an error on the birth certificate or, for example, the applicant is a post-operative transsexual, meaning that they have undergone complete sex affirmation surgery. Still, other states permit the record of

250 See Births and Deaths Registration Act 1973 (C.I.), s 40; Births and Deaths Registration Ordinance of 1934 (H.K.), s 27; Births and Deaths Registration Act 1957 (Malay.), s 27; National Registration Act 1959 (Malay.), s 62(2)(a); Clerical Error Law of 2001 (Phil.); Registration of Births and Deaths Act of 1938 (Sing.), s 24(3). See also J.G. v. Pengarah Jabatan Pendaftaran Negara, [2006] 1 MLJ 90 (Malay., High Court of Kuala Lumpur) (ordering that a post-operative male to female transsexual be declared a woman and that the record of sex on her identity card be changed to reflect that status.). But see Wong Chou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara, [2005] 1 MLJ 551 (Malay., High Court of Ipoh) (dismissing an application from a post-operative female to male transsexual to change the record of sex on his identity card and birth certificate on the basis that the record of sex can be amended only in cases of error.).
251 See, e.g., Law Concerning Special Cases in Handling Gender For People with Gender Identity Disorders of 2003 (Jap.); Family Register Act of 1998 (Sth. Kor.), art. 120; In re Change of Name and Correction of Family Register, [2006] KRSC 15 (Sth. Kor., Supreme Court); Births, Deaths and Marriages Registration Act 2005 (NT) (Austl.), ss 28A, 28B, 40.
sex/gender to be changed if there has been a certain degree of permanent change in the applicant’s sex/gender; that is to say, complete sex affirmation surgery is not a precondition for changes to the record of that person’s sex/gender. The various preconditions imposed by Western Pacific states have different consequences for the sexual health and human rights of persons wishing to align the official record of their sex/gender with their true gender identity.

138. The Philippines expressly prohibits changes to the record of a person’s sex/gender, limiting changes in the civil registry to clerical or typographical errors. In Silverio v. Republic of the Philippines, the Philippines Supreme Court dismissed an appeal concerning an application by a post-operative transsexual to change the official record of her sex. Justice Corona, delivering the Court’s opinion, held that the determination of a person’s sex is made at the time of birth and that there is no Filipino law that permits the record of that sex/gender to be altered. While Justice Corona noted that “there are people whose [gender] preferences ... do not fit neatly into the commonly recognized parameters of social convention,” he concluded that the relief sought involved public policy questions that should be addressed by the Legislature and not the courts.

139. In Republic of the Philippines v. Cagandahan, the Supreme Court carved out an exception to the prohibition against changes to the record of a person’s sex/gender for intersex persons. Justice Quisumbing held that, for intersex persons, sex/gender is determined at the age of maturity, and not at birth, and that the determining factor in the classification of their sex/gender is the sex/gender with which those persons reasonably identify. Justice Quisumbing determined that the applicant had made a mature decision to be a man, which the Court was obliged to respect. He reasoned that, in the absence of a law regulating changes to the record of sex for intersex persons, the Court should not impose its views on the applicant or force him to undergo surgery to align his sex with that assigned to him at birth. His Honor explained that the Court will not dictate on respondent concerning a matter so innately private as one’s sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment. The Court will not consider respondent as having erred in not choosing to undergo treatment in order to become or remain as a female. Neither will the Court force respondent to undergo treatment and to take medication in order to fit the mold of a female. Respondent is the one who has to live with his intersex anatomy. To him belongs the human right to the pursuit of happiness and of health. Thus, to him should belong the primordial choice of what courses of action to take along the path of his sexual development and maturation. In the absence of evidence that respondent is an “incompetent” and in the absence of evidence to show that classifying respondent as a male will harm other[s], the Court affirms as valid and justified the respondent’s position and his personal judgment of being a male.

140. In South Korea, changes to the record of a person’s sex/gender in the family register are regulated under the Family Register Act of 1998. Although the Act is silent as to the position of intersex or trans persons, following the Supreme Court of South Korea’s decision in the case of In re Change of Name and Correction of Family Register, post-operative transsexuals may apply to change the

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253 See Clerical Error Law of 2001 (Phil.), ss 1, 2(3); Civil Code of 1949 (Phil.), arts. 376, 407-408, 412.


255 See ibid.


257 See ibid.

258 See ibid.

259 Ibid [citation omitted].

260 In re Change of Name and Correction of Family Register, [2006] KRSC 15 (5th. Kor., Supreme Court).
record of their sex/gender. In that case, a majority of the Supreme Court stated that, for the purposes of the family register, the determination of a person’s sex/gender is generally made at the time of birth, having regard to biological factors such as sex chromosomes. However, it held that this determination could change after birth having regard to psychological and social factors. While the Court acknowledged that the Family Register Act did not explicitly provide for a procedure to correct the record of sex/gender of a post-operative transsexual, it determined that the Act must be interpreted to allow post-operative transsexuals to make such changes in order to ensure the accuracy of the register. It elaborated that where a person is legally recognized as a transsexual, they must be evaluated according to the sex with which he or she identifies, rather than the sex/gender determined at birth. The majority based its decision on the rights to dignity and to pursue happiness, guaranteed in the Constitution of the Republic of Korea of 1948. It explained: “[a] transsexual has [the] right to enjoy the dignity and value of a human being, to seek happiness and to lead a human life.” In the majority’s view, maintaining the record of a person’s sex at birth, rather than his or her actual sex, compromises those rights.

141. In New Zealand, a person may apply to the Family Court, under the Births, Deaths, Marriages, and Relationships Registration Act 1995, for a declaration to alter the record of sex on his or her birth certificate. To be eligible to change the record of sex, an applicant must have attained 18 years of age. Moreover, under section 28(3) of the Act, the Family Court of New Zealand may make a declaration as to the sex to be shown on a person’s birth certificate only if:

(c) Either—
   (i) It is satisfied, on the basis of expert medical evidence, that the applicant —
      (A) Has assumed (or has always had) the gender identity of a person of the nominated sex; and
      (B) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
      (C) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex; or
   (ii) It is satisfied that the applicant’s sexual assignment … has been recorded or recognised in accordance with the laws of a state for the time being recognised for the purposes of this section by the Minister by notice in the Gazette.

The Family Court may also grant a declaration as to sex made by a guardian of an eligible child.

142. The Family Court of New Zealand had occasion to consider section 28(3) in Michael v. Registrar-General of Births, Deaths and Marriages. In that case, “Michael,” a female to male transsexual, applied for a declaration that his birth certificate be changed to reflect his sex/gender as male. The central issue for determination concerned whether or not Michael (who had had testosterone therapy and a mastectomy, but not a hysterectomy, an ovariectomy or reconstructive surgery) was required to undergo genital surgery in order to satisfy the requirement in 28(3) that an applicant “[h]as undergone such medical treatment as is usually regarded by medical experts as desirable ...

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261 See Family Register Act of 1998 (Sth. Kor.), art. 120.
262 In re Change of Name and Correction of Family Register, [2006] KRSC 15 (Sth. Kor., Supreme Court), s 1(A).
263 See ibid., s 2(B), 2(B)(3), 2(C). See also section 6 (Justice Kim Ji-hyung, concurring).
264 See ibid. s 1(C).
266 In re Change of Name and Correction of Family Register, [2006] KRSC 15 (Sth. Kor., Supreme Court), s 2(B)(1).
267 See ibid.
268 See ibid., s 28(3)(c).
269 See ibid., s 29.
to acquire a physical conformation that accords with the gender identity of a person of the nominated sex." Judge Fitzgerald held that complete sex affirmation surgery, including genital surgery, is not essential for all applicants wishing to change the record of their sex/gender, but that there must be some degree of permanent physical change. "The legislative history," the Judge explained, "suggests that Parliament did not intend that a transsexual should necessarily be required to undergo the full range of surgical procedures that may be available before being afforded legal recognition of their chosen gender. Whilst there needs to be some degree of permanent physical change, that does not mean that full gender reassignment surgery will be required in all cases ..." The question of how much surgery an individual applicant requires must be determined on a case-by-case basis, having regard to the evidence before the Court.

143. In relation to Michael’s case, Judge Fitzgerald held that, in identity, manner, appearance and outlook, Michael was a man; the fact that he retained a uterus and ovaries did not preclude the granting of a declaration that he was a man. In determining that Michael had assumed, and intended to maintain the gender identity of a male, the Judge favoured a less medicalized approach to gender identity issues. Judge Fitzgerald had particular regard to Michael’s self-identification as male and considered the evidence of Michael’s doctors as corroborative rather than definitive in nature. The Judge explained that regard had been paid to the careful and thorough way he has gone about understanding his transsexualism, the early age at which he identified himself as being male, the period over which he has lived and been accepted in society as a male, the convincing way in which he speaks of his determination to live the rest of his life as a male and the professional advice he has taken and acted on to date. He also gets strong corroborative support for his position from those who know him well, in particular his father. The medical experts, Doctors R and F, who have worked closely with him regarding his gender dysphoria, are also convinced of his intention to maintain his identity as a male.

The Judge also stated that Michael had provided sound reasons for not undergoing complete sex affirmation surgery (e.g., Michael already perceived himself as a male). On the basis of these findings, Judge Fitzgerald granted Michael’s application for a declaration that the sex/gender on his birth certificate be recorded as male.

Concluding Remarks

144. Ability to change the record of sex/gender on birth certificates and in civil registries is an important element of sexual health, including being able to express, and live in accordance with, one’s true gender identity. The Cagandahan decision from the Philippines is reflective of a health and human rights approach to the legal recognition of sex/gender. Granting intersex persons the opportunity to align the legal recognition of their sex/gender with their true gender identity validates that identity and helps to guarantee the freedom of gender expression. Recognizing that gender identity is a personal choice that should not be imposed by the state is consistent with the freedom from arbitrary interference in private life and the rights to autonomy and self-determination, among others. Moreover, by acknowledging that persons should not be forced to undergo medical treatment or take medication to conform to a specific gender identity, the Court upheld the rights to bodily integrity, full and informed consent and the highest attainable standard of health, as well as the freedom from cruel, inhuman or degrading treatment.
145. While the Philippines Supreme Court in Cagandahan afforded legal recognition to the gender choices of intersex persons, the Silverio decision shows that it has not been prepared to extend that same recognition to trans persons. The difference in approaches appears to be grounded in the Court’s perception of the experiences of intersex persons as something that are “natural” or “biological,” and the experiences of trans persons as lifestyle choices. The effect of such reasoning is to deny the non-biological elements that influence the gender identity of all persons, including trans persons. Denying trans persons the opportunity to change the record of their sex/gender has the effect of denying them a wide range of human rights and fundamental freedoms (e.g., the freedom of expression), and also has the effect of reinforcing stereotypical understandings of gender and stigmatizing non-conforming gender identities.

146. The Supreme Court of South Korea’s decision in the case of In re Change of Name and Correction of Family Register is consistent with a wide range of human rights and fundamental freedoms, including the freedom of expression and the rights to dignity and self-determination. However, by requiring persons, who wish to be legally recognized in the sex/gender with which they identify, to undergo psychiatric treatment, hormone therapy and sex affirmation surgery, in addition to being diagnosed as transsexual, the majority medicalized gender identity issues, without regard for the potential for discrimination, stigmatization, and further social marginalization, or the effect such interferences would have on the private life of those persons. Moreover, by requiring those same persons to satisfy certain social criteria – namely to have a solid gender identity, receive social recognition as a member of the opposite sex, and conform to stereotypical understandings of that sex – the majority failed to recognize the diverse ways in which individual express their gender identity. In so doing, it reinforced stereotypical understandings of what it means to be a “man” or a “woman.” The effect of this approach is to deny legal recognition to persons who do not conform, or only partially conform, to socially prescribed sex/gender roles, or who do not possess certain attributes or characteristics associated with a particular sex/gender.

147. The Family Court of New Zealand’s decision in Michael v. Registrar-General of Births, Deaths and Marriages is consistent with the freedoms of expression and from arbitrary interference with private life as well as the right to bodily integrity, among others. It acknowledges that there will always be individuals who do not want, or are unable to, access full sex affirmation surgery, and respects the rights of persons to provide full and informed consent to surgical procedures. Prioritizing Michael’s self-identification as male over medical evidence enabled Michael to exercise and enjoy his rights to autonomy and self-determination. However, the suggestion that full sex affirmative surgery may still be required in some cases limits the positive health and human rights effects of this decision, by indicating, for example, that there may be circumstances in which it is acceptable to require a person to undergo genital surgery so that they might align the legal recognition of their sex/gender with their own view of their true gender identity.

5.2 Legal Recognition of Sex / Gender for the Purposes of Marriage

148. A number of Western Pacific states, including Australia, Japan, New Zealand, and Singapore, recognize the legal validity of marriages in which one of the parties is a post-operative transsexual.

149. Marriages involving post-operative transsexuals have been legally valid in Singapore since 1996, when the Parliament of Singapore overturned an earlier High Court ruling denying such recognition. The Women’s Charter of 1961 now explicitly provides that “a marriage solemnized in Singapore or elsewhere between a person who has undergone a sex re-assignment procedure and any person of the opposite sex/gender is and shall be deemed always to have been a valid

278 See Women’s Charter (Amendment) Act of 1996 (Sing.).
279 Lim Ying v. Hock Kian Ming Eric, [1992] 1 SLR 184 (Sing., High Court) (holding that the parties to a marriage cannot be of the same biological sex and that sex affirmation surgery does not alter the legal recognition of a person’s sex for the purpose of marriage.)
marriage.” It further provides that a person who has undergone sex affirmation surgery must be identified as a person of the sex/gender to which they have been reassigned. The record of sex/gender on a person’s identity card at the time of marriage is considered prima facie evidence of the sex/gender of the party.

150. New Zealand, like Singapore, recognizes the legal validity of marriages in which one of the parties is a post-operative transsexual. In M v. M, Mrs. M, a male to female post-operative transsexual, applied to the Family Court for a declaration regarding the legal validity of her marriage to the respondent, Mr. M. The applicant submitted that the marriage was invalid because the Marriage Act 1955 permits the union of a man and a woman only and because she was a man at the time of the marriage. Mr. M claimed that the marriage was legally valid because Mrs. M had undergone sex affirmation surgery and was therefore a woman at the relevant time. The central issue for determination was whether, for the purposes of the Marriage Act 1955, the applicant was a “man” or “woman” at the time of the marriage. Judge Aubin found that, at the time Mrs. and Mr. M married, the applicant had already had sex affirmation surgery and that, since she was a woman and Mr. M was a man, the marriage was legally valid in accordance with New Zealand law.

In reaching this conclusion, the Judge took into account the biological and psychological component of Mrs. M’s gender, reasoning that “[t]he applicant’s core identity ... is that of a woman; her body has been brought into harmony with her psychological sex.

151. In Attorney General v. Otahuhu Family Court, the Attorney-General of New Zealand applied for a declaration regarding the legal validity of a marriage between a post-operative transsexual and a person of the same sex genetically determined. Affirming the finding of the Family Court in M v. M, Judge Ellis of the High Court declared that, for the purposes of the Marriage Act 1955, “where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex.” In acknowledging the psychological and social aspects of sex/gender, Judge Ellis observed that “[s]ome persons have a compelling desire to be recognised and able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfil that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry.” In Judge Ellis’ opinion, there is no social advantage in refusing to recognize the legal validity of the marriage of transsexuals in the sex/gender of their reassignment, and no socially adverse effects or harm to others in allowing them to marry in that sex/gender.

152. In the 2001 case of Re Kevin (Validity of Marriage of Transsexual), the Family Court of Australia recognized the legal validity of a marriage of a transsexual in the sex of his “reassignment,” a decision later upheld by a unanimous Full Court of the Family Court in Attorney-General for the Commonwealth v. Kevin and Jennifer. The central issue for determination in that case was whether or not Kevin, a post-operative female to male transsexual, was a man for the purposes of

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280 See Women’s Charter of 1961 (Sing.), s 12(2).
281 See ibid., s 12(3)(b).
282 See ibid., s 12(3)(o).
284 M v. M, ibid.
285 See ibid.
286 Ibid.
288 Ibid.
289 Ibid.
290 See ibid.
contracting a marriage under the Marriage Act 1961 (Cth.). If it was determined that Kevin was a man, a declaration could be granted recognizing the legal validity of his marriage to “Jennifer.”

153. Justice Chisholm of the Family Court held that the question of whether a person is a man or a woman for the purpose of determining the validity of a marriage, under the Marriage Act 1961, should be determined as at the date of marriage.\(^{293}\) His Honor further held that the term “man” has its ordinary current meaning according to Australian usage, and that a determination of whether or not an individual is a man (or a woman) should not be limited to biological factors but should also be determined having regard to social, psychological and other factors.\(^{294}\) Turning his attention to Kevin, Justice Chisholm found that Kevin: had always perceived himself, and was perceived by others, as male; had undergone sex affirmation surgery prior to his marriage to Jennifer; presented in appearance, characteristics and behavior as male; and, was accepted as a man for a variety of social and legal purposes, including infertility treatment.\(^{295}\) His Honor therefore declared that Kevin was a man at the time of his marriage to Jennifer.\(^{296}\) He further declared that the marriage of Kevin and Jennifer was legally valid under the Marriage Act 1961.\(^{297}\)

154. On appeal, the Full Court of the Family Court unanimously upheld Justice Chisholm’s decision.\(^{298}\) In so doing, it reasoned that Justice Chisholm’s finding was consistent with international human rights law,\(^{299}\) and humanity: “[a] contrary finding would,” the Court explained, “result in considerable injustice to transsexual people and their children, for no apparent purpose.”\(^{300}\)

Concluding Remarks

155. States’ interest in the legal recognition of sex/gender for the purposes of marriage appears to be connected, at least in the Western Pacific Region, to a broader concern about limiting the institution of marriage to heterosexual unions. Evidence of this concern can be seen in laws that deny married persons the opportunity to change the legal record of their sex/gender on birth certificates,\(^{301}\) and in laws that clearly state that, for the purposes of the ban on same sex marriage, persons born male or female are deemed always to be of that sex/gender, notwithstanding that they may have had sex affirmation surgery.\(^{302}\)

156. The legal recognition of sex/gender for the purposes of marriage can affect the ability to marry and stay married to a person of one’s choice. Laws that restrict the ability of persons to marry or remain married following a recognized change of sex/gender have the effect of denying those persons the rights to marry, and the freedoms of gender expression and from arbitrary interference in private life, among others. In contrast, laws that recognize the legal validity of marriages in which one of the parties is a post-operative transsexual help to protect and promote those rights. Yet the laws discussed in this section afford recognition to those marriages only because they identify persons who have undergone sex affirmation surgery in the sex/gender of their “reassignment” and only where their partner is of the opposite sex/gender. Marriages between transgendered persons/pre-operative transsexuels (i.e., persons who have not had sex


\(^{294}\) Ibid., at 329.

\(^{295}\) See ibid., at para. 330.

\(^{296}\) Ibid.

\(^{297}\) See ibid.


\(^{299}\) See, e.g., Goodwin v. United Kingdom, App. No. 28957/95, ECHR 2002-VI (European Court of Human Rights).


\(^{302}\) See Marriage Act 1971 (C.I.), s 15A(1); Marriage Amendment Act 2007 (C.I.).
affirmation surgery) and persons whose sex/gender was determined to be the same as them at birth are not afforded legal recognition since they are characterized in law as same sex unions. The consequences of non-recognition are similar to those resulting from bans on same sex marriage (e.g., denial of the rights and responsibilities that attach to marriage). 303

5.3 Access to Health Care Services

157. There are limited examples of Western Pacific laws and jurisprudence that address access to health care services for transgendered, transsexual and intersex persons. Access to hormone treatment and sex affirmation surgery for minors is one issue that has received recent attention in Australia. 304

158. Under the Family Law Rules 2004 (Cth.), the Family Court of Australia is empowered to make an order for a special medical procedure on a child, if it is satisfied that the proposed procedure is in the best interests of that child. 305 In applying for such an order, the applicant must submit evidence from a medical, psychological or other relevant expert that establishes, inter alia, the: nature and purpose of the procedure; likely long-term physical, social and psychological effects on the child of having and not having the procedure; degree of any risk to the child from the procedure; availability of alternative and less invasive treatments; and, necessity of the procedure for the child’s welfare. 306 Evidence must also be submitted that establishes if the child is capable of making an informed decision to undergo the proposed procedure. 307

159. In Re Alex (Hormonal Treatment for Gender Identity Dysphoria), 308 an application was made on behalf of “Alex” for an order permitting commencement of hormone therapy to suppress pubertal development as a female child, and allowing a change of name. At the time of the application, Alex was a 13-year-old who identified as a male but was anatomically female. Alex had been diagnosed with gender identity dysphoria and wished to undergo hormone therapy to begin the process of sex affirmation. The central issue for determination was whether or not, having regard to Alex’s best interests, the Family Court of Australia should authorize the administration of hormone therapy.

160. Chief Justice Nicholson held that it was in Alex’s best interests to authorize hormone treatment to suppress pubertal development as a female child (a first, but not irreversible, step towards sex affirmation surgery). 309 His Honor also authorized Alex to be treated with testosterone when he was approximately 16 years of age. 310 In reaching that decision, Chief Justice Nicholson took into account that Alex had been diagnosed with gender identity dysphoria, self-identified as a male, and was distressed about being trapped in a girl’s body. 311 The Chief Justice also found that alternative courses of treatment were unlikely to be effective, the expert medical witnesses uniformly supported the proposed treatment, and the treatment accorded with Alex’s wishes and would facilitate his socialization into his self-determined gender identity. 312 Regard was also had to the fact that Alex had been depressed and had harmed himself when he thought his desire to

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303 See Section 3.2 on Sexual Orientation (discussing same sex marriage).
304 See Re: Alex, [2009] FamCA 1292 (Austl., Family Court); Re Brodie (Special Medical Procedure), [2008] Fam CA 334 (15 May 2008) (Austl., Family Court); Re: Bernadette (Special Medical Procedure), [2010] FamCA 94 (Austl., Family Court); Re Alex (Hormonal Treatment for Gender Identity Dysphoria), [2004] FamCA 297 (Austl., Family Court).
305 See Family Law Rules 2004 (Cth.) (Austl.), r. 4.09(1).
306 See ibid., r. 4.09(2).
307 See ibid.
308 Re Alex (Hormonal Treatment for Gender Identity Dysphoria), [2004] FamCA 297 (Austl., Family Court).
309 See ibid., at para. 242.
310 See ibid.
311 See ibid., at paras. 202, 205.
312 See ibid., at paras. 206-207.
affirm his sex had not been taken seriously. Chief Justice Nicholson observed that “if treatment is not permitted there is consistent concern that Alex will revert to unhappiness, behavioural difficulties at home and self-harming behaviour. Socially, he will be significantly ill at ease with body and self-image during his period of adolescent development until he is competent to make his own treatment decision.” In granting the orders sought by Alex, Chief Justice Nicholson accepted submissions made by Australia’s national human rights institution that international human rights law provides that: a child has a right to live with a transgender/transsexual identity, broadly defined, free from discrimination; it is in the child’s best interests to have that right respected; and, the decision of whether or not it is in a child’s best interests to permit sex affirmation treatment should be determined on a case-by-case basis having regard to the right to express gender identity.

161. In 2009, Chief Justice Bryant of the Family Court of Australia granted an order permitting Alex, then 17-years-old, to undergo a double mastectomy. In so ordering, her Honor found that it was in Alex’s best interests to have the surgery immediately, rather than wait until he had attained 18 years of age. In support of her decision, Chief Justice Bryant relied, inter alia, on the freedoms of (gender) expression and from arbitrary interference in private life and the rights to non-discrimination, recognition before the law, preservation of identity, and survival and development, as protected in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and/or the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

Concluding Remarks

162. Although transgendered, transsexual and intersex persons may be able to access health care services in the same way as the general population, health care services that respond to the specific health needs and interests of those persons are often excluded from public health laws and insurance schemes. Moreover, transgendered, transsexual and intersex persons often face obstacles when seeking to access health care services and information. For example, transsexuals can face discrimination and prejudice or experience difficulties accessing sex affirmation surgery due to, inter alia, an absence of qualified doctors able to perform that surgery or an inability to fund sex affirmation surgery where it is not covered under public health insurance schemes. Obstacles to accessing health care services are often exacerbated in the case of minors, who can experience discrimination on the basis of their age as well as their sex or gender identity. Intersex minors can have a gender identity imposed on them without their full and informed consent or regard for their right to participate and their age and maturity.

163. Ensuring access to quality and affordable health care services is essential to the sexual health of transgendered, transsexual and intersex persons. Ensuring that gender identities are not arbitrarily imposed on transgendered, transsexual and intersex persons, including minors, through surgical intervention or other medical procedures is also crucial. Surgical intervention on intersex infants and access to sex affirmation treatment and surgery for minors presents unique challenges for the advancement of sexual health and human rights. The case of Re Alex (Hormonal Treatment for Gender Identity Dysphoria) illustrates many of the considerations that should be taken into account and weighed when deciding whether or not to grant a minor access to hormone treatment to suppress pubertal development, including the best interests of the child, the right of children to
live with a transsexual identity without discrimination, potential for self-harm if the wishes of the child are not respected, and the availability of less invasive treatment.

164. Greater protection is needed in the Western Pacific Region to ensure timely and non-discriminatory access to quality and affordable health services for transgendered, transsexual and intersex persons. This need is all the more urgent considering the absence of widespread protection against discrimination on the ground of gender identity.
6. Sexual Expression and Non-Violent Sexual Behavior

165. In almost every state, criminal law is used not only to deter and prosecute sexual conduct understood to be violent or otherwise coercive, but is also applied to a wide range of consensual sexual conduct between adults in private. In the second case, criminal law is used selectively to enforce certain moral, religious or cultural standards, with arbitrary (i.e., not necessary or justifiable in a democratic society) negative impacts for sexual health and human rights. Moreover, police practices regarding consensual adult sexual conduct in private—sometimes under color of criminal law enforcement, but often without actual juridical basis in the law—have grave effects on sexual health and rights, especially on persons who are already socially marginalized. Criminalization of consensual sexual conduct between adults in private constitutes direct state interference with respect to private life; it also violates the rights to non-discrimination and equality. Criminalization of consensual conduct between adults can proscribe sexual practices ("sodomy," "unnatural offenses"), sexual conduct between persons of the same sex, sexual conduct between unmarried persons, and sexual conduct outside marital relationships.

166. In addition to discrimination on the basis of marital status or sexual orientation, regimes of criminalization often impose penalties on women, but not on men, for the same behavior (e.g., departures from virginity or chastity), thus constituting additional discrimination on the basis of sex/gender. Criminal statutes prohibiting sexual conduct are often vague and non-specific in their use of euphemism instead of clear descriptions of sexual activity, thus making it difficult to know what exactly is forbidden, and violating a basic principle of criminal law (that laws give clear notice of what actions are prohibited).

167. Criminalization of consensual, private sexual behavior among adults has many consequences for sexual health. Persons whose sexual behavior is deemed a criminal offense strive to hide their behavior and relationships from agents of the state and others, not availing themselves of sexual health services. Research has documented that those engaged in sexual behavior deemed criminal (e.g., sex work, adultery) evade or do not take full advantage of HIV and STI services for prevention and treatment of disease, fearing compromised medical privacy or doubting health providers' respect for confidentiality. The consequences are often exacerbated by other characteristics of the person, which render them more vulnerable to abuse by authorities under the criminal law, such as disfavored sex/gender, race, ethnicity or national status. Many legal systems fail to create remedies that reach both the underlying basis for abuse (e.g., race, national status, or sex/gender) and the immediate barriers (e.g., sexual stigma through criminalization.)

168. Similarly, seeking out sex education, contraceptive information and services, or abortion (even when it is legally permitted) is compromised by fear of identification, arrest, and prosecution for engaging in consensual and desired sexual behavior. Furthermore, sexual practices conducted quickly and secretly to avoid detection do not foster safe sex practices or good communication between partners. Criminalization of consensual behavior is a direct impediment and barrier to the ability to access appropriate sexual health care, leading to no care, self-care, or care at the hands of amateurs, with predictably poor results.

169. In addition to reduced ability to access existing information and services, persons who do reach services report being ill-treated by medical providers on the grounds of their illegitimate status, should it become known. Refusal to make clinic appointments, refusal to treat or treatment with gross disrespect, private shaming, and public disparagement are among the abuses reported, along

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319 See Section 7 on Criminalization of Violence Related to Sex and Sexuality.
321 Definitions of sodomy can include both same sex and heterosexual anal or oral sex. Definitions of “unnatural” sexual practices are often even broader, but generally capture a range of non-reproductive sexual practices.
with hurried and inferior care. Name-calling, violation of medical privacy, and segregation to specific treatment areas removed from other patients are reported. These experiences reduce the likelihood that patients so treated will return for future care. In many contexts, the effect of criminalization of consensual, private adult behavior on sexual health is entirely negative.

