

An Overview of the Legal Environments for the HIV Response in Participant Countries

Consultant Desk Review

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In preparation for the UNAIDS Pacific Consultation on Legal and Policy Barriers to Accessing HIV Services for PLHIV and Key Affected Populations held in Nadi, Fiji from 17-19 April 2013, the author was commissioned as a consultant to conduct a desk review of the available national laws and legislative policies impacting HIV responses in the participant countries: Fiji, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu.

For these countries, this review complements the UNDP Pacific Centre, Regional Rights Resource Team (RRRT) of SPC and UNAIDS HIV, Ethics and Human Rights: Legislative Compliance Reviews published in March 2009 (LCR 2009).

Divided into country specific Chapters, this review provides contemporary information on the legal environments in each country, with any known changes and relevant additional information given when related to the specific focus areas of—

- International obligations undertaken by the country
- Constitutional protections
- Anti-discrimination (relating to HIV)
- Access to services, including privacy and confidentiality of services
- Criminalisation of HIV transmission and behaviours (MSM, transgender, sex work, injecting drug use)
- HIV-related restrictions on entry, stay and residence
- Inclusion of TRIPS flexibilities in national legislation

The LCR 2009 for each of the participant countries should be considered in conjunction with this review as information in LCR 2009 has not been repeated where it has remained accurate. The country specific LCR 2009 is reproduced at section 6 of each country Chapter.

The review information has been drawn from multiple sources including key informant responses, legislative data-bases and information in the public domain about law revision and development of new domestic laws. While every effort has been taken to ensure accuracy, errors or omissions may have occurred as the legislative environment constantly evolves, legislative data-bases do not always reflect latest developments and some countries do not publish Bills prior to enactment.

The analyses contained in this review are those of the author and do not necessarily represent the views of UNAIDS.

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1. THE NECESSITY TO ESTABLISH THE LEGAL ENVIRONMENT OF EACH COUNTRY

Every country has a unique legal environment that will dictate whether and how the HIV response might be incorporated into legislation. New or amending laws should be tailor-made for the specific legal environment that exists.

Already existing in each country is a body of both primary (Laws, Acts and Decrees) and secondary laws (such as Regulations and Orders). The legal environment includes the Constitution (as the supreme Law of the country) and the constitutional protections provided by it. This may include a Bill of Rights, with specific rights stated. Such constitutional rights are rarely ‘absolute rights’. They may be limited or qualified in some way. For example, a right might be given that is potentially to be limited ‘in the interests of public health’ or ‘in the event of the declaration of a public emergency’. Such limitations are usually, but not always, permitted if ‘authorised by law’.

Each Pacific Island nation has a particular history. There may have been a previous colonisation that, despite Independence, still influences both the way in which laws are made and their content. Often newly independent countries decided to keep inherited laws in place to prevent gaps in coverage until making replacement laws. Some such inherited Laws still remain in force. Sometimes replacement laws repeated the approach of the inherited law and remain in force. This can be despite the original Law having been modernised, or even, repealed, in the source country. Such an example is examined in an article written by Former Justice Michael Kirby, Commissioner of the Global Commission on HIV and the Law, describing the influence of the British Empire on the spread of criminal offences involving adult, private, consensual same sex activity¹ in former British colonies.

Legislative data-bases necessarily still include reference to United Kingdom legislation in Fiji Islands, Kiribati, Solomon Islands, Tuvalu and Vanuatu and Samoan Laws still refer to New Zealand Legislation in Samoa. The relevance of such references is illustrated by, for example, the Patents Act 1949 (UK) which still applies in Solomon Islands. Similarly, the Patents Act 1977 (UK) is referred to in the (Kiribati) Registration of UK Patents Act Cap. 87.

International obligations that have been undertaken by a country, or are in the process of being undertaken, form part of its legislative environment, such as becoming a party to a United Nations Multilateral Treaty. Details of signatories to UN Multilateral Treaties and their status, together with information regarding parties can be found at the website at <http://treaties.un.org>. The UN Treaty web-site also provides the text of the Treaties and any Optional Protocols to them. Further information about how a country becomes a Party to a Treaty is given in the *Treaty Handbook* which also explains how a Party is required to implement the terms of a treaty into its domestic law. After signing a Treaty and before becoming a Party, the prospective party reviews existing legislation in order to decide whether new legislation has to be made so that the treaty can be implemented within the country. This is why, for instance, the Samoa Law Reform Commission website currently shows a pipeline project: Legislative Compliance review for the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

Cabinets and Parliaments are always keen to know whether one of the purposes of any new law that is proposed is to implement (or aid implementation of) international obligations. Including such information in Cabinet Papers and Explanatory Memoranda to Bills before

¹ M. Kirby, *The Sodomy Offence: England's Least Lovely Criminal Law Export?*, [2011] JCL, 22

Parliament can be extremely influential in achieving both ‘in principle’ approval from Cabinet to draft a Bill and, ultimately, to a Bill being passed by the legislature.

Often entry into international obligations is negotiated by such Ministries as Foreign Affairs, or Trade, and there is on occasion a lack of awareness about the impact that such undertakings have upon other areas of Government. Sometimes, this has become apparent in the health sector after the negotiation and entry of the country into the World Trade Organization (WTO) because of the impacts of particular WTO agreements. Most commonly, the consequences of WTO membership are felt in Ministries and Departments of Health because of the General Agreement on the Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).

When implementing international obligations in domestic law, such as passing a Disability Act in order to implement the Convention on the Rights of Persons with Disabilities (CRPD), that implementing Act can also be relevant in the drafting of HIV-related legislation because it will establish particular procedures for the making and hearing of complaints of ‘persons under a disability’. That term will be defined or explained in the Disability Act and the definition will be of importance because it could include persons who are living with HIV. This highlights the need to ensure harmony between different pieces of legislation, especially when they are potentially providing remedies to the same person.

Once a country has become a party to a particular international obligation, the country needs to continue to ensure that it remains in compliance. For instance, there has been a recent report² from the UN Special Rapporteur on Torture to the Human Rights Council concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In his Report, the Special Rapporteur looks at different aspects of healthcare treatment that he claims amount to cruel, inhuman or degrading treatment or torture. The report focuses on the need for consent to treatment of all patients and particularly patients belonging to marginalised groups, including people with disabilities, people suffering from addiction, lesbian, gay, bisexual, transgender and intersex persons and women. He urgently asks States to reform their healthcare systems, banning all forms of compulsory detention or restraint for medical conditions.

Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) need to be aware that the United Nations standards with respect to prisoners are also changing. Revised UN Standard Minimum Rules for the Treatment of Prisoners are about to be made. The original Standard Minimum Rules are now 55 years old and, while they remain of value today, are no longer considered compliant with current international human rights standards. An Inter-governmental Expert Group meeting on the Review of the UN Standard Minimum Rules for the Treatment of Prisoners was held in Buenos Aires in December 2012. It is expected that the outcome of that meeting will be reported to the UN Commission on Crime Prevention and Criminal Justice in April 2013 and revised Rules made.

As anyone who works in the area of law reform or legislative drafting knows, examination of the prevailing legal environment is essential in order to make evidence-based decisions about the scope and content of new legislation. New laws have to be harmonious with other laws. The relevance of policies, other primary and secondary laws to new law being developed can only be determined upon close reading and analysis.

Consideration has to be given about how the new legislation will work alongside existing Laws or Acts (for example on questions of access to justice) and whether there needs to be

² 4 March 2013

consequential amendments or repeals of other laws, such as changes that might need to be made to Immigration Laws in order to implement a legal requirement that decisions on entry, stay and residence should not be HIV-related.

The measured examination of the legislative environment must occur whether or not an HIV-specific law is to be adopted or, for example, where another legislative vehicle is to be used, such as giving legislative effect to the HIV response by way of a Public Health Act. No matter the legislative vehicle, the overriding purpose of such new law is to provide the best possible law for the prevention of HIV and for the care and support of persons living with HIV and those who are at risk of acquiring the virus. As the legislative environment in each country is unique, the author does not endorse the thinking that a model law can be ‘imported’ and made to fit the country. Models, or other examples of laws that have been enacted as an HIV Law or Act, are certainly useful to guide a country into thinking about particular matters that need to be addressed in the legislation and it is common to use another law as a precedent for particular sections. For example, the model South African HIV Law is very useful regarding responsibilities of a State concerning education about HIV. It is of paramount importance, however, to make sure that any law that is enacted fits the resources and abilities of the country and is capable of being effective to achieve its stated purpose

Those developing law with the aim of removing legal and policy barriers to accessing HIV services for People Living with HIV and the Key Affected Populations are encouraged to access the many authoritative resources now available at the web-site of the Global Commission on HIV and the Law at www.hivlawcommission.org. A useful series of Regional Issues Briefs can be found including, for example, the *Asia-Pacific Regional Issues Brief: Laws and Practices Relating to Criminalization of People Living with HIV and Populations Vulnerable to HIV*. Written in 2011, that Regional Issues Brief includes Chapters on the alignment of health and legal policy responses, HIV transmission, exposure and non-disclosure, men who have sex with men (MSM) and transgender people, sex work and the sex industry and drug use, giving examples from throughout the Region.

Another Regional Issues Brief that explains the complex area of patent laws and the requirements of the TRIPS agreement (as well as providing information on the TRIPS flexibilities) is the *Regional Issues Brief: Intellectual Property Rights and Access to Medicines*. The UNAIDS, WHO, UNDP *Policy Brief: Using TRIPS flexibilities to improve access to HIV treatment*³ can also assist with this topic.

When seeking to remove HIV-related travel restrictions, a publication (often called GIPA 2010⁴) *Denying Entry, Stay and Residence due to HIV Status: Ten things you need to know* provides brief and compelling arguments about why such restrictions are both discriminatory and uphold stigma.

³ Available at
http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2049_PolicyBrief_TRIPS_en.pdf

⁴ Available at
http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/basedocument/2009/jc173_8_entry_denied_en.pdf

2. FIJI

2.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Consolidated Legislation—1985 Revised Edition
Sessional Legislation 1874—
Promulgations and Decrees (updated to 2013)
Subsidiary Legislation
United Kingdom Legislation in Fiji Islands

2.2 INTERNATIONAL TREATIES, OBLIGATIONS & MEMBERSHIPS

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) accession 28 August 1995 when it made reservations on articles 5 (a) and 9 of the Convention. On 24 January 2000, the Government of Fiji notified the Secretary-General that it had decided to withdraw those reservations made upon accession.

Convention on the Rights of the Child (CRC) signature 2 July 1993 and ratification 13 August 1993. Acceptance of amendment to article 43 (2) of CRC on 20 August 1997
Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography signature 16 September 2005

Convention on the Rights of Persons with Disabilities (CRPD) signature 2 June 2010
Optional Protocol to CRPD signature 2 June 2010

International Health Regulations (2005) (IHR (2005)) to which Fiji became bound through membership of the International Health Assembly of the World Health Organization on 15 June 2007

Member of World Trade Organization (WTO) and subject to TRIPS requirements (and patent laws have been revised to comply with TRIPS as required to provide patent protection for pharmaceutical products from 2005)

Member of International Labour Organisation (ILO)

2.3 CONSTITUTIONAL PROTECTIONS

The 1997 Constitution of Fiji was the supreme law of Fiji from its adoption in 1997 until 2009 when President Josefa Iloilo purported to abrogate it. A draft Constitution 2013 has been drawn up and released for consultation by the current government. The consultation period (in which submissions in response to the draft will be received) is currently extended to 20 April 2013. A pdf of the draft is available at <http://www.fiji.gov.fj>

The further brief analysis in this section refers to the draft Constitution 2013. Clause numbers are referred to, rather than sections, as the document is in draft form.

Chapter 2 comprises the Bill of Rights. The Chapter applies to all to be made after the commencement of the Constitution and to all laws already in force at commencement; thus it will apply to the HIV/AIDS Decree 2011.

Interpretation of the Chapter by a court, tribunal or other authority must promote the values that underlie a democratic society based on human dignity, equality and freedom and may, if

relevant consider international law that is applicable to the protection of the rights and freedoms of the Chapter (clause 7 (1)). A direction is included that, in considering the application of the Chapter to any particular law, a court must interpret the Chapter contextually, having regard to the content and consequences of the particular law, including its impact on individuals or groups of individuals (clause 7 (5)).

The Bill includes many rights, none of which are absolute in that particular activities are not to be regarded as a contravention of the section (currently clause) giving the right. As such, the rights given are qualified rights. For instance, the right to life provides that a person must not be arbitrarily deprived on life (clause 8). Deprivation of life must not be regarded as inflicted in contravention of this right when it results from the use of force which is no more than absolutely necessary to (among other things) effect a lawful arrest or to prevent the escape of a person lawfully detained.

Similarly, personal liberty (clause 9) can be deprived for the purpose (among other things) of ‘preventing the spread of an infectious or contagious disease’ (clause 9 (1) (g)). This is a broad exception because it is not further limited (as is more usual in Bills of Rights) by reference to the deprivation needing to be done under the authority of any law (as, for example, might be authorised under public health or quarantine laws). Clause 9 (1) (h) also permits the deprivation of liberty to be for the purpose of the person’s care or treatment or for the protection of the community if he or she is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol or a vagrant. Thus having (or being reasonably suspected to have) a mental illness, an addiction to drugs or alcohol or being without a fixed place of living is sufficient for the person’s liberty to be removed if it is ‘for the purpose of the person’s care or treatment or the protection of the community’.

The freedom from cruel and degrading treatment provided by clause 11 is not as qualified as the deprivation of liberty provisions. Every person has the right to freedom from torture of any kind, whether physical, mental, or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

Access to courts or tribunals is confirmed in clause 15. Freedom of assembly at clause 18 is, again, a qualified right but this time the qualification is linked to a law that may limit, or impose limitations on the right. Clause 18(2) provides that the freedom of assembly right held by every person, peaceably and unarmed, to assemble, demonstrate, picket and present petitions may be limited by a law, or a law may authorise the limitation of the right. This includes when the limitation is ‘in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections’ or ‘for the purpose of protecting the rights and freedoms of others’. The rights to freedom of association (clause 19), employment relations (clause 20), freedom of movement and residence (clause 21) are all similarly subject to similar limitations (in terms of laws authorising the limitation) as applies to clause 18.

Every person has the right to privacy under clause 24 (including the right to confidentiality of personal information, to confidentiality of communications and in respect for their private and family life) but, again, a law may limit or may authorise the limitation of the right.

Clause 26 contains a right of paramount importance – the right to equality and freedom from discrimination. Subclause (3) provides—
A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her—

- (a) *actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, gender, sexual orientation,*

gender identity, birth, primary language, economic or social or health status, disability, age, religion, marital status or pregnancy
(b) ...

or any other ground prohibited by this Constitution.

Subparagraph (a) provides perhaps the most comprehensive grounds of discrimination to date included in any constitutional document in the South Pacific and is applauded.

Other rights include—

- the right to education (clause 28),
- the right to economic participation (clause 29),
- the right to social security schemes (clause 34),
- the right to health (clause 35),
- the right to freedom from arbitrary evictions (clause 36) which provides that evictions from a home or the demolition of a home cannot be without an order of a court,
- the rights of children (clause 38), and
- the rights of persons with disabilities (39) which may in fact reinforce the rights of PLHIV if they are ‘a person with a disability’. This right includes access to necessary materials, substances and devices relating to the person’s disability. Thus it is arguable that anti-retroviral therapy and condoms are substances and devices that so relate.

The right to health does include some respite to the State if it is able to show that it does not have the resources available to provide the healthcare prescribed in the right i.e. for the State to take reasonable measures, within its available resources to achieve the progressive realisation of the right of every person to health, and to the conditions and facilities necessary to good health, and to health care services, including reproductive health care. If the State claims the absence of resources, it is the responsibility of the State to show that the resources are not available.

Clause 42 confirms that the Human Rights Commission established under the Human Rights Commission Decree 2009 continues in existence as the Human Rights and Anti-Discrimination Commission. Clearly, as this Commission is now constituted, it is likely to have a role in the examination of questions of discrimination put under the HIV/AIDS Decree 2011. As at the time of writing, the web-page of the Commission was not available to the author. Among other things, the Commission has the responsibility for receiving and investigating complaints about alleged abuses of human rights. It is unknown whether the Commission receives complaints alleging unlawful acts under the HIV/AIDS Decree 2011.

2.4 NATIONAL PLANS AND REPORTS

- Ministry of Health, Republic of Fiji National Strategic Plan on HIV and STIs, 2012-2015 which includes as Priority 1: Prevention of HIV and STI transmission. The strategic approaches within the prevention objective of Prevention among key affected populations include that *Members of the uniformed services such as the military, police and prison services will receive support for prevention of HIV and STI transmission for themselves and their families. There will also be programs to raise their awareness of how their work can enhance or prohibit prevention among other vulnerable groups. This includes education about the HIV/AIDS Decree, the impact of police and military practices on the vulnerability or resilience of sex*

*workers, and the potential to reduce vulnerability of prisoners while they are in prison and upon release*⁵.

- Ministry of Health, Implementation Plan of National Strategic Plan 2011-2015: National AIDS/STD Programme, 2011
- UNAIDS, Centre for International Health Strategy 2010-2016, Global AIDS Progress Report 2012: Fiji Islands

2.5 LAWS OF RELEVANCE TO FOCUS AREAS AND LAW REVISION ACTIVITIES

Administration of Justice Decree 2009

- Administration of Justice (Amendment) Decree 2009
- Administration of Justice (Amendment) No. 2 Decree 2009
- Administration of Justice (Amendment) No. 3 Decree 2010

Child Welfare Decree 2010

Corrections Service Act 2006 [No knowledge of commencement]

- Prisons and Corrections (Amendment) Decree 2011

Crimes Decree 2009

- Crimes (Amendment) Decree 2010

Criminal Procedure Decree 2009

Domestic Violence Decree 2009

Employment Relations Promulgation 2008

- Employment Relations (Amendment) Decree 2009

HIV/AIDS Decree 2011

- HIV/AIDS (Amendment) Decree 2011

Human Rights Commission Decree 2009

Immigration Act 2003

- Immigration (Amendment) Promulgation 2008
- Immigration (Amendment) Decree 2011
- Immigration Regulations 2007

Mental Health Decree 2011

Patents Act [Cap. 239]

- Patents Amendment Act 2002

Public Order Act [Cap. 20]

- Miscellaneous Amendments (Provincial Administrators) Act 2005
- Public Order (Amendment) Decree 2011

Public Health Act [Cap. 111]

Public Service Act 1999

- Public Service (Amendment) Decree 2011

Quarantine Act [Cap. 112]

Sentencing and Penalties Decree 2009

⁵ At page 32.

2.6 FIJI LCR 2009 (The content of Fiji LCR 2009 is reproduced here as published in March 2009)

HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Fiji Islands Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS March 2009

Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Fiji Islands. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006.⁶

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.⁷ The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.
- Criminal law.
- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.
- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the

⁶ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

⁷ UNAIDS/IPU. Geneva, 1999.

information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.⁸

Background⁹

Fiji has very high rates of sexually transmitted infections (STIs) and there has been a steady rise in reported HIV cases, from a cumulative total of 68 diagnoses by 2000, 182 by 2004 and 259 by 2007. Many other cases go undiagnosed. UNAIDS and WHO estimated the actual number living with HIV to be over 450 in 2008. Very high levels of stigma and concerns about confidentiality are a disincentive to HIV and STI testing.

Virtually all HIV cases have been acquired sexually. Most of these cases are reported as being transmitted through heterosexual sex. In some cases HIV has been transmitted through male to male sex, and this may be under-reported as a route of transmission due to stigma associated with homosexuality. Injecting drug use has not been a significant factor in Fiji's epidemic to date, with only one case reported to have resulted from injecting drug use.

⁸ See *Consolidated Guidelines* paras 102-103.

⁹ Information based on UNAIDS and WHO (2008) *Epidemiological Factsheet on HIV and AIDS* Geneva: WHO. Ministry of Health Fiji (2008), *UNGASS 2008 Country Progress Report Fiji : 1 January 2006 – 31 December 2007; Increasing Number of STIs Put Fiji Youth at Risk of HIV/AIDS, Health Official Says* October 7, 2008 www.thebody.com/content/news/art48931.html; C.Jenkins (2005), *HIV/AIDS in the Pacific*, Manila: ADB; WHO (2006); *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries* Ministries of Health, World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community, University of NSW.

Males (56%) and young people aged 20-29 years (45%) are predominantly affected. 81% of diagnoses are indigenous Fijian, 13% Indo-Fijian and 6% other races.

The high incidence of STIs such as syphilis and gonorrhoea is a proxy indicator of unprotected sex in the community. Chlamydia is endemic among pregnant women. Social factors that contribute to vulnerability to STIs include a young, mobile population and taboos that constrain open discussion of sex and sexual health. Some conservative faith-based groups discourage promotion of condoms, particularly to youth.

Condom use is very low, and the selling of sex for cash or other commodities or services is widespread. In 1996, selling sex for cash was reported by 4.9% of males and 13.3% of females.¹⁰ A survey of police and military personnel in 2005 found that 5.8% of males reported having sex with female commercial partners in the last year, none of whom reported consistent condom use. Only 19% of men had correct HIV protection and transmission knowledge.¹¹

The Ministry for Health has established “hub” health care centres to facilitate treatment, care and support for people living with HIV. Testing is also made available through private medical practices, although access is limited for the poor as testing costs are high. Public hospitals implement mandatory HIV screening of women attending for ante-natal services. Mandatory HIV testing is also required of soldiers on active duty overseas.

The patriarchal nature of Fijian society increases the vulnerability to HIV of women, and of men who have sex with men. Gender inequalities and gender-based violence are widespread. There are low levels of HIV awareness among in-school youth, and a lack of sex education in schools. The criminalization of female prostitution, but not of the purchasing of sex by male clients, reinforces gender inequality, and limits female sex workers’ access to HIV information, prevention equipment, and treatment.

Legal system¹²

The country’s legal and judicial structure is patterned on the British common law system. Under the *Constitution of the Republic of the Fiji Islands 1997*, customary law is no longer formally recognised as a general source of law. However, Section 186 of the Constitution provides:

- (1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with Fijian processes.
- (2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.

Magistrates’ Courts are established for each division and hear most civil and criminal matters. The High Court is the appellate court for decisions of Magistrates’ Courts. The highest court is the Supreme Court.

Fiji’s Bill of Rights is enshrined in Chapter 4 of the *Constitution 1997*. Human rights guaranteed are:

¹⁰ C. Jenkins (2005), *HIV/AIDS in the Pacific*, Manila, ADB

¹¹ WHO (2006) *Second Generation Surveillance Surveys of HIV, Other STIs and Risk Behaviours in Six Pacific Island Countries (2004-2005)* WHO, Manila.

Information on legal systems from Pacific Islands Legal Information Institute; additional information from RRRT.

- right to life (Section 22);
- personal liberty (Section 23);
- freedom from servitude and forced labour (Section 24);
- freedom from cruel and degrading treatment (Section 25(1));
- freedom from scientific or medical treatment or procedures without informed consent (Section 25(2));
- freedom from unreasonable searches and seizures (Section 26);
- rights of arrested and detained persons (Section 27);
- rights of charged persons (Section 28);
- right of access to courts and tribunals (Section 29);
- freedom of expression (Section 30);
- freedom of assembly (Section 31);
- freedom of association (Section 32);
- right of workers to form and join trade unions, and of employers to form and join employers' organisations (Section 33);
- freedom of movement (Section 34);
- freedom of conscience, religion and belief (Section 35);
- right to personal privacy, including privacy of personal communications (Section 37);
- right to equality before the law, without discrimination on the grounds of actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability (Section 38);
- right to basic education and to equal access to educational institutions (Section 39).

International obligations

Fiji is a member of the United Nations. It has ratified the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination Against Women, and the Convention on the Rights of the Child. Section 43(2) of Fiji's *Constitution* provides that, in interpreting the provisions of Fiji's Bill of Rights (see "Checklist 4 – Anti-Discrimination Legislation" below), the courts must have regard to relevant public international law applicable to the protection of the rights in the Bill of Rights.

HIV policy framework

Fiji's response is led by the National Advisory Committee on AIDS (NACA) and its Secretariat within the framework of the National HIV/AIDS Strategic Plan 2007-2011. The national HIV programme is coordinated by NACA, which is chaired by the Minister for Health and reports directly to the Cabinet. The Fijian Network of People Living with HIV (FJN+), Fiji Red Cross Society, and the University of the South Pacific are represented on the National Advisory Committee alongside Government. NACA also coordinates the national strategic plan, mobilises resources, and monitors the implementation of the national programme. Implementing partners are government and non-government organizations, community based organizations, private sector organizations, churches and community leaders.

Prison authorities, the military, the Ministry of Labour, and some private sector agencies have developed HIV policies. The Fiji Strategic Development Plan includes a strong focus on HIV, and reiteration of Fiji's commitment to the Millennium Development Goals.

The *Charitable Trusts Act* (Cap 67) enables the Government to de-register NGOs, which may limit the role of NGOs in policy development processes.¹³

CHECKLIST 1 – PUBLIC HEALTH LAW

1. Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:

- **Information and education**
- **Voluntary testing and counselling**
- **STD, sexual and reproductive health services**
- **Access to means of prevention e.g. condoms and clean injecting equipment**
- **Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?**

Fijian legislation does not specifically empower public health authorities to provide HIV and STI prevention and treatment services, and reproductive health services. On 12 January 2006, Fiji issued a Notification of Infectious Diseases under Section 68 of the *Public Health Act* (Cap 111) to declare HIV/AIDS an infectious disease under the Act.

2. Does the legislation:

- **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
- **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?**

Fiji's *Constitution* guarantees freedom from scientific or medical treatment or procedures without informed consent (Section 25), which appears to satisfy the requirement that laws require that HIV testing only be performed with informed consent.

Section 41 of the *Constitution* allows for application to the High Court for redress where a person considers there has been or is likely to be a contravention of a constitutional right in relation to that person. An application may also be made on behalf of another person, where that other person is detained. This would provide for judicial review of mandatory HIV testing.

Notwithstanding the above constitutional provisions, several Acts provide for mandatory medical examination, such as —

- the *Public Health Act* (Cap 111) Section 69: medical examination of persons suffering from infectious diseases. In practice, ante-natal HIV testing for women is routine.
- the *Royal Fiji Military Forces Act* (Cap 81) and *Police Act* (Cap 85) require military personnel and police to undergo medical examination. In practice personnel to be deployed overseas are subject to mandatory HIV testing.
- the *Immigration Act* (Cap 88) Section 4 vests powers in immigration officers and Government medical officers to subject a person who desires to enter Fiji to a medical examination; Section 11 classifies people who do not submit to medical examination as prohibited immigrants. The terms of the legislation appear sufficiently broad to encompass mandatory HIV testing.

These provisions conflict with the standards established by the *International Guidelines*.

¹³ Information provided by RRRT.

Section 38(2) of the *Employment Relations Promulgation 2007* states that it is an offence, where a contract of service specifies that a medical examination is required in the course of a worker's employment, for the medical examination to comprise HIV/AIDS screening, or screening for sexually transmitted diseases or pregnancy.

Fiji's Ministry of Labour, Industrial Relations, Tourism and Environment issued a *National Code of Practice for HIV/AIDS in the Workplace* in 2007. In relation to workplace testing, the *National Code of Practice* provides:

Where adequate medical services exist, voluntary testing may be undertaken at the request and with the written informed consent of a worker, with advice from the workers' representative if so requested. It shall be performed by suitably qualified personnel with adherence to strict confidentiality and disclosure requirements. Gender-sensitive, pre-test and post-test counselling, which facilitates an understanding of the nature and purpose of the HIV tests, the advantages and disadvantages of the tests and the effect of the result upon the worker, shall form an essential part of any testing procedure (para.10.4).

- 3. Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?**

Does the legislation provide in such cases the following due process protections:

- **Reasonable notice of case to the individual;**
- **Rights of review/appeal against adverse decisions;**
- **Fixed periods of duration of restrictive orders (i.e. not indefinite);**
- **Right of legal representation?**

Part VII (Infectious Diseases) of the *Public Health Act* (Cap 111) provides for —

- regulation of movement of people, medical examination, restraint and isolation of persons for the purposes of preventing the spread of an infectious disease (Section 69);
- notification provisions where a person has died of infectious disease (Sections 71 and 73);
- the offence of being in a public place without taking precautions against the spread of the disease, or of a carer permitting the offence to be committed.

These provisions all have potential to increase discrimination and stigma against people living with HIV and those associated with them. These aspects of the *Public Health Act* conflict with Constitutional rights and freedoms, and the standards established in the *International Guidelines*.

- 4. Does the legislation authorise health-care professionals to notify sexual partners of their patients' HIV status in accordance with the following criteria:**
- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;**
 - **The HIV-positive patient has refused to notify or consent to notification of the partner;**
 - **A real risk of HIV transmission to the partner exists;**

- The identity of the HIV-positive partner is concealed from the partner where this is possible;
- Necessary follow-up support is provided to those involved?

There is no legislation addressing the duty of health care professionals to notify third parties of risks posed by a patient to others. The Constitutional guarantee of right to personal privacy (Section 37 *Constitution*) may be infringed if information on HIV status is disclosed without patient consent.

5. **Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?**

No legislation was identified that protects blood, tissue, and organ supply against contamination from HIV or other blood borne viruses.

CHECKLIST 2 – CRIMINAL LAW

1. **Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers)?**

There is no legislative provision for the operation of needle and syringe programs in Fiji. The occurrence of injecting drug use in the community should be monitored so that action can be taken at an early stage should injecting drug use emerge as a new factor in the spread of HIV.

2. **Does the law allow the following sexual acts between consenting adults in private:**

- Homosexual acts e.g. sodomy;
- Fornication or adultery;
- Street sex work;
- Brothel or escort sex work?

Homosexual acts e.g. sodomy.

Section 175 of the *Penal Code* prohibits “carnal knowledge against the order of nature, and section 177 prohibits “acts of gross indecency” between males. In the cases of *Nadan v The State*¹⁴ and *McCoskar v The State*¹⁵ the High Court ruled that laws against consenting sexual acts between adult men in private are in breach of the constitutional guarantee to personal privacy (Section 37 *Constitution*). These rulings in effect decriminalise homosexuality.

Fornication or adultery

Adultery is not illegal, is not grounds for compensation and is not grounds for divorce.

Street sex work

Prostitution is criminalised by the *Penal Code* Section 168: ‘Any common prostitute who loiters or solicits in any public place...’ and ‘any person who, in any public place, solicits for immoral purposes...’ This is applied mainly against female sex workers and not against the male client. The law is inconsistent with the *International Guidelines*.

Brothel or escort sex work?

¹⁴ (2005) FJHC 1.

¹⁵ (2005) FJHC 500.

Penal Code Section 167 makes it an offence to live off the earnings of prostitution or to aid and abet prostitution. *Penal Code* Section 170 provides that any person who-

- (a) keeps or manages or acts or assists in the management of a brothel; or
- (b) being the tenant, lessee or occupier of any premises knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or
- (c) being the lessor or landlord of any premises or the agent of such lessor or landlord lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

is guilty of a misdemeanour.

3. If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?

There are no exceptions in the prostitution offences for HIV prevention and care services.

4. Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:

- Practised by clients;
- Practised by workers; and
- Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?

Legislation does not regulate occupational health and safety in the sex industry.

5. Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?

There is no anti-trafficking legislation. Section 255 of the *Penal Code* provides an offence for abduction of girls under 16 years of age.

6. Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?

Fiji has incorporated an offence of intentional or negligent transmission of life-threatening disease at Section 193 of the *Penal Code*, as follows —

Negligent act likely to spread infection of disease dangerous to life

193. Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.

The *Code* also includes an offence to maliciously do grievous harm (Section 227) which is defined as —

any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.

These are general rather than HIV-specific offences.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

1. Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:

- **Information and education**
- **Voluntary counselling and testing**
- **Means of prevention e.g. condoms, bleach, and clean injecting equipment**
- **Treatment – ART and treatment for opportunistic infections**
- **Choice to participate in clinical trials (if available)?**

The *Prisons and Corrections Act 2006* provides a human rights-based framework for HIV in prisons.

The Act prohibits any programme or policy of compulsory testing of prisoners to determine their HIV/AIDS status (see Section 26(1)). Section 3 of the Act requires prison authorities to ensure that prisoners who are infected with HIV or suffering any serious illness or any disability are treated in a manner which takes into account their basic rights and special needs.

The Act also provides that “prison authorities shall apply the accepted practices and standards identified in the context of HIV/AIDS, and in particular the International Minimum Standards on HIV/AIDS and Human Rights” (Section 3). This presumably refers to the *International Guidelines on HIV/AIDS and Human Rights*, as there are no other UN authorised minimum standards that have been published internationally.

The Act provides that in interpreting the Act and exercising any power, function or duty under it, all persons shall apply the rights and obligations of the Convention on the Elimination of all forms of Discrimination Against Women and the Convention of the Rights of the Child (Section 3).

The Act provides that arrangements shall be made for the provision of medical and related services, in accordance with any relevant policy or programme of the Ministry of Health, including public awareness and education programmes and “programmes of specific treatment for certain diseases” (Section 32).

2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?

Fijian law does not recognize rape of a male by another male (*Penal Code* Section 149), thus it appears this requirement is not satisfied. Assault is a prison offence.

3. Does the legislation provide for the confidentiality of prisoners’ medical and/or personal information, including HIV status?

Section 33(4) of the *Prisons and Corrections Act 2006* provides that “Regulations and Commissioners Orders shall prescribe requirements and arrangements for ensuring that the HIV/AIDS status of any prisoner is kept confidential”. Hence this requirement is satisfied in the case of HIV-related information. Hence this requirement is satisfied in relation to prisoners’ HIV-related information. It was not clear at the time of writing whether the duty of confidentiality extended to other personal and/or medical information concerning prisoners.

4. Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?

Section 31(6) of the *Prisons and Corrections Act* provides that no separation shall be ordered on the basis of a prisoner's HIV/AIDS status.

5. Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?

Section 26(1) of the *Prisons and Corrections Act 2006* requires prison authorities to ensure that prisoners who are infected with HIV or suffering any serious illness or disability are treated in a manner which takes into account their basic rights and special needs. Section 46 provides for early release on medical grounds.

There is a discretion at common law to take HIV into account in mitigation when deciding a prison sentence if imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk that imprisonment will have a gravely adverse effect on the offender's health (see e.g. *PP v Lim Kim Hock* [1998] SGHC 274; *Bailey v DPP* (1988) 78 ALR. 116; *R v Bernard* [1997] 1 Cr App R (S) 135).

6. Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?

Prison authorities are required to treat prisoners with HIV or AIDS in a manner which takes into account their basic rights and special needs (Section 3). Discrimination in relation to access to facilities and privileges is likely to be a breach of this Section.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

1. Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?

Sections 6 and 75 of the *Employment Relations Promulgation 2007* prohibits discrimination against workers or prospective workers on the ground of real or perceived HIV/AIDS status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

There is also a general protection against discrimination on the ground of disability in the Constitution.

Section 38 of Fiji's *Constitution 1997* guarantees the right to equality before the law, without discrimination. The Constitution prohibits discrimination on the grounds of actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability. Neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground. Every person has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging-houses, public restaurants, places of public entertainment, public transport services, taxis and public places.

Chapter 5 of the *Constitution* dealing with social justice makes detailed provision at Section 44 for programs designed to achieve, for 'all groups or categories of persons who are

disadvantaged’, equality of access to education and training; land and housing; and participation in commerce and in all levels and branches of service of the State.

The *Human Rights Commission Act* prohibits “unfair discrimination”, which is defined at Section 17 of the Act as directly or indirectly differentiating adversely against or harassing a person by reason of disability (or other prohibited grounds of discrimination).

2. Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?

Section 38 of the *Constitution* prohibits discrimination on the grounds of actual or supposed personal characteristics or circumstances including gender, sexual orientation and disability.

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

Does the legislation contain the following substantive features:

- **Coverage of direct and indirect discrimination;**
- **Coverage of those presumed to be infected, as well as carers, partners, family, or associates;**
- **Coverage of vilification;**
- **The ground complained of only needs to be one of several reasons for the discriminatory act;**
- **Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);**
- **Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?**

Coverage of direct and indirect discrimination

Section 38 of the Bill of Rights of the *Constitution* provides —

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.

The *Employment Relations Promulgation 2007* prohibits direct and indirect discrimination against workers or prospective workers.

Coverage of those presumed to be infected, as well as carers, partners, family or associates

The *Employment Relations Promulgation 2007* covers workers or prospective workers presumed to be infected.

Those presumed to be infected would be covered under the terms of Section 38 of the *Constitution*, which prohibits discrimination on the basis of “actual or supposed” personal characteristics, including disability. There are no specific protections against discrimination in the *Constitution* for carers, partners, families or associates of people living with HIV, except where they are assumed to have a disability.

Coverage of vilification

The *Human Rights Commission Act* at Section 17 prohibits “harassment” of a person by reason of a prohibited ground of discrimination, which includes disability, gender and sexual orientation. The right to be free from cruel and degrading treatment under section 25(1) of the *Constitution* may also provide some protection against vilification.

The ground complained of only needs to be one of several reasons for the discriminatory act

Based on the information available at the time of writing, this requirement is not satisfied by Fijian law.

Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data)

The *Employment Relations Promulgation 2007* provides for narrow exceptions, which are defined in relation to authenticity and privacy, religious purposes, disability and genuine occupational qualifications.

In particular, disability exceptions are narrowly defined in that the *Promulgation* does not prevent different treatment based on physical disability if—

- (1) (a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
- (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of infecting others with an illness, and it is not reasonable to take that risk. This subsection (1)(b) does not apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)

The prohibitions of discrimination contained in the *Constitution* apply widely to both the public and private sectors. Areas in which discrimination is prohibited include employment, training, education, access to services, facilities, banking, public places, vehicles, rights to land and housing, provision of trade and professional qualifications and membership of organisations and unions. Additionally, the *Constitution* at Section 39 guarantees all persons the right of equal access to educational institutions. The *Employment Relations Promulgation 2007* applies to public and private sectors.

3. Does the legislation provide for the following administrative features:

- **Independence of a complaint body;**
- **Representative complaints (e.g. public interest organizations on behalf of individuals)**
- **Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;**
- **Access to free legal assistance;**
- **Investigatory powers to address systemic discrimination;**
- **Confidentiality protections e.g. use of pseudonyms in reporting of cases?**

Independence of a complaint body

Section 42 of the *Constitution* establishes the Human Rights Commission, the only one in the Pacific (although several other PICs are considering establishing Commissions). The Fiji Human Rights Commission is constituted as an independent statutory body under the 1997 Constitution. In 2007, the Commission's accreditation to the UN Human Rights Council was suspended by the International Co-ordinating Committee of National Human Rights Commissions due to concerns about independence and the Commission resigned its membership of the Asia Pacific Forum of National Human Rights Institutions. In relation to employment matters, an independent Employment Relations Tribunal and Employment Relations Court were established by the *Employment Relations Promulgation* and have jurisdiction in relation to work related discrimination complaints.

Representative complaints (e.g. public interest organizations on behalf of individuals)

Representative complaints can be made to the Human Rights Commission. Section 25 of the *Human Rights Commission Act 1999* provides that any person may make a complaint to the Commission, including a representative complaint on behalf of other persons with a similar cause of complaint, about a contravention or alleged contravention of human rights.

Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill

There was insufficient information available at the time of writing to determine this requirement is satisfied.

Access to free legal assistance

There was insufficient information available at the time of writing to determine this requirement is satisfied.

Investigatory powers to address systemic discrimination

Under the *Human Rights Act* the Human Rights Commissioner can inquire into matters and enactments which appear to infringe human rights, hence this requirement appears to be satisfied.

Confidentiality protections e.g. use of pseudonyms in reporting of cases

Section 29 of the *Human Rights Commission Act* provides that a letter written by a person in custody; or a patient in a hospital and addressed to the Commission must be forwarded immediately, unopened and unaltered, to the Commission by the person in charge of the place or institution where the writer of the letter is detained or in which he or she is a patient. Section 30 requires the investigations of the Human Rights Commission to be conducted in private. Section 41 provides that in any court proceedings brought under the Act before the High Court, the court may, if it considers it desirable to do so order that any hearing held by it be heard in private, either in whole or part and may make an order prohibiting the publication of any report or account of the evidence or other proceedings before it (whether heard in public or in private) either in whole or in part. The guarantee of personal privacy in Section 37 of the *Constitution* could be invoked to claim privacy in reporting.

4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- **Education and promotion of human rights;**
- **Advising government on human rights issues;**

- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on its activities?**

Education and promotion of human rights

The Fiji Human Rights Commission has the functions of promoting and protecting human rights in Fiji Islands.

Advising government on human rights issues

The Human Rights Commission is specifically empowered to make recommendations to government.

Monitoring compliance with domestic legislation and international treaties and norms

The power of the Human Rights Commission to “inquire into matters and enactments which appear to infringe human rights, and to make recommendations to government” appears to encompass the function of monitoring compliance with domestic legislation and in international treaties and norms, although specific information on this issue was not available at the time of writing.

Investigating, conciliating, resolving or arbitrating individual complaints

The Human Rights Commission is empowered to perform all these functions, hence this requirement is satisfied.

Keeping data/statistics of cases and reporting on its activities

The Commission is required to report annually (Section 42).

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. **Does the law ensure the equal legal status of men and women in the following areas:**
 - **Ownership of property and inheritance;**
 - **Marital relations e.g. divorce and custody ;**
 - **Capacity to enter into contracts, mortgages, credit and finance;**
 - **Access to reproductive and STD health information and services;**
 - **Protection from sexual and other violence, including rape in marriage;**
 - **Recognition of de facto relationships;**
 - **Prohibition of harmful traditional practices e.g. female genital mutilation?**

Ownership of property and inheritance and capacity to enter into contracts, mortgages, credit and finance

The constitutional guarantee of equality before the law, and the prohibition against discrimination on the basis of gender, indicate that men and women should enjoy equal status before the law.

In relation to inheritance *Fiji's Succession, Probate and Administration Act* (Cap 60) provides for equal inheritance rights for men and women. Women who are left out of a will or who are otherwise inadequately provided for can apply for a family provisions order: *Inheritance (Family Provision) Act* (Cap 61).

However Fijian customary law may lawfully discriminate against women in respect of land. The Fiji *Constitution* includes provisions which exempt customary law in respect of inheritance of land and chiefly title from the operation of the provisions guaranteeing equality and non-discrimination (Section 38(8)). Therefore customary property, contract and inheritance laws in respect of land are legal even where they discriminate against women.

The *Human Rights Commission Act 1999* Section 17 makes it unlawful to discriminate in 'the provision of goods, services or facilities, including facilities by way of banking or insurance for grants, loans credit or finance' on the grounds of gender.

Marital relations e.g. divorce and custody and recognition of de facto relationships

The *Family Law Act 2003* provides for gender equality in the area of family relationship breakdowns and the subsequent issues of maintenance and custody. In compliance with international gender equality standards, divorce is not fault based.

However, the *Family Law Act 2003* only applies to married persons and does not apply to or recognise de facto relationships, including same-sex relationships. The *Marriage Act (Cap 50)* does not treat men and women equally. Section 12 provides the minimum age for males to marry is 18 whereas the minimum age for girls is 16.

Access to reproductive and STD health information services

Women are guaranteed equality in access to services generally by the *Constitution* and the *Human Rights Commission Act*. However, abortion is criminalised by the *Penal Code (Cap 17)* except for the purpose of preserving the life of the mother. The procuring of abortion by any person, including the woman herself, and the supply of means of abortion are criminalised under the *Penal Code* Sections 172-174. Section 221 contains an offence of 'child destruction' i.e. causing a child capable of being born alive to die before it has an existence independent of its mother — this offence carries the highest penalty, of life imprisonment.

Protection from sexual violence, including rape in marriage

Section 149 of the *Penal Code* prohibits rape. Rape can only be committed by a man against a woman or a girl. There is no exemption for rape in marriage. However men are not protected against rape, as the law does not recognize rape of a man by another man.

2. Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?

Mandatory employment testing is unlawful. Section 38(2) of the *Employment Relations Promulgation 2007* states that it is an offence, where a contract of service specifies that a medical examination is required in the course of a worker's employment, for the medical examination to comprise HIV/AIDS screening, or screening for sexually transmitted diseases or pregnancy. The Promulgation also prohibits discrimination on grounds of ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age, disability, HIV/AIDS status, social class, marital status (including living in a relationship in the nature of a marriage), employment status, family status, opinion, religion or belief (Section 75).

