

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Palau

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

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.² The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

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

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant

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

² UNAIDS/IPU. Geneva, 1999.

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—

- 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

Seven HIV diagnoses have been notified in Palau. All of the cases are of Pacific Islander race. Key factors relevant to HIV vulnerability of Palau's populations include:

- Low prevalence of condom use;
- High prevalence of other STIs, which amplify the risk of transmission of HIV;
- Stigma and taboos regarding HIV, STIs and discussion of sexual health;
- HIV is perceived as a foreign problem;
- Homophobia;

³ See: *Consolidated Guidelines* paras 102-103.

⁴ See: Ministry of Health HIV Section (2008) *UNGASS Country Progress Report Republic of Palau*; Ministry of Health (2000) *Palau STD HIV/AIDS Strategic Plan of 2000-2005: Speak Out for Change*.

- High mobility of the population makes it difficult to engage in sustainable prevention activities;
- Around 30% of the population consists of migrant workers mainly from neighbouring countries;
- A growing sex industry with links to higher HIV prevalence countries.

A survey in 2005 found only 50% of sexually active students had used a condom or another form of birth control in their last sexual experience.

The geographic distribution of cases generally reflects that of the total population. All current cases arose in residents of Koror, the main population centre.

Escort sex work centres on bars, and uses women from Asia. Trafficking of women from Asia for sex work has been identified as a problem.

A small sub-population, mainly men, report injecting drug use.

In the last Palau Health Survey (1990-1991) it was found that 4% of Palauan men reported either homosexual or bisexual behaviour. Homosexuality is highly stigmatised, making it difficult to reach men who have sex with men with prevention efforts.

In traditional Palau society, rank and inheritance are matrilineal. Women are accorded respect within the clan system. However, social change is leading to weakening of extended family ties and an increase in alcohol use, which are contributing to an increase in incidence of domestic violence against women.

Legal system⁵

Laws consist of the *Constitution*, national laws codified as the *Palau National Code*, national statutes, ordinances of the 16 states of Palau, rules of common law and equity drawn from the USA, and traditional law. Statutes prevail only to the extent that they are not in conflict with underlying traditional law principles.

References to Titles in the analysis below are to titles of the *Palau National Code* (the Code).

The judicial system consists of the Supreme Court, National Court, the Court of Common Pleas and the Land Court.

The *Constitution* Article IV states the following Fundamental Rights—

- freedom of religion;
- freedom of expression and the press;
- right of assembly, association and petition;

⁵ Information on court and legal systems derived from Pacific Islands Legal Information Institute www.pacii.org; additional information from RRRT.

- right to be secure in person, house, papers and effects against entry, search and seizure;
- no deprivation of life, liberty, or property without due process of law;
- right of citizens to enter, leave and migrate within Palau;
- freedom from torture, cruel, inhumane or degrading treatment or punishment, slavery or involuntary servitude;
- government shall provide for marital and related parental rights, privileges and responsibilities on the basis of equality between men and women.

International obligations

Palau is a member of the United Nations. It has ratified the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

HIV policy framework⁶

The *Palau STD HIV/AIDS Strategic Plan of 2000-2005: Speak Out for Change* is in the process of being updated for the period 2008-2012. The update is to take into account human rights factors, such as the need for workplace anti-discrimination policies.

There is a Palau HIV, AIDS and STI Advisory Group (PHASAG), a multi disciplinary group (including government and non government representatives) that serves as a policy making body for national HIV/AIDS/STI programs, assists the implementation of HIV and STI related activities, has an advocacy role, and supports the Ministry of Health in efforts to prevent and provide of surveillance of HIV/AIDS and STIs. PHASAG meets 4-6 times a year. The group assisted in developing Palau's proposals to the Global Fund to Fight AIDS, Tuberculosis and Malaria.

Achievements under the Strategic Plan of 2000-2005 include development of:

- multi-sectoral strategies;
- policies and procedures for ARVs for pregnant women;
- a strategy to addresses HIV in uniformed services;
- reproductive and sexual health education for young people;
- interventions for groups with high or increasing rates of HIV infection; and
- a strategy to expand access, including among vulnerable groups, to condoms.

Palau Red Cross Society represents Palau at Global Fund Regional Country Coordinating Mechanism meetings.