170. Paradoxically, legal and policy reform to remedy discrimination against sexually stigmatized persons in other branches of the law (for example, in administrative law or constitutional or legislative equality protections) often co-exist with continued criminal enforcement in some nations, leading to incomplete enjoyment of rights and continued ill-effects on health.

171. Criminalization of consensual sexual conduct has additional consequences beyond its direct effect on access to, and quality of, sexual health care. Criminalization intensifies and reinforces stigma against persons engaging in, or imagined to engage in, sexual conduct that is against the law. Persons or groups of persons thus stigmatized are targets of violence (sexual and non-sexual), extortion, and other violations by state and non-state actors. Blackmail is frequently reported, with stigmatized persons afraid to report blackmail to the police or other authorities, for fear of arrest (and because extortionists not uncommonly are police officers operating extramurally). Those committing “consensual sexual crimes” are thus targets for a range of abuses, which can be committed against them with impunity. Persons stigmatized through real or imagined violation of laws against consensual sex face reduced enjoyment of the full range of other human rights, particularly rights to bodily integrity, education, and employment, and freedoms of expression and association. For example, impunity for police abuse (sometimes reaching the level of torture) has been associated with many criminal laws against same sex conduct as well regimes criminalizing sex work.

172. Specific criminalization of HIV transmission (through sexual and other behavior) has become a popular state response to HIV, although a health and human rights analysis suggests that the appropriate application of existing criminal law (on assault, for example) is more suitable and effective. Criminal statutes vary greatly in terms of what is prohibited: intentional sexual conduct (i.e., intending to cause transmission and infection) or sexual behavior that is deemed reckless. To avoid criminal penalty, some laws require the infected person to announce his or her status to the potential partner prior to sexual relations, while others require taking protective steps (using a condom). Across such laws, the definition of prohibited sexual practices is often vague, violating basic principles of criminal law (that conduct must be described with sufficient clarity to give notice). Other laws explicitly (or de facto) are used to address only specific populations perceived to be particularly prone to “risky behavior” (e.g., sex workers or men who have sex with men), such that the laws may be discriminatory in substance or application. Although laws criminalizing intentional or careless HIV transmission might serve as strong statements of social disapproval about harmful or reckless sexual behavior, the most significant effect on sexual health is that such laws discourage people from being tested and knowing their HIV status. Weighing the very small number of cases prosecuted under these laws against their impact suggests legislators turn to them as symbolic rather than functional interventions; nonetheless, their negative health and human rights consequences, in part through discriminatory policing and associated abuses, are felt by already stigmatized populations.

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323 See Roseman & Miller, International Report (2010), available at: http://www.who.int; Section 7 on Criminalization of Violence Related to Sex and Sexuality; Section 10 on Sex Work.
173. Criminalization of sexual conduct between a person deemed sufficiently mature and a person deemed below the age of consent is accomplished in many locations through the criminal offense of “statutory rape” (i.e., criminalization of sexual conduct with a person below the age at which the younger person is deemed able to give consent). Legal frameworks regarding statutory rape are complex and vary across national contexts regarding the age at which the young person can give consent, to which sexual practices, and with what age difference between the younger and older partners. In addition, such laws often vary greatly in what sexual conduct is prohibited. Statutory rape laws often have a restrictive effect on health and rights. Their existence is used to justify denying young people their rights to information and services essential to protecting their reproductive and sexual health, as well as their decision-making capacity. Thus, statutory rape laws must balance the objective of protecting younger persons in situations of vulnerability, while not interfering with their ability to access sexual information and engage in sexual behavior appropriate to their ages and evolving capacities.

174. While human rights standards set the age of marriage at 18 for men and women, the age of consent for sex is generally understood in international human rights standards to be lower than the age of marriage. To avoid discrimination, statutory rape laws must not impose different standards for boy and girls, or for differently gendered partners, or assume a priori that the “offender” in the case of two young people close in age is the male.

175. Section 6 examines how Western Pacific states have sought to regulate and/or restrict sexual expression and non-violent sexual behavior through criminal law. It begins in section 6.1 by considering the application, in Western Pacific states, of criminal law to private sexual conduct between consenting persons of the same sex. Section 6.2 examines the (de)criminalization and regulation of HIV transmission. In section 6.3, the report looks at how Western Pacific states have applied law to criminalize indecent acts and indecent exposure. Last, section 6.4 discusses the legal regulation, in the Western Pacific Region, of ages of consent to sexual conduct as well as the criminalization of sexual conduct with underage persons.

6.1 Same Sex Conduct

176. Sexual conduct between consenting persons of the same sex is lawful in a number of Western Pacific states, including Australia, China, Fiji, Hong Kong, Japan, the Marshall Islands, New Zealand, the Philippines, Vanuatu, and Viet Nam. In some states, decriminalization of same sex conduct has been brought about through legislative reform. For example, the Homosexual Law Reform Act 1986 decriminalized consensual sexual conduct between adult men in New Zealand. Since the passage of that Act, men who have sex with men in New Zealand have been able to engage in consensual sexual conduct with one another, without fear of criminal prosecution. In other states, decriminalization has occurred through judicial invalidation of laws that criminalize same sex sexual conduct. For instance, in Fiji, Hong Kong and Australia, superior courts and international human rights treaty bodies have invalidated laws that criminalize sexual conduct between persons of the same sex by invoking human rights norms and standards, including the rights to non-discrimination, equality and privacy, as well as the principle of human dignity. Section 6.1 examines the process of decriminalization in Fiji, Hong Kong and Australia, focusing on how human rights norms and standards were applied to invalidate such laws.

177. In Fiji, section 175(a) of the Penal Code 1945 made it a criminal offense to have “carnal knowledge” of a person “against the order of nature.” Section 175(c) made it a criminal offense for a person to permit a man to have “carnal knowledge” of him or her “against the order of nature.” In addition,

327 But see Penal Code of 1981 (Van.), s 99 (providing that “[n]o person shall commit any homosexual act with a person of the same sex under 18 years of age, whether or not that person consents.”).
section 177 criminalized “indecent practices” between men. It provided that “[a]ny male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment.”

178. In 2005, the constitutionality of sections 175(a), 175(c) and 177 were challenged in *Nadan and McCoskar v. State*. McCoskar, an Australian citizen, had travelled to Fiji on holiday. During his time in Fiji, McCoskar suspected that Nadan had stolen money from him and subsequently reported Nadan to the Fijian police. Nadan told police that McCoskar had taken nude photographs of him, promised to pay him modeling fees for publication of the photographs, and had engaged in sex with him. McCoskar and Nadan were convicted under sections 175 and 177 of the *Penal Code 1945*, and sentenced to two years’ imprisonment. McCoskar and Nadan subsequently appealed against conviction and, in so doing, challenged the validity of the impugned provisions of the Code on the grounds that they violated the constitutional rights to privacy, non-discrimination and equality, and the freedom from degrading treatment. Regarding the right to privacy, the appellants argued that Fiji should not interfere in the field of private morality or legislate regarding private, consensual sexual conduct. They further argued that limitations on the right to privacy or the ability to make fundamental decisions about intimate relationships could not be justified in law. Regarding the rights to non-discrimination and equality, the appellants argued that section 175 was discriminatory, as it was applied in practice to men who have sex with men only, and it criminalized their primary expression of sexuality. They submitted that section 177 was discriminatory because it criminalized indecent practices between men, but not between women or heterosexuals. Fiji argued that section 175 did not discriminate, as it was neutral in relation to gender and sexual orientation; in its view, section 175 simply proscribed certain sexual acts. Fiji also claimed that any limitation of rights was justified by the “abhorrent” nature of (male) homosexuality, and for moral reasons.

179. The High Court of Fiji upheld the appeal and quashed the appellants’ convictions. Judge Winter found that the impugned provisions violated the constitutional rights to privacy, non-discrimination and equality, and were therefore invalid to the extent that they criminalized private consensual sexual conduct between adults against the order of nature, and private consensual sexual conduct of adult males. In finding a violation of the right to privacy, Judge Winter observed that “[t]he way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally [affect] our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy.” Judge Winter explained that the right to privacy imposes on the State both a negative obligation to refrain from interfering in one’s private life and a positive obligation “to establish and nurture human relationships free of criminal or indeed community sanction.” His Honor acknowledged that the right to privacy can be limited in certain circumstances, but concluded that the limitation of this right in section 175

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329 See *Constitution (Amendment) Act 1997* (Fiji), arts. 25, 37-38.
330 See *ibid.*, at 14, 19.
331 See *ibid.*, at 7.
332 See *ibid.*, at 4.
333 See *ibid.*, at 4, 19.
334 See *ibid.*, at 25.
335 *ibid.*, at 17.
336 See *ibid.*, at 18.
337 See *ibid.*, at 18-19.
and 177 of the Penal Code 1945 was not justifiable. Indeed, he characterized the limitation as: “a gross intrusion into the private sexual lives of consenting adults;” “wholly disproportionate to the right of privacy;” and, “a severe restriction on a citizen’s right to build relationships with dignity and free of State intervention.” Judge Winter observed that the right to privacy is “so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity. Criminalizing private consensual adult sex acts against the course of nature and sexual intimacy between consenting adults males is not a proportionate or necessary limitation.”

180. In finding a violation of the rights to non-discrimination and equality, Judge Winter concluded that the differential treatment permitted in section 177 on the grounds of sex and sexual orientation was repugnant to the Fijian Constitution and therefore invalid, insofar as it punished gays but not lesbians or heterosexuals for private, consensual sexual conduct. He explained that section 177 made “certain conduct between males criminal, while leaving unaffected by the criminal law comparable conduct when not committed exclusively by males.” Judge Winter thus found that section 177 “is discriminatory of males and unequal in its legal treatment of citizens. As such it is overtly discriminatory of homosexuals as it criminalizes their sexual expression.” Regarding sections 175(a) and (c), Judge Winter held that, although the provisions did not formally discriminate, in that they applied to men and women of any sexual orientation, they were applied unequally in practice and were used primarily to prosecute gays. He explained: “while technically the provisions of Section 175 are not anti homosexual nonetheless they proscribe criminal conduct essential to the sexual expression of the homosexual relationship and are perceived as such.” He further explained: “[t]he technical description of the law may read as equal. ... I accept ... that while these Section 175 offences are not exclusively anti-homosexual they are selectively enforced primarily against homosexuals.”

181. In 2009, the Fijian Government abolished all criminal offences related to consensual sexual conduct between persons of the same sex.

182. Hong Kong decriminalized private consensual sexual conduct between men in 1991. That same year, however, section 118F of the Crimes Ordinance of 1971 was enacted, which made it a criminal offense for a man to commit buggery with another man otherwise than in private.

183. In 2007, in Secretary for Justice v. Yau Yuk Lung Zigo and Anor, the constitutionality of section 118F was challenged. In that case, the respondents, Yau Yuk Lung Zigo and Lee Kam Chuen, had been charged with violating section 118F, the first prosecution since the provision was enacted. The Magistrates Court and the Court of Appeal dismissed the charges on the ground that the impugned provision of the Crimes Ordinance was discriminatory and, thus, unconstitutional. The Government of Hong Kong appealed to the Court of Final Appeal, the State’s highest court, and, in so doing, sought a determination as to whether or not section 118F was discriminatory on the basis that it criminalized homosexual, but not heterosexual, buggery committed in public. In seeking leave to appeal, the Government gave an undertaking that it would not seek remittal of the case or bring any charge against the respondents in relation to the alleged conduct.
The Court of Final Appeal unanimously dismissed the Government’s appeal. Chief Justice Li, delivering the opinion of the Court, interpreted the constitutional protection against discrimination on the ground of “other status” as including sexual orientation, and held that the impugned provision of the Crimes Ordinance discriminated against men who have sex with men on the ground of sexual orientation. Chief Justice Li reasoned that, in criminalizing public buggery between men only, section 118F(1) gave rise to a difference in treatment on the ground of sexual orientation.

[H]omosexuals alone are subject to the statutory offence in s. 118F(1) for committing buggery otherwise than in private. In contrast, heterosexuals are not subject to any criminal liability comparable to that prescribed in s. 118F(1) in relation to the same or comparable conduct, namely vaginal intercourse or buggery otherwise than in private. Thus, as a result of s. 118F(1), a dividing line is drawn on the basis of sexual orientation between homosexuals on the one hand and heterosexuals on the other in relation to the same or comparable conduct.

In his Honor’s view, that difference in treatment could not be legally justified, as there was no genuine need for that treatment. In invalidating section 118F(1), Chief Justice Li explained that “[h]omosexuals constitute a minority in the community. The provision has the effect of targeting them and is constitutionally invalid. The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law.”

The Court of Final Appeal’s decision in Secretary for Justice v. Yau Yuk Lung Zigo and Anor provides another positive example of a health and human rights approach to same sex conduct. It establishes that laws in Hong Kong that criminalize sexual conduct between persons of the same sex but not between persons of the opposite sex are violative of human rights norms and standards. However, by limiting its finding to the rights to non-discrimination and equality, the Court of Final Appeal of Hong Kong missed an opportunity to recognize the full range of human rights violations caused by section 118F(1) of the Crimes Ordinance. Its decision might have been strengthened had it considered whether or not the criminalization of public buggery between men only also constituted a violation, for example, of the constitutional freedom from arbitrary interference with private life. Had it done so, it might, similar to the High Court of Fiji, have concluded that section 118F(1) violated that freedom and elaborated the positive elements of this obligation.

With the exception of the state of Tasmania, Australian jurisdictions decriminalized sexual conduct between same sex persons during 1970’s and 1980’s, through a process of legislative reform.

In Tasmania, section 122 of the Criminal Code Act 1924 (Tas.) provided that any person who “(a) has sexual intercourse with any person against the order of nature” or “(c) consents to a male person having sexual intercourse with him or her against the order of nature” is guilty of “unnatural” sexual intercourse. In addition, section 123 provided that “[a]ny male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person,” is guilty of “indecent practice between male persons.”

In Toonen v. Australia, Nicholas Toonen challenged the impugned provisions of the Criminal Code Act 1924 on the grounds that they violated the right to non-discrimination in articles 2 and 26 of the International Covenant on Civil and Political Rights, and the freedom from arbitrary

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348 Ibid., at para. 11.
349 Ibid., at para. 24.
350 See ibid., at paras. 25-30.
351 Ibid., at para. 29.
interference with private life in article 17(1). In a communication to the Human Rights Committee, Toonen submitted that the criminalization of same sex conduct denied him the ability “to expose openly his sexuality,” and fostered “the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.” He further submitted that the impugned provisions of the Act violated the right to privacy because “they distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity” and the rights to non-discrimination and equality because they do not “outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private.”

The Human Rights Committee determined that Australia had violated the freedom from arbitrary interference with private life in article 17(1), read in conjunction with the right to non-discrimination in article 2. In reaching that determination, the Committee interpreted the right to non-discrimination on the ground of “sex” to include sexual orientation. It also dismissed the claim that the provisions in the Act were justified on public health grounds, explaining that “the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS.”

189. Following the Toonen decision, the Australian Government enacted the Human Rights (Sexual Conduct) Act 1994 (Cth.), based on article 17 of the International Covenant on Civil and Political Rights, which provides that “[s]exual conduct involving only consenting adults acting in private life is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy ....” Notwithstanding that enactment, the state of Tasmania refused to repeal the offending provisions of the Criminal Code Act 1924, thereby giving rise to an inconsistency between a federal and state law. In 1997, in Croome v. Tasmania, the impugned provisions of the Criminal Code Act 1924 were challenged on the basis that they violated the freedom from arbitrary interference with private life. Although the plaintiffs had not been charged under the Act, they claimed to have engaged in same sex conduct that made them liable to criminal prosecution. The plaintiffs sought a declaration from the High Court of Australia, Australia’s highest court of appeal, that sections 122(a) and (c) and 123 of the Act were inconsistent with the Human Rights (Sexual Conduct) Act 1994 and, thus, constitutionally invalid to the extent of that inconsistency.

Following an unsuccessful attempt to have the matter struck out on procedural grounds, the Government of Tasmania repealed the impugned provisions, at long last bringing Tasmania into line with other Australian states and territories.

Concluding Remarks

190. Consistent with a health and human rights, a significant number of Western Pacific states have decriminalized sexual conduct between consenting persons of the same sex. Following decriminalization, persons who engage in sexual conduct with persons of the same sex can express their sexuality freely and access health care services and information without fear of criminal prosecution. Moreover, the act of decriminalization sends a clear message that the state embraces sexual diversity. In Nadan and McCoskar v. State, Judge Winter recognized the importance of sexual diversity and the ability to give expression to one’s sexuality freely and in a dignified way,
without state interference. He held that the Fijian Constitution requires Fijian laws, policies and practices to acknowledge difference, affirm dignity and ensure equal respect to all people. “The acceptance of difference,” the Judge explained, “celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.” The Judge continued: “[a] country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator.”

191. Notwithstanding decriminalization in a number of Western Pacific states, it is still a criminal offense for persons to engage in same sex conduct in certain states, including the Cook Islands, Kiribati, Malaysia, Papua New Guinea, Samoa, Singapore, the Solomon Islands and Tuvalu. It is common for Western Pacific states that criminalize same sex conduct to make consensual sexual conduct between men, but not women, a criminal offense. Laws that criminalize consensual same sex conduct threaten to undermine sexual health, as persons who do not conform to heterosexual norms may choose not to access, or take full advantage of, sexual health services, fearing criminal prosecution. They also sanction state interference in private sexual relations between consenting persons based on their sexual orientation and deny individuals their sexual autonomy and ability to choose a sexual partner of their choice.

6.2 HIV Transmission

192. It is common practice in the Western Pacific Region to criminalize or prohibit the intentional transmission of HIV through sexual intercourse. HIV transmission is sometimes criminalized or prohibited through offenses related specifically to HIV, such as in the case of Viet Nam where it is a criminal offense to intentionally spread HIV to another person. At other times, HIV transmission is encompassed within general criminal offenses, including criminal nuisance and infecting another with a disease, and/or in civil offenses in public health laws (e.g., spreading an infection or disease). In Papua New Guinea, for example, the intentional transmission of HIV to another person is characterized as an assault occasioning bodily harm under the Criminal Code Act 1974 and, where death has occurred, an act of unlawful killing.

193. There are conflicting trends in the Western Pacific Region regarding the legal obligations of persons with HIV/AIDS to disclose their health status to sexual partners. Some Western Pacific states require persons with HIV/AIDS to disclose their HIV/AIDS status to sexual partners, and punish persons who fail to abide by that legal duty, regardless of circumstances (e.g., threat of

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360 Nadan and McCoskar v. State, [2005] FJHC 500 (Fiji, High Court), at 25.
361 Ibid.
362 See, e.g., Penal Code of 1985 [Sing.], s 377A; Penal Code (Amendment) Act of 2007 [Sing.].
violence). China, for example, imposes a legal duty on persons living with HIV/AIDS to inform sexual partners in a timely manner of their HIV/AIDS status. This duty is in addition to the obligation to take necessary precautions to prevent the transmission of HIV through sexual intercourse and the prohibition against intentionally infecting other persons with HIV. In Vietnam, HIV-infected persons are required to inform their spouse or fiancé/fiancée of their HIV status and also apply measures to prevent the transmission of HIV to others.

Disclosure of one’s HIV/AIDS status to sexual partners is not, however, required in all Western Pacific states. New Zealand courts, for example, have held that while persons with HIV/AIDS must exercise reasonable care to avoid infecting sexual partners, such persons are under no legal obligation to disclose their HIV/AIDS status to sexual partners. In 2005, in Police v. Dalley, Judge Thomas of the Wellington District Court dismissed charges of criminal nuisance against Justin Dalley, an HIV-positive man who had protected vaginal intercourse and unprotected oral sex with a woman to whom he had not disclosed his HIV status. In dismissing the charges against Dalley, Judge Thomas held that New Zealand law imposes a legal duty not to engage in conduct that could foreseeably expose a sexual partner to harm, including the risk of HIV infection. It also imposes a duty to take reasonable precautions against, and to use reasonable care to avoid, such harm. However, Judge Thomas held that the legal duty does not extend to disclosing one’s HIV status. Her Honor explained that

> [I]t seems ... that most people would want to be told that a potential sexual partner was HIV-positive. There may well be a moral duty to disclose that information. There is however a difference between a moral duty and a legal duty, the legal duty in this case being to take reasonable precautions against and use reasonable care to avoid transmitting the HIV virus. I note that the duty at common law is essentially the same – to take reasonable steps.

Judge Thomas concluded that Dalley was therefore under no legal obligation to disclose his HIV status to his sexual partner. He was, however, required not to engage in conduct that could foreseeably expose her to the risk of infection.

In determining whether or not Dalley had exercised reasonable care to avoid endangering his sexual partner, Judge Thomas relied heavily on medical evidence regarding HIV transmission. In relation to the protected vaginal intercourse, Judge Thomas considered whether or not use of a condom was sufficient to constitute reasonable precautions against, and reasonable care to avoid, HIV transmission. Her Honor found that, although condoms are not failsafe, in using a condom during vaginal intercourse, Dalley had demonstrated reasonable caution and care, thereby fulfilling his legal duty. According to Judge Thomas,

> [Police v. Dalley, (2005) 22 CRNZ 495 (N.Z., District Court, Wellington). See also R v. Mwai, [1995] 3 NZLR 149 (N.Z., Court of Appeal) (upholding convictions against Peter Mwai, an HIV-positive man, for recklessly causing grievous bodily harm, and criminal nuisance, for having unprotected sex with five women and failing to disclose his HIV status to them. In upholding Mwai’s conviction, the Court stated that, whilst it was certainly arguable that there would have been no duty incumbent on Mwai to wear a condom if his sexual partners had consented to unprotected sex knowing that he was HIV-positive, this argument was irrelevant as Mwai had neither disclosed his status nor taken reasonable precautions in engaging in sex by wearing a condom: at 156-157. The Court upheld the sentence of seven years’ imprisonment, finding that it was not manifestly excessive having regard to the need to express the community’s condemnation of the recklessness of Mwai’s actions and the impact of his actions on his victims. The Court acknowledged the difficulties Mwai would face in prison, as an HIV-positive man, but said that the sentencing Judge “was right to send a clear signal of personal responsibility. This is an increasingly significant area of public health.” at 158).
The evidence was that, so far as public health needs are concerned, the steps necessary to prevent the transmission of HIV can be met without the requirement for disclosure. In other words, the use of a condom for vaginal intercourse is considered sufficient. I consider that I must attach significant weight to the approach of the relevant professional bodies in this area. There was no evidence to suggest that experts in the area consider that prevention of the transmission of HIV requires disclosure. Added to that is the evidence of relatively low risk of transmission when a condom is used when vaginal intercourse takes place. The duty under s 156 is to use ‘reasonable’ precautions and care. The duty is not to take fail-safe precautions. Reasonableness is an objective standard. On the basis of this evidence, I find that in the circumstances Mr Dalley did take reasonable precautions and care.\textsuperscript{373}

In relation to the unprotected oral sex, the Judge found that “[t]he risk of transmission ... as a result of oral intercourse without a condom is not zero because it is biologically possible, but it is so low it does not register as a risk. In any event Mr Dalley did not ejaculate. On the basis of those two factors I find that reasonable precautions against and reasonable care to avoid such danger was taken by Mr Dalley.”\textsuperscript{374}

Concluding Remarks

196. Under a health and human rights approach, criminalization of HIV transmission through sexual intercourse is justified only when HIV is intentionally or maliciously transmitted with a view to harming others.\textsuperscript{375} In the limited number of cases where persons have acted with intent or malice,\textsuperscript{376} general criminal laws (rather than criminal laws specific to HIV transmission) should be applied. Evidence suggests that HIV-specific offenses are no more effective than general criminal offenses in deterring persons from intentionally or maliciously transmitting HIV, and may even have the unintended consequence of discouraging people from getting tested so that they might deny knowledge of their HIV status. Moreover, HIV-specific offenses have the effect of shifting the burden of HIV prevention to persons living with HIV/AIDS and minimizing the shared responsibility that all persons bear to adopt practices that promote safer sex and sexual health.

197. A health and human rights approach requires the establishment of a social and legal environment that is supportive of safe and voluntary disclosure of HIV status. Western Pacific laws that require persons with HIV/AIDS to disclose their condition to sexual partners fail to address the varied reasons (e.g., fear of violence, discrimination or stigmatization) that may prevent a person from disclosing his or her HIV/AIDS status. Mandatory disclosure requirements could foreseeably result in people foregoing HIV testing when they suspect that they might be infected in order to prevent themselves being placed in a position where they are obligated to disclose the results of any tests. In contrast, Western Pacific laws that impose a duty to take reasonable precautions against, and to use reasonable care to avoid, transmission of HIV through sexual intercourse, but that do not require persons with HIV/AIDS to disclose their health status to sexual partners, strike a balance between public health and human rights objectives. For example, in Police Dalley, Judge Thomas

\textsuperscript{373} Ibid., at paras. 47-49.
\textsuperscript{374} Ibid., at para. 39.
\textsuperscript{376} In January 2009, in the first prosecution of its kind in Victoria, Australia, the County Court of Victoria convicted Michael John Neal of intentionally attempting to transmit HIV to a number of people and sentenced him to almost 19 years’ imprisonment. At trial, it was revealed that Neal had lied about his HIV status in order to engage in unprotected sex with his victims, and that he had ignored repeated warnings from the Department of Health to cease that behavior; see Kate Hogan, “Grandfather Jailed for Spreading HIV” \textit{The Age} (Jan. 16, 2009), available at: [http://www.theage.com.au/national/grandfather-jailed-for-spreading-hiv-20090116-7ivc.html](http://www.theage.com.au/national/grandfather-jailed-for-spreading-hiv-20090116-7ivc.html).

guaranteed the right to privacy of Dalley, a HIV positive man, in a way that was consistent with the public health goal of preventing the transmission of HIV. In upholding the right to privacy, Judge Thomas also indirectly helped to protect and promote other human rights of persons with HIV/AIDS, including the right to non-discrimination and the freedom from violence.

### 6.3 Indecent Acts and Indecent Exposure

198. It is common state practice in the Western Pacific Region, in particular in the Pacific, to limit the freedom of sexual expression through criminalization of “indecent” acts and “indecent” exposure. In Malaysia, for example, “[a]ny person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.” In the Marshall Islands, it is a criminal offense, punishable by a maximum term of imprisonment of 30 days, for a person to intentionally expose his or her genitals to a person to whom he or she is not married, in circumstances that are likely to cause affront.

199. Whether or not certain sexual acts will be characterized as indecent and in what circumstances are rarely made clear in Western Pacific laws. Those Western Pacific states that criminalize indecent acts, for example, typically tie indecency to community standards of morality or decency or the public interest, without articulating those standards or defining what constitutes public interest, or outlining criteria by which standards of morality or decency or the public interest might be assessed. In New Zealand, it is a crime against morality and decency to willfully do an indecent act in a place to which the public has access or that is in public view. In the Cook Islands, it is a crime against morality and decency to commit an indecent act in “any place to which the public have or are permitted to have access, or within view of any such place.” Sexual acts deemed to be contrary to community standards of morality or decency or the public interest (whatever that may mean) are deemed indecent and, therefore, the freedom to express oneself through those acts is denied or, at the very least, limited.

### Concluding Remarks

200. A health and human rights approach requires that the freedom of sexual expression be limited only if the restriction is provided by law and is necessary “for the protection of ... public order ..., or of public health or morals.” Laws that limit voluntary and consensual sexual expression in private on the basis of indecency are difficult to justify under a health and human rights approach, as they are neither necessary for the protection of public order nor for the protection of public health or morals. Care must therefore be exercised when limiting that same expression in public to ensure that law is not used as a tool to privilege heteronormativity, reinforce prescriptive sexual stereotypes concerning “appropriate” forms of sexual conduct, or punish persons who do not conform (or only partially conform) to heterosexuals norms.

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377 See, e.g., Criminal Code Act 1924 (Tas.) (Austl.), s 137; Crimes Act 1969 (C.I.), ss 136, 137A; Penal Code of 1907 (Jap.), art. 174; Penal Code 1997 (Malay.), ss 294(a), 377D, 377E; Crimes Act 1961 (N.Z.), ss 125-126; Crimes Ordinance 1962 (Sam.), ss 44-45; Penal Code of 1985 (Sing.), ss 294(a), 377A; Penal Code 1966 (S.I.), ss 162, 175(e), 178(m); Penal Code 1978 (Tuv.), ss, 155 167(e); Penal Code 1988 (Van.), s 94. For a discussion of the criminalization of “indecent acts” between persons of the same sex, see Section 6.1.

