

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Kiribati

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

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Introduction and methodology

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Kiribati. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006¹.

To assist parliamentarians and other elected officials to promulgate and enact effective legislation, and undertaking appropriate law reform in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.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 2 – Criminal Law considers the issue of abortion.

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

¹ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm> for the full text of the consolidated Guidelines.

² UNAIDS/IPU. Geneva, 1999.

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

Background⁴

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

The majority of people infected with HIV have been Kiribati men who work overseas as merchant seamen, who in turn pass on the infection to their wives and children. Over a thousand Kiribati seafarers are working on merchant ships at any point in time, many of which visit high HIV prevalence countries. While there is no organized sex industry in Kiribati, there is transactional sex between I-Kiribati women or girls and visiting fishermen.⁵

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

- Low rates of condom use resulting in unwanted pregnancies and high levels of STIs among youth;

³ See Consolidated Guidelines paras 102-103.

⁴ Information based on World Health Organization Regional Office for the Western Pacific *Country Health Information Profiles*; WHO (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries* Ministries of Health, World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community, University of NSW.

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

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

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

Gender based violence contributes to HIV vulnerability of women and girls. Recent survey data⁶ found:

- 60% of women reported that they had experienced physical partner violence.
- 46% of women reported that they had experienced sexual partner violence.
- Overall, 68% of women reported that they had experienced physical or sexual partner violence, or both.
- 23% of women who had ever been pregnant reported that they had been beaten by a partner during their pregnancy
- 18% of women aged 15–49 reported that they had experienced sexual abuse during their childhood (under age 15).

Legal system⁷

Sources of law in Kiribati are:

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

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

⁶ UNDP, SPC (2008) *16 Days of Activism Against Gender Violence* (Kiribati pamphlet, full survey results to be published 2009)
⁷Information on court and legal systems derived from Pacific Islands Legal Information Institute www.paclii.org

International obligations

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

HIV policy framework

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

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

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

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

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

CHECKLIST 1 – PUBLIC HEALTH LAW

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

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

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

2. Does the legislation:

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

The *Public Health Ordinance* does not address the issue of HIV testing and counselling. In practice, testing is performed on people with symptoms, or who voluntarily request an HIV test.⁸

The *Immigration Ordinance* [Cap 41] permits an immigration officer to require any person entering Kiribati to submit to medical examination (Section 5). The terms of the Ordinance are sufficiently broad to enable mandatory HIV testing. HIV testing for screening purposes is routinely required of visa applicants and seafarers⁹. In relation to seafarers, the information available at the time of writing was insufficient to indicate whether all seafarers were required to undergo HIV testing, or only foreign seafarers entering Kiribati, or seafarers identified according to some other criteria. The Kiribati Marine Training Centre carries out routine HIV testing of all new entrants.¹⁰

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

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

⁸ UNDP communication, January 2007.

⁹ UNDP communication, January 2007.

¹⁰ UNDP communication, January 2007.

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

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

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

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

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

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

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

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

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

HIV testing is performed on all donated blood¹¹. No blood safety legislation was identified.

¹¹ UNDP communication, January 2007.

CHECKLIST 2 – CRIMINAL LAW

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

No laws regulating supply of needles and syringes were identified.

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

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

Homosexual acts e.g. sodomy

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

Fornication or adultery

Fornication and adultery are not crimes in Kiribati.

Street sex work

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

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

Brothel or escort sex work?

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

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

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

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

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

There is no legislation regulating occupational health and safety in the sex industry (there is no organised industry).

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

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

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

Section 176 of the *Penal Code* states:

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

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

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

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

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

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

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

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

Section 128 of the *Penal Code* defines rape as a crime committed against a woman or girl by a male. As the *Penal Code* does not recognise rape of a male, and on the assumption that prisoners are segregated by sex, then the legislation affords no protection for prisoners against rape. The *Prisons Ordinance* provides for punishment of prisoners for breaches of discipline presumably including assault, however further information regarding this Ordinance was not available at the time of writing.

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

There are no legislative or constitutional protections for the confidentiality of prisoners' medical and/or personal information, including HIV status. The right to privacy in Article 3 of the *Constitution* extends only to privacy of the home and personal property, and not to privacy of the person. As noted above, further information regarding the *Prisons Ordinance* or other legal or policy instruments which may be relevant to prisons administration was not available at the time of writing.

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

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

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

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

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

There are no legislative or constitutional protections against discrimination on the ground of HIV status. At the time of writing, insufficient information was available to assess whether there are any relevant provisions in the *Prisons Ordinance*.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Article 3 of the *Constitution* provides that every person in Kiribati is entitled to fundamental human rights “whatever his race, place of origin, political opinions, colour, or creed.” However there are no constitutional or legislative prohibitions against discrimination based on a person’s disability, HIV or other health status. Hence there is no protection under the *Constitution* or legislation against discrimination on the ground of HIV.

