

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Federated States of Micronesia

**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 Federated States of Micronesia (FSM). 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 2006¹.

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*.² 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:

1. Public health law.
2. Criminal law.
3. Prisons/correctional laws.
4. Anti-discrimination legislation.
5. Equality of legal status of vulnerable populations.
6. Privacy/confidentiality laws.
7. Employment law.
8. Therapeutic goods, consumer protection laws.
9. Ethical human research.
10. 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

¹ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm>.

² UNAIDS/IPU. Geneva, 1999.

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.³

Background

Since the first case was detected in 1989, a cumulative total of 35 HIV cases have been reported in the Federated States of Micronesia (FSM). Among them, 25 have developed AIDS of whom 23 have died. Heterosexual transmission is the predominant mode of HIV transmission. Seven cases were in men who have sex with men / bisexual men. Two cases were in injecting drug users. Males account for the majority of cases. Chuuk is the state with highest number of reported infections, and is the most populous and has the most mobile population. Emergence of injecting drug use among FSM youth poses a high risk of rapid escalation of the epidemic.

Socio-cultural factors affecting vulnerability include:

- high rates of sexually transmitted infections (STIs);
- low condom use;

³ See *Consolidated Guidelines* paras 102-103.

- young population;
- alcohol and substance use issues among youth including some injecting;
- mobility, with frequent travel between the FSM, Guam, Commonwealth of the Northern Marianas and Hawaii;
- culture is male-dominated and women suffer violence and discrimination;
- stigma and discrimination are significant factors.

Legal system

The legal system generally is based on and derived from US law. In addition to the Federation's *Constitution* and *Code*, each State has its own *Constitution* and *Code*. State Codes are in the process of being compiled from regulations. The national government has express power to legislate in respect of—

- defence;
- treaties;
- immigration, citizenship;
- import duties, income tax, currency, banking, foreign commerce, insurance, patents, copyrights, major loans;
- navigation and shipping, natural resources beyond the territorial sea;
- postal system;
- minimum standards for education and health.

Powers of legislating for systems of social security and public welfare are exercised concurrently with states. The Supreme Court is comprised of Justices who sit in trial and appellate divisions.

International obligations

FSM is a member of the United Nations, and had ratified the Convention on Elimination of all forms of Discrimination Against Women and the Convention on the Rights of the Child.

HIV policy framework

The national policy is the *FSM National Strategic Plan for HIV and other STIs 2007–2011*. State HIV/STI strategic plans are also being drafted. The lead agency is the Department of Health, Education and Social Affairs. HIV prevention activities include:

- Chuuk Women's Council and Health Services Joint Project;
- HIV/AIDS Peer Mentor Outreach Program (Kosrae);
- High School Youth HIV/AIDS/STD Outreach (Pohnpei);
- Micronesia Red Cross Society and the Adolescent Health Program.

The *Pohnpei HIV Prevention and Care Act of 2007* provides a human rights-based legislative model for FSM. The Act provides for a Pohnpei HIV Council to oversee an

integrated and comprehensive approach to HIV prevention and care in Pohnpei. Membership of the Council include the Directors of Departments of Health Services, Education, the General Manager of the Pohnpei Port Authority, representatives of the youth and women's groups of Pohnpei, a person living with HIV, a representative of the International Red Cross, and the Chief of Primary Health Care Division. The Council is responsible for overseeing the development of:

- state wide information and education campaigns;
- establishment of a comprehensive HIV monitoring system;
- guidelines on medical and other procedures carrying a risk of HIV transmission;
- the provision of accessible and affordable HIV testing and counselling for all those in need;
- the provision of health and support services in hospitals and in communities;
- promotion and protection of the rights of people living with HIV;
- strict observance of medical confidentiality; and
- monitoring implementation of rules and regulations of the Act, issue rules or regulations, or make recommendations to implementing agencies.

Pohnpei HIV Prevention and Care Act 2007 includes a declaration of policy at the outset as follows:

Cap 6A-102(1) 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. The program shall involve affected communities and groups including people living with HIV.

