

HIV, ETHICS AND HUMAN RIGHTS

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

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

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

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

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

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

² UNAIDS/IPU. Geneva, 1999.

complete assessment. We welcome any additional information that can be provided to improve and update this review.

Human rights principles

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.³

Background

There have been eight HIV cases diagnosed (2007). The Ministry of Health considers that many cases go undiagnosed due to limited availability of HIV testing. Surveillance of STIs has found that over 20% of pregnant women aged under 25 years have Chlamydia.

Socio-cultural factors that are contributing to HIV vulnerability include:

- high prevalence of STIs that amplify the risk of transmission of HIV;
- low condom use;
- gender based violence;
- taboos regarding discussion of sex and sexuality;
- a young population (40% below 15 years).

³ See *Consolidated Guidelines* paras 102-103.

Both young women and young men are known to exchange sex for cash, goods, and services. Seafarers and fishermen, businessmen, and youth are known to be clients of sex workers. Little is known about the levels of extramarital sex. Male-to-male sex does occur but is not openly discussed or well-documented.⁴

Gender based violence contributes to HIV and STI vulnerability of women and girls. The Family Health and Safety Survey conducted by the Government of Solomon Islands found two out of three women aged 15-49 years who have ever been in a relationship have experienced violence by their husband or boyfriend, and one out of ten pregnant women report being beaten during pregnancy.⁵ “Longline” or gang rape is also present, though under-reported.

There are 11 hospitals, but with limited access to drugs and facing human resource constraints. There are small numbers of private practitioners.

Legal system⁶

The law comprises legislation of Solomon Islands parliament, Solomon Islands case law, English common law, and Solomon Islands customary law.

The High Court has unlimited civil and criminal jurisdiction. Appeals lie from the High Court to the Court of Appeal. Local Courts have civil and criminal jurisdiction, and hear matters where traditional dispute resolution processes (referral to chiefs) have been exhausted. A customary land appeal court hears appeals from Local Courts.

International obligations

Solomon Islands has ratified the International Convention on Economic Social and Cultural Rights, the Convention on Elimination of all forms of Racial Discrimination, Convention on Elimination of all forms of Discrimination Against Women, and the Convention on Rights of the Child.

HIV policy framework

The *National Multi-Sectoral Strategic Plan for HIV and AIDS* was developed in 2003. The Plan’s guiding principles for implementation were drawn from the Constitution and existing government policies and reports. The Plan recognises priority areas, objectives, strategies, steps, inputs, key actors and target groups of people at risk from HIV/AIDS. The Plan covers the period 2005-2010. Solomon Islands National AIDS Council (SINAC) coordinates the national response.

⁴ C Jenkins (2005), *HIV/AIDS in the Pacific* Asian Development Bank, Manila.

⁵ Government of Solomon Islands et al (2008) *Human Rights for Women, Human Rights for All: 16 Days of Activism Against Gender Violence* (pamphlet, full survey results to be published 2009)

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

The Plan lists as priorities:

- Reduce risk behaviour and vulnerability to HIV and STIs.
- Enhance confidentiality of voluntary testing and counselling for HIV as an entry point toward prevention and treatment of STIs and AIDS and blood safety.
- Enhance HIV/STI surveillance, treatment, and care.
- Enhance capacity building for the national HIV response at both the community and institutional level.
- Ensure sustainable development to create an enabling environment for behaviour change, de-stigmatization, and elimination of discrimination that will promote prevention and care.

Voluntary Counselling and Testing counsellors are trained in Papua New Guinea. In 2005, the Ministry of Health, with support from the Global Fund to Fight AIDS, Tuberculosis and Malaria, conducted behavioural surveys with youth and sex workers and HIV surveillance among antenatal mothers. An HIV/AIDS Unit in the Ministry of Health has been established.

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?**

Section 4 of the *Health Services Act* [Cap 100] requires the Minister to provide primary health care services throughout the country, which are to be free of charge unless regulations enable the setting of fees. Local authorities and provincial assemblies are required by the *Environmental Health Act 1980* to make bylaws for the provision of health services in their areas including education campaigns.

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 that makes specific provision for informed consent and counselling in relation to HIV tests. The common law of England 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. Common law does not require pre and post test counselling.

Powers in prisons and migration legislation may enable compulsory testing in limited exceptional circumstances, although there are no HIV specific provisions.