Confidential testing and referral is conducted at the Communicable Diseases Unit and at the Belau Hospital in the Family Health Unit. A health resource centre at Palau

⁶ Ministry of Health HIV Section (2008) *UNGASS Country Progress Report Republic of Palau*.

Community College distributes condoms among high school and college students and a clinic on the same campus provides HIV/STI counselling, testing, referral, and care services.

A youth peer mentor program educates youth for testing and condom distribution

Universal screening for pregnant women and donated blood is in place. A public health campaign targets workers in the entertainment industry for STI and HIV testing and condoms.

Community education including on human rights issues is provided to address discrimination. The HIV/STI program has provided training for members of Congress (on request) which has resulted in improved understanding of the issues related to HIV and STIs by parliamentarians.

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?**

The Government is obliged to take positive action for the promotion of the health and social welfare of the citizens through the provision of free or subsidized health care and provision of public education for citizens, which shall be free and compulsory:
Constitution Article VI.

In 2008 Palau voted at a general election to amend Article IV of the Constitution to include a new section which reads as follows:

Section 16. The national government shall provide free preventive health care for every citizen as prescribed law.

Public health authorities are empowered under Title 34 of the *Palau National Code* (the Code) to provide public health services. The duties of the Director of the Bureau of Health Services include to maintain and improve health, minimize and control communicable disease and establish standards of medical care and practice (Code Title 34 Cap 34 Section 101). There are no specific powers relating to HIV.

Health workers are required to encourage, support, and protect breastfeeding (Title 34 Section 8610). Access to infant formula may be beneficial to reduce HIV transmission from mother to child provided that there is not mixed breast/bottle feeding. Exclusive breastfeeding in the first six months can be important to reduce mother to child transmission of HIV as compared to mixed feeding.

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?**

There is no legislation requiring specific informed consent, with pre- and post-test counselling.

The common law applies, which requires consent to a blood test. If consent is not given, the person taking blood may be liable under civil and/or criminal law for assault.

All foreign workers need to pass a medical exam (including HIV testing) prior to visa issue (Code Title 30 Cap 2 Section 202: *Nonresident Workers' Health Certificates*). After arrival foreign workers must present within ten days for medical examination in Palau (Code Title 30 Cap 2 Section 203). HIV testing is offered during these examinations, but is not mandatory.

An attempt was made in 2005 to introduce a law for periodic HIV testing of foreign workers in the entertainment industry. The public health department advised against it due to potential human rights issues, the negative image of forced testing and the cost of testing. The law was not passed.

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

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

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

There is a broad power in Title 34 Cap 7 Section 701 of the Code to isolate and quarantine persons suffering from contagious diseases in accordance with the Health Regulations. As the Regulations were not available to review, it is not known whether HIV and AIDS are defined by regulation as contagious diseases.

Legislation does not provide the above due process protections. A writ of habeas corpus is available to review deprivation of freedom e.g. as a result of a quarantine or isolation order: Code Title 1 (Bill of Rights) Section 411.

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?**

Legislation does not authorise health-care professionals to notify sexual partners of their patients' HIV status.

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

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

No legislation was identified that provides for protection of blood, tissue and organ supply. As a matter of practice all blood donations are tested for HIV using a rapid screening test.

CHECKLIST 2 – CRIMINAL LAW

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

There are no needle and syringe programs or legislation to regulate needle and syringe programs. It is an offence to manufacture or traffic a controlled substance e.g. narcotics: Code Title 34 Cap 33 Section 3301. It is an offence to possess a controlled substance except under medical prescription: Title 34 Cap 33Section 3302.

- 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

Sodomy is a crime and embraces abominable and detestable crime against nature (Code Title 17 Cap 28 Section 2803). Sodomy is equated by the Code with bestiality. This is likely to encourage homophobic attitudes and undermines efforts to promote sexual health among men who have sex with men.

Fornication or adultery

Adultery is a crime (Code Title 17 Cap 28 Section 2805).

Street sex work, brothel or escort sex work

Prostitution is not illegal. Trafficking in sex workers is heavily penalised (see below).

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

There is no exception in prostitution related offences (e.g. trafficking) specifically for carrying condoms or other aspects of HIV prevention and care services.

