

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Republic of Marshall Islands

**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 Republic of Marshall Islands (RMI). 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 5 considers the issue of abortion.

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

Human rights principles

The principles of Human Rights relevant to HIV include—

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

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

Marshall Islands has a low level HIV epidemic. The cumulative number of reported HIV cases as of June 2008 was 12. These cases were transmitted sexually. Injecting drug use is not considered an issue. Prevalence of sexually transmitted infections (STIs) is thought to be high. Common STIs diagnosed are syphilis, Chlamydia and gonorrhoea. A survey of prenatal mothers revealed that 11.6% had ever been diagnosed with an STI. There are high levels of stigma and shame associated with HIV and STIs.

Population growth is high in urban areas. There are high levels of mobility both between islands and between the Marshall Islands and other countries. Education is free and compulsory up to the 8th Grade, with higher dropout rates for girls. Traditional culture is hierarchical. There are high rates of domestic violence, teenage pregnancy and alcoholism. Social and economic discrimination against women is widespread despite the tradition of matrilineal inheritance. Domestic violence against women is often alcohol related. Each year since 2000, nearly one-fifth of all babies were born to teenage mothers.

³ See Consolidated Guidelines paras 102-103.

⁴ Information based on Institute of Justice and Applied Legal Studies (IJALS) n.d. *The Pacific HIV/AIDS Law, Ethics and Human Rights Implementation Strategy Report* Suva, Fiji Islands; UNHCR *Freedom in the World Report 2008*; Statement by Marshall Islands for Pacific SIDS - Delivered at UN on June 10, 2008; WHO (2006) *Country Health Information Profiles United Nations General Assembly Special Session on HIV and AIDS (UNGASS) 2008 Marshall Islands Progress Report - Reporting period: January 2006–December 2007* January 2008.

There is some organised commercial sex work by and for foreigners, in the bars of Majuro and Ebeye. Clients mainly come from the crews of foreign fishing vessels. There are allegations that sex workers are trafficked.⁵ There is some informal sex work by young Marshallese women.

Subsidised essential medical services are provided for all citizens, largely funded by foreign donors. The STI clinics (Majuro and Ebeye) are walk in and referral clinics. NGOs work with out-of-school youth on life skills education including HIV. The two most important civil society organizations working in HIV prevention are Youth to Youth in Health and Women's United Together Marshall Islands.

Legal system⁶

Marshall Islands is a self-governing nation under the Compact of Free Association with the United States, which manages defence and national security. The legal system is based largely on US common law, which is subject to the *Constitution*, customary law, traditional practice and statutes. The High Court is the superior court of record. Appeals lie to the Supreme Court. The Traditional Rights Court adjudicates land rights; the District Court is a court of record with limited jurisdiction. There is a Community Court for each of the 24 local government areas.

The Marshall Islands *Constitution* provides legal recognition of the following human rights and freedoms:

- the right to equality and freedom from discrimination;
- the right to freedom of thought, conscience, and belief;
- the right to the free exercise of religion;
- freedom of peaceful assembly and association;
- freedom of speech and of the press;
- the right to petition the government for a redress of grievances;
- freedom from slavery or involuntary servitude, forced or compulsory labour;
- the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures;
- the right to life, liberty, and property;
- freedom from torture or inhuman and degrading treatment, cruel and unusual punishment, excessive fines or deprivations;
- freedom from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into privacy;
- the right of the people to health care, education, and legal services

International obligations

Republic of Marshall Islands (RMI) is a Member of the United Nations, and 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.

⁵ PNS *Marshall Prostitution Charges* PACNEWS 3 (online): Mon 28 Aug 2006

⁶ Information on court and legal systems derived from Pacific Islands Legal Information Institute <www.paclii.org>.

HIV policy framework

The Ministry of Health acts as the central coordinating body for HIV related activities. The Ministry of Health works closely with other ministries on HIV initiatives. Outside of the Ministry of Health only the Ministry of Education has specific allocated funding for HIV programmes.

One of the national health priorities is to reduce transmission of sexually transmitted diseases and develop HIV/AIDS/STI prevention programmes. There is an overarching Five Year Health Strategic Plan.

A Community Planning Group is responsible for coordination of HIV policies and programs.