The *Correctional Services Regulations 2008* Regulation 33 provides that every prisoner shall submit to a medical examination by the medical officer when directed by an officer, a medical officer, nurse or nurse aide and shall submit to such treatment, including vaccinations or inoculations, as the medical staff prescribe.

The *Immigration Act* [Cap 60] provides that a person entering the country may be subject to a medical examination if required by an immigration officer.

Under the National HIV/AIDS Strategic Plan, a policy of voluntary informed consent testing has been established.

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 no legislation authorising restriction of liberty of people living with HIV.

The *Environmental Health (Public Health Act) Regulations* govern public health, and Part III deals with notifiable diseases, which are those listed in the Schedule. At present, HIV and AIDS are not on this list. However, the list may be added to from time to time by the Minister by notice, and he may also direct that all or any notifiable disease provisions do not apply in respect of any disease in the Schedule. Some provisions of Part III were never brought into force.

Part III contains brief provisions for notifying notifiable diseases, and the isolation and quarantine of infected persons and consequent disinfection procedures.

The *Quarantine Act* [Cap 106] gives powers to isolate and contain diseases, which under Section 2 are defined as smallpox, plague, cholera, yellow fever, typhus fever or leprosy or any disease declared by the Minister by order to be a quarantinable disease.

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

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

There is no legislation specifically authorising health-care professionals to notify sexual partners of a patient's HIV status.

Section 8(j) of the *Health Services Act* [Cap 100] permits the making of regulations regarding the confidentiality of patient information. However, the *Environmental Health (Public Health Act) Regulations* Regulation 7 provide that a medical practitioner or nurse attending a person suffering a notifiable disease shall inform the head of the person's family and the person's employer of the communicable nature of the disease and precautions to be taken to prevent its spread. However HIV has not been listed as a notifiable disease.

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)?

There is a National Blood Policy that addresses blood quality issues. There is no blood safety legislation.

CHECKLIST 2 – CRIMINAL LAW

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

No reports of injecting drug use in Solomon Islands were found, so legislation relating to needles and syringes is not considered necessary. *Dangerous Drugs Act* [Cap 98] provides offences for importing, selling and exporting illicit drugs.

2. Does the law allow the following sexual acts between consenting adults in private:
 - Homosexual acts e.g. sodomy;
 - Fornication or adultery;
 - Street sex work;
 - Brothel or escort sex work?

Homosexual acts e.g. sodomy

Section 160 of the *Penal Code* criminalises ‘buggery’ with another person; the permitting of a male person to commit buggery on him or her; and attempts. The lesser offence of ‘committing any act of gross indecency’ by persons of the same sex is at Section 161. Attempting to procure another person of the same sex to commit an act of indecency is an offence.

In 1988, an appeal was taken in *DPP v Noel Bowie* [1988-1989] SILR 113, against the discriminatory nature of the offence of gross indecency between male persons. The appeal was successful, but the court suggested to Parliament the non-discriminatory solution of removing the word ‘male’, so that the offence was now gender-neutral. Rather than repealing the provision altogether, at least in respect of adults, Parliament made the recommended amendment. This was followed in December 2003 by a report of two women being charged for lesbian activity, but the outcome of this case is not known.

Fornication and adultery

Section 18 of the *Islanders Divorce Act* [Cap 170] provides that a husband may, on a petition for divorce, claim damages from any person on the ground of adultery with the wife of the petitioner.

Sex work

The *Penal Code* provides offences of—

- knowingly living on the earnings of prostitution (Section 153(1)(a))

- persistent soliciting or importuning in a public place for immoral purposes (Section153(1)(b))
- aiding, abetting or compelling the prostitution of a prostitute for the purpose of gain (Section153(1)(c))
- keeping a brothel (Section155(a))
- permitting premises to be used as a brothel (Section155(b)).

There is no law specifically against sex tourism, although such offences could be prosecuted under laws against prostitution. There are some press reports of sex tourism.

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 criminal law for HIV prevention and care services.

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

- Practised by clients;
- Practised 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)?

Child prostitution and trafficking have been reported in a study of impacts of the logging industry.⁷ The law prohibits trafficking in persons for labour or sexual exploitation. There are anecdotal reports that young women were trafficked from China and several Southeast Asian countries, for the purpose of sexual exploitation on foreign ships and in logging camps.⁸

Specific offences currently in the Penal Code that cover children include:

- procuring a girl to become a prostitute, or become an ‘inmate of a brothel’;
- detaining a girl in a brothel;
- disposing of minors under the age of 15 years for prostitution or unlawful intercourse;

⁷ Tania Herbert, Church of Melanesia (2007) *Commercial Sexual Exploitation of Children: A report focusing on the presence of the Logging Industry in a Remote Region*.