The Rights guaranteed in the Constitution are rights to life, personal liberty, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement, freedom from discrimination, protection from slavery, forced labour, inhuman treatment, deprivation of property, privacy of home and other property, and protection of law. These Constitutional rights are “subject to respect for the rights and freedoms of others and the public interest”.

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

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

3. Does the legislation contain the following substantive features:

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

Please see Question 1 above.

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

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

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

5. **Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:**
- **Education and promotion of human rights;**
 - **Advising government on human rights issues;**
 - **Monitoring compliance with domestic legislation and international treaties and norms;**
 - **Investigating, conciliating, resolving or arbitrating individual complaints;**
 - **Keeping data/statistics of cases and reporting on its activities?**

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

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

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

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

Status of customary law

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

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

Laws of Kiribati Act 1989 provides:

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

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

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

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

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

Ownership of property and inheritance, access to credit and finance

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

There is no legal barrier to women obtaining bank loans, mortgages, credit and finance. Despite the absence of formal barriers, women may experience indirect discrimination in obtaining credit and loans.¹²

In the preamble to the Constitution, the people pledge to uphold their customs. Legislation has been introduced permitting the observance of customary law in a range of situations including criminal law, family law and land law, all of which have gendered impacts on women. The status given to customary law coupled with the absence of anti-discrimination provisions and other protective provisions in the Constitution leaves women in Kiribati with no legal recourse against customs relating to inheritance and property that discriminate against them on the basis of sex/gender.¹³

The *Gilbert and Phoenix Islands Land Code* made pursuant to the *Native Lands Ordinance* [Cap 61] 1957 governs inheritance law, specifying different rules for different islands based on custom. The Code tends to favour paternal lines and sons over daughters in some circumstances. Generally, succession is along patrilineal lines and sons are often favoured over daughters in relation to both land and important resource rights such as fishponds.¹⁴ The *Gilbert and Phoenix Islands Land Code* Section 11(1) provides:

Nikunua, Arorae

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

Beru, Nikumaroros

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

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

Makin, Butaritari, Tamana, Arorae

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

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

Marakei

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

¹² Ibid. p.224.

¹³ V Jivan, C Forster (2007) *Translating CEDAW into Law - CEDAW Legislative Compliance in Nine Pacific Countries*, UNDP and UNIFEM Suva p.200.

¹⁴ Ibid. p.204.

Marital relations e.g. divorce and custody

Divorce in Kiribati is based on fault based criteria (including adultery, desertion and cruelty): *Native Divorce Ordinance* 1948 [Cap 60] Section 4. Women face disadvantage or risk violent reprisal in proving fault, particularly cruelty and adultery if they choose not to be witnesses or they do not wish to attend court proceedings.¹⁵

The prohibitions against discrimination in Article 3 of the Constitution are subject to a number of exemptions, which include the application of the law “with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description”.

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

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

Kiribati law provides for maintenance orders during separation and after divorce for both children and spouses. Further, the children of unmarried women are specifically and separately provided for in the *Land Code* with discretionary criteria.¹⁶

Hence this criterion is satisfied in relation to the issue of custody of children, and partially satisfied in respect of maintenance after divorce. There is no provision for property settlement upon divorce or separation in the legislation.

Protection from sexual and other violence including rape in marriage

Kiribati has legislated against sexual assault: *Penal Code* [Cap 67] 1965 Sections 128, 133. Rape in marriage is not excluded from the prohibition against rape in Section 128 of the *Penal Code*, although cultural values tend to place the blame for rape on the survivor rather than the perpetrator.¹⁷ Under the *Laws of Kiribati Act* 1989, Schedule 1, Section 3(a)-(e), customary law may be taken into account in a criminal case to ascertain the state of mind of a person; deciding the reasonableness of an act, default, omission or excuse by a person whether to convict.

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

Access to sexual and reproductive health services

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

Recognition of de facto relationships

Kiribati legislation does not recognise de facto relationships.

¹⁵ Ibid. p.203.

¹⁶ Ibid.

¹⁷ UNDP communication, January 2007.

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

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

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

Under Section 11 of the *Immigration Ordinance* [Cap 41], a person entering Kiribati who refuses to undergo a medical examination, or who is certified by a medical practitioner to be suffering a contagious or infectious disease which makes their presence dangerous to the community, is a prohibited immigrant. 'Contagious or infectious disease' is not defined by the *Ordinance*, however visa applicants and seafarers are routinely tested,¹⁸ in breach of the standards set by the *International Guidelines*.

