

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Fiji Islands

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

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Note that Fiji changed its laws in 2010 and therefore this review is outdated now.

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 2006.¹

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 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—

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

² UNAIDS/IPU. Geneva, 1999.

- 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

Background⁴

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. 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

³ See *Consolidated Guidelines* paras 102-103.

⁴ 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.

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.⁵ 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.⁶

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 system⁷

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:

- 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));

⁵ C. Jenkins (2005), *HIV/AIDS in the Pacific*, Manila, ADB

⁶ WHO (2006) *Second Generation Surveillance Surveys of HIV, Other STIs and Risk Behaviours in Six Pacific Island Countries (2004-2005)* WHO, Manila.

⁷ Information on legal systems from Pacific Islands Legal Information Institute; additional information from RRRT.

- 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.⁸

⁸ Information provided by RRRT.

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*.

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*⁹ and *McCoskar v The State*¹⁰ 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?

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,

⁹ (2005) FJHC 1.

¹⁰ (2005) FJHC 500.

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;
- 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 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 Coordinating 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.¹¹

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:**

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?**

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

¹¹ RRRT communication, February 2007.

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.

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.

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?**

Fiji has a National Health Research Committee and a National Ethics Committee,¹² although information about the working of the committee was not available at the time of writing. The *Constitution* at Section 25(2) guarantees every person the right to freedom from scientific or medical treatment or procedures without his or her informed consent or, if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian. This provision provides a safeguard against unethical medical research.

- 2. Does the legislation require subjects to be provided before, during and after participation with:**
 - **Counselling**
 - **Protection from discrimination;**
 - **Health and support services?**

No research legislation was identified. Please see Question 1 above.

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

Please see Question 1 above.

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

Section 37 of the *Constitution* guarantees the right to personal privacy.

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

Please see Question 1 above.

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

Section 38 of the *Constitution* guarantees 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. However it is unclear whether this applies to discrimination in the conduct of research. The Human

¹² 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.31

Rights Commission Act does not apply to selection of research subjects. Research is not an area of activity in relation to which discrimination is unlawful as specified in Section 38(4) or Section 17 of the *Human Rights Commission Act*.

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?

Although Fiji's *Constitution* guarantees rights of personal liberty (Section 22), freedom of assembly (Section 31), freedom of association (Section 32), and freedom of movement (Section 34), the criminalization of sex work may lead to restrictions on the movement of sex workers through law enforcement activities such as arrest and imprisonment. Criminalization of sex work makes the task of reaching sex workers with HIV prevention and other health and safety information difficult, as sex workers are driven into hiding by such laws.

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

The laws criminalising sex work, and restricting the freedom of movement of sex workers, discussed in question 1 above, also restrict the freedom of association of sex workers. If sex workers come together as a group then they may fear arrest and prosecution. Gay men / men who have sex with men who seek to form associations are protected by the Constitutional right to freedom of association.

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

Section 188 of the *Penal Code* prohibits trafficking in obscene publications, which includes any object tending to corrupt morals. The *Cinematographic Films Act* (Cap. 271) provides for the licensing of exhibitors and the censorship of films, with exemptions for films of medical or surgical procedures, educational films used by educational institutions, and scientific, cultural, religious or sporting instruction films (Section 6). The censor may withhold approval for any film for public exhibition which he considers 'indecent, obscene, injurious to morality or likely to encourage public disorder or crime' (section 12(2)). Neither of these laws provides exemptions for general and targeted HIV information.

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

There is a Fiji Media Council which sets standards through a *Code of Ethics and Practice*. The Code does not address HIV information. A 2006 Bill proposed creation of a Broadcast Licensing Authority, but was not enacted.

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)?**

At the time of writing, there was no information available to indicate the development of specific HIV codes of practice for any of the above professional groups. Fiji's Ministry of Labour, Industrial Relations, Tourism and Environment issued a *National Code of Practice for HIV/AIDS in the Workplace* in 2007. The Code of Practice is based on the International Labor Organization *Code of Practice on HIV/AIDS and the World of Work*. The Fijian Code addresses:

- 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 (e.g. in relation to duty of care). Under Fiji's *Health and Safety at Work Act 1996* and the *Employment Relations Promulgations 2007* the Minister for Labour, Industrial Relations, Tourism and Environment has the authority to approve the Code of Practice for the purpose of providing practical guidance on matters relating to those Acts.

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?**

See above, there are no requirements to develop Codes of Practice with these elements.

SUMMARY AND RECOMMENDATIONS

Public Health Law

Fiji's public health legislation requires updating to address HIV through a human rights-based framework. While Fiji's *Constitution* guarantees freedom from medical procedures without informed consent, the *Public Health Act* and several other Acts permit mandatory HIV testing. The *Public Health Act* also inappropriately applies measures traditionally used to combat infectious diseases, such as restricting the movement of people in public places, physical restraint and isolation. Public health legislation should be reviewed so as to address the particular challenges posed by the HIV epidemic, such as confidential reporting of HIV and AIDS diagnoses to public health authorities, due process protections and restrictions on coercive interventions. Inappropriate measures for the control of infectious diseases should not be applied to HIV in ways that breach human rights, undermine prevention efforts and contribute to HIV-related stigma and discrimination.