⁸ US Government State Department (2007) *Country Report of Human Rights Practices: Solomon Islands*.

- obtaining minors under the age of 15 years for prostitution or unlawful sexual intercourse. (Sections 144, 146, 147)

It is also an offence to procure or attempt to procure a woman for sexual intercourse using threats, intimidation, fraud or by giving her drugs (Section 145). The *Penal Code* also contains an offence of detaining a woman in a brothel, or detaining her for the purpose of her having sexual intercourse, against her will (Section 148).

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

Intentional HIV transmission is likely to fall within the general offences for causing grievous harm. The offence of grievous harm under Section 224 of the *Penal Code* requires intent to maim, disfigure or disable, or to do some grievous harm. It includes causing any dangerous or noxious thing to be taken or received by any person. Section 226 also makes causing grievous harm an offence.

The year and a day rule for unlawful killing is at Section 209. Therefore it would not be possible to obtain a murder or manslaughter conviction for HIV transmission.

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)?**

There are no HIV specific provisions. New legislation comprehensively addresses prisoner's general rights to health services.

Section 43 of the *Correctional Services Act 2007* provides that health care facilities and primary care services shall be provided for prisoners to a community standard while also taking into account the special circumstances and health care needs of prisoners.

Section 44(3) provides that where a medical officer, nurse or nurse aide is of the view that a prisoner is in need of specialist treatment, he or she may make a report to the Commandant, and where practicable, may make arrangements for the prisoner to be referred to an appropriate medical practitioner.

Section 44(2) provides that Commandants may order that prisoners be medically examined, and the medical officer shall examine and treat any prisoner in need of medical attention.

Section 45 provides that arrangements shall be made for the provision of other medical and related services, in accordance with any relevant policy or program of the Ministry of Health including public awareness and education programs; vaccination programs or programs for the treatment or prevention of certain diseases; and support services for infants and mothers.

Section 47 provides that the Commissioner and Commandants shall ensure that conditions within correctional centres do not facilitate the spread of disease, and must implement recommendations made by medical officers or the Ministry of Health aimed at reducing the risk of the outbreak of disease.

The *Correctional Services Regulations 2008* provide:

136. The Commandant shall ensure that appropriate medical care in accordance with community standards is provided to prisoners and shall continue to carefully monitor the prisoners who are in need of, or who are receiving medical treatment.

137. If a medical officer is of the opinion that –

- (a) a prisoner is mentally ill or mentally disordered;
- (b) the life of a prisoner may be endangered by further imprisonment;
- (c) a sick prisoner will not survive for the length of the sentence; or
- (d) a prisoner is totally and permanently unfit to live in correctional centre conditions

the medical officer shall inform the Commandant. The Commandant shall report the case to the Commissioner without delay.

138. The medical officer shall report to the Commandant the case of any prisoner who the medical officer believes has special medical needs that may require an alteration to the living conditions of the prisoner. The Commandant shall, as far as circumstances permit, put into effect any recommendation made by the Medical Officer for the medical treatment of prisoners, including transportation to a hospital or other facility, isolation, specialist care, equipment or additional or alternative dietary supplements.

139. Any prisoner suffering from an infectious or contagious disease or transmissible condition, shall be immediately given treatment for the disease or condition. The Medical Officer, nurse or nurses aide treating the prisoner must take the necessary steps or precautions necessary to prevent the spread of the disease.

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?

Prison offences including assaults are prescribed by *Correctional Services Regulations 2008*, Regulation 163. The Regulations also provide protection of prisoners from abuse by prison officers. Regulation 152 provides that any officer entering a prisoner's cell at night must be accompanied by another officer, except in cases of necessity or emergency. In these circumstances, the officer must immediately report the unaccompanied entry to the senior officer in charge of the centre. Regulation 153 provides that any male officer entering a part of the centre where women prisoners are located must be accompanied by a female officer.

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

Section 46 of the *Correctional Services Act* provides that:

- (1) Arrangements shall be made for keeping the medical records of prisoners confidential but prisoners should be notified of the results of any test or treatment, and provided with any necessary support. A prisoner shall not be regarded as the owner of any medical records kept but must be provided with any relevant information contained in the records upon request following their release from a correctional centre.

(2) A prisoner who has an on-going medical condition that has been treated while he or she has been in custody shall be given a discharge note confirming the nature of the illness and of the treatment provided.