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

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

- 4. Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:**
 - **Consent to voluntary testing with pre- and post-test counselling;**
 - **Access to confidential sexual and reproductive health services?**

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

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

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

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

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

¹⁸ UNDP communication, January 2007.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

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

The only privacy protection provided by Kiribati law is Article 3 the *Constitution*, which protects privacy of the home and other property. The privacy of personal information is not protected by law, although in practice the Ministry of Health takes steps to protect the confidentiality of HIV test results.¹⁹ Hence this requirement is not satisfied by legislation.

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

Please see Question 1 above.

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

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

Please see Question 1 above.

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

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

Please see Question 1 above.

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

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

¹⁹ UNDP communication, January 2007.

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

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

CHECKLIST 7 – EMPLOYMENT LAWS

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

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

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

Mandatory HIV testing is not prohibited by Kiribati law.

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

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

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

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

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

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

Employment security

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

Social security

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

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

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

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

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

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

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

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

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

- Safe; and
- Efficacious?

Pharmacy and Poisons Ordinance [Cap 70] Section 48 provides that the British Pharmacopeia is the standard for quality of medicines.

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

The Ordinance provides that only licensed medicine providers can supply medicines. The Pharmacy and Poisons Board has power to revoke licenses.

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

Compliance with the International Condom Standard is not required.

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

- Condoms
- Bleach
- Needles and syringes?

The *Pharmacy and Poisons Ordinance* prohibits promotion of devices that can be used to prevent conception (Section 47). This could prevent promotion of condoms.

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

The *Registration of United Kingdom Patents Ordinance* Chapter 87 provides that the grantee or holder of a United Kingdom patent may re-register it in Kiribati. There is no legislative power to issue compulsory licences. Hence the legislation does not comply with the *International Guidelines* in this respect.

Information regarding subsidised schemes for HIV-related and other pharmaceuticals, and on customs, duties, or taxes payable on imported pharmaceuticals, was not available at the time of writing.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

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

There is no legislation governing the conditions under which research on human subjects can be conducted. Approval can be sought from the Ministry of Health for the conduct of research on human subjects. This is done in accordance with Ministry of Health policy.²⁰ There is no standing research ethics committee.

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

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

Kiribati legislation does not address these issues.

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

Kiribati legislation does not address these issues.

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

Kiribati legislation does not address these issues.

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

Kiribati legislation does not address these issues.

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

Kiribati legislation does not address these issues.

²⁰ UNDP communication, January 2007.

CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

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

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

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

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

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

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

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

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

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

There are several laws governing censorship of materials in Kiribati:

- Section 166 of the *Penal Code* prohibits the making, production, possession, importation, exportation, conveyance, dealing in, distribution, exhibition or lending of obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph

films, or any other obscene objects, or any other object tending to corrupt morals, and the public exhibition of any indecent show or performance or any show or performance tending to corrupt morals; Sections 167-9 prohibit indecent acts in public places.

- The *Exhibition of Films Ordinance* [Cap 31A] requires the censorship of all films to be publicly exhibited, and a film censor examiner may in his absolute discretion refuse to certify a film for public exhibition, and an appeal lies to the Minister.
- Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles are prohibited imports under Section 29 and Schedule 2 of the *Customs Act* 1993.

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

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

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

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

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

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

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

- Confidentiality/privacy protections;
- Informed consent to HIV testing;
- Duty not to unfairly discriminate; and
- Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?

Please see Question 5 above.

SUMMARY AND RECOMMENDATIONS

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

Public health law

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

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

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

Criminal law

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

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

Prisons/correctional laws

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

Anti-discrimination legislation

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

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

Equality of legal status of vulnerable populations

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

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

Privacy/confidentiality laws

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

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

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

Employment laws

- The *Employment Act* currently grants employers wide powers regarding pre-employment medical examination. The Act should be amended to prohibit mandatory HIV testing as a condition of employment, training, promotion, and benefits, and mandatory HIV testing of specific employment groups (such as seafarers) should also be prohibited;
- Legislation should be enacted to require provision of information and education about HIV for occupational health and safety reasons, for example workers travelling to areas of high incidence;
- Employment security for HIV-positive employees who are fit to work should be protected, and social security and other benefits provided for workers who are no longer able to work;
- Legislation should be enacted requiring employers to protect the confidentiality of workers' medical and personal information including HIV status;

- The *Workers Compensation Ordinance* [Cap 102] should be amended so that occupationally acquired HIV infection is compensable, by removing the requirement that incapacity or death from occupationally acquired disease must occur within 12 months of contracting the disease;

Therapeutic goods, consumer protection laws

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

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

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

Ethical human research

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

Association, information, codes of practice

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

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