378 See, e.g., Crimes Act 1969 (C.I.), s 137A; Crimes Ordinance of 1971 (H.K.), s 148; Penal Code 1965 (Kirib.), s 168(d); Criminal Code 1966 (M.I.), s 152(F); Penal Code 1966 (S.I.), s 176(d); The Order in Public Places Act of 1921 (Tonga), s 3(l); Penal Code 1978 (Tuv.), s 168(d).

379 See Criminal Code 1966 (M.I.), s 152(F).


381 Crimes Act 1969 (C.I.), s 136(1).

382 See ICCPR, art. 19(3)(b); CRC, art. 13(2)(b).
6.4 Ages of Consent for Sexual Conduct

201. As in other Regions, Western Pacific states limit the lawful expression of sexuality by prescribing ages of consent for sexual conduct; that is, minimum ages at which persons are deemed legally competent to consent to sexual conduct.\(^{384}\) Ages of consent vary across the Region and, in some instances, within Western Pacific states, depending on such factors as the type of sexual conduct. The minimum age of consent for lawful heterosexual sex is 16 years in a number of Western Pacific states, including several Australian states, the Cook Islands, Hong Kong, Malaysia, the Marshall Islands, New Zealand, Papua New Guinea, and Singapore.\(^{385}\) Some of the youngest ages of consent for heterosexual sex have been established in China (14 years), Japan (13 years) and Tuvalu (15 years),\(^{386}\) while the age of consent in the Australian states of South Australia and Tasmania is 17 years and, in Viet Nam, it is 18 years.\(^{387}\)

202. In states that have decriminalized sexual conduct between persons of the same sex,\(^{388}\) it is common practice to prescribe equal ages of consent for sexual conduct between persons of the same or opposite sex. For example, in Leung v. Secretary for Justice,\(^{389}\) a unanimous Court of Appeal of Hong Kong invalidated provisions of the Crimes Ordinance of 1971 that established different ages of consent for heterosexual and homosexual sexual conduct. Under the impugned provisions, the age of consent for male buggery (section 118C)\(^{390}\) and male gross indecency/sexual intimacy (section 118H)\(^{391}\) was set at 21 years. In contrast, the age of consent for the same acts between heterosexuals or lesbians was set at 16 years.\(^{392}\) The impugned provisions also made it a criminal offense for two men to engage in buggery\(^{393}\) or gross indecency/sexual intimacy\(^{394}\) otherwise than in private; however, no comparable provision existed with respect to sexual intercourse between heterosexuals or lesbians.

203. Leung, a 20 year-old gay man, challenged the constitutionality of the impugned provisions on the ground that they infringed the rights to non-discrimination and equality, and the freedom from arbitrary interference in private life, in contravention of the Basic Law of Hong Kong of 1990 and the Hong Kong Bill of Rights Ordinance of 1991.\(^{395}\) With respect to the rights to non-discrimination and equality, Leung submitted that, while the impugned provisions “permit heterosexual and lesbian couples to give physical expression to their shared sexual orientation once they have reached 16 years of age, [the provisions] discriminate against gay couples in that they prohibit them from a similar expression of their shared desires until each of them has reached 21 years of age.”\(^{396}\) Leung further submitted that the impugned provisions discriminated against gays by

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\(^{384}\) Compare Section 4.1 on Consent to Marriage (discussing ages of consent to marriage in Western Pacific states).

\(^{385}\) See Crimes Act 1900 (NSW) (Austl.), s 66C; Crimes Act 1969 (C.I.), s 147; Crimes Ordinance of 1971 (H.K.), s 124; Penal Code 1997 (Malay.), s 375(f); Criminal Code 1966 (M.I.), ss 151-152; Crimes Act 1961 (N.Z.), s 134; Criminal Code Act 1974 (P.N.G.), ss 229A-229B; Women’s Charter of 1961 (Sing.), s 140(1)(j); Penal Code of 1985 (Sing.), s 376A.

\(^{386}\) See Criminal Law of the People’s Republic of China of 1997 (China), art. 236; Penal Code of 1907 (Jap.), art. 177; Penal Code 1978 (Tuv.), s 135.


\(^{388}\) See Section 6.1 on Same Sex Conduct.

\(^{389}\) Leung v. Secretary for Justice, [2006] 4 HKLRD 211 (H.K., Court of Appeal) [Leung I].

\(^{390}\) Crimes Ordinance of 1971 (H.K.), ss 118C.

\(^{391}\) Ibid., s 118H. In Leung v. Secretary for Justice, [2005] 3 HKLRD 657 (H.K., Special Administrative Court of First Instance) [Leung I], Judge Hartmann defined the term “gross indecency” as “sexual conduct with or towards another person that is offensive to common propriety, each case being judged in the context of its own time, place and circumstance.” For the purpose of the judgment, Judge Hartmann described gross indecency as “sexual intimacy,” by which he meant “any act of such intimacy with or towards another person that falls short of sexual intercourse; namely, penetration;” ibid., at para. 16.

\(^{392}\) Crimes Ordinance of 1971 (H.K.), ss 122(2), 124.

\(^{393}\) Ibid., s 118F(2)(a).

\(^{394}\) Ibid., s 118J(2)(a).

\(^{395}\) Leung v. Secretary for Justice, [2005] 3 HKLRD 657 (H.K., Special Administrative Court of First Instance) [Leung I], at paras. 3-4, 42.

\(^{396}\) Ibid., at para. 3.
prohibiting gay, but not heterosexual or lesbian, couples from engaging in certain forms of sexual intimacy regardless of age. With respect to the freedom from arbitrary interference in private life, Leung asserted that "what takes place in the bedroom on an entirely consensual basis between two men who are both aged 16 or older is very much a matter private to them and that privacy should be protected by law just as it is protected for heterosexual and lesbian couples." Leung submitted that, as a 20-year-old, the legislative regime had "place[d] a considerable stress on his relationships with other gay men, clouding such relationships with apprehension and making it effectively impossible to develop, as he would wish, long-lasting relationships." More generally, he submitted that "his knowledge that the physical desires which define his sexual orientation are perceived by the law to be a form of deviance warranting condign criminal punishment ha[d] led to feelings of low self-esteem and an on-going denial of his true identity, even to those closest to him. The result has been a sense of marginalisation and ... a profound uncertainty as to his own moral worth as a member of the Hong Kong community."

Leung sought a declaration that sections 118C and 118H, which established the ages of consent for buggery and gross indecency/sexual intimacy, were inconsistent with the rights to non-discrimination and equality and the freedom from arbitrary interference with private life, insofar as they applied to men between the ages of 16 and 21. Leung also sought a declaration that sections 118F(2)(a) and 118J(2)(a), which criminalized buggery and gross indecency/sexual intimacy between two men otherwise than in private, violated those same rights.

During proceedings, the Secretary for Justice of Hong Kong conceded, and Judge Hartmann of the Special Administrative Court of First Instance agreed, that sections 118F(2)(a), 118H and 118J(2)(a) were unsustainable in law because they clearly discriminated against Leung and arbitrarily interfered with his autonomy. It was accepted that section 118H on the age of consent for gross indecency/sexual intimacy had to be read down so that references to the phrase "under the age of 21" are understood to mean "under the age of 16." It was further accepted that sections 118F(2)(a) and 118J(2)(a) were unsustainable. The central issue for determination was thus whether or not section 118C, which prescribed 21 as the age of consent for male buggery, was constitutionally valid.

In the Special Administrative Court of First Instance, Judge Hartmann held that section 118C of the Crimes Ordinance directly and indirectly discriminated against Leung and granted each of the declarations sought by him. In respect of the finding of direct discrimination, Judge Hartmann stated that, under section 118C, both men are criminally liable for engaging in homosexual buggery and, under section 118D, it is only the man who is made criminally liable for engaging in heterosexual buggery. That, he explained, "is a direct inequality of treatment." In respect of the finding of indirect discrimination on the ground of sexual orientation, Judge Hartmann explained that "[g]ay couples (not yet 21) are prohibited from engaging in the only form of sexual intercourse available to them while heterosexual couples are free to have sexual intercourse in a manner natural to them; that is, per vagina. That," in his judgment, "also discriminate[d] against gay men. Put plainly, heterosexual couples may have sexual intercourse under the age of 21, homosexual couples may not." On the basis of that reasoning, Judge Hartmann concluded that

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397 Ibid.
398 Ibid., at para. 4.
399 Ibid., at para. 5.
400 Ibid., at para. 6.
401 Ibid., at para. 99.
402 See ibid.
403 See ibid., at paras. 128, 135.
404 Ibid., at para. 128.
405 Ibid., at para. 135.
[d]enying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as ‘disguised discrimination’. It is ... an apt description. It is disguised discrimination founded on a single base: sexual orientation.\textsuperscript{406}

207. Judge Hartmann further held that the impugned provisions were contrary to the freedom from arbitrary interference in private life. The sections, his Honor explained,

are demeaning of gay men who are, through the legislation, stereotyped as deviant. The sections also constitute ... a grave and arbitrary interference with the right of gay men to self-autonomy in the most intimate aspects of their private lives. ... [T]he four sections all go to consensual activities in private. The sections are not designed to punish sexual exploitation nor are they designed to protect against health risks. The primary purpose of the four sections is to discourage vulnerable young men from what is perceived to be a chosen lifestyle of which the majority of the community disapprove. This discouragement is achieved by the threat of severe sentences of imprisonment – indeed life imprisonment for a breach of s.118C – for conduct which ... is entirely consensual and if carried out in the same circumstances by a heterosexual or lesbian couple would be entirely lawful.\textsuperscript{407}

208. According to Judge Hartmann, it was not possible to justify the restriction of the rights to non-discrimination and equality and the freedom from arbitrary interference in private life. His Honor held that “imprisoning young men because of their sexual orientation, when there has been no abuse or exploitation of a third party,” is not “a proportionate response to any perceived need to protect those young men against moral degradation.”\textsuperscript{408}

209. On appeal, the Court of Appeal of Hong Kong upheld Judge Hartmann’s ruling.\textsuperscript{409} Delivering the opinion of the Court, Judge Ma affirmed that sections 118C violated the rights to non-discrimination and equality and the freedom from arbitrary interference in private life. His Honor dismissed the Secretary for Justice’s argument that section 118C did not infringe Leung’s rights because it was facially neutral. He held that the provision constituted a form of indirect discrimination against gay men, reasoning that

the answer lies in what Hartmann J held, namely that ‘for gay couples the only form of sexual intercourse available to them is anal intercourse.’ For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse. This is obviously unavailable as between men. It is clear then that section 118C of the Crimes Ordinance significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter.\textsuperscript{410} Judge Ma held the discriminatory ages of consent could not be legally justified. In his Honor’s view, there was no medical evidence to support an age of consent of 21 years, the Legislature had already set the age of majority at 18 years when it enacted the \textit{Age of Majority (Related Provisions) Ordinance} of 1990, and there was no evidence to suggest that a higher age of consent was needed to prevent blackmail.\textsuperscript{411} While Judge Ma conceded that the Hong Kong Legislature has a margin of appreciation in determining how to construct laws that best address the needs of the community, including in relation to ages of consent to sexual conduct, his Honor concluded that there are limits to the margin of appreciation and that, where human rights are breached without justification, as in the present case, courts are obligated to strike down unconstitutional laws.\textsuperscript{412}

\textsuperscript{406} Ibid., at para. 141.
\textsuperscript{407} Ibid., at para. 147.
\textsuperscript{408} Ibid., at para. 148.
\textsuperscript{409} See \textit{Leung v. Secretary for Justice}, [2006] 4 HKLRD 211 (H.K., Court of Appeal), at para. 47.
\textsuperscript{410} Ibid., at para. 48.
\textsuperscript{411} See ibid., at para. 51.
\textsuperscript{412} See ibid., at paras. 52-53.
Persons who engage in sexual conduct with persons below the minimum legal age of consent can be prosecuted for a range of criminal offenses in Western Pacific states. An exhaustive discussion of the different offenses is not possible in this section, but paradigmatic examples include rape and sexual intercourse with a child. For example, a man who has sexual intercourse with a girl who is less than 16 years in Malaysia, whether with or without her consent, is guilty of rape and liable to whipping and a term of imprisonment between five to 20 years.413 Defenses to charges related to engaging in sexual conduct with persons below the legally prescribed age of consent vary across jurisdictions, but include marriage,414 genuine mistake as to age,415 and closeness in age.416 Consent of the under age child is generally deemed to be irrelevant, as in the case of Papua New Guinea.417

Concluding Remarks

A health and human rights approach to ages of consent requires the careful balancing of the rights of persons less than 18 years of age to sexual autonomy and self-determination, and the freedom from sexual exploitation and abuse (having regard to the evolving capacity, age, and maturity of those persons). This means that, on the one hand, states need to recognize that young persons are sexual beings, with sexual desires, needs and interests, and that caution must be had when criminalizing sexual expression and experimentation that is a natural part of personal development and advancement as human beings. On the other hand, states must take into account the vulnerability of certain young persons to sexual exploitation and abuse and the need to put in place appropriate safeguards in cases where young persons may be incapable of providing genuine consent to sexual conduct or are forced to engage in sexual conduct against their express wishes. There is no clear consensus in the Western Pacific Region on appropriate ages of consent for sexual conduct; in the laws examined in this section, ages of consent range from 13 to 18 years of age. It is important to consider whether or not states that establish lower ages of consent have put in place appropriate safeguards to protect young persons against sexual abuse and coercion. It is also important to consider whether or not states that establish higher ages of consent threaten to undermine the sexual health of young persons by impeding their access to health care services and information, for example, regarding sexuality and safe sex practices.

A health and human rights approach to ages of consent requires that minimum ages of sexual consent are determined on a basis of equality, by which is meant that states should not establish different ages of sexual consent based on sex or sexual orientation. Leung v. Secretary for Justice418 highlights the discriminatory effect of establishing different ages of consent based on sexual orientation as well as the impact that difference in treatment has on a person’s private life, including in respect of consensually expressing one’s sexuality without fear of criminal prosecution and the development and sustaining of sexual relationships. However, the case has been criticized for its characterization of homosexual buggery as the only form of sexual expression available to gay men.419 Conceptualizing homosexual buggery in this way had the effect of perpetuating stereotypes of sexual expression between gay men and marginalizing other forms of sexual expression, such as oral sex, by indirectly categorizing them as “illegitimate” forms of such expression.

413 See Penal Code 1997 (Malay.), ss 375-376.
414 See, e.g., Crimes Act 1969 (C.I.), s 141(3); Crimes Ordinance of 1971 (H.K.), s 124(2); Penal Code 1997 (Malay.), s 375; Crimes Act 1961 (N.Z.), s 134(4); Criminal Code Act 1974 (P.N.G.), s 229G.
415 See, e.g., Crimes Act 1961 (N.Z.), s 134A; Criminal Code Act 1974 (P.N.G.), s 229P; Penal Code 1978 (Tuv.), s 135(1).
416 See, e.g., Criminal Code Act 1974 (P.N.G.), s 229F.
417 See ibid.
418 Leung v. Secretary for Justice, [2006] 4 HKLRD 211 (H.K., Court of Appeal) [Leung II].
7. **Criminalization of Violence Related to Sex and Sexuality**

213. Violence committed against persons violates and diminishes fundamental human rights recognized in all international conventions, most notably the right to life and bodily integrity.\(^{420}\) Persons may be deprived of life or liberty only in accordance with the law. All nations have made formal commitments to protect persons against violence, through their national laws and international obligations. All treaty bodies have agreed that states are required to prevent violence by state and non-state actors.\(^ {421}\) The types of violence considered in this review include sexual violence, as well as non-sexual violence directed at persons because of their real or imagined sexual practices, expressions, associations, or identities.

214. Forms of sexual violence include rape, coerced sex, child sexual abuse, sexualized forms of domestic and intimate partner violence, FGM/FGC, so-called “crimes of honor,” and trafficking into forced prostitution. It is important to recognize that sexual violence can be and is directed at women, men, girls and boys, and at any group in a position of vulnerability, though available data suggest higher incidence of sexual violence directed against women and girls.\(^ {422}\) Sexual violence in its diverse forms impairs sexual health through physical injury, psychological trauma, transmission of disease through unprotected sex, particularly HIV and STIs, unwanted pregnancy and subsequent unsafe abortion or maternal mortality.\(^ {423}\) Victims of sexual violence are often held responsible, in part or in whole, for the violence, feeling shame, dishonor, spoiled identity, and guilt that make it difficult to report incidents of violence and seek treatment and care for related physical and psychological injuries. Sexual violence is thus responsible for a significant disease burden from the national and global perspective, some portion of which becomes chronic. The extensive social and health system costs stemming from sexual violence, however, may be significantly reduced through prevention and earlier, more effective state intervention.

215. A comprehensive review of sexual health must consider violence committed against persons because of their real or imagined sexual characteristics, even though delivered through non-sexual means (i.e., non-sexual assault or injury). These real or imagined sexual characteristics or attributes might include sexual behavior or practices, same sex sexual partner, lack of virginity, extramarital sex, sexual contact with social “inferiors” or members of “enemy” groups, “bad reputation,” “dishonor” to the kin group, and sexual “disobedience.” Although the delivery of violence may not utilize rape or sexual injury as its medium, the physical and psychological effects are otherwise similar: injury, reduced ability to access health care for these injuries, and increased disease burden.

216. In addition to representing an assault on fundamental rights to life and bodily integrity, violence may be both a sign and consequence of gender discrimination. Sexual violence against women and girls reduces freedom of movement, association, and speech, as well as reducing their access to education, work, the public sphere, and political participation. Sexual violence, however, is directed not just at women and girls, but also at men, boys, and transgender persons, who are thought to transgress social norms of appropriate masculine or feminine behavior (in dress, manner, speech, or work). Sexual violence reinforces and stems from other forms of inequality as well, serving to reinforce hierarchies of power based on class, race, ethnicity, caste, or other important social divisions. Sexual violence thus serves as an extra-legal form of punishment and control, which may be administered informally by state agents or by non-state actors (family members, neighbors, or workmates). It is a draconian form of extra-legal punishment, intended to


\(^{421}\) See ibid.


\(^{423}\) See ibid; Lori Heise, with Adrienne Germain and Jacqueline Pitanguy, *Violence against Women: The Hidden Health Burden* (1994).
induce shame and diminish the reputation of the victim of violence, resulting in social exclusion, damaged reputation, and diminished life prospects.

217. In addition, sexual and non-sexual violence directed at sexually stigmatized persons reduce the capacity of persons to access and utilize other rights – the right to health and health services, freedom of movement, expression, political participation, livelihood, and free and unconforced marriage. Sexual and non-sexual violence directed at sexually stigmatized persons promotes fear and terror, especially in conditions of conflict and ethnic cleansing, erodes personal agency, and serves as a marker of stigma and subordination. National and international law must provide for effective prevention, investigation, and forms of response. The bodies of law that address violence more directly include human rights, humanitarian, refugee, and international criminal law.

218. Section 7 of the report considers how Western Pacific states have applied human rights norms and standards regarding violence related to sex and sexuality. Section 7.1 examines the legal response of Western Pacific states to domestic violence and intimate partner violence. Section 7.2 considers the legal regulation of sexual violence. Section 7.3 highlights legal prohibitions against FGM/FGC. Next, section 7.4 addresses the legal regulation of hate crimes, including crimes motivated by a person’s actual or perceived sex, sexual orientation or gender identity. Section 7.5 examines the legal protections available in the Western Pacific Region against so-called “crimes of honor” and “crimes of passion.” Last, section 7.6 addresses the legal regulation of sexual exploitation.

7.1 Domestic Violence / Intimate Partner Violence

219. Protection against domestic violence/intimate partner violence can be found in many laws throughout the Western Pacific. A number of states in the Region have enacted domestic violence-specific laws, supplementing those protections through their general laws. Malaysia, for instance, introduced the Domestic Violence Act 1994 to provide legal protection in situations of domestic violence, strengthening general protections in the Penal Code 1997 against murder and assault, for example. Other states address domestic violence/intimate partner violence in their general laws, including criminal laws and laws related to marriage and gender equality. For example, Singapore has established a protection order regime for family violence in the Women’s Charter of 1961. In China, the Law of the People’s Republic of China on the Protection of Rights and Interests of Women of 1992 prohibits domestic violence and obligates the state to take measures to prevent and eliminate that form of violence. In addition, “maltreatment” is prohibited in the Constitution of the People’s Republic of China of 2004, the Criminal Law of the People’s Republic of China of 1979 and the Marriage Law of the People’s Republic of China of 1980.

220. The types of conduct that constitute domestic violence/intimate partner violence vary throughout the Region but can include physical violence, psychological violence, economic violence and sexual violence. Domestic violence is defined broadly in Viet Nam to include “purposeful acts ... that cause or may possibly cause physical, mental or economic injuries to other family members.”

427 See Women’s Charter of 1961 (Sing.), ss 64-67.
430 Law on Domestic Violence Prevention and Control of 2007 (Viet.), art. 1(2).
is also defined to include specific forms of sexual violence, such as forced sex. The term “family violence” is defined broadly to include physical violence, psychological violence, economic violence and sexual violence. The Family Violence Act 2004 (Tas.) provides that “family violence” means:

(a) any of the following types of conduct committed by a person, directly or indirectly, against that person’s spouse or partner:
   (i) assault, including sexual assault;
   (ii) threats, coercion, intimidation or verbal abuse;
   (iii) abduction;
   (iv) stalking ... 
   (v) attempting or threatening to commit conduct referred to in subparagraph (i), (ii), (iii) or (iv); or
(b) any of the following:
   (i) economic abuse;
   (ii) emotional abuse or intimidation;
   (iii) contravening an external family violence order an interim [family violence order], a [family violence order] or a [police family violence order].

221. Protections against domestic violence in the Western Pacific apply where the victim/survivor of the violence is or, in some cases, has been, in a certain kind of relationship with the abuser. The range of relationships covered varies from jurisdiction to jurisdiction, but can include a husband and a wife, de facto partners, same sex couples, family members and members of the same household. In New Zealand, a person is considered to be in a “domestic relationship” if he or she is a spouse, partner or family member of the other person, ordinarily shares a household with the other person, or has a close personal relationship with that person. The term “domestic relationship” includes same sex and heterosexual couples and married and unmarried couples.

In the Philippines, the Anti-Violence Against Women and Their Children Act of 2004 applies to “any act or series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode ....” The Act is gender-specific insofar as it protects women and their children only against violence, however, male victims/survivors of domestic violence/intimate partner violence may be able to take advantage of general criminal offenses, including assault. Victims/survivors of domestic violence in lesbian relationships are afforded protection under the Act.

222. It is common for Western Pacific laws on domestic violence/intimate partner violence to establish protection order regimes. Protection orders are preventative in nature, insofar as they are awarded to prevent a person from engaging in future acts of violence against the person for whose benefit the order is made; they are not punitive in nature, as they do not punish perpetrators for their past acts of violence. In New Zealand, the Domestic Violence Act 1995 empowers the Family and District Courts to grant, on application, a protection order if satisfied that “the respondent is using, or has used, domestic violence against the applicant, or a child of the applicant’s family, or both” and “the making of an order is necessary for the protection of the applicant, or a child of the

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430 See ibid., art. 2(1)(e).
431 See Family Violence Act 2004 (Tas.) (Austl.), s 7.
432 See Domestic Violence Act 1995 (N.Z.), s 4(1).
433 Anti-Violence Against Women and Their Children Act of 2004 (Phil.), s 3(a).
435 Family Violence Protection Act 2008 (Vic.) (Austl.), pmbl. See also section 9(2)(a).
436 See ibid., ss 7-13.
applicant’s family, or both.\textsuperscript{437} It is a condition of every protection order that the respondent must not, \textit{inter alia}, physically or sexually abuse (or threaten to physically or sexually abuse) the protected person.\textsuperscript{438} It is an offense, punishable by a maximum term of imprisonment of 2 years, to breach a protection order without reasonable excuse.\textsuperscript{439} The Act further empowers the courts to grant orders permitting the applicant to remain in his or her home.\textsuperscript{440} Where an order is in force, a police officer may arrest, without warrant, any person it is suspected with good cause has contravened, or failed to comply with, any condition of the order.\textsuperscript{441}

223. Certain Western Pacific states give primacy to human rights in their domestic violence laws. In the Philippines, the \textit{Anti-Violence Against Women and Their Children Act of 2004} provides that

the State values the dignity of women and children and guarantees full respect for human rights. The State also recognizes the need to protect the family and its members particularly women and children, from violence and threats to their personal safety and security.

Towards this end, the State shall exert efforts to address violence \textit{...} in keeping with the fundamental freedoms guaranteed under the Constitution and the \textit{...} Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party.\textsuperscript{442}

In addition, the \textit{Magna Carta of Women} of 2009 requires state agents and officials involved in the protection and defense of women against domestic violence to undergo mandatory training on human rights and gender sensitivity.\textsuperscript{443} In the Australian state of Victoria, the \textit{Family Violence Protection Act 2008} (Vic.) recognizes that “family violence is a fundamental violation of human rights and is unacceptable in any form.”\textsuperscript{444} In Viet Nam, the \textit{Law on Domestic Violence Prevention and Control of 2007} guarantees victims/survivors of domestic violence the rights to: request authorized persons to protect their lives, dignity and other rights and legitimate benefit; request authorized persons to adopt measures to prevent, protect and forbid contact as stipulated by the Law; be provided with health services, and psychological and legal counsel; be provided with a temporary (and confidential) home; and, other rights guaranteed under Vietnamese law.\textsuperscript{445} However, the Law obligates victims/survivors to provide information relating to the violence to authorized persons, when required.\textsuperscript{446}

\textit{Concluding Remarks}

224. There is widespread protection in the Western Pacific Region against domestic violence/intimate partner violence. Western Pacific laws on domestic violence/intimate partner violence help to ensure that individuals can exercise and enjoy the rights to, \textit{inter alia}, life and health and the freedoms from violence and cruel, inhuman or degrading treatment. A health and human rights approach to domestic violence/intimate partner violence requires that legislation on domestic violence encompass more than physical violence; it must also include sexual, psychological and economic violence, taking into account the full range of violence employed by abusers.\textsuperscript{447} It

\textsuperscript{437} Ibid., s 14(1).
\textsuperscript{438} Ibid., s 19(1).
\textsuperscript{439} Ibid., s 49.
\textsuperscript{440} Ibid., s 52-58.
\textsuperscript{441} Ibid., s 50.
\textsuperscript{442} \textit{Anti-Violence Against Women and Their Children Act of 2004} (Phil.), s 2. See also section 4 (providing: “This Act shall be liberally construed to promote the protection and safety of victims of violence against women and their children.”).
\textsuperscript{443} See ibid., s 9(c).
\textsuperscript{444} \textit{Family Violence Protection Act 2008} (Vic.) (Austl.), pmbl.
\textsuperscript{445} \textit{Law on Domestic Violence Prevention and Control of 2007} (Viet.), art. 5(1).
\textsuperscript{446} Ibid., art. 5(2).
further requires that legislation prohibiting domestic violence apply to the full range of intimate relationships (past and current) in which violence takes place, undermining sexual health and human rights. Much of the legislation in the Western Pacific addressing domestic violence focuses primarily on gender-based violence against women. Such legislation reflects the reality that overwhelmingly it is women who are victims/survivors of domestic violence/intimate partner violence. Notwithstanding the statistical reality of violence in the Region, victims/survivors of other types of domestic violence/intimate partner violence, for instance same sex intimate partner violence, must also be afforded legal protection in the laws of Western Pacific states. Failure to adopt measures to protect against all types of domestic violence/intimate partner violence renders that violence invisible, allowing it to take place with state impunity, and also sends a message that victims/survivors of that violence are not equal before the law.

7.2 Sexual Violence

225. Western Pacific states criminalize a broad range of offenses involving sexual violence. These include rape, sexual assault, indecent assault, and assault with intent to rape. Some offenses are general in nature, applying to all persons, while others relate to sexual violence against certain vulnerable populations (e.g., women/girls, children, persons with an intellectual disability, prisoners) or sexual violence committed during specific times, such as wartime. Some offenses apply to sexual violence perpetrated by state agents and officials, while others apply to private individuals. Section 7.2 is concerned with the criminalization, by Western Pacific states, of rape (both of adults and children) and marital rape only.