The *RMI National Strategic HIV/AIDS Action Plan 2006-2009* targets the general population; it also provides for programmes within specific settings focusing on youth (12-24), church groups, women's group, men's groups, seafarers, men who have sex with men, commercial and transactional sex workers. The Plan was developed through a workshop held in 2006 with Government Departments and Non Governmental Organizations. This Plan is a community orientated response plan to the spread of HIV/AIDS which emphasizes five priority areas:

- a. Coordinating the response to HIV and AIDS
- b. Preventing and controlling sexually transmitted diseases
- c. Reducing vulnerability
- d. Care and support for people living with and affected by HIV and AIDS
- e. Providing a safe blood transfusion

The Strategic Plan outlines the need to look at legislation that provides an environment that is supportive of people living with HIV so they are able to live productive lives without the fear of discrimination or stigma. *RMI National Guidelines for HIV Care and Prevention* were issued by the Health Ministry HIV AIDS Health Care Team in 2006.

CHECKLIST 1 – PUBLIC HEALTH LAW

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

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

There is a right to health and education in Article 2, Section 15 of the *Constitution*. Article V Section 1 of the *Constitution* provides that the Cabinet shall be responsible for establishing and maintaining such hospitals and other institutions and for providing such other services as may be reasonable and necessary for the public health.

The *Communicable Diseases Prevention and Control Act 1988* provides for the reporting, identification, prevention and control of communicable diseases, including STDs, HIV and AIDS.

Communicable Diseases Prevention and Control Act 1988 Section 7 provides that the Public Health Department shall provide testing, treatment and counselling at no or low cost, within the limits of its resources. Section 10 of the Act requires the primary and secondary school curriculum to include health education about the transmission and prevention of communicable diseases, the use and abuse of alcohol and other drugs, preparation for adult life, knowledge about basic bodily functions and preparation for raising families.

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?

Under the *Communicable Diseases Prevention and Control Act 1988* Section 7, testing for communicable diseases (including HIV) may be made mandatory by regulation⁷ for —

- the donation of blood or body parts;
- food handlers;
- aliens;
- high school students;
- prisoners;
- citizens who have been out of the country for five years or more;
- pregnant women; and

⁷ According to the *RMI 2008 UNGASS Report*, HIV Testing is mandatory for: Taxi Drivers and Food Handlers, Migrants, TB Patients, STD Clients, Pre natal mothers, Contract employees

- persons the Director of Public Health reasonably believes have a communicable disease.

Judicial authorisation is not required for testing in these circumstances. Those who are tested are to be promptly notified of the results. Persons who are found to be infected are required to be offered appropriate treatment and counselling (Section 7(4)).

Minors over 14 may consent to testing, treatment or counselling. The provider is authorized but not required to inform the parents or guardians.

Under the *Immigration and Emigration Act 1986*, all non-citizens entering the country, other than those exempted which includes those entering government service, may be required to undergo a medical examination at arrival or as soon as possible after arrival (Section 119). In practice this does not include testing for HIV⁸. Additionally, the *Non-resident Worker's Health Certificate Act* requires that all nonresident workers and family members entering the Republic shall have a certificate of freedom from contagious and communicable disease (including a 'social disease'), executed not more than 30 days before arrival; shall be required to undergo a physical examination on arrival, and may have their entry permits revoked if their continued presence might threaten the health of citizens or overtax the Republic's medical and hospital facilities.

There are no restrictions for short-term tourist stays of up to 30 days. Applicants for a permanent residence or work permit and visitors who wish to stay longer than 30 days must present an HIV test result.

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?

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 *Communicable Disease Prevention and Control Act 2007* Section 7 provides that in the event that a person refuses to take a test required by the Act, or refuses to accept treatment and/or counselling, a Public Health officer may petition the High Court to impose on that person, or related property, health care measures to prevent the spread of or exposure to diseases that are a threat to the public. Such measures may include testing, treatment, isolation and quarantine, provided, however, that isolation or quarantine must be based upon a showing of clear and convincing evidence of the serious and present health threat to others. The measures taken shall be the least restrictive to protect the public health and shall maintain confidentiality to the extent possible.