(2) 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:

- (a) compulsory testing shall be considered unlawful unless otherwise provided by this Chapter;
- (b) the right to privacy of individuals with HIV shall be guaranteed;
- (c) discrimination, in all its forms and subtleties, against individuals with HIV, or persons perceived or believed as having HIV shall be considered inimical to individual and state interest;
- (d) provision of appropriate health and social services for individuals with HIV shall be assured.

(3) The State shall promote utmost safety and standard precautions in practices and procedures that carry the risk of HIV transmission.

(4) 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.

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?**

Article XIII Section 1 of the *FSM Constitution* provides that the national government recognizes the right of the people to education, health care, and legal services and shall take every step reasonable and necessary to provide these services.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A] provides that “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.”

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?**

Many of the HIV tests conducted are mandatory under FSM or US law. These include all people who join the US military forces, and all students going to study in the US. Since 2006, facilities for voluntary testing have expanded in all states, designed particularly for young people. However, most HIV tests undertaken are mandatory, being conducted through screening of blood donors, pregnant women, people attending STI clinics, students, food handlers and prior to marriage.⁴

The *Pohnpei HIV Prevention and Care Act 2007* [Cap 6A] provides that:

- compulsory HIV testing as a precondition to employment, admission to educational institutions, the exercise of freedom of abode, entry or continued stay in the state, the right to travel, the provision of medical service or any other kind of service, or the continued enjoyment of said undertakings shall be deemed unlawful. (Section 131)

⁴ FSM Department of Health and Social Affairs (2008) *UNGASS 2008 Country Progress Report Federated States of Micronesia Reporting period: January 2006–December 2007*

- the training of health care workers shall include discussion on HIV related ethical issues such as confidentiality and informed consent. (Section 111)
- no compulsory HIV testing is allowed. Minors aged above 14 years may consent for themselves if, in the opinion of the testing clinicians, they have been at risk of HIV acquisition and are able to understand the nature and implications of the test; (Section 130)
- compulsory HIV testing may be allowed, upon court order, when a person is charged with any crime involving the endangerment of HIV infection of another person which appears on a list prescribed by the Director of the Department; (Section 130)
- all testing centres, clinics, or laboratories offering HIV testing are required to provide and conduct free pre-test counselling and post-test counselling for persons who avail themselves of their HIV testing services. Such counselling must be provided by persons who meet standards set by the Department. (Section 135)

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 *Pohnpei HIV Prevention and Care Act 2007* does not authorise restriction of liberty or detention.

At the national level, traditional public health laws exist that apply to other diseases that are transmitted through casual contact, with powers of isolation and quarantine: *Health Services Administration* [FSM Code Title 41 Cap 1]. The FSM Code provisions relating to isolation and quarantine of people with contagious or communicable diseases do not include specific provisions regarding reasonable notice of case to the individual; fixed periods of duration of restrictive orders; or right of legal representation. Rights of appeal through judicial review and habeas corpus may be available.

FSM Immigration Act [Title 50 Cap 1 Section 107] enables deportation of non-citizens carrying a serious communicable 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?**

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A-152] provides that contact tracing may be pursued by the Department provided that information shall remain confidential and can only be used for the purpose of offering HIV counselling and testing to persons who may have been exposed and for statistical and monitoring purposes.

Common law duties of confidentiality derived from US case law applies in FSM jurisdictions. US common law allows disclosure of medical records in limited public interest circumstances, such as to prevent injury to third parties: *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).

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)?

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A – 120] requires HIV screening of donated blood, tissue or organs. Blood safety legislation was not identified in the other FSM jurisdictions. As a matter of practice, all donated blood is screened for HIV.

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 are no needle and syringe programs or legislation to regulate needle and syringe programs.

The 2007 Pohnpei Youth Survey reported that 6.1% of young females and 11.2% of young males having used drugs including injecting in the previous 12 months.⁵

The FSM *Controlled Substances Act* [Title 11 Cap. 11] provides for registration of practitioners who may import, prescribe etc. narcotic drugs for medical use, and offenses of trafficking, unlicensed possession, distribution to persons under 18, etc. The term ‘drug dependent person’ is defined but not used in the Act – it may be found in Regulations. Addiction to narcotic drugs is a ground for refusal of entry or deportation under the FSM *Immigration Act* [Title 50 Cap 1 Section 107].