Mandatory HIV testing of prisoners is prohibited by section 26(1) of the *Prisons and Corrections Act 2006*. Although Fijian law does not otherwise specifically prohibit mandatory HIV testing, section 25(2) of the *Constitution* guarantees freedom from medical procedures without informed consent. This constitutional provision is sufficiently broad to encompass HIV testing.

However there are statutory provisions which are used to perform either mandatory or routine HIV testing in certain circumstances such as military service.

Section 69 of the *Public Health Act* permits the “medical examination” of people with infectious diseases.

3. Does the law require children to be provided with age-appropriate information, education and means of prevention?

This issue is not dealt with by Fijian law. However the Fijian *Constitution* guarantees freedom from scientific or medical treatment or procedures without informed consent (Section 25(2)). Section 43(2) of the *Constitution* provides that in interpreting the provisions of the constitutional Bill of Rights, the courts must, if relevant, have regard to public international law applicable to the protection of the rights in question. As Fiji is a State party to the Convention on the Rights of the Child, then this provides a mechanism for asserting the rights of children to be provided with age-appropriate information, education, and means of prevention.

4. Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

Please see the comments above in Question 3 regarding the Convention on the Rights of the Child.

5. Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?

Fiji’s *Penal Code* provides some protection for children against sexual abuse and exploitation. All sexual offences except indecent assault require penile penetration which excludes many of the ways in which children are sexually violated.

6. Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?

The age of consent to homosexual acts is unclear. Consensual sex between adult men in private is legal under the Constitution, although it is not clear at what age males are considered ‘adult’ for these purposes.

Age of consent to heterosexual acts is 16. It is an offence in Fiji to have carnal knowledge of a girl under the age of 16 (*Penal Code 1978* Sections 155 and 156).

The law does not recognise same sex marriages or same sex domestic relationships.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

1. Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data?

Chapter 4 of the *Constitution* (Section 37) guarantees the right to personal privacy. While this provision does not refer specifically to HIV, its terms are sufficiently broad to encompass HIV-related information. International human rights law suggests that rights to personal privacy extend to protection of people living with HIV from having their confidential medical records disclosed without consent. See e.g. *I v Finland* [2008] ECHR 20511/03 (17 July 2008) in which the European Court of Human Rights held that the measures taken by a hospital to safeguard the right to respect for private life of an HIV-positive patient of the hospital were inadequate and in violation of Article 8 (the right to respect for private life) of the *European Convention on Human Rights*.

The *Prisons and Corrections Act 2006* requires prison authorities to ensure that the HIV/AIDS status of any prisoner is kept confidential.

The *Medical Practitioners and Dentists Act* requires medical confidentiality through its fiduciary duty provisions.

The *Legal Practitioners Act* upholds ethical principles and reinforces the fiduciary duty between lawyer and client, which is sufficiently broad to encompass a duty of confidentiality regarding a client's HIV-related information.

2. Does the legislation prohibit unauthorised use and disclosure of such data?

Please see Question 1 above. To the extent that these provisions protect the confidentiality of HIV-related information, they should, on the plain meaning of the relevant provisions, also prohibit unauthorized use and disclosure of such information.

3. Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are:

- **Accurate;**
- **Relevant;**
- **Complete;**
- **Up-to-date?**

Fijian law does not specifically provide for these rights.

4. Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:

- **Education and promotion of privacy;**
- **Advising government on privacy issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on activities?**

Both the Human Rights Commission and the Ombudsman Commission have jurisdiction over breaches of human rights, including privacy rights.

5. **Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

There is no HIV specific legislation.

Article 29 of the Constitution provides :

(4) The hearings of courts (other than military courts) and tribunals established by law must be open to the public.

(5) Subsection (4) does not prevent:

(a) the making by the Parliament of laws relating to the trial of juveniles, or to the determination of family or domestic disputes in a closed court; or

(b) the exclusion by a court or tribunal from particular proceedings (except the announcement of the decision of the court or tribunal) of persons other than the parties and their legal representatives if a law empowers it to do so in the interests of justice, public morality, the welfare of persons under the age of 18, personal privacy, national security, public safety or public order.

The Constitutional guarantee of personal privacy allows HIV-positive people to request the protection of their privacy or identity during the course of legal proceedings. The Constitutional right to freedom of the press also needs to be taken into account by the Court, which weighs in favour of open courts and disclosure of identity. Such cases will be assessed on a case by case basis.

6. **Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

Sections 70-73 of the *Public Health Act* (Cap 111) provide for notification of HIV diagnoses, AIDS diagnoses, and deaths following AIDS. There are no specific confidentiality requirements in relation to such notifications, and medical practitioners are entitled to obtain particulars of such notifications, although the extent of this right is not clear. It is also unclear whether the Constitutional right to privacy would apply in relation to information concerning a person who is deceased (in relation to notifications of death following AIDS).

CHECKLIST 7 – EMPLOYMENT LAWS

1. **Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

Section 38(2) of the *Employment Relations Promulgation 2007* states that it is an offence, where a contract of service specifies that a medical examination is required in the course of a worker's employment, for the medical examination to comprise HIV/AIDS screening, or screening for sexually transmitted diseases or pregnancy.

2. **Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

There are no legislative prohibitions on mandatory HIV testing of specific employment groups such as those listed, although the blanket prohibition of the *Employment Relations Promulgation* applies. The *Royal Fiji Military Forces Act* (Cap 81) and the *Police Act* (Cap 85) require military personnel and police respectively to submit to medical examinations. It is standard practice to test personnel for HIV who will be deployed overseas.¹⁶

3. Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?

Fiji's Ministry of Labour, Industrial Relations, Tourism and Environment issued a *National Code of Practice for HIV/AIDS in the Workplace* in 2007 that requires universal infection control measures. This is not legally enforceable but may be used in evidence in cases regarding duty of care under relevant legislation.

4. Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?

The *National Code of Practice for HIV/AIDS in the Workplace* requires provision of access to information and education about HIV for occupational health and safety reasons.

5. Does the law provide for:

- **Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
- **Social security and other benefits where workers are no longer able to work?**

Unfair dismissal remedies and workers' disability pension rights are provided by legislation (*Employment Relations Promulgation 2007, Fiji National Provident Fund Act* (Cap 219).

6. Does the law provide for confidentiality of employees' medical and personal information including HIV status?

There is a constitutional guarantee of personal privacy, which could be invoked in this context. The *National Code of Practice for HIV/AIDS in the Workplace* requires employees' HIV status to be kept confidential, consistent with the *ILO Code of Practice on the Protection of Workers' Personal Data - 1997*.

7. Does workers' compensation legislation recognize occupational transmission of HIV?

The only information available at the time of writing regarding liability for infectious diseases in the context of employment, was a reference to the *Employment Act* limiting employers' liability regarding medical treatment for workers with an infectious disease. Workers' compensation legislation does not recognize occupational transmission of HIV.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?

No legislation was identified regulating HIV test kits.

¹⁶ RRRT communication, February 2007.

2. Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:

- Safe; and
- Efficacious?

Pharmacy and Poisons Act (Cap 115) regulates licensing of manufacturers and marketers of medicines. Section 48 provides that the British Pharmacopeia is the standard for quality of medicines in Fiji. Section 48D requires the Pharmacy Board to consider safety, efficacy and quality of the medicine before approving a license.

3. Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?

Pharmacy and Poisons Act (Cap 115) Section 47 provides an offence for false or misleading advertisements relating to medicines.

4. Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?

No legislation was identified requiring compliance with the International Condom Standard.

5. Does the legislation ensure the accessibility and free availability of the following prevention measures:

- Condoms
- Bleach
- Needles and syringes?

Legislation does not require access and free availability of condoms and other prevention tools. Section 45 of the *Pharmacy and Poisons Act* prohibits use of vending machines to sell devices for preventing conception. This could prevent condom vending machines being used.

6. Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?

Fiji is a member of the World Trade Organization. The current *Patents Act* (Cap 239) is in the process of revision. The current Act does not provide for the flexibilities and safeguards allowed by the WTO TRIPS Agreement, i.e parallel importation, the 'Bolar' exception and compulsory licenses. This was confirmed by a WHO-funded review of national patent laws in 2003.

2.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

Employment Relations Promulgation 2008

Employment Relations (Amendment) Decree 2009

There is a guarantee against discrimination in employment in the Employment Relations Promulgation which, among other things, is expressed to provide a statutory framework to prevent and eliminate direct and indirect discrimination in employment on the basis of race, colour, gender, sexual orientation, age, physical or mental disability, HIV/AIDS status, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Public Service Act 1999

Public Service (Amendment) Decree 2011

Subsequent to the Employment Relations Promulgation 2008, the Public Service Act 1999 was amended by the 2011 Amending Decree to make discrimination on the basis of HIV status a prohibited ground of discrimination in the public service. The Public Service Code of Conduct has been amended to state that any person who discriminates against another on any prohibited ground (which includes HIV status) is liable for disciplinary action.

Criminal Procedure Decree 2009

This Decree provides special protections for vulnerable witnesses

Crimes Decree 2009

This Decree replaced the previous Penal Code. Major features impacting on the HIV response include—

- Does not criminalise MSM
- New definitions for sexual offences (s. 206) – e.g. 'vagina' includes a surgically constructed vagina, whether provided for a male or female.
- Offence of rape gender neutral (s. 207)
- Prostitution offences continue with increased penalties (Part 13) including loitering or soliciting for the purposes of prostitution (s. 231). Both sex worker and client commit offences as section 231 includes as offences the using of services of a prostitute in a public place and making arrangements with a prostitute to use services. Keeping of a brothel continues as offence (s. 233). The author has been unable to ascertain any statistics regarding the charging of offences under the 2009 Decree.
- Includes a generic summary offence of unlawfully or negligently doing any act which is, and which he or she knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life. This carries a maximum penalty of 2 years. (On the face of it, it appears that, if accompanied by unlawfulness or negligence, the act is sufficient for the offence to be proved – not the infection with the disease).

Domestic Violence Decree 2009

This decree is to provide greater protection from domestic violence, to clarify the duties of the police in that regard, to introduce domestic violence restraining orders and other measures to promote the safety and wellbeing of victims of domestic violence and to promote the rehabilitation of perpetrators of domestic violence.

To be domestic violence the violence has to be committed against a victim by a perpetrator with whom the victim is, or has been, in a family or domestic relationship. Violence has been defined extensively (s. 3 (2)).

Human Rights Commission Decree 2009

This Decree establishes the Human Rights Commission as a body corporate. The functions of the Commission are contained in section 11. They are—

- (a) to educate the public about the nature and content of human rights;
- (b) to make recommendations to the Government about matters affecting compliance with human rights;

- (c) to promote and protect human rights of all persons in Fiji;
- (d) to perform such other functions as are conferred on it by this Decree or any written law.

The functions of the Commission do not extend to receiving complaints against, or investigating, questioning or challenging, the legality or validity of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009, or such other Decrees made or to be made by the President.

The Commission is given extensive powers and duties by section 12 including the power to inquire generally into any procedure or practice whether governmental or non-governmental. It is also to make recommendations to the Government on the desirability of legislative, administrative or other action so as to give better protection to human rights. The Commission has a specific duty to advise the Government on its obligations under international human rights instruments. Significantly for law reform, the Commission has a duty to make recommendations on the implications of any proposed law or any proposed policy of the Government that may affect human rights.

Its operations might include investigation of complaints under the HIV/AIDS Decree 2011 as section 12 specifies that the Commissions powers and duties include the investigation of allegations of contraventions of human rights and allegations of unfair discrimination, of its own motion or on complaint by individuals, groups or institutions on their own behalf or on behalf of others. Section 12 (1) (k) states that complaints are to be resolved by conciliation and unresolved complaints are to be referred to the courts for decision. The effect upon procedures for the making of complaints under the HIV/AIDS Decree 2011 has not been ascertained.

Part 3 prohibits Unfair Discrimination. Section 19 provides—

- (1) It is unfair discrimination for a person, while involved in any of the areas set out in subsection (3), directly or indirectly to differentiate adversely against or harass any other person by reason of a prohibited ground of discrimination.
- (2) Without limiting subsection (1), sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination.
- (3) The areas to which subsection (1) applies are—
 - (a) the making of an application for employment, or procuring employees for an employer, or procuring employment for other persons;
 - (b) employment;
 - (c) participation in, or the making of an application for participation in a partnership;
 - (d) the provision of an approval, authorisation or qualification that is needed for any trade, calling or profession;
 - (e) the provision of training, or facilities or opportunities for training, to help fit a person for any employment;

- (f) subject to subsection(4), membership, or the making of an application for membership, of an employers' organisation, an employees' organisation or an organisation that exists for members of a particular trade, calling or profession;
- (g) the provision of goods, services or facilities, including facilities by way of banking or insurance or for grants, loans, credit or finance;
- (h) access by the public to any place, vehicle, vessel, aircraft or hovercraft which members of the public are entitled or allowed to enter or use;
- (i) the provision of land, housing or other accommodation;
- (j) access to, and participation in, education.

Victimisation arising in certain circumstances is also unfair discrimination.

Part 4 is Complaints and investigations. This part establishes the Proceedings Commissioner. It covers the making of complaints, investigations, proceedings, remedies and damages. The Commission has discretion whether or not to investigate a complaint.

Sentencing and Penalties Decree 2009

This Decree introduces penalty units in place of fines and applies to all courts exercising jurisdiction in relation to criminal offences. In all Acts, Decrees, Promulgations and Regulations in Fiji, a reference to a fine expressed as dollars shall become a reference to an amount of penalty units being 1 penalty unit for each \$100 of the fine. Fines that are expressed to be for continuing offences are set at one half of the substantive fine for each day that an offence continues.

The Decree includes extensive provisions about a number of sentencing matters. It is divided into Parts—

Part I:	Preliminary
Part II:	Sentencing Guidelines
Part III:	Habitual Offenders
Part IV:	General Sentencing Provisions
Part V:	Sentences of Imprisonment
Part VI:	Suspended Sentences
Part VII:	Other Sentencing Orders
Part VIII:	Fines
Part IX:	Dismissals, Discharges and Adjournments
Part X:	Restitution and Compensation Orders
Part XI:	Participation of Traditional and Community Leaders in Sentencing Processes
Part XII:	Penalty Units
Part XIII:	Miscellaneous Provisions

Child Welfare Decree 2010

This Decree has stated purposes (s. 2) to—

- (a) ensure mandatory reporting of cases of possible, likely or actual harm in relation to events discovered by a professional to be affecting the health and welfare of children;
- (b) emphasise the duty of care of the professional in handling cases of possible child abuse and outlining the reporting requirements of such cases in their care; and
- (c) to protect the confidentiality and integrity of cases and of the professionals handling these cases.

HIV/AIDS Decree 2010

HIV/AIDS (Amendment) Decree 2011

The following analysis is derived from a Speech given by Madam Nazmat Shameem delivered at the Attorney-General's Conference, Shangri Law Hotel, Sigatoka in December 2011.

This Decree is human-rights based and incorporates specifically all the relevant human rights conventions which protect those rights. It—

- expressly extends those rights to homosexuals and transgender persons,
- provides for prisoners in custody,
- provides for HIV/AIDS awareness materials,
- protects NGO's from prosecution when they are distributing or demonstrating HIV material,
- makes unlawful forced testing, stigmatisation, indirect and direct discrimination,
- protects those who are infected with and those who are affected by HIV/AIDS,
- makes pre-test and post-test counselling mandatory and testing to be voluntary (with limited exceptions),
- provides for safe blood transfusions,
- criminalises not those who are infected, but those who discriminate against them.

In the original Decree, deliberate or attempted infection of a person by a person who knows he or she carries HIV was an offence under the Decree (section 40). That section gave power to the Permanent Secretary of Health to seek an ex-parte injunction requiring a person who knows he or she carries HIV to cease acting in a manner which, in the opinion of the Permanent Secretary, may on the balance of probabilities transmit HIV to another person or persons. Section 40 was repealed in 2011 by the amending Decree.

The Decree does establish the HIV Board, providing for there to be a full-time Chief Executive Officer. Frequency of meetings is mandated. It is understood that the Board met for the first time in 2011 and a Chief Executive Officer has been appointed.

The author notes that the Board appears not to have a presence on the Ministry of Health website.

On 26 August 2011, the President of Fiji announced a decision by the Government of Fiji to lift its restrictions on entry, stay or residence based on HIV status, as was included in original drafts of the HIV/AIDS Decree. This was achieved by the amending Decree in its deletion of section 4 (2) of the Decree. The author notes that current Medical Report Form available at the Immigration Department website (necessary to be completed for Applications for a Permit to Work; Applications to Reside and Applications for a Student Permit) includes the following question—

5. Has the applicant ever suffered from the HIV/AIDS syndrome or any other sexually transmitted disease?
- Yes No

If yes to any other above, please give details and dates:

The author suggests that, if decisions on entry, stay and residence are no longer based on HIV status, then such a question should not be asked.

The author has been unable to ascertain the extent to which the Decree has been used in relation to alleged unlawful acts and in which forum.

Mental Health Decree 2010

This Decree includes a guarantee against discrimination based upon HIV status.

3. KIRIBATI

3.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Constitution

Consolidated Legislation—1977 Revised Edition

Consolidated Legislation—1980 Revised Edition

Sessional Legislation (updated to Act No. 4 of 2011)

United Kingdom Legislation in Kiribati

3.2 INTERNATIONAL TREATIES, OBLIGATIONS AND MEMBERSHIPS

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) accession 17 March 2004

Convention on the Rights of the Child (CRC) accession 11 December 1995 (Reservation made concerning article 24 paragraphs (b,c,d,e and f), article 26 and article 28 paragraphs (b, c and d), in accordance with article 51 paragraph 1 of the Convention and made a Declaration ‘The Republic of Kiribati considers that a child’s rights as defined in the Convention, in particular the rights defined in articles 12-16 shall be exercised with respect for parental authority, in accordance with the Kiribati customs and traditions regarding the place of the child within and outside the family.’)

Convention on the Rights of Persons with Disabilities (CRPD) ratification

International Health Regulations (2005) (IHR (2005)) to which Kiribati became bound through membership of the International Health Assembly of the World Health Organization on 15 June 2007

Member of International Labour Organisation (ILO)

3.3 CONSTITUTIONAL PROTECTIONS

Constitution 1979

Constitution (Amendment) Act 1995

The information given in LCR 2009 for Kiribati remains accurate, although this report expands upon the information given.

Chapter II provides Protection of the Fundamental Rights and Freedoms of the Individual. The Chapter commences with a detailed expression of the fundamental rights and freedoms that—

Whereas every person in Kiribati is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) *life, liberty, security of the person and the protection of the law;*
- (b) *freedom of conscience, of expression and of assembly and association; and*
- (c) *protection for the privacy of his home and other property and from deprivation of property without compensation,*

It confirms that the rights and freedoms are subject to such limitations designed to ensure that the enjoyment of the rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

The protection of the right to personal liberty includes a limitation, where authorised by law, for the purpose of preventing the spread of an infectious or contagious disease.

The protections of freedom of expression, freedom of assembly and association, and freedom of movement all provide that nothing contained in or done under the authority of any law shall be held to be inconsistent with the protections to the extent that the law in question makes provision (among other things) *in the interests of defence, public safety, public order, public morality or public health*. Periods of public emergency are also provided for.

3.4 NATIONAL PLANS AND REPORTS

- Ministry of Health and Medical Services, National Strategic Plan for STI/HIV/AIDS (2005-2008) – written but never officially endorsed
- Ministry of Health and Medical Services, National Strategic Plan (2008-2011)
- Kiribati Country Coordination Mechanism, National HIV and STI Strategic Plan (2012-2015) – in development
- Kiribati Country Coordination Mechanism, Global AIDS Response Progress: Kiribati Country Progress Report 2012
- SPC and Government of Kiribati, *Kiribati Family Support and Health Study: A study on violence against women and children*, 2010
- SPC, Second Generation Surveillance of Antenatal Women, Seafarers, Policemen and Youth, Kiribati, 2008

3.5 LAWS OF RELEVANCE TO FOCUS AREAS AND LAW REVISION ACTIVITIES

Births Deaths & Marriages Registration Ordinance [Cap. 5]

Births Deaths and Marriages (Amendment) Act 1997

Births, Deaths & Marriages Registration (Amendment) Act 2007

Copyright Ordinance [Cap. 16]

Custody of Children Ordinance [Cap. 21]

Education Ordinance [Cap. 29]

Education (Amendment) Act 1996

Education (Amendment) (No. 2) Act 1997

Employment Act [Cap. 30]

Employment (Amendment) Act 2000

Employment (Amendment) Act 2008

Industrial Relations Code (Amendment) Act 2010

Immigration Ordinance [Cap. 41]

Immigration (Amendment) Act 1983

Immigration (Amendment) Act 2002

Interpretation and General Clauses Ordinance [Cap. 46]

Laws of Kiribati Act 1989

Limitation Act 2004

Local Government Act 1984

Local Government (Amendment) Acts 1984, 1985, 1987, 1989, 1994, 1995, 2006

Magistrates' Courts Ordinance [Cap. 52]

Magistrates' Courts (Amendment) Acts 1981, 1990, 1993 (assent withheld), 2000

Maintenance (Miscellaneous Provisions) Ordinance [Cap. 53]

Marriage Ordinance [Cap. 54]

Marriage (Amendment) Act 2002

Medical Services Act 1996**Penal Code [Cap. 67]**

Penal Code (Amendment) Acts 1984, 1999, 2001

Pharmacy and Poisons Ordinance [Cap. 70]**Parole Board Act 1986**

Parole Board (Amendment) Act 2005

Prisons Ordinance [Cap. 76]

Prisons (Amendment) Acts 1984 and 1985

Public Health Ordinance [Cap. 80]**Public Order Ordinance [Cap. 82]**

Public Order (Amendment) Act 2006

Public Records Act 1983**Public Service Commission (Functions) Act 1983****Quarantine Ordinance [Cap. 85]****Registration of UK Patents Act [Cap. 87] referring to Patents Act 1977 (UK)****3.6 KIRIBATI LCR 2009**

(The content of Kiribati LCR 2009 is reproduced here as published in March 2009)

HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Kiribati

Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS

March 2009

Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Kiribati. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006¹⁷.

To assist parliamentarians and other elected officials to promulgate and enact effective legislation, and undertaking appropriate law reform in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.¹⁸ The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.

¹⁷ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm> for the full text of the consolidated Guidelines.

¹⁸ UNAIDS/IPU. Geneva, 1999.

- Criminal law.
- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.
- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 2 – Criminal Law considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.¹⁹

¹⁹ See Consolidated Guidelines paras 102-103.

Background²⁰

The number of reported HIV diagnoses grew from 46 at the end of 2004 to 61 at the end of 2006. The primary mode of transmission is heterosexual sex.

The majority of people infected with HIV have been Kiribati men who work overseas as merchant seamen, who in turn pass on the infection to their wives and children. Over a thousand Kiribati seafarers are working on merchant ships at any point in time, many of which visit high HIV prevalence countries. While there is no organized sex industry in Kiribati, there is transactional sex between I-Kiribati women or girls and visiting fishermen.²¹

A number of socio-economic factors exist which contribute to increasing vulnerability to HIV transmission in Kiribati. They include:

- Low rates of condom use resulting in unwanted pregnancies and high levels of STIs among youth;
- Widely scattered islands making communication, transport and delivery of services difficult;
- Meagre resources in the public and private sectors;
- High population growth and a youthful population;
- Concentration of people (over one-third of the total) in the capital, leading to stress on resources, high unemployment, increased crime and significant levels of alcohol use;
- Violence against women, with father-daughter violence high;
- Low status of women in traditional culture;
- High suicide rates, gangs and crime, and substance abuse;
- Seafarers working overseas contribute a large part of national income;
- A mobile population who are away from their partners for long periods of time;
- Sharing of tattoo needles;
- Some use of methamphetamine and injecting of drugs among seafarers;
- High rates of use of sex workers by seafarers, and low levels of knowledge of prevention methods;
- Visiting fishing fleet crews interact with local people, contributing to commercial sex (both male and female sex workers), alcohol use and increased rates of STIs.

There are limited health services, with only 3 hospitals in total, limited laboratory and public health information capacity, and no doctors on the outer islands. There is a free national medical service, but the geography of the country prevents access to services for much of the population.

Gender based violence contributes to HIV vulnerability of women and girls. Recent survey data²² found:

- 60% of women reported that they had experienced physical partner violence.

²⁰ Information based on World Health Organization Regional Office for the Western Pacific *Country Health Information Profiles*; WHO (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries* Ministries of Health, World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community, University of NSW.

²¹ C Jenkins (2005) *HIV/AIDS in the Pacific* ADB, Manila.

²² UNDP, SPC (2008) *16 Days of Activism Against Gender Violence* (Kiribati pamphlet, full survey results to be published 2009)

- 46% of women reported that they had experienced sexual partner violence.
- Overall, 68% of women reported that they had experienced physical or sexual partner violence, or both.
- 23% of women who had ever been pregnant reported that they had been beaten by a partner during their pregnancy
- 18% of women aged 15–49 reported that they had experienced sexual abuse during their childhood (under age 15).

Legal system²³

Sources of law in Kiribati are:

- *Constitution* and Acts of the Parliament;
- English common law and equity;
- pre-Independence British Acts continued after Independence and not replaced;
- customary law.

Custom determines titles to land and is relied on in Magistrates' Courts, provided the custom is not repugnant to natural justice, equity and conscience or inconsistent with any Ordinance or other law for the time being in force in the country.

International obligations

Kiribati is a Member of the United Nations. It is a State party to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

HIV policy framework

The Ministry of Health is the lead government agency responsible for HIV. The Kiribati HIV/AIDS and TB Task Force (KHATBTF) is a multi-sectoral non-government organization chaired by a representative from the Kiribati Protestant Church. It was established by the government and is now a registered NGO, functioning as a National AIDS Council.

An HIV Parliamentary advisory committee is composed of MPs and Task Force members.

Key areas of the National Strategic Plan for STI/HIV/AIDS (2005-2008) are —

- Treatment, care and support for people living with HIV or AIDS;
- Behaviour change strategies to reduce the vulnerability of specific groups and the general population to HIV infection;
- Increased prevention of other sexually transmitted infections;
- Improved safe blood supply for the country;
- Increased occupational safety for health workers and others in high risk occupations;
- Strengthening and coordination of the national multi-sectoral response to STI, HIV and AIDS, including political advocacy and strengthening the capacity of the Task Force, the government and civil society organisation to participate effectively in the national response (which aims among other things to decrease stigma and discrimination in the health system).

The guiding principles of the Strategic Plan are based on human rights and Christian ethics. The Plan contemplates anti-discriminatory and workplace policy development.

²³Information on court and legal systems derived from Pacific Islands Legal Information Institute www.paclii.org

CHECKLIST 1 – PUBLIC HEALTH LAW

1. Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:
- Information and education
 - Voluntary testing and counselling
 - STD, sexual and reproductive health services
 - Access to means of prevention e.g. condoms and clean injecting equipment
 - Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?

There is no public health legislation which deals specifically with HIV. The *Public Health Ordinance* [Cap 80] includes “venereal diseases” as “infectious diseases”. The Secretary for Health may from time to time declare other diseases to be infectious diseases either temporarily or permanently. Under regulations made pursuant to the *Public Health Ordinance* sanitary inspectors have powers of isolation or removal to hospital of the infected person (Regulation 22) and of restriction of movement of contacts of the infected person (Regulation 23). Neither HIV nor AIDS have been declared “infectious diseases”. If HIV is considered to be a venereal disease then it would also be an “infectious disease” for the purposes of the *Ordinance*.

2. Does the legislation:
- Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?
 - Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?

The *Public Health Ordinance* does not address the issue of HIV testing and counselling. In practice, testing is performed on people with symptoms, or who voluntarily request an HIV test.²⁴

The *Immigration Ordinance* [Cap 41] permits an immigration officer to require any person entering Kiribati to submit to medical examination (Section 5). The terms of the Ordinance are sufficiently broad to enable mandatory HIV testing. HIV testing for screening purposes is routinely required of visa applicants and seafarers²⁵. In relation to seafarers, the information available at the time of writing was insufficient to indicate whether all seafarers were required to undergo HIV testing, or only foreign seafarers entering Kiribati, or seafarers identified according to some other criteria. The Kiribati Marine Training Centre carries out routine HIV testing of all new entrants.²⁶

Section 21 of the *Prisons Ordinance* [Cap 76] provides that every prisoner shall be medically examined upon admission and discharge, and at any other time the officer in charge considers necessary.

There is no requirement to obtain judicial consent in order to the exercise the above powers.

²⁴ UNDP communication, January 2007.

²⁵ UNDP communication, January 2007.

²⁶ UNDP communication, January 2007.

3. **Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relation to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?**

The right to liberty guaranteed by Article 3 of the *Constitution* is subject to a law made inter alia ‘for the purpose of preventing the spread of an infectious or contagious disease’ under Article 5. The *Public Health Ordinance* enables sanitary inspectors to isolate or forcibly hospitalise people with infectious diseases. The *Quarantine Ordinance* also provides for quarantine measures such as declaration of quarantine areas, control of inbound vessels, and restriction of movement of persons. To the extent that these powers apply to or are used merely on the grounds of people’s HIV status, they are inconsistent with the *International Guidelines*.

Does the legislation provide in such cases the following due process protections:

- **Reasonable notice of case to the individual;**
- **Rights of review/appeal against adverse decisions;**
- **Fixed periods of duration of restrictive orders (i.e. not indefinite);**
- **Right of legal representation?**

The *Public Health Ordinance* and the *Quarantine Ordinance* are not subject to the above due process protections, with the exception of rights of review/appeal against adverse decisions in respect of “infectious diseases” made using the powers granted by the *Public Health Ordinance*. Rights (under common law and equity) of review of administrative action, and Article 17 of the *Constitution* (which allows alleged contraventions of constitutional rights to be heard by the High Court) may provide a means of obtaining judicial review e.g. on grounds of habeas corpus or the constitutional guarantee of liberty in Article 3 of the Constitution. However as noted above, Article 5 of the Constitution qualifies the right to liberty on various grounds including “for the purpose of preventing the spread of an infectious or contagious disease”.

4. **Does the legislation authorise health-care professionals to notify sexual partners of their patients’ HIV status in accordance with the following criteria:**

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;**
- **The HIV-positive patient has refused to notify or consent to notification of the partner;**
- **A real risk of HIV transmission to the partner exists;**
- **The identity of the HIV-positive partner is concealed from the partner where this is possible;**
- **Necessary follow-up support is provided to those involved?**

On the information available at the time of writing, public health legislation in Kiribati does not address these issues, and hence the requirements of the *International Guidelines* are not satisfied.

5. **Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?**

HIV testing is performed on all donated blood²⁷. No blood safety legislation was identified.

²⁷ UNDP communication, January 2007.

CHECKLIST 2 – CRIMINAL LAW

1. **Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers).**

No laws regulating supply of needles and syringes were identified.

2. **Does the law allow the following sexual acts between consenting adults in private:**

- **Homosexual acts e.g. sodomy;**
- **Fornication or adultery;**
- **Street sex work;**
- **Brothel or escort sex work?**

Homosexual acts e.g. sodomy

Sex between males is prohibited by the *Penal Code*. Section 153 of the *Penal Code* prohibits both “buggery” and “permitting buggery”. Consent is not recognised as a defence to a charge under Section 153. Section 155 prohibits gross acts of indecency between males “whether in public or in private”. The National Strategic Plan states that there is “increased visibility” of men who have sex with other men in Kiribati.

Fornication or adultery

Fornication and adultery are not crimes in Kiribati.

Street sex work

Section 34 of the *Criminal Law and Procedure (Patriation) Act 1991* abolished several common law offences including the offence of being a “common night walker”. However the *Penal Code* includes the following criminal offences in relation to sex work:

- Being a male person living on the earnings of prostitution (Section 145)
- Being a woman controlling the prostitution of another woman (Section 146)
- Keeping or permitting the use of premises for a brothel (Section 148)
- A common prostitute behaving in a disorderly or indecent manner in any public place (Section 167(c));
- Soliciting for immoral purposes in any public place (Section 167(f))

Brothel or escort sex work?

The *Penal Code* criminalises keeping or permitting the use of premises for a brothel (Section 148), being a male person living on the earning of prostitution (Section 145), or being a woman controlling the prostitution of another woman (Section 146). All of these provisions could be used in criminal prosecutions in connection with brothel-based sex work.

3. **If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?**

There are no exceptions for HIV prevention and care services (such as evidentiary immunity for carrying condoms).

4. **Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:**

- **Practised by clients;**
- **Practiced by workers; and**

- **Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?**
There is no legislation regulating occupational health and safety in the sex industry (there is no organised industry).

5. Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?

Penal Code [Cap 17] 1966, Section 136(c) makes it an offence to procure or attempt to procure any woman or girl to leave the Islands, with intent that she may become an inmate of or frequent a brothel elsewhere. Consent is no defence, and corroboration is required. This provision offers a degree of legal protection to women and girls, and does not criminalise women or girls subject to trafficking. However the legislation does not provide for support to trafficked/coerced women and girls. The requirement for corroboration limits the protective effect of the legislation because there will often be no witnesses prepared to testify when women or girls are trafficked.

6. Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?

Section 176 of the *Penal Code* states:

“Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.”

This is a generic disease transmission offence. There is no need to provide for additional HIV-specific transmission offences. Other sections of the *Penal Code* which may be used where deliberate or intentional transmission of HIV is alleged are:

- Acts intended to cause grievous harm (Section 218)
- Grievous harm (Section 220)
- Unlawful wounding (Section 223)
- Common assault (Section 237)
- Assault causing actual bodily harm (Section 228).

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

1. Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:

- **Information and education**
- **Voluntary counselling and testing**
- **Means of prevention e.g. condoms, bleach, and clean injecting equipment**
- **Treatment – ART and treatment for opportunistic infections**
- **Choice to participate in clinical trials (if available)?**

Insufficient information was available regarding the *Prisons Ordinance* [Cap 67], or other legal or policy instruments relevant to prisons administration, to assess the degree of compliance with these requirements. There are five prisons, four male prisons and one female.

2. **Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?**
Section 128 of the *Penal Code* defines rape as a crime committed against a woman or girl by a male. As the *Penal Code* does not recognise rape of a male, and on the assumption that prisoners are segregated by sex, then the legislation affords no protection for prisoners against rape. The *Prisons Ordinance* provides for punishment of prisoners for breaches of discipline presumably including assault, however further information regarding this Ordinance was not available at the time of writing.
3. **Does the legislation provide for the confidentiality of prisoners' medical and/or personal information, including HIV status?**
There are no legislative or constitutional protections for the confidentiality of prisoners' medical and/or personal information, including HIV status. The right to privacy in Article 3 of the *Constitution* extends only to privacy of the home and personal property, and not to privacy of the person. As noted above, further information regarding the *Prisons Ordinance* or other legal or policy instruments which may be relevant to prisons administration was not available at the time of writing.
4. **Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?**
Insufficient information was available at the time of writing to assess the degree of compliance with this requirement.
5. **Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?**
Insufficient information was available at the time of writing to assess the degree of compliance with this requirement.
6. **Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?**
There are no legislative or constitutional protections against discrimination on the ground of HIV status. At the time of writing, insufficient information was available to assess whether there are any relevant provisions in the *Prisons Ordinance*.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

1. **Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?**
Article 3 of the *Constitution* provides that every person in Kiribati is entitled to fundamental human rights "whatever his race, place of origin, political opinions, colour, or creed." However there are no constitutional or legislative prohibitions against discrimination based on a person's disability, HIV or other health status. Hence there is no protection under the *Constitution* or legislation against discrimination on the ground of HIV.

The Rights guaranteed in the Constitution are rights to life, personal liberty, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement, freedom from discrimination, protection from slavery, forced labour, inhuman treatment, deprivation of property, privacy of home and other property, and protection of

law. These Constitutional rights are “subject to respect for the rights and freedoms of others and the public interest”.

2. Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?

There are no constitutional or legislative prohibitions against discrimination based on a person’s gender or sexual orientation.

3. Does the legislation contain the following substantive features:

- Coverage of direct and indirect discrimination;
- Coverage of those presumed to be infected, as well as carers, partners, family, or associates;
- Coverage of vilification;
- The ground complained of only needs to be one of several reasons for the discriminatory act;
- Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);
- Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?

Please see Question 1 above.

4. Does the legislation provide for the following administrative features:

- Independence of a complaint body;
- Representative complaints (e.g. public interest organizations on behalf of individuals)
- Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;
- Access to free legal assistance;
- Investigatory powers to address systemic discrimination;
- Confidentiality protections e.g. use of pseudonyms in reporting of cases?

Please see Question 1 above regarding the limited scope of anti-discrimination protections under the Kiribati *Constitution*.

5. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- Education and promotion of human rights;
- Advising government on human rights issues;
- Monitoring compliance with domestic legislation and international treaties and norms;
- Investigating, conciliating, resolving or arbitrating individual complaints;
- Keeping data/statistics of cases and reporting on its activities?

There is no Human Rights Commission or Ombudsman. Please see Question 1 above.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. Does the law ensure the equal legal status of men and women in the following areas:

- Ownership of property and inheritance;
- Marital relations e.g. divorce and custod

- **Capacity to enter into contracts, mortgages, credit and finance;**
- **Access to reproductive and STD health information and services;**
- **Protection from sexual and other violence, including rape in marriage;**
- **Recognition of de facto relationships;**
- **Prohibition of harmful traditional practices e.g. female genital mutilation?**

Status of customary law

Customary laws operate to preserve male dominance in some aspects of property and family matters.

Magistrates Courts Act [Cap 52] Section 42(2) provides that Magistrates Courts can observe and enforce local law or custom not repugnant to natural justice, equity and good conscience and not incompatible directly or by necessary implication any ordinance or other law.

Laws of Kiribati Act 1989 provides:

Section 4. (2)(b). In addition to the Constitution, the laws of Kiribati comprise customary law.

Section 6(3)(b). Customary law prevails over common law.

Schedule 1. s 2. Customary law shall be recognised and enforced by, and may be pleaded in, all courts except if results, in injustice or contrary to the public interest.

Schedule 1. s 3(a)-(e). Customary law may be taken into account in a criminal case to ascertain the state of mind of a person, deciding the reasonableness of an act, default, omission or excuse by a person whether to convict, determining the penalty.

Schedule 4 (a)-(l). Customary law may be applied in a case concerning native land any sea or lagoon area, inland waters or foreshore or reef, or in or on the seabed, including rights of navigation or fishing, inheritance, defamation; adoption; rights of married persons arising out of their marriage or on the termination of their marriage by nullity, divorce or death, the right of a member of a family to support by other members of that family, or the right to the custody or guardianship of infants, the duty or member of a community to contribute, whether by labour, money or in kind, to projects for the welfare of that community.

Ownership of property and inheritance, access to credit and finance

Article 3 of the *Constitution* prohibits discrimination based on race, place of origin, political opinion, colour, or creed, but not sex.

There is no legal barrier to women obtaining bank loans, mortgages, credit and finance. Despite the absence of formal barriers, women may experience indirect discrimination in obtaining credit and loans.²⁸

In the preamble to the Constitution, the people pledge to uphold their customs. Legislation has been introduced permitting the observance of customary law in a range of situations including criminal law, family law and land law, all of which have gendered impacts on women. The status given to customary law coupled with the absence of anti-discrimination

²⁸ Ibid. p.224.

provisions and other protective provisions in the Constitution leaves women in Kiribati with no legal recourse against customs relating to inheritance and property that discriminate against them on the basis of sex/gender.²⁹

The *Gilbert and Phoenix Islands Land Code* made pursuant to the *Native Lands Ordinance* [Cap 61] 1957 governs inheritance law, specifying different rules for different islands based on custom. The Code tends to favour paternal lines and sons over daughters in some circumstances. Generally, succession is along patrilineal lines and sons are often favoured over daughters in relation to both land and important resource rights such as fishponds.³⁰ The *Gilbert and Phoenix Islands Land Code* Section 11(1) provides:

Nikunua, Arorae

Section 3(iii). An owner has complete authority over the disposal of any land received as a reward for work, or which he has bought, or which he has received in exchange for a canoe or any unreturnable gift land. If he dies issueless and he has no brothers and sisters and is intestate then the lands will be distributed to his paternal next-of-kin.

Beru, Nikumaroros

Section 11(i)(c). If an owner has several spouses the eldest son of the owner will receive the best land and it is immaterial whether he is by the first spouse or any other spouse.

Section 11(ii). In the distribution of an estate between the sons and daughters of an owner the shares of the eldest son shall exceed that of his brothers, and the share of sons shall exceed the shares of daughters.

Makin, Butaritari, Tamana, Arorae

Section 11(ii). Sons will receive more than daughters.

Section 11(iii). A daughter will receive fishponds or fishtraps if there are no sons of the owner, or if the parent or her brother so decide. If there are many fishponds and fishtraps, and the parent has made no will concerning them, the court may direct that a daughter will receive a share but only if the sons have received their shares.

Marakei

Section 11(v)(a) Women will not receive shares in the distribution of an issueless estate.

Marital relations e.g. divorce and custody

Divorce in Kiribati is based on fault based criteria (including adultery, desertion and cruelty): *Native Divorce Ordinance* 1948 [Cap 60] Section 4. Women face disadvantage or risk violent reprisal in proving fault, particularly cruelty and adultery if they choose not to be witnesses or they do not wish to attend court proceedings.³¹

The prohibitions against discrimination in Article 3 of the Constitution are subject to a number of exemptions, which include the application of the law “with respect to adoption,

²⁹ V Jivan, C Forster (2007) *Translating CEDAW into Law - CEDAW Legislative Compliance in Nine Pacific Countries*, UNDP and UNIFEM Suva p.200.

³⁰ *Ibid.* p.204.

³¹ *Ibid.* p.203.

marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description”.

The Kiribati *Custody of Children Ordinance* [Cap 21] provides in Section 3(3) that the “first and paramount consideration” for a court making an order as to custody of a child is the welfare of the child, and shall not take into consideration “whether from any other point of view the claim of the father is superior to that of the mother, or the claim of the mother is superior to that of the father.”

The law mandates an equal marriageable age for males and females of 18.

Kiribati law provides for maintenance orders during separation and after divorce for both children and spouses. Further, the children of unmarried women are specifically and separately provided for in the *Land Code* with discretionary criteria.³² Hence this criterion is satisfied in relation to the issue of custody of children, and partially satisfied in respect of maintenance after divorce. There is no provision for property settlement upon divorce or separation in the legislation.

Protection from sexual and other violence including rape in marriage

Kiribati has legislated against sexual assault: *Penal Code* [Cap 67] 1965 Sections 128, 133. Rape in marriage is not excluded from the prohibition against rape in Section 128 of the *Penal Code*, although cultural values tend to place the blame for rape on the survivor rather than the perpetrator.³³ Under the *Laws of Kiribati Act 1989*, Schedule 1, Section 3(a)-(e), customary law may be taken into account in a criminal case to ascertain the state of mind of a person; deciding the reasonableness of an act, default, omission or excuse by a person whether to convict.

Rape of males is not recognised or penalised by the *Penal Code* which defines rape as a crime committed against women or girls.

Access to sexual and reproductive health services

Abortion is illegal and there is no right for women to access sexual and reproductive health services. Sections 150-152 of the *Penal Code* prohibit the procuring of abortion of a woman, or a woman procuring her own abortion, or supplying a woman with means to procure an abortion.

Recognition of de facto relationships

Kiribati legislation does not recognise de facto relationships.

Protection against harmful traditional practices e.g. female genital mutilation

No information on the legal status of such practices was available at the time of writing. There was also no information to suggest that practices such as female genital mutilation occur in Kiribati.

- 2. Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

³² Ibid.

³³ UNDP communication, January 2007.

Under Section 11 of the *Immigration Ordinance* [Cap 41], a person entering Kiribati who refuses to undergo a medical examination, or who is certified by a medical practitioner to be suffering a contagious or infectious disease which makes their presence dangerous to the community, is a prohibited immigrant. 'Contagious or infectious disease' is not defined by the *Ordinance*, however visa applicants and seafarers are routinely tested,³⁴ in breach of the standards set by the *International Guidelines*.

3. Does the law require children to be provided with age-appropriate information, education and means of prevention?

Kiribati law does not address this issue specifically in the context of HIV.

4. Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

Kiribati law does not address this issue specifically in the context of HIV.

5. Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?

Insufficient information was available at the time of writing to assess compliance with this requirement.

6. Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?

Homosexual acts are illegal therefore there is no age of consent. The law does not recognise same sex marriages or domestic relationships.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

1. Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data?

The only privacy protection provided by Kiribati law is Article 3 the *Constitution*, which protects privacy of the home and other property. The privacy of personal information is not protected by law, although in practice the Ministry of Health takes steps to protect the confidentiality of HIV test results.³⁵ Hence this requirement is not satisfied by legislation.

2. Does the legislation prohibit unauthorised use and disclosure of such data?

Please see Question 1 above.

3. Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are:

- **Accurate;**
- **Relevant;**
- **Complete;**
- **Up-to-date?**

Please see Question 1 above.

³⁴ UNDP communication, January 2007.

³⁵ UNDP communication, January 2007.

4. **Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:**
- Education and promotion of privacy;
 - Advising government on privacy issues;
 - Monitoring compliance with domestic legislation and international treaties and norms;
 - Investigating, conciliating, resolving or arbitrating individual complaints;
 - Keeping data/statistics of cases and reporting on activities?

Please see Question 1 above.

5. **Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

There is no specific legislative protection for the privacy and/or identity of HIV-positive people involved in legal proceedings. Article 10 of the *Constitution* provides that court proceedings shall be held in public except with the consent of all parties, or in circumstances where publicity would prejudice, among other things, the interests of justice or the protection of the private lives of persons concerned in the proceedings. The wording of Article 10 is sufficiently broad to encompass protection of the privacy of HIV-related information in court proceedings.

6. **Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

Regulations under the *Public Health Ordinance* require notification of infectious diseases, by parents of sick children or householders in the case of an adult, to the nearest sanitary inspector (Regulation 21). As noted above, there was insufficient information available at the time of writing to indicate whether these provisions are applied to cases of HIV.

CHECKLIST 7 – EMPLOYMENT LAWS

1. **Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

Section 49 of the *Employment Act* [Cap 30] provides that before employment, workers shall be medically examined by a medical officer or person approved for that purpose. The terms of the Act are sufficiently broad to enable mandatory HIV screening for employment purposes, and there is no legislative prohibition on mandatory HIV testing. Hence the Act is inconsistent with the *International Guidelines*.

2. **Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Mandatory HIV testing is not prohibited by Kiribati law.

3. **Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

Insufficient information was available at the time of writing to assess compliance with this requirement.

4. **Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

Kiribati law does not require the provision of HIV information for occupational health and safety reasons.

5. **Does the law provide for:**

1. **Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
2. **Social security and other benefits where workers are no longer able to work?**

Employment security

Section 49 of the *Employment Act* provides that before employment workers shall be medically examined by a medical officer or person approved for that purpose. The terms of the Act are sufficiently broad to enable mandatory HIV screening for employment purposes, and there is no legislative prohibition on mandatory HIV testing, or discrimination on the ground of HIV status. On the information available at the time of writing, Kiribati legislation does not provide for employment security while HIV-positive workers are able to work, and hence does not comply with the *International Guidelines*.

Social security

There is no legislated welfare or social security system. Workers' compensation legislation is framed in such a way that does not provide benefits to people who are infected with HIV through occupational transmission (see Question 7 below).

6. **Does the law provide for confidentiality of employees' medical and personal information including HIV status?**

There is no legislative protection of the confidentiality of employees' medical and personal information including HIV status. Hence this requirement is not satisfied.

7. **Does workers' compensation legislation recognize occupational transmission of HIV?**

Section 11 of the *Workers Compensation Ordinance* [Cap 102] provides for compensation for diseases contracted during the course of employment, however compensation is only payable where incapacity or death occurs within 12 months of acquiring the disease. As the overwhelming majority of cases of HIV infection do not result in disability or death within 12 months of the person becoming infected, this restriction on the payment of benefits will exclude compensation for occupationally acquired HIV. The *Ordinance* does not define "incapacity" and no information was available at the time of writing regarding any instances of judicial interpretation of "incapacity" for the purposes of the *Ordinance*. On the information available, the *Ordinance* would exclude payment of compensation in almost all cases of occupationally acquired HIV, unless there were exceptional circumstances concerning disease progression following HIV infection. Hence the legislation does not comply with the *International Guidelines*.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. **Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?**

No information on this topic was available at the time of writing.

2. **Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:**
 - **Safe; and**
 - **Efficacious?**

Pharmacy and Poisons Ordinance [Cap 70] Section 48 provides that the British Pharmacopeia is the standard for quality of medicines.
3. **Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?**

The Ordinance provides that only licensed medicine providers can supply medicines. The Pharmacy and Poisons Board has power to revoke licenses.
4. **Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?**

Compliance with the International Condom Standard is not required.
5. **Does the legislation ensure the accessibility and free availability of the following prevention measures:**
 - **Condoms**
 - **Bleach**
 - **Needles and syringes?**

The *Pharmacy and Poisons Ordinance* prohibits promotion of devices that can be used to prevent conception (Section 47). This could prevent promotion of condoms.
6. **Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?**

The *Registration of United Kingdom Patents Ordinance* Chapter 87 provides that the grantee or holder of a United Kingdom patent may re-register it in Kiribati. There is no legislative power to issue compulsory licences. Hence the legislation does not comply with the *International Guidelines* in this respect. Information regarding subsidised schemes for HIV-related and other pharmaceuticals, and on customs, duties, or taxes payable on imported pharmaceuticals, was not available at the time of writing.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

1. **Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?**

There is no legislation governing the conditions under which research on human subjects can be conducted. Approval can be sought from the Ministry of Health for the conduct of research on human subjects. This is done in accordance with Ministry of Health policy.³⁶ There is no standing research ethics committee.
2. **Does the legislation require subjects to be provided before, during and after participation with:**

³⁶ UNDP communication, January 2007.

- **Counselling;**
 - **Protection from discrimination;**
 - **Health and support services?**
- Kiribati legislation does not address these issues.

3. Does the legislation provide for informed consent to be obtained from the subjects?

Kiribati legislation does not address these issues.

4. Does the legislation provide for confidentiality of personal information obtained in the process of research?

Kiribati legislation does not address these issues.

5. Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?

Kiribati legislation does not address these issues.

6. Does the legislation provide for non-discriminatory selection of subjects?

Kiribati legislation does not address these issues.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

1. Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?

The right to liberty guaranteed by Article 3 of the *Constitution* is subject to a law made ‘for the purpose of preventing the spread of an infectious or contagious disease’ under Article 5 of the *Constitution*.

Under Regulations made pursuant to the *Public Health Ordinance*, sanitary inspectors have the power to isolate or remove to a hospital any person infected with an ‘infectious disease’ as defined by the *Public Health Ordinance*.

The *Quarantine Ordinance* provides that a quarantinable disease is smallpox, plague, cholera, yellow fever, typhus fever or leprosy or any disease declared by the Minister by order to be a quarantinable disease. The *Ordinance* provides for declaration of quarantine areas, control of inbound vessels, and restriction of movement of persons.

Kiribati legislation places restrictions on the movement of vulnerable groups, for example sex workers. A person may be found guilty of an offence against *Penal Code* Sections 167(c) (the offence of a common prostitute behaving in a disorderly or indecent manner in any public place) or Section 167(f) (the offence of soliciting for immoral purposes in a public place). A person found guilty of either of these offences is deemed to be an ‘idle and disorderly person’, and in addition to penalties of fine and/or imprisonment, may be removed to their place of ordinary residence and ordered to remain there for up to a year; repeat offenders are classed as ‘rogues and vagabonds’ and incur increased penalties and the possibility of being confined at place of ordinary residence under section 168 of the *Penal Code*.

Under the *Immigration Ordinance* the Minister for Immigration may also declare a class or group of persons to be a prohibited class, and any member of the class or group is also a prohibited immigrant.

2. Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?

As noted above, Sections 153 and 155 of the *Penal Code* criminalise consensual sexual acts between men. The existence of these criminal prohibitions against sex between men, and the absence of laws against discrimination, means that association between men who engage in homosexual acts may carry a risk of criminal prosecution under either Section 153 or 155 for ancillary offences such as aiding, abetting, or counselling in relation to sex between men.

3. Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?

There are several laws governing censorship of materials in Kiribati:

- Section 166 of the *Penal Code* prohibits the making, production, possession, importation, exportation, conveyance, dealing in, distribution, exhibition or lending of obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films, or any other obscene objects, or any other object tending to corrupt morals, and the public exhibition of any indecent show or performance or any show or performance tending to corrupt morals; Sections 167-9 prohibit indecent acts in public places.
- The *Exhibition of Films Ordinance* [Cap 31A] requires the censorship of all films to be publicly exhibited, and a film censor examiner may in his absolute discretion refuse to certify a film for public exhibition, and an appeal lies to the Minister.
- Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles are prohibited imports under Section 29 and Schedule 2 of the *Customs Act* 1993.

As there are no exceptions for general and targeted HIV/AIDS information, these laws do not comply with the standards in the *International Guidelines*.

4. Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?

Information regarding broadcasting standards legislation was not available at the time of writing.

5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:

- Health care workers;
- Other industries where there may be a risk of transmission, e.g. sex or funeral workers;
- Media;
- Superannuation and insurance;
- Employers (in a tripartite forum involving unions and government)?

Information on relevant Codes of Practice was not available at the time of writing.

6. Are such Codes of Practice required to contain the following elements:

- Confidentiality/privacy protections;
- Informed consent to HIV testing;
- Duty not to unfairly discriminate; and

- **Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?**

Please see Question 5 above.

SUMMARY AND RECOMMENDATIONS

Current policy as set out in the draft National Strategic Plan for STI/HIV/AIDS conforms closely with human rights principles.

Public health law

The policy of testing all donated blood for HIV accords with good practice for protecting the safety of the blood supply, however compliance with good practice needs to be supported by blood safety legislation.

The legislative framework for the response to HIV in Kiribati could be improved by the enactment of public health legislation which deals with the particular issues raised by HIV, in accordance with the *International Guidelines*. Such legislation would include the following features:

- Public health authorities empowered to provide comprehensive HIV prevention, treatment and care services;
- A requirement that HIV testing be performed only with specific informed consent and pre-test and post-test counselling, with any exceptions subject to judicial authorisation;
- The power to restrict the liberty of or detain persons living with HIV only as a last resort and on grounds of behaviour exposing others to a real risk of HIV transmission with due process protections for anyone subject to such interventions;
- The right of notification of a person's HIV status to their sexual partners only by health officials and in accordance with appropriate criteria as set out in Checklist 1 Question 4.

Criminal law

The *Penal Code* provides for a generic offence of spreading the infection of a dangerous disease, and is in accordance with the standards in the *International Guidelines*. Reforms which would contribute to a more enabling environment for the response to HIV include:

- Decriminalisation of sex work, or ensuring that laws against sex work do not impede the provision of HIV prevention, treatment, and care interventions (such as evidentiary immunity for the carrying condoms);
- Legislation establishing occupational health and safety standards for sex workers and clients;
- Decriminalisation of consensual sex between men in private, to facilitate access by men who have sex with other men to HIV prevention, treatment, and care interventions.
- Decriminalisation of abortion. The criminalisation of abortion is contrary to human rights protections concerning the sexual and reproductive rights of women, as discussed in Guideline 8 of the *International Guidelines* and should be decriminalised.

Prisons/correctional laws

Insufficient information was available regarding the *Prisons Ordinance*. The *Penal Code* should be amended to criminalise the rape of a male by another male.

Anti-discrimination legislation

At present there is no legal protection against discrimination on the basis of HIV status. In order to reduce stigma and discrimination, and contribute to a more enabling environment for the response to HIV, it is recommended that anti-discrimination laws be enacted with the following features:

- Protection against discrimination on the ground of disability and health status widely defined to include HIV, and on the ground of membership of a group made more vulnerable to HIV e.g. sex, sexual orientation and transgender status;
- Broad coverage of anti-discrimination provisions to include direct and indirect discrimination, those presumed to be infected as well as carers, partners, and family members, a prohibition against vilification, provided that the ground complained of only needs to be one of several reasons for the discriminatory act, narrow exemptions and exceptions, and wide jurisdiction in the public and private sectors;
- Appropriate administrative features as described in Checklist 4;
- Appropriate administrative powers for the administering institution as described in Checklist 4; and
- Appropriate functions as described in Checklist 4.

Equality of legal status of vulnerable populations

The *Constitution* prohibits discriminatory treatment on a number of grounds but not on the ground of sex. Information available at the time of writing indicates that men and women are treated equally at law in relation to custody of children, and the definition of rape in the *Penal Code* does not exclude rape in marriage. Recommended reforms in relation to equality of status of vulnerable populations include:

- Amend the *Constitution* or enact legislation to prohibit discrimination on the grounds of sex, gender and sexuality or sexual orientation;
- Prohibit mandatory HIV testing of targeted or vulnerable groups;
- Provide legal recognition of de facto relationships
- Decriminalise sex between men, provide for an equal age of consent for homosexual and heterosexual sex, and accord legal recognition to same sex relationships.

Privacy/confidentiality laws

There is no legal protection of the privacy of personal information including HIV status, with the exception of Article 10 of the *Constitution*, which provides for in camera court proceedings where publicity would prejudice the interests of justice or the private lives of persons concerned in the proceedings. It is recommended that legislation be enacted which:

- Protects the privacy of personal information widely defined to include HIV-related information;
- Provides for a right of access to ones own personal records, and a right to require that such records are accurate, relevant, complete, and up-to-date;
- Provides for an independent agency to administer the legislation with appropriate powers.

Public health legislation should also require the protection of confidentiality in relation to the reporting of HIV and AIDS cases to public health authorities.

Employment laws

- The *Employment Act* currently grants employers wide powers regarding pre-employment medical examination. The Act should be amended to prohibit mandatory HIV testing as a condition of employment, training, promotion, and

benefits, and mandatory HIV testing of specific employment groups (such as seafarers) should also be prohibited;

- Legislation should be enacted to require provision of information and education about HIV for occupational health and safety reasons, for example workers travelling to areas of high incidence;
- Employment security for HIV-positive employees who are fit to work should be protected, and social security and other benefits provided for workers who are no longer able to work;
- Legislation should be enacted requiring employers to protect the confidentiality of workers' medical and personal information including HIV status;
- The *Workers Compensation Ordinance* [Cap 102] should be amended so that occupationally acquired HIV infection is compensable, by removing the requirement that incapacity or death from occupationally acquired disease must occur within 12 months of contracting the disease;

Therapeutic goods, consumer protection laws

Quality of condoms should be ensured by requiring compliance with International Condom Standard.

Condoms should be exempted from the provision of the *Pharmacy and Poisons Act* preventing advertisement of devices preventing conception.

Patents legislation should include powers to issue compulsory licences to authorise government use of generic medicines for non-commercial use, and parallel importing of cheaper medicines sourced on the global market.

Ethical human research

On the information available at the time of writing, Kiribati legislation does not regulate the conduct of research on human subjects. The Ministry of Health is responsible for approving such research, although information regarding the criteria used was not available at the time of writing. It is recommended that legislation be enacted to establish an ethics review committee, in order to protect human subjects in research including HIV-related research.

Association, information, codes of practice

Laws which criminalise vulnerable groups such as sex workers and men who have sex with men impede the effectiveness of HIV prevention, treatment, care and support interventions, by driving the populations most in need into hiding. In order to prevent this happening in Kiribati, it is recommended that the *Penal Code* be amended to decriminalise sex work and related activities, sex between men, and the offences relating to "idle and disorderly people" so far as they can be applied to people living with or vulnerable to HIV.

Censorship laws should be amended to provide exceptions for HIV-related information and education.

3.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

EMPLOYMENT LAWS

With technical assistance from ILO, a draft Employment and Industrial Relations Code is in the final stages of development. The Bill provides it is unlawful to discriminate either

directly or indirectly against an applicant or employee based on real or perceived HIV AIDS status.

HIV-SPECIFIC LAW

A Cabinet Paper for the seeking of in principle approval of Cabinet for drafting of HIV-specific legislation has still to be finalised by the Ministry of Health. During the Consultation, the Kiribati delegation developed a draft action plan that includes seeking Cabinet approval for the drafting of the Bill (by end of June 2013) and for the drafting of the Bill (by end of December 2013).

4. PAPUA NEW GUINEA

4.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Constitution

Consolidated Legislation—

Index to PNG Laws—compiled by PNG Department of Justice and Attorney General. Index current at September 2012

Index to PNG Repealed Legislation—compiled by PNG Department of Justice and Attorney General. Index current at September 2012 (found to be not entirely accurate)

Sessional Legislation—for years 1974, 1977, 1978, 2010

Papua New Guinea Law Reports to 2004

Other resources—

 Ombudsman Commission of Papua New Guinea

 Constitutional and Law Reform Commission of Papua New Guinea

4.2 INTERNATIONAL TREATIES, OBLIGATIONS AND MEMBERSHIPS

International Covenant on Economic, Social and Cultural Rights (ICESCR) accession 21 July 2008

International Covenant on Civil and Political Rights (ICCPR) accession 21 July 2008

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) accession 12 January 1995

Convention on the Rights of the Child (CRC) signature 30 September 1990 and ratification 2 March 1993

Convention on the Rights of Persons with Disabilities (CRPD) signature 2 June 2011

International Health Regulations (2005) (IHR (2005)) to which Papua New Guinea became bound through membership of the International Health Assembly of the World Health Organization on 15 June 2007

Member of World Trade Organization (WTO) and subject to TRIPS requirements (and patent laws have been revised to comply with TRIPS as required to provide patent protection for pharmaceutical products from 2005)

Member of International Labour Organisation (ILO)

4.3 CONSTITUTIONAL PROTECTIONS

Constitution of the Independent State of Papua New Guinea 1975

The information given in LCR 2009 for Papua New Guinea remains accurate.

4.4 NATIONAL PLANS AND REPORTS

- National AIDS Council, Papua New Guinea National HIV and AIDS Strategy 2011-2015
- Papua New Guinea National HIV and AIDS Strategy 2011-2015 Implementation Framework

- Papua New Guinea National HIV and AIDS Strategy 2011-2015 Monitoring and Evaluation Framework
- UNAIDS, Key Findings & Progress Towards Achieving Targets & Commitments of the 2011 Political Declaration on HIV & AIDS (in development)
- Papua New Guinea National Department of Health National Guidelines for HIV Care and Treatment in Papua New Guinea
- Papua New Guinea National Health Plan 2011-2020
- Papua New Guinea National Sexual and Reproductive Health Policy
- Papua New Guinea National Family Planning Policy
- Papua New Guinea National Department of Health National Drug Policy (date unknown)
- Papua New Guinea National Department of Health National Medicines Policy (in development)
- Papua New Guinea Institute of Medical Research, University of New South Wales, *Emerging HIV Risk in Papua New Guinea*, 2012
- The National Parliament of Papua New Guinea, Manual of Practice and Procedure, 2009

4.5 LAWS OF RELEVANCE TO FOCUS AREAS AND LAW REVISION ACTIVITIES

Adoption of Children Act 1968

Adoption of Children (Amendment) Act 1971

Adoption of Children Regulation

Adoption of Children (Temporary Provisions) Regulations 1971 [Amendment]

Adoption of Children (Customary Adoptions) Act 1969

Adoption of Children (Customary Adoptions) Regulations 1970

Adultery and Enticement Act 1988

Adultery and Enticement (Amendment) Act 1989

Bail Act 1977

Bail (Amendment) Acts 1978, 1982, 1993

Bail (Consequential Amendment) Act 1991

Constitutional and Law Reform Commission Act 2004

Correctional Service Act 1995

Correctional Service (Amendment) Act 2010

Correctional Service Regulation 1995

Criminal Code Act 1974

Criminal Code (Amendment) Acts 1975, (Further Amendment) 1975, 1976, 1977, 1979, 1982, 1983, (Amendment No. 2) 1986, 1989, 1991, (Amendment No. 2) 1991, 1993, 2001

Criminal Code (Indictable Offences) Act 1980

Criminal Code (Minimum Penalties) Amendment Act 1983

Criminal Code (Minimum Penalties) Amendment Act 1984

Criminal Code (Sexual Offences and Crimes Against Children) Act 2002

Criminal Justice (Sentences) Act 1986

Deserted Wives and Children Acts 1951, 1955 and 1961

District Courts Acts 1963, 1964 & 1965

District Courts (Amendment) Acts 1981, 1983, 1986, (Amendment No. 2) 1986, 2000 & 2009

District Courts Regulations 1965 & 1967 (Amendment)

District Courts (Vagrancy) Regulation 1977

District Courts Practice Direction to allow for the issuing of Interim Protection Orders

Education Act 1983

Education (Amendment) Acts 1986, 1989, 1995
Education (Board of Studies) Regulation 1986
Education Regulation 1983

Employment Act 1978 (currently under review)

Employment (Amendment) Act 1981
Employment Regulation 1980
Employment (Amendment) Regulations 1998 and 2002

HIV/AIDS Management and Prevention Act 2003

Industrial Safety, Health and Welfare Act 1961 (currently under review)

Industrial Safety, Health and Welfare (Amendment) Acts 1970 & 1976
Industrial Safety, Health and Welfare Regulations 1965
Industrial Safety, Health and Welfare (Amendment) Regulations 1987, 1998, 2002

Infants Act 1956

Infants (Amendment) Act 1975

Legislative Drafting Service Act 1972

Lukautim Pikinini (Child) Act 2009 (repealed and replaced Lukautim Pikinini (Child) Act 2007)
Lukautim Pikinini (Child) Regulation 2011

Marriage Act 1963

Marriage Regulations 1964
Marriage Regulations (Amendments) 1965, 1979, 1986, 1998

Married Women's Property Act 1953

Married Women's Property (Amendment) Act 1970

Matrimonial Causes Act 1963

Medicines and Cosmetics Act 1999

Medicines and Cosmetics Regulations 2001
National Medicines Policy (in development)

National AIDS Council Act 1997

National AIDS Council (Amendment) Act 2009

National Provident Fund Act 1980

National Provident Fund (Amendment) Acts 1982, 1986, 1990

Patent and Industrial Designs Act 2000

Patents and Industrial Designs Regulation 2002

Public Health Act 1973

Public Health Act (Amalgamated) Act 1974
Infectious Diseases Act (Amalgamated) Act 1973
Venereal Diseases Act (Amalgamated) Act 1973
Venereal Diseases Regulations (Amalgamated) 1973
Public Health (Amendment) Acts 1998 & 2003

Public Hospitals Act 1994

Public Hospitals (Amendment) Acts 1995 & 1998
Public Hospitals (Charges) Act 1972
Public Hospitals (Charges) (Amendment) Regulation 1994

Public Services (Management) Act 1995

Public Services (Management) (Amendment) Acts 1998, 2002, 2003, 2004

Public Solicitor (see Constitution)

Public Solicitor (Charges) Act 1976

Quarantine Acts 1953, 1965, 1967

Quarantine Regulation
Quarantine (Amendment) Regulation 1981

Summary Offences Act 1977

Summary Offences (Amendment) Acts 1978, 1981, 1982, 1983, 1985, 1986, 1993

Supreme Court Act 1975

Supreme Court (Amendment) Acts 1987 and 2012

Workers' Compensation Act 1978

Workers' Compensation (Amendment) Act 1990
Workers' Compensation Regulation 1983

Bills

Family Protection Bill (with National Executive Committee and expected to be introduced to Parliament in May 2013)
People Smuggling and Trafficking in Persons Bill (endorsed by National Executive Committee)
Draft Employment Relations Bill
Draft Industrial Relations Bill
Draft Occupational Safety and Health Bill

4.6 PAPUA NEW GUINEA LCR 2009

(The content of Papua New Guinea LCR 2009 is reproduced here as published in March 2009)

**HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Papua New Guinea
Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and
UNAIDS
March 2009**

Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Papua New Guinea. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006.³⁷

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.³⁸ The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 "checklists" with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.
- Criminal law.
- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.

³⁷ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm> .

³⁸ UNAIDS/IPU. Geneva, 1999.

- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.³⁹

Background⁴⁰

PNG has a generalised HIV epidemic, with adult prevalence of 1.6% in December 2006. Estimates made in 2007 projected adult prevalence of 2.6% and 98,000 people living with

³⁹ See *Consolidated Guidelines* paras 102-103.

⁴⁰ UNAIDS (2008) *Report on the Global AIDS Epidemic* Geneva

HIV by December 2009.⁴¹ Prevalence is rising more quickly in rural areas than urban areas. Concentrations of HIV infection exist in Port Moresby and other towns, along major transport routes, and around rural enterprises such as mines and plantations where there are risk settings, such as active markets for commercial sex.

Unprotected heterosexual intercourse is the main mode of HIV transmission. Unprotected paid sex is a central factor. In one survey, 60%–70% of truck drivers and military personnel, and 33% of port workers said they had bought sex in the previous year.

About 40% of the adult population are infected with at least one sexually transmitted infection (STI). Unprotected sex between men is also a factor in the epidemic. When surveyed, 12% of young men said they had had sex with men, and condom use was rare. Injecting drug use is not thought to be a factor in the PNG epidemic.

Factors increasing vulnerability include —

- exceptionally high prevalence of STIs that amplify the risk of HIV transmission;
- low rates of condom use;
- patterns of male sexual behaviour including concurrent multiple sexual partners, and a high incidence of sexual assault;
- limited employment opportunities, illiteracy and urban migration, which contribute to growing poverty;
- rapid social change, especially as it affects gender relations, increases the vulnerability of women, weakens social structures, and exposes young people to HIV risk;
- poor access to health services and the poor health status of the population which increases their susceptibility to HIV infection, including the prevalence of TB and malaria and poor antenatal care;
- poor infrastructure which is deteriorating even further, poor or no health care facilities in most parts of the country;
- poor status of women — women and girls are the victims of coerced sex, family or sexual violence, and polygyny and brideprice encourage the view that women are property;
- Some faith based groups with fundamentalist followings publicising anti-condom, punitive messages;
- low life expectancy and low illiteracy rates of women, increased poverty obliging women to turn to transactional sex.

Legal system⁴²

The legal system is based on the Anglo-Australian legal system and adopts the common law of England as received at time of Independence in 1975. Much of the statutory law at the time was based on the legislation of Australia (principally Queensland e.g. the Criminal Code) although extensive legislative reform has been ongoing since then. The first superior court of record is the National Court (single judge) with appeals to the Supreme Court (3 judges or more). The Supreme Court has original jurisdiction in constitutional matters. The District

⁴¹ PNG National AIDS Council (2007) *2007 Estimation Report on the HIV Epidemic in Papua New Guinea*

⁴² Information on court and legal systems derived from Pacific Islands Legal Information Institute www.paclii.org; additional information from RRRT.

Court is the court of limited jurisdiction, with various grades of magistrates. Village Courts are empowered to hear and determine a limited range of matters according to custom.

The Bougainville Province has been granted autonomous status, and has its own Constitution, which makes provision for the establishment of a Bougainville judicial system, consisting of a High Court which is a court of record and unlimited jurisdiction, including jurisdiction over the national Criminal Code, with a Chief Justice and other Judges, who may also be National Court Judges; and other courts. The national Supreme Court is the appellate court, and the National Court of PNG may review the exercise of judicial authority of the Bougainville High Court.

International obligations

PNG is a member of the United Nations. It is a State party to the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. PNG is a signatory to the Millennium Development Declaration and the UNGASS Declaration of Commitment on HIV/AIDS 2001.

Section 117(7) of the *Constitution* provides that 'no treaty forms part of the municipal law of Papua New Guinea unless, and then only to the extent that, it is given the status of municipal law by or under a Constitutional Law or an Act of the Parliament'. In determining whether a law is Constitutional on the grounds of being 'reasonably justified in a democratic society', regard may be had to international human rights law including:

- the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and
- the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms;
- judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms (Section 39(3)).

HIV policy framework

The *National Strategic Plan (NSP) for HIV/AIDS 2006-2010* (NSP) identifies seven focal areas: treatment, counselling, care and support; education and prevention; epidemiology and surveillance; social and behavioural change research; leadership, partnership and coordination; family and community; and monitoring and evaluation. The guiding principles of the NSP are —

- The rights of all PNG citizens, as enshrined in the national Constitution, must be the basis for the delivery of all services relating to HIV and AIDS.
- Decisions on all aspects of the national response must be based on evidence.
- Transparency and accountability must be the basis for all aspects of the national response to HIV and AIDS.
- Respect must be given to the culture of PNG in the implementation of HIV/AIDS related projects and programmes.

PNG's *Medium Term Development Strategy 2005-2010* includes HIV and AIDS as one of the 6 expenditure priorities of the Government. *The National Gender Policy and Plan on HIV and*

AIDS 2006-2010 has been developed and launched as a companion document to the NSP to guide efforts to integrate gender issues into the response.

The *HIV/AIDS Management and Prevention Act 2003* ('HAMP Act') provides a legal framework for addressing HIV and human rights.

The *National AIDS Council Act* was passed in 1997. It establishes the National AIDS Council (NAC) as a separate statutory body, with a Secretariat. Its objects are —

- (a) to take multi sectoral approaches with a view to prevent, control and to eliminate transmission of HIV in Papua New Guinea; and
- (b) to organise measures to minimize the personal, social and economic impact of HIV infection and the disease of AIDS; and
- (c) to ensure, as far as is possible, that personal privacy, dignity and integrity are maintained in the face of the HIV/AIDS epidemic in Papua New Guinea, in accordance with the *Constitution* and the Global Strategy on AIDS.

NAC has lead agency responsibility, including responsibility for law review and development. Responsibility for health matters remains with the Department of Health. The Council's work is supplemented by that of a Parliamentary Special Committee on HIV and AIDS. Ministerial responsibility is located with the Minister for Health and HIV.

Twenty Provincial AIDS Committees have been established under the National AIDS Council, although these vary in their capacity to function, and in some provinces lack community representation and support from local government.

NAC policies include the 100% condom use policy and 100% safe blood supply policy. The NAC has also considered decriminalisation of sex work, although no moves have been made yet on this.

Government is three tiered, with national government, 19 provincial governments plus the National Capital District Commission, and several hundred local-level governments. Funding at lower levels is uneven and often inadequate. Coordination and cooperation between governmental bodies can be weak.

Civil society is represented predominantly by international NGOs, with in-country NGOs consisting mainly of sporting, environmental and church bodies. A coalition of companies has formed Business Against HIV/AIDS (BAHA) to coordinate the business sector response.

The Government has adopted a policy of mainstreaming HIV, which entails consideration of the management of HIV in every aspect of the core business of government. Program responses have been developed in key public sector agencies including the Correctional Services, Ministry of Education, Ministry of Social Welfare and Development, private industry including the mining sector and the Trade Union Congress. A national HIV/AIDS Workplace Policy was launched in July 2006,⁴³ and there is an HIV/AIDS Policy for the National Education System.

⁴³ Peter, Agnes. 'Workplace policy on HIV/AIDS set' *The National* PNG (online) Tuesday July 25, 2006

CHECKLIST 1 – PUBLIC HEALTH LAW

1. Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:

- Information and education
- Voluntary testing and counselling
- STD, sexual and reproductive health services
- Access to means of prevention e.g. condoms and clean injecting equipment
- Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?

The National AIDS Council Secretariat and National Department of Health coordinate treatment and prevention programs.

The *Public Health Act* is a pre-Independence statute in need of revision and reform, but this has not yet happened. It contains outdated provisions for management of listed ‘venereal diseases’. The provisions relating to infectious disease and ‘venereal disease’ in the *Public Health Act* (Chapter 226), and quarantine diseases in the *Quarantine Act* (Chapter 234), have been explicitly displaced by provisions in the HAMP Act (Section 3).

The HAMP Act by Section 11 makes it unlawful to deny a person access to a means of protection from HIV infection without reasonable excuse. This has a wide range of applications, from provision of condoms and HIV awareness materials to means of disinfection of sharps in prison, to provision of PEP.

The *Constitution* of the Autonomous Bougainville Government declares at Section 31 that the government shall make the fight against HIV/AIDS and its threat to the clans and to the future of Bougainville a major priority.

2. Does the legislation

- Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?
- Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?

The HAMP Act requires informed consent except in emergency situations where the person is unable to give consent and the test is clinically necessary (Section 14) or by court order (Section 23(4)). All testing is to be with voluntary informed consent (Section 14). “Voluntary informed consent”, in relation to an HIV test, is defined by Section 12 to mean consent specifically related to the performance of an HIV test, freely given, without threat, coercion, duress, fraudulent means or undue influence, after provision of “pre-test information” and with the reasonable expectation of post-test support. Pre-test information, in relation to an HIV test, includes information about –

- (a) the nature of HIV and of AIDS; and
- (b) the nature and purpose of an HIV test; and
- (c) the testing process and the probable time-frame for obtaining test results; and
- (d) the legal and social consequences, including the possibility of notifying sexual partners, of having an HIV test and being infected with HIV; and
- (e) the ways to prevent transmission of HIV.

Mandatory screening, or the requirement to undergo an HIV test, produce an HIV certificate or answer questions tending to discover whether a person is a member of a stigmatised group, is also forbidden. This includes situations of employment, immigration, school admission and accommodation (Section 9).

Since 2007 PNG Government HIV testing policy endorses provider initiated counselling and testing (PICT), consistent with WHO/UNAIDS 2007 *Guidance on Provider-Initiated HIV Testing and Counselling in Health Facilities*. This Guidance requires a lower level of information and support for people tested compared to the Voluntary Counselling and Testing model. Under the PICT model, the more extensive pre-test counselling used in VCCT services is adapted to simply ensure informed consent, without a full education and counselling session. Minimum Standards for HIV/AIDS Services and Activities in PNG call for people to be tested at every entry point to the health care system: antenatal and STI clinics, paediatric clinics, TB clinics and outpatient clinics. There is a concern that in practice implementation of the PICT approach may breach HAMP requirements for pre-test information and post test support.

3. Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?

Section 25 HAMP Act relates to reckless behaviour as opposed to HIV status.

Does the legislation provide in such cases the following due process protections:

- **Reasonable notice of case to the individual;** The case for imposing restrictions must be outlined by notice (see below).
- **Rights of review/appeal against adverse decisions;** Unclear, although there may be rights of appeal against a notice through administrative law, and against a conviction for breach of notice although these rights are not specified in the HAMP Act. The *District Courts Act 1963* grants a right of appeal to a person aggrieved by a decision of the District Court to appeal to the National Court from the conviction, order or adjudication
- **Fixed periods of duration of restrictive orders (i.e. not indefinite); No**
There is a broad power to make orders that the Director considers are necessary or convenient to ensure an appropriate change of behaviour, the duration of these orders is not limited.
- **Right of legal representation? No**

The HAMP Act Sections 25 and 27 make it an offence to disobey a notice requiring a person to desist from reckless behaviour. The notice may restrict liberty (e.g. freedom of movement) if necessary to ensure an appropriate change of behaviour. The notice may be issued if it is believed, on reasonable grounds, that a person –

- (a) is and is aware of being infected with HIV; and
- (b) has behaved in such a way as to expose others to a significant risk of infection; and
- (c) is likely to continue that behaviour in future; and
- (d) has been counselled without success in achieving appropriate behaviour change; and
- (e) presents a real danger of infection to others.

Breach of the notice is an offence which may be punished by a prison sentence of up to 3 years. There is no right to legal representation. Notice provided to the person must state –

- (a) the grounds upon which the Director believes that it should be issued; and
- (b) the reasons why the person should not continue the behaviour; and
- (c) a direction that the person should not continue the behaviour, or should commence to behave in a specific manner; and
- (d) any other matters or directions that the Director considers are necessary or convenient to ensure an appropriate change of behaviour; and
- (e) that breach of a direction in the notice is an unlawful act, and may be dealt with according to this Act.

4. Does the legislation authorise health-care professionals to notify sexual partners of their patients' HIV status in accordance with the following criteria:

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change; Yes**
- **The HIV-positive patient has refused to notify or consent to notification of the partner; Yes**
- **A real risk of HIV transmission to the partner exists; Yes**
- **The identity of the HIV-positive partner is concealed from the partner where this is possible; Yes**
- **Necessary follow-up support is provided to those involved? No**

The HAMP Act Section 20 makes specific provision for partner notification. At counselling, positive people are urged to inform partners. In situations of refusal, a person providing treatment, care or counselling are enabled but not required to notify partners (Section 20), provided that:

- (i) counselling of the infected person has failed to achieve appropriate behavioural change; and
- (ii) the infected person has refused to notify, or consent to the notification of, the sexual partner; and
- (iii) there is a real risk of transmission of HIV by the infected person to the sexual partner.

The HAMP Act does not provide a requirement for follow up support.

5. Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?

Yes. Safety of the blood supply, and of organ and tissue donation, is ensured by provisions inserted in the *Public Health Act* in 2003.

CHECKLIST 2 – CRIMINAL LAW

1. Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers)?

No. Injecting drug use is not considered a factor in the PNG epidemic. The *National Narcotics Control Board Act 1992* established the Board. The Act enables licensing of addicts and the establishment of detoxification and rehabilitation programmes. The Board's main work to date has been with marijuana.

2. Does the law allow the following sexual acts between consenting adults in private:

- **Homosexual acts e.g. sodomy;**

No. The *Criminal Code* (Sections 210, 212) retains the offences of sodomy and indecent dealings between males. Amendments in 2002 altered the language used in these provisions but did not abolish the offences. The *HAMP Act 2003* provides that any communication relating to the sexual behaviour of a person made by another person undergoing an HIV test, a surgical or dental procedure or counselling under this Act is not admissible in any proceedings under Sections 210 and 212 of the *Criminal Code Act 1974* or Sections 55 and 56 of the *Summary Offences Act 1977*.

- **Fornication or adultery;**

No. The *Adultery and Enticement Act 1988* makes adultery unlawful.

- **Street sex work, brothel or escort sex work?**

In 1975, the PNG Law Reform Commission recommended the decriminalisation of prostitution with the exclusion of any offence of soliciting in the *Summary Offences Act 1977*. However, prostitution is still illegal (at least where there is a course of conduct, rather than an isolated incident). In 1978 the courts determined that the Summary Offences Act offence of 'living on the earnings of prostitution' applies to the prostitute (*Anna Wemay and Others. v. Kepas Tumdual and Others* [1978] PNGLR 173). This interpretation is at odds with other common-law jurisdictions, where the provision is used only against those living on the earnings of the prostitution of others. This interpretation was not applied in a subsequent PNG case of receiving money for an isolated prostitution association, which was held not to constitute living, even partly, off earnings.

Although prosecutions are rare, the illegality gives police a basis for harassment of both female and male sex workers. Enactment of legislation that implements the 1975 Law Reform Commission recommendations of decriminalisation of soliciting while retaining the offences of brothel-keeping and living off the earnings of others would provide a pragmatic solution that would bring PNG law into line with the *International Guidelines*.

3. If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?

There is no evidentiary immunity for carrying condoms or other legal protections relating to HIV prevention and sexual health promotion work with sex workers. There are reports of police harassment of HIV peer education workers and sex worker action groups.⁴⁴

4. Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:

- Practised by clients;
- Practised by workers; and
- Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?

There is no legislation regulating health and safety in the sex industry. Sex work in PNG is generally not brothel based.

⁴⁴ C Jenkins (2000) *Female Sex Worker HIV Prevention Projects: lessons learned from Papua New Guinea, India and Bangladesh*, UNAIDS Best Practice Collection, Geneva.

5. **Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?**

Criminal Code 1974 Section 218 makes it an offence to procure entice or lead away any girl or woman so that some person may have carnal knowledge with her either inside or outside Papua New Guinea. In some circumstances traffickers may be subject to prosecution for living off the earnings of prostitution.

The *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* amended the Criminal Code to protect children from sexual abuse and commercial sexual exploitation, including child prostitution. For the purposes of control of child prostitution, a child is defined as a person under the age of eighteen years. The Act criminalises both persons purveying or allowing child prostitution, and persons who are clients of a child prostitute.

Rights-based child protection legislation, the *Lukautim Pikinini Act (Child Protection Act) 2007* enables children to demand the right to protection.

6. **Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?**

The HAMP Act provides that transmission or attempted transmission of HIV is an assault or attempted assault occasioning bodily harm under the *Criminal Code*. Where death has already occurred, it is an act of unlawful killing, and the year and a day rule is displaced. It is a defence to a charge that the other person was aware of the risk and voluntarily accepted it; that the other person was already infected; or that a condom was used if the transmission was through sexual intercourse (Section 23 HAMP Act).

Reckless behaviour in someone infected should be discouraged by counselling and, if necessary, written notice from the Director (Section 25). Breach of a notice is an offence which can be punished by imprisonment.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

1. **Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:**

- **Information and education**
- **Voluntary counselling and testing**
- **Means of prevention e.g. condoms, bleach, and clean injecting equipment**
- **Treatment – ART and treatment for opportunistic infections**
- **Choice to participate in clinical trials (if available)?**

The Constitution provides that all persons deprived of their liberty "shall be treated with humanity and with respect for the inherent dignity of the human person".

There is no statutory right to access services in prison that are equal to those available in the outside community. In practice, condoms and ARVs are not available to prisoners. However the HAMP Act Section 11 provides that people including prisoners have a right to access means of prevention including condoms and means of disinfecting sharps.

The *Correctional Service HIV/AIDS Strategy* includes policies on discrimination, universal health precautions for staff and voluntary testing for detainees, information and education

programs for staff, detainees and surrounding communities. The Strategy aims to “uphold the human rights of those people infected and affected by HIV/AIDS and other infectious diseases”. The HIV Strategy states that “preventive measures for HIV will be based on the risk behaviours occurring in prisons and will be complementary to, and compatible with, those in the community” and requires that “if available, condoms will be provided to detainees on leave of absence programs and release.”

The *Correctional Services Act 1995* provides that as soon as possible after the reception of a detainee into a correctional institution, the detainee shall submit to medical tests including blood tests; at any time after the reception of a detainee into a correctional institution, the medical officer may direct the detainee to submit to medical tests. Section 9 of the HAMP Act provides that it is unlawful to require or coerce a detainee or person in custody to submit to an HIV test. As the HAMP Act was enacted in 2003, it is likely to take precedence over the *Correctional Services Act 1995*. The HAMP Act’s requirements for informed consent and counselling apply to detainees.

The *Correctional Services Regulations* provide that the prison medical officer shall daily see all sick detainees.

Human Rights Watch investigations in 2006 revealed police use of violence, including sexual violence, against individuals in custody. Reception centres for processing children have begun operating in the Port Moresby and Lae police stations. Police are reported to have detained children with adults in police lockups, where they are denied medical care and placed at risk of rape and other forms of violence. In prisons and other juvenile institutions, children awaiting trial are mixed with those already convicted. Many facilities lack blankets, beds, mosquito nets, clothes, or any education program.⁴⁵

Intravenous drug use is not an issue in PNG prisons, but cannabis use is reportedly high.

- 2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?**
Section 152 of the *Correctional Services Act* provides that assault and malicious threats are prison offences.
- 3. Does the legislation provide for the confidentiality of prisoners’ medical and/or personal information, including HIV status?**
Clause 67(2) of the *Correctional Service Regulations* provides that a Commanding Officer shall ensure that the reception process of medically examining the detainee is conducted with regard to the detainee’s privacy and self respect. The HAMP Act imposes obligations of confidentiality on medical officers and other staff involved in care of prisoners living with HIV, being “a person is providing an HIV testing, treatment, care, counselling, or associated health care service” (Section 18).
- 4. Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?**

⁴⁵ Human Rights Watch, *Human Rights Watch World Report 2007 - Papua New Guinea*, 11 January 2007. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/45aca2a425.html>

Clause of 112 the *Correctional Services Regulations* provide that the medical officer of a correctional institution shall see and examine every detainee in that correctional institution as soon as possible after his admission and thereafter as necessary, with a view particularly to—

- (a) the discovery of physical or mental illness and the taking of all necessary measures in connection therewith; and
- (b) the segregation of detainees suspected of infectious or contagious conditions.

Where the medical officer believes or suspects that a person in a correctional institution is suffering from an infectious disease, he shall immediately—

- (a) notify the Commissioner and the Departmental Head of the Department responsible for health matters; and
- (b) take, or cause or direct to be taken, all necessary measures to protect persons in the institution against the disease; and
- (c) supervise the carrying out of the measures or cause them to be supervised

It is not known whether HIV is considered an infectious disease for the purpose of the *Regulations*.

5. Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?