(3) Information about the medical condition of any prisoner shall be notified as soon as possible to a Commandant if action is or may be required to ensure the safety and well being of officers, prisoners, visitors or any other person.

Regulation 135 *Correctional Services Regulations 2008* provides that when a Commandant is informed that a prisoner has a serious illness or injury, the Commandant shall notify the most accessible known relative of the prisoner or the next of kin. As consent of the prisoner to disclosure is not specified, this regulation may lead to breach of confidentiality.

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

Section 44(4) *Correctional Services Act* provides that a prisoner who is suffering from any disease or illness must only be held separately from other prisoners upon the order of a medical officer, nurse or nurse aide. Section 44(5) provides that notwithstanding this section a Commandant may order the separation of a prisoner who is apparently suffering from an illness if arrangements are made for a medical officer or nurse to examine the prisoner and confirm the need for separation as soon as is practicable.

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

Section 48 *Correctional Services Act 2007* provides that where a prisoner is suffering from an illness, disability or other condition or there are special circumstances that make their detention within a correctional centre impractical or undesirable, a Judge or Commissioner of the High Court may review the sentence of the prisoner and make orders for the release of the prisoner or for the prisoner to be moved to suitable accommodation outside of a correctional centre.

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

The Act does not specifically address non-discriminatory access to facilities and privileges.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Discrimination on the grounds of HIV or AIDS status is not unlawful. There is no disability discrimination legislation.

Section 15 of the *Constitution* makes discrimination unlawful but only on the grounds of race, place of origin, political opinions, colour, creed or sex.

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 very weak legal protections for vulnerable groups. There are no specific protections for people living with HIV or those assumed to have HIV by reason of their membership of a vulnerable group.

Subject to exceptions, the *Constitution* makes discrimination on the ground of sex unlawful in access to places, in provisions of law and in administration of the law by public authorities. In relation to sex discrimination:

- no law may make any provision that is discriminatory either of itself or in its effect;
- no person may be treated in a discriminatory manner by any person acting by virtue of any written law or performance of the function of any public office or any public authority;
- no person may be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating-houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

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)?**

There is no HIV discrimination or vilification legislation.

Under the provisions of the *Constitution* that relate to sex discrimination, “discriminatory” is defined to mean affording discriminatory treatment to different persons attributable *wholly or mainly* to their respective descriptions by sex. This means that the ground must be more than one of several reasons for the discrimination, it must be wholly or mainly the reason for the discrimination.

“Discriminatory treatment” means subjecting persons of one such description to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description.

2. 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 HIV discrimination legislation.

Chapter IX of the *Constitution* establishes the Ombudsman, with functions to investigate the conduct of public bodies, members of the public service, the Police Force, the Prisons Service, the government of Honiara city, provincial governments, and other offices, commissions, corporate bodies or public agencies as prescribed by Parliament. Section 97(2) provides that Parliament may confer additional powers on the Ombudsman.

The Ombudsman has the power to subpoena and to investigate complaints of official mistreatment or unfair treatment. The Ombudsman has potentially far-ranging powers, but is limited by a shortage of resources.

Section 10(9) of the *Constitution* requires all court proceedings to be held in public. However, Section 10(10) enables courts to be closed where the publicity of the case would prejudice the interest or justice of public morality, or where publicity would prejudice the interests of justice, or in the interests of decency, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings.

- 3. 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. The Ombudsman office does not have specific powers in relation to HIV discrimination.

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

Discriminatory customary laws in respect of property and inheritance may still legally operate. Section 15 of the *Constitution* makes sex discrimination unlawful but the prohibition on discrimination does not apply to:

- the law with respect to devolution of property on death;
- the application of customary law;
- law with respect to land, the tenure of land, the resumption and acquisition of land and other like purposes.

Schedule 3 Paragraph 3 provides that customary law takes effect as part of the law to the extent that it is not inconsistent with the *Constitution* or any Act of Parliament.

Under the *Customs Recognition Act 2000*, custom may be pleaded as a question of fact except where its recognition would result, in the opinion of the court, in an injustice or would not be in the public interest. This would allow a court to strike down a customary practice which contravenes constitutional rights.

Wills Probate and Administration Act [Cap 33] 1987, Section 84 provides for equal rights to inheritance for men and women, however the application of customary inheritance laws is permitted even though it may result in discrimination against women.