There is no explicit provision for reasonable notice of case to the individual, fixed periods of duration of restrictive orders (i.e. not indefinite), or right of legal representation. The *Constitution* provides for a writ of habeas corpus against unlawful detention.

⁸ UNDP communication, 20 February 2007.

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?**

Persons infected or suspected of being infected with a communicable disease are requested to identify possible contacts. Persons who are named as contacts shall be informed by the Public Health Department that they may have been exposed to a communicable disease and offered testing, treatment and counselling (i.e. contact tracing is mandatory). The name of the informant will not be revealed (Section 7). These provisions satisfy the requirement that the identity of the HIV-positive partner is concealed from the partner where this is possible, but not the other requirements listed above.

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 mandatory for donation of blood or body parts (*Communicable Disease Prevention and Control Act 2007* (Section 7)).

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).**

Information concerning the legality of needle and syringe exchange was not available at the time of writing. The *Narcotic Drugs (Prohibition and Control) Act 1987* prohibits the importation, exportation, cultivation, manufacture, dispensing, use, possession and distribution of a wide range of narcotic drugs, with exemption for professional medical use.

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

Under the 2004 *Revised Criminal Code Part XXV – Sex Crimes*, all sex crimes are gender-neutral. Homosexual acts between consenting males in private are legal. This accords with the anti-discrimination provision of the Constitution which includes a prohibition on gender-based discrimination.

Fornication or adultery

Information on these topics was not available at the time of writing.

Street sex work, brothel or escort sex work

The *Prostitution Prohibition Act 2001* criminalises engaging in, promoting or patronizing prostitution, and the regular use of premises for prostitution activity is prohibited. The *Immigration and Emigration Act 1986* Section 112 provides that no entry documents shall be provided to an alien who is 'a prostitute, procurer or person living on the earnings of the prostitution of others'. These provisions are inconsistent with the *International Guidelines*.

The *Prostitution Prohibition Act 2001* criminalises the aiding and abetting of prostitution and the operation of organised premises. The *Prostitution Prohibition Act 2001* provides offences for any person who promotes prostitution (Section 503); and regular use of any room, building or other for prostitution (Section 504). If the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for prostitution activity, the court may order the premises not be occupied or used for up to one year. All persons, including owners, lessees, officers, agents, inmates or employees, aiding or facilitating such a nuisance may be made defendants.

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)?

No exceptions for HIV prevention and care services were identified.

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.

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)?

No offences for trafficking or sex tourism were identified.

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

Section 11 of the *Communicable Diseases Prevention and Control Act 1988* provides:

Any person knowingly infected with AIDS or HIV, who purposefully or through gross negligence transmits such disease to another person, shall be guilty of a criminal offense, and shall upon conviction be liable to a fine not exceeding \$100,000 or to a life of isolated confinement under the care of the Ministry of Health Services, or both. In addition, any such offender shall be liable to civil damages and any other rights and remedies which a victim may have at law or equity.

This provision does not comply with the recommended approach of general rather than specific offences for the intentional transmission of HIV. The penalty of isolation for life is draconian. There is no public health rationale for isolated confinement, which would be in breach of human rights standards.

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)?

Public Safety Act 1988 Section 30 provides that it shall be the duty of the Probation Officer to visit and interview all prisoners and take all possible steps to correct and rehabilitate them.

Mandatory testing of prisoners is enabled under the *Communicable Diseases Prevention and Control Act 1988*, therefore the requirement of voluntary counselling and testing is not satisfied.

No other legislation specifically relating to prisoner health was identified. Article II of the Marshall Islands *Constitution* establishes the right of the people to health care and education. Article II.12 entitled Equal Protection and Freedom from Discrimination provides that all persons are equal under the law and are entitled to the equal protection of the laws. These Articles can be interpreted to guarantee prisoners access to treatments on an equal basis as non-incarcerated citizens.

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

Section 152 of the *Revised Criminal Code 2004* defines the offence of rape as unlawful sexual intercourse by any person with a female, not his wife, by force and against her will. This excludes rape of males, and hence the legislation does not comply with the *International Guidelines* in this respect.

