HIV, ETHICS AND HUMAN RIGHTS

REVIEW OF LEGISLATION OF PACIFIC ISLAND COUNTRIES

REGIONAL SUMMARY

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

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OVERVIEW

This review applied the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legislative environment for HIV responses in fifteen Pacific Island countries. It is hoped that this review will contribute to a constructive dialogue within and between Pacific Island countries on effective ways to promote public health and human rights through law reform.

The review demonstrates the diversity of legislative responses to HIV by Pacific Island countries and maps out priorities for human rights-based law reform.

The review found that only PNG and Pohnpei State of the Federated States of Micronesia have well developed human-rights based legislative frameworks for addressing HIV.

The other thirteen countries reviewed have taken minimal or no legislative action to provide an enabling legal environment for HIV responses. Most countries are involved in the gradual, complex process of modernising health and criminal laws inherited from the colonial period. It is important to underpin future HIV prevention efforts that sexual and reproductive health rights are considered in these reform processes.

Pacific Island countries are well placed to introduce human rights-based approaches to public health issues. Most Pacific Island countries already incorporate human rights principles into law through Constitutional Bills of Rights, and in some cases by legislation incorporating international human rights law into domestic legislation.

The *Pacific Regional Strategy on HIV and Other STIs 2009–2013* acknowledges traditional, cultural and religious values of Pacific communities that are based on compassion and reconciliation, affirms the protection and promotion of human rights and emphasises the need for leadership and non-partisan political support and commitment.

HIV and sexual health are often difficult issues for communities to discuss and can be unpopular issues for leaders to champion. It takes courage for legislators to confront stigma, myths and misconceptions and to commit to an agenda for human rights-based law reform on sensitive issues related to sexuality and gender equality. Commitment is required to protect the health rights of the most vulnerable in our communities and to involve people living with HIV and those most affected by HIV in the law reform process.

Leadership on these issues will enable a more vigorous multi-sectoral response to HIV and related sexual and reproductive health issues, which will ultimately be of benefit to the health prospects of the Pacific region as a whole.
PUBLIC HEALTH LAW

Traditional infectious disease laws are poorly equipped to address HIV. Yet the majority of Pacific Island countries are relying on these inappropriate legal frameworks for managing HIV.

PNG’s *HIV/AIDS Management and Prevention Act 2003* and the *Pohnpei HIV Prevention and Care Act 2007* provide examples of protective, non-punitive legislation. These Acts provide for rights to education, informed consent, counselling, and protection from discrimination and breach of confidentiality.

*Pohnpei HIV Prevention and Care Act 2007* explicitly adopts a human rights-based approach by stating in the preamble:

> The state shall extend to every person believed to be or known to be infected with HIV full protection of his or her human rights and civil liberties. Towards this end...provision of appropriate health and social services for individuals with HIV shall be assured.

The Pohnpei legislation is unique in recognising the role of people living with HIV in effective rights-based responses. The Act provides that:

> The state shall recognize the potential role of affected individuals in propagating vital information and educational messages about HIV and shall utilize their experience to inform the public about HIV, promote HIV testing and encourage the modification of behaviour that may be associated with HIV acquisition. [Cap 6A-102(4)]

The PNG *HIV/AIDS Management and Prevention Act 2003* is unique in that it makes it unlawful to deny a person access to a means of protection from HIV infection without reasonable excuse. Such a provision is important to support efforts to promote access to male and female condoms and other prevention tools.

Both PNG and Pohnpei avoid HIV specific offences for intentional transmission of HIV.

Samoa is in the process of updating its public health legislation. The inclusion of reproductive health in the list of responsibilities of the Ministry of Health in the *Ministry of Health Act 2006* is a significant advance.

Nauru has old public health legislation but its Constitutional Review Commission recommended in 2007 that a right to health services be introduced into the Constitution in the following terms:

1. Everyone has the right to access basic health services, including maternity and related care for every woman.

2. The government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, and to progressively improve the standard of health services.
Palau already includes health entitlements in its Constitution, which was amended by popular vote in 2008 to include the statement that “the national government shall provide free preventive health care for every citizen”. Similarly, the Constitution of Federated States of Micronesia and the Constitution of the Republic of the Marshall Islands recognizes the right of the people to health care and education and the obligation to take every step reasonable and necessary to provide these services.

Marshall Islands includes HIV within communicable disease legislation, which has been updated to ensure that any compulsory measures taken shall be the least restrictive to protect the public health and shall maintain confidentiality to the extent possible.