In *Tanavulu & Tanavulu v Tanavulu and SINPF*, the Solomon Islands Court of Appeal considered customary inheritance for the purpose of the Solomon Islands National Provident Fund Act. That Act provides that, if a member of the fund dies without nominating a beneficiary for their accumulated funds, distribution is to be in accordance with the custom of the member, ‘to the children, spouse and other persons’ entitled in custom. The Court of Appeal found that the Act was not unconstitutional because it

discriminated against the widow. This decision confirmed that discrimination founded on customary law is lawful.⁹

The Constitutional preservation of discriminatory customary laws in respect of land and inheritance may contribute to women's HIV vulnerability. There are insufficient decisions involving resolution of conflict between customary law and anti-discrimination provisions to make any accurate predictions for the future.¹⁰ Amendment of the Constitution should be considered to clarify women's rights to equality in inheritance, property and financial matters.

Although there is no legislative barrier to women from accessing loans or financial services, discrimination continues to hinder women from obtaining credit and loans to purchase property or businesses.¹¹ Anti-discrimination legislation protecting women from discrimination in access to services is required.

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

Legislation requires the registration of marriages and prohibits bigamy. However, customary marriages are exempt from these requirements. Section 15 of the *Constitution* makes discrimination against women unlawful but the prohibition on discrimination does not apply to the law with respect to marriage and divorce, and it does not apply to the application of customary law.

Divorce is based on fault based criteria including adultery, desertion and cruelty. A husband can sue a third party for an adulterous relationship with his wife but this action is not available for wives in relation to their adulterous husbands.

Legislation provides for maintenance orders during separation and after divorce for both children and spouses. However, the basis on which maintenance is provided is left largely to the discretion of the court with the broad criteria of 'just and necessary': *Islanders Divorce Act* [Cap 170] 1960, Section 21. Although unmarried mothers can claim for maintenance for children they must lodge the claim within 3 years of the child's birth denying the joint responsibility of maintaining children of both parents.¹²

There is no legislative provision for the division of property after separation and divorce and therefore any determination is left to customary law which may discriminate against women. Custody disputes are determined on the standards of 'just and necessary', *Islanders Divorce Act* [Cap 170] 1960, s 21. Customary law may also be relied on to assist in the determination of custody disputes, which may be influenced by payment of a bride price.

⁹ J Corrin Care (2000) Customary law and women's rights in Solomon Islands *Development Bulletin*, no. 51, pp. 20-22.

¹⁰ *Ibid* p.22.

¹¹ V Jivan, C Forster (2007) *Translating CEDAW into Law - CEDAW Legislative Compliance in Nine Pacific Countries*, UNDP and UNIFEM Suva p.331

¹² *Ibid* p.333.

De facto relationships are not legally recognised.

Access to reproductive and STD health information services

Sections 157-159 of the *Penal Code* criminalise abortion, or the procurement of miscarriage. The procurer, the woman herself and the supplier of any means are all guilty. Section 221 provides that it is not an offence if the conduct is in good faith for the purpose of preserving the life of the mother.

Protection from sexual violence, including rape in marriage

Under the *Penal Code* Section 136, rape is an offence but it is defined as unlawful sexual intercourse with a woman or girl only, so rape of a man by another man is not covered. There is no exclusion for marriage, so marital rape is included in the offence.

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?

There are no laws prohibiting mandatory testing of groups.

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

There are no laws requiring children to be provided with information or education about HIV and STIs, or to be provided with condoms or other means of prevention.

4. Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

There are no laws specifically addressing children's and young people's rights of informed consent and access to confidential sexual and reproductive health services.

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

Protection is provided by the *Penal Code*, which provides for offences for abduction of unmarried girl under 18 years to have carnal knowledge (Section 140); indecent assault (Section 141); defilement of girl under 13 (Section 142) and defilement 13 - 15 year old (Section 143).

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

Homosexual acts are illegal. The law does not recognize same sex 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?**

There is no privacy or confidentiality legislation relating to medical records. Medical records are subject to common law confidentiality protections.

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

There is no legislation. Common law allows disclosure of medical records only in exceptional circumstances in the public interest, such as where third parties are at risk of serious injury.

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

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

There is no legislation.

- 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 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)?**

There is no HIV specific law. Under the *Constitution* Section 10(10), Courts have discretion to close hearings where there are public interest factors including the protection of the private lives of persons concerned in the proceedings.

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

There is no legislation providing for reporting of HIV or AIDS cases to public health authorities for epidemiological purposes.