226. It is common practice in the Western Pacific Region to criminalize rape. However, the nature and scope of protections against rape vary widely, including in respect of which persons are recognized as victims/survivors of rape, which person can be recognized legally as rapist, what acts constitute rape and in what circumstances, defenses to rape, and procedural and evidential requirements to prove rape.

227. In a number of Western Pacific states, it is a criminal offense for any person to rape another. In other states, however, it is an offense for men to rape women only. The effect of this more limited recognition is to: exclude perpetrators of other forms of rape (i.e., the rape of a man by a woman or homosexual rape) from criminal liability; minimize the harm caused by those rapes; and, deny equal protection of and before the law to victims/survivors of those rapes. Certain states have expressly recognized rape of transsexuals. For example, in 2009, the Busan District Court in South Korea convicted a 28-year-old man of raping a 58-year-old male to female transsexual. The ruling marks the first application of South Korea's rape law, which applies only to the rape of a “woman,” to a transsexual woman. In recognition of the particular vulnerability of minors to rape, criminalization of rape of children is widespread throughout Region. Western Pacific states

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449 See, e.g., Criminal Code Act 1924 (Tas.) (Austl.), s 185; Crimes Decree 2009 (Fiji), s 209(1); Crimes Act 1961 (N.Z.), ss 128(1), 128B(1); Criminal Code Act 1974 (P.N.G.), s 347(1); Anti-Rape Law of 1997 (Phil.), s 2; Revised Penal Code of the Philippines of 1930 (Phil.), s 335; Penal Code of 1999 (Viet.), arts. 111(1), 113(1).

450 See, e.g., Crimes Ordinance of 1971 (H.K.), s 118(1); Penal Code 1997 (Malay.), s 375(1); Penal Code of 1985 (Sing.), s 375(1).

typically respond to the rape of a child by punishing the act more severely than when committed against an adult.\textsuperscript{452}

228. Certain Western Pacific states, including Victoria (Australia), Fiji, New Zealand and the Philippines, have defined sexual intercourse for the purpose of rape broadly to mean to: introduce a penis into the vagina, anus or mouth of another person; introduce an object or body part (other than the penis) into the vagina or anus of another; or, perform oral sex.\textsuperscript{453} This conceptualization of rape extends beyond traditional understandings of rape as penile penetration only; it includes heterosexual rape (both rape of a woman by a man and rape of a man by a woman) and homosexual rape.

229. A number of Western Pacific states have introduced procedural or evidential reforms aimed at protecting and promoting the rights of victims/survivors of rape. For example, in 2002, Papua New Guinea abolished the requirement that a third party must corroborate the testimony of rape victims/survivors.\textsuperscript{454} The Criminal Code Act 1974 now provides that “a person may be found guilty on the uncorroborated testimony of one witness, and a Judge shall not instruct himself that it is unsafe to find the accused guilty in the absence of corroboration.”\textsuperscript{455} Since 2007, a Victorian judge is required, by the Crimes Act 1958 (Vic.), to direct the jury in a rape trial that “the jury is not to regard a person as having freely agreed to a sexual act just because – (i) she or he did not protest or physically resist; or (ii) she or he did not sustain physical injury; or (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.”\textsuperscript{456} In the Philippines, the Rape Victim Assistance and Protection Act of 1998 provides that “[i]n prosecutions for rape, evidence of complainant’s past sexual conduct, opinion thereof or of his/her reputation shall not be admitted unless, and only to the extent that the court finds, that such evidence is material and relevant to the case” (the so-called “rape shield”).\textsuperscript{457} It is not clear, however, upon what grounds evidence might be deemed “material and relevant to the case.”

230. Certain Western Pacific states have enacted laws designed to advance sexual health and maximize the exercise and enjoyment, by rape victims/survivors, of human rights and fundamental freedoms. The Philippines has committed itself, in the Rape Victim Assistance and Protection Act of 1998, to providing assistance and protection to rape victims/survivors, including through the establishment of rape crisis centers.\textsuperscript{458} These centers are required, inter alia, to provide psychological counseling and health services, secure free legal assistance for victims/survivors, ensure the privacy and safety of victims/survivors, and develop and undertake training for relevant persons on human rights-based and gender sensitive approaches to rape cases.\textsuperscript{459} Laws that guarantee assistance, support, and protection to rape victims/survivors help to advance sexual health and human rights, by ensuring victims/survivors of rape and other forms of sexual assault timely access to health care and other services and information.

231. Historically, certain Western Pacific states created exceptions to the criminal offense of rape for non-consensual sexual intercourse between husband and wife (i.e., marital rape). States’ failure to criminalize marital rape was based on an assumption that women, upon entering into the contract

\begin{thebibliography}{9}
\item See, e.g., Crimes Act 1958 (Vic.) (Austl.), s 45; Criminal Law of the People’s Republic of China of 1979 (China), art. 236; Crimes Decree 2009 (Fiji), s 207(3); Penal Code 1997 (Malay.), s 375(f); Crimes Act 1961 (N.Z.), ss 132, 134; Penal Code of 1985 (Sing.), s 376A; Penal Code of 1999 (Viet.), arts. 112, 114.
\item See Crimes Act 1958 (Vic.), s 35; Crimes Decree 2009 (Fiji), s 207(2); Crimes Act 1961 (N.Z.), ss 128-128B; Anti-Rape Law of 1997 (Phil.); Revised Penal Code of the Philippines of 1930 (Phil.), art. 335.
\item See Criminal Code (Sexual Offences and Crimes against Children) Act 2002 (P.N.G.).
\item See Criminal Code Act 1974 (P.N.G.), s 352A.
\item See Crimes Act 1958 (Vic.) (Austl.), s 37AAA(e).
\item See Rape Victim Assistance and Protection Act of 1998 (Phil.), s 6.
\item See ibid., s 2.
\item See ibid., s 3.
\end{thebibliography}
of marriage, become the property of their husbands and consented to sexual relations with them at any time.\(^{460}\) States such as Australia, Hong Kong, New Zealand, Papua New Guinea, and the Philippines, have since criminalized marital rape, often through abolishment of marital rape exceptions.\(^{461}\) The introduction of the Anti-Rape Act of 1997 in the Philippines signaled the abolishment of the marital rape exception in that country. However, marital rape is still permitted insofar as subsequent forgiveness by the victim/survivor (i.e., the wife) extinguishes criminal liability for rape.\(^{463}\) In Hong Kong, the Crimes Ordinance of 1971 provides that, for the avoidance of doubt, the criminal offense of rape “does not exclude sexual intercourse that a man has with his wife.”\(^{462}\) In January 2009, the Busan District Court in South Korea convicted a 42-year-old man, Lee, of raping his 25-year-old Filipino wife, reportedly the first conviction of its kind in South Korea.\(^{464}\) Lee was sentenced to a suspended 30-month term of imprisonment.\(^{465}\) In reaching its decision, the District Court emphasized the importance of the right to sexual self-determination within marriage.\(^{466}\)

232. In certain other states, including China and Vietnam, it is recognized that, although offenses related to rape are silent as to criminal liability for non-consensual sexual relations within marriage, there is no criminal immunity for marital rape.\(^{467}\) In the case of China, for example, it has been explained that “[t]here is no law specifically regarding marital rape, but legal scholars have recognized marital rape if the marriage is forced, in certain circumstances such as during separation, or after a divorce has been filed for.”\(^{468}\)

233. Immunity for marital rape still exists in Malaysia, Singapore and in certain Pacific Islands states, including Samoa, Tonga and the Cook Islands.\(^{469}\) Limited exceptions have been carved out, however, including where a wife is living apart from her husband, there is a court injunction restraining a husband from having sex with his wife, the parties are divorced, or where consent has been withdrawn through the process of law. In 2007, Malaysia amended its Penal Code 1997 to create an offense for any man, during his marriage, to cause hurt or fear of death or hurt to his wife or any other person, in order to have sexual intercourse with her.\(^{470}\) Two years later, in Pahang state, a man was sentenced to 5 years’ imprisonment, the maximum term possible, for forcing his wife to have sex through violence.\(^{471}\) The conviction is believed to be the first of its kind under the new law.\(^{472}\)

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\(^{461}\) See R. v. L., (1993) 174 CLR 379 (Austl., High Court); Crimes Ordinance of 1971 (H.K.), ss 117(1B), 118; Crimes Act 1961 (N.Z.), s 128(4); Criminal Code (Sexual Offences and Crimes against Children) Act 2002 (P.N.G.); Anti-Rape Act of 1997 (Phil.), ss 2; Revised Penal Code of the Philippines of 1930 (Phil.), art. 335.
\(^{462}\) See Anti-Rape Act of 1997 (Phil.), ss 2; Revised Penal Code of the Philippines of 1930 (Phil.), art. 335.
\(^{463}\) Crimes Ordinance of 1971 (H.K.), s 117(1B).
\(^{465}\) See ibid.
\(^{466}\) See ibid.
\(^{468}\) Center for Reproductive Rights and Asian-Pacific Resource Centre for Women, Women of the World: Laws and Policies Affecting Their Reproductive Lives (2005), at 61 [citation omitted].
\(^{469}\) See Crimes Act 1969 (C.I.), ss 141(3); Penal Code 1997 (Malay.), s 375; Crimes Ordinance 1961 (Sam.), ss 47(3); Penal Code of 1985 (Sing.), ss 375(4)-375(5); Criminal Offences Act of 1926 (Tonga), ss 118(2).
\(^{470}\) Penal Code 1997 (Malay.), s 375A.
\(^{472}\) See ibid.
Concluding Remarks

234. Although protection against rape is commonplace in the Western Pacific Region, the advancement of sexual health and human rights requires states to ensure their rape laws encompass all forms of rape, and not just the rape of a woman by a man. This includes rape within marriage; it cannot be a defense to a charge of rape that the perpetrator and the victim/survivor were married (or in a similar relationship). A health and human rights approach to sexual violence further requires states to define rape broadly to include non-traditional forms of heterosexual sexual intercourse (e.g., anal sex) and homosexual sexual intercourse. Defined thus, Western Pacific laws will enable all perpetrators of all forms of rape to be held legally accountable for their non-consensual sexual acts. In contrast, narrowly defined rape laws have the effect of denying recognition to certain forms of rape and excluding from criminal liability the perpetrators of such violence. This can have the further effect of re-traumatizing rape victims/survivors and creating an environment of impunity in which certain forms of rape go unpunished.

235. Reforms such as those in Papua New Guinea, Victoria, and the Philippines – that prevent a victim’s/survivor’s sexual past being introduced as evidence in a rape trial or that abolish requirements for corroborating evidence – address gender stereotypes that, historically, have saturated the law on rape and sexual assault, and which have lead to the acquittal of perpetrators, undermined sexual health, and compromised the exercise and enjoyment, by rape victims/survivors, of human rights and fundamental freedoms. These include the sex stereotype of female witnesses as “inherently untruthful” or as “intrinsically unreliable,” which implies that women are therefore more likely to lie about cases involving sexual assault, and the sexual stereotype that women should physically resist rape/sexual assault and that failure to resist on the part of a female complainant signals consent to sexual activities with the alleged perpetrator. A health and human rights approach to sexual violence requires Western Pacific states to: review their laws for gender stereotypes that contribute to and/or condone rape and other forms of sexual assault; reform those laws or offenses that are found to be based on gender stereotypes; and, take positive steps to eliminate gender stereotypes, for instance by abolishing requirements for corroborating evidence.

7.3 Female Genital Mutilation / Female Genital Cutting

236. A handful of Western Pacific states have enacted laws that criminalize FGM/FGC. In New Zealand, for example, it is a criminal offense to perform, or cause to be performed, on a female person, “any act involving female genital mutilation,” meaning “the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person.” It is also a criminal offense to remove from New Zealand, or arrange for the removal of, a girl under the age of 17 years with the intention of having FGM/FGC performed on her in another country. No girl/woman can be charged as a party to an offense of FGM/FGC that is committed upon her in New Zealand, and consent (whether actual or believed) of the girl/woman on whom FGM/FGC was performed is not a legitimate defense to that act.

237. The prohibition in New Zealand against FGM/FGC does not apply to

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474 Crimes Act 1961 (N.Z.), s 204A(2).
475 ibid., s 204A(1).
476 ibid., s 204B.
477 See ibid., s 204B.
478 See ibid., s 204A(7).
479 See ibid., s 204A(6).
(a) any medical or surgical procedure (including a sexual reassignment procedure) that is performed on
any person—
(i) for the benefit of that person’s physical or mental health; and
(ii) by a medical practitioner:
(b) any medical or surgical procedure that is performed on any person—
(i) while that person is in labour or immediately after that person gives birth; and
(ii) for the benefit of that person’s health or the health of the child; and
(iii) by a medical practitioner or a midwife or a trainee health professional, or by any other person
in any case where the case is urgent and no medical practitioner or midwife or trainee health
professional is available.  

For the purposes of determining “whether or not any medical or surgical procedure is performed
on any person for the benefit of that person’s physical or mental health, no account shall be taken
of the effect on that person of any belief on the part of that person or any other person that the
procedure is necessary or desirable as, or as part of, a cultural, religious, or other custom or
practice.” The effect of this exclusion is to prevent persons from invoking the right to participate
in cultural life or the freedom of religion as justification for performing FGM/FGC, or causing it to
be performed.

238. Certain Western Pacific states, although not criminalizing FGM/FGC per se, could prosecute
persons who perform, or cause to be performed, on a female person, any act involving FGM/FGC
under general criminal offenses, including assault occasioning grievous bodily harm. Constitutional
and legislative protections of the rights of the child, to health, and to non-discrimination and
equality, and the freedoms from gender-based violence against women, torture, cruel, inhuman or degrading treatment, and from harmful traditional practices provide additional,
albeit indirect, protection against FGM/FGC.

Concluding Remarks

239. While a handful of Western Pacific states have expressly prohibited FGM/FGC, criminalization of
the practice (other than through general criminal offenses such as assault) is uncommon in the
Region. Absence of widespread legislative protections against FGM/FGC may be reflective of the
relatively low incidence of the practice in the Western Pacific Region. However, evidence suggests
that FGM/FGC—which has no known health benefits and is practiced on women and girls only—
has increased in immigrant communities in destination countries (e.g., Australia and New Zealand)
in recent years. Research suggests that there is a need for greater protection against FGM/FGC
in the Western Pacific Region. Strengthened protection would help to ensure the exercise and
enjoyment of the rights to life, non-discrimination, health, security and physical integrity of the
person, the rights of the child, and the freedoms from gender-based violence against women and

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479 Ibid., s 204A(3).
480 Ibid., s 204A(4) [emphasis added].
482 See, e.g., Constitution of Japan of 1946 (Jap.), art. 25.
483 See Section 3 on Non-Discrimination and Equality.
484 See, e.g., Magna Carta of Women of 2009 (Phil.), ss 4(k)(1), 9.
485 See, e.g., Hong Kong Bill of Rights Ordinance of 1991 (H.K.), art. 3.
486 See, e.g., Magna Carta of Women of 2009 (Phil.), ss 4(k)(1), 9.
487 See WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008), 1 (explaining that FGM/FGC “has no known
health benefits. On the contrary, it is known to be harmful to girls and women in many ways. First and foremost, it is painful and
traumatic. The removal of or damage to health, normal genital tissue interferes with the natural functioning of the body and causes
several immediate and long-term health consequences. For example, babies born to women who have undergone female genital
mutilation suffer a high rate of neonatal death compared with babies born to women who have not undergone the procedure.”).
488 See UNICEF, Female Genital Mutilation/Cutting: A Statistical Exploration (2005), at I; UNICEF Innocenti Research Centre, Changing
from torture and cruel, inhuman or degrading treatment, all or many of which may be violated when FGM/FGC is performed on women and girls.

7.4 Hate Crimes

240. Certain Western Pacific states have enacted laws addressing hate crimes, by which is meant crimes that are motivated by hatred for, or prejudice against, a particular group of people based on common attributes such as sex, sexual orientation or gender identity. Some Western Pacific states have also introduced laws related to hate speech, meaning forms of speech that incite, or have the effect of inciting, human rights violations based on those same common attributes.

241. In Fiji, it is permissible for a law to limit, or authorize the limitation of, the freedoms of speech and expression, in order to protect individuals or groups against hate speech. The term “hate speech” is defined to include an expression that encourages, or has the effect of encouraging, discrimination on the grounds of gender and sexual orientation. In addition, the criminal offense of “urging political or inter-group force or violence” could be applied to hate crimes motivated by gender or sexual orientation. Section 65(2) of the Crimes Decree 2009 provides:

A person commits an indictable offence (which is triable summarily) if the person by any communication whatsoever ... intended by the person to be read or heard –
  (a) makes any statement or spreads any report which is likely to –
      (i) incite dislike or hatred or antagonism of any community; or
      (ii) promote feelings of enmity or ill-will between different communities ... or classes of the community; or
      (iii) otherwise prejudices the public peace by creating feelings of communal antagonism; or
  (b) makes any intimidating or threatening statement in relation to a community or religious group other than the person’s own which is likely to arouse fear, alarm, or insecurity amongst members of that community or religious group.
Penalty – Imprisonment for 10 years.

For the offense to be applied to hate crimes, it would need to be established that persons of a particular sex, sexual orientation or gender identity constitute a “community” or that feelings of communal antagonism against those persons had been created.

242. Hate crimes in New Zealand are considered an aggravating factor that must be taken into account by the courts at trial. New Zealand’s Sentencing Act 2002 states:

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:
  ... (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as ... gender identity, [or] sexual orientation...; and
  (i) the hostility is because of the common characteristic; and
  (ii) the offender believed that the victim has that characteristic.

In contrast to the position in Fiji, New Zealand has not enacted legislation prohibited hate speech.

243. Several Australian states have addressed hate crimes in their sentencing laws. The state of Victoria requires its courts, when sentencing offenders, to have regard to whether or not the offense “was

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489 See WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008), at 1.
490 See Constitution (Amendment) Act 1997 (Fiji), s 30(2)(b)(i).
491 See ibid., s 30(3).
motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated.”

The term “common characteristics” is intended to apply to groups characterized by, *inter alia*, sexual orientation, sex, and/or gender identity. In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* provides that it is an aggravating factor at sentencing if an offense was motivated by “hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular … sexual orientation …).” Although gender identity is not enumerated as a prohibited ground in New South Wales, it could be argued that it is encompassed by the non-exhaustive list. In the Northern Territory, courts are required to have regard to whether or not the offense was motivated by hate against a group of people as an aggravated factor in sentencing.

It could be argued that the obligation imposed on courts extends to consideration of motivation of hate against persons of a particular sexual orientation or gender identity.

244. Certain Australian states criminalize conduct that promotes, incites, or is motivated by prejudice against or hatred of a particular group. For example, in New South Wales, it is unlawful “for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of,” a person or group of persons on the grounds of “homosexuality” or “transgender” identity. The public act is not unlawful, however, if “done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.” The civil wrong of homosexual or transgender vilification can be elevated to a criminal offense if the person threatens physical harm towards, or towards any property of, the person or group of persons because of their homosexuality or transgendered identity, or incites others to do the same.

Concluding Remarks

245. Those Western Pacific states that have established specific offenses against, or that provide harsher penalties for, violent hate crimes (including hate crimes based on sexual orientation and gender identity) help to protect and promote the rights to, *inter alia*, life, health, non-discrimination, and liberty and security of the person, and the freedoms from violence and cruel, inhuman or degrading treatment. Effective protection against hate crimes in the Region requires more Western Pacific states to take steps to protect persons against violent crimes perpetrated by individuals or groups of individuals, and police failure to respond to acts of violence, because of the victim’s (actual or perceived) sex, sexual orientation or gender identity. Laws against hate crimes can be strengthened by offenses related to hate speech provided that those offenses do not unreasonably stifle the freedom of expression, for instance, by extending to private conversations between individuals.

7.5 Crimes of Honor / Crimes of Passion

246. The defense of provocation has been applied throughout the Western Pacific Region to justify so-called “crimes of honor” and “crimes of passion.” Historically, provocation defenses have

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494 See Attorney-General Rob Hulls, Second Reading Speech, Hansard (Sept. 17, 2009), at 3358.
498 Ibid., ss 38S(2)(c), 49ZT(2)(c).
499 Ibid., ss 38T(1), 49ZTA(1).
500 For the purposes of this report, the so-called term “crimes of honor” is defined to encompass “a variety of manifestations of violence against women, including ‘honour killings,’ assaults, confinement or imprisonment, and interference with choice in marriage, where the publicly articulated ‘justification’ is attributed to a social order claimed to require the preservation of a concept
been invoked to “justify” the murder (or assault) of women engaged in non-conforming (often sexual) behavior. Recent examples show that provocation has also been used in an effort to “justify” the murder (or assault) of gay men for their alleged sexual advances toward heterosexual men (i.e., the “gay panic” defense).\(^{302}\) Underlying the provocation defense is the notion that the victim/survivor provoked the defendant to murder or assault them through their behavior (e.g., infidelity, homosexual sexual advances). In the case of so-called “crimes of honor,” the perpetrator invokes the defense of provocation to justify the murder or assault of the (usually female) victim, which it is alleged was essential to restore the honor of the perpetrator, the victim’s family, or the community. In the case of so-called “crimes of passion,” the perpetrator invokes the defense to justify the murder or assault of the victim, which it is alleged occurred due to a loss of self-control induced by the victim’s behavior towards or affecting the perpetrator. The effect of use of the provocation defense has been to excuse from criminal liability, either wholly or in part, persons (usually men) who allegedly commit violent crimes in the name of “honor” or “passion.”

247. Several Western Pacific jurisdictions, including New Zealand and the Australian states of Tasmania, Victoria, and Western Australia have repealed the provocation defense.\(^{504}\) Laws in the Australian Capital Territory and the Northern Territory (Australia) include provocation as a partial defense to murder but exclude non-violent sexual advances alone as a legitimate basis for use of that defense.\(^{504}\) In the Northern Territory, the Criminal Code Act 1983 (NT) states that “conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant: (a) is not, by itself, a sufficient basis for a defence of provocation; but (b) may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.”\(^{505}\) The effect of the exclusion is to preclude “gay panic” as a sole basis for the legitimate use of the provocation defense.

248. The defense of provocation is, however, still widely available throughout the Western Pacific Region. The criminal laws of a large number of Western Pacific states provide that, in certain circumstances, “provocation” exempts, or is a mitigating factor in determining the criminal liability of, perpetrators of murder and, in some cases, other acts of violence, including assault.\(^{506}\) For example, in the Philippines, the Revised Penal Code of the Philippines of 1930 provides:

Any legally married person who having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro. If he shall inflict upon them physical injuries of any other kind, he shall be exempt from punishment. These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eighteen years of age, and their seducer, while the daughters are living with their parents. Any person who shall
promote or facilitate the prostitution of his wife or daughter, or shall otherwise have consented to the infidelity of the other spouse shall not be entitled to the benefits of this article. 507

Concluding Remarks

249. Widespread availability in the Western Pacific Region of the provocation defense has the effect of undermining the fundamental freedom from violence as well as the rights to life, health, non-discrimination, and security of the person, for example. Those Western Pacific states that have not already repealed the provocation defense should take steps to repeal or, at the very least, limit the application of the defense and its effect on sexual health. In addition, all Western Pacific states should give serious consideration to the adoption of specific criminal offenses related to so-called “crimes of honor” or “crimes of passion.” In Good Practices in Legislation on “Harmful Practices” against Women, an expert group meeting convened by the United Nations Division for the Advancement of Women noted that “[e]xperience has shown that without a specific offence for so-called ‘honour’ crimes, judges will often employ defences such as provocation in order to reduce the sentence of those who have committed such crimes, or perpetrators will not be charged at all. Where legislation defines crimes of ‘honour’ too narrowly, or uses wording that may be narrowly constructed, it is highly probable that not all so-called ‘honour’ crimes will be punished.” 508

7.6 Trafficking for Forced Prostitution

250. Protection against trafficking for forced prostitution 509 is widespread throughout the Western Pacific Region, with numerous states prohibiting both trafficking in persons 510 and trafficking in children, 511 as well as other related offenses such as exploitation of trafficked persons, profiting from exploitation of trafficked persons, and unlawful recruitment for the purposes of trafficking in persons. Western Pacific states typically regulate trafficking for forced prostitution either through a criminal law framework or anti-trafficking legislation.

251. Cambodia’s Law on the Suppression of Human Trafficking and Sexual Exploitation of 2007 is illustrative of the latter approach. The Law aims to suppress the acts of human trafficking and sexual exploitation in order to protect the rights and dignity of human beings, to improve the health and welfare of citizens, to preserve and enhance good national customs, and to implement the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational

507 See Revised Penal Code of the Philippines of 1930 (Phil.), art. 247.


509 Persons can be trafficked for a multitude of reasons. This section is concerned with the trafficking of persons for forced prostitution only.


512 See, e.g., Criminal Code Act 1995 (Cth.) (Austl.), ss 271.1, 271.4, 271.7; Trafficking and Smuggling of Persons Order of 2004 (Brunei), s 5; Criminal Law of the People’s Republic of China of 1979 (China), arts. 240-242; Crimes Decree 2009 (Fiji), ss 111, 114, 117; Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children of 1999 (Jap.), art. 8; Anti-Trafficking in Persons Act 2007 (Malay.), s 14; Crimes Act 1961 (N.Z.), ss 98D-98E; Anti-Trafficking in Persons Act of 2003 (Phil.), s 6; Women’s Charter of 1961 (Sing.), ss 141-142; Penal Code of 1999 (Viet.), art. 120.
Organized Crimes, or other international instruments or agreements with regard to human trafficking that the Kingdom of Cambodia has ratified or signed.\textsuperscript{512}

In so aiming, the Law makes it clear that responses to trafficking should not only be concerned with holding traffickers criminally liable for their actions, but also with prevention of trafficking and the protection and promotion of human rights of trafficked persons.

252. The Philippines provides a further illustration of a Western Pacific state that has enacted trafficking-specific legislation, namely the \textit{Anti-Trafficking in Persons Act} of 2003. Echoing closely the definition in the \textit{United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crimes},\textsuperscript{513} the Act defines "trafficking in persons" as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.\textsuperscript{514}

The \textit{Anti-Trafficking in Persons Act} establishes a number of offenses related to trafficking, including the following:

4. Acts of Trafficking in Persons

It shall be unlawful for any person, natural or judicial, to commit any of the following acts.

(a) To recruit, transport, transfer, harbor, provide, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;

(b) To introduce or match for money, profit, or material, economic or other consideration, any person or, as provided for under Republic Act No. 6955, any Filipino women to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;

(c) To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading them to engage in prostitution, pornography, sexual exploitation, forced labor or slavery, involuntary servitude or debt bondage;

(d) To undertake or organize tours and travel plans consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography or sexual exploitation;

(e) To maintain or hire a person to engage in prostitution or pornography;

(f) To adopt or facilitate the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;

(g) To recruit, hire, adopt, transport or abduct a person, by means of threat or use of force, fraud deceit, violence, coercion, or intimidation for the purpose of removal or sale of organs of said person; and

(h) To recruit, transport or adopt a child to engage in armed activities in the Philippines or abroad.

5. Acts that Promote Trafficking in Persons

The following acts which promote or facilitate trafficking in persons shall be unlawful:

(a) To knowingly lease or sublease, use or allow to be used any house, building or establishment for the purpose of promoting trafficking in persons;

(b) To produce, print and issue or distribute unissued, tampered or fake counseling certificates, registration stickers and certificates of any government agency which issued these certificates and

\textsuperscript{512} Law on the Suppression of Human Trafficking and Sexual Exploitation of 2007 (Camb.), art. 1.


\textsuperscript{514} \textit{Anti-Trafficking in Persons Act} of 2003 (Phil.), s 3(a).
stickers as proof of compliance with government regulatory and pre-departure requirements for the purpose of promoting trafficking in persons;
(c) To advertise, publish, print, broadcast or distribute, or cause the advertisement, publication, printing broadcasting or distribution by any means, including the use of information technology and the internet, of any brochure, flyer, or any propaganda material that promotes trafficking in persons;
(d) To assist in the conduct of misrepresentation or fraud for purposes of facilitating the acquisition of clearances and necessary exit documents from government agencies that are mandate to provide pre-departure registration and services for departing persons for the purpose of promoting trafficking in persons;
(e) To facilitate, assist or help in the exit and entry of persons from/to the country at international and local airports, territorial boundaries and seaports who are in possession of unissued, tampered or fraudulent travel documents for the purpose of promoting trafficking in persons;
(f) To confiscate, conceal, or destroy the passport, travel documents, or personal documents or belongings of trafficked persons in furtherance of trafficking or to prevent them from leaving the country or seeking redress from the government or appropriate agencies; and
(h) To knowingly benefit from, financial or otherwise, or make use of, the labor or services of a person held to a condition of involuntary servitude, forced labor, or slavery.