Chuuk: Controlled substances legislation is under review.

Kosrae Criminal Code Section 13.531 makes the possession of a controlled substance a misdemeanour, subject to the exception of possessing a valid prescription.

Yap Code: Title 11 Chapter 10 *Drug Control Act* criminalises distribution, possession, or use of certain 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

Homosexuality is not illegal in FSM. The Penal Codes have a gender-neutral offence of sexual assault. The offense of sexual abuse is constituted by intentional sexual contact with a child under 13 (e.g. *Kosrae Code* Section 13.312).

⁵ UNGASS 2008 Country Progress Report Federated States Of Micronesia Reporting Period: January 2006–December 2007

Fornication or adultery

Adultery is grounds for divorce but not an offence.

Street sex work, brothel or escort sex work

Prostitution is illegal in Chuuk and Pohnpei, but not in Yap and Kosrae.

Chuuk criminalises prostitution, both the client and the sex worker (Title 12 Cap 28 §9025). 'Prostitution' is defined as 'the act of performing, or offering or agreeing to perform, a sexual act for hire, either as a prostitute or as a customer of a prostitute. Prostitution includes engaging in or agreeing or offering to engage in sexual conduct with another person, and engaging in any lewd act between persons, for money or other consideration, either as the person paying or the person receiving the money or other consideration' and is an offence.

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 prostitution related offences specifically 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 are no offences for trafficking or sex tourism in any of the states.

Chuuk and Pohnpei penalise non-consensual procurement. In Kosrae the sexual assault offences include 'causing a person to have either sexual penetration or sexual contact with another'.

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

The law provides general offences that could be applied in cases of deliberate or intentional transmission of HIV e.g. assault and endangering others.

Chuuk: Title 12 Chapter 4:

Section 2053 Negligent homicide is the negligent causing of death of another person where the defendant's failure to perceive the risk constitutes a gross deviation from the duty of care.

Section 2058 Assault, Section 2059 assault and battery.

Section 2061. Reckless endangering: A person commits the offense of reckless endangering if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

Kosrae:

The *Offenses Against the Person Act* contains the offences of assault and battery — striking, beating, wounding, or otherwise doing bodily harm (Section 13.303), assault — offering or attempting, with force or violence, to strike, beat, wound, or to do bodily harm (Section 13.302) and aggravated assault — assaulting, striking, beating, or wounding another with a dangerous weapon, with an intent to kill, rape, rob, inflict grievous bodily harm, or to commit any other felony (Section 13.301).

Yap: *Offenses Against the Person Act*

Section 204. Negligent homicide: negligently causing death under circumstances where the actor should be aware of a substantial risk that death will result from his conduct.

Section 207. Aggravated assault: causing serious bodily injury intentionally, knowingly, or recklessly under circumstances showing extreme indifference to the value of human life.

Section 209. Assault: unlawfully offering or attempting, with force or violence, to strike, beat, wound, or to do bodily harm to another.

Section 210. Assault and battery: unlawfully striking, beating, wounding or otherwise doing bodily harm to another,

Section 212. Reckless endangering: recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury.

In 2005 a Bill was prepared for the FSM Congress, but not enacted, providing an HIV specific offence as follows:

Section 611. Causing a person to contract the Human Immunodeficiency Virus (HIV).

(1) A person who:

(a) intentionally or knowingly; or

(b) recklessly under circumstances manifesting extreme indifference to the value of human life, causes another person, by any means, to contract any of the various strains of the human immunodeficiency virus or attempts, by any means, to cause another person to contract any of the various strains of the human immunodeficiency virus commits an offence.

(2) The maximum penalty for a person convicted of an offence pursuant to subsection (1) of this section is life 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 four jail facilities are owned and administered by the states. The FSM pays to board its prisoners in the state jails.