Legislation is required that protects blood, tissue, and organ supply against contamination from HIV or other blood borne viruses.

Criminal Law

The general offence of disease transmission in the *Penal Code* is in accordance with the *International Guidelines*. Laws which criminalize sex work and abortion require review. Homosexual sex has in effect been decriminalised by the High Court's ruling that the Penal Code offences that criminalise consensual sex between adults in private are unconstitutional. Legislative action is still required to remove the unconstitutional provisions from statute. Decriminalization of sex work and abortion will support more effective public health responses. Action is required to enable peer education of HIV and sexual health to occur openly without fear of prosecution, and the protection of sex workers from coercion and trafficking.

Prisons/Correctional Laws

The *Prisons and Corrections Act 2006* is compliant with international human rights standards regarding treatment of prisoners and HIV, and provides a model for the rest of the Pacific. Specific provisions providing for the free availability of quality assured condoms in prisons are required.

Anti-Discrimination Law

Fiji has strong anti-discrimination laws which could be applied to prevent HIV related discrimination. Fiji's *Constitution* prohibits discrimination on the grounds of gender, sexual orientation and disability. It is the only Pacific country to have a Human Rights Commission, and one of the few Pacific countries with a Constitution which enables its courts to look to international human rights instruments for guidance. Some domestic legislation, such as the *Public Health Act* and the *Penal Code*, has not yet been revised so as to be consistent with the *Constitution*. Ensuring consistency between Acts and the *Constitution* would further enhance respect for human rights. The protection of people living with HIV from discrimination at work provided by the *Employment Relations Promulgation 2007* provides a model for other countries.

It is not clear whether the existing prohibition on discrimination on the grounds of gender includes transgender status. This may require legislation to clarify that transgender people are protected from discrimination.

Equality of Legal Status of Vulnerable Populations

Fiji's *Constitution* guarantees equality before the law. Amending the *Penal Code* to make the offence of rape gender-neutral would enhance protections against sexual violence, thus promoting greater respect for human rights, and contributing to a more effective response to the HIV epidemic. The Convention on the Rights of the Child provides a framework for the recognition of children's rights in line with their evolving capacity, and in accordance with internationally adopted standards. Legislation to provide an equal age of consent for heterosexual and homosexual acts, and the recognition of same-sex relationships, would contribute to a more enabling environment for HIV prevention, treatment and care. The prohibition of discrimination on the ground of presumed HIV status or sexual orientation at work provided by the *Employment Relations Promulgation 2007* provides a model for other countries.

Privacy and Confidentiality Laws

Fiji's *Constitution* guarantees the right to personal privacy. In addition, prisoners' privacy is protected by the *Prisons and Corrections Act 2006*. Professional groups such as health care workers and lawyers are also bound by regulatory Acts to uphold the confidentiality of clients' HIV-related information. Both the Human Rights Commission and the Ombudsman Commission have jurisdiction over human rights breaches, including privacy breaches.

Employment Laws

The *Employment Relations Promulgation 2007* and national *Code of Practice on HIV/AIDS* provide a progressive framework for addressing HIV in the workplace. The *Royal Fiji Military Forces Act (Cap 81)*, and the *Police Act (Cap 85)* should be amended to clarify that mandatory HIV testing is not permitted in the context of employment.

Therapeutic Goods, Consumer Protection Laws

Censorship laws should be amended to allow for the appropriate distribution of HIV information and education materials. The provision in the *Pharmacy and Poisons Act* that prohibits use of vending machines to sell devices to prevent conception should be amended so as not apply to male and female condoms. The *Patents Act (Cap 239)* should be amended to promote access to affordable HIV treatments. Legislation should require that condom quality complies with the International Condom Standard. The *Patents Act* should be amended to include powers for: compulsory licensing including government use of generic medicines for non-commercial purposes; parallel importing of cheaper medicines under patent that are sourced on the global market; and a solar provision to ensure that generic medicines can be registered for sale as soon as possible after patent expiry.

Ethical Human Research

Fiji has a National Health Research Committee and a National Ethics Committee, although information about the working of these committees was not available at the time of writing. The *Constitution* at Section 25(2) guarantees every person the right to freedom from scientific or medical treatment or procedures without his or her informed consent or, if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian. This provision provides a safeguard against unethical medical research. Further information is required regarding the standards by which decisions as to ethical approval of research involving human subjects are made, and the rights of research participants.

Association, Information, Codes of Practice

Although Fiji's *Constitution* guarantees rights of personal liberty (Section 22), freedom of assembly (Section 31), freedom of association (Section 32), and freedom of movement (Section 34), the criminalization of sex work makes the task of reaching sex workers with HIV prevention and other health and safety information difficult or impossible, as sex workers are driven into hiding by such laws. Further information is needed regarding codes of practice in various professions and industries.

Censorship legislation and the Media Council Code of Ethics should be amended to provide exceptions for appropriately distributed HIV information and education materials.