- 4. Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:**
 - **Practised by clients;**

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

Legislation does not regulate occupational health and safety in the sex industry.

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

Palau enacted the *Anti-People Smuggling and Trafficking Act* in 2005 as community concern about abuse of foreign workers brought to Palau have risen. Women from the Philippines and China reportedly were trafficked to Palau for the purpose of commercial sexual exploitation in karaoke bars.⁷

In 2007, four foreign nationals were convicted of forty-seven criminal counts for offences relating to prostitution, human trafficking and exploiting trafficked persons.⁸ Palau Supreme Court interpreted Palau's human trafficking statute, which holds all participants in the trafficking chain criminally liable and provides for penalties of up to \$250,000 in fines and 25 years in jail. Under the Act, trafficked persons are granted immunity in that they shall not be subject to criminal prosecution with respect to:

- (a) The act of people trafficking;
- (b) That person's illegal entry into the receiving country;
- (c) That person's period of unlawful residence in the receiving country; and
- (d) That person's procurement or possession of any fraudulent travel or identity documents which he or she obtained, or with which he or she was supplied, for the purpose of entering the receiving country.

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

The law provides for general offences of aggravated assault, including assault with intent to inflict grievous bodily harm (Code Title 17, Cap 5, Section 502). This offence could be used in cases of deliberate or intentional transmission of HIV.

⁷ U.S. State Dept Trafficking in Persons Report, June, 2008

⁸ Palau Supreme Court Convicts "Carnival Four" In Forced Prostitution And Human Trafficking Case April 26, 2007 <http://www.humantrafficking.org/updates/612>

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

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

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

The Director of the Bureau of Public Safety is responsible for supervision of prisons and jails including “proper treatment, housing, feeding and clothing of all prisoners” (Code Title 34 Section 5022).

Legislation does not specifically provide for access equal to the outside community to the following HIV-related prevention and care services in prisons. A prisoner could argue for HIV prevention and treatment services based on Constitutional rights that flow from the government’s duties to take positive action for the promotion of the health and social welfare of the citizens through the provision of free or subsidized health care and to provide free preventive health care for every citizen.

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?

Assault and battery are offences under Code Title 17 Cap 5 and sodomy of males and females (with or without consent) and rape of females are offences under Title 17 Cap 28. Indecent assault of adults (e.g where intercourse does not occur) is not otherwise provided for in the Code.

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

No legislation was identified providing for confidentiality of prisoners’ medical and/or personal information, including HIV status.

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

No legislation was identified requiring segregation of prisoners on the basis of HIV status. The *Constitution* Article IV Section 10 prohibits inhumane or degrading punishment.

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?

Code Title 17 Cap 31 provides for sentencing including periods of probation, and Cap 32 provides for Executive Clemency. Health status and medical factors are not specifically referred to in the legislation.

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

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

Legislation does not specifically provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Palau has disability discrimination legislation in employment, but not in other areas such as accommodation, access to services and education (*Disabled Person's Anti-Discrimination Act* Title 30, Cap 5). Disability is defined as a physical or mental impairment that substantially limits one or more of a person's major life activities. This definition would cover symptomatic HIV or AIDS, as well as merely being a person living with HIV without symptoms. US case law confirms that HIV without symptoms substantially limits the major life activity of reproduction: *Bragdon v Abbott* 524 US 624 (*Americans with Disabilities Act*).

Discrimination in the *Disabled Person's Anti-Discrimination Act* is defined to include refusal to hire and employ, or to bar or to discharge from employment, or to treat unequally with regard to terms, conditions or privileges.

Handicapped Children Act Title 22 Cap 4 provides rights to free individualized education programs for children with special needs.

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

Does the legislation contain the following substantive features:

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

The Palau *Bill of Rights* provides that no law shall be enacted which discriminates against any person on account of sex, nor shall the equal protection of the laws be denied (Code Title 1 Section 407). This provides women with the ability to challenge laws that discriminate against them on the ground of sex and provides protection from discrimination in implementation of law by government agencies.