Section 152 of the *Revised Criminal Code 2004* provides that a person commits the offence of sexual assault in the second degree if while employed in a correctional facility or as a law enforcement officer the person knowingly subjects to sexual penetration an imprisoned person, a person confined to a detention facility, a person residing in a correctional facility operating in the RMI, or a person in custody; or sexual assault in the third degree if while employed in a correctional facility the person knowingly subjects to sexual contact an imprisoned person, a person committed to the director of public safety, or a person residing in a private correctional facility operating in the RMI or causes the person to have sexual contact with the actor.

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

Prisons are specifically excluded from the confidentiality requirements of the *Communicable Diseases Prevention and Control Act 1988*. *Public Safety Act 1988* Section 30 provides that the Minister may appoint a Probation Officer to be attached to any prison who shall have access to the prisons, prisoners and all records relating to prisoners at all times during the day. Thus the requirement of confidentiality of prisoners' HIV status is not satisfied.

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

Information on this topic was not available at the time of writing.

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?

Functions of the Parole Board under the *Parole of Prisoners Act 2001* include appraising prisoners and making decisions that will be compatible with the welfare of the community and of individual offenders, and as such, determine the time at which parole may be granted.

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

Marshall Islands law does not prohibit discrimination on the grounds of HIV in prisons.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

There is no disability discrimination legislation, however there is legislation making it unlawful to discriminate on the grounds of having a communicable disease. Section 1508 of *Communicable Diseases Prevention and Control Act 1988* provides:

(1) No one shall be refused housing solely because he has a communicable disease, nor shall he be denied employment, admission to a school, or access to any other services or facilities available to the public unless Public Health finds that his disease or conduct is such that his employment at a particular job, his attendance at school, or his access to such other services or facilities presents a substantial danger to public health.

(2) Notwithstanding Subsection (1) of this Section, no one who has an STD shall be permitted to engage in an occupation which would regularly bring him into contact with the bodily fluids of a living person. Anyone who is found in violation of this provision shall be subject to a civil fine of not more than \$1,000 in addition to any rights and remedies the afflicted person may have at law or equity.

The Marshall Islands *Constitution* provides that all persons are equal under the law and are entitled to the equal protection of the laws.

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 legal protections from discrimination on the grounds of gender, but not on the grounds of sexual orientation, sexuality or transgender status.

The *Constitution* at Article II.12 provides:

(1) All persons are equal under the law and are entitled to the equal protection of the laws.

(2) No law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender, race, colour, language, religion, political or other opinion, national or social origin, place of birth, family status or descent.

2. Does the legislation contain the following substantive features:

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

The *Constitution* 1979 Section 12(2) states that no law and no executive or judicial action shall either expressly or in its practical operation discriminate. The words 'practical operation' enables some claims of indirect discrimination. A claim may be pursued if a rule appears to apply to a group of people in the same way but in its practical operation the rule places a burden on particular members of that group who share a common characteristic such as HIV status, which is a burden not faced by others.

There is no coverage of those presumed to be infected, or carers, partners, family, or associates.

Vilification is not addressed directly by Marshall Islands legislation, although the right to be free from degrading treatment in Article II of the *Constitution* could be interpreted to prohibit vilification.

There is a general exception allowing discrimination to prevent acts that present a substantial danger to public health, and there is a narrow exception allowing discrimination for occupations which would regularly bring a person with an STD into contact with the bodily fluids of a living person.

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

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

There is no complaint handing body such as a Human Rights Commission or Ombudsman. The High Court can determine claims and may refer Constitutional issues to the Supreme Court.⁹

Article II of the *Constitution* establishes the right of the people to legal services. The other issues raised above are not addressed by Marshall Islands legislation.

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?**

The above issues are not addressed by Marshall Islands legislation. There is no independent human rights body such as a Human Rights Commission or Ombudsman. The courts of the Marshall Islands have jurisdiction in cases of alleged breaches of any of the human rights or freedoms guaranteed by the *Constitution*. No other mechanisms for the protection or promotion of human rights have been established.

⁹ Information on court and legal systems derived from Pacific Islands Legal Information Institute <www.paclii.org>

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?

Customary laws may disadvantage women in some aspects of property and family matters.

Ownership of property and inheritance

Equality of legal status of men and women is guaranteed by Article II.12 of the Marshall Islands *Constitution*, which provides:

(1) All persons are equal under the law and are entitled to the equal protection of the laws.