253. In addition to establishing a number of offenses related to trafficking, the Anti-Trafficking in Persons Act provides that

the State values the dignity of every human person and guarantees the respect of individual rights. In pursuit of this policy, the State shall give highest priority to the enactment of measures and development of programs that will promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons but more importantly, to ensure their recovery, rehabilitation and reintegration into the mainstream of society.


In so providing, the Act makes it clear (like in Cambodia) that it is not enough to effectively address trafficking to simply hold traffickers accountable for violating human rights; steps must also be taken in the Philippines to eliminate the causes of trafficking and to protect and promote the rights of persons already trafficked. With respect to the care and protection of trafficked persons, the Act requires the Philippines Government to “establish and implement preventive, protective and rehabilitative programs for trafficked persons.” It also requires that trafficked persons have access to certain mandatory services, including emergency shelter, counseling, free legal services, and medical or psychological services, to ensure their recovery, rehabilitation and reintegration into the mainstream of society. In addition, the Act treats trafficked persons as victims and affords them legal protection against prosecution for crimes related to trafficking.

254. In Malaysia, the Anti-Trafficking in Persons Act 2007, establishes a number of offenses related to trafficking in persons, which is defined as “the recruiting, transporting, transferring, harbouring, providing or receiving of a person for the purpose of exploitation.” The Act, which was introduced in 2007 “to provide for the offence of trafficking in persons, the protection and support
of trafficked persons, [and] the establishment of the Council for Anti-Trafficking in Persons ...,” provides:

Offence of trafficking in persons
12. Any person, who traffics in persons not being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine.

Offence of trafficking in persons by means of threat, force, etc.
13. Any person, who traffics in persons not being a child, for the purposes of exploitation, by one or more of the following means:
   (a) threat;
   (b) use of force or other forms of coercion;
   (c) abduction;
   (d) fraud;
   (e) deception;
   (f) abuse of power;
   (g) abuse of the position of vulnerability of a person to an act of trafficking in persons; or
   (h) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

Offence of trafficking in children
14. Any person, who traffics in persons being a child, for the purposes of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

Like in the Philippines, trafficked persons are immune from criminal prosecution for illegal entry into and unlawful residence in Malaysia and for procurement or possession of fraudulent travel or identity documents. Consent of trafficked persons to the act of trafficking is irrelevant to determining the legal of persons charged with the offenses above.

Concluding Remarks

255. The focus in certain Western Pacific anti-trafficking laws on prevention of trafficking and the protection and promotion of human rights of trafficked persons is consistent with the advancement of sexual health in the Region. The shift beyond a criminal law framework helps to ensure that traffickers are held legally accountable for their actions, while at the same ensuring trafficked person immunity from criminal prosecutions and access to health and other essential services. It also helps to ensure that Western Pacific states adopt a systematic approach to addressing the underlying causes that lead to persons being trafficked for forced prostitution and other purposes.

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520 Ibid., pmbl.
521 See ibid., s 2 (defining the term “exploitation” as “all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.”).
522 See ibid., s 25.
523 See ibid., s 16.
8. Access to Health Care Services Related to Sex and Sexuality

256. Health services and health systems (which organize and ensure the appropriate delivery of health services and goods) are essential for the promotion of sexual health. The structure and delivery of health care must be seen as contributing to the experience of being a full member of one’s society. A health and human rights-based approach to health services focuses not only on the technical and clinical quality of services, but also on the design, delivery and use of these services. In addition to evaluating the impact of health services on the rights to health and life of all persons without discrimination, a human rights-based analysis examines how the structure and delivery of sexual health services follows other key values of human rights. Moreover, a rights-based framework recognizes that untreated or inadequately treated sexual health conditions are themselves often a source of stigma for affected persons and groups.

257. In addition to evaluating health services in relation to customary public health criteria, it is necessary to assess the legal and policy framework of health services with attention to values of equality, dignity, freedom and autonomy for all. Such evaluations would address the laws and policies determining the distribution, content, accessibility, delivery, and accountability for inadequate services. While the state is ultimately responsible for insuring the availability, accessibility, acceptability, and quality of health services, the state itself is not the only provider of those services. The state remains responsible, however, for ensuring that non-state actors do not discriminate, and that non-state actors providing services to marginalized populations are not themselves discriminated against or face restrictions on their freedoms of association and expression.

258. Four key aspects of accessibility for health services have been spelled out in international human rights law and are applicable to services necessary for sexual health:

- **non-discrimination**, by which is meant in the sexual health context that health services must be accessible without discrimination, including on the basis of sex, gender, sexual conduct, marital status or sexual orientation;
- **physical accessibility**, which requires health services to be within safe physical reach of all persons, including persons in detention, refugees, and women facing restrictions on movement;
- **economic accessibility**, by which is meant that health services are affordable to all, including marginalized populations; and,
- **information accessibility**, meaning the right to seek, receive and impart information and ideas concerning sexual health, including the availability of relevant services, even services challenging dominant sexual mores.

Each of those four aspects must be considered in regard to the wide array of health services important to sexual health. The scope of those services includes the prevention and treatment of STIs and HIV/AIDS (including voluntary testing, post-exposure prophylaxis, and access to ARV therapies), contraception (including condoms and emergency contraception), and abortion services. Laws that erect barriers to accessing contraception or safe abortion services have the effect of reducing the sexual wellbeing of girls and women, in that they are denied the fundamental right to determine if and when sexual activity will become reproductive. Other laws fail to provide adequate access to goods and services in the context of sexual assault (such as forensic tests and treatment of injuries and STIs).

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126 See ibid.
Discriminatory exclusion of certain categories of persons (e.g., married women, men, adolescents, persons assaulted in conflict situations, persons in detention, persons in refugee or displacement settings) can result in preventable ill-health, compounding the initial abuse and falling disproportionately on marginalized populations. Other laws regulate access to ART and other infertility services on the grounds of individuals’ marital status or perceived or actual sexual orientation. Excluding unmarried women and lesbians from access to infertility services violates the rights to non-discrimination and the highest attainable standard of reproductive and sexual health.\textsuperscript{527}

In general, the analysis of health service laws must consider not only the necessary scope of the laws, but the barriers that specific populations and marginalized sub-groups may face: does the law on its face or in practice exclude unmarried women, from accessing contraception, for example? Does the law provide for information and distribution in ways that will reach young married women or men who have sex with men? Is the privacy of persons seeking information and services protected explicitly, or does the law subordinate their rights to police registration of HIV status of people in sex work? Are there other laws penalizing behavior, such that a person seeking care would be reluctant to disclose his or her actual sexual practices? Do the services reach populations in prison and non-nationals, including both migrants and refugees? Are the insurance or social welfare schemes supporting access to health services non-discriminatory, and adequately held accountable to meeting health and human rights protections?

HIV status (actual or imputed) can function as a major barrier to accessing general health services or, conversely, HIV-positive status can result in coercive services (e.g., mandatory testing). Certain groups, such as sex work or men having sex with men, can also be singled out for coercive health services (e.g., mandatory health checks and tests), which are often rationalized as public health measures but which in fact fail both on effectiveness and ethical grounds.\textsuperscript{528}

Persons under 18 years of age face particular barriers in accessing sexual health services, care, and information. The necessity of consent for health services and procedures is fundamental. While in regard to minors, parents or guardians may retain formal powers to consent, respect for the principles of the evolving capacity of the child and his or her best interest can result in minors accessing appropriate and necessary services without recourse to parental involvement or consent. The principle of evolving capacity suggests that older adolescents should be able to access services without consent of parents or guardians. In addition, the right to enjoy confidentiality in regard to sexual health services and care should be respected. Persons less than 18 years of age have the right to accurate, comprehensive, and age-appropriate sexual health information, regardless of the nature of the provider (state or non-state actor). Sexual health information must not be restricted on discriminatory grounds (e.g., sex, gender, or sexual orientation). Young persons’ right to information includes information about sexual health services.

State obligation for non-discriminatory access to health services includes the obligation to eliminate both formal and substantive discrimination. Formal discrimination consists of codified differential access and treatment (both exclusion from treatment or services, or mandated and non-consensual treatment). Substantive discrimination includes practices, such as derogatory, humiliating, and inferior treatment in health facilities and programs, which are legally mandated but to which the law does not provide adequate redress. Both formal and informal discrimination

\textsuperscript{527} See Section 3.2 on Sexual Orientation (discussing discrimination on the ground of sexual orientation) and Section 3.4 on Marital Status (discussing discrimination on the ground of marital status).

\textsuperscript{528} Systems that impose mandatory testing on certain groups, on the grounds of their alleged or real higher risk of transmission of HIV or other STIs, often drive persons further from care and services. These mandatory tests also violate medical norms in that testing is not provided for the health benefit of those tested, but for the good of others (most clearly shown in laws that mandate tests without providing for treatment of tested individuals). See Section 3.5 on HIV Status (discussing discrimination on the ground of HIV status, including mandatory HIV testing).
excludes or reduces the access of persons from care, treatment, and information necessary for
sexual health, increasing mortality and morbidity.

264. Section 8 of the report examines how Western Pacific states apply human rights norms and
standards in the regulation of access to health care services related to sex and sexuality. Section
8.1 explores the legal regulation of access to contraceptives in the Western Pacific Region. It also
examines laws that restrict childbearing or establish non-enforceable ideal family sizes. Section 8.2
identifies whether or not Western Pacific states guarantee women access to abortion services.
Last, section 8.3 explores the legal regulation of access to health services related to HIV/AIDS.
Whilst the availability and accessibility of health care services related to sex and sexuality are often
regulated through policies, strategic plans or other non-legislative instruments (e.g., drug approval
processes), this section, like the others in this report, is concerned with how access to those health
services is addressed in Western Pacific laws and jurisprudence only.

8.1 Contraceptives

265. In general, Western Pacific states support access to contraceptives, although they adopt
divergent legal approaches to ensuring that end, and many regulate contraceptives in policies
rather than legislation.

266. China has put in place one of the most comprehensive legal frameworks on access to
contraceptives, the breadth and depth of which stems (at least in part) from the Government’s
efforts to control China’s birthrate. State agents and officials in China are required to take steps to
ensure that individuals are guaranteed an informed choice of safe, effective and appropriate
methods of contraception, thereby enabling individuals to practice safe sex and to exercise and
enjoy their right to decide on the number and spacing of children. Together with the Constitution
of the People’s Republic of China of 2004, the Population and Family Planning Law of 2001 imposes
explicit obligations on married couples to practice family planning, including to prevent incidences
of unwanted pregnancies and to be conscientious in adopting contraceptive methods and in
accepting the guidance of family planning technical services. In providing that husbands and
wives bear equal responsibility for family planning and in guaranteeing the right to bear
and not to bear children, the Population and Family Planning Law and the Law of the People’s
Republic of China on the Protection of Rights and Interests of Women of 1992 respectively uphold
the rights to, inter alia, sexual autonomy and non-discrimination and equality.

267. China is the only Western Pacific state to impose mandatory restrictions on childbearing. The
Population and Family Planning Law, which enshrines China’s one child policy, provides that each
couple may have one child only. Persons who fail to comply with that policy are liable to
financial, administrative and/or disciplinary penalties. In recognition of the disproportionate
effect the one child policy has had on women in China, the Population and Family Planning Law
prohibits discrimination against, and the mistreatment of, infertile women and women who give
birth to girls. It also prohibits discrimination against, and mistreatment and abandonment of, baby

529 But see Executive Order No. 003: Declaring Total Commitment and Support to the Responsible Parenthood Movement in the City
of Manila and Enunciating Policy Declarations in Pursuit Thereof of 2000 (Phil.).
530 See Population and Family Planning Law of the People’s Republic of China of 2001 (China), art. 19. See also Regulations for the
Management of Family Planning Technical Services of 2001 (China).
531 See Population and Family Planning Law of the People’s Republic of China of 2001 (China), arts. 17, 20; Constitution of the
People’s Republic of China of 2004 (China), art. 49(2).
532 See Population and Family Planning Law of the People’s Republic of China of 2001 (China), art. 17; Law of the People’s Republic of
China on the Protection of Rights and Interests of Women of 1992 (China), art. 51.
533 See ibid., arts. 40-43.
In prohibiting those forms of treatment, the Population and Family Planning Law endeavors to uphold the rights to non-discrimination and equality and the freedoms from gender-based violence and cruel, inhuman and degrading treatment.

In Viet Nam, access to contraceptives is regulated through such laws as the Law on Gender Equality of 2006 and the Population Ordinance of 2003. In an example of good practice, the Law on Gender Equality guarantees men and women equal rights in decisions related to the use of contraceptives, family planning and other measures for safe sex. Adopting a rights-based approach to contraception, the Population Ordinance states that its underlying principles include to guarantee the “initiative, voluntariness and equality of each individual and family in birth control, and reproductive health care ....” The Ordinance enshrines Vietnamese citizens’ rights to: decide freely on the number and spacing of children; choose appropriate family planning measures; and, access quality and confidential population services. It also requires state agents and officials to create and sustain favorable conditions for family planning, with priority given to marginalized and disadvantaged communities. In contrast to the Chinese position on family size, there is no legally mandated limit on the number of children that a person or couple may have in Viet Nam. However, Vietnam’s Population Ordinance of 2003 requires Vietnamese citizens to practice family planning and have small families.

Concluding Remarks

Access to contraceptives and related information is essential to the advancement of sexual health. Laws that promote access to contraceptives enable individuals to practice safe sex, which, in turn, helps to prevent unwarranted pregnancy and the transmission of HIV and others STIs. Laws, such as in China and Viet Nam, that require shared responsibility for family planning help to advance sexual health, by acknowledging that both men and women bear responsibility for the adoption of measures that promote safe sex. In contrast, laws that impede access to contraceptives expose individuals to HIV and other STIs and deprive them of the right to make an autonomous decision to become, or not to become, parents. Assuming particular individuals do wish to become parents, those laws also deprive them of the ability to decide freely and responsibly on the number and spacing of their children. Laws that impede access to contraceptives have particular health implications for women. Exposing women to the risk of unintended pregnancies imposes on them the physical burdens of procreation. In the case of multiple pregnancies in particular, this can jeopardize women’s lives and comprise their health, including too-frequent deliveries or when women seek out underground and unsafe abortions.

Although China’s efforts to limit its population have resulted in widespread access to contraceptives, they have also had the effect of diminishing men’s and women’s sexual autonomy and restricted their private choices of the design and composition of their families. A health and human rights approach requires that states not diminish the capacity of individuals to make their own decisions regarding parenthood and the number and spacing of their children. Although Viet Nam’s Population Ordinance is not nearly as far-reaching as China’s one child policy, there is still the potential to impact sexual health if the direction to have a small family is carried out or enforced in a way that restricts access to sexual health care services or information.

See ibid., art. 22.

See Law on Gender Equality of 2006 (Viet.), arts. 17(2), 18(3), 41(5).

Population Ordinance of 2003 (Viet.), art. 2(2).

See ibid., arts. 4(1)(a)-4(1)(c), 10(1)(a)-10(1)(b).

See ibid., arts. 5(2), 9(3), 11(1).

See Population Ordinance of 2003 (Viet.), arts. 4(2)(a), 10(2).
8.2 Abortion Services

271. A number of Western Pacific laws (e.g., Victoria (Australia), China, Singapore, Viet Nam) guarantee unrestricted access to safe and lawful abortion services, at least during certain periods of pregnancy. The more common approach in the Western Pacific Region is to criminalize abortion in whole, or in part with exceptions for specific indications, including where necessary to save a woman’s life and to preserve her physical and/or mental health, and in cases of sexual assault.

272. In Singapore, the Termination of Pregnancy Act of 1974 guarantees women unrestricted access to abortion during the first 24 weeks of pregnancy. Women who are more than 24 weeks pregnant may also access abortion services provided that it is necessary to save their life or to prevent grave permanent injury to their physical or mental health. Abortions must be performed only with the voluntary and informed consent of the woman undergoing the procedure. Persons who, by means of coercion or intimidation, compel or induce a pregnant woman to abort a pregnancy may be convicted of an offense under the Act. In addition to guaranteeing the right to voluntary and informed consent, the Act protects the freedom from arbitrary interference in private life by prohibiting relevant persons from disclosing, without the patient’s consent, any information related to the termination of a pregnancy. Health providers are not obligated, under the Act, to provide abortion where they have a conscientious objection, unless such treatment is "immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman."

273. In 2008, the Australian state of Victoria enacted the Abortion Law Reform Act 2008 (Vic.), which repealed criminal offenses related to bringing about, attempting to bring about, or assisting a person to bring about, an unlawful termination of pregnancy. Under the Act, a registered medical practitioner may perform an abortion on a woman who is not more than 24 weeks pregnant without restriction as to reason. A registered medical practitioner may perform an abortion on a woman who is more than 24 weeks pregnant, provided that two registered medical practitioners reasonably believe that abortion is appropriate having regard to all relevant medical circumstances and the woman’s current and future physical, psychological and social circumstances. In addition, the Act permits a registered pharmacist or nurse to supply or

541 See Abortion Law Reform Act 2008 (Vic.) (Austl.), ss 4-5; Criminal Law of the People’s Republic of China of 1997 (China);
Termination of Pregnancy Act of 1974 (Sing.), s 4(1)(a); Law on the Protection of People’s Health of 1989 (Viet.), art. 44.
544 See, e.g., Crimes Decree 2009 (Fiji), ss 234-236; Emerson v. Emerson, Criminal Appeal No. 16 of 1976 (Fiji, Supreme Court); Offences Against the Person Ordinance of 1865 (H.K.), ss 46-47A; Penal Code 1997 (Malay.), s 312; Crimes Act 1961 (N.Z.), s 187A(1)(a); Contraception, Sterilisation, and Abortion Act 1977 (N.Z.), s 33.
545 See, e.g., Offences Against the Person Ordinance of 1865 (H.K.), s 47A; Crimes Act 1961 (N.Z.), s 187A(2)(b).
546 Termination of Pregnancy Act of 1974 (Sing.), s 3(1). But see section 3(3) (providing: “No treatment to terminate pregnancy shall be carried out by an authorised medical practitioner unless the pregnant woman — (a) is a citizen of Singapore or is the wife of a citizen of Singapore; (b) is the holder, or is the wife of a holder, of a work pass issued under the Employment of Foreign Manpower Act (Cap. 91A); or (c) has been resident in Singapore for a period of at least 4 months immediately preceding the date on which such treatment is to be carried out, but this subsection shall not apply to any treatment to terminate pregnancy which is immediately necessary to save the life of the pregnant woman.”).
administer drugs to a woman for the purposes of an abortion, which has the effect of helping to ensure women’s timely access to abortion. As well, the Act requires registered health practitioners, who have a conscientious objection to abortion, to inform their patient of that objection and to refer her to a registered health practitioner without a conscientious objection. A registered medical practitioner is required to perform an abortion in an emergency situation, regardless of any conscientious objection, where such procedure is necessary to preserve the life of the pregnant woman.

Concluding Remarks

274. Laws, such as Singapore’s and Victoria’s, that guarantee women access to abortion services protect women’s sexual autonomy and advance their reproductive and sexual health. They achieve those objectives by affording women the opportunity to decide how they will respond to the consequences of sexual activity (including pregnancy caused by rape or incest), and determine courses of action that reflect their reproductive and sexual health needs, priorities, and interests. Conversely, those Western Pacific laws that criminalize abortion – a medical procedure needed by women only – and punish women who have abortions, impede women’s access to health care services and information. In so doing, they reduce women’s moral agency and sexual autonomy, impair their ability to decide how they will respond to the consequences of sexual activity and pregnancy, and compromise women’s reproductive and sexual health. Laws that criminalize abortion but provide exceptions for specific indications, such as women’s health or sexual violence, enable women to respond to certain of the consequences of sexual activity, but they do not recognize the full range of sexual rights needed to advance women’s health. While Western Pacific states may claim an interest in protecting prenatal life, a health and human rights approach requires that efforts to ensure such protection are balanced with states’ duty to ensure pregnant women’s dignity and autonomy, and their rights to life, health and bodily integrity. Laws and policies that support interventions to reduce miscarriages or that ensure health system measures to decrease neonatal deaths protect prenatal life in ways that are compatible with women’s reproductive and sexual rights.

8.3 Health Care Services Related to HIV/AIDS

275. A health and human rights-based approach to HIV/AIDS requires non-discriminatory access to quality and affordable health care services and information. Laws that guarantee access to health services related to HIV/AIDS have been adopted by a number of Western Pacific states (e.g., Cambodia, China, the Philippines, Papua New Guinea, and Viet Nam) as, too, have laws that prohibit discrimination on the ground of HIV in the health sector. Such laws aid the prevention and treatment of HIV/AIDS and help to ensure the realization of a range of human rights, including the rights to life and the highest attainable standard of sexual health.

554 See ibid., ss 6-7.
555 See ibid., s 8(1).
556 See ibid., ss 8(3)-8(4).
560 See Section 3.5 on HIV Status (discussing discrimination on the ground of HIV status).
276. Viet Nam has enacted one of the more comprehensive legal frameworks on access to HIV/AIDS-related health services. The Law on HIV/AIDS Prevention and Control of 2006 provides for HIV/AIDS prevention and control measures and guarantees care, treatment and support for HIV-infected persons. 561 With respect to prevention and control measures, the Law obligates the Vietnamese Government to facilitate the implementation of harm reduction measures, including mobilization and encouragement of the use of condoms, to curb the spread of HIV infection. 562 Toward that end, the Decree Detailing the Implementation of a Number of Articles of the Law of HIV/AIDS Prevention and Control of 2007 guarantees certain “target groups” (e.g., sex workers, drug addicts, HIV infected persons and persons having same sex relations) access to free or subsidized condoms. 563 However, the Vietnamese Government has reported that access to condoms may be compromised for certain target groups because carrying condoms can be regarded as evidence of unlawful sex work. 564

277. With respect to measures for the care, treatment and support of persons living with HIV/AIDS, the Law guarantees a right to enjoy medical treatment and health care and a right to refuse medical examination and treatment. 565 The Law obligates the State to, inter alia, facilitate access for eligible persons to ARVs and, in this regard, provides:

(1) HIV-infected people shall be facilitated by the State to have access to ARVs through programs and projects suitable to socio-economic conditions.
(2) People who have been exposed to or infected with HIV due to occupational accidents, people who have been infected with HIV due to risks of medical technique, HIV-infected pregnant women and HIV-infected under-six children shall be provided ARVs free-of-charge by the State.
(3) ARVs paid with the state budget or sponsored by domestic and foreign organizations and individuals shall be provided free-of-charge to HIV-infected people at HIV/AIDS treatment establishments in the following priority order:
   (a) HIV-infected children of between full 6 years and under 16 years old;
   (b) HIV-infected people who actively participate in HIV/AIDS prevention and control;
   (c) HIV-infected people meeting with particularly difficult circumstances;
   (d) Other HIV-infected people.
(4) The Government shall issue detailed regulations on the management, distribution and use of ARVs.
(5) The Prime Minister shall provide for the application of necessary measures to respond to requirements for ARVs in emergency cases. 566

In addition, the Law provides that the State shall support the prevention and control of mother-to-child transmission of HIV, including by providing HIV-infected mothers with substitute milk for children less than six months of age. 567 More generally, the Law guarantees all persons, including persons undergoing HIV testing or who have been exposed to HIV, access to HIV/AIDS prevention and control counseling services. 568 It also stipulates that persons with medical insurance, who contract HIV, are entitled to have their health expenses covered by that insurance. 569

561 See Law on HIV/AIDS Prevention and Control of 2006 (Viet.), arts. 1(1), 6(8).
562 See ibid., arts. 2(15), 21.
566 See ibid., arts. 39.
567 See ibid., art. 6(7).
568 See ibid., arts. 22, 26, 36.
569 See ibid., art. 40.
The Philippines AIDS Prevention and Control of 1998 guarantees persons with HIV/AIDS access to basic health care services in public hospitals in the Philippines, and expressly prohibits hospitals and health institutions from denying a person access to those services or charging a higher fee for them, because of his or her actual, perceived or suspected HIV/AIDS status. The Act imposes specific obligations on local government units to provide community-based HIV/AIDS prevention and care services, and requires HIV testing facilities to provide free counseling to persons who undergo HIV/AIDS testing. The Act also expressly prohibits insurance companies from denying a person health, accident or life insurance because of his or her actual, perceived or suspected HIV/AIDS status.

A handful of Western Pacific states (e.g., Cambodia, China, Papua New Guinea, the Philippines and Viet Nam) have proscribed mandatory HIV testing in their laws and regulations and imposed obligations to respect the privacy of persons requesting HIV tests. For example, in Papua New Guinea, mandatory HIV testing is proscribed under the HIV/AIDS Management and Prevention Act 2003. The Act stipulates that a HIV test may be requested and performed only with the voluntary informed consent of the person to be tested. In addition to the requirement of voluntariness, it is unlawful to require or coerce certain persons, including job applicants, persons seeking to adopt or marry, or prisoners, to undergo an HIV test, produce proof that he or she is not HIV-positive, or answer questions that tend to show that he or she is infected or affected by HIV/AIDS. It is also unlawful for a person, who is not a medical practitioner, to request an HIV test, or for a person to perform such a test unless required to do so by a medical practitioner or other authorized person. Specific protections are provided in the Act for persons less than 12 years of age and persons with a disability. In the case of the former, if it is determined that the child is incapable of understanding the meaning and consequences of undergoing an HIV test, voluntary informed consent must be obtained from that child’s parent or guardian. In the case of the latter, if it is determined that the person’s disability renders him or her incapable of consenting to a HIV test, voluntary informed consent must be obtained, in order of priority, from that person’s guardian, partner, parent, or child who has attained 18 years of age.

Notwithstanding the requirement in the HIV/AIDS Management and Prevention Act 2003 that HIV testing be voluntary and undertaken with informed consent, courts may require a person to undergo an HIV test if that person has been charged with intentionally transmitting HIV resulting in unlawful homicide or assault occasioning bodily harm. Medical practitioners may also request HIV testing for a patient under their treatment and care if that patient is unconscious or otherwise unable to give consent, or if the practitioner believes that such a test is clinically necessary or
desirable in the interests, and for the purposes of treatment, of that patient. In addition, the Migration Act 1978 permits a migration officer to require a person seeking entry into Papua New Guinea to undergo a medical examination for the purposes of allowing the officer to form an opinion as to whether or not that person should be refused entry because he or she is suffering from a disease that could endanger the community. The effect of this permission is to restrict the freedoms of movement and from arbitrary interference with private life, of persons living with HIV/AIDS.

281. In Nap v. Nap, the District Court of Papua New Guinea had occasion to consider the ban on mandatory HIV testing. In that case, the District Court affirmed that HIV tests must be voluntary and that courts are prohibited from forcing a person to undergo HIV testing. The Court explained that forcing a person to be tested for HIV outside the limited circumstances permitted in the HIV/AIDS Management and Prevention Act 2003 “may amount to an interference of an individual right and be deemed unconstitutional.” The Court determined that it was for the respondent to decide voluntarily whether or not to have an HIV test, and not for the court to order him to do so.

282. Notwithstanding that ruling, the District Court ordered that the respondent refrain from having sex with his wife until his HIV status had been confirmed, thereby effectively requiring the respondent to undergo testing if he wished to have sexual intercourse with his wife in the future. In granting the order, the Court stated that the respondent had failed to satisfy the legal obligation to take all reasonable steps to avoid contracting and spreading HIV. It reasoned that, by engaging in extramarital affairs, the respondent had exposed his wife to the risk of HIV and thereby placed her life in jeopardy. In the Court’s view, it was significant that the respondent, through his infidelities, had already transmitted a STI to his wife. In reaching its finding, the District Court did not consider whether or not use of condoms or the adoption of other measures would have satisfied the legal obligation to take reasonable steps to prevent the transmission of HIV to his wife. Instead, the Court stated, without explaining its reasoning, that use of condoms offered the applicant no guarantee that she would not contract HIV from her husband. While the gender or sexual dynamic of the respondent’s relationship with his wife may have influenced the Court’s ruling, that was not made clear in the Court’s reasoning. It was also unclear from the Court’s reasoning why use of condoms, a comparatively less intrusive means of reducing the transmission of HIV, was not preferred over a court order.