The Constitution of the Autonomous Region of Bougainville 2004 includes a constitutional commitment to tackling HIV in the following terms:

The Autonomous Bougainville Government shall make the fight against HIV/AIDS and its threat to the clans and to the future of Bougainville a major priority. (Section 34)

The Bougainville Constitution also provides that the Government will:
- take all practical measures –
  - (a) to promote primary health care; and
  - (b) to pursue universal health care of the highest standard; and
  - (c) to ensure the provision of basic medical services to the population...
- (Section 33)

These examples provide interesting models for consideration.

The majority of jurisdictions however have included HIV within outdated, punitive public health laws that may compound stigma associated with sexual health and therefore are detrimental to public health in the context of epidemics of HIV and other sexually transmitted infections (STIs).

Only PNG, Pohnpei State of FSM and Marshall Islands have introduced legislation to secure the blood supply from HIV contamination. All countries require legislation to ensure blood, and donated organs and human tissue, are screened for HIV and other blood borne viruses.

**CRIMINAL LAW**

Inappropriate application of criminal laws is a major impediment to effective HIV and STI prevention and care responses. Fear of prosecution can deter the most vulnerable populations from accessing services. Sex workers and men who have sex with men are driven underground by laws that criminalise their behaviours. Criminal laws can also reinforce women’s low social status, contributing to HIV vulnerability.
Prostitution is criminalised in every country reviewed except Palau and two states of Federated States of Micronesia. Decriminalisation of prostitution would make it easier to reach sex workers with information, condoms and support services, and for sex workers to organise to protect their safety and provide peer education services.

Of the 15 countries reviewed, homosexual sex between consenting adults is not a criminal offence in four countries: Vanuatu, the Federated States of Micronesia, Marshall Islands and Tokelau.

In Fiji, the High Court held in two test cases decided in 2005 that laws criminalising consenting sexual acts between adult men in private are in breach of the constitutional guarantee of the right to privacy. This ruling effectively decriminalised homosexuality at that time in Fiji as well, although the offences are yet to be repealed from the Fijian Penal Code.

Criminalisation of male-to-male sex in the other ten countries reviewed legitimises homophobia and is a significant impediment to effective sexual health promotion including peer education programs with men who have sex with men. It is also violates the human right to privacy, in breach of international human rights law.

Abortion is criminalised in every country reviewed except the Republic of Marshall Islands. Continued criminalisation of abortion contributes to women’s and girls’ lack of social equality and vulnerability to a range of health harms. No jurisdiction specifically recognises the rights of women and girls to access to reproductive health services including safe abortion facilities.

Apart from Federated States of Micronesia and Palau, injecting drug use is not considered an HIV prevention risk for the countries reviewed. Sharing of injecting equipment is highly effective in transmitting HIV. The potential for injecting drug use to lead to rapid escalation of HIV and hepatitis epidemics means that Federated States of Micronesia and Palau may need to consider harm reduction approaches for reducing transmission risk. Legislation may be required to enable a harm reduction approach such as providing immunity from prosecution for peer educators, health care workers who provide information on safe injecting, and access to and possession of clean injecting equipment.

Only Republic of Marshall Islands has introduced an HIV-specific offence for intentional transmission of HIV. Marshall Islands provides a draconian offence for HIV transmission purposefully or through gross negligence, with a penalty of isolated confinement for life under the care of the Ministry of Health Services. This type of offence is likely to be ineffective in achieving public health objectives, may add to stigma and drive people most at risk away from testing, counselling and treatment services.

Other countries either apply general criminal law assault or endangerment offences, or public health law provisions. Some of the disease transmission provisions of old public health laws are highly inappropriate to HIV, as the legislation was drafted for contagious diseases that could be transmitted by casual contact. For example, some laws regulate
exposure to HIV risk in shops and on public transport (e.g. Samoa, Tonga), settings which pose no actual HIV transmission risk.

PNG’s legislation provides a useful precedent for disease transmission offences, as it applies the general criminal law while providing a defence to a charge of intentional transmission that the other person was aware of the risk and voluntarily accepted it, or that a condom was used.

**PRISONS**

Only PNG and Fiji have introduced legislation enabling HIV prevention and care in prisons.

PNG’s *HIV/AIDS Management and Prevention Act 2003* protects prisoners from HIV screening, and discrimination in the application of detention, restriction or segregation procedures or conditions; the provision of and access to health facilities and care; or the subjecting of a detainee to any other detriment in relation to detention or custody.

There is no example of a law specifically addressing the need for free access to condoms and HIV prevention information in prisons. However, PNG’s Department of Correctional Services has an HIV Strategy which 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.”