(2) No law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender....

This equality guarantee does not invalidate discriminatory customary laws regarding land. Article X S.1 states that no action on the basis of a breach of fundamental rights and freedoms can invalidate customary law or traditional practice concerning land tenure. The *Probate Code* (Title 25) does not discriminate against women.

Inheritance in relation to land is determined according to custom. Although inheritance in the Marshall Islands is matrilineal, which means that land and property is passed through females, men still control many aspects of land and property.

Marital relations e.g. divorce and custody

Marshall Islands has nominated 18 as the age of marriage for males and 16 for females. Registration of marriages is required as is the equal consent of both parents in the marriage of minors. Bigamy, however, is not prohibited and customary marriages are exempt from the legislative requirements. *Domestic Relations Act 1988* Section 105 provides that provisions of the Act do not apply to any annulment, divorce, or adoption effected in accordance with local custom, nor shall any restrictions or limitations be imposed upon the granting of divorces in accordance with local custom.

Capacity to enter into contracts, mortgages, credit and finance

There is no legislative barrier to women in the Marshall Islands entering contracts and accessing financial services.

Access to reproductive and STD health information services

The Constitution of the Marshall Islands guarantees the right of the people to health care. Under the *Marshall Islands Revised Code*, there is no mention of abortion. The criminal provisions of the Code are not the exclusive source of criminal law in the country and specific acts can be made a crime by generally respected custom. According to a review published by UNFPA in 2002 whether abortion is a crime is not clear and there were no post-independence court decisions found dealing with the issue.¹⁰ US common law since *Roe v. Wade* 410 U.S. 113 (1973) has established the right of a woman to obtain an abortion in the first two trimesters of pregnancy. However, since independence Marshall Islands courts apply common law developed locally and customary law as well as US common law. Correspondence between the Marshall Islands Attorney General's Office and this review in 2009 indicated the Attorney General's view that abortion is illegal.

Protection from sexual violence, including rape in marriage

Section 152 of the *Revised Criminal Code 2004* defines sexual assault offences in a gender neutral way and does not exclude rape within marriage. The legislation satisfies the requirement of equality of status of men and women in this respect.

Recognition of de facto relationships

De facto relationships, including same-sex relationships, are not recognised.

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 paragraph 1504 of the *Communicable Diseases Prevention and Control Act 1988*, mandatory testing may be required by regulation for —

- the donation of blood or body parts;
- food handlers;
- aliens;
- high school students;
- prisoners;
- citizens who have been out of the country for five years or more;
- pregnant women; and
- persons the Director of Public Health reasonably believes has a communicable disease.

Thus the requirement that legislation prohibit mandatory testing of targeted or vulnerable groups is not satisfied.

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

¹⁰ See summary submitted to UNFPA at www.un.org/esa/population/publications/abortion/doc/marsha.doc

Article 1510 of the *Communicable Diseases Prevention and Control Act 1988* requires that the Ministry of Education, in consultation with the Ministry of Health Services, public and private schools, and parents of school age children, develop a health education curriculum for primary and secondary schools which shall include education about, *inter alia*, the transmission and prevention of communicable diseases. A school failing to implement the health education curriculum may have its funding withdrawn and lose its charter.

- 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?**

Minors over 14 may consent to testing, treatment or counselling. The provider is authorized but not required to inform the parents or guardians (*Communicable Diseases Prevention and Control Act 1988*).

- 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?**

Section 152 of the *Criminal Code* provides that continuous sexual assault of a minor under the age of 16 years is a felony in the first degree.

- 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?**

There is an equal age of consent for heterosexual and homosexual acts. The law does not recognize same-sex marriages or domestic relationships.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

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

The RMI *Constitution* provides a right to privacy. All persons shall be free from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into their privacy (Article II Section 13). In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court acknowledged that the doctor-patient relationship is one which evokes Constitutional rights of privacy.