Concluding Remarks

283. Laws that guarantee access to quality and affordable health care services and information are critical to ensuring that persons living with HIV/AIDS can treat their condition and live a full and dignified life. While persons with HIV/AIDS may be able to access health care services and information in the same way as the general population, fear of discrimination, stigma and, for example, violence, may prevent them from accessing those health services. States should implement laws that establish the conditions necessary to ensure that persons with HIV/AIDS can access health services, including ARVs and information on how to practice sex safely. This might, as in the case of the Philippines, mean explicitly prohibiting hospitals and health institutions from

582 See Migration Act 1978 (P.N.G.), s 8(1)(b)(ii), 8(2).
584 Ibid., at para. 5.
585 Ibid., at para. 6.
586 See ibid., at para. 15.
587 See ibid.
588 Ibid., at paras. 10-14.
590 See Nap v. Nap, [2006] PGDC 22 (P.N.G., District Court of Justice), at paras. 2, 8.
denying a person with HIV/AIDS access to health services or charging them more for those services than a person without HIV/AIDS.

284. A health and human rights-based approach to HIV/AIDS requires non-discriminatory access to quality and affordable health care services, but a person should never be forced to undergo mandatory HIV testing. Laws that permit mandatory HIV testing have not been shown to promote better sexual health outcomes. Moreover, in addition to violating the freedom from arbitrary interference in private life, mandatory testing laws often target groups, such as sex workers, who are considered to be at higher risk of contracting HIV. Laws should require health professional to seek the voluntary and informed consent of persons before conducting HIV testing. They should also require health professionals to respect the privacy of persons undergoing HIV testing; information related to a person’s HIV status should not be disclosed to a third party without consent.

See Section 10.2 on Access to Health Care Services and Information for Sex Workers.
9. Education, Information and Expression

285. A human rights-based approach to sexuality education is derived from the rights to health, to education, to non-discrimination and equality, to dignity, to participate, and to enjoy the benefits of scientific progress, as well as the freedoms of expression and to seek, receive and impart information. Sexuality education, as a component of education, is understood to be essential to the full development of human personality, in addition to being an essential means to protect oneself from sexual ill-health, whether from STIs, unwanted pregnancies, or sexual violence and abuse.  

286. Many different laws are essential to ensure adequate education, in general, and adequate sexuality education, in particular. They include administrative regulations regarding educational curricula, constitutional and legislative provisions on right to education, and equality and non-discrimination laws (regarding sex, gender, sexual orientation, race, religion, disability, health status, and national status, among other grounds). Other important laws engaged to support effective sexuality education include those protecting freedoms of speech and expression, and laws guaranteeing teachers and students safe and non-discriminatory environments.

287. Sexuality education is understood to include not only accurate, age appropriate, scientifically supported information on health, sexual health and sexuality, as an aspect of human conduct, but also ideas on non-discrimination and equality, tolerance, safety and respect for the rights of others, which are delivered through trained agents using age and context appropriate pedagogical methods. In particular, a human rights-based approach to sexuality education requires the participation and contributions of young people, particularly adolescents and older teens.

288. Sexuality education, coupled with comprehensive access to information, contributes to health by promoting individuals’ ability to have preferences for, and act on, decisions that protect their health, and to determine the number and spacing of children. Sexuality education is also essential to each person’s ability to develop themselves and their sense of self-worth, particularly in regard to any decision regarding their sexual and gender identity, and sexual behavior, as an aspect of their personhood. Sexuality education is aimed at prevention of, and creating understanding of when and how to seek treatment or other forms of assistance for, ill-health, abuse, or other sexuality-related concerns. Accessible and good quality sexuality education can contribute to breaking silences over sexual violence, sexual exploitation and abuse, and inspire those who suffer from sexual dysfunction to seek assistance. Furthermore, sexuality education can serve as an important tool for equality and dignity in society – when presented in a non-discriminatory and non-judgmental manner – it can challenge gender stereotypes and fearful or negative attitudes towards sexuality, including towards those who engage in non-conforming, consensual sexual practices.

289. Failures to develop and deliver accurate and comprehensive sexuality information not only contribute to ill-health, unwanted pregnancies, exposure and transmission of STIs, and increased rates of HIV infection, but also to reduced use of services and treatment for HIV and other STIs and reduced access to appropriate contraception and family planning services and services responding to pregnancy and complications of unsafe abortion. Barriers in law or practice to implementing

594 Education must be paired with access to services and resources necessary to act on the knowledge gained from that education, which includes links to other preventive systems, as relevant, such as human papilloma virus (HPV) vaccine and cervical cancer screening.
comprehensive sexuality education contribute to inequality, violence and exclusion as well as to higher incidence of otherwise preventable STIs, unwanted pregnancies, abortion (particularly unsafe abortion), and other complications. Often states’ laws and policies exclude specific topics or persons from sexuality education as part of a larger policy of gender stereotyping, or imposition of particular religious or cultural beliefs about the intrinsic need of sexual activity to be legitimized by reproduction, and the specific obligation of girls or women to submit to husbands in regard to sexual decision-making, or the “sinfulness” of same sex behavior or sex outside of marriage. These exclusions run counter to evidence-based evaluations of effective sexuality education, and conflict with basic rights protections for education. Moreover, sexuality education should not replicate gender stereotyped understandings of sexual behavior in the name of promoting respectful behaviors, such that girls are taught that their duty is to be chaste in the face of the “natural” lust of boys.

290. Comprehensive sexuality education may include information and ideas regarding the effective use of contraception, protection against HIV and other STIs, protections against sexual violence, and diversity of sexual orientation and sexual practices. This form of education is associated with better health outcomes for girls and women, as well as sexual minority populations. Comprehensive sexuality education requires strong legal protections of the rights to education and non-discrimination and the freedom of expression, as it relies on the dissemination of information that may challenge religious leaders and dominant but gender stereotyped beliefs around the roles of men and women, for example. Educational curricula that limit sexual education to a content promoting abstinence before marriage, for instance, fail to provide the information that sexually active youth need, even if they delay sexual activity. Under international human rights standards it is clear that states must refrain from arbitrarily censoring scientifically accurate sexual health information or dispensing misinformation in sexuality education programs.

291. Sexuality education can be conveyed by both state and non-state actors, in both formal and non-formal, educational settings. While the state has the primary duty to ensure sexuality education in its system of primary and secondary education, to reach the widest range of people, voluntary organizations must be involved in sexuality education and protected from intimidation and censorship. For example, reaching people in sex work, or men who have sex with men with sexuality education is often done most effectively by voluntary organizations rather than the state, which is associated with police abuse and exclusionary policies. National laws, such as those for expression, association and non-discrimination, and laws that ensure the ability to participate in the benefits of scientific progress and in cultural and political life are essential to protecting voluntary groups who provide important sexuality education to marginalized groups.

292. Sexuality education must be flexible in its formats, so that it reaches both school going and non-school going youth (especially street youth) and must be available to adults throughout their lives. Women, in particular, often face de facto bars to accessing comprehensive sexuality education; and special steps, supported by law, should be taken by the state to reach young married adolescents (who often leave school early). Sexuality education must also be understood to be required throughout life, as older people should not be excluded from the benefits of new information and understanding of sexuality in their lives.

293. It is important to distinguish rights-based, necessary and affirmative measures that must be taken to reach targeted populations from the rights-denying and less effective tactics that assume categories of information are relevant to specific populations and deny comprehensive sexuality education. For example, assuming that only “gay-identified” populations need information about anal sex (in the face of evidence that heterosexual youth are engaging in anal sex to avoid

pregnancy) and condom use is to fail to provide effective sexual health education. To assume laws on education for women are all that is needed to ensure population-wide use of contraception and the rights of women (as if men in heterosexual relationships do not need to understand family planning) or to assume that men who have sex with men only need education on condom use with men (as if they did not also have sex with women) is to provide insufficient sexuality education, and thus to fail to protect the health and rights of the general populations as well as the rights of women and girls.

294. Children have specific rights to age-appropriate and comprehensive sexuality education that is made accessible to them regardless of sex/gender, disability or national status. International rights standards elaborate the importance of sexuality education, especially for adolescents, to support them in determining their lives and identities, and to live free of abuse and preventable illness and unwanted pregnancy. Sexuality education, understood to be an obligation of the state, is often in constructive tension with the rights of parents and families. While families have the right to raise their children consistent with their religious and cultural beliefs, the rights of the child to objective and scientifically supported information (commensurate with their evolving capacity) is coupled with the duty of the state to present information and education in an objective and pluralistic manner to that child. This set of rights and duties means that parents cannot bar their children from receiving such critical information.597

295. It is important to note that the impact of education on sexual health is not limited to sexual health education. Education in general is a vehicle for realizing other rights,598 and to contributing to all persons’ ability to live lives of equality, dignity and freedom.599 The importance of non-discriminatory access to education for all is critical to supporting the sexual health and human rights of persons who might otherwise be stigmatized and excluded from formal and informal opportunities for education, such as unmarried pregnant girls and women, men or women failing to conform to gender norms, or persons in sex work, etc.600 Laws that mandate or permit discrimination against students or teachers on the grounds of sexual orientation, gender expression or marital status, therefore, are violations of the right to education but also contribute to the stigmatization of persons excluded on those grounds, and thus ultimately erect barriers to their health.

296. In international human rights, information and expression are understood to have a dynamic relationship with each other. Freedom of expression implies a corresponding right: the freedom to hear the ideas and opinions that are expressed. Information is rendered meaningless if it cannot be expressed to others, whether through scholarly, scientific, popular, medical, political, or artistic


598 See CESCR, General Comment No. 13: The Right to Education, UN Doc. E/C.12/1999/10 (1999), at paras. 1 (stressing that “education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”), and 6 (providing that education should exhibit the following interrelated and essential features: availability; accessibility; acceptability; and, adaptability.).

599 See UDHR, art. 26.

600 See Section 3 on Non-Discrimination and Equality.
channels. Freedom of expression implies the right of everyone to hear and know of the opinions of others, and to access information on which those opinions are based.601

297. The exchange of information through free expression is the basis of democratic and pluralistic societies. Rights to information and expression are essential to equality, participation, freedom of conscience and autonomy. A human rights-based approach to expression, however, must consider permissible state-based constraints on rights, found within core human rights treaties and declarations. Under international law standards, unpopular, offensive, dissident sexual speech, and even speech deemed “against public morals” under national law, may be protected.

298. A diverse array of laws provide the framework for permissible speech, publication, performance, research, and other forms of expression, on the one hand, and permissible limitations on the rights of information and expression, on the other hand. These laws include criminal codes, intellectual property law, and administrative/regulatory laws. In many states, legal limitations have been placed on material featuring sexuality as the subject matter. Often (but not always) using criminal law, limitations utilize terms such as “obscene,” “indecent,” “offensive,” “pornographic,” “prurient,” or “against public morals” to indicate the material that cannot be published, distributed, purchased, or viewed/read, as the case may be.

299. Often these terms, and the definitions provided for them, are problematic. First, they fail to give notice about what they cover: it is not possible in advance to infer what type of sexual content is prohibited or limited, without extensive research into prosecutions and convictions in that country and legal system. Second, the terms are highly variable and unstable: terms have undergone changes in meaning, as law evolves in a single state, and they also vary considerably in meaning from one national legal system to another. Caution is thus advised against unwarranted assumptions that the nature of the prohibited texts or images can be easily known from the legal term employed. Historically, the same term (“obscenity”) has been applied to scientific and medical research; health and self-help instruction aimed at consumers; artistic expression, including novels, paintings, and performances; erotic instructional material; recreational and popular entertainment, including songs and humor; political satire; and, expression of unconventional political speech about sexual behavior or arrangements in society. Terms such as “obscenity” or “pornography” have decidedly negative connotations in some political contexts. The label “obscenity” affixed to sexual health texts or images makes it difficult for advocates to question the designation or defend the material in question, for fear of being labeled deviant or immoral. Indeed, historical struggles over what can be said and shown about sexuality are, at their core, contests over social and political questions. Tellingly, “obscenity” was the legal term used to penalize family planning information in the late nineteenth and early twentieth centuries in a number of countries.

300. Information and expression important to sexual health spans genres, fields of knowledge, and media. It includes medical, social, and scientific research (information about sexual dysfunction, new methods of family planning, or surveys of sexual practices within a population); legal information (about rights to access sexual health services, non-discriminatory treatment, and legal avenues for seeking redress); and, ideas and opinions (demonstrating diverse perspectives on sexuality, including those of minority persons, opinions, and practices). Expression and information also include social and political analysis of sexual arrangements and norms in society, and creative and artistic expression that describes human experience, including works that allude to or depict behavior or speech deemed sexual. Expression and information may be conveyed via


texts, images, and speech, as well as personal expression through dress, deportment and demeanor. Methods of communication may be verbal or non-verbal, and involve many types of media (e.g., print, film and video, electronic, the internet, performance) and many domains (e.g., newspapers, songs, books, scholarly papers, movies, television, internet sites, and the radio).

301. Limitations on the rights of information and expression regarding sexual health can be life threatening. Broad censorship of factual information about family planning for women and men, legal access to abortion to save the life or health of the woman, or HIV/AIDS prevention denies individuals the ability to protect their lives and health. In addition, restrictions on information reinforce discrimination, gender stereotypes and inequality in society (for example, when information and expression are denied to unmarried adolescent girls, married women lacking husbands’ permission, or those in same sex sexual relationships). Restrictions or censorship of research about "difficult" or disfavored topics or groups (for example, non-reproductive or non-marital sexual practices, or groups espousing controversial ideas about sexuality) can interfere with scientific exploration and discovery, resulting in increased levels of sexually transmitted infections, unwanted pregnancies, unsafe abortion and other preventable burdens of disease and ill-health.

Moreover, denials of other forms of expression, such as restrictions on association, political speech, publication, protests or rallies, can result in indirect but powerful health effects. Such restrictions curtail the ability of persons and groups (women protesting sexual abuse in health clinics, men who have sex with men needing safe sex information, or transgender persons and sex workers seeking redress for police abuse) to present grievances, make rights claims, and influence law and public policy that effectively address their needs regarding sexual health and human rights.

302. The application of human rights principles to material with sexual content has a limited history, because affirmative rights to sexual expression is relatively recent as a topic for human rights standards elaboration. Under international human rights law, states are given limited powers to restrict the fundamental freedom of expression: restrictions are permitted only as determined by law, and as necessary to protect national security, public safety, public morals, public order/ordre public, public health, or the fundamental rights and freedoms of others.

303. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide a roadmap for evaluating when and whether the permissible grounds for limiting rights (as listed above) have been met. In the short section on “public morality,” the Siracusa Principles note that “[s]ince public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.”

607 Ibid., at para. 27. The Siracusa Principles also state that “[t]he margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant,” at para. 28. This means that the state is scrutinized closely for regulations that impact the rights of marginalized groups or ideologically dissident views differentially. “The protected interest of public morals is a further ground on which States can interfere with the right to freedom of expression. Typical examples of restrictions in this domain relate to pornography and blasphemy. The Special Rapporteur notes that public morals differ widely and depend in large measure on the national context that includes matters of politics and culture. A margin of appreciation must therefore be accorded to the State. The Special Rapporteur would like to note, however, that restrictions applied on the freedom of expression should not be applied in
Siracusa Principles affirm a rights-oriented test of proportionality (including concern for the abusive nature of the criminal law as a mode of regulating speech) and non-discrimination.  

304. The lack of an extensive doctrine on sexual speech and rights to sexual expression in international human rights law presents an important opportunity for developing a coherent, health and human rights approach, as stringent national criminal laws often have direct effects on the sexual health and overall rights of individuals, as well as long-term chilling effects on the provision of effective services and information necessary to promote sexual health. Sexual health information and expression is vital to all persons and groups (not just marginalized populations) in attaining the highest standard of health, well-being, and personal development. 

305. Material with sexual content is sometimes prohibited on grounds that it is harmful to the character, dignity or morals of women. Such laws regarding women constitute a form of gender stereotyping, which draws on assumptions that women are keepers of chastity or should remain untouched by sexual information; thus, women are ‘harmed’ simply by viewing such material or being viewed as sexual actors. Other arguments for limiting material with a sexual content assert that it may lead to violence against women. Gender inequality in general and violence against women in particular are complex social problems, influenced by discriminatory norms, beliefs, and practices in law and society. Depictions of women (sexual and non-sexual) may be stereotyped or convey ideas of women’s inferiority. While women’s rights bodies express concern that gender-stereotyped images may contribute to discrimination and thus seek measures to discourage their ubiquity and promote alternative and more diverse images, they do not endorse the criminalization and censorship of these materials. 

306. The regulation of how and when persons under 18 can access material with sexual content, whether in print, internet or other media, is a specific domain of censorship. While some international standards permit prior restraint in the service of protecting minors, other human rights-based standards recommend that adolescents in particular require access to information and education about sexuality, in order to protect their sexual health as well permit them to share in the benefits of scientific progress and participate in their communities and culture. Information about sexuality and sexual health is also important to the development and expression of adolescents’ full personality without discrimination. Reasonable time, manner and place restrictions may be allowed to inhibit accidental viewing of age-inappropriate material with sexual content by minors, but assumptions of hypothetical harm of incitement to sexual activity are disallowed. 

307. Many legal regimes criminalize the production and distribution materials deemed to be “obscene,” but do not prohibit the mere possession of such material, regimes that also criminalize
possession are recognized as invading private life to a disproportionate extent, unjustifiable under basic protections of privacy.

308. It should be noted that the category of material called “child pornography” is handled differently under many legal regimes.\textsuperscript{614} Photographs, videos, or other depictions of sexual behavior or sexualized poses of, actual minors are not permitted, and many states have adopted criminal statutes toward this end. The freedom from sexual abuse or exploitation of persons less than 18 years of age is of paramount importance and obligation of the state.\textsuperscript{615} A human rights-based approach to child pornography focuses on coercion of, and harm to, actual children, regardless of the sex and gender of the minor. Many current criminal law regimes, aiming at discouraging any market for child pornography and in light of the alleged relationship between such a market and incentives for actual abuse of a minor, criminalize possession of such images, as well as their production and distribution. Criminalization of possession is an emerging topic in international criminal law, although the rights standards are also evolving, and many international agreements may not pass national constitutional or international rights review.\textsuperscript{616} As an element of contemporary rights evolution, however, some regions have exempted from penalization material with a sexual content made by adolescents by and for their own private use.\textsuperscript{617}

309. Section 9.1 of this report examines how Western Pacific regulate access to sexuality education as well as education and information on sexual health more broadly, including on safe sex practices, infertility, sexual dysfunction, and the management and prevention of HIV/AIDS and other STIs. Although education and information related to sex, sexuality and sexual health is commonly regulated through the policies of Western Pacific states,\textsuperscript{618} provision is made in a number of laws in the Region for education and information on HIV/AIDS, family planning and, for example, sexual health issues associated with sex work. Section 9.1, like the other sections in this report, is limited to a discussion of those laws. Section 9.2 explores the legal regulation in Western Pacific states of information with sexual content. It focuses primarily on laws related to materials characterized as “obscene” or “indecent,” and briefly considers laws on pornography. In so doing, it examines the limitations placed on the freedom to seek, receive and impart information on sex, sexuality and sexual health.

9.1 Education and Information on Sex, Sexuality and Sexual Health

310. In the Philippines, state agents and officials are obligated to provide women with appropriate, timely, complete, and accurate information and education on family planning methods, HIV/AIDS prevention and management, infertility and sexual dysfunction.\textsuperscript{619} State agents and officials are also obligated to provide sexuality education and health services to young girls.\textsuperscript{620} In providing education and information in these areas, the Government is required to pay due regard to:

\begin{enumerate}
\item The natural and primary right and duty of parents in the rearing of the youth and the development of moral character and the right of children to be brought up in an atmosphere of morality and rectitude for the enrichment and strengthening of character;
\item The formation of a person’s sexuality that affirms human dignity; and
\end{enumerate}

\begin{footnotes}
\textsuperscript{615} See ibid.
\textsuperscript{616} See ibid.
\textsuperscript{617} See Westeson, European Report (2010).
\textsuperscript{618} See, e.g., Fiji National HIV/AIDS Strategic Plan (2007–2011) (Fiji); National Strategic Plan on HIV/AIDS and STIs 2009-2015 (Mong.).
\textsuperscript{619} See Magna Carta of Women of 2009 (Phil.), ss 17(a)(3)-17(a)(5), 17(a)(9), 17(b).
\textsuperscript{620} See ibid., s 17(a)(4).
\end{footnotes}
In addition to the obligations outlined above, state agents and officials in the Philippines are required to provide education and information to men and women concerning the prevention and treatment of HIV/AIDS and other STIs. The Philippine AIDS Prevention and Control Act of 1998, for instance, requires the integration into school curricula of information on the causes, transmission and prevention of HIV/AIDS and other STIs. The Act provides that the content and scope of courses on HIV/AIDS and STIs and the methodologies used to convey information to students must be determined in consultation with parent-teacher-community associations, private school associations, school officials and other (unspecified) interest groups. It also prohibits use of material deemed to be "sexually explicit" in HIV/AIDS education in schools.

311. In the health sector in the Philippines, public and private health care workers are obligated to provide patients with information on HIV/AIDS as part of the delivery of health services. Toward that end, health care workers receive training on ethical issues associated with HIV, including confidentiality and informed consent. Such training helps to ensure that health care workers respect the rights of HIV patients. Training on confidentiality, for instance, helps to ensure that an appropriate balance is struck between patients' right to privacy and the broader public health objective of preventing HIV infection. Beyond the education and health care sectors, the Act requires the provision of education and information on HIV/AIDS and other STIs in the employment sector and local communities, and to Filipinos travelling abroad and tourists. Persons found guilty of providing misleading information on HIV/AIDS prevention and control are liable to a term of imprisonment between two months and two years, a fine and, where appropriate, revocation of their professional or business license.

312. In Viet Nam, access to education and information related to sex, sexuality and sexual health is guaranteed in a range of laws. The Population Ordinance of 2003 guarantees Vietnamese citizens the right to access information on population, as well as quality, convenient and confidential information on family planning. The Law on HIV/AIDS Prevention and Control of 2006 establishes a general right to access education and information on HIV/AIDS prevention and control and, in this regard, affords priority access to persons with HIV and groups deemed to be at particular risk of HIV infection (e.g., drug users, sex workers). The Law imposes explicit obligations on state agents and officials as well as education institutions, employers and non-state actors to provide education and information on HIV/AIDS prevention and management. The Ministry of Education and Training, for example, bears primary responsibility for developing school curricula on sexual and reproductive health, including on such issues as HIV/AIDS prevention and control. The Ministry also bears responsibility for directing education institutions to implement
that curricula, and education institutions are responsible for providing that curricula to their students. The Law stipulates that education and information on HIV/AIDS must aim to: raise awareness of methods of prevention and control of HIV/AIDS; change attitudes and behaviors; and, combat the stigmatization of, and discrimination against, persons infected with HIV. In addition, the Law requires that education and information on HIV/AIDS be accurate, accessible, non-discriminatory and relevant to the targeted audience, taking into account factors such as age, gender and culture. It also states that education and information on HIV/AIDS should address, among other issues, the: causes, methods of prevention and treatment of HIV; impacts of the disease on human health and life; and, rights and obligations related to HIV/AIDS prevention and control.

313. In China, access to sex education in schools is enshrined in such laws as the Population and Family Planning Law of the People’s Republic of China of 2001, the Law of the People’s Republic of China on the Protection of Minors of 1991 and the Regulations on AIDS Prevention and Treatment of 2006. Together, these laws require schools to provide age-appropriate education in sexual health and HIV/AIDS prevention and treatment. In the health context, medical and health institutions are obligated, under the Law on Maternal and Infant and Health Care of 1994, to provide pre-marital health-care services, including information on sex, human reproduction and genetic diseases. In addition, the Regulations on AIDS Prevention and Treatment of 2006 obligate state agents and officials and certain employers to provide education and information related to the prevention and treatment of HIV/AIDS and other STIs. For example, state agents and officials are responsible for organizing and developing education on HIV/AIDS prevention and treatment for people living with HIV/AIDS, their family and the general public. In the health context, medical professionals are required to educate their patients about AIDS prevention and treatment when diagnosing, treating and providing counseling for AIDS or STIs, and population and family planning agencies are required to do the same when providing population and family planning services to clients.

314. In New Zealand and the Australian state of Victoria, sex workers and their clients are guaranteed access to sexual health information. The Prostitution Reform Act 2003 requires operators of businesses of prostitution in New Zealand to adopt and promote safe sex practices, including by taking “all reasonable steps” to provide oral or written health information to sex workers and their clients and, in the case of brothel owners, by displaying sexual health information prominently in brothels. The Public Health and Wellbeing Act 2008 (Vic.) requires brothel proprietors and escort agencies in Victoria to “provide easily accessible written information about the transmission of sexually transmitted infections in a variety of relevant languages for the benefit of sex workers and clients.” brothel proprietors and escort agencies are under an obligation to provide that information in a language familiar to the sex worker if he or she has difficulty understanding it in English. In an example of good practice, brothel proprietors and escort agencies are also

636 See ibid., arts. 12(4), 15(1).
637 See ibid., art. 9(1).
638 See ibid., art. 9(2).
639 See ibid., art. 10.
641 See Law on Maternal and Infant and Health Care of 1994 (China), art. 7(1).
642 See ibid., arts. 10-21.
643 See ibid.
644 See ibid., art. 12.
645 See ibid., arts. 10-11.
646 See Prostitution Reform Act 2003 (N.Z.), ss 8(1)(b)-8(1)(c).
648 See ibid., ss 162(3), 162(6).
required to take reasonable steps to ensure that information provided about STIs is medically accurate. Requiring operators of businesses of prostitution to take all reasonable steps to provide health information helps to facilitate access to health care services and information for sex workers. This has the effect of ensuring that sex workers are equipped with the means and knowledge necessary to practice sex safely, which, in turn, aids the prevention and treatment of HIV and other STIs, and the realization of the right to the highest attainable standard of sexual health.

Concluding Remarks

315. Laws that require state agents and officials to take steps to ensure access to accurate and evidence-based education and information, aid the development and safe expression of sexuality and the enjoyment of the highest attainable standard of sexual health. Those laws help to equip individuals with knowledge and skills necessary to carve out, develop, and understand their own sexuality and sexual identity, and to practice safe sex. They also help to arm individuals with essential knowledge to enable them to decide on the number and spacing of children, avoid unwanted pregnancy, address infertility and sexual dysfunction, and prevent and manage HIV/AIDS and other STIs. Conversely, failure to provide access to accurate and evidence-based education and information and/or censoring, withholding or intentionally misrepresenting that information can negatively impact the development of sexuality and compromise a person’s sexual health, for example, by increasing a person’s exposure to infertility or sexual violence.

316. While laws, such as the Philippines AIDS Prevention and Control Act, that provide for community consultation regarding the content and scope of courses on sexuality education can promote the right to participate, caution must be exercised to ensure consultation does not threaten the comprehensiveness, accuracy, or evidence-based nature of information disseminated to students. A health and human rights approach requires that sexual health information be based on medical evidence and not on political or religious ideology or grounded in harmful gender stereotypes that perpetuate discrimination, contribute to social exclusion or marginalization, or compromise sexual health. Caution must also be exercised to ensure that blanket bans on use of materials deemed (vaguely and provocatively) “sexually explicit” do not undermine efforts to educate students about sexuality, by limiting their access to information that is essential to enabling them to develop and express safely their sexuality and their exercise and enjoyment of sexual health.

9.2 Regulation of Information with Sexual Content

317. Information with sexual content is tightly regulated in the Western Pacific Region. States typically exercise a high degree of control over the production, importation, sale, dissemination and (for instance) exhibition of information with sexual content, commonly referred to as “obscene” or “indecent” information/material and/or pornography.