Fiji’s *Prisons and Corrections Act 2006* requires those implementing the legislation to 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” and to ensure that “prisoners who are infected with HIV/AIDS...are treated in a manner which takes into account their basic rights and special needs”. Fiji’s legislation also specifies that “there shall be no programme or policy of compulsory testing of prisoners to determine their HIV/AIDS status” and “no separation shall be ordered only on the basis of a prisoners HIV/AIDS status”. Condoms are not specifically mentioned, although there is a requirement to provide health education to prisoners.

Solomon Islands *Correctional Services Act 2007* provides an example of protective legislation for prisoners’ health. It states 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.

Vanuatu’s *Correctional Services Act 2006* also provides an example of rights-based prison legislation by stating that prisoners have a right of access to medical care and treatment, and regular health inspections.

**DISCRIMINATION**
Only PNG and Pohnpei have comprehensive protections against discrimination on the ground of actual or assumed HIV status.

No country reviewed has comprehensive anti-discrimination legislation that covers HIV, disability, sex, marital status, sexuality or sexual orientation, and transgender status.

Only Palau and Fiji have legislation that makes it unlawful to discriminate on the grounds of disability.

Discrimination on the grounds of transgender status is not unlawful in any jurisdiction. Fiji’s 1997 Constitution made it unlawful to discriminate on the grounds of sexual orientation.

Discrimination on the grounds of disability, HIV status, sexuality and transgender status may be unlawful in Tokelau, which incorporates the human rights protections of the International Covenant on Civil and Political Rights into domestic law.

Vilification or inciting hatred of people living with HIV is only unlawful in PNG (as ‘unlawful stigmatisation’).

**EQUALITY OF VULNERABLE POPULATIONS**

Ensuring an effective legislative response to gender inequality is of central importance to HIV prevention in the Pacific.

Many Pacific Island countries have introduced formal legislative guarantees of equality and for women. Most countries have legislation protecting women from laws that discriminate on the grounds of sex, although this is generally subject to the exception of customary laws particularly in respect of land.

There is a range of legislative models for protecting women from violence. PNG and Vanuatu have legislation specifically addressing domestic violence. Most other countries apply general assault provisions of the criminal law to gender based violence, rather than tailoring legislation to the needs of women for protection within the context of domestic relationships.

A common theme for all countries reviewed is the challenge of reconciling the human right to non-discrimination on the ground of sex with customary laws that disadvantage women. Customary laws can seriously disadvantage women in areas such as inheritance, property and family disputes. Legislation should guarantee that customary law in relation to inheritance and property does not have precedence over rights to equality between men and women.

The failure to criminalise rape in marriage in many Pacific Island countries contributes to women’s lack of power in relationships and undermines women’s capacity to negotiate safety and sexual health in relationships. Rape in marriage is not a crime in Samoa,
Tonga, Cook Islands, Niue, Nauru, Palau and Pohnpei State of the Federated States of Micronesia.

De facto heterosexual relationships are generally not recognised by law. Failure to recognise de facto relationships can contribute to women’s social disadvantage. Women generally have fewer financial resources than men and may be unable to claim a share in property or support from a partner after separation.

Same sex relationships are not recognised by law in any country reviewed. Tonga and Palau specifically legislated against same sex marriages in 2007 and 2008. This may have the effect of adding to stigma associated with homosexuality and therefore is not helpful to HIV prevention efforts.

Most countries reviewed have fault-based models of divorce and family law. Women may be reluctant or afraid to seek divorce if they are required to prove fault. This may result in women remaining in abusive and violent relationships. Infliction with an incurable disease capable of being transmitted is a ground for divorce in Tonga. Such a provision compounds stigma associated with potentially fatal illnesses including HIV. Introducing a no-fault model of divorce (e.g. Fiji), and allowing for women’s non-financial contributions to a marriage and future needs to be taken into account in property proceedings after separation, would improve women’s social and economic status.

PRIVACY AND CONFIDENTIALITY LAWS

Privacy and confidentiality laws are generally weak or untested in relation to medical records and data protection in the Pacific. This is an important issue as it is difficult to keep personal information confidential in small island communities that have traditions of sharing information. Without confidentiality protections, people may be fearful of testing. Only PNG and Pohnpei have legislation that specifically addresses HIV confidentiality. No country has a separate Privacy Commissioner or Data Protection Commissioner to administer privacy laws. Some countries have constitutional privacy guarantees. The application of these constitutional privacy guarantees to HIV information in Pacific Island countries is yet to be tested by the courts. However, international human rights law suggests that such protections do extend to protection of people living with HIV from having their confidential medical records disclosed without consent.

EMPLOYMENT LAWS


- rights and responsibilities of Government, employees and employers;
- discrimination and equality rights;
- risk management including universal precautions and post exposure prophylaxis;
- education and training;
prohibition of compulsory testing;
- care and supported for people living with or affected by HIV.