Sentencing is generally discretionary and ill health may be taken into account as a mitigating factor on a case by case basis. There is a discretion at common law to take AIDS into account in mitigation when deciding a prison sentence if imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk that imprisonment will have a gravely adverse effect on the offender's health (see e.g. *PP v Lim Kim Hock* [1998] SGHC 274; *Bailey v DPP* (1988) 78 ALR. 116; *R v Bernard* [1997] 1 Cr App R (S) 135).

The *Correctional Services Regulations* provide that the prison medical officer report to the Commanding Officer whenever he considers that a detainee's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment. Where the medical officer is of the opinion that the life of a detainee is endangered by his detention in a correctional institution; or a sick detainee may not survive his sentence; or a detainee is unfit for detention in a correctional institution he shall report his opinion in writing to the Commissioner.

The *Correctional Services Act* provides that a person is serving a term of imprisonment the Minister may, if he thinks proper to do so in the circumstances, grant to him, by writing under his hand, a licence to be at large.

6. Does the legislation provide for non-discriminatory access to facilities and privileges for HIV positive prisoners?

Under the HAMP Act discrimination on the grounds of a person's HIV status is unlawful in relation to detainees and persons in custody in —

- (i) the application of detention, restriction or segregation procedures or conditions; or
- (ii) the provision of and access to health facilities and care; or
- (iii) the subjecting of a detainee to any other detriment in relation to detention or custody.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

1. **Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?**

There is no general disability discrimination legislation in PNG.

2. **Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?**

The HAMP Act Part II makes discrimination against a person infected or affected by HIV unlawful in a wide range of situations, including discriminatory treatment of prisoners and people in custody, and in relation to employment. A "person infected or affected by HIV/AIDS" is defined as a person who—

- is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or
- has had, is having, is seeking to have or has refused to have an HIV test; or
- is related to or is associated with a person who is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or
- is, or is presumed to be, a member of or associated with a group, activity or occupation, or living in an environment, which is commonly associated with, or presumed to be associated with, infection by, or transmission of, HIV (Section 2).

This makes discrimination against some marginalised but currently criminalised persons such as sex workers unlawful in some circumstances.

The *Constitution of the Bougainville Autonomous Government* provides at Article 30 that the right of persons with disabilities to respect and human dignity shall be recognized and protected.

Does the legislation contain the following substantive features:

- **Coverage of direct and indirect discrimination**
The HAMP Act covers direct discrimination. There is no specific provision making indirect discrimination unlawful. Discrimination is not defined by the HAMP Act. Therefore the position is ambiguous and requires clarification.
- **Coverage of those presumed to be infected, as well as carers, partners, family or associates**
Yes. See above.
- **Coverage of vilification**
Vilification is covered by provisions of the HAMP Act that make stigmatisation unlawful (Section 10).
- **The ground complained of only needs to be one of several reasons for the discriminatory act**
The HAMP Act Section 6 states that the ground complained of may be one of several reasons, and need not be the dominant or substantial reason for the discrimination.
- **Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data)**
HAMP Act exceptions are narrow in relation to:

- (i) Superannuation and insurance; and
- (ii) Actions which are for the special benefit, assistance, welfare, protection or advancement of a person or group.

The exception in the HAMP Act Section 6(3) that “it is not unlawful to discriminate against a person on the ground of infection by HIV or having AIDS if the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition” is unnecessarily broad. This exception may mean that blanket discrimination against all people with life threatening conditions is lawful, even if unreasonable.

- **Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)**

The HAMP Act has wide application in public and private sectors including health care, employment, education, and accommodation (Section 7). The Ombudsman Commission has limited capacity to consider complaints in relation to discrimination in the private sector. The *Constitution* does not specifically state that the Commission’s jurisdiction extends to consideration of the actions of private individuals. Under the *Organic Law on the Ombudsman Commission* the only action open to the Ombudsman Commission in relation to complaints about private sector individuals and organisations is to refer matters to the Public Prosecutor. Therefore court action is required in order to pursue a complaint against a private sector entity.

3. **Does the legislation provide for the following administrative features:**

- **Independence of a complaint body;**
- **Representative complaints (e.g. public interest organizations on behalf of individuals)**
- **Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;**
- **Access to free legal assistance;**
- **Investigatory powers to address systemic discrimination;**
- **Confidentiality protections e.g. use of pseudonyms in reporting of cases?**

Independence of a complaint body

The Ombudsman Commission has been given powers to investigate breaches of the HAMP Act under its anti-discrimination jurisdiction. Section 219(1)(c) of the *Constitution*, which provides that it may investigate, either on its own initiative or on complaint by a person affected, any case of an alleged or suspected discriminatory practice within the meaning of a law prohibiting such practices.

The Ombudsman Commission has established a Human Rights Desk.

Under Part XIV of the *Constitution* of the Bougainville Autonomous Government, human rights are enforceable in the Bougainville High Court, as well as the national Supreme and National Courts, in the same way as they are enforceable under the National *Constitution*. In addition, damages may be awarded to a person whose rights have been infringed. Customary methods of dealing with abuses of rights should be utilized wherever possible. Provision is made for the establishment of a human rights enforcement body.

Representative complaints (e.g. public interest organizations on behalf of individuals)

HAMP Act Section 27 provides that action in respect of an unlawful act may be taken by any person who has an interest in the unlawful act complained of, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his right under this section, by a person acting on his behalf, whether or not by his authority. There is no specific provision for organizations to represent individuals but Section 27 may allow this if the organization is incorporated and can demonstrate a sufficient interest in the unlawful act complained of.

Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill; Access to free legal assistance

This is not specifically addressed by the HAMP Act or other legislation. The Ombudsman Commission has limited reach throughout PNG, can only provide very limited assistance to private sector complainants and can provide limited remedies for public sector complainants. It cannot grant compensation.

National and District Courts also have jurisdiction to grant relief under the HAMP Act including compensation for loss or damage and a declaration that the act was unlawful. National and District Courts are difficult to access particularly in rural areas.

Amending the Act to grant direct but limited jurisdiction to the village courts would make some of the rights and protections created by the HAMP Act more accessible to the general population, particularly in the areas of stigmatisation, and discrimination in provision of accommodation, and, access to goods, services, or public facilities.⁴⁶

Access to legal aid is not specifically addressed by the HAMP Act or other legislation.

Investigatory powers to address systemic discrimination

This is not specifically addressed by the HAMP Act. The Ombudsman Commission is able to report to Parliament or other authorities on systemic issues as a result of an investigation into an act of discrimination.

Confidentiality protections e.g. use of pseudonyms in reporting of cases

Sections 18 and 19 of the HAMP Act provide comprehensive confidentiality and privacy protections relating to administration of complaints and court proceedings under the Act.

4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- **Education and promotion of human rights;**
- **Advising government on human rights issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on its activities?**

Legislation does not give the Ombudsman Commission powers relating to education but as a matter of practice the Commission conducts education and public awareness through its

⁴⁶ G Howse. Accessing Rights and Protections Under The *HIV/AIDS Management And Prevention Act* in Papua New Guinea: Making a Case For Granting A Limited Jurisdiction to The Village Courts *Journal of South Pacific Law* (2008) 12(1)

external relations program and provides advice to leaders and other persons on the proper discharge of functions. Section 219 of the *Constitution* and the *Organic Law on the Ombudsman Commission* define the Commission's powers of investigation.

The *Constitution* limits the Commission's powers of enforcement to publicity for its proceedings, reports and recommendations, to the making of reports and recommendations to the Parliament and other appropriate authorities as provided by an Organic Law, and to the giving of advice. The Commission does not have conciliation and arbitration powers. The Commission reports on activities through annual reports and publication of the outcome of investigation of complaints.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. Does the law ensure the equal legal status of men and women in the following areas:

- **Ownership of property and inheritance;**
- **Marital relations e.g. divorce and custody ;**
- **Capacity to enter into contracts, mortgages, credit and finance;**
- **Access to reproductive and STD health information and services;**
- **Protection from sexual and other violence, including rape in marriage;**
- **Recognition of de facto relationships;**
- **Prohibition of harmful traditional practices e.g. female genital mutilation?**

The *Constitution* Section 55 guarantees all citizens the same rights, privileges, obligations and duties irrespective of sex, although this does not affect pre-Independence law. Citizens have the right to the full protection of the law (*Constitution* Part III.3) However, freedom from discrimination is not a guaranteed right. Schedule 2.1(1) of the *Constitution* provides that Customary law is part of the 'underlying law' of Papua New Guinea.

Part XIV of the *Constitution of the Autonomous Bougainville Government* provides for a system of human rights whereby the rights in the National *Constitution* are applied in Bougainville.

Ownership of property, inheritance and capacity to enter into contracts, mortgages, credit and finance

As there is no legal guarantee of non-discrimination on the grounds of sex, women can be discriminated against in access to mortgages, credit and finance. Consumer protection legislation may offer some limited protection where conduct is considered unfair or resulting in denial of right to choice of products.

Women do not enjoy equality in relation to the ownership and disposition of property because land tenure is often based on custom leaving men in control of most aspects of land and property. The *Wills, Probate and Administration Act 1966* provides equality for men and women in inheritance. However, the Act does not apply to customary land, which is based instead on patrilineal lines. Customary law in respect of land can discriminate against women as long as it not repugnant to humanity, does not result in injustice or is contrary to the interests of a child under 16.

Customary law has constitutional legal status. This means that customs relating to inheritance and property ownership that favour men are effectively preserved. Although there are some limits on customary law, in the absence of a constitutional guarantee that

equality between men and women takes precedence over customary law, women have limited recourse against discriminatory practices. Schedule 2.1(1) of the *Constitution* provides that customary law is part of the 'underlying law' of Papua New Guinea. This is subject to the provisos that customary law cannot be inconsistent with the *Constitution* or with statute and is not valid if inappropriate to conditions of country. The *Customs Recognition Act 1963* provides that customary law is not recognised if it results in injustice or is contrary to public interests or is contrary to the best interests of a child under 16.

Marital relations e.g. divorce and custody and recognition of de facto relationships

Section 3 of the *Marriage Act* (Chapter 280) recognizes both statutory (registered) and customary marriages. Polygamy is legal where customary. Most, but not all, customs require payment of a brideprice.

In *Re Willingal* (1997) N 1506, the Court refused to accept a custom whereby an unwilling woman was to be given in marriage as part of a complicated compensation settlement between two kin groups. A custom of this sort was in breach of section 55 of the *Constitution*.

There is not equality in marital relations. The minimum age for marriage is 18 for males and 16 for females. Divorce in PNG is based on fault based criteria (including adultery, desertion and cruelty: *Matrimonial Causes Act 1963*). Women may become trapped in violent relationships if they do not proceed with divorce for fear of violent reprisals if they give evidence to prove their husband's cruelty and adultery.

Part VII of the *Matrimonial Causes Act 1963* addresses property and custody upon separation.

PNG has adopted the standard of the best interests of the child as the paramount consideration in custody disputes after separation and divorce. Customary laws regarding custody however favour men. The general customary law principle is that brideprice brings entitlement to children. This is recognized by the Courts.

The division of property is based on what is 'just and equitable', which fails to provide clear criteria for judges. Such criterion may not include adequate consideration of women's unpaid contributions to the household including care of dependents. PNG provides for maintenance orders during separation and after divorce for both children and spouses. The basis on which maintenance is provided is left largely to the discretion of the court with the broad criteria of the 'means, earning capacity and conduct' of the parties. A married woman having separate property is subject to the same liability for the maintenance of her children as the husband is subject to for the maintenance of her children (*Married Women's Property Act 1953*).

De facto partners are not spouses at law although there may be difficulty involved in distinguishing a valid customary marriage from a *de facto* relationship.

Access to reproductive and STD health information services

HAMP Act by Section 11 makes it unlawful to deny a person access to a means of protection from HIV infection of himself or another, without reasonable excuse. This gives women and

men the right to access male and female condoms. Under the Act “means of protection” includes –

- (a) HIV/AIDS awareness materials; and
- (b) condoms, condom lubricant and any other means of prevention of HIV transmission.

There is no statutory basis for rights of access reproductive health services. Abortion is illegal under Sections 225-226 of the *Criminal Code*.

Protection from sexual violence, including rape in marriage

The *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* introduced a new sexual assault regime into the Criminal Code. Offences cover all forms of abuse and are graded on the basis of seriousness to the victim. Substantial penalties apply. The 2002 Criminal Code amendments rendered rape gender-neutral and provided for rape within marriage, by amending Section 347.

2. Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?

Section 9 of the HAMP Act prohibits requiring or coercing a person to be tested for HIV in relation to employment or contract work; prisons and other places of detention; partnerships; membership of an industrial or professional organization, club sporting association or other association; education; accommodation including rental, hotel and guesthouse accommodation; the provision of or access to goods, services or public facilities; adoption or marriage; or entry into, residence in or citizenship of the country.

3. Does the law require children to be provided with age-appropriate information, education and means of prevention?

Section 11 of the HAMP Act states the right to access HIV awareness materials and other “means of protection” against HIV such as condoms, which must be provide unless there is a reasonable excuse.

4. Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

The HAMP Act Section 14(2) recognises children’s and young people’s right to consent to testing. The informed consent of a child aged 13 or more is required prior to an HIV test. A child’s parent or guardian can consent if the person to be tested is aged 12 years or less and is, in the opinion of the person providing the pre-test information, not capable of understanding the meaning and consequences of an HIV test.

The HAMP Act Section 18 recognises the right to confidentiality of HIV test results of children aged 13 or more. The child’s consent is required to release of confidential information to family or others. If the child is aged 12 or less then the parent or guardian can consent to release of confidential information.

5. Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?

The *Criminal Code (Sexual Offences and Crimes Against Children) Act* 2002 provides protection for children from sexual abuse.

6. Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?

Homosexual acts are illegal. Same sex relationships have no legal recognition.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

1. Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data? 2. Does the legislation prohibit unauthorised use and disclosure of such data?

The *Constitution* Section 49 provides—

Every person has the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38. Courts have held that this right extends to medical records: *S.C.R. No.2 of 1984; Re Medical Privilege* [1985] PNGLR 247.

International human rights law suggests that the human right to respect for private life extends to protection of people living with HIV from having their confidential medical records disclosed without consent. See e.g. *I v Finland* [2008] ECHR 20511/03 (17 July 2008) in which the European Court of Human Rights held that the measures taken by a hospital to safeguard the right to respect for private life of an HIV-positive patient of the hospital were inadequate and in violation of Article 8 (the right to respect for private life) of the *European Convention on Human Rights*.

The HAMP Act requires that any person who comes into possession of information regarding a person’s HIV status should take all steps to preserve confidentiality. A test result should only be given to the person to whom it relates.

2. Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are: Accurate; Relevant; Complete; Up-to-date?

There is no legislative requirement for a person to have access to his or her own records and the right to require that the data are accurate, relevant, complete and updated.

3. Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:

- **Education and promotion of privacy;**
- **Advising government on privacy issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on activities?**

There is no legislation establishing a privacy or data protection commissioner. The Ombudsman Commission has functions in relation to investigation of complaints in respect of Constitutional rights including privacy and can advise government on recommendations resulting from an investigation.

- 4. Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

Section 37(12) of the *Constitution* requires trials to be held in public, but Subsection 13 provides for laws to enable courts to exclude persons from proceedings in the interests of public welfare or in circumstances where publicity would prejudice the interests of justice, the welfare of minors or the protection of the private lives of those concerned in the proceedings. The HAMP Act Section 19 enables such closure where the person to whom the HIV information relates requests it, or the court considers that the information should not be publicly disclosed because of the social, psychological or economic consequences to the person to whom the information relates. This closure extends to the publication of reports of the proceedings, other than law reports.

- 5. Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

Section 18 of the HAMP Act provides that information on HIV status gained in the course of surveillance can be disclosed where the information is statistical only or cannot otherwise reasonably be expected to lead to the identification of the person to whom it relates.

CHECKLIST 7 – EMPLOYMENT LAWS

- 1. Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

Yes, the HAMP Act prohibits requiring or coercing an HIV test for employment purposes.

- 2. Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Employment groups are not specified by the HAMP Act.

- 3. Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

To encourage infection control, the HAMP Act Section 32 provides a defence to prosecution under the Act if infection control guidelines issued by the National Department of Health have been followed. However, there is no requirement that the guidelines promote or require a “universal” infection control approach.

- 4. Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

There is no specific obligation to provide HIV information and education for occupational health and safety reasons. There is a general obligation to provide access to means of protection from HIV including awareness materials in the HAMP Act.

- 5. Does the law provide for:**

- 1. Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
- 2. Social security and other benefits where workers are no longer able to work?**

The anti-discrimination provisions of the HAMP Act provide employment security while people living with HIV are at work. There is no social security legislation for unemployment or disability support. *Employment Act 1978* requires employers to provide sick leave to employees. For employees who have contributed to superannuation schemes, disability benefits are payable for permanent incapacity under schemes operating under the *Superannuation Act 2000*.

6. Does the law provide for confidentiality of employees' medical and personal information including HIV status?

Although there is a constitutional guarantee of privacy, there was no information available at the time of writing to indicate whether it has been invoked in this context.

The HAMP Act provisions relating to confidentiality place an obligation of confidentiality on those involved in providing treatment, care and counselling of a person living with HIV, but not on employers.

7. Does workers' compensation legislation recognize occupational transmission of HIV?

There are no specific provisions in the *Workers Compensation Act 1978* or regulations relating to HIV. A workplace injury that involved HIV transmission would be dealt with under the general provisions of the Act. Section 41 provides that proceedings for the recovery of compensation are not maintainable unless—

- (a) notice of the injury has been given as soon as practicable after the injury occurs and before the worker has voluntarily left the employment in which he was injured; and
- (b) the claim for compensation with respect to the injury has been made within 12 months after the occurrence of the injury.

This may disqualify claims for HIV if diagnosis occurs more than 12 months after the occupational transmission.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?

Section 31 HAMP Act provides that the Minister may approve a type or class of HIV test kit for use in the country. An approval may include conditions as to use. A person who manufactures, imports, sells, distributes, supplies, uses or authorises the use of or otherwise deals with an HIV test kit that is not an approved HIV test kit, or contrary to any condition of approval for its use, is guilty of an offence. Any HIV test kit in respect of which a person is convicted of an offence is forfeited to the State and shall be disposed of as the Director directs.

2. Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:

- Safe; and
- Efficacious?

Section 14 of the *Medicines and Cosmetics Act* requires pharmaceuticals, vaccines and medical devices to conform to such standards as are prescribed. The standards prescribed by regulation relate to safety and efficacy.

3. Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?

The *Medicines and Cosmetics Act 1999* Section 19 protects consumers against false or misleading claims in respect of drugs, vaccines, and medical devices.

4. Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?

A condom is a medical device for the purposes of the *Medicines and Cosmetics Act 1999*. No information was available as to whether compliance with the International Condom Standard is required or monitored.

5. Does the legislation ensure the accessibility and free availability of the following prevention measures:

- **Condoms**
- **Bleach**
- **Needles and syringes?**

Legislation does not provide an absolute guarantee of access or free availability. However the HAMP Act by Section 11 makes it unlawful to deny a person access to a means of protection from HIV infection of himself or another, without reasonable excuse. Under the Act “means of protection” includes –

- (a) HIV/AIDS awareness materials;
- (b) condoms, condom lubricant and any other means of prevention of HIV transmission;
- (c) exclusive personal use of skin penetrative instruments, including razors, needles and syringes; and
- (d) means of disinfecting skin penetrative instruments.

6. Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?

Section 20 of the *Value Added Tax Act 1998* provides that the supply of prescription drugs prescribed by a registered medical practitioner is exempt from VAT.

Patent legislation provides for compulsory licensing (including government use), which enables a compulsory license to be issued to import generic versions of patented medicines if required. However, there are no parallel importing provisions, so importing of brand name medicines that are available more cheaply in other countries is not provided for.

PNG is a member of the World Trade Organization. The *Patent and Industrial Designs Act 2000* provides protection for an invention which also includes improvements to an invention which may be a product or process. An invention must be new, involve an inventive step and must be industrially applicable.

PNG became a member state of the Patent Cooperation Treaty in 2003 which is an international filing system. The patents office (IPOPNG) accepts national applications (applications which are sought through the national system) and PCT (Patent Cooperation Treaty) applications (applications which are sought through the international PCT system).

The Act provides protection for any invention which is an idea of an inventor which provides a solution to a specific problem in the field of technology and maybe a product or a process. After being granted a patent in Papua New Guinea, the protection lasts for 20 years from the

date of initial filing. After 20 years, the invention enters the public domain and the protection for the invention is not renewable.

The protection of the patent is within Papua New Guinea and protects the patented invention from persons other than the owner from infringement.

Compulsory licensing is provided for government use, in case of national interests such as national security, health, or a national emergency. If the Government decides to exploit a patent, the owner including stake holders are paid remuneration.

Parallel importing is not addressed by the legislation. The Act incorporates national exhaustion of rights. This limits the circulation of products covered by patents in one country to only those put on the market by the patent owner or its authorized agents in that same country.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

- 1. Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?**

The HAMP Act at Section 30 requires that all HIV-related research must first obtain the approval of the National AIDS Council. The National AIDS Council Research Advisory Committee has developed guidelines for approval of research that require ethical review and consideration of the merit of proposed research.

The visa approval process also imposes requirements for ethical review. The National Research Institute liaises with other national institutions, and technical review committees, where necessary, to effect project approval and appropriate research affiliation before recommending the approval of a research visa. Similarly, medical research visa applications are vetted by the PNG Medical Research Advisory Council.

For clinical research, the Medical Society recommends that the principles laid out by the World Medical Association be followed. These include conformity to the moral and scientific principles that justify medical research; careful assessment of inherent risk; the subject's freely given consent should be obtained after full explanation of the nature, purpose and risks of the research has been given, and consent may be withdrawn at any time; personal integrity of the subject should be safeguarded.

- 2. Does the legislation require subjects to be provided before, during and after participation with:**

- **Counselling**
- **Protection from discrimination;**
- **Health and support services?**

There are no specific legislative requirements.

- 3. Does the legislation provide for informed consent to be obtained from the subjects?**

No, but ethics committees will require informed consent.

4. **Does the legislation provide for confidentiality of personal information obtained in the process of research?**
Yes, HAMP Act Section 18 requires a researcher to take all reasonable steps to prevent disclosure of HIV or AIDS status of a research subject to any other person.
5. **Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?**
No, although this may be considered in the ethics committee review process.
6. **Does the legislation provide for non-discriminatory selection of subjects?**
No, although this may be considered in the ethics committee review process.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

1. **Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?**
The Constitution provides that citizens have the right to freedom of movement. This may be difficult to enforce in practice particularly for populations who are marginalised such as women or whose behaviours are criminalised such as sex workers and men who have sex with men.
2. **Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?**
The Constitution provides that citizens have the right to freedom of assembly and association. This may be difficult to enforce in practice, particularly in the case of associations of men who have sex with men and sex workers, given that sodomy and soliciting remain crimes.
3. **Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?**
The application of censorship legislation (*Classification of Publications (Censorship) Act 1988*), the prohibited imports provisions of the *Customs Act*, the obscene and indecent matter provisions of Section 228 of the *Criminal Code* and the indecent articles provisions of the *Summary Offences Act* to HIV/AIDS awareness materials is excluded by Section 3 of the HAMP Act. Condoms and condom lubricant are not obscene or indecent objects for the purposes of the *Criminal Code* or *Summary Offences Act*.
4. **Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?**
No broadcasting standards were identified that address HIV.
5. **Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:**
 - Health care workers
 - Other industries where there may be a risk of transmission, e.g. sex or funeral workers;
 - Media;
 - Superannuation and insurance;
 - Employers (in a tripartite forum involving unions and government)?

The HAMP Act mandates the development, by National Department of Health, of Infection Control Guidelines. Other professional groups are not required by legislation to have Codes of Practice relating to HIV. A national *HIV/AIDS Workplace Policy* was launched in 2006.

6. **Are such Codes of Practice required to contain the following elements:**

- **Confidentiality/privacy protections;**
- **Informed consent to HIV testing;**
- **Duty not to unfairly discriminate; and**
- **Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?**

There are no specific legislative requirements.

SUMMARY AND RECOMMENDATIONS

The rights based approach introduced by the HAMP Act could be strengthened by reform to criminal laws.

Criminal law and corrections

The following matters in the criminal law have not been addressed—

- the continued criminalisation of prostitution
- the continued criminalisation of abortion
- the sodomy law and the law on indecent dealings between males, which marginalise men who have sex with men.

The offences related to male-male sex and prostitution involving consenting adults in private contravene human rights and undermine HIV and STI prevention and care efforts. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices as noted in the International Guidelines. To encourage honest discussion of sexual behaviours the adultery offence should be removed.

Legal protections are required for health promotion work with sex workers. Evidentiary immunity should be allowed for carrying condoms. Peer educators should not be subject to risk of prosecution.

Condoms and ARVs should be required to be made available to prisoners under the *Correctional Services Regulations*. Legislation should clarify that HIV is not an infectious disease for the purpose of the *Correctional Services Act* and regulations.

HAMP Act

The HAMP Act was designed to take account of the rights in the *Constitution*, human rights generally and the principles in the International Guidelines. The HAMP Act is progressive legislation that affords important protections to people living with and affected by HIV and contributes to setting an enabling environment for HIV prevention and care. Ongoing efforts to educate communities and the legal and medical professions about rights and responsibilities under the Act are important.

The Act could be strengthened in a number of areas.

The HAMP Act must be accessible and enforceable so that the law can provide the protections intended by Parliament. Legislation that clarifies the jurisdiction of Village Courts

to hear complaints under the HAMP Act would assist HIV affected populations across the country to access human rights protections.

The HAMP Act provisions relating to discrimination could be strengthened by:

- defining discrimination to include indirect discrimination
- removing the defence that allows discrimination on the ground of HIV if other medical conditions are treated similarly. The HAMP Act defence that states that “it is not unlawful to discriminate against a person ...if the discrimination is no more detrimental than discrimination on the ground of having another life threatening medical condition” should be removed, or qualified so that the defence is only available where discrimination on the ground of having another life threatening medical condition is reasonable taking into account the impacts on people living with life threatening conditions and the public interest.

HAMP Act protections against discrimination in the private sector require strengthening. The body receiving complaints under the HAMP Act should be able to address discrimination by private sector entities. The Ombudsman commission is currently not able to perform this function.

The HAMP Act could be strengthened by amendments to clarify that representative or class action complaints can be made by public interest organizations on behalf of individuals or a defined class of individuals.

HAMP Act Section 25 should be amended to require fixed periods of duration of restrictive orders (i.e. not indefinite).

The implementation of the provider-initiated testing and counselling (PICT) approach to HIV testing in health facilities requires active monitoring to ensure that HAMP Act requirements for pre-test information and post test support are met.

Legislation should require “universal” infection control approaches in health care settings.

Unlinked anonymous HIV surveillance testing is prohibited by the HAMP Act as informed consent is not obtained. There is a public interest in obtaining more reliable data on HIV prevalence which is likely to be assisted by unlinked anonymous HIV surveillance testing. Counter to this runs the ethical argument of the problem of detecting positive results and not being able to offer care and counselling to the person to whom the result relates. These arguments require community debate.

Other legislation

Legislation should clarify that aspects of customary law that discriminate against women including in relation to property, inheritance and custody of children should not be enforceable.

The introduction of general anti-discrimination legislation covering discrimination on the grounds of disability, sex, sexuality and transgender status would improve the environment for HIV prevention and care.

Legislation should require that condoms comply with international quality standards.

The *Patents and Industrial Designs Act* should be amended to recognise international exhaustion of patents, thereby enabling parallel importing of medicines. In anticipation of PNG increasing its capacity to assess and approve drugs for marketing, the Act should also include an 'early working' exception through including a 'bolar' provision, so that generic medicines can be registered domestically and approved for marketing as soon as possible after patent expiry.

Legal recognition should be given to de facto relationships including same sex partnerships. This would assist HIV prevention efforts by improving the status of women (e.g. by providing rights to property and maintenance after separation) and reducing the social marginalisation of men who have sex with men.

Legislation should enable persons to have access to their own medical records.

4.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

LCR 2009 does not make reference to legislative changes post March 2009. Thus it does not make reference to—

- Correctional Service (Amendment) Act 2010
- Lukautim Pikinini (Child) Act 2009 (which repealed and replaced Lukautim Pikinini (Child) Act 2007)
- Lukautim Pikinini (Child) Regulation 2011
- National AIDS Council (Amendment) Act 2009
- Supreme Court (Amendment) Act 2012

Employment legislation

A draft Industrial Relations Bill was developed almost 10 years ago and the Government is focussing on progressing with the enactment of this legislation in the near future. The Bill, developed with technical assistance from ILO, provides that it is unlawful to discriminate against a person in employment either directly or indirectly based on actual or perceived HIV/AIDS status. It also requires employers to develop and communicate policies to eliminate discrimination in the workplace. It notably includes a provision making any form of harassment in the workplace unlawful, which would extend to harassment based on HIV/AIDS status.

5. SAMOA

5.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Constitution

Consolidated Acts of Samoa 2012

Sessional Legislation to 2012

Subsidiary Legislation to 2011

Link to Samoa Law Reform Commission website

New Zealand Legislation in Samoa

<http://www.SamlII.org>

Consolidated Acts of Samoa 2012

Sessional Legislation to 2012. New Laws have been included and existing Laws revised, including general revisions. The general revisions include amendments made to conform with modern drafting styles and to use modern language, to include up-to-date references to offices, officers and statutes, to insert the commencement date and other minor editing in accordance with the lawful powers of the Attorney General.

Subsidiary Legislation for years 1961, 1977, 2004, 2005, 2006, 2010

5.2 INTERNATIONAL TREATIES, OBLIGATIONS AND MEMBERSHIPS

International Covenant on Civil and Political Rights (ICCPR) accession 15 February 2008

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) accession 25 September 1992

Convention on the Rights of the Child (CRC) signature 30 September 1990 and ratification 29 November 1994. Upon ratification, reservation made: 'The Government of Western Samoa whilst recognising the importance of providing free primary education as specified under article 28 (1) (a) of the Convention *And* being mindful of the fact that the greater portion of schools within Western Samoa that provide primary education are controlled by bodies outside the control of the Government *Pursuant* then to article 51, the Government of Western Samoa thus reserves the right to allocate resources to the primary level sector of education in Western Samoa in contrast to the requirement of article 28 (1) (a) to provide free primary education'. Acceptance of amendment to article 43 (2) of CRC on 22 March 2002

International Health Regulations (2005) (IHR (2005)) to which Samoa became bound through membership of the International Health Assembly of the World Health Organization on 15 June 2007

Member of World Trade Organization (WTO) and subject to TRIPS requirements (though has Least Developed Country Status)

5.3 CONSTITUTIONAL PROTECTIONS

Constitution of the Independent State of Samoa 1960

As with all Laws appearing on the SamLII website, the version of the Constitution that appears was revised and consolidated in 2008 and then further revised each year by the Legislative Drafting Division up to and including 2012. This is an extremely valuable feature of this source.

The information given in LCR 2009 for Samoa's Constitution remains accurate, although this report expands upon the information given with respect to the Preamble which includes—

WHEREAS the Leaders of Samoa have declared that Samoa should be an Independent State based on Christian principles and Samoan custom and tradition

and that given on Freedom from discriminatory legislation (Article 15).

Sub-article (1) provides that—

All persons are equal before the law and entitled to equal protection under the law.

Sub-article (2) provides that—

Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.

5.4 NATIONAL PLANS AND REPORTS

- Government of Samoa, National HIV/AIDS Policy 2011-2016 (including Samoa National HIV/AIDS Plan of Action 2010: This Plan of Action includes, under Governance and Leadership, a Goal to develop adequate and administrative basis for the implementation of HIV/AIDS prevention interventions targeted to high-risk behaviour groups of the population. Strategy 1.1 is Advocacy to initiate amendments in the current legislations for development of supportive legal environment for HIV prevention programmes among high-risk behaviour groups of the population).
- Samoa Global AIDS Country Progress Report: Reporting period January 2010 – December 2011
- SPC, Second Generation Surveillance Surveys of antenatal women in Samoa, 2008
- Samoa Bureau of Statistics, Population and Housing Census Report 2006, 2008
- Samoa Ministry of Health (2008), Health Sector Plan 2008-2018
- Samoa Ministry of Health (2010), Samoa National Health Promotion Policy 2010
- Samoa Ministry of Health (2010), Samoa Health Sector Monitoring and Evaluation Framework, 2010
- Samoa, Statement by Hon. Gatoloaifaana Amataga Gidlow, Association Minister for Women, Community and Social Development of the Independent State of Samoa to the 52nd session of the Committee on the Elimination of Discrimination against Women, 19 July 2012
- AusAID Samoa – Australia Partnership for Development: Law and Justice Sector Plan 2008-2012
- Government of Samoa, Office of the Attorney General, Legislation Drafting Handbook (Legislative drafting requirements approved by the Attorney General for use in Samoa from July 1 2008).

5.5 LAWS OF RELEVANCE TO FOCUS AREAS

Births and Deaths Registration Ordinance 1961

Community Justice Act 2008

Crimes Act 2013 (repeals Crimes Ordinance 1961)

Education Act 2009

Commenced 1 February 2010, except for sections 27 and 65 which commenced on 1 February 2011

Health Ordinance 1959

Immigration Act 2004

Amended by Public Notice 2011 (Amendment to Fees and Forms)

Intellectual Property Act 2011 (repeals Patents Act 1972; Trade Marks Act 1972; Industrial Designs Act 1972 and makes consequential amendments to Customs Act 1977)

Komesina o Sulufaiga (Ombudsman) Act 1988

Labour and Employment Relations Act 2013 (repeals Labour and Employment Act 1972)

Ministry of Health Act 2006

National Health Service Act 2006

Police Offences Ordinance 1961

Prisons Act 1967 (under review)

Public Service Act 2004

Village Fono Act 1990 (under review)

5.6 SAMOA LCR 2009

(The content of Samoa LCR 2009 is reproduced here as published in March 2009)

HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Samoa

Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS

March 2009

Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Samoa. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006⁴⁷.

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.⁴⁸ The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.
- Criminal law.

⁴⁷ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

⁴⁸ UNAIDS/IPU. Geneva, 1999.

- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.
- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.⁴⁹

⁴⁹ See *Consolidated Guidelines* paras 102-103.

Background⁵⁰

2007, Samoa had a cumulative total of 15 reported HIV diagnoses since 1990. Infections have been mainly though not exclusively acquired overseas. Transmission is principally heterosexual. At least two cases were acquired by homosexual intercourse, and two from an infected mother to her child. Recent diagnoses of HIV in Samoa have been among people who were believed to have been infected several years earlier. Therefore it is likely that there is an additional population of people living with HIV that is, as yet, undiagnosed in the country.

STI surveillance reveals high prevalence of other STIs. In 2005, the prevalence of genital chlamydia among antenatal women was 27%, with 41% of women aged less than 25 years testing positive for the infection. The prevalence of gonorrhoea was 2.3%.⁵¹

Gender roles are strict and females are expected to be submissive to males. Many people consider it acceptable for men to physically discipline their wives and to expect sex on demand. A study of partner violence has shown that physical and sexual abuse is more common in rural areas among the less educated sectors of the population.

A traditional alternative gender, the *fa'a'fafine*, has general public acceptability and is associated with male-to-male sex.

Sex work in night clubs, hotels, and brothels is reported. Growing unemployment among youth and problems with alcohol and substance use contribute to risk. Condoms are not easily available, particularly in rural areas. Socio-cultural factors relevant to HIV vulnerability also include:

- low condom use;
- high rates of STIs, which amplify the risk of HIV transmission;
- population mobility, with high levels of circular migration between Samoa and New Zealand;
- marked gender roles and taboos on discussion of sexual issues;
- young population;
- early-age sexual activity.

Village *fonos* have considerable powers at village level. Women enjoy increasing levels of equality in access to education and employment opportunities. An extensive network of women's committees co-manages publicly funded rural health services. Specialist treatment must be sought in New Zealand. There is a growing private sector in health care.

Legal system

Sources of the law are the *Constitution*, Acts of the Samoan Parliament, pre-Independence Ordinances continued after Independence, some New Zealand and United Kingdom Acts still applying, English common law and equity, and custom for the purpose of ascertaining land rights. There is a Supreme Court with right of appeal to the Appeal Court.

⁵⁰ See C Jenkins (2005) *HIV/AIDS in the Pacific* ADB, Manila.

⁵¹ World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41

International obligations

Samoa is a member of the UN and has ratified the Convention on Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child.

HIV policy framework

HIV is addressed in the country's National Health Plan of Action. A National HIV/AIDS Policy was developed in 2001 and a National Plan of Action for HIV/AIDS and STIs 2003-2005. There is also a Strategic Plan on Responding to the Impact of HIV/AIDS on Women in Samoa 2001-2005. Samoa's NACC/CCM made a decision in 2004 to develop and formulate a Samoa National HIV/AIDS Strategy to be in line with the Principles of the Pacific Regional HIV/AIDS Strategy's eight thematic areas, Samoa's Global Fund Plan of Action 2003-2008 and Samoa's Millennium Development Goals.

Three key areas of the National Plan of Action are —

- strengthen national coordination for the planning and implementation of HIV/AIDS-STI programs and activities
- strengthen national health promotion and prevention programmes for HIV/AIDS-STI in Samoa
- strengthen the management, treatment and surveillance of HIV/AIDS-STI cases in Samoa.

The National AIDS Coordinating Committee is responsible for coordination of HIV programs. The National AIDS Coordinating Committee was formed in 1987 with a variety of government departments and NGOs represented. It also undertakes the functions of the country coordinating mechanism for the Global Fund Regional Project, though it has not met frequently. Most decisions on the national HIV response are made by the Technical AIDS Committee made up mainly of health personnel.

Responses by other government sectors besides the Ministry of Health have mainly consisted of awareness-raising for those employed in those sectors. Several NGOs have become active.

A *fa'a'afafine* group called My Girls Association have provided HIV education for members of the group and promoted prevention to the community. The Samoa Family Health Association, the Samoa Red Cross Society, Sautima (Catholic social services), and the Samoa YMCA are active in HIV education. Samoa Umbrella of NGOs (SUNGO) conducts NGO capacity development.

CHECKLIST 1 – PUBLIC HEALTH LAW

1. **Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:**
 - **Information and education**
 - **Voluntary testing and counselling**
 - **STD, sexual and reproductive health services**
 - **Access to means of prevention e.g. condoms and clean injecting equipment**
 - **Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?**

There is no legislation specifically empowering public health authorities to provide comprehensive HIV and sexual health services.

Section 7 of the *Health Ordinance 1959* provides that the principal functions of the Department of Health which include to prevent, limit and suppress infectious and other disease. The Minister of Health has powers under the *Minister of Health Act 2006* to ensure resources under the Ministry's control are applied to activities to improve, promote and protect the health of the people. The Ministry of Health has responsibilities under the *Minister of Health Act Schedule 2* in relation to health promotion and preventive services, including:

- (a) Health Education and Health Promotion;
- (b) Preventive Services;
- (c) Public Health Services Surveillance;
- (d) Reproductive Health.

2. Does the legislation:

- **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
- **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?**

There is no legislation in relation to informed consent to health care or blood tests. There is no specific power to require a person to submit to a blood test except for immigration purposes. There is a general power to medically examine.

HIV/AIDS has been declared an infectious disease under the *Health Ordinance 1959*.

Section 29(e) of the *Health Ordinance 1959* provides that the Director of Health may require persons to report themselves or submit themselves for medical examination at specified times and places.

The *Immigration Act 2004* at Section 7 permits the medical examination of anyone entering or about to leave Samoa. This may include requiring the person to provide samples of bodily tissue or other biological material. A person entering or about to leave Samoa may also be required to provide a medical certificate on any matter which the Minister by notice determines.

3. Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?

Does the legislation provide in such cases the following due process protections:

- **Reasonable notice of case to the individual;**
- **Rights of review/appeal against adverse decisions;**
- **Fixed periods of duration of restrictive orders (i.e. not indefinite);**
- **Right of legal representation?**

The *Health Ordinance 1959* provides extensive powers in relation to infectious diseases. Isolation and quarantine for infectious diseases are enabled under Sections 29 and 36 of the *Health Ordinance 1959*. Section 29 provides that the Director may from time to time, if authorised in writing by the Minister, exercise the following special powers for the purpose of preventing the outbreak or spread of any infectious disease:

- (a) require persons to report themselves or submit themselves for medical examination at specified times and places;
- (b) require persons, places, buildings, premises, animals, and things to be isolated, quarantined, or disinfected as he thinks fit;
- (c) forbid persons, ships, aircraft, animals, or things to come, or to be brought to any port or place in Western Samoa from any port or place which is or is supposed to be infected with any infectious disease;
- (d) forbid persons to leave the place in which they are isolated or quarantined until they have been medically examined and found to be free from infectious disease, and until they have undergone such preventive treatment as he may in such case prescribe.

There are no provisions for:

- reasonable notice of case to the individual;
- fixed periods of duration of restrictive orders (i.e. not indefinite);
- right of legal representation.

Rights of review are not explicit in the Ordinance, however a person could apply to a court seeking judicial review of administrative action.

4. Does the legislation authorise health-care professionals to notify sexual partners of their patients' HIV status in accordance with the following criteria:

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;**
- **The HIV-positive patient has refused to notify or consent to notification of the partner;**
- **A real risk of HIV transmission to the partner exists;**
- **The identity of the HIV-positive partner is concealed from the partner where this is possible;**
- **Necessary follow-up support is provided to those involved?**

There is no legislation addressing confidentiality of medical information or the duty of health care professionals to notify third parties of risks posed by their patient to others.

The *Health Ordinance 1959* Sections 31-34 imposes obligations on medical practitioners, occupier of premises and masters of ships and aircraft to report any reasonable suspicion of a case of infectious disease. A register shall be kept of all cases, and there are no confidentiality provisions.

5. Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?

There is no blood safety legislation.

CHECKLIST 2 – CRIMINAL LAW

1. **Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers).**

No reports of injecting drug use in Samoa were found, so legislation relating to needles and syringe access for drug users is not considered necessary.

The *Narcotics Act 1967* regulates import, supply, possession and use of narcotics. Section 8 of the *Narcotics Act 1967* permits registration of and supply of opium to those addicted to the quasi-medicinal use of opium, and who are unlikely to be cured.

2. **Does the law allow the following sexual acts between consenting adults in private:**

- **Homosexual acts e.g. sodomy;**
- **Fornication or adultery;**
- **Street sex work;**
- **Brothel or escort sex work?**

Homosexual acts e.g. sodomy

Section 58D of the *Crimes Ordinance 1961* prohibits indecent acts between males, regardless of consent. Section 58E prohibits sodomy, including between adult males, and consent is not a defence.

Section 58J prohibits keeping of any premises used as a place of resort for the commission of indecent acts between males.

Section 58N prohibits the impersonation of a female by a male.

Section 58B prohibits indecent acts between women over 21 and girls under 16

Fornication or adultery

Adultery is an offence under Sections 58 and 58A *Crimes Ordinance 1961*.

Street sex work, brothel or escort sex work

Sections 58K-58M of the *Crimes Ordinance 1961* prohibit brothel-keeping, living on the earnings and procuring. Soliciting is prohibited under Section 16 *Police Offences Act*.

3. **If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?**

There is no exception in criminal law for HIV prevention and care services.

4. **Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:**

- **Practised by clients;**
- **Practised by workers; and**
- **Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?**

Legislation does not regulate occupational health and safety in the sex industry.

5. **Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?**

There are no laws in relation to trafficking or coercion of people into sex work.

6. **Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?**

There is no specific legislation on deliberate HIV transmission. Deliberate transmission of HIV could be prosecuted under the criminal offence of causing grievous bodily harm (*Crimes Ordinance 1961* Section 79).

HIV is an infectious disease and the *Public Health Ordinance 1959* provides offences for a person who:

- (a) While (knowingly) suffering from any infectious disease wilfully is in any public place without having taken proper precautions against the spread of infection;
- (b) While in charge of any person suffering as aforesaid takes him into or allows him to be in any public place without having taken proper precautions against the spread of infection;
- (c) While suffering as aforesaid enters any public conveyance, or while in charge of any person so suffering takes him into any public conveyance, without in every such case notifying the driver or conductor of the fact;
- (d) Being the owner or driver or conductor of a public conveyance fails or neglects to disinfect the conveyance or cause the same to be disinfected forthwith after it has to his knowledge been entered by any person suffering as aforesaid.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

1. **Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:**

- **Information and education**
- **Voluntary counselling and testing**
- **Means of prevention e.g. condoms, bleach, and clean injecting equipment**
- **Treatment – ART and treatment for opportunistic infections**
- **Choice to participate in clinical trials (if available)?**

There are no specific provisions relating to HIV testing, prevention or treatment in prisons.