The *Disabled Persons Discrimination Act* (Code Title 30 Cap 5) does not have provisions covering indirect discrimination, and does not apply to people presumed to have a disability, or carers, partners, family or associates of a person with a disability. The Act requires that discrimination must be “for reasons relating to the person’s disability”. It is unclear whether the ground complained of only needs to be one of several reasons for the discriminatory act.

Appropriate exemptions and exceptions apply (Section 505). Discrimination is lawful where the discrimination is a result of bona fide occupational qualifications reasonably necessary to the operation of a particular business or enterprise. Discrimination is lawful if the disability results in inability to perform the work in question (having regard to the essential functions of the job).

The *Disabled Persons Discrimination Act* applies to both the public and private sectors (Section 503) (private individuals, businesses, and corporations, public corporations, and national and state governments).

There is no legislation protecting people living with and affected by HIV from vilification. The *Constitution* provides a right to be free from degrading treatment (Article IV Section 10).

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

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

Legislation does not provide for the above administrative features. Complaints under the *Disabled Persons Discrimination Act* are handled through civil court proceedings for compensation for damages or such other remedies as may be appropriate (Section 506).

Complaints of sex discrimination, in breach of Constitutional guarantees of non-discrimination, would also have to be made to the Courts, rather than as complaints to an Ombudsman or human rights commission. Confidentiality protections, e.g. use of pseudonyms in reporting of cases, may be available on application to the court, although the Constitutional guarantee of press freedom may weigh in favour of disclosure.

4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:

- **Education and promotion of human rights;**
- **Advising government on human rights issues;**

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

There is no Human Rights Commission or Ombudsman to investigate human rights complaints or carry out other functions. Complaints must be lodged through the Court system.

CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

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

- **Ownership of property and inheritance;**
- **Marital relations e.g. divorce and custody ;**
- **Capacity to enter into contracts, mortgages, credit and finance;**
- **Access to reproductive and STD health information and services;**
- **Protection from sexual and other violence, including rape in marriage;**
- **Recognition of de facto relationships;**
- **Prohibition of harmful traditional practices e.g. female genital mutilation?**

Ownership of property and inheritance and capacity to enter into contracts, mortgages, credit and finance

Women are disadvantaged by some inheritance laws.

The *Constitution* provides that no law shall be enacted which discriminates against any person on account of sex, nor shall equal protection of the laws be denied. Section 5 of the Constitution provides that every person shall be equal under the law and shall be entitled to equal protection. No person shall be treated unfairly in legislative or executive investigations. The government shall take no action to discriminate against any person on the basis of sex, but an exception is made for “matters concerning intestate succession and domestic relations”.

Most laws in respect of property, inheritance and capacity to enter contracts, mortgages, credit and finance do not disadvantage women. In some respects women may be advantaged by matrilineal inheritance rules under customary law.

However women are disadvantaged in relation to inheritance rights under formal law, if there is no will. Title 25 of the Code relates to wills and inheritance. Land held in fee simple (rather than customary land) is inherited by the owner's oldest legitimate son if there is no will. If there is no male heir, land is inherited by the oldest legitimate daughter.

Customary law is preserved (Title 25 Section 103). In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent that it is not in conflict with the underlying principles of the traditional law.

Land may be held according to freehold or custom. A complex system of land tenure based on clan and lineage ownership has developed. In the past, lineages, clans, or villages owned most of the land. Inheritance was and remains matrilineal. More recently,

individual ownership has spread, as the value of land has risen and new houses have been built.⁹ Senior women still have strong voices in clan decisions on property and wealth because money from exchanges enters the clan through women.¹⁰

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

The *Constitution* Article IV Section 13 provides that government shall provide for marital and related parental rights, privileges and responsibilities on the basis of equality between men and women.

Customary and formal family law generally treats women and men equally, although in some areas women may in practice be disadvantaged.

Divorce is fault based, which may disadvantage women if they are reluctant or afraid to testify e.g. against a violent husband. Grounds for divorce include adultery, cruelty, neglect, personal indignities, wilful desertion for at least one year, and separation for two years without cohabitation. No divorce can be granted where the ground for the divorce has been forgiven by the injured spouse.

Divorce decrees may contain orders for the custody of children, support and distribution of property based on broad criteria of “justice and best interests of all concerned” (Code Title 21 Cap 3 Section 302). There are no express provisions requiring women’s needs and non-financial contributions to a marriage to be taken into account.