By Section 1506 of the *Communicable Diseases Prevention and Control Act 1988*, information public or privately held, that identifies persons who have been infected with an STD, may have been infected with an STD, or have been tested for an STD, shall be kept confidential, and may only be released —

- with the consent of the identified person;
- to a physician retained by the identified person;
- to enforce the provision of the rules and regulations of the Public Health Department relating to the prevention, control and treatment of STDs;
- to medical personnel in a medical emergency to the extent necessary to protect the health or life of the named party;
- to blood banks, school, preschools and day care centers, and prisons;
- to a parent or guardian of a minor under the age of fourteen (14) or an incompetent; and
- to the spouse of a person who has AIDS or HIV

The requirement of confidentiality is partially satisfied. Exemptions for pre-schools, day care centres, and prisons are not justified on public health grounds, are inconsistent with the *International Guidelines*, and may be contrary to the right to privacy as guaranteed in the Marshall Islands *Constitution*. Disclosure of a person's positive HIV diagnosis to their spouse should only be done in accordance with appropriate procedures (see Checklist 1 Question 4) which are not required by Marshall Islands law. Confidentiality may also be breached in the case of mandatory testing (see Checklist 1 Question 2 above).

Section 5 of the *Communicable Diseases Prevention and Control Act 1988* provides that anybody who in good faith reports to the Public Health Department a person whom he suspects has a communicable disease, or whom he suspects has had contact with a person who has a communicable disease, is immune from civil and criminal penalties. This Section is inappropriate in the context of HIV, as it permits the reporting of people's HIV-positive status or suspected HIV-positive status to public health authorities without any justification such as that there are reasonable grounds for believing the person has put others at risk of HIV infection.

Under the *Immigration and Emigration Act 1986*, all non-citizens entering the country, other than those exempted which includes those entering government service, may be required to undergo a medical examination at arrival or as soon as possible after arrival (Section 119). Additionally, the *Nonresident Worker's Health Certificate Act* requires that all nonresident workers and family members entering the Republic shall have a certificate of freedom from contagious and communicable disease (including a 'social disease'), executed not more than 30 days before arrival; shall be required to undergo a physical examination on arrival; and may have their entry permits revoked if their continued presence might threaten the health of citizens or overtax the Republic's medical and hospital facilities. These provisions

are inconsistent with the *International Guidelines* and the right to freedom from unreasonable intrusions into privacy as guaranteed by the Marshall Islands *Constitution*.

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

Section 6 of the *Communicable Diseases Prevention and Control Act 1988* requires that information public or privately held, that identifies persons who have been infected with an STD, may have been infected with an STD, or have been tested for an STD, shall be kept confidential, and may only be released in the circumstances listed above. This provision is consistent with the *International Guidelines*. However see comments in Question 1 above on unjustified exemptions to the requirement of confidentiality, and on mandatory testing, which may result in unjustified disclosure of HIV-related 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?**

Marshall Islands legislation does not provide for any of the above rights, hence this requirement is not satisfied.

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?**

Marshall Islands legislation does not provide for a privacy commissioner or data protection commissioner to administer privacy protections, hence this requirement is not satisfied.

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)?

No legislation was identified relating to privacy of people living with HIV in legal proceedings.

Provisions of the Constitution and the common law principle of open justice mean court proceedings will rarely be held in private. An extremely strong overriding interest is required to displace the presumption of open court proceedings. The *Constitution* Article 2 Section 1 provides for freedom of the press, and Article 2 Section 4 refers to the right to a "public trial" in criminal proceedings. US common law suggests that constitutional guarantees of freedom of the press establish a constitutional right of access of the press to criminal and civil court proceedings and records: *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

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)?

By Section 6 of the *Communicable Diseases Prevention and Control Act 1988*, information public or privately held, that identifies persons which have been infected with an STD, may have been infected with an STD, or have been tested for an STD, may be released to enforce the provision of the rules and regulations of the Public Health Department relating to the prevention, control and treatment of STDs. Although the Act requires information to be kept confidential, it does not specify any mechanisms for protection of privacy when information is reported to the Department, such as reporting in the form of coded rather than nominal data.

CHECKLIST 7 – EMPLOYMENT LAWS

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

This requirement is not satisfied. Marshall Islands legislation does not prohibit HIV screening for general employment purposes, and specifically provides for regulations to be made requiring HIV testing of food handlers, aliens, citizens who have been out of the country for more than 5 years, pregnant women, and persons the Director-General of health reasonably believes has a communicable disease (*Communicable Diseases Prevention and Control Act 1988*).