2. **Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?**

Section 34 of the *Prisons Act 1967* provides that assault is a prison offence.

3. **Does the legislation provide for the confidentiality of prisoners' medical and/or personal information, including HIV status?**

The *Prisons Act* does not provide for confidentiality of medical information including HIV status. Infectious diseases must be notified by the prison medical officer under the *Prisons Regulations 1954*.

4. **Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?**

The *Prisons Act* does not require segregation of prisoners on the basis of HIV status. The Act makes provision for transfer of sick prisoners to hospital (*Prisons Act 1967* Section 45).

5. **Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?**

The grounds for remissions of sentences under the Act are good conduct and industry, not ill health (Section 39B). There is a general discretion to release on parole (Section 39A). There is a discretion at common law to take AIDS into account in mitigation when deciding a prison sentence if imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk that imprisonment will have a gravely adverse effect on the offender's health (see e.g. *PP v Lim Kim Hock* [1998] SGHC 274; *Bailey v DPP* (1988) 78 ALR. 116; *R v Bernard* [1997] 1 Cr App R (S) 135).

6. **Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?**

Legislation does not provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

1. **Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?**

There is no protection from discrimination on the grounds of disability or HIV status.

2. **Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?**

Does the legislation contain the following substantive features:

- Coverage of direct and indirect discrimination;
- Coverage of those presumed to be infected, as well as carers, partners, family, or associates;
- Coverage of vilification;
- The ground complained of only needs to be one of several reasons for the discriminatory act;
- Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);
- Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?

There is no legislation specifically providing for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS and there is no anti-vilification legislation.

Article 15 of the *Constitution* provides that no law and no executive or administrative action of the State shall subject anyone to any disability or restriction, or confer any privilege or advantage on anyone, on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth or family status. This may offer some protection to women who are subject to discrimination. The provision does not apply to discrimination in the private sector.

3. **Does the legislation provide for the following administrative features:**

- **Independence of a complaint body;**
- **Representative complaints (e.g. public interest organizations on behalf of individuals)**
- **Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;**
- **Access to free legal assistance;**
- **Investigatory powers to address systemic discrimination;**
- **Confidentiality protections e.g. use of pseudonyms in reporting of cases?**

In some cases it may be possible to make a complaint of discrimination or unfair treatment by government officials to the Ombudsman office. Under the *Komesina O Sulufaiga (Ombudsman) Act 1988*, the Ombudsman has power to investigate any decision or recommendation made (including any recommendation made to a Minister of Cabinet), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any government Department, board or agency, or by any of their officers, employees or members (Section 11). Investigations are conducted in private and Ombudsman office staff must maintain secrecy (Section 15 and 18).

A sex discrimination complaint relating to Article 15 of the *Constitution* should be made to the Supreme Court. The *Constitution* Article 9 guarantees the right to a fair and public trial, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

There are no procedures in respect of:

- representative complaints;
- speedy redress;
- access to free legal assistance;
- investigatory powers to address systemic discrimination.

4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- **Education and promotion of human rights;**
- **Advising government on human rights issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on its activities?**

There is no Human Rights Commission. The Ombudsman has general investigatory powers into discriminatory conduct of public agencies but does not educate and promote human rights or monitor compliance with international human rights law and norms. The Ombudsman office reports to government on results of investigations and reports periodically on its activities.

The Ombudsman can recommend action be taken to remedy any decision, recommendation, act, or omission that is found to be “unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory”

(Section 19). The Ombudsman can recommend that any law on which a discriminatory decision, recommendation, act, or omission was based should be reconsidered.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. Does the law ensure the equal legal status of men and women in the following areas:

- Ownership of property and inheritance;
- Marital relations e.g. divorce and custody;
- Capacity to enter into contracts, mortgages, credit and finance;
- Access to reproductive and STD health information and services;
- Protection from sexual and other violence, including rape in marriage;
- Recognition of de facto relationships;
- Prohibition of harmful traditional practices e.g. female genital mutilation?

Ownership of property and inheritance and capacity to enter into contracts, mortgages, credit and finance

Women in Samoa do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property. Patrilineal inheritance is given legislative status. Men control many aspects of land and property.

Inheritance laws apply equally to males and females in Samoa under the formal law (*Administration Act 1975* Section 44.), although patrilineal customary rules of inheritance may lawfully operate taking precedence over the formal law. The Constitution gives status to custom in a range of contexts. In the absence of a guarantee that equality between men and women takes precedence over custom, traditional practices that discriminate against women may be lawful.

The Preamble to the *Constitution* declares that ‘Samoa should be an Independent State based on Christian principles and Samoan custom and tradition’. The definition of ‘law’ in Article 111 includes ‘any custom or usage which has acquired the force of law’. The *Village Fono Act 1990* validates the exercise of power and authority by Village Fono (Village Councils) in accordance with the custom and usage of their villages.

Rights to reside on and use land are granted to members of a kin group who request them, subject to availability. Rights lapse at death. Since neither lands nor titles can be formally transmitted without the consent of the kin group, the only property that can be assigned is personal property.⁵²

Under the *Administration Act 1975* Part IV, an application for further and better provision from an estate can be made by a widow where "insufficient provision" for them has been made.

There are no legal impediments to women entering contracts, or accessing mortgages, credit and finance. However there are no legal remedies for discrimination on the grounds of sex in the private sector.

⁵² C Macpherson (n.d.) *Culture of Samoa* <http://www.everyculture.com/No-Sa/Samoa.html>

Marital relations e.g. divorce and custody and recognition of de facto relationships

Divorce is fault based and includes grounds of adultery and desertion. Providing a no-fault system for divorce, and allowing women's non-financial contributions to be taken into account in maintenance proceedings would promote women's equality.

The *Maintenance and Affiliation Ordinance 1967* (District Court) and *Divorce and Matrimonial Causes Ordinance 1961* (Supreme Court) provide for maintenance orders during separation and after divorce for both children and spouses.

Divorce and Matrimonial Causes Ordinance 1961 Section 22 provides for the payment of a lump sum to the wife after divorce having regard to 'her conduct, her fortune and the ability of her husband' that the Court may deem to be reasonable.

Divorce and Matrimonial Causes Ordinance 1961 Section 24 provides that the Court may make such provision for custody as appears 'just' with respect to the custody, maintenance, and education of the children.

Access to reproductive and STD health information services

The law does not give women a right of non-discriminatory access to health services. Women do not have access to safe abortion facilities as of right.

Sections 73A-73D of the *Crimes Ordinance 1961* provide the offences of abortion, either performed by another or by the woman herself, or supplying the means of procuring miscarriage.

Protection from sexual violence, including rape in marriage

Rape by a man of a woman is an offence, but not against his wife unless at the time there was in force in respect of the marriage a decree of judicial separation or a separation order (Section 47 of the *Crimes Ordinance 1961*).

2. **Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

There are no laws prohibiting mandatory testing of groups.

3. **Does the law require children to be provided with age-appropriate information, education and means of prevention?**

There are no laws requiring children to be provided with information or education about HIV and STIs, or to be provided with condoms or other means of prevention.

4. **Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:**

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

There are no laws specifically addressing children and young people's rights of informed consent and access to confidential sexual and reproductive health services.

5. **Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?**

Crimes Ordinance 1961 provides for offences of:

Section 50 Sexual intercourse by man with young related girl living in his family;

Section 51 Sexual intercourse with girl under 12;

Section 52 Indecency with girl under 12;

Section 53 Sexual intercourse or indecency with girl between 12 and 16;

Section 54 Indecent assault on woman or girl.

6. **Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?**

Homosexual acts are illegal and the law does not recognize same sex relationships.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

There is no privacy or confidentiality legislation relating to medical records. Medical records are subject to common law confidentiality protections.

1. **Does the legislation prohibit unauthorised use and disclosure of such data?**
There is no data protection legislation. Common law allows disclosure of medical records in limited public interest circumstances, such as to prevent injury to third parties.
2. **Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are:**
- **Accurate;**
 - **Relevant;**
 - **Complete;**
 - **Up-to-date?**
- There is no legislation.
3. **Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:**
- **Education and promotion of privacy;**
 - **Advising government on privacy issues;**
 - **Monitoring compliance with domestic legislation and international treaties and norms;**
 - **Investigating, conciliating, resolving or arbitrating individual complaints;**
 - **Keeping data/statistics of cases and reporting on activities?**
- There is no legislation.
4. **Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

Section 9 of the *Constitution* provides that court Judgments shall be pronounced in public, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.

5. **Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

There is no legislation providing for privacy protections in reporting of HIV or AIDS cases to public health authorities. Section 31 of the Public Health Ordinance provides that the Director shall keep a register of every case of infectious disease to his knowledge occurring in Samoa, and every medical practitioner who becomes aware that any person is suffering from an infectious disease shall forthwith notify the Director.

CHECKLIST 7 – EMPLOYMENT LAWS

1. **Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

HIV screening for employment is not prohibited.

2. **Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Legislation does not prohibit mandatory testing of specific employment groups

3. **Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

Legislation does not specifically require implementation of universal infection control measures. Section 24 *Occupational Safety and Health Act 2002* provides that all employers and employees shall take measures and adopt work practices which will eliminate, isolate or minimise risks to the health and safety of employees by ensuring that:

- (a) Effective arrangements are taken to eliminate, isolate or minimise the harmful and potentially harmful effects to employees of any ... substances which are either stored or used in the workplace;
- (b) There is provision and maintenance of suitable and adequate supplies of first aid facilities, appliances and requisites, and the availability at all times of persons who have Red Cross approved or equivalent qualifications in the application of basic first aid.

Section 23 *Occupational Safety and Health Act 2002* provides that all employers and employees shall take measures and adopt work practices which will eliminate, isolate or minimise the incidence of accidents and injuries which might derive from:

...(b) Storage, stacking or securing any material which is or is likely to be corrosive, irritant, toxic, explosive or otherwise capable of endangering safety or health;

An employer's failure to provide effective infection control systems in health care workplaces may be a breach of these duties.

4. **Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

Legislation does not specifically require provision of access to information and education about HIV/AIDS.

5. **Does the law provide for:**
- **Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
 - **Social security and other benefits where workers are no longer able to work?**
- There are no unfair dismissal rights for HIV positive workers. The *National Provident Fund Act 1976* provides for a scheme that includes disability benefits to members with a total incapacity for work.
6. **Does the law provide for confidentiality of employees' medical and personal information including HIV status?**
- Legislation does not provide for confidentiality of employees' medical and personal information including HIV status.
7. **Does workers' compensation legislation recognize occupational transmission of HIV?**
- Legislation does not recognize occupational transmission of HIV.
8. **Does workers' compensation legislation recognize occupational transmission of HIV?**
- Workers' compensation legislation does not recognize occupational transmission of HIV. The *Occupational Safety and Health Act 2002* applies to all employers and employees. It makes general provision for safety in the workplace and permits more detailed and specific regulations and Codes of Practice (Section 33).

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. **Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?**
- The *Food and Drugs Act 1967* provides that, prior to marketing, information must be submitted to health authorities on tests conducted to establish the safety of drugs and medical devices and to control the strength, quality, purity or safety of devices. Standards may be issued by regulation.
2. **Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are safe and efficacious?**
- The *Food and Drugs Act 1967* provides that, prior to marketing, information must be submitted to health authorities on tests conducted to establish the safety of the drug or device and to control the strength, quality, purity or safety of the drug or device. Standards may be issued by regulation. Section 8(2) provides that it is an offence to sell a drug or device which does not comply with any standard prescribed by regulation.
- The *Pharmacy Act 2007* provides that the Pharmacists Council may approve standards to ensure that the medical and pharmaceutical services provided to all persons in Samoa meet accepted international standards and are consistent with the human rights applying to all persons in Samoa.
3. **Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?**
- The *Food and Drugs Act 1967* regulates sale of drugs, which are defined to include vaccines and any device or contrivance sold for the purpose of prevention of disease. Section 8(3) provides that every person commits an offence who sells any drug in any package which

bears or has attached thereto any false or misleading statement, word, brand, label, or mark purporting to indicate the nature, quality, strength, purity, composition, weight, origin, age, effects, or proportion of the article contained in the package or of any ingredient thereof.

4. Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?

The *Food and Drugs Act 1967* regulates sale of any device or contrivance sold for the purpose of prevention of disease. This legislation and the *Pharmacy Act 2007* could be used to monitor condom quality if regulations are issued requiring compliance with the International Condom Standard.

5. Does the legislation ensure the accessibility and free availability of the following prevention measures:

- **Condoms**
- **Bleach**
- **Needles and syringes?**

There is no legislation ensuring free availability of condoms or other prevention tools.

6. Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?

Samoa is seeking to accede to the World Trade Organization, which will require compliance with patents legislation standards of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Under the *Patents Act 1972*, foreign patents may be re-registered. There is no provision for compulsory licensing to enable government use of generic versions of patented medicines in the public system, or for parallel importing of patented drugs marketed more cheaply in other countries.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

1. Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?

There is no legislation however there is a Samoan Health Research Committee at the Ministry of Health.⁵³ Approval may also be sought from the Technical Advisory Committee (TAC) of the National AIDS Coordinating Committee (NACC).

2. Does the legislation require subjects to be provided before, during and after participation with:

- **Counselling**
- **Protection from discrimination;**

⁵³ World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41, 65

- Health and support services?
3. Does the legislation provide for informed consent to be obtained from the subjects?
 4. Does the legislation provide for confidentiality of personal information obtained in the process of research?
 5. Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?
 6. Does the legislation provide for non-discriminatory selection of subjects?
These matters may be considered by the Health Research Committee.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

1. Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?

The *Constitution* provides the right to freedom of movement (Article 13). This may be difficult to enforce in practice, particularly in the case of restrictions on movement of sex workers or men who have sex with men, as soliciting and homosexual behaviour remain crimes. This Article does not prevent the State from making laws that impose reasonable restrictions on the exercise of the right in the interests of public order or morals.

2. Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?

The *Constitution* provides rights to freedom of assembly and association (Article 13). This may be difficult to enforce in practice, particularly in the case of associations of sex workers or men who have sex with men, as soliciting and homosexual behaviour remain crimes. This Article does not prevent the State from making laws that impose reasonable restrictions on the exercise of the right in the interests of public order or morals.

3. Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?

There are no exceptions in censorship laws for HIV information that contains sexually explicit information or images, although a defence may be available that the activity was not immoral or mischievous.

The *Indecent Publications Ordinance 1960* prohibits the possession, exhibition etc of any book, newspaper, picture, photograph, print, or writing, containing any indecent word, statement, significant sign, or any indecent picture, illustration, or representation, or which unduly emphasises matters of sex. Section 5 of the Act provides that in determining whether any document or other matter is indecent the Court shall take into consideration:

- (a) the nature of the document or matter;
- (b) the nature and circumstances of the act done by the defendant with respect thereto, and the purpose for which the act was done;
- (c) the literary or artistic merit or medical, legal, political, or scientific character or importance of the document or matter;
- (d) the persons, classes of persons, or age groups to or amongst whom the document or matter was or was intended or was likely to be published, distributed, sold, exhibited, given, sent, or delivered, and the tendency of the matter or thing to deprave or corrupt any such persons, class of persons, or age groups (notwithstanding that persons in other classes or age groups may not be similarly affected thereby).

Section 5 (2) of the Act provides that no document or matter shall be held to be indecent unless, having regard to the aforesaid and all other relevant considerations, the Court is of opinion that the act of the defendant was of an immoral or mischievous tendency.

It is an offence under the *Crimes Ordinance 1961* to sell, distribute etc. indecent models, objects, shows, performances, or to do an indecent act in a public place.

Section 49 of the *Customs Act 1977* prohibits the importing of indecent documents within the meaning of the *Indecent Publications Ordinance 1960*. It is a defence to a charge under this section to prove that the public good was served.

The *Film Control Act 1987* provides for licensing of exhibitors (with the exception of exhibitors of films for medical, educational, instructional or religious purposes) and the censorship of films, which may be refused permission for showing if they depict any matter which is contrary to public order or decency or the exhibition of which would for any other reason be undesirable in the public interest.

4. Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?

No broadcasting standards were identified.

5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:

- **Health care workers**
- **Other industries where there may be a risk of transmission, e.g. sex or funeral workers;**
- **Media;**
- **Superannuation and insurance;**
- **Employers (in a tripartite forum involving unions and government)?**

Codes may be issued under the *Occupational Safety and Health Act*. Standards may be issued under the *Healthcare Professions Registration and Standards Act 2007* relevant to:

- (a) the observance of Codes of Conduct and standards of professional practice relevant to the duties and activities of the relevant profession;
- (b) the observance of legal requirements applying to healthcare professionals and the implementation of processes prescribed by any applicable Professional Act and other relevant laws; and
- (c) the legal and human rights of patients and users of health services and pharmaceuticals.

6. Are such Codes of Practice required to contain the following elements:

- **Confidentiality/privacy protections;**
- **Informed consent to HIV testing;**
- **Duty not to unfairly discriminate; and**
- **Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?**

There are no requirements for Codes of Practice to address HIV or related matters.

SUMMARY AND RECOMMENDATIONS

Addressing HIV and AIDS as infectious diseases under the *Health Ordinance 1959* is inappropriate for human rights-based management of HIV.

Priority actions to build a human rights framework for addressing HIV in Samoa include:

- (i) amending the *Health Ordinance 1959* to remove HIV and AIDS from the list of notifiable diseases, and to introduce provisions for confidential notification, voluntary and confidential testing and counselling, contact tracing with consent, and right to access information about sexual and reproductive health and means of prevention of HIV and STIs;
- (ii) enacting anti-discrimination legislation that covers discrimination on the grounds of HIV status, disability, sex, sexuality, and transgender status; and
- (iii) decriminalizing homosexuality, transvestism, sex work and abortion.

The offences related to male-male sex and prostitution involving consenting adults in private and the lack of provision for marital rape contravene human rights. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices.

Introducing a no fault model of divorce and allowing for women's non-financial contributions to a marriage to be taken into account in property proceedings after separation would improve women's social and economic status. Women may be reluctant or afraid to seek divorce if they are required to prove fault. De facto relationships including same sex partnerships should be recognised by law.

Legislation should guarantee that customary law in relation to inheritance and property does not have precedence over rights to equality between men and women.

It would be beneficial to develop a Code of Practice on HIV and employment, drawing on the International Labor Organization Code of Practice on HIV/AIDS.⁵⁴ A Code of Practice should be developed that promotes universal infection control procedures in health care settings, confidentiality and non-discrimination in workplaces.

Blood safety legislation is required.

Legislation to ensure that condoms and HIV test kits comply with international quality standards is required. Condoms and HIV/STI prevention information should be available in prisons.

Legislation that requires the teaching of sex education in schools within the context of life skills education would help prevention efforts.

In anticipation of WTO accession, patents legislation should be drafted that takes full advantage of TRIPS flexibilities and allows for:

⁵⁴ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work* www.ilo.org/aids

- parallel importing of medicines that are marketed more cheaply in other countries, by incorporating international exhaustion of patent rights after first use into law;
- compulsory licensing including government use of generic medicines for non-commercial use in the health system;
- an ‘early working’ exception through including a ‘bolar’ provision, so that generic medicines can be approved for marketing as soon as possible after patent expiry.

5.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

Intellectual Property and TRIPS—

Intellectual Property Act 2011

The Act provides protection for intellectual property rights in Samoa (marks, patents, innovation patents, plant breeder’s rights, design rights, registered designs, geographical indications and lay-out designs of integrated circuits). The author has been unable to give detailed consideration to the content of the Act but it was enacted in accordance with Samoa’s Legislative Action Plan submitted to the Working Party on the Accession of Samoa to the World Trade Organization. That Legislative Action Plan includes reference to the Intellectual Property Bill 2011 stating that the purpose of the legislation is to modernize Samoa’s intellectual property legislation and policies to address current intellectual property rights developments, improve domestic standards and protections for Samoa, and also to meet international standards and requirements including the WTO TRIPS Agreement including conformity Articles 9 to 14, 22, 25, 26, 27 (1) and 29 and provisions to be implemented as from accession: Articles 16 (2), 16 (3), 19, 20, 21, 27 (2), 27 (3), 30 to 34, 39 to 64.

Criminal Law—

Samoa Law Reform Commission, Final Report Crimes Ordinance 1961: Report 01/10, June 2010

Chapter 2 discussed and made recommendations regarding Crimes against Religion, Morality and Public Welfare. Of particular relevance to key target populations are—

Rape:

Recommendation 2: Section 47(3) of the Crimes Ordinance, which excludes a husband from criminal liability for raping his wife other than in limited circumstances, should be repealed.

Recommendation 3: A definition of rape should be included in the Crimes Ordinance, which specifies that the offence covers all forms of sexual penetration including the introduction into a male or female’s genitalia of another part of a person’s body or an object held or manipulated by another person.

Minors and relationships of trust and dependency:

Recommendation 4: Section 50 of the Crimes Ordinance should cover a wider range of people who have responsibility for, or significant role in, a child’s care or upbringing, including teachers, pastors and doctors.

Recommendation 6: The offences in ss 51 to 53 of the Crimes Ordinance should carry the following maximum penalties:

- *sexual intercourse with a person under 12 years of age—14 years*
- *attempted sexual intercourse with a person under 12 years of age—10 years*
- *sexual indecency with a person under 12 years of age—10 years*
- *sexual intercourse or indecency with a person between 12 and 16 years of age—12 years*

Recommendation 8: Section 54 (a)[indecent assault on a woman or girl of or over the age of 16 years] of the Crimes Ordinance should apply to male or female victims of any age.

Adultery:

Recommendation 11: The adultery offences in ss. 58 and 58A of the Crimes Ordinance should be repealed.

Sodomy and related offences:

Recommendation 12: the sodomy and related offences in ss. 58D and E of the Crimes Ordinance should be repealed. Section 58G of the Crimes Ordinance should be repealed to the extent it applies to sodomy.

Personating a female:

Recommendation 13: The personating a female offence in s. 58N of the Crimes Ordinance should be repealed.

Prostitution:

Recommendation 14: The prostitution offences in ss. 58J to 58M of the Crimes Ordinance should be made gender neutral, including by merging ss. 58J and 58K into one offence of brothel keeping; and amending s. 58M to apply to procuring sexual intercourse with both males and females without regard to their marital status.

Recommendation 15: A new offence should be inserted in the Crimes Ordinance of soliciting or loitering in a public place for the purpose of offering or procuring commercial sex services. The offence should carry a maximum penalty of three months imprisonment.

Crimes Act 2013.

Enacted on 15 April 2013, the Act comes into force on a date or dates to be nominated by the Minister. It repeals and replaces the Crimes Ordinance¹⁹⁶¹.

Cabinet rejected the Samoa Law Reform Commission's Recommendations 11 and 12 that the offences of adultery and sodomy be abolished and they are re-enacted.

Sections 65 and 66 create offences of Adultery by married persons and Adultery with married person. Both offences carry liability to a fine not exceeding 1 penalty unit. (According to the District Court of Samoa Benchbook, 2009, a penalty unit is equal to \$100 Samoan tala. The Benchbook also gives the maximum penalty for littering offences under the Police Ordinances Act as 2 penalty units).

Section 67 contains the offence of sodomy and section 68 the offence of attempts to commit sodomy.

67. Sodomy-*(1) A person who commits sodomy is liable:*

- (a) where the act of sodomy is committed on a female, to imprisonment for a term not exceeding seven (7) years; or*
- (b) where the act of sodomy is committed on a male, and at the time of the act that male is under the age of 16 years and the offender is of or over the age of 21 years, to imprisonment for a term not exceeding 7 years; or*
- (c) in any other case, to imprisonment for a term not exceeding five (5) years.*

(2) Sodomy is complete upon penetration.

(3) It is no defence to a charge under this section that the other party consented.

68. Attempts to commit sodomy- *A person is liable to imprisonment for a term not exceeding five (5) years who:*

- (a) attempts to commit sodomy; or*
- (b) assaults any person with intent to commit sodomy.*

With respect to gender based violence, the Act, according to the Attorney General's Report of 2011/2012 does not specify 'marital rape' but it is wide enough to prosecute a husband for sexual violation of his wife. Section 48 defines *sexual intercourse* as complete upon penetration of the female's genitalia by male penis. New definitions are included at section 49 of *sexual violation* (the act of a male who rapes a female or the act of a person having unlawful sexual connection) and at section 50 of *sexual connection* (connection occasioned by the penetration of the genitalia or the anus of any person by any part of the body of any other person, or any object held or manipulated by any person, or connection between the mouth or tongue or any part of the body of any person and any part of the genitalia or anus of any other person). Section 52 establishes different penalties for the offences of sexual violation (liable to imprisonment for life) and unlawful sexual connection (liable to imprisonment for a term not exceeding 14 years).

Part VIII contains Crime against Public Welfare. This Part contains all the sex work offences, including brothel keeping (s. 70), keeping place of resort for homosexual acts (s. 71), prostitution (s. 72) and living on earnings of prostitution (s. 72). Despite the object of the soliciting offence recommended by the Samoa Law Reform Commission recommendation 15, the new offence included at section 73 is of solicitation and the offence appears to be only capable of being committed by a customer, rather than by a sex worker.

73. Solicitation-*(1) A person is liable to imprisonment for a term not exceeding five (5) years who offers or agrees to pay or reward monies to another person for sexual intercourse or sexual connection.*

(2) Despite anything in subsection (1), no male shall be convicted under this section in respect of any sexual intercourse or sexual connection with his wife.

The section 73 offence is not the same as the soliciting offence in section 16 (b) Police Offences Ordinance 1961. Section 16 (b) contains a prostitution offence in that *A person commits an offence and is liable to imprisonment for a term not exceeding 3 months or to a fine of 2 penalty units who entices or solicits a person or persons in a public place for the purposes of prostitution.*

The section 72 Prostitution offence is committed by a person who has sexual intercourse or sexual connection, or agrees, or offers to have sexual intercourse or sexual connection with another person for gain or reward. The offence carries a maximum penalty of 3 years imprisonment.

Offences created at 81 and 82 concerning the distribution or exhibition of indecent matter will be relevant to the production of HIV/AIDS awareness materials and, for example, to the use of models and demonstrations of appropriate condom use. There is a defence to such charges to prove that the public good was being served by the acts alleged to have been done and prosecutions require the leave in writing of the Attorney-General.

The offence of personating a female (previously section 58N Crimes Ordinance) is not re-enacted as recommended by the Samoa Law Reform Commission recommendation 13.

Education—

By section 58, the **Education Act 2009** includes a requirement that all schools and early childhood education centres must deliver the curriculum specified by the Minister to the standards specified by the Minister. The author has been unable to consider the current specified curriculum.

Public Health—

Health Ordinance 1959

Infectious disease means any disease for the time being included in Schedule 1, and includes any other disease which may be declared by the Minister by notice in the Samoa Gazette to be an infectious disease. Schedule 1 includes Venereal Diseases: Gonorrhoea, Syphilis, Other types. HIV is not specified.

When there is an outbreak of any infection disease, the Chief Executive Officer of the Ministry has powers (section 28) and special powers (section 29) authorised for the purpose of preventing the outbreak or spread of infectious. The special powers include requiring persons to report themselves or submit themselves for medical examination and requiring persons to be isolated and quarantined. Section 31 requires the Chief Executive Officer to keep a register of every case of infectious disease to his or her knowledge occurring in Samoa. Medical practitioners who become aware that any person is suffering from an infectious disease have a responsibility to notify the Chief Executive Officer of the fact.

Section 36 permits isolation of *persons likely to spread infectious disease ... in any case where [the Chief Executive Officer, any medical practitioner employed by the Ministry, or any inspector] thinks it expedient in the interests of the public health so to do to make an order for the removal of any person suffering from any infectious disease to a hospital or other place of effectual isolation.*

Section 37 creates offences in respect of infectious diseases. It is an offence for a person who knows he or she is suffering from an infectious disease wilfully to be in any public place without having taken proper precautions against the spread of infection. As another offence is to enter any public conveyance while so suffering and failing to notify the driver or conductor of the fact, section 37 is clearly outdated as it contemplates and is suited only to infectious diseases spread by casual contact, especially as the sufferer of the disease can be found responsible by a Court, upon conviction of the offence, for the costs of disinfection.

Human Rights and Jurisdiction—

Human Rights Commission Bill

The author has been unable to obtain access to this Bill.

Komesina o Sulufaiga (Ombudsman) Act 1988

Section 11 establishes the Office of the Ombudsman as an independent body authorised to investigate complains concerning the actions of governmental authorities within the public sector. In Samoa's 2011 Universal Periodic Review, the Samoa Umbrella for Non-Governmental Organisations (SUNGO) was concerned that the Office lacked accessibility due to minimal public awareness of the functions of the office and its limitation to the public sector.

Apart from the Constitutional provisions, Samoa has no overarching human rights legislation or institution, but there has been movement towards the creation of a human rights commission. Samoa was party to the joint 'Samoa Declaration' agreed and made by several Pacific Island states in 2009. The declaration emphasised the importance of national human rights institutions and encouraged states to establish such bodies. The Law and Justice Sector Plan 2008-2012 makes reference to the establishment of a human rights commission and at the 2011 UPR Meeting that it initially be established within the Office of the Ombudsman. A potential difficulty in placing human rights commissions within an Ombudsman's Office is the functions and powers of the Ombudsman. Often the law creating an Ombudsman's office limits the extent to which orders or findings of an Ombudsman are enforceable.

Employment Law—

Labour and Employment Relations Bill 2013.

This Bill has not been sighted by the author. Advice from ILO states that the Bill was passed in March 2013 and is thus the Labour and Employment Relations Act 2013. The Act provides it is unlawful to discriminate either directly or indirectly in employment based on real or perceived HIV AIDS status. It covers workers in the private sector only.

Prisoners—

Prisons Act 1967 (under review)

Samoa Law Reform Commission, Review of Prisons Act 1967: Report 04/11, June 2011. It is recommended that new legislation have a focus on rehabilitation and ensure that the UN Standard Minimum Rules on the Treatment of Prisoners⁵⁵ be adhered to.

Discrimination—

Village Fono Act 1990 (under review)

Samoa Law Reform Commission, Village Fono Act 1990: Report 09/12, June 2012

The reference to the Law Reform Commission resulted from a 2010 Commission of Inquiry into the issues that had arisen in relation to Article 11 of the Constitution, freedom of religion. Prominent issues over the years involved family members or village groups who have become part of a different church denomination that is separate from the prominent, long established churches, such as the Methodist Church, the Catholic Church and the Congregational Christian Church. Village fonos on occasion issued orders evicting and eventually banishing the family members or village groups that had joined different church denominations.

The Report provides discussion of enormously complex issues, including the making of village fono decisions in the context of customs and traditions. The original Village Fono Bill included a clause 6 (c) specifically relating to 'banishment'. That was removed from the Bill

⁵⁵ NB Current revision of UN Standard Minimum Rules on the Treatment of Prisoners

during parliamentary debate. However, the village fono is confirmed to have powers to impose punishments for village misconduct. Banishments, for a range of reasons, are frequently reported in the media as having occurred.

The potential relationship between perceived or actual HIV status/sexual behaviour and village misconduct is not canvassed in the report.

6. SOLOMON ISLANDS

6.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Constitution

Consolidated Legislation—1996 Revised Edition

Sessional Legislation to 2012

Subsidiary Legislation to 2011

United Kingdom Legislation in Solomon Islands

Access to Solomon Islands Gazettes at <http://www.parliament.gov.sb/files/legislation>

Gazettes for the years 2011 and 2012 available electronically, including index

6.2 INTERNATIONAL TREATIES, OBLIGATIONS AND MEMBERSHIPS

International Covenant on Economic, Social and Cultural Rights (ICESCR) succession 17 March 1982

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) accession 6 May 2002

Optional Protocol to CEDAW accession 6 May 2002

Convention on the Rights of the Child (CRC) accession 10 April 1995

Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography signature 24 September 2009

Convention on the Rights of Persons with Disabilities (CRPD) signature 23 September 2008

Optional Protocol to CRPD signature 24 September 2009

International Health Regulations (2005) (IHR (2005)) to which Solomon Islands became bound through membership of the International Health Assembly of the World Health Organization on 15 June 2007.

Member of World Trade Organization (WTO) and subject to TRIPS requirements (although does not have to provide patent protection for pharmaceutical products until 2016)

Member of the International Labour Organisation (ILO)

6.3 CONSTITUTIONAL PROTECTIONS

The Constitution 1978 was amended in 1982, 1983, 1989, 1992, 2001, and twice in 2009. All amendments up to and including those of 1992 have been consolidated. The 2001 and 2009 amendments are not concerned with matters that impact upon this analysis (2001: Granting of amnesty, pardon or immunity to certain persons; 2009 (No. 1): providing for Deputy Chief Justice; 2009 (No. 2): relating to boundaries of Constituency Boundaries Commission.

The Constitution 1978 is the Supreme Law of Solomon Islands. If any other law is inconsistent with the Constitution, that law is void to the extent of the inconsistency. Rights and freedoms in the Constitution are not absolute: they can be limited in certain circumstances including some rights that can be limited in the interests of public health.

Section 3 provides that every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual, these being life, liberty, security of the person and the protection of the law; freedom of conscience of expression and of assembly and association, and protection for the privacy of his home and other property and from deprivation of property without compensation. However, there are limitations designed to ensure that the enjoyment of the fundamental rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest.

The section 5 protection of the right to personal liberty ensures that no person can be deprived of their personal liberty except as may be authorised by law. Legal authorisation of deprivation of liberty can include for the prevention of the spread of an infectious or contagious disease. Deprivation to such extent as may be necessary in the execution of a lawful order of a court that requires a person to remain within a specified area (or prohibiting a person from being there) is permitted to the extent it is reasonably justifiable. Any person so detained is to be given reasons in a language he understands as soon as reasonably practicable.

Section 7 gives protections from inhuman treatment and provides that no person is to be subjected to torture or to inhuman or degrading punishment or other treatment.

Privacy of home or other property is protected by section 9 that provides that no person can be subjected to a search of person, property or entry onto his premises unless the person's consent is given. Again, nothing that is done in this respect under authority of a law contravenes this provision if the search or entry is in the interests of public health.

Protection of the freedom of assembly and association is achieved by section 13. Hindrance of these freedoms is only permitted with consent or with the authority of any law so long as the law is in the interests of public health (or for the purpose of protecting the rights or freedoms of other persons). The section 14 protection of freedom of movement provides that nothing under authority of a law contravenes the section where the law makes provision for restrictions that are reasonably required in the interests of public health. Freedom of movement includes the right to move freely throughout the Solomon Islands, the right to reside in any part of Solomon Islands, the right to enter the Solomon Islands and immunity from expulsion from Solomon Islands. Any person deprived of freedom of movement has a right to review by an independent and impartial tribunal.

The section 15 protection from discrimination provides that, subject to further subsections of section 15, no law shall make any provision that is discriminatory either of itself or in its effect and that no person shall be treated in a discriminatory manner by any person acting by virtue of a written law. Discriminatory means *affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description*. The reference to discriminatory provisions do not apply to any law that makes provision with respect to persons who are not citizens and does not apply to customary law. Neither does it refer to laws that are actually made for the advancement of the more disadvantaged members of the community.

There are special rules about periods of public emergency. Periods of public emergency are provided for in section 16.

Section 17 ensures that any person whose rights or freedoms are contravened has an entitlement to compensation from the person or authority that contravened the rights or

freedoms. Any person who alleges that his or her constitutional rights and protections have been or are likely to be contravened has a right to apply to the High Court for redress (with a right of appeal to the Court of Appeal from a determination of the High Court).

6.4 NATIONAL PLANS AND REPORTS

- Ministry of Health and Medical Services, National Multi-Sectoral Strategic Plan for HIV and AIDS 2005-2010
- Ministry of Health and Medical Services, National Strategic Plan 2011-2015 (not located)
- Solomon Islands: Global AIDS Response Progress Report 2012
- SPC, Second Generation Surveillance of Antenatal Women and Youth Solomon Islands, 2008
- Ministry of Provincial Government and Institutional Strengthening reports.
- Solomon Islands Government, Office of the Prime Minister and Cabinet, The Legislation Handbook, July 2010
- Solomon Islands Government, Office of the Prime Minister and Cabinet, The Cabinet Handbook, 2005 [for requirements of Cabinet Papers]. The author has been unable to locate a pdf. version of this Handbook and can only find reference to hard copies within libraries.

6.5 LAWS OF RELEVANCE TO FOCUS AREAS

Births and Deaths (Registration) Act [Cap. 168]

Births, Marriages and Deaths Registration Act [Cap. 169]

Employment Act [Cap. 72]

Environmental Health [Cap. 99] (Review commenced 2011 – not complete)

Environmental Health (Public Health Act) Regulations

Health Services Act [Cap. 100]

Health Services (Hospitals) Regulations

Honiara City Act 1999

See Local Government Act [Cap. 117] for subordinate legislation (by-laws) of Honiara Town Council

Immigration Act 2012

Labour Act [Cap. 73]

Local Government Act [Cap. 117]

Penal Code – under review of Law Reform Commission

Penalties Miscellaneous Amendments Act 2009 (Unknown whether commenced)

Provincial Government Act 1997

Public Service Act [Cap.92]

The Public Service Commission is established under section 115 of the Constitution.

Public Service Commission Regulations 2006

Public Solicitor Act [Cap. 30]

Quarantine Act 1931

Registration of United Kingdom Patents Act [Cap. 179] & Patents Act (UK)

Safety at Work Act [Cap. 74]

Trade Dispute Act [Cap. 75]

Trade Unions Act [Cap. 76]

Unfair Dismissal Act [Cap. 77]

Workmen’s Compensation Act [1977]

6.6 SOLOMON ISLANDS LCR 2009

(The content of Solomon Islands LCR 2009 is reproduced here as published in March 2009)

HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Solomon Islands
Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS
March 2009

Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Solomon Islands. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006⁵⁶.

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.⁵⁷ The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.
- Criminal law.
- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.
- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no

⁵⁶ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

⁵⁷ UNAIDS/IPU. Geneva, 1999.

guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.⁵⁸

Background

There have been eight HIV cases diagnosed (2007). The Ministry of Health considers that many cases go undiagnosed due to limited availability of HIV testing. Surveillance of STIs has found that over 20% of pregnant women aged under 25 years have Chlamydia.

Socio-cultural factors that are contributing to HIV vulnerability include:

- high prevalence of STIs that amplify the risk of transmission of HIV;
- low condom use;
- gender based violence;
- taboos regarding discussion of sex and sexuality;
- a young population (40% below 15 years).

Both young women and young men are known to exchange sex for cash, goods, and services. Seafarers and fishermen, businessmen, and youth are known to be clients of sex workers.

⁵⁸ See *Consolidated Guidelines* paras 102-103.

Little is known about the levels of extramarital sex. Male-to-male sex does occur but is not openly discussed or well-documented.⁵⁹

Gender based violence contributes to HIV and STI vulnerability of women and girls. The Family Health and Safety Survey conducted by the Government of Solomon Islands found two out of three women aged 15-49 years who have ever been in a relationship have experienced violence by their husband or boyfriend, and one out of ten pregnant women report being beaten during pregnancy.⁶⁰ “Longline” or gang rape is also present, though under-reported.

There are 11 hospitals, but with limited access to drugs and facing human resource constraints. There are small numbers of private practitioners.

Legal system⁶¹

The law comprises legislation of Solomon Islands parliament, Solomon Islands case law, English common law, and Solomon Islands customary law.

The High Court has unlimited civil and criminal jurisdiction. Appeals lie from the High Court to the Court of Appeal. Local Courts have civil and criminal jurisdiction, and hear matters where traditional dispute resolution processes (referral to chiefs) have been exhausted. A customary land appeal court hears appeals from Local Courts.

International obligations

Solomon Islands has ratified the International Convention on Economic Social and Cultural Rights, the Convention on Elimination of all forms of Racial Discrimination, Convention on Elimination of all forms of Discrimination Against Women, and the Convention on Rights of the Child.

HIV policy framework

The *National Multi-Sectoral Strategic Plan for HIV and AIDS* was developed in 2003. The Plan’s guiding principles for implementation were drawn from the Constitution and existing government policies and reports. The Plan recognises priority areas, objectives, strategies, steps, inputs, key actors and target groups of people at risk from HIV/AIDS. The Plan covers the period 2005-2010. Solomon Islands National AIDS Council (SINAC) coordinates the national response.

The Plan lists as priorities:

- Reduce risk behaviour and vulnerability to HIV and STIs.
- Enhance confidentiality of voluntary testing and counselling for HIV as an entry point toward prevention and treatment of STIs and AIDS and blood safety.
- Enhance HIV/STI surveillance, treatment, and care.

⁵⁹ C Jenkins (2005), *HIV/AIDS in the Pacific* Asian Development Bank, Manila.

⁶⁰ Government of Solomon Islands et al (2008) *Human Rights for Women, Human Rights for All: 16 Days of Activism Against Gender Violence* (pamphlet, full survey results to be published 2009)

⁶¹ Information on court and legal systems derived from Pacific Islands Legal Information Institute <www.paclii.org>

- Enhance capacity building for the national HIV response at both the community and institutional level.
- Ensure sustainable development to create an enabling environment for behaviour change, de-stigmatization, and elimination of discrimination that will promote prevention and care.

Voluntary Counselling and Testing counsellors are trained in Papua New Guinea. In 2005, the Ministry of Health, with support from the Global Fund to Fight AIDS, Tuberculosis and Malaria, conducted behavioural surveys with youth and sex workers and HIV surveillance among antenatal mothers. An HIV/AIDS Unit in the Ministry of Health has been established.

CHECKLIST 1 – PUBLIC HEALTH LAW

1. **Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:**
 - **Information and education**
 - **Voluntary testing and counselling**
 - **STD, sexual and reproductive health services**
 - **Access to means of prevention e.g. condoms and clean injecting equipment**
 - **Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?**

Section 4 of the *Health Services Act* [Cap 100] requires the Minister to provide primary health care services throughout the country, which are to be free of charge unless regulations enable the setting of fees. Local authorities and provincial assemblies are required by the *Environmental Health Act 1980* to make bylaws for the provision of health services in their areas including education campaigns.

2. **Does the legislation:**
 - **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
 - **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?**

There is no legislation that makes specific provision for informed consent and counselling in relation to HIV tests. The common law of England applies, which requires consent to a blood test. If consent is not given, the person taking blood may be liable under civil and/or criminal law for assault. Common law does not require pre and post test counselling.

Powers in prisons and migration legislation may enable compulsory testing in limited exceptional circumstances, although there are no HIV specific provisions.

The *Correctional Services Regulations 2008* Regulation 33 provides that every prisoner shall submit to a medical examination by the medical officer when directed by an officer, a medical officer, nurse or nurse aide and shall submit to such treatment, including vaccinations or inoculations, as the medical staff prescribe.

The *Immigration Act* [Cap 60] provides that a person entering the country may be subject to a medical examination if required by an immigration officer.

Under the National HIV/AIDS Strategic Plan, a policy of voluntary informed consent testing has been established.

3. **Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?**

Does the legislation provide in such cases the following due process protections:

- **Reasonable notice of case to the individual;**
- **Rights of review/appeal against adverse decisions;**
- **Fixed periods of duration of restrictive orders (i.e. not indefinite);**
- **Right of legal representation?**

There is no legislation authorising restriction of liberty of people living with HIV.

The *Environmental Health (Public Health Act) Regulations* govern public health, and Part III deals with notifiable diseases, which are those listed in the Schedule. At present, HIV and AIDS are not on this list. However, the list may be added to from time to time by the Minister by notice, and he may also direct that all or any notifiable disease provisions do not apply in respect of any disease in the Schedule. Some provisions of Part III were never brought into force.

Part III contains brief provisions for notifying notifiable diseases, and the isolation and quarantine of infected persons and consequent disinfection procedures.

The *Quarantine Act* [Cap 106] gives powers to isolate and contain diseases, which under Section 2 are defined as smallpox, plague, cholera, yellow fever, typhus fever or leprosy or any disease declared by the Minister by order to be a quarantinable disease.

4. **Does the legislation authorise health-care professionals to notify sexual partners of their patients' HIV status in accordance with the following criteria:**

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;**
- **The HIV-positive patient has refused to notify or consent to notification of the partner;**
- **A real risk of HIV transmission to the partner exists;**
- **The identity of the HIV-positive partner is concealed from the partner where this is possible;**
- **Necessary follow-up support is provided to those involved?**

There is no legislation specifically authorising health-care professionals to notify sexual partners of a patient's HIV status.