649 See ibid., ss 162(2), 162(5).

650 See, e.g., Criminal Code Act 1924 [Tas.] (Austl.), s 138; Crimes Act 1969 (C.I.), ss 138-139; Control of Obscene and Indecent Articles Ordinance of 1987 (H.K.); Prevention of Child Pornography Ordinance of 2003 (H.K.); Penal Code of 1907 (Jap.), art. 175; Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children of 1999 (Jap.); Penal Code 1965 (Kirib.), s 166; Penal Code 1997 (Malay.), ss 292-293; Crimes Act 1961 (N.Z.), s 124; Films, Videos, and Publications Classification Act 1993 (N.Z.); Customs and Excise Act 1996 (N.Z.), s 54(1)(aa); Criminal Code Act 1974 (P.N.G.), ss 177, 228, 229, 229I, 229H-229V; Revised Penal Code of the Philippines of 1930 (Phil.), art. 201; Crimes Ordinance 1961 (Sam.), s 43; indecent Publications Ordinance 1960 (Sam.); Penal Code of 1985 (Sing.), ss 292-293; Indecent Advertisements Act of 1941 (Sing.); Penal Code 1966 (Sol. Isl.), ss 173-174; Penal Code 1978 (Tuv.), s 166, 169(m); Penal Code 1988 (Van.), ss 93, 147; Obscenity Act of 1973 (Van.). Although laws on pornography can have implications for sexual health, an examination of those laws and their sexual health impacts is beyond the scope of this report.
318. The terms “obscene” and “indecent” cover a broad spectrum of information and material across Western Pacific jurisdictions, with varying degrees of sexual content. Whether or not certain information/material is characterized as obscene or indecent and in what circumstances are rarely made clear in Western Pacific laws. Those Western Pacific states that criminalize dealings in obscene or indecent information/material typically define obscenity and indecency by reference to ambiguous and subjective community standards of morality. In Fiji, for example, it is a criminal offense to deal in obscene information/material tending to “corrupt morals.” Western Pacific states’ interference in dealings with information/material with sexual content are – with the exception of child pornography laws that aim to protect children against sexual exploitation and abuse – rarely linked to an explicit requirement that harm be present. Hong Kong’s obscenity law, the Control of Obscene and Indecent Articles Ordinance of 1987, represents a departure from the general approach. Material is characterized as obscene in Hong Kong “if by reason of obscenity it is not suitable to be published to any person” and as indecent “if by reason of indecency it is not suitable to be published to a juvenile.” Both terms are defined to include violence. By connecting obscenity and indecency to harm in this way, Hong Kong’s law helps to strike a balance between the freedoms from sexual exploitation, abuse, and violence and the freedom of sexual expression.

319. Papua New Guinea provides an illustration of the tight regulation of obscene and indecent material in the Western Pacific. A person will be found guilty of a misdemeanor in Papua New Guinea, under section 228(1) of the Criminal Code Act 1974, if he or she knowingly and without lawful justification or excuse

(a) publicly sells or exposes for sale –
   (i) an obscene book or other obscene printed or written matter; or
   (ii) an obscene picture, photograph, drawing or model; or
   (iii) any other object tending to corrupt morals; or

(b) exposes to view in a place to which the public are permitted to have access, whether or not on payment of a charge for admission –
   (i) an obscene picture, photograph, drawing or model; or
   (ii) any other object tending to corrupt morals; or

(c) publicly exhibits any indecent show or performance ...; or

(d) for the purposes of, or by way of, trade or sale, or for distribution or public exhibition, makes, produces or has in his possession an obscene writing, drawing, print, painting, picture, poster, emblem, photograph or cinematograph film, or any other obscene object; or

(e) for a purpose referred to in Paragraph (d)–
   (i) imports, conveys, or exports; or
   (ii) causes to be imported or exported; or
   (iii) puts into circulation,
   any obscene matter or thing referred to in that paragraph; or

(f) carries on or takes part in a business (whether public or private) concerned with any obscene matter or thing referred to in this section, or deals in, distributes, exhibits publicly or makes a business of lending any such obscene matter or thing; or

(g) with a view to assisting in an act made punishable by this section, advertises or makes known by any means that a person is engaged in any such act, or how or from whom any obscene matter or thing referred to in this section can, directly or indirectly, be procured.

651 Crimes Decree 2009 (Fiji), s 377.
653 Ibid.
654 See ibid., s 2(3).
655 See Medicines and Cosmetics Act 1999 (P.N.G.), s 31; Criminal Code Act 1974 (P.N.G.), ss 177, 228, 229j, 229r-229v; Summary Offences Act 1977 (P.N.G.), ss 25, 25a; Classifications of Publications (Censorship) Act 1989 (P.N.G.), Pt. V; Customs Act 1951 (P.N.G.); Public Health Act 1973 (P.N.G.), s 140.
656 See also Criminal Code Act 1974 (P.N.G.), s 117.
It is a defense to a charge under section 228(1) of the Criminal Code Act 1974 to show that the alleged act was for the benefit of the public. Whether or not the alleged act was for the public benefit is a question of fact to be determined on a case-by-case basis. A person may also be convicted, under the Criminal Code Act 1974, of possessing, producing, publishing, distributing, importing, exporting, showing or selling child pornography. It is a defense to a charge related to child pornography to show that the material in question has a genuine medical, legal, scientific or educational purpose or has artistic or cultural merit. It is also a defense to show that the accused reasonably believes that the child depicted in the material had attained 18 years of age.

320. In addition to constituting a criminal offense, certain acts associated with obscene and indecent information/material are prohibited in the Medicines and Cosmetics Act 1999, the Summary Offences Act 1977, the Classifications of Publications (Censorship) Act 1989, the Customs Act 1951 and the Public Health Act 1973. For example, it is an offense, under the Medicines and Cosmetics Act 1999 to advertise or promote the sale of any product, instrument or appliance for the alleviation, cure or treatment of STIs, reproductive diseases, sexual impotence, complaints or infirmity arising from or relating to sexual intercourse, and menstrual irregularities. It is also an offense to advertise or promote the sale of any product, instrument or appliance for the purpose of terminating or influencing the course of pregnancy, or preventing conception. The offenses in the Medicines and Cosmetics Act 1999 have the direct effect of limiting the freedom to seek, receive and impart information related to certain aspects of sexual health, such as sexual impotency and the treatment of STIs.

321. Taking into account the expansive and restrictive operation of Papua New Guinea’s laws related to obscenity, it is significant that the HIV/AIDS Management and Prevention Act 2003 carves out an exception for “HIV/AIDS awareness materials” that might otherwise be characterized as obscene or indecent. The term “HIV/AIDS awareness materials” is defined as:

(a) written, drawn, constructed, fabricated, photographic, film, video, theatrical, or audio material, however presented, performed, published or displayed, which raises awareness of HIV/AIDS, its management and prevention; and

(b) instructions for use of condoms and condom lubricant, and other means of prevention of HIV transmission.

In accordance with the HIV/AIDS Management and Prevention Act 2003, HIV/AIDS awareness materials are:

657 See ibid., s 228(2).
658 See ibid., s 228(3).
659 See ibid., ss 229J, 229T. The term “child pornography” is defined to mean:

(a) any photographic, film, video or other visual representation –
   (i) that show a person who is or who is depicted as being under the age of 18 years and is engaged in, or is depicted as engaged in, sexual activity; or
   (ii) whose dominant characteristics is the depiction, for a sexual purpose, of the genital or anal region of a person under the age of 18; or

(b) any audio representation of a person who is, or is represented as being, a child and who is engaged in, or is being represented as being engaged in, sexual activity; or

(c) any written material, visual representation or audio representation that advocates, counsels or encourages sexual activity with children, irrespective of how or through what medium the representation has been produced, transmitted or conveyed and, without prejudice to the generality of the foregoing, includes any representation produced by or from computer graphics or by the other electronic or mechanical means: ibid., s 229J.

660 See ibid., s 229U(a)-229U(b).
661 See ibid., s 229U(c).
662 See Medicines and Cosmetics Act 1999 (P.N.G.), s 31(2)(a). See also Public Health Act 1973 (P.N.G.), s 140(3).
663 See Medicines and Cosmetics Act 1999 (P.N.G.), s 31(2)(b).
664 See HIV/AIDS Management and Prevention Act 2003 (P.N.G.), s 3(2).
665 Ibid, s 2(1).
material is not obscene or indecent matter, indecent articles, objectionable or declared publications, prohibited imports or prohibited statements or advertisements. In addition to carving out an explicit exception, the Act states that it is unlawful to unreasonably deny a person access to HIV/AIDS awareness materials, which are characterized as an essential means of protection against HIV infection. The effect of the exception under the HIV/AIDS Management and Prevention Act 2003 is that, regardless of content, HIV/AIDS awareness material is not considered obscene or indecent and, therefore, cannot be lawfully censored or its usage prohibited. The distinction between the regulation of HIV/AIDS awareness material and information related to other aspects of sexual health, including preventing conception, has the effect of leaving intact the freedom to seek, receive and impart information related HIV/AIDS materials while simultaneously restricting that same freedom in relation to information on other aspects of sexual health.

Concluding Remarks

322. Research suggests that there is often little consideration paid in Western Pacific laws to how the tight regulation of information with sexual content may limit the right to the highest attainable standard of sexual health or, for example, the freedoms of expression (including sexual expression), and to seek, receive and impart information on sex, sexuality and sexual health. Western Pacific laws on obscenity do not typically accommodate or carve out exceptions for non-harmful material that is intended to enable sexual minorities to exercise and enjoy their freedom of sexual expression, for instance by equipping them with the knowledge and skills, and providing them a space, to discover, develop and understand their own sexuality and sexual identities safely.

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666 See Criminal Code Act 1974 (P.N.G.), s 228.
667 See Summary Offences Act 1977 (P.N.G.), ss 25, 25A.
668 See Classifications of Publications (Censorship) Act 1989 (P.N.G.), Pt. V.
669 See Customs Act 1951 (P.N.G.).
670 See Public Health Act 1973 (P.N.G.), s 140; Medicines and Cosmetics Act 1999 (P.N.G.), s 31.
10. Sex Work

323. Section 10 examines how laws governing the exchange of sexual services for money or goods (often called “sex work” or “prostitution”) influence the sexual health of persons in sex work, as well as facilitate or prevent discrimination, abuse and violence against them. Analysis of laws’ influence on the health and rights of people in sex work requires careful attention to legal words and language: terms and their meanings have changed historically and, in addition, do not have uniform meaning across nations and legal systems. The language used herein mirrors the original terminology when referring to the text or discussing the text of laws that regulate sex work. When not directly referencing specific national or regional laws, the terms “sex work” and “sex workers” have been used to describe the practices of, and the people engaged in, exchanging sexual services for money or goods, either regularly or occasionally.672

324. States vary in how they approach sex work in law. Some use criminal law to prohibit various aspects of sex work. Other states permit buying and selling of sexual services, subject to administrative regulations that govern work and labor practices generally. Others have developed regulatory schemes directed specifically at the people, conditions, and venues involved in the exchange of sexual services for money or goods, with strong penalties for violating those rules. Sex work laws may be gender-specific, punishing only women for selling sex. Nevertheless, men who sell sex in legal systems with sex-specific criminal prostitution codes may face penalties under other criminal laws prohibiting indecent conduct, same sex sexual behavior or vagrancy, for example.

325. Criminalization, in particular, marginalizes people in sex work. To avoid arrest, detention, or conviction, as well as general harassment and surveillance, people may distance themselves or hide from authorities in law, health and education, as well as from family, migrate to other towns or countries, or otherwise organize their lives outside formal social structures. Criminal convictions for sex work have lasting social consequences, in addition to their direct effects through fines or detention. Criminal records may bar individuals from gainful employment, public housing, or other social benefits. Even in states that do not criminalize sex work (and more so in states that do), people in sex work face significant social stigma. This stigma is variously linked to disapproval of sex for non-reproductive purposes or sex outside or before marriage, particularly for women, as well as the short-term exchange of sexual services for money outside domestic or “private” locations. This stigma constrains sex workers from seeking support and operates through the condemnation of authorities in key institutions, enabling abuse with impunity at the hands of both state and non-state actors and generally erecting barriers to sex workers taking steps individually or through organizing to claim their rights, including the right to health.

326. Research on sex work finds that it takes protean forms. Most exchanges of sex for money, food, or resources occur in informal labor sectors, often in combination with other work, as a livelihood strategy. Sex work is found at all socio-economic levels, with corresponding differences in income, danger, and vulnerability. The selling and buying of sexual services takes place in a range of physical environments, including brothels, bars, clubs, homes, hotels, cars, streets, and outdoor settings. The context of sex work ranges from highly organized, with multiple participants, social differentiation, and inequality of power to individual workers operating independently in the informal sector. Sex work may be arranged through direct personal contact (involving the sex worker or a go-between) or via telephone, internet, or other modes of solicitation or

672 This definition of sex work is drawn from the UNAIDS, Guidance Note on HIV and Sex Work (2009), at 3, citing UNAIDS, Technical Update: Sex Work and HIV/AIDS (2002). However, it is acknowledged that sex workers might not be the best term to convey the multitude of people doing sex work or exchanging sexual services for money, as many people may not necessarily call themselves by this term, or have this “identity.”
advertisement. Persons involved in sex work can be male, female or transgender/transsexual and may range in age.

327. This extensive variation in the people, places and practices that constitute “sex work” has tremendous implications for health and human rights-based policy interventions. Unequal and vastly different vulnerabilities and capacities of people in sex work defy any single characterization. Moreover, a health and human rights-based evaluation reveals that the participation of people in sex work is essential to devising interventions needed to respond to their needs. As the WHO review of laws on sex work reveals, however, the dominance of criminalization as the legal response to sex work impedes cooperative and participatory measures.

328. Under conditions of criminalization, many people in sex work face steep barriers to realizing their fundamental rights, such as rights to health, equality, privacy, association, family life, housing and education, and participation in cultural life. Under regimes in which some forms of sex work are legal, sex workers may continue to face social and practical exclusions because of the continued weight of stigma, or because laws differentiating what is legal and what is criminal in regard to selling sex maintain surveillance over sex workers that render even legal sex workers vulnerable to both state and non-state abuse. Persons in systems that permit some forms of sex work, however, may have better opportunities to organize, share information, and to seek public redress for abuse and discrimination.

329. In many cases, the state and its agents are the primary abusers of persons in sex work. Arbitrary detention, irregular deportation, forced evictions and removal of children without due process are often committed under the claimed authority of law, but without formal warrant, arrest or other due process protection. Transgender/transsexual sex workers, migrant sex workers and sex workers of minority racial or ethnic groups can be particularly vulnerable to abuse by law enforcement operating under the cover of law. They face compounded barriers in seeking redress for those abuses. They also face additional hurdles in accessing health services and information.

330. Use of raids and exemptions from the need for independent review of warrants for entering premises or arrest are common in legal regimes regarding sex work, demonstrating high levels of state disregard for people engaged in that type of work. Extralegal abuses by state agents, including rape, assault, murder, theft, and extortion, are committed with impunity. Revolving door arrests and mass arrests coupled with a high degree of state-generated sensational publicity reveal the extent to which the spectacle of “punishing the sex worker” continues to serve an interest of the state in controlling sexual behavior through the production of the “sex worker” as a moral scapegoat. Often, these public arrests are tied to claims of state action on behalf of public health or national morality.

331. Health services, provided by both state and non-state actors, have historically not been a site of rights promotion for people in sex work. State health controls, through measures purportedly serving a public health purpose, are a frequent source of violations of sex workers’ rights: mandatory testing for STIs and HIV; routine infringements of confidentiality regarding HIV test results and other medical information; and, mandatory health identity cards that must be displayed to authorities on demand. Moreover, the orthodox understanding of sex workers as a discrete and “findable” sub-population of women (as opposed to an often diffuse and diverse population of women, men and transgendered persons as described earlier) has led to

673 While persons under 18 years of age may be involved in sex work, under international standards their involvement is deemed abuse or exploitation: see Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res. 55/25, Annex II, 55 UN GAOR Supp. (No. 49) at 60, UN Doc. A/45/49 (Vol.I) (2001). Thus, persons less than 18 years involved in sex work should – under no circumstances – be treated as criminal offenders.

674 See Section 10.2 on Access to Health Care Services and Information for Sex Workers.
interventions tailored in ways that miss many people in sex work. Finally, the tendency of health programs designed for people in sex work to focus exclusively or disproportionately on HIV and STI prevention is a constraint on the right to health, and violates rights to equal treatment, as people in sex work need comprehensive health services for everything from contraception, pre-and postnatal care, to dental care and overall care for physical and mental health.

332. The state tolerates abuses by non-state actors, such as violence by clients, abuse from neighbors and family members, or abuse, substandard care, or humiliating treatment by health professionals. Discrimination gains justification by the imputation of "sex worker status," real or imagined, reducing the ability of persons in sex work to function as full members of society. The inability of sex workers to access bank accounts, decent housing, social security schemes, or education for their children, because of discrimination and prejudice, contributes to their precarious livelihood and increases social exclusion.

333. The health status of many people in sex work can be quite variable: it is often relatively low, in part related to insecurity of income, food and housing for the most vulnerable persons in sex work, and because of the difficulty of accessing appropriate and respectful health services for prevention or treatment of health problems. Barriers to care and accurate information are proportionate to socially discriminatory attitudes and legal barriers. That said, people in sex work with higher socio-economic status may enjoy relatively good health status, especially if they also have access to adequate services (although they remain in jeopardy through police abuse and risk of incarceration.)

334. Having multiple sex partners under conditions of unsafe sex increases the risk of STIs, yet prevention efforts directed at sex workers for HIV and STIs are often demeaning, discriminatory, substandard, and ineffective. Effective prevention programs are often stymied by police practices under criminalization regimes. For example, while condom promotion is essential to HIV prevention efforts, in many settings possession of condoms is used as evidence of criminal activity (i.e., engaging in sex work). In many states, ARV treatment is denied to sex workers entirely in practice, or persons deemed more "innocent" are prioritized for treatment as a matter of policy.

335. Many people in sex work have little recourse to law to vindicate their rights, whether to custody of their children, rights to their wages, or prosecutions of perpetrators of violence. Often, police and other authorities do not register their complaints, and many sex workers come to believe that they do not enjoy the same status as other members of their community. Few legal defenses are mounted to challenge the arbitrary detentions or deportations of (alleged) sex workers or to investigate crimes committed against sex workers by law enforcement.

336. Much of what is termed "prostitution law" (law directly prohibiting prostitution/sex work) is criminal law. However, many other laws (e.g., laws on loitering, vagrancy, "riotous behavior,”

675 Interventions also often presume that condom use with casual clients is always the greatest concern in sexual health, whereas some studies show that condom use is less frequent with intimate partners, posing a greater risk for HIV and STI transmission.
677 The literature (English language) of the last two decades about prostitution/sex work law often characterizes legal approaches to prostitution with a set of terms claiming to delineate essential categories. Terms include abolitionist, prohibitionist, or regulationist, and decriminalization, legalization, or regulation. Despite their ubiquity, these categories do not enable careful analysis. First, the categories suggest that there are clear boundaries between “types” of legal approaches, such that one can assign any national or local law to one category. These assignments are in fact very problematic; for example, does one consider systems that decriminalize the seller and criminalize the buyer “prohibitionist” or partial decriminalization? Further analysis grounded in empirical research reveals that it is mistaken to call this decriminalization, even of the seller, because in practice the person selling sex is not free of criminal surveillance. For example, sex workers may be taken into custody in order to be questioned or to ensure their evidence in any prosecution of the buyer.
zoning and housing, health, bar or cabaret licensing, public indecency, etc.) also have a direct
effect on the practice of sex work. The criminal laws on prostitution vary widely: in order to
analyze the specific effects of law, it is critical to identify with great specificity what particular acts
are prohibited. Inquiry into law must ask: is the actual exchange of sex for money or goods a
crime? Are other activities (by the sex workers themselves or others) criminalized, for example,
solicitation (i.e., the public attempt to seek clients or make an offer for a sex/money exchange),
pandering (i.e., to act as a go-between in facilitating the sexual exchange), living off the earnings of
a prostitute (i.e., pimping), managing or renting premises for the purposes of prostitution, etc.? Many systems do not criminalize the exchange of money for sexual services, but rather the
penumbra of conduct surrounding it.

337. Systems that permit sex work under regulatory codes vary widely in their impact on sexual health
and rights. Some systems are health and rights violating, such as those that restrict the ability of
people registered as sex workers to choose their own housing or live with their families, or
condition limited health care services on registration. These systems transgress norms of equal
protection of the law, and constrain the underlying rights of privacy, family life, and to housing and
health. Many legal regimes also severely constrict freedom of movement, through regimes of
zoning and registration, or provisions barring workers from living together or assigning sex work to
isolated areas, rendering persons in sex work more vulnerable to violence and other forms of
abuse.

338. Other legal regimes are more health and human rights promoting, particularly as they move
toward greater integration with general labor regimes, so that the system ensures access to
insurance and other social benefits, and ensures health and safety conditions akin to those found
in other service sectors. Other key aspects of health and rights-promoting legal regimes for sex
work are ensuring access to health services for a full range of mental and physical health concerns
(and not solely for STIs) and guaranteeing rights to organize and access to courts to vindicate a full
range of rights.

339. Even legal systems that administer the conditions of sex work (i.e., permit it as labor) have not
succeeded in disentangling sex work from criminal law. Some legal systems define only some
forms of sex work as legal (brothel-based or escort services, for example); street-based or
independent sellers of sex may still face criminal sanctions. Some systems permit only nationals of
their country (or from a limited number of other countries) to work in the sex sector; persons who
fall outside the legally permissible status commit criminal offenses in selling sex. These
complicated inter-relationships between legal and criminalized forms of sex work suggest that
even systems often characterized as “legalized” can put sex workers at a high risk of law

Furthermore, this taxonomy attends exclusively to laws governing the exchange of sexual services, ignoring the many overlapping
laws (found in other parts of the criminal code, such as statutes punishing vagrancy or indecent conduct, as well as health codes,
zoning and other administrative laws) that effectively penalize sex work over and above the offences listed in the criminal code.
Finally, even more confusion has been engendered over the meaning and distinctions between “legalized” and “regulated”
prostitution, as some use the term ‘regulation’ to refer to prostitution-specific registration and surveillance schemes, while others
use the term to refer to any system in which the government plays a role in setting the conditions of work (which may be
comparable to state regulation of health and safety in restaurants or other service sectors.) As noted in the discussion in the text,
different legalization schemes can vary greatly in their promotion of equality, autonomy and health, as well as in their impact on
sexual health.

678 Many legal systems that are understood to criminalize prostitution/sex work do not, in fact, criminalize the specific act of
exchange – in part because the proof is so difficult to obtain, absent police surveillance in the private space where the sexual
behavior occurs, or direct police participation in the sexual acts themselves. A key reason given for law reform decriminalizing sex
work is corruption by law enforcement agents and abusive or rights-violating methods of surveillance. Confusion arises about
terminology, when sexual exchange per se is not criminalized, but the penumbral conduct is: some observers describe this as a legal
environment in which “sex work is not a crime,” while others deem the penalization of acts supporting the exchange of sex for
money as “criminalization.”

679 This is distinct from many labor regimes, where the irregular immigrant commits an administrative violation in working out of
status, but not a criminal offense.
enforcement monitoring (and concomitant harassment), suggesting the need for close review of all regulatory and administrative systems regarding sex work from a health and human rights perspective.

340. From a health and human rights perspective, both under-prosecution and over-prosecution in regard to persons in sex work constitute failures to respect rights, especially in creating the conditions for redress and restitution. On the one hand, many national laws often fail to respond to abuses against sex workers, applying gender-stereotyped presumptions about sex workers’ credibility and dismissing their accounts of abuse. On the other hand, campaigns against trafficking into forced prostitution often mistakenly assume all people in sex work, particularly women, are victims of trafficking, and have no capacity to consent to exchange sexual services for money. During criminal investigations, people in sex work may be detained against their will or treated as accomplices in the trafficking of others. The equation of all prostitution with trafficking elides two very different conditions and circumstances. This confusion produces ineffective legal and health interventions such as “raid and rescue” of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.680

341. There is agreement that persons less than 18 years of age should not engage in sex work.681 More difficult to formulate, however, are the legal and policy responses that constructively engage with teenagers engaged in survival sex or other forms of regular or irregular sex work, not infrequently occasioned by ejection from their natal homes or attempts to escape abuse. At a minimum, those teenagers need access to services to help them protect their health, education and housing, and support that allows for rapid exit from sex work. Many health programs that target young persons aged 14-24 fail to offer services to address the needs and contexts of the diversity of young people in sex work. Transgender/transsexual or homosexual youth, who are escaping violence in their homes or communities, find both resources and abuse when they leave home and move to larger urban areas, where many engage in survival sex. Services should be designed for them that meet their particular needs and barriers to exiting sex work, and integrating into safer community settings.

342. Moreover, young persons in sex work should not be prosecuted as criminal offenders. Few legal regimes have incorporated this approach, especially in light of their reliance on punitive and non-rehabilitative juvenile justice systems. Rescues and raids targeted at minor sex workers often place them in abusive conditions of detention in “rescue or remand homes.” Girls face particular problems when rescued from sex work, as they may be returned to communities in which they are culturally stereotyped as no longer “good” women, assumed to be HIV positive and unable to reintegrate. Moreover, the raid and rescue strategy has not proved sustainable in many sites, as debt structures that facilitated the minors’ entry into sex work motivates indebted families to send still-younger children in their place. Alternative livelihood strategies and education must be created.

343. Section 10 explores the legal regulation of sex work in Western Pacific states. Section 10.1 examines whether or not Western Pacific states have decriminalized sex work. It also examines how international human rights norms and standards related to sex work have been applied in states where sex work is legal. Section 10.2 examines the legal regulation of sex workers’ access to health care services and information, including voluntary HIV and STI testing.


10.1 (De)criminalization of Sex Work

344. In the Western Pacific, sex work has been essentially decriminalized in New Zealand and the Australian state of New South Wales.\textsuperscript{682} The more common approach to sex work, however, is to criminalize or prohibit sex work\textsuperscript{683} and/or acts closely associated with that work, including solicitation,\textsuperscript{684} living on the earnings of sex work (i.e., pimping),\textsuperscript{685} and procuring a sex worker.\textsuperscript{686} Certain Western Pacific states that criminalize the exchange of sex for reward draw a distinction between the act of providing commercial sexual services and the act of purchasing those services, criminalizing or prohibiting the former but not the latter, or penalizing more severely persons who provide commercial sexual services (i.e., sex workers).\textsuperscript{687} Since the overwhelming majority of sex workers are women, it is typically women who bear the burden of criminalization of sex work in those states.\textsuperscript{688}

345. The decision of many Western Pacific states to regulate sex work through a criminal law framework has left little space to advance the sexual health of sex workers and their clients, or to address the public health consequences of sex work (e.g., transmission of HIV and other STIs). This is because the application of human rights norms and standards related to sex work is theoretically inconsistent with the criminalization of that type of work. Examples of a health and human rights-based approach to sex work emerge in the Western Pacific Region primarily in states that have decriminalized or legalized sex work. The application in those states of human rights norms and standards related to sex work has helped to advance the sexual health of sex workers and their clients, for instance by ensuring that sex workers and their clients have access to sexual health information in brothels.\textsuperscript{689} It has also helped to promote public health, including by requiring sex workers and their clients to practice safe sex (thereby helping to minimize the transmission of HIV and other STIs through sex work).

346. New Zealand’s \textit{Prostitution Reform Act 2003} provides an illustration of a health and human rights-based approach to sex work. The \textit{Prostitution Reform Act 2003} decriminalized sex work in New Zealand, and the act of living on the earnings of sex work (i.e., pimping) is punishable by imprisonment.\textsuperscript{690} This approach has been adopted in other states in the region, such as Australia’s \textit{Prostitution Reform Act 2003} (NSW), which criminalizes neither the act of providing commercial sexual services nor the act of purchasing those services.\textsuperscript{691}

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\textsuperscript{682} See Prostitution Reform Act 2003 (N.Z.), s 7; Disorderly Houses Amendment Act 1995 (NV) (Austl.) (notwithstanding the general decriminalization of sex work in New South Wales, the Summary Offences Act 1988 (NV) (Austl.) still contains a number of criminal offences related to sex work, including living on the earnings of prostitution, public acts of prostitution and solicitation). See also Prostitution Amendment Act 2008 (WA) (Austl.) (seeking to amend the Prostitution Act 2000 (WA) (Austl.) to decriminalize sex work in the state of Western Australia. The Act received royal assent in April 2008 but, as at the time of writing, had not been proclaimed due to a change in Government.).


\textsuperscript{684} See, e.g., Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children of 1999 (Jap.), art. 6; Penal Code 1997 (Malay.), s 3728; Police Offences Ordinances 1961 (Sam.), s 16(b).

\textsuperscript{685} See, e.g., Crimes Ordinance of 1971 (H.K.), s 137; Penal Code 1965 (Kirib.), s 145; Women’s Charter of 1961 (Sing.), s 146.

\textsuperscript{686} See, e.g., Law of the Peoples Republic of China on the Protection of Women’s Rights and Interests of 1992 (China), art. 41; Crimes Ordinance of 1971 (H.K.), s 131; Penal Code of 1907 (Jap.), art. 182; Women’s Charter of 1961 (Sing.), s 140(1)(b); Penal Code of 1999 (Viet.), art. 255; Ordinance on Prostitution Prevention and Combat of 2003 (Viet.), arts. 3-4.


\textsuperscript{688} See Section 10.2 on Access to Health Care Services and Information for Sex Workers.
Zealand and established a regime that requires businesses of prostitution to hold court-issued operator certificates. Section 3 of the Act states that its purpose 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;
  - (e) implements certain other related reforms.