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

See Question 1 above.

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

Legislation does not require implementation of universal infection control measures.

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

Legislation does not specifically require provision of access to information and education about HIV 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?**

The anti-discrimination provision of the *Communicable Diseases Prevention and Control Act 1988* provides employment security. However, mandatory testing may be required for some employees, and the human rights and freedoms guaranteed by the Marshall Islands *Constitution* do not include protection from discrimination on the grounds of HIV status, disability, health status, or other grounds that would provide protection or redress for people with HIV who are subject to discrimination.

The *Social Security Act 1990* establishes a social security system with pension benefits and early retirement, whereby workers are ensured a measure of security in their old age and during disability, and whereby surviving spouses and surviving children of deceased workers are ensured support after the loss of the family's income.

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

There is no Marshall Islands legislation which specifically protects the confidentiality of employees' medical and personal information. However the constitutional right to be free from unreasonable intrusions into privacy should provide protection for employees' privacy, with the exception of employees who are subject to mandatory HIV testing (see question 1 above).

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

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

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?

The *Health Services Act 1983* provides that the Medical Board shall establish standards for the licensing of persons to practice in any category of health service in the Republic.

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

Section 403 of the *Consumer Protection Act* (Revised Code Title 20) provides consumers with protection against fraudulent claims including deceptive representations and representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

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

No legislation requires 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?

It could be argued that the constitutional right to health care extends to access to HIV prevention equipment such as condoms, bleach, and sterile injecting equipment.

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 Marshall Islands is not a member of the World Trade Organization and does not have domestic patent legislation. No information was available at the time of writing regarding subsidization schemes for pharmaceuticals, or customs, duties, or taxes on HIV medications. Marshall Islands has access to regional bulk procurement arrangements for ARVs and other HIV related medicines.

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?**

Marshall Islands law does not address this issue.

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

Marshall Islands law does not address these issue.

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

Marshall Islands law does not address this issue.

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

Marshall Islands law does not address this issue specifically. It could be argued that the constitutional guarantee of freedom from unreasonable intrusions into privacy protects the confidentiality of personal information obtained during the process of research, however there was no information at the time of writing that the constitution has been interpreted in this way.

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

Marshall Islands law does not address this issue.

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

Marshall Islands law does not address this issue.

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?

Legislation does not enable the unrestricted movement of sex workers or other vulnerable groups.

The *Immigration and Emigration Act 1986* Section 112 provides that no entry documents shall be provided to an alien who is 'a prostitute, procurer or person living on the earnings of the prostitution of others'.

The *Anti-Prostitution Act 2001* criminalises engaging in, promoting or patronizing prostitution, and the regular use of premises for prostitution activity is prohibited. 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 and restrictions on the rights of sex workers such as the right to freedom of movement, make 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. The illegality of the sex industry also mitigates against the development and enforcement of occupational health and safety standards which can protect the health and safety of both sex workers and their clients.

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 they may be more conspicuous and liable to arrest and prosecution.

Marshall Islands legislation does not place similar restrictions on the freedom of movement of gay men or men who have sex with other men, as consensual homosexual acts between men are not criminalised.

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

The *Adult Film Act 1994* restricts the showing of films with a U.S. rating other than 'G' or 'PG', or unrated films which contain language and/or situations which are unsuitable for general viewing audiences, to adults only. There is no specific mention of obscene or indecent materials in customs legislation or the *Criminal Code*. There are no exceptions for HIV/AIDS information in the *Adult Film Act 1994*. It is not clear whether this would affect the production or distribution of HIV/AIDS information resources either to the general community or targeted to particular populations.

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

No broadcasting standards were identified.

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

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

No laws require professional groups to develop HIV/AIDS Codes of Practice.

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

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

No laws require professional groups to develop HIV/AIDS Codes of Practice.

SUMMARY AND RECOMMENDATIONS

The anti-discrimination protections of the *Communicable Diseases Prevention and Control Act 1988* are helpful to prevention and care efforts. However other aspects of public health law and criminal law are likely to impede HIV prevention and sexual health promotion.