Section 8(j) of the *Health Services Act* [Cap 100] permits the making of regulations regarding the confidentiality of patient information. However, the *Environmental Health (Public Health Act) Regulations* Regulation 7 provide that a medical practitioner or nurse attending a person suffering a notifiable disease shall inform the head of the person's family and the person's employer of the communicable nature of the disease and precautions to be taken to prevent its spread. However HIV has not been listed as a notifiable disease.

5. **Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?**

There is a National Blood Policy that addresses blood quality issues. There is no blood safety legislation.

CHECKLIST 2 – CRIMINAL LAW

1. **Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers)?**

No reports of injecting drug use in Solomon Islands were found, so legislation relating to needles and syringes is not considered necessary. Dangerous Drugs Act [Cap 98] provides offences for importing, selling and exporting illicit drugs.

2. **Does the law allow the following sexual acts between consenting adults in private:**

- **Homosexual acts e.g. sodomy;**
- **Fornication or adultery;**
- **Street sex work;**
- **Brothel or escort sex work?**

Homosexual acts e.g. sodomy

Section 160 of the *Penal Code* criminalises ‘buggery’ with another person; the permitting of a male person to commit buggery on him or her; and attempts. The lesser offence of ‘committing any act of gross indecency’ by persons of the same sex is at Section 161. Attempting to procure another person of the same sex to commit an act of indecency is an offence.

In 1988, an appeal was taken in *DPP v Noel Bowie* [1988-1989] SILR 113, against the discriminatory nature of the offence of gross indecency between male persons. The appeal was successful, but the court suggested to Parliament the non-discriminatory solution of removing the word ‘male’, so that the offence was now gender-neutral. Rather than repealing the provision altogether, at least in respect of adults, Parliament made the recommended amendment. This was followed in December 2003 by a report of two women being charged for lesbian activity, but the outcome of this case is not known.

Fornication and adultery

Section 18 of the *Islanders Divorce Act* [Cap 170] provides that a husband may, on a petition for divorce, claim damages from any person on the ground of adultery with the wife of the petitioner.

Sex work

The *Penal Code* provides offences of—

- knowingly living on the earnings of prostitution (Section 153(1)(a))
- persistent soliciting or importuning in a public place for immoral purposes (Section 153(1)(b))
- aiding, abetting or compelling the prostitution of a prostitute for the purpose of gain (Section 153(1)(c))
- keeping a brothel (Section 155(a))
- permitting premises to be used as a brothel (Section 155(b)).

There is no law specifically against sex tourism, although such offences could be prosecuted under laws against prostitution. There are some press reports of sex tourism.

3. If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?

There is no exception in criminal law for HIV prevention and care services.

4. Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:

- Practised by clients;
- Practiced by workers; and
- Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?

Legislation does not regulate occupational health and safety in the sex industry.

5. Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?

Child prostitution and trafficking have been reported in a study of impacts of the logging industry.⁶² The law prohibits trafficking in persons for labour or sexual exploitation. There are anecdotal reports that young women were trafficked from China and several Southeast Asian countries, for the purpose of sexual exploitation on foreign ships and in logging camps.⁶³

Specific offences currently in the Penal Code that cover children include:

- procuring a girl to become a prostitute, or become an ‘inmate of a brothel’;
- detaining a girl in a brothel;
- disposing of minors under the age of 15 years for prostitution or unlawful intercourse;
- obtaining minors under the age of 15 years for prostitution or unlawful sexual intercourse. (Sections 144, 146, 147)

It is also an offence to procure or attempt to procure a woman for sexual intercourse using threats, intimidation, fraud or by giving her drugs (Section 145). The *Penal Code* also contains an offence of detaining a woman in a brothel, or detaining her for the purpose of her having sexual intercourse, against her will (Section 148).

6. Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?

Intentional HIV transmission is likely to fall within the general offences for causing grievous harm. The offence of grievous harm under Section 224 of the *Penal Code* requires intent to maim, disfigure or disable, or to do some grievous harm. It includes causing any dangerous or noxious thing to be taken or received by any person. Section 226 also makes causing grievous harm an offence.

The year and a day rule for unlawful killing is at Section 209. Therefore it would not be possible to obtain a murder or manslaughter conviction for HIV transmission.

⁶² Tania Herbert, Church of Melanesia (2007) *Commercial Sexual Exploitation of Children: A report focusing on the presence of the Logging Industry in a Remote Region*.

⁶³ US Government State Department (2007) *Country Report of Human Rights Practices: Solomon Islands*.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

1. Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:
- Information and education
 - Voluntary counselling and testing
 - Means of prevention e.g. condoms, bleach, and clean injecting equipment
 - Treatment – ART and treatment for opportunistic infections
 - Choice to participate in clinical trials (if available)?

There are no HIV specific provisions. New legislation comprehensively addresses prisoner's general rights to health services.

Section 43 of the *Correctional Services Act 2007* provides that health care facilities and primary care services shall be provided for prisoners to a community standard while also taking into account the special circumstances and health care needs of prisoners.

Section 44(3) provides that where a medical officer, nurse or nurse aide is of the view that a prisoner is in need of specialist treatment, he or she may make a report to the Commandant, and where practicable, may make arrangements for the prisoner to be referred to an appropriate medical practitioner.

Section 44(2) provides that Commandants may order that prisoners be medically examined, and the medical officer shall examine and treat any prisoner in need of medical attention.

Section 45 provides that arrangements shall be made for the provision of other medical and related services, in accordance with any relevant policy or program of the Ministry of Health including public awareness and education programs; vaccination programs or programs for the treatment or prevention of certain diseases; and support services for infants and mothers.

Section 47 provides that the Commissioner and Commandants shall ensure that conditions within correctional centres do not facilitate the spread of disease, and must implement recommendations made by medical officers or the Ministry of Health aimed at reducing the risk of the outbreak of disease.

The *Correctional Services Regulations 2008* provide:

136. The Commandant shall ensure that appropriate medical care in accordance with community standards is provided to prisoners and shall continue to carefully monitor the prisoners who are in need of, or who are receiving medical treatment.

137. If a medical officer is of the opinion that –
(a) a prisoner is mentally ill or mentally disordered;
(b) the life of a prisoner may be endangered by further imprisonment;
(c) a sick prisoner will not survive for the length of the sentence; or
(d) a prisoner is totally and permanently unfit to live in correctional centre conditions

the medical officer shall inform the Commandant. The Commandant shall report the case to the Commissioner without delay.

138. The medical officer shall report to the Commandant the case of any prisoner who the medical officer believes has special medical needs that may require an alteration to the living conditions of the prisoner. The Commandant shall, as far as circumstances permit, put into effect any recommendation made by the Medical Officer for the medical treatment of prisoners, including transportation to a hospital or other facility, isolation, specialist care, equipment or additional or alternative dietary supplements.

139. Any prisoner suffering from an infectious or contagious disease or transmissible condition, shall be immediately given treatment for the disease or condition. The Medical Officer, nurse or nurses aide treating the prisoner must take the necessary steps or precautions necessary to prevent the spread of the disease.

2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?

Prison offences including assaults are prescribed by *Correctional Services Regulations 2008*, Regulation 163. The Regulations also provide protection of prisoners from abuse by prison officers. Regulation 152 provides that any officer entering a prisoner's cell at night must be accompanied by another officer, except in cases of necessity or emergency. In these circumstances, the officer must immediately report the unaccompanied entry to the senior officer in charge of the centre. Regulation 153 provides that any male officer entering a part of the centre where women prisoners are located must be accompanied by a female officer.

3. Does the legislation provide for the confidentiality of prisoners' medical and/or personal information, including HIV status?

Section 46 of the *Correctional Services Act* provides that:

- (1) Arrangements shall be made for keeping the medical records of prisoners confidential but prisoners should be notified of the results of any test or treatment, and provided with any necessary support. A prisoner shall not be regarded as the owner of any medical records kept but must be provided with any relevant information contained in the records upon request following their release from a correctional centre.
- (2) A prisoner who has an on-going medical condition that has been treated while he or she has been in custody shall be given a discharge note confirming the nature of the illness and of the treatment provided.
- (3) Information about the medical condition of any prisoner shall be notified as soon as possible to a Commandant if action is or may be required to ensure the safety and well being of officers, prisoners, visitors or any other person.

Regulation 135 *Correctional Services Regulations 2008* provides that when a Commandant is informed that a prisoner has a serious illness or injury, the Commandant shall notify the most accessible known relative of the prisoner or the next of kin. As consent of the prisoner to disclosure is not specified, this regulation may lead to breach of confidentiality.

4. Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?

Section 44(4) *Correctional Services Act* provides that a prisoner who is suffering from any disease or illness must only be held separately from other prisoners upon the order of a medical officer, nurse or nurse aide. Section 44(5) provides that notwithstanding this section a Commandant may order the separation of a prisoner who is apparently suffering from an

illness if arrangements are made for a medical officer or nurse to examine the prisoner and confirm the need for separation as soon as is practicable.

5. **Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?**

Section 48 *Correctional Services Act 2007* provides that where a prisoner is suffering from an illness, disability or other condition or there are special circumstances that make their detention within a correctional centre impractical or undesirable, a Judge or Commissioner of the High Court may review the sentence of the prisoner and make orders for the release of the prisoner or for the prisoner to be moved to suitable accommodation outside of a correctional centre.

6. **Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?**

The Act does not specifically address non-discriminatory access to facilities and privileges.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

1. **Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?**

Discrimination on the grounds of HIV or AIDS status is not unlawful. There is no disability discrimination legislation.

Section 15 of the *Constitution* makes discrimination unlawful but only on the grounds of race, place of origin, political opinions, colour, creed or sex.

- Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?**

There are very weak legal protections for vulnerable groups. There are no specific protections for people living with HIV or those assumed to have HIV by reason of their membership of a vulnerable group.

Subject to exceptions, the Constitution makes discrimination on the ground of sex unlawful in access to places, in provisions of law and in administration of the law by public authorities. In relation to sex discrimination:

- no law may make any provision that is discriminatory either of itself or in its effect;
- no person may be treated in a discriminatory manner by any person acting by virtue of any written law or performance of the function of any public office or any public authority;
- no person may be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating-houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

Does the legislation contain the following substantive features:

- **Coverage of direct and indirect discrimination;**
- **Coverage of those presumed to be infected, as well as carers, partners, family, or associates;**
- **Coverage of vilification;**

- **The ground complained of only needs to be one of several reasons for the discriminatory act;**
- **Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);**
- **Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?**

There is no HIV discrimination or vilification legislation.

Under the provisions of the *Constitution* that relate to sex discrimination, “discriminatory” is defined to mean affording discriminatory treatment to different persons attributable *wholly or mainly* to their respective descriptions by sex. This means that the ground must be more than one of several reasons for the discrimination, it must be wholly or mainly the reason for the discrimination.

“Discriminatory treatment” means subjecting persons of one such description to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description.

2. Does the legislation provide for the following administrative features:

- **Independence of a complaint body;**
- **Representative complaints (e.g. public interest organizations on behalf of individuals)**
- **Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;**
- **Access to free legal assistance;**
- **Investigatory powers to address systemic discrimination;**
- **Confidentiality protections e.g. use of pseudonyms in reporting of cases?**

There is no HIV discrimination legislation.

Chapter IX of the *Constitution* establishes the Ombudsman, with functions to investigate the conduct of public bodies, members of the public service, the Police Force, the Prisons Service, the government of Honiara city, provincial governments, and other offices, commissions, corporate bodies or public agencies as prescribed by Parliament. Section 97(2) provides that Parliament may confer additional powers on the Ombudsman.

The Ombudsman has the power to subpoena and to investigate complaints of official mistreatment or unfair treatment. The Ombudsman has potentially far-ranging powers, but is limited by a shortage of resources.

Section 10(9) of the *Constitution* requires all court proceedings to be held in public. However, Section 10(10) enables courts to be closed where the publicity of the case would prejudice the interest or justice of public morality, or where publicity would prejudice the interests of justice, or in the interests of decency, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

3. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- **Education and promotion of human rights;**

- **Advising government on human rights issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on its activities?**

There is no Human Rights Commission. The Ombudsman office does not have specific powers in relation to HIV discrimination.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. **Does the law ensure the equal legal status of men and women in the following areas:**
 - **Ownership of property and inheritance;**
 - **Marital relations e.g. divorce and custody ;**
 - **Capacity to enter into contracts, mortgages, credit and finance;**
 - **Access to reproductive and STD health information and services;**
 - **Protection from sexual and other violence, including rape in marriage;**
 - **Recognition of de facto relationships;**
 - **Prohibition of harmful traditional practices e.g. female genital mutilation?**

Ownership of property and inheritance and capacity to enter into contracts, mortgages, credit and finance

Discriminatory customary laws in respect of property and inheritance may still legally operate. Section 15 of the *Constitution* makes sex discrimination unlawful but the prohibition on discrimination does not apply to:

- the law with respect to devolution of property on death;
- the application of customary law;
- law with respect to land, the tenure of land, the resumption and acquisition of land and other like purposes.

Schedule 3 Paragraph 3 provides that customary law takes effect as part of the law to the extent that it is not inconsistent with the *Constitution* or any Act of Parliament.

Under the *Customs Recognition Act 2000*, custom may be pleaded as a question of fact except where its recognition would result, in the opinion of the court, in an injustice or would not be in the public interest. This would allow a court to strike down a customary practice which contravenes constitutional rights.

Wills Probate and Administration Act [Cap 33] 1987, Section 84 provides for equal rights to inheritance for men and women, however the application of customary inheritance laws is permitted even though it may result in discrimination against women.

In *Tanavulu & Tanavulu v Tanavulu and SINPF*, the Solomon Islands Court of Appeal considered customary inheritance for the purpose of the Solomon Islands National Provident Fund Act. That Act provides that, if a member of the fund dies without nominating a beneficiary for their accumulated funds, distribution is to be in accordance with the custom of the member, 'to the children, spouse and other persons' entitled in custom. The Court of

Appeal found that the Act was not unconstitutional because it discriminated against the widow. This decision confirmed that discrimination founded on customary law is lawful.⁶⁴

The Constitutional preservation of discriminatory customary laws in respect of land and inheritance may contribute to women's HIV vulnerability. There are insufficient decisions involving resolution of conflict between customary law and anti-discrimination provisions to make any accurate predictions for the future.⁶⁵ Amendment of the Constitution should be considered to clarify women's rights to equality in inheritance, property and financial matters.

Although there is no legislative barrier to women from accessing loans or financial services, discrimination continues to hinder women from obtaining credit and loans to purchase property or businesses.⁶⁶ Anti-discrimination legislation protecting women from discrimination in access to services is required.

Marital relations e.g. divorce and custody and recognition of de facto relationships

Legislation requires the registration of marriages and prohibits bigamy. However, customary marriages are exempt from these requirements. Section 15 of the *Constitution* makes discrimination against women unlawful but the prohibition on discrimination does not apply to the law with respect to marriage and divorce, and it does not apply to the application of customary law.

Divorce is based on fault based criteria including adultery, desertion and cruelty. A husband can sue a third party for an adulterous relationship with his wife but this action is not available for wives in relation to their adulterous husbands.

Legislation provides for maintenance orders during separation and after divorce for both children and spouses. However, the basis on which maintenance is provided is left largely to the discretion of the court with the broad criteria of 'just and necessary': *Islanders Divorce Act* [Cap 170] 1960, Section 21. Although unmarried mothers can claim for maintenance for children they must lodge the claim within 3 years of the child's birth denying the joint responsibility of maintaining children of both parents.⁶⁷

There is no legislative provision for the division of property after separation and divorce and therefore any determination is left to customary law which may discriminate against women. Custody disputes are determined on the standards of 'just and necessary', *Islanders Divorce Act* [Cap 170] 1960, s 21. Customary law may also be relied on to assist in the determination of custody disputes, which may be influenced by payment of a bride price.

De facto relationships are not legally recognised.

⁶⁴ J Corrin Care (2000) Customary law and women's rights in Solomon Islands *Development Bulletin*, no. 51, pp. 20-22.

⁶⁵ Ibid p.22.

⁶⁶ V Jivan, C Forster (2007) *Translating CEDAW into Law - CEDAW Legislative Compliance in Nine Pacific Countries*, UNDP and UNIFEM Suva p.331

⁶⁷ Ibid p.333.

Access to reproductive and STD health information services

Sections 157-159 of the *Penal Code* criminalise abortion, or the procurement of miscarriage. The procurer, the woman herself and the supplier of any means are all guilty. Section 221 provides that it is not an offence if the conduct is in good faith for the purpose of preserving the life of the mother.

Protection from sexual violence, including rape in marriage

Under the *Penal Code* Section 136, rape is an offence but it is defined as unlawful sexual intercourse with a woman or girl only, so rape of a man by another man is not covered. There is no exclusion for marriage, so marital rape is included in the offence.

2. **Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

There are no laws prohibiting mandatory testing of groups.

3. **Does the law require children to be provided with age-appropriate information, education and means of prevention?**

There are no laws requiring children to be provided with information or education about HIV and STIs, or to be provided with condoms or other means of prevention.

4. **Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:**

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

There are no laws specifically addressing children's and young people's rights of informed consent and access to confidential sexual and reproductive health services.

5. **Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?**

Protection is provided by the *Penal Code*, which provides for offences for abduction of unmarried girl under 18 years to have carnal knowledge (Section 140); indecent assault (Section 141); defilement of girl under 13 (Section 142) and defilement 13 - 15 year old (Section 143).

6. **Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?**

Homosexual acts are illegal. The law does not recognize same sex relationships.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

1. **Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data?**

There is no privacy or confidentiality legislation relating to medical records. Medical records are subject to common law confidentiality protections.

2. **Does the legislation prohibit unauthorised use and disclosure of such data?**
There is no legislation. Common law allows disclosure of medical records only in exceptional circumstances in the public interest, such as where third parties are at risk of serious injury.
3. **Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are:**
- **Accurate;**
 - **Relevant;**
 - **Complete;**
 - **Up-to-date?**
- There is no legislation.
4. **Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:**
- **Education and promotion of privacy;**
 - **Advising government on privacy issues;**
 - **Monitoring compliance with domestic legislation and international treaties and norms;**
 - **Investigating, conciliating, resolving or arbitrating individual complaints;**
 - **Keeping data/statistics of cases and reporting on activities?**
- There is no legislation.
5. **Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**
There is no HIV specific law. Under the *Constitution* Section 10(10), Courts have discretion to close hearings where there are public interest factors including the protection of the private lives of persons concerned in the proceedings.
6. **Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**
There is no legislation providing for reporting of HIV or AIDS cases to public health authorities for epidemiological purposes.

CHECKLIST 7 – EMPLOYMENT LAWS

1. **Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**
Employment legislation consists of:
- *Employment Act* [Cap 72]
 - *Labour Act* [Cap 73]
 - *Safety at Work Act* [Cap 74]
 - *Trade Dispute Act* [Cap 75]
 - *Trade Unions Act* [Cap 76]
 - *Unfair Dismissal Act* [Cap 77]
 - *Workmen’s Compensation Act* [Cap 78]

HIV screening for employment is not prohibited. The following offer some potential protection for people living with HIV—

- *Unfair Dismissal Act* Right not to be unfairly dismissed.
- *Trade Dispute Act* Right to bring a case to trade dispute panel.

2. **Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Legislation does not prohibit mandatory testing of specific employment groups

3. **Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

Legislation does not specifically require implementation of universal infection control measures. *Safety at Work Act* [Cap 74] Part II provides that it is the duty of every employer to ensure, so far as is reasonably practicable, the health and safety at work of all his employees, including (Schedule 1)

- arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- the provision and maintenance of a working environment for employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

An employer's failure to provide effective infection control systems in health care workplaces would be a breach of this duty.

4. **Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

Legislation does not specifically require provision of access to information and education about HIV/AIDS, but there is a general duty under *Safety at Work Act* [Cap 74] Section 4 and Schedule 1 for the employer to provide "such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees".

5. **Does the law provide for:**

1. **Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
2. **Social security and other benefits where workers are no longer able to work?**

There is no legislation prohibiting discrimination on the grounds of HIV against employees although in some circumstances an unfair dismissal claim could be argued under the *Unfair Dismissal Act* [Cap 77]. The *National Provident Fund Act* [Cap 109] enables employees who have contributed to the fund to claim a disability benefit if assessed with a permanent physical or mental incapacity to work. The *Labour Act* provides for workers' medical attention and treatment, and sick leave entitlements are included in the Holidays, Sick Leave & Passage Rules (Section 80).

6. **Does the law provide for confidentiality of employees' medical and personal information including HIV status?**

Legislation does not provide for confidentiality of employees' medical and personal information including HIV status.

7. **Does workers' compensation legislation recognize occupational transmission of HIV?**
The Workmen's Compensation Act [Cap 78] does not specifically recognize occupational transmission of HIV.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. **Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?**

There is no legislation regulating HIV test kits.

2. **Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:**
1. **Safe; and**
 2. **Efficacious?**

There is no legislation requiring registration of drugs or assessment and approval of pharmaceuticals, vaccines, and medical devices based on safety and efficacy data. The *Pharmacy and Poisons Act* [Cap 105] provides that the British Pharmacopoeia is the standard of quality or composition for all drugs or medicines.

3. **Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?**

Under the *Pharmacy and Poisons Act* [Cap 105] only a registered pharmacist or a bona fide assistant to a registered pharmacist, under the immediate and personal supervision and control of a registered pharmacist, shall dispense a drug or medicine.

4. **Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?**

There is no legislation regulating the quality of condoms.

5. **Does the legislation ensure the accessibility and free availability of the following prevention measures:**

- **Condoms**
- **Bleach**
- **Needles and syringes?**

The *Pharmacy and Poisons Act* [Cap 105] Section 42(1) provides that no person shall publish any statement, whether by advertisement or otherwise, to promote the sale of any article as an instrument or appliance for preventing conception. This may prevent promotion of condoms.

Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?

Solomon Islands is a member of WTO, and has obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). As a least developed country, Solomon Islands has until 2016 to introduce patent legislation that complies with TRIPS standards.

Under the *Registration of United Kingdom Patents Act* [Cap 179], patents registered in the UK can be automatically re-registered in the Solomon Islands. Registration confers on the applicant the same privileges and rights in so far as may be applicable to Solomon Islands as he is entitled to in the United Kingdom and as though the patent had been issued in the United Kingdom with an extension to Solomon Islands.

There is no legislation enabling parallel importing or compulsory licensing of pharmaceutical products. There is no legislation in relation to early working of a patented product to enable generic medicines to be approved for marketing as soon as possible after patent expiry.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

- 1. Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?**

The *Research Act* [Cap 152] requires permits to be issued for overseas researchers. There are no other specific legislative requirements. There is a national Health Research Ethics Committee at the Ministry of Health.⁶⁸

- 2. Does the legislation require subjects to be provided before, during and after participation with:**

- **Counselling**
- **Protection from discrimination;**
- **Health and support services?**

There are no specific legislative requirements.

- 3. Does the legislation provide for informed consent to be obtained from the subjects?**

There are no specific legislative requirements.

- 4. Does the legislation provide for confidentiality of personal information obtained in the process of research?**

There are no specific legislative requirements.

- 5. Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?**

There are no specific legislative requirements.

- 6. Does the legislation provide for non-discriminatory selection of subjects?**

There are no specific legislative requirements.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

- 1. Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?**

⁶⁸ World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41, p.81.

The *Constitution* Section 14 provides that citizens have the fundamental right to freedom of movement. This may be difficult to enforce in practice particularly for populations who are marginalised and whose behaviours are criminalised such as sex workers and men who have sex with men.

2. Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?

The *Constitution* Section 13 provides that citizens have the fundamental right to freedom of assembly and association. This may be difficult to enforce in practice, particularly in the case of associations of sex workers or men who have sex with men, as soliciting and buggery remain a crime.

3. Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?

There are no exceptions for HIV information that contains sexually explicit information or images, although a defence may be available that disseminating the information or image is for educational purposes and public benefit.

The *Cinematograph Act* [Cap 137] provides for the censorship of films. Permits may be issued free for charitable, educational or public purposes.

Under the *Customs Act* [Cap 121] 'indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles' are prohibited imports.

Sections 173 and 174 of the *Penal Code* prohibits the possession, sale, exhibition, or publication of obscene articles or those tending to corrupt public morals, and of obscene videos or photographs.

4. Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?

No broadcasting standards were identified. Under Section 24 of the *Broadcasting Act* [Cap 112] the Minister may prohibit the Solomon Islands Broadcasting Corporation from broadcasting any material, in which case the prohibition must be reported to Parliament.

5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:

- **Health care workers**
- **Other industries where there may be a risk of transmission, e.g. sex or funeral workers;**
- **Media;**
- **Superannuation and insurance;**
- **Employers (in a tripartite forum involving unions and government)?**

There is no legislation requiring professional groups to develop or enforce HIV Codes of Practice. Section 26 of the *Safety at Work Act* gives the Minister power to approve Codes of Practice as guidance. It would be beneficial to develop a Code of Practice on HIV and employment, drawing on the International Labor Organization Code of Practice on HIV/AIDS

to address issues such as workplace discrimination and universal infection control procedures.⁶⁹

6. **Are such Codes of Practice required to contain the following elements:**

- **Confidentiality/privacy protections;**
- **Informed consent to HIV testing;**
- **Duty not to unfairly discriminate; and**
- **Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?**

No Codes are required.

SUMMARY AND RECOMMENDATIONS

Current Solomon Islands law is not appropriate for management of HIV, although current national policy is to respect human rights e.g. by promoting voluntary and confidential counselling and testing.

Criminal law and prisons

The criminal offences relating to prostitution and homosexuality involving consenting adults in private contravene human rights and undermine prevention efforts. These offences should be repealed or amended.

The criminal offence of abortion should be repealed as it contravenes the rights of women and girls to make their own reproductive choices.

The offence of causing grievous harm under the *Penal Code* appears sufficient to cover situations of intentional transmission.

The offence in the *Pharmacy and Poisons Act* [Cap 105] Section 42(1) relating to promotion of means of preventing conception should be amended so that it does not deter or prevent promotion of condoms.

Censorship legislation should not criminalise sexual health promotion. Exceptions for bona fide HIV information and education materials should be introduced into censorship legislation.

The *Correctional Services Act* should require that condoms and HIV/STI prevention information be made available to prisoners.

Regulation 135 *Correctional Services Regulations 2008* provides that when a Commandant is informed that a prisoner has a serious illness or injury, the Commandant shall notify the most accessible known relative of the prisoner or the next of kin. As consent of the prisoner to disclosure is not specified, this regulation may lead to breach of confidentiality. It is recommended that this Regulation be amended to only permit notification of relatives and next of kin if consent of the prisoner has been obtained or if the prisoner is not able to consent due to ill health.

⁶⁹ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work* www.ilo.org/aids

The *Correctional Services Regulations 2008* should be amended to guarantee non-discriminatory access to facilities and privileges for people living with HIV or other infections that are not transmitted through casual contact.

Public health

Blood safety legislation should be introduced which provides for screening of donated blood for HIV and other blood borne diseases.

The notifiable diseases provisions of the *Environmental Health Act* should not apply to HIV. Rather, a new part to the Act should be introduced to regulate management of HIV and sexual health. Such legislation should:

- require confidential notification of HIV and AIDS cases, and informed consent including pre and post-test counselling in relation to HIV tests
- clarify how health care workers should balance their duty of confidentiality to people living with HIV and their duty of care to third parties such as sexual partners.
- require male and female condoms, and HIV and STI test kits to comply with international quality standards.

Health privacy legislation should be introduced that protects medical information from disclosure and gives people rights of access to data relating to them.

Discrimination, equality and employment

It is recommended that discrimination on the grounds of HIV or AIDS status, disability, sexual orientation and transgender status be made unlawful.

It would be beneficial to develop a Code of Practice on HIV and employment, drawing on the International Labor Organization Code of Practice on HIV/AIDS,⁷⁰ for approval under Section 26 of the *Safety at Work Act*. A Code of Practice should be developed that promotes universal infection control procedures in health care settings and non-discrimination in workplaces.

Parliament may confer additional powers on the Ombudsman. It is recommended that consideration be given to providing powers for the Ombudsman to investigate and report on discrimination matters relating to disability and HIV.

A comprehensive definition of discrimination is needed which prohibits both direct and indirect discrimination. Complaints of discrimination should be able to be made to an accessible body that has powers of investigation and conciliation, and that can refer matters to courts for hearing, determination and enforcement.

Status of women in family law, property and inheritance

Women will be less vulnerable to HIV and other diseases if their social and economic status is improved. Amending the law to include a provision that protection from discrimination on the grounds of sex prevails when there is conflict between customary law and domestic

⁷⁰ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work* www.ilo.org/aids

legislation would improve women's status. This would prevent application of discriminatory customary laws in property and inheritance. It may however require amendment to Section 15 of the Constitution.

Legislation relating to administration of wills and estates should be amended to provide for family provision orders and statutory legacies to prevent women from being left financially destitute after a husband's death.

Consideration should be given to moving to a no-fault model for family law. Legislation should abolish the husband's right to claim compensation for adultery.

De facto relationships including same sex partnerships should be recognised by law.

Access to medicines

Patents legislation should be drafted that allows for:

- parallel importing of medicines that are marketed more cheaply in other countries, by incorporating international exhaustion of patent rights after first use into law;
- compulsory licensing including government use of generic medicines for non-commercial use in the health system;
- early working exception through including a bolar provision, so that generic medicines can be placed on the market as soon as possible after patent expiry.

6.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

Cabinet Paper (initial draft) drafted with the assistance of RRRT in order to request in principle approval to the drafting of human rights compliant HIV legislation.

Further development of this draft is required as it should be presented in accordance with the requirements for Cabinet Papers contained in the Cabinet Handbook and subject to the Legislation Handbook.

Births and Deaths (Registration) Act [Cap. 168]

Births, Marriages and Deaths Registration Act [Cap. 169]

The author questions whether the civil registration systems currently operating in the Solomon Islands are adequate to ensure that every birth and death is counted, and to ensure that causes of death are accurately recorded.

The Births, Marriages and Deaths Registration Act [Cap. 169] became law in 1896, has been amended five times, the last amendment being in 1978. This Act provides for the registration of ministers able to celebrate marriages in Solomon Islands, for the celebration of marriages and has provisions (differing from Cap. 168) for the giving of notices of births of any child of a British subject or foreigner and deaths of a British subject or foreigner.

The Births and Deaths (Registration) Act [Cap. 168] appears to have been passed in 1988 and applies only to the births and deaths of Solomon Islanders. It seems there has been no subsidiary legislation, such as regulations, made.

Deaths of Solomon Islanders are to be reported by a responsible person as soon as reasonably after the death of the person. Reports by a responsible person other than if made by a medical

practitioner or nurse (which are to be in writing) may be by word of mouth. In any case, the report must specify the name and sex of the deceased, the place of residence of the deceased immediately before death, the place where the deceased died, the cause of death (if known) and the place where burial occurred (if known).

The responsible person varies according to whom was present at the death. If the death occurred in the presence of a medical practitioner only, it is the medical practitioner. If the death is in the presence of a medical practitioner and a nurse, the medical practitioner or, if the medical practitioner is unable to report on reasonable grounds, the nurse. If the death is in the presence of a nurse alone, the nurse reports the death. In any other case (where a medical practitioner or nurse is unable on reasonable grounds to report the death) alternates are the spouse of the deceased, the eldest surviving adult child of the deceased, the father of the deceased, the mother of the deceased, the eldest surviving adult brother of the deceased or the eldest surviving adult sister of the deceased.

Under the Births, Marriages and Deaths Registration Act [Cap. 169], in every case of the death of a British subject or foreigner (within the limits of the Act) the occupier of the house or place where the death occurred is required to transmit to the Minister a statement of the fact and date of such death. The statement is to include details of the name, age, and parentage (if known) and nationality of the deceased. It must state also, as far as known, whether the deceased was married, and to whom, and at what place, together with the names and ages of any children left by the deceased. The statement of death must include the date and place of burial of the deceased, verified if possible by the signatures of two witnesses present at the burial.

Provisions in this Act regarding the celebration and registration of marriage are not compulsory when both parties to any marriage are Solomon Islanders.

Employment Law

Employment Act [Cap. 72]

Labour Act [Cap. 73]

Safety at Work Act [Cap. 74]

Trade Dispute Act [Cap. 75]

Trade Unions Act [Cap. 76]

Unfair Dismissal Act [Cap. 77]

Workmen's Compensation Act [1977]

The author can locate no information on any review of this suite of employment related laws.

Environmental Health [Cap. 99]

Environmental Health (Public Health Act) Regulations

The Environmental Health Act was made in 1980 to make provisions for securing and maintaining environmental health. This Act repealed the old Public Health Act 1970 but saved any subsidiary legislation under that Act. The Environmental Health (Public Health Act) Regulations were actually Parts of the repealed Public Health Act 1970 and in 1981 the Parts were re-iterated and made as regulations.

The Ministry of Health and Medical Services commenced work on a review of the Quarantine Act 1931 in February 2011. It has been recommended to the Secretary of Health and Medical Services that a review of quarantine legislation necessitates concurrent review of the environmental health legislation. Work on the review has some potential to be revived in the near future.

The Regulations define “Infected”, “infectious disease”, “isolation”, “notifiable disease”, “persons subject to isolation”. The First Schedule includes syphilis and tuberculosis (and apparently not HIV) as Notifiable Diseases, although the author has been unable to ascertain exactly what are currently listed as additional diseases can be added by notice.

Part III is concerned with the Prevention and Suppression of Notifiable Diseases. There are responsibilities placed upon the head of the family to which any person suffering from a notifiable disease belongs to, as soon as he becomes aware, or has reason to suspect that the patient is suffering from any notifiable disease, send notice thereof to the nearest medical practitioner, or to the nearest nurse registered under the Nursing Council Act or, in default of any such person, to the nearest health inspector, health officer or sanitary officer. The feasibility of compliance with such a requirement is questioned, especially when the writer who has access to many Solomon Islands legislative provisions is unable to ascertain precisely what and what is not a notifiable disease within Solomon Islands. How the head of a family, not being a health professional, would have adequate knowledge in order to comply with the responsibility is questioned.

Responsibility is properly placed upon a medical practitioner or nurse attending on or called to visit a patient on becoming aware, or having reason to suspect, that the patient is suffering from a notifiable disease to notify the senior medical officer of the district in which the patient is living (the District Medical Officer). The notification is to be in whatever manner the Under Secretary (Health), Ministry of Health and Medical Services directs. The medical practitioner or nurse is also required to inform the patient’s head of family or any fellow employee of the patient of the communicable nature of the disease and the precautions to be taken to prevent its conveyance to others.

Every medical practitioner or nurse who becomes aware or suspects that a death has occurred as a consequence of a notifiable disease is required to provide the District Medical Officer with a written certificate of same and also inform the head of the patient’s family or any other person who has been in attendance on such deceased person, as well as the employer immediately before death of the deceased person of the communicable nature of the disease and precautions to prevent transmission to others.

The continued veracity of these requirements is questioned in light of the differing modes of transmission of communicable disease, the evolved structure of the Ministry of Health and Medical Services, issues of privacy of personal information and modern requirements for effective notifications of communicable disease sufficient for proper biostatistical and epidemiological systems. A basic tenet of any privacy law is that personal information should only be used for the purpose for which it is obtained and that personal information should be de-identified at the earliest possible opportunity (using coding systems etc.).

Health Services Act [Cap. 100]
Health Services (Hospitals) Regulations

This Act makes provision for the proper administration of health services relating to hospitals, personal health and other health services and for the establishment of rules and regulations by the Minister of Health and Medical Services for the effective carrying out of those services. It was passed in 1979 and amended in 1988. The only regulations that have been made are the Health Services (Hospitals) Regulations. The author is not aware of any rules that have been made. The Act includes organisation of the Ministry to include the Permanent Secretary and such other professional and other staff as may from time to time be appointed. The duty of the Minister is to promote the establishment in Solomon Islands of a comprehensive primary care service designed to secure the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services.

There is a requirement that the services should be provided free of charge except in so far as the Minister may make Rules authorising or prescribing charges for such services.

The Minister is required to establish such Health Advisory Committees as he may consider necessary to advise him in carrying out his functions.

Immigration Act 2012

This Act came into force on 9 March 2012. Under the Act, a person who arrives (or intends to board an aircraft or vessel to depart) Solomon Islands must present himself or herself to an immigration officer to obtain permission to do so. On entry, the person must meet entry requirements prescribed in regulations. The author has been unable to locate the regulations made under the new Act. The Immigration Department website does include a form and checklist under the previous Immigration Act 1978 relating to applications for permits to enter and reside in Solomon Islands that make reference to a medical report. However, no pro forma of a medical report has been located.

By section 21, visas may be cancelled if the Director of Immigration if the Director is satisfied that there is either a character concern (referring to section 23) about the holder of a visa or a serious health concern (referring to section 24).

A character concern includes that the Director considers that, having regard to the person's past and present conduct (including but not limited to criminal conduct), the person is not of good character; or the Director considers that there is a significant risk that, if the person were allowed to enter or stay in Solomon Islands, the person would (among other grounds stated) engage in criminal conduct, vilify a segment of the Solomon Islands community or incite discord in the Solomon Islands community.

There is a serious health concern about a person if the Government medical officer has certified that the person is suffering from a *physical or psychological condition that poses a serious threat to the health or safety of the community*.

The Report of the National Parliament Bills and Legislation Committee on the Immigration Bill 2012 includes—

During Parliament recess, it was realised that few clauses of the Bill needs to be amended. One such amendment was the title of the Bill that has been changed from the Immigration Bill 2011 to the "Immigration Bill 2012". It took time to make amendments and to print hard copies as there is no government printery to do the printing job and the committee hearing was delayed for a number of days awaiting the amended copies.

Local Government Act [Cap. 117]

This Act provides for local government councils to be established by warrant as the Minister deems necessary or expedient for the purposes of local government. Councils have power to make by-laws in Part VI. (Council by-laws are made under this Act rather than under the Act establishing the Council). There is provision for public officers of Council to be appointed for the purpose of giving effect to and enforcing any by-laws.

The functions of councils are stated broadly in Part V and possible (detailed) functions are listed in the Schedule. The general duty is to discharge the functions conferred by the Act and generally to promote the health, welfare and convenience of the inhabitants of the area of

its authority and to maintain order and good government in such area. Section 45 provides that a warrant establishing a Council may provide that the Council either shall perform or may perform all or any or any part of the functions listed in the Schedule. The detailed functions relating to Health include a function to safeguard and promote public health, including the prevention of and the dealing with any outbreak or the prevalence of any disease.

Under Administration and Legal, there is a possible function to provide services for the registration of births, marriages and deaths. However, section 38 *requires* that a council maintain, in such form as may be approved by the Minister, records of births and deaths of all persons not subject to the provisions of the Births, Marriages and Deaths Registration Act occurring within the area of authority of the council. The births and deaths of Solomon Islanders are not subject to the Births, Marriages and Deaths Registration Act. Thus the births and deaths of Solomon Islanders are to be the subject of the records of births and deaths occurring within the area of authority of a council.

Honiara City Act 1999

See Local Government Act [Cap. 117] for subordinate legislation (by-laws) of Honiara Town Council

Patents Act (UK)

Registration of United Kingdom Patents Act [Cap. 179]

As a member of WTO, Solomon Islands has obligations under TRIPS. Because of its least developed country classification, it has until 2016 to introduce patent legislation that complies with TRIPS standards. Under the Registration of United Kingdom Patents Act [Cap. 79], patents registered in the UK can be automatically re-registered in Solomon Islands. Registration confers on the applicant the same privileges and rights in so far as may be applicable to Solomon Islands as he is entitled to in the United Kingdom and as though the patent had been issued in the United Kingdom with an extension to Solomon Islands.

Penal Code

Solomon Islands Law Reform Commission has a current reference for a review of the Penal Code and the Criminal Procedure Code. The Penal Code contains many of the criminal offences that apply in Solomon Islands.

In 2008, the Solomon Islands Law Reform Commission released an Issues Paper on the Penal Code and called for submissions on how this law should be reformed. Factsheets were released on various issues relating to the review, including (those that relate to the HIV response) on—

- Children
- Domestic Violence (including protection orders)
- Rape (including introducing gender neutrality to offence and whether marital rape should become an offence)
- Sexual abuse of children
- Homosexual conduct

In 2009, consultations were conducted in Honiara and the Provinces on the Penal Code. Draft recommendations for reform of the law relating to sexual offences were anticipated to be released during 2010. A research paper concerning sexual offences and sentencing was released by the Commission in 2011. The author has not located final recommendations of the Commission concerning sexual offences.

Penalties Miscellaneous Amendments Act 2009 (Unknown whether commenced)

This Act is of significance as it amends upwards the amount of fines and sometimes the maximum sentence of imprisonment to be applied for offences against a number of Acts (including the Environmental Health Act [Cap. 99] and the Pharmacy and Poisons Act [Cap. 105] as well as providing for penalty units by amendment of the Interpretation and General Provisions Act [Cap. 85]. It provides a new section to that Act (section 50A)—

Penalty units

- 50A. (1) *Penalties (whether for an offence or otherwise) in all written laws shall be expressed in penalty units.*
- (2) *If a written law provides for monetary penalty, that penalty shall be treated as and converted into penalty units.*
- (3) *The value of one penalty unit is one dollar.*

Provincial Government Act 1997

This Act is administered by the Ministry of Provincial Government and Institutional Strengthening. The Ministry is the central government agency responsible for coordinating the activities of the nine provincial governments. It establishes the legal framework for the operation of Provinces (which are provided for in the Constitution and were previously established by the Provincial Government Act 1981).

Broad functions provided for in the Act relate to elections of provincial governments, transfer of functions to the provincial assemblies and exercise of administrative functions which include financial and other supplementary obligations. The Government's Medium Term Strategy 2008-2010 emphasised the need to improve devolution of powers with the view that political and economic stability will be achieved through a gradual change to State Government.

The Act creates a Provincial Assembly for each Province, with elected politicians given power to pass Ordinances that are not in conflict with national policy or legislation. A Provincial Assembly has power to make laws only if they are within the legislative competence of the Assembly or are incidental or consequential thereto. A Provincial Assembly has no power to make laws extending to any part of Solomon Islands other than the province.

By section 28, the Minister of Provincial Government and Institutional Strengthening may, in respect of any Province, make devolution orders.

Under section 35 (5), services for a Province that may be provided by a Provincial Executive (subject to the provisions of any enactment wherever made or passed) are in respect of any of the matters set out in Schedule 6. That Schedule contains a large number of services, including for health, medical services and public health, as well as local matters with the potential to affect health such as waste disposal and cleaning services, eating house and similar places, public conveniences, public nuisances, cemeteries, market, keeping of domestic animals and building standards.

Public Service Act [Cap.92]

The Public Service Commission is established under section 115 of the Constitution.

Public Service Commission Regulations 2006

Public Solicitor Act [Cap. 30]

This Act makes provision for the granting of Legal Aid. The author understands that resources for Legal Aid are severely limited.

Quarantine Act 1931 (see reference to Environmental Health Act above)

Draft Cabinet Paper seeking Cabinet's approval for HIV Management, Prevention and Control Legislation

7. TUVALU

7.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Constitution

Consolidated Legislation—selected legislation from the 1990 Revised Edition

Sessional Legislation—1990—2007

Selected subsidiary legislation

United Kingdom Legislation in Tuvalu

<http://www.tuvalu-legislation.tv>

As at 2013

Current Legislation—Principal and Subordinate (both alphabetical and by category)

Provides for Repealed Legislation (not currently available)

Provides for Not in Force Legislation (not currently available)

7.2 INTERNATIONAL TREATIES AND OBLIGATIONS

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)
accession 6 October 1999

Convention on the Rights of the Child (CRC) accession 22 September 1995

International Health Regulations (2005) (IHR (2005)) to which Tuvalu became bound through
membership of the International Health Assembly of the World Health Organization on 15
June 2007

7.3 CONSTITUTIONAL PROTECTIONS

Constitution of Tuvalu

Amended by Constitution (Recognition of Traditional Standards, Values and
Practices) Amendment Act 2010

The Laws of Tuvalu have a British colonial history. Since Independence, the supreme law of
Tuvalu has been the Constitution of Tuvalu. The sources of Law are the Acts of Parliament,
customary law and the common law of Tuvalu. In addition, every applied law (originally the
laws of England) continued to have effect as part of the law of Tuvalu.