No legislation regulating jails was identified.

Case law establishes that deliberate indifference to an inmate's medical needs can amount to cruel and unusual punishment in breach of Constitutional rights: *Plais v. Panuelo* 5 FSM Intrm. 179, 199-200 (Pon. 1991). Confining a prisoner in dangerously unsanitary conditions, which represent a broader government-wide policy of deliberate indifference to the dignity and well-being of prisoners, is a failure to provide civilized treatment or punishment, in violation of prisoners' protection against cruel and unusual punishment, and renders the state liable under 11 F.S.M.C. 701(3). *Plais v. Panuelo* 5 FSM Intrm. 179, 208 (Pon. 1991).

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?

No prison legislation was identified.

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

No prison legislation was identified.

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

No prison legislation was identified.

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?

Statutes at the state and national levels outline the provisions of parole. An inmate is eligible for parole after one-third of the total sentence has been served. At the national level, the sentencing judge makes the parole decision. In Kosrae and Chuuk, parole decisions are made by the Governor⁶ [see eg Chook Code Section 6012 (Pardons and paroles)]. Prisoner health may be a factor in parole.

Common law allows ill health to be taken into account in sentencing as a mitigating factor, consistent with US federal sentencing guidelines e.g in circumstances where there is extraordinary physical impairment.

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

No legislation was identified.

⁶ World Factbook of Criminal Justice Systems <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjfsm.txt>

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Legislation does not provide protection against discrimination on the ground of disability. Only Pohnpei has legislation making discrimination on the ground of HIV illegal.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A 171-175] makes discrimination on the grounds of actual, perceived or believed HIV status a criminal offence if it occurs in the following areas:

- Employment;
- Education;
- Right to seek public office;
- Credit and health, accident and life insurance;
- Hospitals and health institutions.

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)?

FSM and all states except Kosrae have anti-discrimination clauses enabling women who have experienced sex discrimination to seek remedies. Discrimination on the grounds of sexual orientation, sexuality or transgender status is not unlawful.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A - 171-175] makes discrimination on the grounds of actual, perceived or believed HIV status an offence.

Vilification is not covered by the *Pohnpei HIV Prevention and Care Act 2007* or in other FSM jurisdictions.

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

Exceptions are defined in the *Pohnpei HIV Prevention and Care Act* e.g. [6A-174] In the case of discrimination in provision of credit and loan services, and health, accident and life insurance, there is an exception if the person with HIV concealed or misrepresented the fact to the credit, loan or insurance company upon application.

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?**

Legislation does not provide for the above administrative features. Complaints are handled through prosecutions or civil court proceedings for breach of Constitutional guarantees of non-discrimination, rather than as complaints to human rights agencies.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A-177] provides that violations of sections prohibiting discrimination is a criminal offence with penalties of between six months and four years imprisonment and/or a fine not exceeding \$1,000. In addition licenses, permits of schools, hospitals and other institutions found guilty may be revoked. As a criminal offence, discrimination under this Act will have to be proved on the criminal standard of proof i.e. beyond reasonable doubt. This will make it more difficult to succeed in a claim as compared to a civil claim which requires proof on the balance of probabilities. It also means that persons who are wronged by discrimination are unable to claim remedies such as compensation and reinstatement.

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 to investigate human rights complaints or carry out other functions. Complaints must be lodged through the Court system.

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

FSM and all states provide for the equal protection of the law (the right of all persons to be treated equally by the law). However, all states and FSM expressly recognise customary law in their Constitutions which may have discriminatory impacts on women.

There are no legal impediments on women entering contracts or accessing credit and finance.