In reserving its position on the morality of sex work, the New Zealand Legislature implicitly acknowledged that sex work “is, and has always been, a social reality” in New Zealand, and that it is thus “preferable to deal with health, safety and exploitation concerns transparently.”

347. The Prostitution Reform Act 2003 introduced a number of specific protections for sex workers and their clients that are based on human rights norms and standards. Requiring operators of businesses of prostitution to adopt and promote safe sex practices (e.g., displaying health information) and obliging sex workers and their clients to adopt safe sex practices (e.g., using a prophylactic sheath or other appropriate barrier when providing or receiving commercial sexual services), helps to protect and promote the right to the highest attainable standard of health. Prohibiting persons from inducing or compelling another person to provide commercial sexual services or earnings derived from providing those services, helps to protect and promote the rights to liberty and security of the person and to live free of violence and exploitation as well as the freedom from cruel, inhuman or degrading treatment. In providing that a person may, “at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person,” and in guaranteeing employment related benefits of persons who refuse to provide commercial sexual services, the Act upholds the rights to, inter alia, sexual autonomy and just and favorable conditions of work, and also helps to protect sex workers against sexual slavery.

348. Minors involved in sex work are often especially vulnerable to sexual health harms. A minor sex worker may not, for example, be in a position to negotiate safe sex practices because of such factors as age and power imbalances with the person seeking to engage their services. The Prostitution Reform Act 2003 recognizes these vulnerabilities and seeks to ensure that minors are adequately protected against harm that may result from them providing commercial sexual services. Evidence of such recognition can be seen in one of the purposes of the Prostitution Reform Act 2003, namely the creation of a framework that “prohibits the use in prostitution of persons under 18 years of age.” It can also be seen in the prohibitions against persons: assisting

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690 See Prostitution Reform Act 2003 (N.Z.), ss 7 (providing that “[n]o contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds.”), 4(1) (defining prostitution as “the provision of commercial sexual services;” sex worker as “a person who provides commercial sexual services;” and, commercial sexual services as “sexual services that – (a) involve physical participation by a person in sexual acts with, and for the gratification of, another person; and (b) are provided for payment or other reward (irrespective of whether the reward is given to the person providing the services or another person.”). But see, e.g., Prostitution Reform Act 2003 (N.Z.), s 19 (prohibiting persons granted a temporary or limited purpose visa under the Immigration Act 1987 (N.Z.) from engaging in sex work.).

691 See ibid., Pt. 3 (requiring operators of a business of prostitution to hold a certificate from the Registrar of the District Court. Individual sex workers and brothels or escort agencies that employ four or less sex workers are not required, under Part 3 of the Act, to obtain an operator certificate.), s 4(1) (defining business of prostitution as “a business of providing, or arranging the provision of, commercial sexual services.”).

692 Ibid., s 3.


694 See Section 10.2 on Access to Health Care Services and Information for Sex Workers.

695 See Prostitution Reform Act 2003 (N.Z.), s 17(1).

696 See ibid., s 18. See also Social Security Act 1964 (N.Z.); Injury Prevention, Rehabilitation, and Compensation Act 2001 (N.Z.).

697 See Prostitution Reform Act 2003 (N.Z.), s 3(d).
a minor to provide commercial sexual services; receiving earnings from commercial sexual services provided by a minor; or, contracting for commercial sexual services from, or being a client of, a minor. 699 Minors cannot be charged as a party to an offense related to the provision of commercial sexual services. 700 Moreover, a person cannot be charged with assisting a minor to provide commercial sexual services merely by providing him or her legal advice, counseling, health advice or health care. 701 The effect of this exemption is to ensure that minors can access services essential to their health and general well-being, even if they are engaging in sex work, in violation of the Prostitution Reform Act 2003.

349. The Australian state of Victoria, like New Zealand, has applied certain human rights norms and standards in its laws regulating sex work. 702 The aims of the Prostitution Control Act 1994 (Vic.), the primary state law governing sex work, include to: protect sex workers and their clients from health risks; protect sex workers from violence and exploitation; promote the welfare and occupational health and safety of sex workers; and, protect children from sexual exploitation and coercion. 703 Victoria seeks to give effect to those objectives by, inter alia, prohibiting a person from intentionally forcing another person into, or to remain in, sex work, and from forcing another person to provide financial support out of sex work. 704 Sex workers can refuse to provide, or stop providing, sexual services if they believe they are at risk of violence or the situation is potentially unsafe, 705 and brothels are required to install easily accessible alarm buttons or similar devices in all rooms used for sex work. 706 In addition, it is an offense to intimidate, insult or harass a sex worker in or near a public place. 707 These protections give domestic effect to the rights to sexual autonomy, liberty and security of the person, and just and favorable conditions of work. They also uphold the right to live a life free of violence and exploitation and the freedom from cruel, inhuman or degrading treatment. Requiring brothels to provide sex workers and their clients access to contraceptives and sexual health information, 708 and ensure that all rooms used for sex work have sufficient lighting to enable sex workers to check for readily evident signs of STIs, helps to protect and promote the right to the highest attainable standard of health by minimizing sex workers’ exposure to STIs. Minors are afforded additional protection against child prostitution. 711

699 See ibid., ss 20-23.
700 See ibid., s 23(3).
701 See ibid., s 23(2).
702 See Prostitution Control Act 1994 (Vic.) (Austl.); Prostitution Control Regulations 2006 (Vic.) (Austl.); Public Health and Wellbeing Act 2008 (Vic.) (Austl.), ss 158-165. Although sex work has been legalized in the state of Victoria, a sex worker may still be charged with a number of criminal offences connected to providing commercial sexual services, including offences related to street-based sex work and working while infected with a disease: see Prostitution Control Act 1994 (Vic.) (Austl.), ss 13, 20. Other offences related to sex work include living on the earnings of sex work, offensive behavior toward sex workers, and permitting a sex worker to provide commercial sexual services when infected with a STI: see ibid., ss 5-21A.
703 See Prostitution Control Act 1994 (Vic.) (Austl.), ss 4, 3(1) (defining: prostitution as “the provision by one person to or for another person (whether or not of a different sex) of sexual services in return for payment or reward,” sexual services as “(a) taking part with another person in an act of sexual penetration; (b) masturbating another person; and (c) permitting one or more other persons to view the following occurring in their presence – (i) two or more persons taking part in an act of sexual penetration; (ii) a person introducing (to any extent) an object or a part of their body into their own vagina or anus; (iii) a person masturbating himself or herself or two or more persons masturbatining themselves or each other or one or more of them – in circumstances in which – (iv) there is an form of direct physical contact between any person viewing the occurrence and any person taking part in the occurrence; or (v) any person viewing the occurrence is permitted or encouraged to masturbate himself or herself while viewing – and, for the purposes of this definition, a person may be regarded as being masturbated whether or not the genital part of his or her body is clothed or the masturbation results in orgasm.”).
704 See ibid., s 8.
705 See ibid., s 9.
706 See Prostitution Control Regulations 2006 (Vic.) (Austl.), rr 7(1)(a)-7(1)(b).
707 See ibid., r 7(3)(a).
708 See Prostitution Control Act 1994 (Vic.) (Austl.), s 16.
709 See Section 10.2 on Access to Health Care Services and Information for Sex Workers.
710 See Prostitution Control Regulations 2006 (Vic.) (Austl.), r 7(3)(b).
Concluding Remarks

350. With the exception of New Zealand and, to a lesser extent, some Australian jurisdictions, Western Pacific states overwhelmingly favor criminalization over decriminalization as a legal response to sex work. The predilection of most Western Pacific states for the criminal law has meant that there are limited examples in the Region of laws that protect and promote the human rights of sex workers and their clients, or that respond effectively to public health imperatives. The failure of many Western Pacific states to decriminalize sex work has had the effect of leaving sex workers (who are overwhelming women) vulnerable to human rights violations in those states, and of undermining the sexual health of sex workers and their clients. In contrast, New Zealand’s pragmatic approach—which sets aside questions concerning the political and moral aspects of sex work and acknowledges the social reality of the sex industry—has allowed it to safeguard and advance the sexual health and human rights of sex workers (and their clients), for example by protecting them against sexual exploitation and abuse and guaranteeing them their employment benefits and entitlements.\(^\text{712}\) New Zealand’s approach to regulating sex work has also created space to establish an environment and conditions conducive to meeting public health objectives, such as prevention of the spread of HIV and other STIs,\(^\text{713}\) which helps to advance the sexual health and human rights of all persons.

10.2 Access to Health Care Services and Information for Sex Workers

351. A health and human rights approach requires the adoption of all appropriate measures to ensure that sex workers can access quality and affordable health care services and information on a basis of equality. The adoption of laws, policies and practices that guarantee access to health care services and information not only helps to advance the sexual health of sex workers, but also reduces the probability that HIV and other STIs will be spread through unsafe sex practices. As explained in section 10.1 above, the decision of many Western Pacific states to regulate sex work through a criminal law framework has left little space to advance sexual health and human rights. States that criminalize sex work tend not to expressly protect and promote the right of sex workers to access health care services and information, although sex workers in those states may be able to access health care services and information in the same way as the general population.

352. Examples of a health and human rights-based approach to health care services and information for sex workers typically emerge in those Western Pacific states that have decriminalized sex work. For instance, access to contraceptives and sexual health information for sex workers and their clients is addressed in New Zealand’s Prostitution Reform Act 2003. That Act brought the sex industry under the purview of the Health and Safety in Employment Act 1992. Sex work is consequently subject to general workplace health and safety requirements, just like any other type of work in New Zealand.\(^\text{714}\) In addition to these general requirements, the Prostitution Reform Act 2003 established health and safety requirements specific to the sex industry. The Act provides that every operator of a business of prostitution must:

(a) take all reasonable steps to ensure that no commercial sexual services are provided by a sex worker unless a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections; and


\(^\text{713}\) See ibid.

(b) take all reasonable steps to give health information (whether oral or written) to sex workers and clients; and
(c) if the person operates a brothel, display health information prominently in that brothel; and
(d) not state or imply that a medical examination of a sex worker means the sex worker is not infected, or likely to be infected, with a sexually transmissible infection; and
(e) take all other reasonable steps to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections.715

Requiring operators of businesses of prostitution to take all reasonable steps to ensure the adoption of safe sex practices and provide health information (defined as information on safe sex practices and services for the prevention and treatment of STIs716), helps to facilitate access to health care services and information for sex workers. Facilitating such access helps to limit the spread of HIV and other STIs through sex work and allows sex workers and their clients to make informed decisions about when and how to have sex safely.

353. In addition to the obligations imposed on operators of businesses of prostitution, the Prostitution Reform Act 2003 requires sex workers and their clients to adopt safe sex practices. It provides that “[a] person must not provide or receive commercial sexual services unless he or she has taken all reasonable steps to ensure a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections.”717 It further provides that “[a] person who provides or receives commercial sexual services must take all other reasonable steps to minimise the risk of acquiring or transmitting sexually transmissible infections.”718 Access to health care services and information is essential to enabling sex workers and their clients to fulfil their obligations under the Prostitution Reform Act 2003. If a sex worker is unable to access and use a prophylactic sheath or other appropriate barrier, for example, he or she will be in breach of his or her obligations under the Act. How the requirement to adopt safe sex practices is to be enforced is a question left unanswered by the Act and is one that is complicated by the private nature of many exchanges of sex for financial reward. The Act also does not address the legal liability of a sex worker who is forced by a client to engage in unsafe sex practices; however, in such cases, legal liability would presumably be attributed to the client and not the sex worker.

354. In the Australian state of Victoria, brothel proprietors are required, under the Public Health and Wellbeing Act 2008 (Vic.), to provide a free and readily accessible supply of condoms and water based lubricant.719 In addition, brothel proprietors and escort agency providers must not “expressly or impliedly discourage the use of condoms ...”720 and are required to take reasonable steps to ensure that sex workers and their clients use condoms in any encounter that involves “vaginal, oral or anal penetration whether by means of a penis or other part of the body or by a device or object.”721 The Act further obligates brothel proprietors and escort agencies to “provide easily accessible written information about the transmission of sexually transmitted infections in a variety of relevant languages ...”722 Perhaps in recognition of the fact that a significant number of sex workers in Victoria speak English as a second language, the Act states that “[i]f a sex worker has difficulty in communicating in the English language, the [brothel proprietor or escort agency proprietor] must provide the information in a language with which the sex worker is familiar.”723

Requiring access to condoms, water based lubricant, and sexual health information is consistent

715 Prostitution Reform Act 2003 (N.Z.), s 8(1).
716 See ibid., s 8(4).
717 Ibid., s 9(1).
718 Ibid., s 9(3).
720 Ibid., ss 159(2), 159(4).
721 Ibid., ss 159(1), 159(3).
722 Ibid., ss 162(1), 162(4).
723 Ibid., ss 162(3), 162(6).
with the right to the highest attainable standard of health. It ensures that sex workers are equipped with the means and knowledge necessary to practice sex safely and reduce the spread of HIV and other STIs.

355. Ensuring access to quality and affordable health care services and information is essential to the sexual health of sex workers. Adopting laws and policies that facilitate sex workers’ regular access to HIV and STI testing, for example, aids the prevention and treatment of those infections. Yet sex workers should never be forced to undergo mandatory, arbitrary or invasive HIV or STI testing. Laws, like China’s,724 that force sex workers to have venereal disease inspections and to undergo compulsory medical treatment if found to be positive for such a disease, violate sex workers’ rights to informed consent, dignity, and bodily integrity, among others. Sex workers should also never be unreasonably required to disclose personal health information to their employers. In the state of Victoria, prostitution service providers, brothel managers and escort agencies are prohibited from permitting a sex worker to provide commercial sexual services if they know that he or she is infected with a STI.725 It is a defense to show that there were reasonable grounds for believing that the sex worker was not infected with a STI and was undergoing regular blood and swab tests to determine whether or not he or she was so infected.726 In practice, these legislative regimes impose significant testing obligations on sex workers and sanction regular interference with sex workers’ private health information by their employer.

**Concluding Remarks**

356. Although sex workers may be able to access health care services and information (e.g., information about safe sex practices) in the same way as the general population, fear of criminal prosecution can often prevent them from accessing those services and information.727 Laws that criminalize sex work undermine the sexual health of sex workers by making it less likely that they will seek to access health care services and information, including services and information related to safe sex practices, ill-health, prevention or management of HIV/AIDS or other STIs, and sexual dysfunction. So deterred, sex workers may forgo HIV testing728 (for example) and, instead, continue to provide commercial sexual services for reward, with potentially negative implications for the sexual health of the sex worker, his/her clients, and public health. Laws that require sex workers to undergo mandatory, arbitrary or invasive HIV or STI testing or that require sex workers to unreasonably disclose personal health information to their employers not only undermine their sexual health and human rights, but also further marginalize an already vulnerable group in society, for instance by sanctioning employers’ interference in the private lives of sex workers.

357. Laws, such as New Zealand’s Prostitution Reform Act 2003, that recognise the social reality of sex work, remove the potential for criminal prosecution of sex workers and, therefore, a major obstacle to accessing health care services and information. By making advancement of sexual health one of its primary objectives, New Zealand’s law on sex work recognises the shared responsibility that all persons involved in the sex industry (including clients) bear to adopt practices that promote safe sex and sexual health. Requiring brothel proprietors and escort agency providers to take reasonable steps to ensure that sex workers and their clients can access condoms and sexual health information, for example, not only helps to ensure access to sexual health care services and information for sex workers and their clients, but also acknowledges that sex workers should not bear sole responsibility for the adoption of measures that promote sexual health.

724 See Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring of 1991 (China), art. 4.
725 See Prostitution Control Act 1994 (Vic.) (Austl.), s 19(1).
726 Ibid., s 19(2).
728 See ibid., at 108, 111.
Moreover, by requiring sex workers and their clients to adopt safe sex practices, but not imposing mandatory testing requirements on sex workers or unreasonably requiring sex workers to disclose their HIV or STI status to their employers, New Zealand’s *Prostitution Reform Act* seeks to respect the human rights of sex workers and, at the same time, establish conditions that empower individual sex workers to undergo voluntary testing (e.g., by seeking to eliminate discrimination and stigma associated with sex work through its decriminalization).
11. Documents and Sources

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*Criminal Code Act 1899 (Qld.)*

*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas.)*

*Criminal Law Amendment (Homicide) Act 2008 (WA)*

*Criminal Law Consolidation Act 1913 (SA)*

*Disability Discrimination Act 1992 (Cth.)*

*Disability Discrimination Act 1991 (ACT)*

*Disorderly Houses Amendment Act 1995 (NSW)*

*Domestic and Family Violence Act 2007 (NT)*

*Domestic and Family Violence Protection Act 1989 (Qld.)*

*Domestic Violence Act 1994 (SA)*

*Domestic Violence and Protection Orders Act 2008 (ACT)*

*Equal Opportunity Act 1984 (SA)*

*Equal Opportunity Act 1984 (WA)*

*Equal Opportunity Act 1995 (Vic.)*

*Fair Work Act 2009 (Cth.)*

*Family Law Act 1975 (Cth.)*

*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth.)*
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<td>Family Violence Prevention Act 2008 (Vic.)</td>
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<td>Human Rights (Sexual Conduct) Act 1994 (Cth.)</td>
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<td>Relationships (Miscellaneous Amendments) Bill 2009 (Tas.)</td>
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<td>Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995 (SA)</td>
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<td>Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth.)</td>
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<td>Trafficking and Smuggling of Persons Order of 2004</td>
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<td>Law on Monogamy of 2006</td>
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<td>Law on Suppression of Human Trafficking and Sexual Exploitation of 2007</td>
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<td>Constitution of the People’s Republic of China of 2004</td>
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<td>Criminal Law of the People’s Republic of China of 1979</td>
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<td>Decision of the Standing Committee of the National People’s Congress on the Strict Prohibition Against Prostitution and Whoring of 1991</td>
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<td>Labor Law of the People’s Republic of China of 1995</td>
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<td>Law on Maternal and Infant and Health Care of 1994</td>
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<td>Marriage Law of the People’s Republic of China of 1980</td>
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<td>Regulations for the Management of Family Planning Technical Services of 2001</td>
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<td>Regulations of the People’s Republic of China on Administrative Penalties for Public Security of 1986</td>
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Regulations on AIDS Prevention and Treatment of 2006

Cook Islands
Births and Deaths Registration Act 1973
Constitution of the Cook Islands 1964
Crimes Act 1969
Marriage Act 1973
Marriage Amendment Act 2007

Federated States of Micronesia
Pohnpei AIDS Prevention and Control Act of 2006

Fiji
Constitution (Amendment) Act 1997
Crimes Decree 2009
Family Law Act 2003
Human Rights Commission Act 1999
Marriage Act 1969
Matrimonial Causes Act 1985
Penal Code 1945

Hong Kong
Adoption Ordinance of 1956
Age of Majority (Related Provisions) Ordinance of 1990
Basic Law of Hong Kong of 1990
Births and Deaths Registration Ordinance of 1934
Control of Obscene and Indecent Articles Ordinance of 1987
Crimes (Amendment) Ordinance of 1991
Crimes Ordinance of 1971
Disability Discrimination Ordinance of 1995
Hong Kong Bill of Rights Ordinance of 1991
Human Reproductive Technology Ordinance of 2007
Marriage Ordinance of 1876
Offences Against the Person Ordinance of 1865
Prevention of Child Pornography Ordinance of 2003
Sex Discrimination Ordinance of 1995

Japan
Anti-Prostitution Act of 1956
Basic Law for Gender Equal Society of 1999
Civil Code of 1896
Constitution of Japan of 1946
Law Concerning Special Cases in Handling Gender For People with Gender Identity Disorders of 2003
Law on Proscribing Stalking Behavior and Assisting Victims of 2000
Penal Code of 1907

Kiribati
An Act to Amend the Marriage Ordinance 2002
Marriage Ordinance 1977
Penal Code 1965

Lao People’s Democratic Republic
Law on the Development and Protection of Women of 2004
Penal Law of 1989

Malaysia
Anti-Trafficking in Persons Act 2007
Births and Deaths Registration Act 1957
Domestic Violence Act 1994
Employment Act 1955
Federation Constitution of Malaysia 1957
Islamic Family Law (Federal Territory) Act 1984
Law Reform (Marriage and Divorce) Act 1976
National Registration Act 1959
Penal Code 1997
Prevention and Control of Infectious Diseases Act 1988
Syariah Criminal Offences (Federal Territories) Act 1997

Marshall Islands
Births, Deaths and Marriages Registration Act 1988
Constitution of the Marshall Islands 1979
Criminal Code 1966
Prostitution Prohibition Act 2001

New Zealand
Adoption Act 1955
Births, Deaths, Marriages and Relationships Registration Act 1995
Civil Union Act 2004
Contraception, Sterilisation and Abortion Act 1977
Crimes Act 1961
Crimes (Provocation Repeal) Amendment Act 2009
Customs and Excise Act 1996
Domestic Violence Act 1995
Employment Relations Act 2000
Family Proceedings Act 1980
Films, Videos, and Publications Classification Act 1993
Health and Safety in Employment Act 1992
Homosexual Law Reform Act 1986
Human Assisted Reproductive Technology Act 2004
Human Rights Act 1993
Immigration Act 1987
Injury Prevention, Rehabilitation, and Compensation Act 2001
Marriage Act 1955
New Zealand Bill of Rights Act 1990
Prostitution Reform Act 2003
Sentencing Act 2002
Social Security Act 1964
Status of Children Act 1969

Papua New Guinea
Adultery and Enticement Act 1988
Classifications of Publications (Censorship) Act 1989
Criminal Code Act 1974
Criminal Code (Sexual Offences and Crimes against Children) Act 2002
Customs Act 1951
Marriage Act 1963
Matrimonial Causes Act 1963
Medicines and Cosmetics Act 1999
Migration Act 1978
Police Act 1998
Public Health Act 1973
Summary Offences Act 1977

Philippines
Anti-Rape Law of 1997
Anti-Sexual Harassment Act of 1995
Anti-Trafficking in Persons Act of 2003
Anti-Violence Against Women and Their Children Act of 2004
Civil Code of 1949
Clerical Error Law of 2001
Code of Muslim Personal Laws of 1977
Constitution of the Republic of the Philippines of 1987
Domestic Adoption Act of 1998
Executive Order No. 003: Declaring Total Commitment and Support to the Responsible Parenthood Movement in the City of Manila and Enunciating Policy Declarations in Pursuit Thereof of 2000
Family Code of the Philippines of 1987
Inter-Country Adoption Act of 1995
Labor Code of the Philippines of 1974
Magna Carta of Women of 2009
Rape Victim Assistance and Protection Act of 1998
Revised Penal Code of the Philippines of 1930
Samoa
Constitution of the Independent State of Western Samoa 1960
Crimes Ordinance 1961
Divorce and Matrimonial Causes Ordinance 1961
Indecent Publications Ordinance 1960
Marriage Ordinance 1961
Police Offences Ordinance 1961
Singapore
Administration of Muslim Law Act of 1968
Indecent Advertisements Act of 1941
Penal Code (Amendment) Act of 2007
Penal Code of 1985
Registration of Births and Deaths Act of 1938
Termination of Pregnancy Act of 1974
Women’s Charter (Amendment) Act of 1996
Women’s Charter of 1961
South Korea
Act on the Prevention of Prostitution and Protection of Victims Thereof of 2004
Act on the Punishment of Procuring Prostitution and Associated Acts of 2004
Constitution of the Republic of Korea of 1948
Criminal Act of 2004
Family Register Act of 1998
Gender Discrimination Prevention and Relief Act of 1999
Solomon Islands
Islanders Divorce Act 1960
Islanders Marriage Act 1945
Penal Code 1966
Tonga
Criminal Offences Act of 1926
The Order in Public Places Act of 1921
Tuvalu
Marriage Ordinance 1968
Penal Code 1978
Vanuatu
Control of Marriage Act of 1966
Obscenity Act of 1973
Penal Code of 1981
Viet Nam
Civil Code of 1996
Constitution of the Socialist Republic of Viet Nam of 1992
Decision No. 36/2004/QD-TTG of 2004 of the Prime Minister on the National Strategy on HIV/AIDS Prevention and Control in Viet Nam till 2010 with a Vision to 2020
Decision No. 96/2007/Qd-Ttg of 2007 of the Prime Minister on Management, Care, Counseling, and Treatment for HIV-Infected People and on HIV Prevention at Educational Establishments, Correctional Centres, Treatment Centres for Drug Users and Sex Workers, Social Welfare Establishments, Prisons, and Remand Houses
Decision No. 647/QD-BYT of 2007 of the Minister of Health on Promulgation of Voluntary HIV Counseling and Testing (VCT) Guidelines
Law on Domestic Violence Prevention and Control of 2007
Law on Education of 2005
Law on Gender Equality of 2006
Law on HIV/AIDS Prevention and Control of 2006
Law on the Protection of People’s Health of 1989
Marriage and Family Law of 2000
Ordinance on Prostitution Prevention and Combat of 2003
Penal Code of 1999
Population Ordinance of 2003
11.3 Links to Cases and Legislation

Australia
Australasian Legal Information Institute: http://www.austlii.org/
Tasmanian Legislation: http://www.thelaw.tas.gov.au

China
China Legislative Information Network System: http://www.chinalaw.gov.cn
National People’s Congress Database of Laws and Regulations: http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html
Women of China: http://www.womenofchina.cn/Policies_Laws/

Fiji

General
Asian Legal Information Institute: http://www.asianlii.org/
Global Legal Information Network: http://www.glin.gov/search.action
GlobalLex: http://www.nyulawglobal.org/globalex/
Lawyers Collective: http://www.lawyerscollective.org/acln/database
Pacific Islands Legal Information Institute: http://www.pacllii.org/
UN Secretary-General’s Database on Violence against Women: http://webapps01.un.org/vawdatabase/home.action
World Legal Information Institute: http://www.worldlii.org/

Hong Kong

Japan
Japanese Law Translation: http://www.japaneselawtranslation.go.jp
Supreme Court of Japan: http://www.courts.go.jp/english/

Malaysia
Laws of Malaysia: http://www.agc.gov.my
New Zealand

Philippines
Chan Robles Virtual Law Library: http://www.chanrobles.com/
Supreme Court of the Philippines: http://sc.judiciary.gov.ph/

Singapore
Singapore Statutes Online: http://statutes.agc.gov.sg/

South Korea
Constitutional Court of South Korea: http://english.ccourt.go.kr/
Ministry of Justice: http://www.moj.go.kr

Tuvalu
Tuvalu Legislation Online: http://www.tuvalu-legislation.tv

Viet Nam
National Assembly of the Socialist Republic of Viet Nam: http://www.na.gov.vn
Socialist Republic of Viet Nam: The Government Website: http://www.vietnam.gov.vn
UN AIDS Viet Nam: http://www.unaids.org.vn
11.4 Select Bibliography

This section contains a select bibliography of secondary materials relied on in preparing this report. The resources included in the select bibliography have been chosen because of their focus on, or relevance to, sexuality, sexual health and human rights in the Western Pacific Region. It is hoped that the bibliography will serve as a non-exhaustive starting point for research on the issues canvassed in this report, as they relate to the Western Pacific.


Busza, Joanna. “Sex Work and Migration: The Dangers of Oversimplification: A Case Study of Vietnamese Women in Cambodia” 7(2) *Health and Human Rights* 231


Cheng, Sealing. “Interrogating the Absence of HIV/AIDS Interventions for Migrant Sex
Workers in South Korea” (2004) 7(2) Health and Human Rights 193


——. *Mandatory HIV Testing for Employment of Migrant Workers in Eight Countries of South-East Asia: From Discrimination to Social Dialogue* (2009)


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Ng, Cecelia, Zanariah Mohd Nor, and Maria Chin Abdullah. A Pioneering Step: Sexual Harassment & the Code of Practice in Malaysia (2003)


______. “Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong’s Constitutional Jurisprudence,” in Fu Hualing, Lison Harris, and Simon N. M. Young, eds., Interpreting Hong Kong’s Basic Law: The Struggle for Coherence (2007)

______. “Negotiating Respect: Sexual Harassment and the Law in Hong Kong” (2005) 7 International Journal of Discrimination and the Law 127


______. “Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong’s Anti-Discrimination Laws” (1999) 29 Hong Kong Law Journal 178


______. “Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong” (1996) 34 Columbia Journal of Transnational Law 334


Pollock, Nancy J. “Rethinking Marriage and Gender Relations using Evidence from
the Pacific” (2003) 11(2) Gender and Development 85


Tran, Lisa. “Sex and Equality in Republican China The Debate Over the Adultery Law” (2009) 35 Modern China 191