Principles 5 and 6 of the Constitution are pivotal, these being—

5. *In government, and in social affairs generally, the guiding principles for Tuvalu
are—*

*agreement, courtesy and the search for consensus, in accordance with traditional
Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness;*

*the need for mutual respect and co-operation between the different kinds of
authorities concerned, including the central Government, the traditional authorities,
local governments and authorities, and the religious authorities.*

6. *The life and laws of Tuvalu should therefore be based on respect for human dignity,
and on the acceptance of Tuvaluan values and culture, and on respect for them’.*

Part II of the Constitution is the Bill of Rights which defines the national interest to include a reference to the public interest in public safety, public order and the protection of the international standing and reputation of Tuvalu. The Bill of Rights gives fundamental human rights and freedoms. While fundamental, the human rights and freedoms are not absolute, as limitations upon them are contemplated so as to respect the rights and freedoms of others and the national interest. The stated fundamental rights and freedoms that might be affected by other laws are—

- personal liberty (ss. 17 and 18)
- security for the person (ss. 18 and 19)
- freedom of expression
- freedom of assembly and association (s. 25)
- protection for the privacy of his home and other property (s. 21) and
- protection from unjust deprivation of property (s. 20)

The Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010 sets out a Purpose which it states to be required in the national interest. The purpose is—

- (a) to protect the island communities of Tuvalu from the spread of religious beliefs which threaten the cohesiveness of island communities
- (b) to provide the powers necessary to make laws to restrict the exercise of certain constitutional freedoms, where the exercise of those freedoms is inconsistent with a law, or an act done under law, which accords with the traditional standards, values and practices of the island communities of Tuvalu
- (c) to provide legal recognition for the traditional practices of island communities to limit the establishment of religions on their islands.

Several sections of the Constitution are amended including section 15 which addresses that laws and all acts under laws must be ‘reasonably justifiable in a democratic society’ (except where there is a public emergency). Section 15 (5) states—

In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to—

- (a) traditional standards, values and practices, as well as previous laws and judicial decisions, of Tuvalu; and
- (b) laws, practices and judicial decisions of other countries that the court reasonably regards as democratic; and
- (c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and
- (d) any other matters that the court thinks fit.

The amending Act then inserts a new subsection (6)—

Notwithstanding subsection (5), any law, or any act done under a valid law, which accords with traditional standards, values and practices shall not contravene subsection (1) above,

unless the relevant traditional standard, value or practice should be regarded by an ordinary modern citizen of Tuvalu as one which should be eliminated.

Protection of Tuvaluan Values etc. is expressly made at section 29. Section 29 includes that within Tuvalu, the freedoms of the individual can only be exercised by having regard to the rights or feelings of other people, and to the effect on society.

It continues that it may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise may be devious, unsettling or offensive to the people or may directly threaten Tuvaluan values and culture.

These provisions, especially relating to Tuvaluan traditional standards, values and practices and protection of such Tuvaluan values will be significant in future law reform, especially in an area such as HIV- related legislative development which has the risk of being seen to challenge such traditional standards, values and practices.

7.4 NATIONAL PLANS AND REPORTS

National Strategic Plan for HIV & STIs 2009-2013

Global AIDS Response Progress Reporting Country Progress Report Tuvalu January 2010-December 2011

Ministry of Health, National Drug Policy (date unknown)

Government of Tuvalu, Parliamentary Rules of Procedure

S.M.K. Homasi, *HIV/AIDS and other STIs in Tuvalu South Pacific*, August 2007 (Treatise submitted in partial satisfaction of the requirements for the Degree of Master of Medicine, University of Sydney).

Allen & Clarke Policy & Regulatory Specialists, Project Reports: Review of Tuvalu's legislation for compliance with the International Health Regulations 2005 (October & December 2007)

7.5 LAWS OF RELEVANCE TO FOCUS AREAS

Births, Deaths and Marriages Registration Act [Cap. 17.10]

Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010

Falekaupule Act 1997

Immigration Act

Island Courts Act [Cap. 7.32]

Law Revision (Miscellaneous Amendments) Act 2009

Magistrates' Courts Act [Cap. 7.36]

Penal Code

Police Powers and Duties Act 2009

Prisons Act [Cap. 20.28]

Public Health Ordinance [Cap. 35]

Draft Public Health Bill 2008

Superior Courts Act [Cap. 7.68]

7.6 TUVALU LCR 2009 (The content of Tuvalu LCR 2009 is reproduced as published in March 2009)

HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Tuvalu Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS March 2009

Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Tuvalu. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006⁷¹.

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.⁷² The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.
- Criminal law.
- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.
- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no

⁷¹ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm> for the full text of the consolidated Guidelines.

⁷² UNAIDS/IPU. Geneva, 1999.

guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.⁷³

Background

There have been 12 reported infections since 1991, half among seafarers. The primary mode of transmission is heterosexual. All HIV infections in Tuvalu are due to sexual transmission except for one mother-to-child transmission.

Many Tuvaluans travel for education and work. At any time about 400-500 seafarers are working abroad. In addition to seafarers and their sexual partners, young people are considered to be at-risk because there is little sex education, alcohol use among young people is increasing and there are low levels of condom use.

Socio-cultural factors increasing vulnerability to HIV and STIs include —

- widely scattered islands making communication, transport and delivery of services difficult and expensive;
- high population growth and a youthful population;
- concentration of people (over one-third of the total) in the capital, with high unemployment and significant levels of alcohol abuse;

⁷³ See *Consolidated Guidelines* paras 102-103.

- high rate of international travel;
- domestic violence against women is common;
- low status of women in traditional culture;
- knowledge of sexual health issues is variable, cultural taboos make it difficult to spread awareness;
- unprotected sex, unwanted pregnancies and STIs among youth;
- sharing of tattoo needles.

There are limited health services, with one hospital on the capital island and eight health clinics located on outer islands. There is a free national medical service. Violence against women and girls is often not reported because it is often perceived by the general public and police as a private family matter. In 2008, the Government reported a decrease in the use of contraceptives and an increase in the overall number of teenage pregnancies and sexually transmitted infections, and that young people living in outer islands have more limited access to sexual health information than those living in the capital.⁷⁴

Legal system

Tuvalu is a sovereign democratic State, governed in accordance with the *Constitution* and in particular in accordance with the Principles set out in the Preamble.

Sources of law consist —

- the *Constitution* and Acts of the Parliament;
- English common law and equity;
- pre-Independence British Acts continued after Independence and not replaced;
- customary laws, to determine title to land and for the determination of civil and criminal proceedings in Magistrates' Courts, provided the custom was not repugnant to natural justice, equity and conscience or inconsistent with any Ordinance or other law for the time being in force in the country, for all civil or criminal proceedings in all courts except to the extent that it is inconsistent with the *Constitution* or legislation.

The court system comprises Magistrates' courts with limited jurisdiction and the High Court with unlimited civil and criminal jurisdiction. Rulings from the High Court can be appealed to the Court of Appeal in Fiji.

International obligations

Tuvalu is a member of the UN, and has ratified the Convention on Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child.

HIV policy framework⁷⁵

The Ministry of Health is the lead government agency. The Tuvalu HIV/AIDS Task Force is a multi-sectoral committee composing of members from Government and the NGOs chaired by an elected Chairperson currently the Director of Health. It enjoys good support from the government.

⁷⁴ UN Committee on the Elimination of Discrimination against Women (2008) *List of issues and questions with regard to the consideration of periodic reports: Second periodic report of Tuvalu CEDAW/C/TUV/2*.

⁷⁵ C Jenkins (2005) *HIV/AIDS in the Pacific*, ADB: Manila

A National Strategic Plan (2001–2005) was developed by the Tuvalu National AIDS Committee and has been revised for 2009-2013. The first plan was endorsed by the national Cabinet in 2001. With external support, several NGOs have begun to take action according to the plan’s priorities including:

- Support and care for people living with HIV/AIDS and their families.
- Prevention and control of STIs.
- Reducing vulnerability and promoting safer behaviors among specific groups.
- Safe blood and blood products.
- Coordinating the multi-sectoral response.

The Tuvalu Overseas Seamen’s Union conducts a training program for seafarers leading to a certificate regularly through the year. This program covers behaviour management, including HIV and STIs, and has had positive appraisals.

UNICEF has been implementing a program in collaboration with the Ministry of Youth. The Tuvalu Family Health Association also targets youth.

The Tuvalu Association of Non Governmental Organisations (TANGO) is the coordinating body for the 30 registered NGOs in the country and provides training.

Tuvalu participates in the Regional Project of the Global Fund to Fight AIDS, Tuberculosis and Malaria.

CHECKLIST 1 – PUBLIC HEALTH LAW

1. Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:

- **Information and education**
- **Voluntary testing and counselling**
- **STD, sexual and reproductive health services**
- **Access to means of prevention e.g. condoms and clean injecting equipment**
- **Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?**

There is no HIV or STI specific public health legislation. The *Public Health Ordinance* [Cap 35] enables the Minister to make regulations for the purpose of protecting and advancing the public health of Tuvalu.

2. Does the legislation:

- **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
- **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?**

Legislation does not address issues of informed consent to HIV tests or access to counselling. The common law of England applies, which requires consent to a blood test. If consent is not given, the person taking blood may be liable under civil and/or criminal law for assault. Common law does not require pre and post test counselling.

All pregnant mothers are now routinely tested, though there is no prevention of mother to child transmission program and pre-test counselling is doubtful. Seafarers are routinely screened. The Marine Training Centre carries out routine testing on all new entrants.

The *Immigration Act* permits an immigration officer to require any person entering Tuvalu to submit to medical examination (Section 5). A person refusing to undergo a medical examination, or who is certified by a medical practitioner to be suffering a contagious or infectious disease which makes his presence dangerous to the community, is a prohibited immigrant. The Minister may also declare a class or group of persons to be a prohibited class, and any member of the class or group is also a prohibited immigrant. 'Contagious or infectious disease' is not defined.

Section 59 of the *Employment Act* makes it mandatory for every worker who enters into a contract to be medically examined by a medical officer or a person approved for that purpose by the Health Officer.

3. **Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?**

Does the legislation provide in such cases the following due process protections:

- Reasonable notice of case to the individual;
- Rights of review/appeal against adverse decisions;
- Fixed periods of duration of restrictive orders (i.e. not indefinite);
- Right of legal representation?

AIDS is listed as an infectious disease by notice [L.N. 11/87] under the *Public Health Ordinance* [Cap 35].

The *Public Health Ordinance* [Cap 35] includes 'venereal diseases' as 'infectious diseases' (Section 2).

The *Public Health Regulations* provide sanitary inspectors with powers of isolation or removal to hospital of the infected person (Reg. 22) and of restriction of movement of contacts of the infected person (Reg. 23).

The *Quarantine Act* provides that a quarantinable disease is smallpox, plague, cholera, yellow fever, typhus fever or leprosy or any disease declared by the Minister by order to be a quarantinable disease. It contains provisions for declaration of quarantine areas, control of inbound vessels, and restriction of movement of persons.

There are no due process protections in the *Public Health Ordinance*, *Public Health Regulations* and *Quarantine Act* such as

- Reasonable notice of case to the individual;
- Rights of review/appeal against adverse decisions;
- Fixed periods of duration of restrictive orders (i.e. not indefinite);
- Right of legal representation.

A person could seek judicial review of an adverse decision under principles of habeas corpus or administrative law.

4. Does the legislation authorise health-care professionals to notify sexual partners of their patients' HIV status in accordance with the following criteria:

- Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;
- The HIV-positive patient has refused to notify or consent to notification of the partner;
- A real risk of HIV transmission to the partner exists;
- The identity of the HIV-positive partner is concealed from the partner where this is possible;
- Necessary follow-up support is provided to those involved?

There are no rules or other legislation addressing confidentiality of medical information or the duty of health care professionals to notify third parties of risks posed by their patient to others.

5. Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?

There is no blood safety legislation.

All blood transfusions at Princess Margaret Hospital are screened.

CHECKLIST 2 – CRIMINAL LAW

1. Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers).

Injecting drug use is considered not to occur.

The *Dangerous Drugs Act* [Cap 32] applies to named drugs in Schedule 2. Section 14 prohibits imports or exports unless in accordance with Section 21 to 29 of the Act.

2. Does the law allow the following sexual acts between consenting adults in private:

- Homosexual acts e.g. sodomy;
- Fornication or adultery;
- Street sex work;
- Brothel or escort sex work?

The *Penal Code* [Cap 8] Section 153 prohibits 'buggery' or permitting buggery. Section 155 prohibits the commission of acts of gross indecency between males 'whether in public or private'.

Fornication and adultery are not crimes under the Penal Code.

Prostitution is illegal. The *Penal Code* at Sections 145-148 contains the following offences:

- a male person living on the earnings of prostitution;
- a woman controlling the prostitution of another woman;
- keeping or permitting the use of premises for a brothel;
- a common prostitute behaving in a disorderly or indecent manner in any public place;
- a person who in any public place solicits for immoral purposes.

- 3. If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?**

There is no exception in criminal law for HIV prevention and care services.

- 4. Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:**

- Practised by clients;
- Practiced by workers; and
- Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?

Legislation does not regulate occupational health and safety in the sex industry.

- 5. Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?**

Offences under the *Penal Code* [Cap 8] that protect women and children include:

- Sections 136(b)-(d) To procure any woman or girl to leave Tuvalu, with intent that she may become an inmate of or frequent a brothel elsewhere; or to leave her usual place of abode in Tuvalu (such place not being a brothel), with intent that she may for the purposes of prostitution become an inmate of or frequent a brothel either in Tuvalu or elsewhere – the offences requires corroboration either by another person or some material evidence implicating the accused.
- Section 136(a). Procurement of girl under 18
- Section 137. Procurement using drugs, threats or false representation
- Section 138. Householder permits defilement of girl under 13
- Section 139. Householder permits defilement of girl 13-15
- Sections 140-142. Detain in a brothel against will and selling or hiring out of girls for prostitution by parents or any other person

- 6. Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?**

The *Penal Code* provides the offence of acts intended to cause grievous harm.

It also provides at Section 176 the offence of ‘Unlawful or Negligent act likely to spread infection of disease dangerous to life’

Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

- 1. Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:**

- Information and education
- Voluntary counselling and testing
- Means of prevention e.g. condoms, bleach, and clean injecting equipment
- Treatment – ART and treatment for opportunistic infections
- Choice to participate in clinical trials (if available)?

There is no legal guarantee of access to services equal to the outside community. Section 27(1) of the *Prisons Act* [Cap 72] provides that every prisoner shall be medically examined upon admission and discharge, and at any other time the officer in charge considers necessary. The Prison Regulations (Reg. 3) provide that the prison medical officer shall ensure that all prisoners who complain of illness or are sick are examined and treated.

There are two prison facilities. One consists of holding cells near the airport; the other is at the back of the police station. It is rare for a prisoner to spend as long as a week in a cell. It is common for persons to be detained overnight because of drunkenness.⁷⁶

2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?

It is a prison offence for a prisoner to cause, or omit to assist the suppression of, violence any kind; or to take part in any attack upon any prison officer or upon another prisoner (*Prisons Act* Section 43).

3. Does the legislation provide for the confidentiality of prisoners' medical and/or personal information, including HIV status?

The prison medical officer shall notify the officer in charge of all cases of dangerous illness (*Prisons Regulations* Reg. 7). The prison medical officer shall report immediately to the officer in charge any cases of contagious or infectious diseases and shall make any recommendations that appear to be necessary (*Prisons Regulations* Reg. 10).

The officer in charge shall, subject to any directions of the Superintendent, keep record of all prisoners including any reasonable personal particulars (*Prisons Act* Section 32). It is a disciplinary offence for a prison officer without due authority to disclose or convey any information concerning any departmental matter.

4. Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?

The legislation does not require segregation of prisoners with HIV. The Superintendent has a general power to segregate classes of prisoners (*Prisons Act* Section 34). The *Prisons Regulations* (Reg. 10) provide that the officer in charge shall comply with all the recommendations of the prison medical officer in relation to prisoners with infectious diseases which are practicable and may remove any infectious prisoner to a place that has not been declared a prison.

5. Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?

Whenever the prison medical officer is of opinion that the life of any prisoner will be endangered by his continuance in prison, or that any sick prisoner will not survive his sentence, or is totally and permanently unfit for prison discipline, he shall report his opinion and the grounds thereof, in writing, to the officer in charge who shall forward the particulars of the case to the Superintendent of Prisons, who shall report the case for the orders of the Minister (*Prisons Regulations* Reg. 6).

⁷⁶ US Government State Department Bureau of Democracy, Human Rights, and Labor (2002) *Country Reports on Human Rights Practices: Tuvalu*

Legislation does not provide for compassionate release on medical grounds or reduction in sentence. Common law provides that ill health of an offender may be taken into account on sentencing as a mitigating factor. There is a discretion to take HIV into account in mitigation when deciding a prison sentence if imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk that imprisonment will have a gravely adverse effect on the offender's health (see e.g. *PP v Lim Kim Hock* [1998] SGHC 274; *Bailey v DPP* (1988) 78 ALR. 116; *R v Bernard* [1997] 1 Cr App R (S) 135).

6. Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?

Legislation does not provide for non-discriminatory access to facilities for prisoners with HIV.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

1. Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?

Although there is an anti-discrimination clause in the Constitution, disability is not included in the list of grounds of discrimination. The *Constitution* provides for freedom from discrimination, which is the treatment of different people in different ways wholly or mainly because of their different races, places of origin, political opinions, colours, religious beliefs or lack of religious beliefs (*Constitution of Tuvalu* 1986, Section 27).

2. Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?

Legislation does not provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV.

Sex and sexuality are not included in the list of grounds of discrimination under the *Constitution*.

Every person in Tuvalu is entitled to rights to protection of the law and protection for the privacy of home, whatever his (sic) sex (*Constitution* Section 11(1)). However, rights and freedoms may only be exercised in acceptance of Tuvaluan values and culture (Section 11(2)(b)).

Does the legislation contain the following substantive features:

- Coverage of direct and indirect discrimination;
- Coverage of those presumed to be infected, as well as carers, partners, family, or associates;
- Coverage of vilification;
- The ground complained of only needs to be one of several reasons for the discriminatory act;
- Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);
- Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?

There is a wide jurisdiction in relation to discrimination complaints in public and private sectors, however the grounds of disability, HIV, sex and sexuality are not covered.

3. Does the legislation provide for the following administrative features:

- Independence of a complaint body;
- Representative complaints (e.g. public interest organizations on behalf of individuals)
- Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;
- Access to free legal assistance;
- Investigatory powers to address systemic discrimination;
- Confidentiality protections e.g. use of pseudonyms in reporting of cases?

There is no Human Rights Commission or similar body established to investigate complaints. Instead, claims must be made through the courts. Section 130 of the *Constitution* provides that the High Court has jurisdiction in relation to Part II (Bill of Rights) of the *Constitution*. The High Court has original jurisdiction to hear and determine applications, may make appropriate orders and direction, or decline to take action if it considers there are already adequate means of redress. A subordinate court may refer such matters to the High Court.

The Office of the People’s Lawyer was established in 1985.

There are no specific provisions in relation to:

- Representative complaints (e.g. public interest organizations on behalf of individuals)
- Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill
- Investigatory powers to address systemic discrimination
- Confidentiality protections e.g. use of pseudonyms in reporting of cases

4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- Education and promotion of human rights;
- Advising government on human rights issues;
- Monitoring compliance with domestic legislation and international treaties and norms;
- Investigating, conciliating, resolving or arbitrating individual complaints;
- Keeping data/statistics of cases and reporting on its activities?

There is no Human Rights Commission or Ombudsman.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. Does the law ensure the equal legal status of men and women in the following areas:

- Ownership of property and inheritance;
- Marital relations e.g. divorce and custody ;
- Capacity to enter into contracts, mortgages, credit and finance;
- Access to reproductive and STD health information and services;
- Protection from sexual and other violence, including rape in marriage;
- Recognition of de facto relationships;
- Prohibition of harmful traditional practices e.g. female genital mutilation?

Ownership of property and inheritance and capacity to enter into contracts, mortgages, credit and finance

Every person in Tuvalu is entitled to rights to protection of the law whatever his (sic) sex (*Constitution* Section 11(1)). However, rights and freedoms may only be exercised in acceptance of Tuvaluan values and culture (Section 11(2)(b)).

The *Constitution* expressly recognises custom. In the absence of a guarantee that custom does not have precedence over equality between men and women, laws that discriminate against women are Constitutional if they are consistent with Tuvaluan values and culture.

The *Native Lands Ordinance* 1956 Section 15 provides that the court shall adjudicate in accordance with native customary law on all cases arising from the administration and partition of native estates.

As a result, women do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property. Patrilineal inheritance is given legislative status.

The *Tuvalu Land Code* [Cap 22] governs inheritance law, specifying different rules for different islands based on custom. Generally, succession is along patrilineal lines and sons are favoured over daughters in relation to some land and resource rights.

Tuvalu Lands Code 1962, Section 9(i) provides that in the case of a person who dies without a will, if an owner has more than one spouse then the eldest son of the first spouse will be the administrator of the estate. Section 9(ii) provides that in the distribution of the estate between the sons and daughters of an owner, the share of the eldest son shall exceed that of his brothers and the shares of sons shall exceed the shares of daughters.

Tuvalu Lands Code 1962 Section 9(4)(c) provides that if the owner dies issueless and he has no brothers and sisters and he has no will, then the lands will be distributed to his paternal next-of-kin.

Tuvalu Lands Code 1962 Section 14 provides that a husband whose wife has lived continuously with him for not less than three years immediately preceding his decease, and by whom he has no children, must make adequate provision for the wife during her lifetime. However, on the death or the remarriage of the said wife the lands and pits given for her support must revert to the husband's family.

Marital relations e.g. divorce and custody and recognition of de facto relationships

Matrimonial Proceedings Act [Cap 21] Sections 8 and 9 provides that the only ground for divorce is that the marriage has completely broken down. A range of criteria can be used to establish complete breakdown, which are fault based.

Legislation provides for maintenance orders for children and spouses. The basis on which maintenance is provided is largely at the discretion of the court. The *Maintenance (Miscellaneous Provisions) Ordinance* [Cap 4] Section 3 provides that the Court can award maintenance if there is a 'legal or customary obligation' to do so. Section 4 provides that the court shall have 'regard to all the circumstances and in particular the resources of the defendant' and order 'such sums of money that the court thinks reasonable'.

The *Matrimonial Proceedings Act* [Cap 21] 1985 Sections 10 and 13 empowers the court to make orders with respect to property as are 'Necessary and desirable' and 'shall not be unreasonable or inconsistent with any other law including Tuvaluan custom'. This does not ensure that division of marital property will include recognition of a woman's non-financial contributions during a marriage such as raising children and household duties.

Section 3 provides that custody is to be awarded 'having regard to the welfare of the child and the conduct and wishes of the mother and father' subject to *Native Lands Ordinance* [Cap 22]. The welfare of the child is the first and paramount consideration (Section 3(3)). An unmarried mother automatically loses custody of her child at the age of two years to the father (provided he admits paternity and wishes to have the custody of the child). The *Custody of Children Ordinance* [Cap 20] *Native Lands Ordinance* [Cap 22] protects a paternal right to custody. Section 20(1) provides that if in any island a single woman is delivered of a child the court may summon the woman and 'all other such natives as it may think fit' and enquire into the paternity of the child. Section 20(2) provides that if the father being a native accepts the child as being his after reaching the age of 2 it shall reside with the father or his relations and shall in accordance with native customary law inherit land and property from his father in the same way as the father's legitimate children. This provision discriminates against women.

In *Tepulolo v Pou*⁷⁷ it was ruled that custody of a child should be awarded to the father as against the mother, substantially on the ground that only in that way would the child inherit land.

Bigamy is discriminatory to women. The *Penal Code* [Cap 8] Section 163 provides that bigamy an offence. However, customary marriage an exception (Section 163(2)).

De facto relationships are not legally recognised.

Access to reproductive and STD health information services

The law does not give women a specific right of non-discriminatory access to services. Abortion is criminalised with a severe penalty of life imprisonment. Women do not have access to sexual and reproductive health services including safe abortion facilities as of right. The *Penal Code* prohibits the procuring of abortion of a woman, or a woman procuring her own abortion, or supplying a woman with means to procure an abortion (Sections 150-152; and Section 26 of the *Pharmacy and Poisons Act* [Cap 33])

Protection from sexual violence, including rape in marriage

The *Penal Code* defines rape as occurring against a woman or girl (Section 128). There is no exclusion for a man raping his wife, so marital rape is an offence. The *Penal Code* [Cap 8] provides a range of sexual assault offences including rape (Section 128), attempted rape (section 130) and indecent assault (Section 133).

Section 156 (5) of the Penal Code provides that any female person of or above the age of 15 years who with consent permits her grandfather, father, brother or son to have sexual intercourse with her, shall be guilty of felony. This provision has the effect of criminalising 15 to 17 year old girls who have been victims of incest, rather than protecting them.

- 2. Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

There are no laws prohibiting mandatory testing of groups.

⁷⁷ [2005] TVHC 1; Case No 17 of 2003 (24 January 2005 Ward CJ)

3. **Does the law require children to be provided with age-appropriate information, education and means of prevention?**
There are no laws requiring children to be provided with information or education about HIV and STIs, or to be provided with condoms or other means of prevention.
4. **Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:**
 - **Consent to voluntary testing with pre- and post-test counselling;**
 - **Access to confidential sexual and reproductive health services?**

There are no laws specifically addressing children and young people's rights of informed consent and access to confidential sexual and reproductive health services.
5. **Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?**
The Penal Code [Cap 8] provides offences for abduction (Section 131), defilement of a girl under 13 (Section 134), defilement of girl 13 – 15 years (Section 135) and indecent assault (Section 133).
6. **Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?**
The law does not recognize same sex relationships. There is no age of consent for homosexual acts.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

1. **Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data?**
There is no privacy or confidentiality legislation relating to medical records. Medical records are subject to common law confidentiality protections.

Section 21 of the *Constitution* guarantees every person in Tuvalu the fundamental right to 'protection for the privacy of home and property'. It is not clear whether this could be relied on to argue for protection of privacy of medical records, as records may not be considered as the property of a patient.
2. **Does the legislation prohibit unauthorised use and disclosure of such data?**
There is no legislation. Common law allows disclosure of medical records in limited public interest circumstances, such as to prevent injury to third parties.
3. **Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are:**
 - **Accurate;**
 - **Relevant;**
 - **Complete;**
 - **Up-to-date?**

There is no legislation.
4. **Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:**

- Education and promotion of privacy;
- Advising government on privacy issues;
- Monitoring compliance with domestic legislation and international treaties and norms;
- Investigating, conciliating, resolving or arbitrating individual complaints;
- Keeping data/statistics of cases and reporting on activities?

There is no legislation.

5. **Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

There are no HIV specific provisions. Article 10 of the *Constitution* provides that court proceedings shall be held in public except with the consent of all parties, or in circumstances where publicity would prejudice, among other things, the interests of justice or the protection of the private lives of persons concerned in the proceedings.

6. **Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

There is no legislation providing for reporting of HIV or AIDS cases to public health authorities for epidemiological purposes.

CHECKLIST 7 – EMPLOYMENT LAWS

1. **Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

HIV screening for employment is not prohibited.

2. **Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Legislation does not prohibit mandatory testing of specific employment groups

3. **Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

Legislation does not specifically require implementation of universal infection control measures.

Employment Ordinance [Cap 84] Section 107 provides a general duty to provide for the medical care of workers.

An employer's failure to provide effective infection control systems in health care workplaces may be a breach of duty of care to employees and patients.

4. **Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

Legislation does not specifically require provision of access to information and education about HIV.

5. **Does the law provide for:**
- **Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
 - **Social security and other benefits where workers are no longer able to work?**
- There are no unfair dismissal provisions relating to dismissal of employees with disabilities such as HIV. Legislation establishes the Tuvalu National Provident Fund, which is owned by its members and provides incapacity benefits (*National Provident Fund Act 1986*).

6. **Does the law provide for confidentiality of employees' medical and personal information including HIV status?**
- Legislation does not provide for confidentiality of employees' medical and personal information including HIV status.

7. **Does workers' compensation legislation recognize occupational transmission of HIV?**
- Workmen's Compensation Ordinance* [Cap 83] does not recognize occupational transmission of HIV.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. **Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?**
- There is no legislation.
2. **Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:**
- **Safe; and**
 - **Efficacious?**
- The *Pharmacy and Poisons Act* [Cap 33] Section 28 provides that the British Pharmacopoeia as published in England shall be the Pharmacopoeia in force in Tuvalu as the standard of quality or composition for all drugs or medicines.
3. **Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?**
- The *Pharmacy and Poisons Act* [Cap 33] contains provisions at Sections 26-27 regarding the dispensing and advertising of drugs, medicines, instruments or appliances in relation to venereal disease and sexual intercourse. Sections 34-36 regulate labelling of imported medicines. *Sale of Goods Act 1991* Section 14 provides that if there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description. Forging certificates with intent to deceive is a crime under Section 330 *Penal Code*. Uttering forged documents with intent to defraud is a crime under Section 336 *Penal Code*.
4. **Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?**
- There is no legislation.
5. **Does the legislation ensure the accessibility and free availability of the following prevention measures:**
- **Condoms**

- Bleach
- Needles and syringes?

The *Pharmacy and Poisons Act* [Cap 33] contains at Sections 27 a prohibition on publishing any statement, whether by advertisement or otherwise, to promote the sale of any article as an instrument or appliance for preventing conception. This could be interpreted as preventing promotion of male and female condoms. This prohibition does not apply to any advertisement, notice or recommendation published by the authority of the Minister.

6. **Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?**

Tuvalu is not a member of WTO. The *Registration of United Kingdom Patents Act* provides that the grantee or holder of a United Kingdom patent may re-register it in Tuvalu. There is no power to issue compulsory licences for government use of generic medicines in the public health system or for parallel importing of medicines that are marketed more cheaply in other countries.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

1. **Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?**

There is no Human Research Ethics Committee.

2. **Does the legislation require subjects to be provided before, during and after participation with:**

- Counselling
- Protection from discrimination;
- Health and support services?

3. **Does the legislation provide for informed consent to be obtained from the subjects?**
 4. **Does the legislation provide for confidentiality of personal information obtained in the process of research?**
 5. **Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?**
 6. **Does the legislation provide for non-discriminatory selection of subjects?**

There are no specific legislative requirements in relation to research in Tokelau.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

1. **Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?**

The Constitution provides a right to freedom of movement (Article 26). This right may be difficult to enforce in the case of movement of sex workers or men who have sex with men, as soliciting and homosexual behaviour remain crimes. Exceptions to the right of freedom of movement apply to restrictions on movement reasonably required in the interests of public health or public morality.

2. Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?

The Constitution provides a right to assemble and associate (Article 25). This may be difficult to enforce in practice, particularly in the case of associations of sex workers or men who have sex with men, as soliciting and homosexual behaviour remain crimes.

3. Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?

There are no exceptions in censorship legislation for HIV information that contains sexually explicit information or images.

The *Penal Code* Section 166 prohibits the making, production, possession, importation, exportation, conveyance, dealing in, distribution, exhibition or lending of obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematography films, or any other obscene objects, or any other object tending to corrupt morals, and the public exhibition of any indecent show or performance or any show or performance tending to corrupt morals.

The *Cinemas and Films Ordinance* [Cap 11] requires the censorship of all films to be publicly exhibited. The film censor has an absolute discretion to refuse to certify a film for public exhibition, and an appeal lies to the Minister.

4. Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?

No broadcasting standards were identified.

5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:

- Health care workers
- Other industries where there may be a risk of transmission, e.g. sex or funeral workers;
- Media;
- Superannuation and insurance;
- Employers (in a tripartite forum involving unions and government)?

There is no legislation requiring professional groups to develop or enforce HIV Codes of Practice.

6. Are such Codes of Practice required to contain the following elements:

- Confidentiality/privacy protections;
- Informed consent to HIV testing;
- Duty not to unfairly discriminate; and
- Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?

No Codes are required by legislation.

SUMMARY AND RECOMMENDATIONS

The *Public Health Ordinance* and *Quarantine Act* are inappropriate for the management of HIV and STIs.

Priority actions to build a human rights framework for addressing HIV include:

- (i) amending the *Public Health Ordinance* to remove AIDS from the list of infectious diseases, and to introduce provisions for confidential notification, voluntary and confidential testing and counselling, contact tracing with consent, and right to access information about sexual and reproductive health and means of prevention of HIV and STIs;
- (ii) enacting anti-discrimination legislation that covers discrimination on the grounds of HIV status, disability, sex, sexuality, and transgender status; and.
- (iii) decriminalizing homosexuality, sex work and abortion.

The offences related to prostitution and homosexuality involving consenting adults in private contravene the human right to privacy and undermine HIV and STI prevention and care efforts.

The offence of abortion (miscarriage) contravenes the rights of women and girls to make their own reproductive choices.

Legislation should guarantee that custom does not have precedence over rights to equality between men and women. This would remedy the inequality experienced by women under the Lands Act, customary laws relating to property and inheritance, and the law of bigamy.

De facto relationships including same sex relationships should be recognised by law.

The provision of the *Native Lands Act* that provides that an unmarried mother automatically loses custody of her child at the age of two years to the father should be repealed.

Section 156 (5) of the Penal Code, which criminalises underage girls involved in incest, should be repealed.

Blood safety legislation is required.

Legislation is required to ensure that condoms comply with international quality standards.

Male and female condoms should not be subject to the prohibition on publishing any statement, by advertisement or otherwise, to promote the sale of articles for preventing conception (*Pharmacy and Poisons Act* Section 27).

Legislation that requires the teaching of sex education in schools within the context of learning life skills and promoting health would help prevention efforts.

Exceptions should be introduced in censorship legislation for HIV information that contains sexually explicit information or images for bona fide educational or health promotion purposes.

Patents legislation should include powers to issue compulsory licences for government use of generic medicines in the public health system and for parallel importing of medicines that are marketed more cheaply in other countries.

7.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

Development of HIV-specific Law

With the assistance of RRRT a Cabinet Paper seeking in principle approval for drafting of human rights compliant HIV legislation was prepared. Cabinet approval has been gained and an initial draft HIV and AIDS Prevention and Control Bill has been prepared (incorrectly labelled HIV and AIDS Prevention and Control Act). The Bill is currently the subject of stakeholder consultations. Such consultations would be assisted by the concurrent development of what will be required by Parliament as the Explanatory Memorandum.

Falekaupule Act 1997

Police Powers and Duties Act 2009

This Act was absent from consideration in LCR 2009. Originally under the Local Government Act (Cap. 19), under an English style model, local government councils were established on each island of Tuvalu. They were predominantly responsible for running each islands affairs but, until 1997, and the Falekaupule Act, the role of the Kaupule of each island was limited to electing a president for the local council. The Falekaupule Act 1997 was passed to extend the statutory recognition and roles of the Kaupule, including transferring to them the functions of the previous local government councils. Another aim was to confer greater autonomy on the islands in conducting their own financial and staffing affairs and their general decision-making.

This is relevant for 2 reasons. First, the 8 Kaupule have functions to be exercised concurrently with the functions of any other (national government) bodies given under other Acts that are listed. The Quarantine Act and the Public Health Act are listed; thus the Kaupule share functions with respect to those Acts.

Second, the Kaupule have a significant role in the legislative process and, ultimately, in the potential success of legislation passing through Parliament. The Kaupule are significant stakeholders in new legislation being developed because, under the Rules of Procedure of the Tuvaluan Parliament, they are sent every Bill that passes its first reading, together with a copy of the debate at first reading. The Kaupule then considers and comments on a bill by an assigned date. A paper giving a resume of all Kaupule comments is distributed to members of Parliament before the second reading and thus Kaupule comments may be crucial in the legislative success of a Bill.

Employment Law

A legislative review of the Employment Ordinance [Cap 84] is planned for 2013 – with technical support from the ILO.

Public Health Ordinance [Cap. 35]

Draft Public Health Bill 2008

(Magistrates' Courts Act)

The author notes comments made during stakeholder discussion of the Draft Public Health Bill 2008 prepared by Allen & Clarke to assist compliance with the International Health Regulations (2005) that suggested penalties were too high for the jurisdiction of the Magistrates' Courts. Of relevance to that development, and in the development of an HIV Bill, section 25 (3) permits, despite the usual jurisdictional limits of the Magistrates' Court, the Senior Magistrate and the Chief Justice by Order to invest the Magistrates' Court with

jurisdiction to try summarily any offence which would otherwise be beyond its jurisdiction. This was done by the Chief Justice with respect to the Fisheries Ordinance 1978 (now repealed) and the increase in jurisdiction for the Magistrates' Court is still permitted with respect to the hearing of offences under the Marine Resources Act [Cap. 48.20]. Under that Act some offences attract liability upon conviction to fines of \$20,000 and imprisonment for 6 months for citizens of Tuvalu. (For non-citizens, fines can be as high as \$250,000 and even \$500,000).

8. VANUATU

8.1 LEGISLATIVE DATA-BASES

<http://www.pacii.org>

Constitution

Consolidated Legislation—2006 Edition

Sessional Legislation—1985—2012

Subsidiary Legislation—Index to Statutory Orders and Table of Operational Standing Orders (by Act)

United Kingdom Legislation in Vanuatu

Link to Vanuatu Law Commission

<http://www.lawcommission.gov.vu>

Information concerning current references

Discussion papers not available direct from site but email link to obtain is provided

Legislative review reports

<http://www.parliament.gov.vu>

Lists of Bills for Sessions of Parliament (up to 2013 list for the Extra Ordinary Session of Parliament)

8.2 INTERNATIONAL TREATIES AND OBLIGATIONS

International Covenant on Civil and Political Rights (ICCPR) signature 29 November 2007 and ratification 21 November 2008

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) accession 8 September 1995

Optional Protocol to CEDAW accession 17 May 2007

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) accession 12 July 2011

Convention on the Rights of the Child (CRC) signature 30 September 1990 and ratification 7 July 1993

Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography signature 16 September 2005 and ratification 17 May 2007

Convention on the Rights of Persons with Disabilities (CRPD) signature 17 May 2007 and ratification 23 October 2008

International Health Regulations (2005) (IHR (2005)) to which Vanuatu became bound through membership of the International Health Assembly of the World Health Organization on 15 June 2007

Member of International Labour Organisation (ILO)

Engaged in consultations on membership of World Trade Organization (WTO)

8.3 CONSTITUTIONAL PROTECTIONS

The information given in LCR 2009 for Vanuatu remains accurate.

8.4 NATIONAL PLANS AND REPORTS

Government of the Republic of Vanuatu, Health Sector Strategy 2010-2016: Moving Health Forward

Republic of Vanuatu, Global AIDS Response Progress Report 2012, 31 March 2012.

SPC, Second Generation Surveillance of Antenatal Women, STI Clinic Clients and Youth, Vanuatu, 2008

McMillan K & Worth H (2011) Risky Business Vanuatu: Selling sex in Port Vila. International HIV Research Group, UNSW, Sydney

8.5 LAWS OF RELEVANCE TO FOCUS AREAS

Administration of Estates Act 1935 [UK]

Censorship of Films Act [Cap. 72]

Correctional Services Act 2006

Disciplinary Committee Order No. 71 of 2009

Dangerous Drugs Act [Cap. 12]

Education Act 2001

Education Regulation Order No. 44 of 2005

Employment Act [Cap. 160]

Employment (Amendment) Act No. 25 of 2010

Family Protection Act 2008

Health and Safety At Work Act [Cap. 195]

Immigration Act 2010

Approved visa application forms Gazette No. 12 of 2011

Immigration Visa Regulation Order No 180 of 2011

Bill for the Immigration (Amendment) Act 2013 listed for the 2013 Extra Ordinary Session of Parliament – not sighted by author

Island Courts Act [Cap. 167]

Island Courts Powers of Magistrates Orders of 1990, No 1 and 2 of 2003, No 1 and 2 of 2005, and No 2 of 2009

Island Courts Rules Order No. 28 of 2005

Judicial Services and Courts Act No. 54 of 2000

Declaration of Approval of Civil Procedure Rules Order No. 49 of 2002

Declaration of Approval of Constitutional Procedures Rules Order No. 26 of 2003

Declaration of Approval of Probate and Administration Rules Order No. 28 of 2003

Judicial Services and Courts Order No. 30 of 2003

Bill for the Judicial Services and Courts (Amendment) Act of 2013 listed for the 2013 Extra Ordinary Session of Parliament – not sighted by author

Labour (Work Permits) Act [Cap. 187]

Bill for the Labour (Work Permits) (Amendment) Act of 2013 listed for the 2013 Extra Ordinary Session of Parliament – not sighted by author

Matrimonial Causes Act 1986 (section 17A claim of damages for adultery)

Obscenity Act [Cap. 73]

Ombudsman's Act [No. 27 of] 1998

Patents Act 2003 – author uncertain whether this Act (which was drafted to make Vanuatu TRIPS compliant) has commenced.

Patents (Amendment) Act No. 14 of 2011 – not sighted by author

Declaration of Convention Countries Order No. 42 of 2012 – not sighted by author

Penal Code [Cap. 135]

Public Health Act [Cap. 234 of] 1994**Public Service Act No. 11 of 1998**

Public Service (Amendment) Act No. 1 of 2011

Public Service (Disciplinary Board) (Procedure Rules) Order No. 3 of 1999

Registration of United Kingdom Patents Act [Cap. 80]

Registration of United Kingdom Patents (Amendment) Act 2008 whereby Vanuatu legislated to re-register EU patents

Quarantine Act [Cap. 1]**Sale of Medicines (Control) Act [Cap. 48]**

Sale of Medicines (Amendment) Order No. 12 of 2007

Vanuatu National Cultural Council Act 1988**Vanuatu National Provident Fund Act 1986**

Bill for the Vanuatu National Provident Fund (Amendment) Act of 2013 listed for the 2013 Extra Ordinary Session of Parliament – not sighted by author

Wills Act [Cap. 55] of 1969**Workmens' Compensation Act 1987**

Workmens' Compensation Commencement Order No. 6 of 2004

8.6 VANUATU LCR 2009**(The content of Vanuatu LCR 2009 is reproduced as published in March 2009)****HIV, ETHICS AND HUMAN RIGHTS: Review of legislation of Vanuatu****Joint project of UNDP Pacific Centre, Regional Rights Resource Team SPC and UNAIDS****March 2009****Introduction and methodology**

This review uses the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV and STIs in Vanuatu. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006⁷⁸.

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.⁷⁹ The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

- Public health law.
- Criminal law.

⁷⁸ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>

⁷⁹ UNAIDS/IPU. Geneva, 1999.

- Prisons/correctional laws.
- Anti-discrimination legislation.
- Equality of legal status of vulnerable populations.
- Privacy/confidentiality laws.
- Employment law.
- Therapeutic goods, consumer protection laws.
- Ethical human research.
- Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country's legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.⁸⁰

⁸⁰ See *Consolidated Guidelines* paras 102-103.

Background

In total, five people have been diagnosed with HIV in Vanuatu (as at 2008), two of whom have died. Sexual transmission is considered the most likely mode of HIV transmission and one of the cases was infected through mother to child transmission. The first HIV-positive case was reported in 2002, generating considerable public interest and giving impetus to health service improvements in the areas of counseling, blood safety and testing.

Public exposure and extreme levels of stigma were experienced by the first person to be diagnosed with HIV in Vanuatu and there is anecdotal evidence to suggest that this has led to reluctance by people who may have been exposed to HIV to come forward for testing. STI surveillance reveals high population prevalence of other STIs. 13% of pregnant women studied tested positive for genital Chlamydia and 2.4% for gonorrhoea.⁸¹ There is clear potential for a sexually transmitted HIV epidemic.

Socio-cultural factors contributing to HIV vulnerability include:

- high prevalence of STIs, which amplify HIV transmission risk;
- low condom use and limited availability of prevention information;
- tourist industry and transactional sex;
- increased urban and overseas migration;
- high birth rates and youthful population;
- low status of women and high incidence of domestic violence.

There is reasonable access to health facilities, however the quality of services delivered is inadequate due to limited resources. There are five main hospitals with a number of health centres (26), dispensaries (104) and aid posts (188) where awareness programs at community level are provided.

Representational health committees are established for each health area, which is an area served by one or more health facilities (other than hospitals). Medical services are free.