There is no legislation in FSM dealing with inheritance so it is determined according to custom. Although inheritance throughout the FSM is matrilineal, which means that land and property are passed through females, men still control many aspects of land and property and are looked upon to provide for and to protect their families. With the exception of Yap and a few atolls in the state of Pohnpei where patrilineal affiliation governed inheritance of land rights, matrilineages traditionally controlled estates. In most cases, the oldest male member of the matrilineage managed the estate. In terms of customary inheritance, lifelong use rights to specific plots of land may be divided by the male lineage head among his sons (patrilineal) or sister's sons (matrilineal).⁷

The FSM Constitution states that ‘nothing in the *Constitution* takes away the functions of traditional leaders’. Additionally, the *Constitution* allows the protection of the ‘traditions of the people of FSM’ by statute and declares that no challenge can be made to such a statute on the basis that it is in violation of Article IV (Declaration of Rights). The absence of a provision that guarantees the precedence of non-discrimination and equality rights over customary law means that discriminatory customary practises may be lawful. Pohnpei *Constitution* provides that Statutes may be enacted to uphold customs or traditions. If such a statute is challenged as violating the rights guaranteed by the

⁷ B Owles. (n.d) *Culture of Federated States of Micronesia* <http://www.everyculture.com/Ma-Ni/Federated-States-of-Micronesia.html>

Constitution, it shall be upheld upon proof of the existence and regular practice of the custom or tradition and the reasonableness of the means established for its protection, as determined by the Pohnpei Supreme Court (Section 4(5)).

In *Koike v. Ponape Rock Products, Inc.*, 3 FSM Intrm. 57, 64 (Pon. S. Ct. Tr. 1986) it was held: “The Government of Pohnpei shall respect and protect the customs and traditions of Pohnpei. Statutes may be enacted to uphold customs or traditions. If such a statute is challenged as violating the rights guaranteed by this Constitution, it shall be upheld upon proof of the existence and regular practice of the custom or tradition and the reasonableness of the means established for its protection, as determined by the Pohnpei Supreme Court.”

The Yap *Constitution* Article III Section 2 provides: Due recognition shall be given to traditions and customs in providing a system of law, and nothing in this Constitution shall be construed to limit or invalidate any recognized tradition or custom.

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

FSM and the states have identical legislation in the area of divorce. Divorce in FSM and all states is permitted either on fault based criteria (including adultery, desertion and cruelty) or on the basis that there has been a two year separation. In the FSM and all states, forgiveness, which can include restoration of marital rights, will prevent divorce from proceeding, failing to account for possible power imbalances between the spouses.⁸ Fault based divorces, which may require proof of desertion or habitual rape, place women in the difficult position of having to provide evidence of situations may interfere with their dignity and privacy. Women also face discrimination in proving fault, particularly cruelty and adultery if they choose not to be witnesses or they do not wish to attend court.

FSM and all states provide for maintenance orders during separation and after divorce for both children and spouses. The criteria used by the court to determine the amount of the order is based on ‘justice’ and ‘the best interests of all’. This leaves the basis on which maintenance is to be provided largely to the discretion of the court rather than on criteria of need, the means of both parties, the financial commitments of both parties to themselves and others, and their capacities to earn.

In the FSM and all the states, property division upon divorce, like maintenance and custody, is determined on the basis of ‘justice’ and ‘the best interests of all’. This is unlikely to lead to a property settlement in which women’s non financial contributions to the marriage are recognised.

⁸ V Jivan, C Forster (2007) *Translating CEDAW into Law - CEDAW Legislative Compliance in Nine Pacific Countries*, UNDP and UNIFEM Suva p.57.

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.

Apart from Yap, abortion is illegal in all states, and is rarely performed in the Yap State Hospital.⁹

Chuuk: Title 12 Chapter 4 Section 2068 makes it unlawful for a mother or another person to perform an abortion unless to save the mother's life.

Kosrae: Section 13.501 makes abortion an offense.

Protection from sexual violence, including rape in marriage

The states have legislation consisting of two categories of sexual assault offences. The first category is sexual assault by penetration without consent, the second is sexual contact with persons under 13. Rape in marriage is an offence in Chuuk, Kosrae and Yap but not in Pohnpei. In Pohnpei, an offender cannot be charged in relation to sexual assault and sexual abuse if the complainant cohabits with the offender in an ongoing voluntary sexual relationship.