A person who is the cause of divorce must provide support ordered by a court for the children of the marriage until they reach 18 years of age (Title 21 Cap 3 Section 335).

De facto relationships are not recognised by law.

Access to reproductive and STD health information services

The law does not give women a right of non-discriminatory access to health services. Women do not have access to safe abortion facilities as of right. Abortion is a serious crime: Code Title 17 Cap 2 Section 201.

Protection from sexual violence, including rape in marriage

Rape is a crime, however rape in marriage is not illegal: Title 17 Cap 28 Section 2802.

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?

⁹ P Holden (2007) *Palau: Policies for Sustainable Growth, A Private Sector Assessment* ADB, Manila.

¹⁰ K Nero (n.d) *Culture of Palau* <http://www.everyculture.com/No-Sa/Palau.html>.

Legislation does not prohibit mandatory testing of vulnerable groups.

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

Legislation does not require children to be provided with information, education and means of prevention. Title 22 Section 156 of the Code enables the Director of Education to establish minimum standards for curriculum development and content of courses.

In 2005 a Bill was introduced proposing to a new school health curriculum to address a number of topics including sex education and education on drug abuse. The Bill has not been approved by the House.

Code Title 22 Cap 6 provides for development of a National Master Plan for Education.

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?**

US common law may enable children and adolescents to be involved in decision-making in these areas in line with their evolving capacities. However there is no legislation clarifying these rights.

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?

The *Constitution* Article IV Section 11 provides that the government shall protect children from exploitation. The Code prohibits sexual abuse of children (Title 17 Cap 28). Sexual abuse is defined as any sexually related activity that is committed for sexual gratification, pleasure, or profit and that involves a child younger than 16 who is not the spouse of the perpetrator. A sexually related activity includes but is not limited to sexual intercourse. The Code also penalizes carnal knowledge as a sex crime if it involves a female younger than 15 who is not the perpetrator's wife.

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 no equal age of consent, as sodomy is a crime. The law does not recognise same sex marriages or domestic relationships. In 2008, Palau voted at a general election to amend Section 13 of the *Constitution* to ban same sex marriage by inserting the words:

All marriages contracted within the Republic of Palau shall be between a man and a woman.

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 *Constitution* guarantees the right to be secure in person, house, papers and effects against entry, search and seizure (Article IV Section 4). This provides protection from unreasonable physical interference with personal records. Legislation does not otherwise provide for general privacy or confidentiality protections for medical and/or personal information, although common law recognises right to confidentiality of medical records which can be overridden in the public interest. 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.

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

No privacy legislation was identified.

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?**

No privacy legislation was identified. The *Constitution* Article IV Section 12 provides that a citizen has the right to examine any government document. Therefore medical records held by public authorities could be accessed by persons who are the subjects of the records as of right.

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

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

There is no independent agency such as a privacy or data protection commissioner established by legislation.

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

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 4 Section 2 provides for freedom of the press, stating: “the government shall take no action to deny or impair the freedom of expression or press” and Section 7 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)?

Public health legislation does not provide for reporting of HIV cases to public health authorities for epidemiological purposes.

Palau’s Disease Surveillance System provides de-identified weekly reports on all reportable diseases (including HIV/AIDS, all STIs, Hepatitis A, B and C and others).

CHECKLIST 7 – EMPLOYMENT LAWS

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

HIV screening for employment is not prohibited.

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

Legislation does not prohibit, nor does it allow, mandatory testing of specific employment groups.

- 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 specifically 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/AIDS in the workplace.

- 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 *Social Security Act of 1987* provides for a retirement and disability fund based on employee and employer contributions. Title 34 Cap 85 of the Code establishes the Palau Severely Disabled Assistance Fund for the purpose of providing monthly assistance to individuals who are homebound, wheelchair bound and/or blind (introduced as a result of the First National Disabilities Convention 2001).

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

There is no legislation protecting employees' medical records from breach of confidentiality.

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

There is no legislation recognising workers' rights to compensation for occupational transmission of HIV.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

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

Legislation does not regulate the quality, accuracy and availability of HIV test kits.

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

No legislative requirements were identified. Health professionals must be licensed under Code Title 34 to distribute medicines.