Public health law

The *Communicable Diseases Prevention and Control Act 1988* contains provisions which are inconsistent with a human rights based response to the HIV epidemic and can undermine the effectiveness of HIV prevention, treatment, care and support interventions. The legislation should be amended as follows:

- To exclude HIV and AIDS from the definitions of communicable disease and sexually transmitted disease;
- To exclude HIV from the mandatory testing provisions, except to the extent that such testing is in accordance with the *International Guidelines* (e.g. testing of blood donors);
- To limit notifications of HIV diagnoses to authorised medical practitioners, rather than allowing such notifications by any person, as is currently the case under Section 1506;

Criminal law

It is recommended that:

- The provisions of the *Anti-Prostitution Act 2001* and the *Immigration and Emigration Act 1986* that criminalise sex workers should be repealed.
- Section 1511 of the *Communicable Diseases Prevention and Control Act 1988* should be repealed. The draconian offence for HIV transmission purposefully or through gross negligence attracts a penalty of isolated confinement for life under the care of the Ministry of Health Services. This type of offence is likely to be ineffective in achieving public health objectives, may add to stigma and drive people most at risk away from testing, counselling and treatment services. Instead, general criminal law provisions (e.g. assault causing grievous bodily harm) should be applied in prosecutions for deliberate or intentional transmission of HIV.

Prisons/correctional laws

It is recommended that legislation be enacted:

- to provide for free provision of condoms and HIV prevention information in prisons
- to provide for protection of the confidentiality of prisoners' medical and/or personal information;
- prohibiting HIV-related discrimination in prisons should be enacted.

Anti-discrimination legislation

It is recommended that the existing anti-discrimination protections for people with communicable diseases (including HIV) be widened to include people assumed to have HIV, and families, carers and other associates of people living with HIV.

Legislation should also be enacted to make discrimination on the grounds of sex, sexuality or sexual orientation, and transgender status unlawful.

Equality of legal status of vulnerable populations

Women will be less vulnerable to HIV and other diseases if their social and economic status is improved. Amending the law to include a provision that protection from discrimination on the grounds of sex prevails when there is conflict between customary law and Constitutional equality guarantees or would improve women's status.

Section 152 of the *Revised Criminal Code 2004* should be amended to recognise rape of a woman by her husband, and rape of men, in order to provide increased protection against sexual violence, and thus to reduce vulnerability to HIV infection.

The *Communicable Diseases Prevention and Control Act 1988* should be amended so that HIV is not a communicable disease, and that mandatory HIV testing be prohibited except where the practice conforms with the *International Guidelines* (e.g. testing of blood donors).

Privacy/confidentiality laws

It is recommended that:

- privacy and confidentiality legislation applicable to HIV-related information should be strengthened by reducing the scope of exemptions currently found in the *Communicable Diseases Prevention and Control Act 1988* (for example, disclosure without consent should not be permitted to schools, day care centres and prisons);
- mechanisms are established to protect the confidentiality of HIV and AIDS cases reported to public health authorities (for example coded rather than nominal data).

Employment laws

It is recommended that:

- provisions enabling or requiring employment-related HIV screening in the *Communicable Diseases Prevention and Control Act 1988* should be amended so that mandatory HIV screening in the context of employment is prohibited;
- privacy and confidentiality legislation applicable to HIV-related information should be strengthened to protect the confidentiality of employees' medical and personal information including HIV status.

Therapeutic goods, consumer protection laws

Legislation should require compliance with the International Condom Standard and ensure that HIV test kits comply with international quality standards.

Ethical human research

Marshall Islands lacks a legal framework for the conduct of ethical research on humans. Checklist 9 provides guidance on the features of a legal framework which promotes respect for human rights in the context of HIV, and is consistent with the standards set out in the *International Guidelines*.

Association, information, codes of practice

It is recommended that Government work with employer and employee bodies to develop a Code of Practice on HIV and employment, drawing on the International Labor Organization Code of Practice on HIV/AIDS.¹¹ A Code of Practice should be developed that promotes universal infection control procedures in health care settings, and confidentiality and non-discrimination in workplaces.

¹¹ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work* www.ilo.org/aids

It is recommended that provisions in the *Immigration and Emigration Act* restricting the movement of sex workers be repealed.