Chuuk – gender-neutral sexual assault (12.4.2053)

Kosrae – gender-neutral sexual assault (13.311)

Yap – gender-neutral sexual assault (11.2.205)

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?

Legislation does not specifically prohibit the mandatory testing of vulnerable groups such as sex workers or men who have sex with men. However, *Pohnpei HIV Prevention and Care Act 2007* makes unlawful compulsory HIV testing as a precondition to employment, admission to educational institutions, the exercise of freedom of abode, entry or continued stay in the state, the right to travel, the provision of medical service or any other kind of service, or the continued enjoyment of said undertakings. (Section 131)

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

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A-110] provides:

⁹ FSM Department of Health and Social Affairs (2008) *UNGASS 2008 Country Progress Report Federated States of Micronesia Reporting period: January 2006–December 2007*

(1) The Department of Education, utilizing official information provided by the Department of Health Services, shall integrate instruction on the modes of transmission and ways of preventing HIV and other sexually transmitted infections in subjects taught in public and private schools at intermediate grade, secondary and tertiary levels, including non-formal and indigenous learning systems, provided that if the integration of HIV education is not appropriate or feasible, the Department of Education shall design special modules in HIV prevention and care.

(2) Flexibility in the formulation and adoption of appropriate course content, scope, and methodology in each educational level of group shall be allowed after consultation with parent-teacher associations, private school associations, school officials, and other interested groups. As such, no instruction shall be offered to minors without adequate prior consultation with parents.

(3) All teachers and instructors of HIV education shall be required to undergo training on HIV prevention and care supervised by the Department of Education, in coordination with the Department of Health Services, and demonstrate proficiency in skills relating to education on the prevention of HIV and other STIs, before they are allowed to teach on the subject.

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?**

Pohnpei HIV Prevention and Care Act provides that minors aged above 14 years may consent for themselves if, in the opinion of the testing clinicians, they have been at risk of HIV acquisition and are able to understand the nature and implications of the test; (Section 130)

There are no other laws in relation to children's and adolescents' rights to decide about testing and access to 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?

States legislation considers sex under the age of 13 as sexual assault.

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?

Age of consent is effectively 14 in all states.

Defacto relationships, including same-sex relationships, are not recognised in the FSM and any of the states, leaving women without any support and right to an equal division of property after breakdown of a relationship.

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 are constitutional rights to privacy that may have application to medical records. The FSM *Constitution* Article IV Section 5 provides the right of the people to be secure in their persons, houses, papers, and other possessions against unreasonable invasion of privacy. Similarly, the Yap *Constitution* Article 2 Section 3, Chuuk *Constitution* Article 3 Section 3; Pohnpei *Constitution* Article 4 Section 8.

In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court acknowledged that the doctor-patient relationship is one which evokes constitutional rights of privacy. The right to privacy depends upon whether a person has a reasonable expectation that the paper should remain free from governmental intrusion: *In re Legislative Subpoena*, 7 FSM Intrm. 261, 266 (Chk. S. Ct. Tr.1995).

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 were inadequate and in violation of Article 8 (the right to respect for private life) of the *European Convention on Human Rights*.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A-160] provides that all health professionals, medical instructors, workers, employers, recruitment agencies, insurance companies, data encoders, and other custodians of any medical record, file, data, and test results are directed to strictly observe confidentiality in the handling of all medical information, particularly the identity and status of the person with HIV. Exceptions are provided for notifications to health authorities and court orders.

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

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A-133] provides that the state shall provide a mechanism for anonymous HIV testing and shall guarantee anonymity and medical confidentiality in the conduct of such tests.

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 privacy legislation giving subjects of the information rights in respect of data relating to them.

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 privacy or data protection commissioner established by 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)?

Although there is a right to privacy in the Constitution, provisions of the Constitution and the common law principle of open justice mean court proceedings will rarely be held in private. An extremely strong overriding interest is required to displace the presumption of open court proceedings. The FSM *Constitution* Article 4 refers to the right to a “public trial” in criminal 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)?