Reproductive and sexual health services are provided by the Ministry of Health through hospitals, health centres and dispensaries, and through the services of NGOs including Vanuatu Family Health Association, Wan Smol Bag and World Vision international. Since 2004 there has been an increase in NGOs working in sexual health and HIV. Wan Smol Bag, Vanuatu Family Health Association, Municipal Dispensaries, Catholic Dispensaries, World Vision international, Save the Children- Australia, Young People's Project, IZA Foundation, Oxfam and the Foundation of the People's of the South Pacific provide HIV awareness activities.

Legal system⁸²

Vanuatu has a combined common law system, incorporating British, French and customary law. The law comprises the *Constitution*, common law, Vanuatu legislation and case law, British and French statutes and Joint Regulations applying at the time of Independence, plus

⁸¹ World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41, p.115

⁸² Information on court and legal systems derived from Pacific Islands Legal Information Institute <www.paclii.org>

Vanuatu customary law. A National Council of Chiefs may advise on any aspect of customary law in connection with Bills before Parliament (Art. 30(2)).

The Supreme Court has unlimited jurisdiction to hear and determine civil and criminal proceedings. Appeals lie to the Court of Appeal. Magistrates' Courts have limited civil and criminal jurisdiction. Island Courts have limited jurisdiction, and are empowered to administer the customary law so far as it is not in conflict with written law and is not contrary to justice, morality and good order.

International obligations

Vanuatu is a member of the United Nations, and party to Convention of the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. Vanuatu ratified the two Optional Protocols to the Convention on the Rights of the Child and the Optional Protocol to CEDAW on 2007. Vanuatu ratified the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities in 2008.

HIV policy framework

The Ministry of Health has developed a *National HIV/AIDS Strategic Plan 2008-2012* covering four priority areas. These priorities are: to reduce the community vulnerability to HIV and STIs; to implement a comprehensive intervention of treatment, care and support for people infected and affected by HIV; to create a policy and social environment in which an effective HIV response can flourish; and to manage and implement the *National HIV/AIDS Strategic Plan* efficiently and effectively. The Government has also developed a Prevention of Mother to Child Transmission Policy and guidelines, and a draft HIV Workplace policy.

CHECKLIST 1 – PUBLIC HEALTH LAW

1. Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:

- **Information and education**
- **Voluntary testing and counselling**
- **STD, sexual and reproductive health services**
- **Access to means of prevention e.g. condoms and clean injecting equipment**
- **Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?**

There is no legislation requiring provision of HIV prevention and treatment services. Legislation does not specifically recognise the human right to the highest attainable standard of health.

However, the Minister for Health is responsible for promoting the health of the population (*Public Health Act 1994* Section 2).

It is the duty of every local authority (municipal or local council) to take all lawful, necessary, and reasonably practicable measures for preventing the occurrence of preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred or imposed on it by the Public Health Act or by any other law (*Public Health Act 1994* Section 6).

2. Does the legislation:

- **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
- **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?**

Legislation does not address issues of informed consent to HIV tests or counselling. The common law of England applies, which requires consent to a blood test. If consent is not given, the person taking blood may be liable under civil and/or criminal law for assault. Common law does not require pre and post test counselling.

Section 11 of the *Public Health Act 1994* provides that if the Director is satisfied, subject to the approval of the Minister -

- (a) that there is reason to believe that a person is or has been suffering from a notifiable disease or, though not suffering from such a disease, is a carrier of the disease; and
- (b) that in the interest of such a person or in the interest of his family, or in the public interest, it is expedient that he should be medically examined; and
- (c) that such a person is not under treatment of a medical practitioner or the medical practitioner who is treating him consents to the making of an order under this section,

the Director may make an order for such a person to be medically examined by a medical practitioner nominated by the Director.

HIV and AIDS are notifiable diseases under the *Public Health Act 1994*. The provisions of the *Public Health Act 1994* in relation to notifiable diseases commenced in 2002.

Under Section 4 of the *Immigration Act* [Cap 66], the Principal Immigration Officer may require any intending entrant to produce any necessary documents. Policy is that for any type of residence permit, an applicant must provide a Medical Certificate stating 'medical condition'. Under Section 4 of the *Immigration Act*, the Principal Immigration Officer may require any intending entrant to submit to a medical examination. A person suffering from a contagious or infectious disease 'which makes his presence in Vanuatu dangerous to the community' may be declared a prohibited immigrant (Section 15(2)).

3. **Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?**

Does the legislation provide in such cases the following due process protections:

- **Reasonable notice of case to the individual;**
- **Rights of review/appeal against adverse decisions;**
- **Fixed periods of duration of restrictive orders (i.e. not indefinite);**
- **Right of legal representation?**

The *Public Health Act 1994* includes powers of detention and isolation (Section 11) and there are numerous provisions in the Act relating to prevention of casual transmission of notifiable diseases (e.g. restrictions on riding on public conveyances, letting of houses etc). HIV and

AIDS are notifiable diseases. Part 3 (Prevention and Suppression of Notifiable Diseases) of the 1994 Act includes the following provisions —

- the head of the family, owner or occupier of lodgings etc should notify the nearest registered nurse, medical officer or environmental health officer, who should notify senior/area medical officers (Section 8)
- the Minister may cause isolation hospitals to be established and order surveillance, restraint, isolation, removal and treatment of persons infected, vaccination programs, etc (Section 9) and order medical examinations of suspected infected persons and suspected carriers in some circumstances (Section 11)
- a medical officer may authorise the isolation or exclusion of persons exposed to infection and in the incubation stage (Section 12(1))
- a child may not attend school until or unless a medical practitioner certifies that there is no undue risk of communicating the disease to other children (Section 12(3))
- infected persons should not expose others to the risk of infection in public places, conveyances, or carry on business which might spread the disease, give, lend or sell bedding, clothes or rags which might spread infection (Section 13)
- public conveyances should be disinfected after conveying a person with a notifiable disease (Section 14)
- dwellings and premises where a person has suffered from a notifiable disease should also be disinfected before letting or hiring (Section 15) and a medical or environmental health officer may prohibit work on such premises (Section 18)
- infected persons shall not enter a swimming pool (Section 17)
- lengthy provisions for dealing with bodies of persons dying from a notifiable disease (Section 19).

All these provisions are discretionary only, and the Minister may, by Regulation, provide that all or any of them do not apply in relation to a specified notifiable disease.

The *Quarantine Act* [Cap 1] covers both human and animal disease. As well as the quarantine requirements placed on inbound vessels, it requires medical personnel to notify outbreaks of ‘epidemic disease’ and quarantine stations may be set up for isolation of infected persons disembarked from ships. Although it is unlikely that the *Quarantine Act* provisions would be applied to quarantine people living with HIV given the lack of risk to others, it would be helpful if legislation could specifically exclude HIV from the Act.

The *Education Act 2001* provides at Section 39 that all school students should be examined at regular intervals by a qualified medical practitioner, and students who have ‘a condition likely to endanger the health of other students’ may be excluded from school until no longer a danger. Parents may request the exemption of their children from this examination, provided the principal is satisfied that the student will be examined privately. There is a risk that this provision could be used to exclude a child with HIV from school, although there is no risk of transmission through casual contact.

4. Does the legislation authorise health-care professionals to notify sexual partners of their patients’ HIV status in accordance with the following criteria:

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;**
- **The HIV-positive patient has refused to notify or consent to notification of the partner;**
- **A real risk of HIV transmission to the partner exists;**

- **The identity of the HIV-positive partner is concealed from the partner where this is possible;**
- **Necessary follow-up support is provided to those involved?**

There is no legislation defining the criteria to be applied by health care workers before notifying sexual partners of the person's HIV or STI status. English common law applies, which generally requires medical confidentiality to be maintained, but may allow disclosure in the public interest in circumstances where there is a specific and substantial or significant physical risk to others. The common law has not defined the steps that need to be taken prior to disclosure of HIV status. The common law is ambiguous on these issues (*W v Egdell* [1990] 1 All ER 835; *X v. Y* [1988] All ER 648). Legislation would be helpful to clarify how health care workers should balance their duty of confidentiality to people living with HIV and their duty of care to third parties such as sexual partners, such that disclosure only happens in exceptional circumstances.

5. Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?

No legislation was found providing for protection of the blood, tissue, and organ supply against HIV contamination. Blood safety legislation should be introduced that provides for screening of donated blood for HIV and other blood borne diseases.

CHECKLIST 2 – CRIMINAL LAW

1. Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers)?

No reports of injecting drug use in Vanuatu were found, so legislation relating to needles and syringes is not considered necessary.

The *Dangerous Drugs Act* [Cap.12] prohibits the importation, sale, supply or possession in Vanuatu of listed narcotic drugs. Exception is made for listed medicinal drugs, and for the possession of a drug legitimately compounded and prescribed for medicinal purposes.

In 2001 the International Narcotics Control Board reported that Vanuatu had been identified as a country is used by drug traffickers as a transit point for consignments of heroin originating in South-East Asia.⁸³ Use of injecting drugs often coincides with heroin trafficking routes. Therefore there may be a risk of injecting practices being introduced to the community in the future.

2. Does the law allow the following sexual acts between consenting adults in private:

- **Homosexual acts e.g. sodomy;**
- **Fornication or adultery;**
- **Street sex work;**
- **Brothel or escort sex work?**

⁸³ See: www.incb.org/pdf/e/ar/2001/incb_report_2001_notes.pdf

Homosexual acts e.g. sodomy

Section 99 of the *Penal Code* provides that no person shall commit any homosexual act with a person of the same sex under 18 years of age, whether or not that person consents. Consensual sex between same-sex adults is therefore not criminalised.

Fornication or adultery

The law allows spouses to claim damages for adultery, which reflects custom. Allowing damages for adultery is demeaning and should be repealed. It may act as a disincentive to open and honest discussion of sexual relations, which is important in the context of HIV prevention. *Matrimonial Causes Act 1986* [Cap 192], Section 17A provides that a petitioner may on a petition for divorce claim damages on the ground of adultery. Adultery is a serious offence in custom and thus, customarily punishable so that damages claimed in that respect are punitive but not compensatory: *Banga v Waiwo* Unreported Appeal Case No.1, 17/6/1996.⁸⁴

Street sex work, brothel or escort sex work?

The *Penal Code* prohibits the procuring, aiding or facilitating the prostitution of another person, or sharing in the proceeds of or being subsidised by the prostitution of another person (Section 101). It also prohibits behaving in a disorderly or indecent manner in any public place for the purpose of prostitution, or soliciting for immoral purposes in any public place (Section 148).

3. **If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?**
There is no exception in criminal law for HIV prevention and care services.
4. **Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:**
 - Practised by clients;
 - Practiced by workers; and
 - Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?

Legislation does not regulate occupational health and safety in the sex industry.
5. **Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?**
There is no legislation prohibiting coercion of adults or children into sex work, or prohibiting trafficking or sex tourism.
6. **Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?**
There is no HIV-specific offence relating to HIV transmission. General *Penal Code* provisions relating to assault, aggravated assault, murder and manslaughter may apply to deliberate transmission of HIV. The *Penal Code* provides two offences that could be applied in the case of intentional or reckless transmission of HIV—

⁸⁴ See: S Farran .What is the Matrimonial Property Regime In Vanuatu? (2001) *Journal Of South Pacific Law* 5 Working Paper 4

Section 107. No person shall commit intentional assault on the body of another person.

Penalty:

- (a) if no physical damage is caused, imprisonment for 3 months;
- (b) if damage of a temporary nature is caused, imprisonment for 1 year;
- (c) if damage of a permanent nature is caused, imprisonment for 5 years;
- (d) if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 10 years.

Section 108. No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.

Penalty:

- (a) if the damage so caused is purely temporary, imprisonment for 3 months;
- (b) if the damage so caused is permanent, imprisonment for 2 years;
- (c) if the damage so caused results in death, imprisonment for 5 years.

The year-and-a-day rule is found at Section 111, meaning that a murder or unlawful killing prosecution would not be possible (because death from HIV would have to occur within a year and a day of the act of HIV transmission).

The *Public Health Act 1994* Section 13 provides an offence for any person who -

- (a) knowing that he is suffering from any notifiable disease, wilfully exposes himself without proper precaution against spreading the notifiable disease, in any street, public place, shop, inn, public conveyance or vessel, or enters any public conveyance or vessel without previously notifying the owner, conductor, driver or master thereof that he is so suffering; or
- (b) being in charge of any person so suffering and in the knowledge that he is so suffering, so exposes such sufferer; or
- (c) knowing that the is suffering from a notifiable disease, engages in or carries on any trade, business or occupation which he cannot engage in or carry on without risk of spreading the disease;
- (d) gives, lends, sells, transmits or exposes, without previous disinfection, any bedding, clothing, rags or other things which have, to his knowledge, been exposed to infection from any such disease.

Penalty is a fine not exceeding VT300.000 and/or imprisonment for a term not exceeding 3 years. HIV is a notifiable disease.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

1. **Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:**
 - **Information and education**
 - **Voluntary counselling and testing**
 - **Means of prevention e.g. condoms, bleach, and clean injecting equipment**
 - **Treatment – ART and treatment for opportunistic infections**
 - **Choice to participate in clinical trials (if available)?**

There are three prisons. There are no specific provisions relating to HIV testing, prevention or treatment in prisons.

The *Correctional Services Act 2006* Section 22 states that prisoners have the right of access to medical care and treatment, and regular health inspections. The correctional centre manager must ensure that all detainees are kept in a correctional centre that is safe and secure with humane living conditions (Section 21).

In 1999 the Ombudsman Commission reported that the physical condition of the prisons, in particular Central Prison, violated prisoners' fundamental constitutional right to security of the person, i.e. a safe, healthy environment. In 2008 the Stade Prison was burnt down by prisoners protesting concerns about conditions.

A 2007 US Government report found that conditions were poor at the small, dilapidated prisons and below international standards.⁸⁵ In 2006 the government began a modernization program to replace outdated prisons. The *Correctional Services Act* created a new Department of Correctional Services. The Government permits prison visits by human rights monitors.

2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?

There are no specific provisions relating to protection of prisoners from intentional transmission of disease. Assaults are prison offences (Section 26 *Correctional Services Act*).

3. Does the legislation provide for the confidentiality of prisoners' medical and/or personal information, including HIV status?

Legislation does not provide for the confidentiality of prisoners' HIV status or medical/personal information.

4. Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?

There are no requirements for segregation of prisoners with HIV. Section 38 of the *Correctional Services Act* provides for confinement of a prisoner who is a risk to other detainees. A detainee subjected to separate confinement is entitled to be regularly examined by a medical practitioner or a registered nurse who may make a recommendation on medical grounds that the correctional centre manager remove the detainee from such confinement.

5. Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?

Legislation does not provide for compassionate release on medical grounds or reduction in sentence. Common law provides that ill health of an offender may be taken into account on sentencing as a mitigating factor in some circumstances e.g. where the illness would potentially be aggravated by imprisonment making the punishment harsher.

⁸⁵ Government of USA (2007) *State Department Country Report on Human Rights: Vanuatu*
<http://www.state.gov/g/drl/rls/hrrpt/2006/78795.htm>;
<http://www.state.gov/g/drl/rls/hrrpt/2007/100542.htm>

6. Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?

Legislation does not provide for non-discriminatory access to facilities for prisoners with HIV. However, all prisoners have equal rights under the *Correctional Services Act* to:

- (a) have a bed and clean beddings; and
- (b) have access to washing facilities so that every detainee may have a bath or shower as necessary for hygiene; and
- (c) have access to clean drinking water and food; and
- (d) have natural or artificial light; and
- (e) have access to sanitary facilities and products; and
- (f) shaving facilities; and
- (g) have clean and acceptable clothing; and
- (h) have a minimum of two hours of outdoor physical exercise in fresh air and sunlight every day; and
- (i) have access to private visitors; and
- (j) have access to a legal counsel and to communicate with him or her freely, without censorship and in confidence; and
- (k) have access to medical care and treatment, and regular health inspections; and
- (l) receive and send correspondences and telephone communications.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION**1. Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?**

Vanuatu has ratified the Convention on the Rights of Persons with Disabilities (*Convention on the Rights of Persons with Disabilities (Ratification) Act 2008*). There is no law specifically prohibiting HIV discrimination or discrimination against persons with physical or mental disabilities. There is a national policy designed to protect the rights of persons with disabilities. The protection and care of people with disabilities is primarily left to the traditional extended family and to NGOs.

The *Education Act 2001* provides at Section 8 that a child is not to be refused admission to any school on account of his or her gender, religion, nationality, race, language or disability. Disability is not defined, but arguably may include HIV.

2. Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?

There are very weak legal protections for vulnerable groups. There are no specific protections for people living with HIV or those assumed to have HIV by reason of their membership of a vulnerable group.

The *Penal Code* Section 150 provides that no person shall discriminate against another person with respect to the right to the supply of goods or services, or to gain or continue in any employment, or to be admitted to any public place, by reason of the sex, ethnic or racial origin, or the religion of such other person. Penalty: Imprisonment for 2 years. As it is a criminal offence there is a high standard of proof i.e. beyond reasonable doubt.

This legislation may provide some protection to women living with HIV if they are refused services, access to a place or employment in part because of their sex, particularly in the

context of Constitutional protections for women. There are no protections from discrimination for men who have sex with men, transgender persons or sex workers.

3. Does the legislation contain the following substantive features:

- Coverage of direct and indirect discrimination;
- Coverage of those presumed to be infected, as well as carers, partners, family, or associates;
- Coverage of vilification;
- The ground complained of only needs to be one of several reasons for the discriminatory act;
- Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);
- Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?

The legislation in respect of discrimination on the grounds of sex does not have these features.

3. Does the legislation provide for the following administrative features:

- Independence of a complaint body;
- Representative complaints (e.g. public interest organizations on behalf of individuals)
- Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;
- Access to free legal assistance;
- Investigatory powers to address systemic discrimination;
- Confidentiality protections e.g. use of pseudonyms in reporting of cases?

The legislation in respect of discrimination on the grounds of sex does not have these features.

4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- Education and promotion of human rights;
- Advising government on human rights issues;
- Monitoring compliance with domestic legislation and international treaties and norms;
- Investigating, conciliating, resolving or arbitrating individual complaints;
- Keeping data/statistics of cases and reporting on its activities?

There is no Human Rights Commission that can address human rights complaints and conduct inquiries. The Office of the Ombudsman has handled discrimination and human rights related actions, however the office primarily addresses malpractice within government.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

**1. Does the law ensure the equal legal status of men and women in the following areas:
Ownership of property and inheritance**

The *Administration of Estates Act 1935* (UK) applies to Vanuatu and provides for rules of inheritance to property other than land. The *Wills Act* [Cap 55] 1969, Section 3 preserves customary succession to land. Although the inheritance laws for assets other than land are

equal for men and women, land inheritance is based on custom. Customary law varies. Some islands have matrilineal inheritance and others patrilineal.

Equality of women in inheritance and property rights has been recognised by the courts, based on the Constitution. In *Noel v Toto* [1995] VUSC 3 the Supreme Court cited international law to support its decision to grant a woman equal rights to land. The Supreme Court held that the constitutional guarantee of equality for women should extend to qualifying customary rules of land tenure that give less land rights to women. Customary law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied. The Supreme Court referred to international law and obligations under the Convention of all forms of Discrimination Against Women to support its decision to grant descendants of the female line equal rights to land entitlements.

The application of the Convention of all forms of Discrimination Against Women and the constitutional rights of women to equality were also considered by the Supreme Court in *Joli v Joli* [2003] VUSC 63. In dividing of matrimonial property, the court applied the equality principles of the Convention along with those in the *Constitution* to set aside the principles in the *Married Women's Property Act 1882* (United Kingdom) and recognise full equality between men and women. However this was overturned by the Court of Appeal *Joli v Joli* [2003] VUCA 27.⁸⁶

There is ongoing lack of clarity as to how the law settles conflicts between customary law and formal law in relation to property rights. This lack of clarity means that women do not yet enjoy equal legal status in ownership of property, as men are still given preferential treatment under customary law.

The fundamental rights of the *Constitution* are available to all people without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex. Fundamental rights include equal treatment under the law or administrative action.

Rights are subject to —

- respect for the rights and freedoms of others
- the legitimate public interest in defence, safety, public order, welfare and health
- any restrictions imposed by law on non-citizens.

The *Constitution* Article 47(1) states that: 'If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.' Article 93(3) states: 'Customary law shall continue to have effect as a part of the law of the Republic.' Section 10 of the *Island Court Act* [CAP 167] states that 'Subject to the provisions of this Act an Island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order'. Legislation gives Chiefs the discretion to define justice, morality and good order based on their own cultural values. Decisions of the Island Courts, which are the most relevant courts

⁸⁶ S Farran, *A Microcosm of Comparative Law: the Overlay of Customary, French and English Family Law in Present Day Vanuatu* (2004) Oxford U Comparative L Forum 4

for the majority of the population, are based on customary laws that are often discriminatory against women.

To address confusion, the law should be amended so that where there are conflicts, constitutional guarantees of equality prevail over customs that discriminate against women.

- **Marital relations e.g. divorce and custody⁸⁷**

Legislation prescribes different ages of consent to marriage for men and women: 18 for males and 16 for females with parental consent; 21 for both without consent (*Control of Marriage Act* [Cap 45] 1966).

The law recognizes customary marriages and allows for registration including polygamous marriages. Traditional culture is characterized by male dominance and belief that women should devote themselves to childbearing. The majority of marriages were secured through bride price payments, which encourage men to view women as property. The Council of Chiefs revoked the minimum bride price in 2006 and encouraged the exchange of gifts between families instead. However, bride price is still practiced.

Under the *Matrimonial Causes Act* divorce is fault based. The grounds of divorce include adultery, desertion for three years, habitual cruelty, rape, sodomy and bestiality, a criminal conviction, insanity and presumption of death. Fault-based divorce disadvantages women where women, who may fear violent retribution, have to prove habitual cruelty.

Although the legislation states that the best interests of the child is the basis of custody decisions, some lower courts favour the father on the basis of bride price. It is argued that the customary practice of bride price secures rights to children after separation and divorce because the child is considered the property of the father. Legislation may be required to explicitly disallow the granting of custody on the basis of bride price.

Maintenance for women and children requires the wife to obtain a criminal conviction prior to a civil action for maintenance. *Maintenance of Family Act* [Cap 42] provides that it is criminal offence for a husband not to support either his wife or legitimate children. Where a conviction is obtained the court may order that 'adequate' provision be made for his wife or children. The requirement that a conviction be obtained is an extra barrier for women in accessing maintenance and should be repealed.

Obtaining a share in land under custom varies between the islands, but generally favours men. There is no legislation covering the sharing of matrimonial property after divorce, so women have no legal protection unless their names are on the title to property or unless they can prove a constructive trust. To establish a constructive trust, under English equity law, a woman must prove that she has made financial contributions to the acquisition of the property, or contributed to the family income, and that there was a common intention and understanding between husband and

⁸⁷ The Vanuatu Rural Development & Training Centers' Association (2007) *Vanuatu NGO Shadow Report on Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women*

wife that both “owned” the property together. It is difficult for women to prove either a financial contribution or a common intention of mutual ownership. Legislation should allow for property distribution on the basis of both financial and non-financial contributions recognizing women’s domestic contributions and their future needs.

- **Capacity to enter into contracts, mortgages, credit and finance**

The *Penal Code* [Cap 135] at Section 150 provides that ‘no person shall discriminate against another person with respect to his right to the supply of goods or services, or to gain or continue in any employment, or to be admitted to any public place, by reason of the sex ... of such other person.’

This provision affords women some protection against discrimination in access to financial services.

- **Access to reproductive and STD health information and services;**

Abortion is illegal. It is an offence under *Penal Code* Section 117 for a woman to procure her own abortion, or a person to procure an abortion for a woman, unless for good medical reasons. There is no legislation guaranteeing access to sexual and reproductive health services.

- **Protection from sexual and other violence, including rape in marriage;**

The *Family Protection Act 2008* enables victims of domestic violence to seek protection orders. The Act states that the custom of bride price is not an acceptable excuse for violence in the home. The Police Department has established an internal Family Protection Unit to address the high levels of domestic violence and other related matters.

The criminal offence of rape relates to assaults of women or girls only. Rape in marriage is a crime (*Penal Code* Section 90).

- **Recognition of de facto relationships**

De facto relationships are not legally recognised.

- **Prohibition of harmful traditional practices e.g. female genital mutilation?**

Customary laws that are contrary to justice, morality and good order are not enforceable.

2. **Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

There are no laws prohibiting mandatory testing of groups.

3. **Does the law require children to be provided with age-appropriate information, education and means of prevention?**

There are no laws requiring children to be provided with information or education about HIV and STIs, or to be provided with condoms or other means of prevention.

4. **Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:**
- **Consent to voluntary testing with pre- and post-test counselling;**
 - **Access to confidential sexual and reproductive health services?**
- There are no laws specifically addressing children and young people's rights of informed consent and access to confidential sexual and reproductive health services.
5. **Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?**
- Penal Code* [Cap 135] provides a range of offences including unlawful sexual intercourse by male with girl aged under 20 who is under protection; unlawful sexual intercourse with a girl aged under 13; unlawful sexual intercourse with a girl aged 13-15 years; and indecent assault of a girl under 13.
6. **Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?**
- The law does not recognize same sex relationships. The age of consent for homosexual sex is 18 and for heterosexual sex is 16.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

1. **Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data?**
- There is no privacy or confidentiality legislation relating to medical records. Medical records are subject to common law confidentiality protections. Article 5 of the *Constitution* provides citizens with the right to protection for the privacy of the home and other property.
2. **Does the legislation prohibit unauthorised use and disclosure of such data?**
- There is no legislation. Common law allows disclosure of medical records in the public interest in limited circumstances e.g. if there is a risk of serious injury to third parties.
3. **Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are:**
- **Accurate;**
 - **Relevant;**
 - **Complete;**
 - **Up-to-date?**
- There is no legislation.
4. **Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:**
- **Education and promotion of privacy;**
 - **Advising government on privacy issues;**
 - **Monitoring compliance with domestic legislation and international treaties and norms;**
 - **Investigating, conciliating, resolving or arbitrating individual complaints;**
 - **Keeping data/statistics of cases and reporting on activities?**
- There is no legislation.

5. **Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

There is no legislation relating to privacy in legal proceedings. Following common law principles, Courts are generally open to the public. Article 5 of the *Constitution* provides a right to a fair hearing by an independent and impartial court. The Constitution includes the right to freedom of expression which may weigh in favour of open proceedings to enable reporting. Courts nonetheless have discretion at common law to close hearings to ensure a fair trial where there are exceptional public interest factors outweighing the public interest in open hearings.

6. **Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

There is no legislation providing for reporting of HIV or AIDS cases to public health authorities for epidemiological purposes. Section 8 of the *Public Health Act* requires medical practitioners to notify HIV and AIDS cases to health authorities.

CHECKLIST 7 – EMPLOYMENT LAWS

1. **Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

HIV screening for employment is not prohibited.

2. **Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Legislation does not prohibit mandatory testing of specific employment groups.

3. **Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

Legislation does not specifically require implementation of universal infection control measures. The *Health and Safety at Work Act* [Cap195] Section 2 provides that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees, including:

- arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

An employer's failure to provide effective infection control systems in health care workplaces would be a breach of these duties.

4. **Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

Legislation does not specifically require provision of access to information and education about HIV, but there is a general duty under *Health and Safety at Work Act* [Cap195] Section 2 for the employer to provide "such information, instruction, training and supervision as is

necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees”.

5. **Does the law provide for:**
Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and
Social security and other benefits where workers are no longer able to work?
There is no unfair dismissal legislation or other legislation prohibiting discrimination on the grounds of HIV against employees.

Employee benefits are provided through provident fund membership (*Vanuatu National Provident Fund Act 1986*). Disability benefit is available if the member is permanently incapable of any employment due to a physical or mental disability assessed by two registered medical practitioners.

6. **Does the law provide for confidentiality of employees’ medical and personal information including HIV status?**
Legislation does not provide for confidentiality of employees’ medical and personal information including HIV status.

7. **Does workers’ compensation legislation recognize occupational transmission of HIV?**
The *Workmen’s Compensation Act 1987* does not specifically recognize occupational transmission of HIV.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

1. **Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?**
There is no legislation regulating HIV test kits.
2. **Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:**
- **Safe; and**
 - **Efficacious?**
- There is no legislation requiring registration of drugs or assessment and approval of pharmaceuticals, vaccines, and medical devices based on safety and efficacy data. The *Sale of Medicines (Control) Act* [Cap 48] prohibits the sale of medicines by anyone other than a licensed pharmacist within 5 miles of a licensed pharmacy. Outside the 5-mile zone, a licensed druggist may sell medicines. Categories of medicines are listed in the Regulations. Issues of safety and efficacy are likely to have been considered in decision to place medicines on the lists contained in the Regulations.
3. **Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?**
The *Sale of Medicines Act* and Regulations prescribe the labelling that must accompany listed drugs. A common law action for breach of contract may be available. There is no Fair Trading Act or equivalent consumer protection law.
4. **Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?**

There is no legislation regulating the quality of condoms.

5. Does the legislation ensure the accessibility and free availability of the following prevention measures:

- **Condoms**
- **Bleach**
- **Needles and syringes?**

There is no legislation ensuring access and availability of condoms or other prevention measures.

6. Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?

Legislation has been enacted but is not yet in operation. The legislation provides for compulsory licensing in narrow circumstances. The *Patents Act 2003* (not commenced) provides for the issue of compulsory licences three years from the date of the grant of a patent or four years from the filing date of a patent application, whichever is the later, on the grounds that in Vanuatu a market for the patented invention is not being supplied at all or not being supplied on reasonable terms.

Section 35 of the Act provides a broad “government use” provision. This allows the Government, and any person authorised in writing by the Government, to make, use, exercise and sell any patented invention for the services of the Government. Government must pay the owner for the use an amount agreed on, or determined by a method agreed between the Government and the owner, having regard to the economic value of the patented invention. This would enable the importation by Government of generic ARVs for public provision.

Exhaustion of patent rights by putting a medicine on the market domestically or internationally does not appear to be addressed by the legislation. This means that the legislation does not enable parallel importing of brand name medicines from countries where they are marketed more cheaply.

The *Patents Act* should also be amended to include a ‘bolar’ provision, so that generic medicines can be approved for marketing as soon as possible after patent expiry.

As a least developed country, should Vanuatu join the World Trade Organization it does not have to apply patent legislation to pharmaceuticals until 2016. Medicines should be exempted from the Act until 2016.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

1. Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?

There are no specific legislative requirements. The Health Research and Ethics Committee has oversight of medical research.⁸⁸

2. Does the legislation require subjects to be provided before, during and after participation with:

- **Counselling**
- **Protection from discrimination;**
- **Health and support services?**

No.

3. Does the legislation provide for informed consent to be obtained from the subjects?

No. Ethics Committee approval may consider consent issues.

4. Does the legislation provide for confidentiality of personal information obtained in the process of research?

No. Ethics Committee approval may consider confidentiality issues.

5. Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?

No. The National Research Policy of the National Cultural Council provides that where research is undertaken with a local community, the research will include a product of immediate benefit and use to that community. This product will be decided upon by the researcher, the local community and the Cultural Centre in the early part of the fieldwork, and the Cultural Centre may have a role in assisting the researcher in its provision.

6. Does the legislation provide for non-discriminatory selection of subjects?

There is no legislation regulating these aspects of the conduct of research on humans.

Under the *Vanuatu National Cultural Council Act 1988*, the Vanuatu National Cultural Council is responsible for research in Vanuatu. [Cap 186, 6(2)(e)].

It is the role of the National Cultural Council to define and implement national research policies, to define national research priorities, and to sponsor, regulate and carry out programs of research. The Vanuatu Cultural Centre is the executing arm of the National Cultural Council.

The standard Research Agreement of the National Cultural Council⁸⁹ requires researchers to:

- (a) recognise the rights of people being studied, including the right not to be studied, to privacy, to anonymity, and to confidentiality;
- (b) recognise the primary right of informants and suppliers of data and materials to the knowledge and use of that information and material, and respect traditional copyrights, which always remain with the local community;

⁸⁸ World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41, p.107

⁸⁹ *Vanuatu Cultural Research Policy* (2000)
http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/vanuatu_policy.pdf

- (c) assume a responsibility to make the subjects in research fully aware of their rights and the nature of the research and their involvement in it;
- (d) respect local customs and values and carry out research in a manner consistent with these;
- (e) contribute to the interests of the local community in whatever ways possible so as to maximise the return to the community for their cooperation in the research work;
- (f) recognise their continuing obligations to the local community after the completion of field work, including returning materials as desired and providing support and continuing concern.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

1. Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?

The *Constitution* provides that citizens have the fundamental right to freedom of movement. This may be difficult to enforce in practice particularly for populations who are marginalised and whose behaviours are criminalised such as sex workers.

2. Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?

The *Constitution* provides that citizens have the fundamental right to freedom of assembly and association. This may be difficult to enforce in practice, particularly in the case of associations of sex workers, as soliciting remains a crime.

3. Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?

There are no exceptions for HIV information that contains sexually explicit information or images, although a defence may be available that disseminating the information or image is for public benefit.

Under Section 93 of the *Penal Code*, it is an offence to sell or distribute indecent models or objects, or publicly exhibit an indecent object, conduct an indecent show or performance. It is a defence that the public good was served by the alleged act. It is a question of law whether that act may in the circumstances serve the public good, but a question of fact whether or not the acts complained of did serve the public good.

Under Section 147, of the *Penal Code* it is an offence to manufacture, hold for sale, distribution, lease or display, import, export or transport, sell or hire, any printed matter, writing, drawing, sign, engraving, printing, photograph, film, sound recording, emblem or other object or representation whatsoever of obscene nature. A publication or other article is obscene if it tends to deprave and corrupt those whose minds are open to such influences and into whose hands it may fall.

The *Censorship of Films Act* [Cap 72] establishes censorship boards for certain areas of Vanuatu, which may classify and prohibit exhibition of films.

4. Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?

No broadcasting standards were identified.

5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:

- Health care workers
- Other industries where there may be a risk of transmission, e.g. sex or funeral workers;
- Media;
- Superannuation and insurance;
- Employers (in a tripartite forum involving unions and government)?

There is no legislation requiring professional groups to develop or enforce HIV Codes of Practice.

6. Are such Codes of Practice required to contain the following elements:

- Confidentiality/privacy protections;
- Informed consent to HIV testing;
- Duty not to unfairly discriminate; and
- Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?

No Codes are required.

SUMMARY AND RECOMMENDATIONS⁹⁰

Public health and criminal laws require amendment to enable a human rights-based approach to HIV and sexual and reproductive health in Vanuatu.

Public Health

HIV and AIDS should not be subject to Part 3 of the *Public Health Act 1994*. Provisions of the *Public Health Act 1994* relating to isolation, restrictions on accommodation etc that have been drafted for diseases that are casually transmitted should not apply to HIV.

Legislation should require confidential notification of HIV and AIDS cases.

Legislation should clarify how health care workers should balance their duty of confidentiality to people living with HIV and their duty of care to third parties such as sexual partners. Privacy legislation should be introduced that protects medical information from disclosure without patient consent and gives people rights of access to data relating to them.

A draft Act called the *Public Health Act 2000* was prepared in 2000. The Bill made specific reference to HIV/AIDS education, confidential testing for HIV, duty of the STD counsellor upon learning of a positive HIV test result, duty to inform the sexual partner of HIV status, and work place testing for HIV. However, the Bill was not supported.⁹¹ Provisions of the Bill provide useful precedents for the Government to consider in the law reform process. The Government is reviewing the *Public Health Act* in 2009.

⁹⁰ See: Amnesty International (2008) *Vanuatu Amnesty International Submission to the UN Universal Periodic Review Fifth session of the UPR Working Group of the Human Rights Council May 2009*; The Vanuatu Rural Development & Training Centers' Association (2007) *Vanuatu NGO Shadow Report on Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women*.

⁹¹ P Mae, *Medical Confidentiality and the Public Disclosure Of HIV Status* (2004) *Journal of South Pacific Law* 8(1)

Legislation requiring screening is required for protection of the blood, tissue, and organ supply from HIV and other blood borne viruses.

Legislation should require condoms and HIV test kits to comply with international quality standards.

Criminal offences

The offences relating to prostitution involving consenting adults in private, the gendered definition of rape, and the lack of provision for marital rape all contravene human rights and require repeal or amendment. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices.

The offences of intentional and unintentional harm causing permanent damage under the *Penal Code* appear sufficient to cover situations of intentional and reckless transmission. It may however be desirable to include defences of condom use and the consent to sex of a fully informed partner, and to exclude mother-to-child transmission of HIV.

Prisoners

The *Correctional Services Act* should require that condoms and HIV/STI prevention information be made available to prisoners.

Anti-Discrimination Law and Equality of Legal Status of Vulnerable Populations

It is recommended that discrimination on the grounds of HIV or AIDS status, disability, sexual orientation and transgender status be made unlawful.

The current *Penal Code* prohibition on discrimination does not apply to HIV. HIV discrimination should be included in the Penal Code. Anti-discrimination legislation that allows civil courts to hear complaints should be introduced. This would allow people living with or affected by HIV to claim civil remedies such as damages or reinstatement. Civil claims are easier to prove than criminal prosecutions (requiring proof on the balance of probabilities rather than the criminal standard of beyond reasonable doubt) and do not require police resources.

There is a risk of human rights violations against marginalised groups if there are no legal guarantees of protection. Irene Malachi was the first Ni-Vanuatu person whose HIV status was made public. She experienced discrimination by government authorities. Irene was a nurse for 17 years and decided to resign in 2002 after it was declared publicly that she was HIV positive. Her case highlights the importance of guaranteeing protection of people living with HIV.

A comprehensive definition of discrimination is needed which prohibits both direct and indirect discrimination. Complaints of discrimination should be able to be made to an accessible body that has powers of investigation and conciliation, and that can refer matters to courts for hearing, determination and enforcement.

Women will be less vulnerable to HIV and other diseases if their social and economic status is improved. Amending the law to include a provision that the human rights chapter of the Constitution prevails when there is conflict between customary law and domestic legislation would improve women's status. This would prevent application of discriminatory customary laws in property and inheritance.

Reform of succession law to provide for family provision orders and statutory legacies could prevent women from being left financially destitute after a husband's death. Consideration should be given to moving to a no-fault model for family law, recognition of de facto relationships and abolition of the requirement that the husband's conviction be obtained as a precondition for maintenance.

Access to medicines and condoms

As a least developed country, under the terms of the TRIPS Agreement, Vanuatu does not have to apply patent legislation to pharmaceuticals until 2016. Medicines should be exempted from the *Patents Act* until 2016 (or a later date if Vanuatu does not proceed to become a WTO member).

The *Patents Act* could also support access to affordable medicines by inserting:

- an international exhaustion provision, to allow for parallel importing of medicines that are marketed more cheaply in other countries;
- an early working exception through including a 'bolar' provision, so that generic medicines can be approved for marketing as soon as possible after patent expiry.

Legislation should require compliance of condom quality with the International Condom Standard.

8.7 UPDATING AND, WHERE NECESSARY, ENLARGING UPON LCR 2009 TO PRESENT THE CHANGING LEGAL ENVIRONMENT FOR THE HIV RESPONSE

Development of HIV-related Law

Draft Paper for Council of Ministers – Policy Paper prepared with the assistance of RRRT proposing adoption of adequate legislation on Control, Prevention and Management of HIV/AIDS in Vanuatu.

Public Health—

Vanuatu Law Commission Report on Public Health Act Legislative Review 2013

Since the Policy Paper above, the Vanuatu Law Commission was given a reference to review the Public Health Act 1994 and the Health Committees Act 2003. Discussion Papers were issued in 2012, with the Discussion Paper covering the Health Committees Act 2003 entitled a Health Services Law Review. The Vanuatu Law Commission Report, Public Health Act Legislative Review 2013, is available from the Law Commission's website.

Chapter 10 concerns HIV/AIDS.

The background information given recognises HIV/AIDS as a complex development and human rights issue which impacts on personal relationships, gender relations, community life, national politics and economic and social development, with it typically affecting the most productive segment of society, young people, women and girls. It acknowledges that there is no specific legislation in Vanuatu that recognises the rights of people of Vanuatu to the highest attainable standard of health. Similarly, there is no current legislation that protects against HIV/AIDS specific discrimination (NB Labour Law developments below). Stigma and discrimination associated with HIV infection represent the single most important barrier for the uptake of HIV prevention and care services.

The Background also notes that the only legislation that makes reference to HIV/AIDS is Vanuatu's current Public Health Act which identifies HIV/AIDS as a notifiable disease under the Notifiable Diseases List. [It is then stated that HIV/AIDS should be removed from this list in order to protect the confidentiality of people who are identified as HIV positive. The author assumes that this will mean that a confidential system of notification to an appropriate authority for the purposes of the compiling of prevalence data and the gaining of knowledge of AIDS-related deaths will replace current notifications].

It revealed consultation with communities, NGOs and health workers at all levels throughout Vanuatu revealed widespread interest in relation to developing a piece of stand-alone HIV/AIDS legislation. Most people [however], including the HIV unit at the MOH and the National AIDS Committee, felt that the best approach was to amend the Public Health Act to include provisions for HIV/AIDS. Consultations also resulted in a finding that the Policy Paper would be used to form a Part of the Revised Public Health Act

The recommendations of the Vanuatu Law Commission are—

1. The legislation shall make reference to workplace safety. All sectors should have some policy in place to regulate for safety in the workplace.
2. The MOH shall promote and encourage education and awareness programs, and look at using HIV positive individuals as peer educators, if they are comfortable doing so.
3. The new law should take a human rights approach to access and rights for victims and their families. Discrimination is most often found in education and employment, largely based on ignorance and panic about the risk of infection.
4. Staff safety should be addressed in the law. Legislation should look into what is to happen if a staff member, though the course of his or her duty, mistakenly is injected with an infected needle. [This author notes that because of the (time-related) efficacy of giving Post Exposure Prophylaxis (PEP), there should be a PEP Policy that does not necessarily depend on identification of the needle involved in needle-stick injury as being infected. PEP involves the administration of one or a combination of anti-retroviral drugs for the purpose of preventing transmission. It is most effective when taken immediately after exposure to HIV, preferably within 2 hours – but it may still be effective if taken within 72 hours (3 days) from the time of the exposure. Other occupational exposures also require consideration, such as those persons engaged in tattooing. PEP is a means of protection from HIV].
5. The legislation is to ensure equal treatment in all areas of life and activity irrespective of gender.
6. The issue of confidentiality between doctor and client and or HIV counsellor and client shall be strictly maintained and covered in the legislation. [This author suggests that the issue of maintenance of confidentiality must also be considered in the context of a refusal, following counselling, of an HIV+ client to disclose HIV status to a sexual partner who is being placed at serious risk of acquiring HIV from that person. In addition, other countries have found that there may need to be an exception in order to provide for the best treatment in the interests of a child born of an HIV+ mother].
7. People infected and/or affected by HIV/AIDS will have access to affordable, appropriate, quality counselling, care and treatment services, including appropriate Anti-Retroviral Therapy.

8. Voluntary Confidential Testing and Counselling shall be made available to anyone who wishes to take HIV/AIDS counselling and testing. [This author suggests that VCCT must also consider the recent encouragement of ‘couples testing’.⁹²]
9. Handling of test results and disclosure must be in line with strict privacy and confidentiality guidelines in the new law. These guidelines are to ensure that the common law right to privacy is enjoyed by persons vulnerable to or persons living with HIV or affected by HIV or AIDS and will include the use of coding to protect identity. The Privacy Guidelines shall cover the recording, collecting, storing and security of information, records or forms to be used in respect of HIV testing, related medical assessments and the reporting to the relevant authorities, including the reporting of AIDS-related deaths.

This author questions whether consideration will be given in the new Public Health Act to the testing of blood and blood products for transfusion.

Labour Law—

The ILO has been providing technical assistance to develop a new Employment Relations Bill to substantially modernise existing labour legislation. The Bill is in its final stages of preparation. Similar to other countries developing labour legislation, it also includes provision providing it is unlawful to discriminate either directly or indirectly in employment based on real or perceived HIV AIDS status. The draft Employment Relations Bill is currently under consideration by the Tripartite Labour Advisory Council.

Immigration—

The Immigration Act 2010 was enacted after LCR 2009. Section 14 permits an immigration officer to require a person about to enter or depart Vanuatu to be examined by a registered medical practitioner to determine the person’s health, or physical or mental condition, and to undergo any test or investigation that the practitioner requires.

⁹² See <http://www.who.int/hiv/pub/guidelines/9789241501972/en/> for the WHO Guidance on couples HIV testing and counselling – including antiretroviral therapy for treatment and prevention in serodiscordant couples.