The Code is not legally binding although can be used as evidence in proceedings under relevant legislation. All countries should consider developing workplace codes of practice on HIV and STIs, through processes engaging employers, employees and government.

No country reviewed recognises occupational transmission of HIV in workers compensation legislation.

PNG’s HIV/AIDS Management and Prevention Act 2003 and the Pohnpei HIV Prevention and Care Act 2007 provide useful precedents of laws prohibiting compulsory testing by employers, requiring workplace confidentiality and making discrimination unlawful in relation to hiring, dismissal and conditions of employment.

THERAPEUTIC GOODS AND CONSUMER PROTECTION

Legislation is required to ensure that condoms and HIV test kits comply with international quality standards. No legislation was identified in the countries reviewed requiring compliance with the International Standards Organization International Condom Standard.

Regulation of the quality of medicines is weak in most countries reviewed, as there are limited sources of local technical expertise. Countries generally rely on advice from the World Health Organization or assessment of safety and efficacy by other countries from which medicines and test kits are imported.

Some old public health legislation which is still operating in some Pacific Island countries prohibits promotion of devices that can be used to prevent conception (e.g. Kiribati, Solomon Islands, Tuvalu). As this may make condom promotion unlawful, these laws should be repealed or amended to exempt male and female condoms.

Until recently, patent law issues have not been significant to public health in Pacific Island countries. An approach to patent laws that optimises access to medicines will become increasingly important as Pacific Island countries integrate with the global economy and are required to comply with the patent law standards of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Patent laws can prevent countries importing cheap medicines, unless specific provision is made for countries to access cheap drugs through compulsory licensing or parallel importing. Patent laws that comply with TRIPS standards, and more onerous ‘TRIPS plus’ requirements, are likely to be increasingly required of Pacific Island countries by reason of accession to the World Trade Organization (WTO) and the terms of bilateral or regional trade agreements. Countries that are not WTO members can consider exempting medicines from patent legislation. Countries that are WTO members or who are seeking
WTO accession need to ensure that the flexibilities permitted by TRIPS (e.g. compulsory licensing, parallel importing) are fully incorporated in domestic legislation.

No country reviewed has provided in legislation for parallel importing of patented medicines. Parallel importing provisions would allow countries to import cheaper medicines sourced on the global market. Only PNG, Vanuatu and Tokelau (as a territory of New Zealand) have incorporated compulsory licensing or government use powers in patent legislation. Compulsory licensing could enable government use of generic medicines for non-commercial purposes.

ETHICAL HUMAN RESEARCH

The majority of countries have established national ethics committees for considering research proposals. Only PNG has introduced legislation specifically addressing HIV related research. In PNG legislation requires national guidelines for the conduct of research relating to HIV. There is a need for countries to legislate generally to ensure ethical approval of social and medical research.

ASSOCIATION, INFORMATION, CODES OF PRACTICE

Most countries provide rights of freedom of association in Constitutional Bills of Rights. These rights may be difficult for vulnerable populations such as sex workers and men who have sex with men to enforce, as their behaviours are often criminalised. However enjoyment of these rights by marginalised communities is essential if a community development approach to HIV prevention is to be implemented. It is important that people living with and affected by HIV are able to organise and form legally recognised groups, which can then lead peer education and peer support efforts that are highly effective in HIV and STI prevention.

Most countries have obscenity and censorship laws that may potentially impede use of sexually explicit materials for HIV prevention education. Only PNG has provided a specific exemption to censorship offences for HIV education.

Stigma, myths and misinformation are at the core of Pacific Island countries vulnerability to HIV and STIs. Addressing HIV, STIs, and sexual and reproductive health in the school curriculum would be a major step forward for Pacific communities. Marshall Islands legislation requires the development of a health education curriculum for primary and secondary schools that includes information on prevention of communicable diseases including HIV and STIs. Palau has proposed a Bill to require sex education in schools, however it has not been enacted. Pohnpei includes school HIV education within the context of a national campaign, legislated in the following terms:

The State shall promote public awareness about the causes, modes of transmission, consequences and means of prevention of HIV through a comprehensive, state wide education and information campaign organized and conducted by the state. Such campaign shall promote value formation and employ
scientifically proven approaches, focus on family, as a basic social unit, support the development of appropriate skills, and be carried out in all schools, training centres, workplaces, and communities. (Pohnpei HIV Prevention and Care Act 2007 Cap 6A Section 102)

Legislation drawing from this precedent requiring HIV and STI education in schools using scientifically proven approaches has the potential to significantly improve the sexual health prospects of young people in Pacific Island communities.