Pohnpei HIV Prevention and Care Act [Cap 6A-150] provides that a comprehensive HIV surveillance and monitoring program shall be established to determine and monitor the magnitude and progression of HIV in Pohnpei, and for the purpose of evaluating the adequacy of the countermeasures being employed. It is mandatory for all public and private health care facilities to report each new HIV infection diagnosed to the Department of Health Services utilizing an agreed name code system [Cap 6A-151].

CHECKLIST 7 – EMPLOYMENT LAWS

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

The FSM *Code* Title 51 Cap 2 Section 202 requires each non-resident worker and each member of his family entering the Trust Territory to have in his possession a certificate of freedom from contagious disease and requires a physical examination of every entrant into the Trust Territory who holds an entry permit for employment.

The *Pohnpei HIV Prevention and Care Act 2007* prohibits HIV screening for employment purposes [6A – 131].

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

The *Pohnpei HIV Prevention and Care Act 2007* [Cap 6A-131] does not prohibit screening for specific groups but provides that compulsory HIV testing “as a precondition to employment, ...or the continued enjoyment of said undertakings” shall be deemed unlawful. Intentional violation of this section is punishable with a penalty of imprisonment for not less than six months and no more than two years, a fine of not more than \$1000, or both such fine and imprisonment.

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?

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A – 121] provides that the Department of Health Service shall issue guidelines on precautions against HIV transmission during surgical, dental, embalming, tattooing, piercing or similar procedures.

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 provide a right of access to information and education about HIV 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?**

No unfair dismissal rules relating to disability or HIV were identified. In Pohnpei, the prohibition against discrimination in employment operates to provide employment security to HIV positive workers.

Social Security rights to disability benefits are defined by Title 53 Cap 8 of the FSM *Code*.

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

The Constitutional guarantee of privacy may afford some protection in some circumstances from government interference in employment medical records.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A-160] provides that all workers, employers, recruitment agencies, insurance companies and other custodians of any medical record, file, data, and test results are directed to strictly observe confidentiality in the handling of all medical information, particularly the identity and status of the person with HIV.

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

Legislation does not recognize compensation for 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 quality, accuracy, and availability of 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?**

No legislation was identified requiring approval and registration of pharmaceuticals, vaccines, and medical devices for marketing. Title 41 Cap 1 Section 102 of the FSM Code (*Health Services Administration*) enables Health Regulations to be made in respect of foods, drugs, and cosmetics, and the manufacture, compounding, processing, extracting, preparing, storing, selling, and offering for sale or for consumption or use of any food, drug, or cosmetic.

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

Pohnpei HIV Prevention and Care Act 2007 [Cap 61-117] provides that misinformation regarding HIV prevention and care through false and misleading advertisements and claims in any media or the promotional marketing of drugs, devices, agents or procedures without prior approval from the Department is an offence.

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 condoms to comply 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?**

Pohnpei HIV Prevention and Care Act [Cap 6A – 111] provides that HIV education and information dissemination shall form part of the delivery of health services by health practitioners, workers and personnel, and it shall be a civic duty of health providers in the

private sector to make available to the public such information necessary to control the spread of HIV and to correct misconceptions about this infection. The training of health workers shall include discussion on HIV related ethical issues such as confidentiality, informed consent and the duty to provide treatment and access to preventative commodities such as 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)?

FSM is not a member of the WTO and no patent legislation was identified. Patent legislation is the province of the national government. Title 35 of the FSM *Code* relates to copyrights, patents, and trademarks, but only legislation relating to copyright is included in the *Code*.

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?**
- 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?**

No legislation was identified in relation to research in FSM. In 2006, FSM reported that it does not have a policy to ensure that HIV/AIDS research protocols involving human subjects are reviewed and approved by an ethics committee.¹⁰

¹⁰ FSM Department of Health and Social Affairs (2006) *UNGASS Country Report*.

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?