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

The *Consumer Protection Act* (Code Title 11) imposes criminal and civil penalties on persons that engage in unfair or deceptive practices in the conduct of a business.

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

No legislation regulates the quality of condoms.

5. Does the legislation ensure the accessibility and free availability of the following prevention measures:
 - Condoms
 - Bleach
 - Needles and syringes?

Legislation does not specifically ensure the accessibility and free availability of HIV prevention tools. However there is a right under the *Constitution* to free preventive health care, which may entitle citizens rights to access sexual health services including STI treatment which is an important aspect of HIV preventive health care.

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 *Constitution* provides the duty of the state to provide free or subsidised health services. Article IX of the *Constitution* provides power to regulate patents. No patent legislation was identified.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

- 1. Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?**
- 2. Does the legislation require subjects to be provided before, during and after participation with:**
 - Counselling**
 - Protection from discrimination;**
 - Health and support services?**
- 3. Does the legislation provide for informed consent to be obtained from the subjects?**
- 4. Does the legislation provide for confidentiality of personal information obtained in the process of research?**
- 5. Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?**
- 6. Does the legislation provide for non-discriminatory selection of subjects?**

No legislation in relation to research was identified.

Palau has a policy to ensure that HIV/AIDS research protocols involving human subjects are reviewed and approved by an ethics committee.

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 *Constitution* Article IV Section 9 provides that a citizen may enter and leave Palau and travel within Palau. The Constitutional guarantee of freedom of travel could be argued to protect vulnerable groups from restrictions on movement, although may be difficult to enforce in the case of men who have sex with men as sodomy is illegal.

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

The *Constitution* Article IV Section 3 provides the right to associate with others for any lawful purpose. The Constitutional guarantee of freedom of association could be argued to protect vulnerable groups such as sex workers from restrictions on organising and forming associations, although may be difficult to enforce in the case of men who have sex with men as sodomy is illegal.

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

No censorship legislation was identified.

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 were identified that require professional groups to have HIV 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 Codes were identified.

SUMMARY AND RECOMMENDATIONS

Priority actions to build a human rights framework for addressing HIV in Palau include:

- (i) to introduce provisions for confidential notification of HIV diagnoses, voluntary and confidential testing and counselling, confidential contact tracing with consent, and right to access information about sexual and reproductive health and means of prevention of HIV and STIs; and
- (ii) introducing anti-discrimination legislation that covers discrimination in all areas of public life (not just employment, but also access to services, insurance, accommodation, education) on the grounds of actual or assumed:
 - HIV status;
 - disability;
 - sex;
 - sexuality or sexual orientation; and
 - transgender status
- (iii) decriminalizing homosexuality and abortion.

Criminal law

The sodomy offence involving consenting adults in private presents a barrier to HIV prevention efforts as it makes it difficult for health workers to reach men at risk. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices.

The lack of provision for an offence for marital rape contravenes human rights and is harmful to the status of women.

The general criminal offence of inflicting grievous bodily harm is sufficient to address cases of deliberate transmission. HIV specific offences are not required.

Public health law

HIV and AIDS should not be subject to the Code's provisions relating to isolation and quarantine, which are inappropriate for the management of diseases that are not transmitted through casual contact.

Blood safety legislation to ensure blood and other human tissue is screened for HIV and other blood borne pathogens is required.

Legislation to ensure that condoms and HIV test kits comply with international quality standards is required.

Legislation should enable condoms and HIV/STI prevention information should be available in prisons.

Family law

Introducing a no-fault model of divorce and allowing for women's non-financial contributions to a marriage to be taken into account in property proceedings after separation would improve women's social and economic status, and reduce HIV vulnerability. Women may be reluctant or afraid to seek divorce if they are required to prove fault.

De facto relationships including same sex partnerships should be recognised by law.

Inheritance

Women should not be disadvantaged in relation to inheritance if there is no will, as is the case under the current provisions of the Code relating to estates. Widows who are left financially destitute after the death of a husband are vulnerable to a range of health threats including HIV and STIs.

Employment

It would be beneficial to develop a Code of Practice on HIV and employment, drawing on the International Labor Organization *Code of Practice on HIV/AIDS*.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