FSM *Constitution* Article IV Section 12 provides that a citizen may travel and migrate within the Federated States. Similar provisions exist at state level e.g. *Constitution of Pohnpei* Article 4 Section 13 subject only to the requirements of public health, order, and safety all persons have freedom of travel and movement. Constitutional guarantees of freedom of travel and movement could be argued to protect vulnerable groups from restrictions on movement, although may be difficult to enforce in the case of sex workers in states where sex work is illegal (Chuuk and Pohnpei).

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

FSM and State Constitutions provide that no law may deny or impair freedom of peaceable assembly or association (e.g. FSM *Constitution* Article 4 Section 1: No law may deny or impair freedom of peaceable assembly, association; *Constitution of Yap* Article 2 Section 1: right of peaceable assembly; *Constitution of Pohnpei* Article 4 Section 2). Constitutional guarantees of freedom of assembly or association could be argued to protect vulnerable groups from restrictions on meeting/association, although may be difficult to enforce in the case of sex workers in states where sex work is illegal (Chuuk and Pohnpei).

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

Censorship legislation does not contain exceptions for HIV information. However, the *Pohnpei HIV Prevention and Care Act 2007* provides that provision of HIV information is a health service.

Kosrae Code Section 13.537 provides an offence of display of indecent material in a place where minors may frequent as follows:

Indecent material is material, taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards of the State of Kosrae, is to a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters, giving due consideration to the preservation of custom and tradition; and is matter which taken as a whole is utterly without redeeming social importance for minors. Display of indecent material in a place where minors may frequent is a category three misdemeanor.

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

Kosrae Code Section 7.204 provides the broadcast standard of respect for community standards of decency. There is no exception for HIV education and information.

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)?**

FSM Health Services Administration [Title 41 Cap 1] provides that the director of Health Services shall establish standards of medical and dental care and practice.

Pohnpei HIV Prevention and Care Act 2007 [Cap 6A – 121] provides that the Department of Health Service shall issue guidelines on precautions against HIV transmission during surgical, dental, embalming, tattooing, piercing or similar procedures. Guidelines shall also be issued for handling and disposition of cadavers.

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?**

The *Pohnpei HIV Prevention and Care Act 2007* requires Departmental guidelines to be developed to minimize risk of transmission, and there are separate requirements in relation to confidentiality, informed consent and discrimination.

SUMMARY AND RECOMMENDATIONS

The *Pohnpei HIV Prevention and Care Act 2007* in many respects provides a model for a rights-based approach to HIV for the other states in FSM and the Pacific region. It could be improved by:

- making civil remedies available for HIV related discrimination as an alternative to a prosecution. This would mean that a lower standard of proof would be required than a prosecution and would ensure that people wronged by discrimination have access to compensation or other remedies such as reinstatement.
- strengthening the requirements for contact tracing such that it may only occur where:
 - 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.

Federal Health Regulations were not available for analysis. If HIV and AIDS appear in the Health Regulations, public health legislation relating to isolation and quarantine is inappropriate for their management. This applies also to current policies regarding screening of groups such as food handlers and immigrant workers.

The qualification of each of the five Constitutions by tradition and custom impedes women enjoyment of gender equality in issues such as inheritance and family law. The approach of FSM courts is to reconcile custom and constitutional rights where possible. The courts have observed that constitutional government works not to override custom, but works in cooperation with the traditional system in an atmosphere of mutual respect,¹¹ and that there may be opportunities for coordination or mutual support, but there appears no reason why one system should control the other.¹²

To avoid ambiguity, it is recommended that legislation guarantee that Constitutional rights to equality between men and women take precedence over customary law in relation to inheritance and property.

The offences in Chuuk and Pohnpei relating to prostitution involving consenting adults in private, and the lack of provision for an offence for marital rape contravene human rights and are harmful to the status of women. The offence of abortion in Chuuk, Kosra and

¹¹ *In re Iriarte* (II), 1 FSM Intrm. 255, 271 (Pon 1982)

¹² *Mudong*, 1 FSM Intrm. at 145.

Pohnpei 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, and reduce HIV vulnerability. 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.

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.¹³ 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 similar to that in Pohnpei is required in all states or nationally.

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.

¹³ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work*
www.ilo.org/aids