CHECKLIST 7 – EMPLOYMENT LAWS

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

Employment legislation consists of:

- *Employment Act* [Cap 72]
- *Labour Act* [Cap 73]
- *Safety at Work Act* [Cap 74]
- *Trade Dispute Act* [Cap 75]
- *Trade Unions Act* [Cap 76]
- *Unfair Dismissal Act* [Cap 77]
- *Workmen's Compensation Act* [Cap 78]

HIV screening for employment is not prohibited. The following offer some potential protection for people living with HIV—

- *Unfair Dismissal Act* Right not to be unfairly dismissed.
- *Trade Dispute Act* Right to bring a case to trade dispute panel.

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 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. *Safety at Work Act* [Cap 74] Part II provides that it is the duty of every employer to ensure, so far as is reasonably practicable, the health and safety at work of all his employees, including (Schedule 1)

- arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- the provision and maintenance of a working environment for employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

An employer's failure to provide effective infection control systems in health care workplaces would be a breach of this duty.

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, but there is a general duty under *Safety at Work Act* [Cap 74] Section 4 and Schedule 1 for the employer to provide “such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees”.

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?**

There is no legislation prohibiting discrimination on the grounds of HIV against employees although in some circumstances an unfair dismissal claim could be argued under the *Unfair Dismissal Act* [Cap 77]. The *National Provident Fund Act* [Cap 109] enables employees who have contributed to the fund to claim a disability benefit if assessed with a permanent physical or mental incapacity to work. The *Labour Act* provides for workers’ medical attention and treatment, and sick leave entitlements are included in the Holidays, Sick Leave & Passage Rules (Section 80).

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

Legislation does not provide for confidentiality of employees’ medical and personal information including HIV status.

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

The *Workmen's Compensation Act* [Cap 78] does not specifically recognize occupational transmission of HIV.

CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

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

There is no legislation regulating HIV test kits.

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

- **Safe; and**
- **Efficacious?**

There is no legislation requiring registration of drugs or assessment and approval of pharmaceuticals, vaccines, and medical devices based on safety and efficacy data. The *Pharmacy and Poisons Act* [Cap 105] provides that the British Pharmacopoeia is the standard of quality or composition for all drugs or medicines.

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

Under the *Pharmacy and Poisons Act* [Cap 105] only a registered pharmacist or a bona fide assistant to a registered pharmacist, under the immediate and personal supervision and control of a registered pharmacist, shall dispense a drug or medicine.

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

There is no legislation regulating the quality of condoms.

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

- **Condoms**
- **Bleach**
- **Needles and syringes?**

The *Pharmacy and Poisons Act* [Cap 105] Section 42(1) provides that no person shall publish any statement, whether by advertisement or otherwise, to promote the sale of any article as an instrument or appliance for preventing conception. This may prevent promotion of condoms.

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)?

Solomon Islands is a member of WTO, and has obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). As a least developed country, Solomon Islands has until 2016 to introduce patent legislation that complies with TRIPS standards.

Under the *Registration of United Kingdom Patents Act* [Cap 179], patents registered in the UK can be automatically re-registered in the Solomon Islands. Registration confers on the applicant the same privileges and rights in so far as may be applicable to Solomon Islands as he is entitled to in the United Kingdom and as though the patent had been issued in the United Kingdom with an extension to Solomon Islands.

There is no legislation enabling parallel importing or compulsory licensing of pharmaceutical products. There is no legislation in relation to early working of a patented product to enable generic medicines to be approved for marketing as soon as possible after patent expiry.

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?**

The *Research Act* [Cap 152] requires permits to be issued for overseas researchers. There are no other specific legislative requirements. There is a national Health Research Ethics Committee at the Ministry of Health.¹³

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

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

¹³ World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41, p.81.

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* Section 14 provides that citizens have the fundamental right to freedom of movement. This may be difficult to enforce in practice particularly for populations who are marginalised and whose behaviours are criminalised such as sex workers and men who have sex with men.

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

The *Constitution* Section 13 provides that citizens have the fundamental right to freedom of assembly and association. This may be difficult to enforce in practice, particularly in the case of associations of sex workers or men who have sex with men, as soliciting and buggery remain a crime.

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

There are no exceptions for HIV information that contains sexually explicit information or images, although a defence may be available that disseminating the information or image is for educational purposes and public benefit.

The *Cinematograph Act* [Cap 137] provides for the censorship of films. Permits may be issued free for charitable, educational or public purposes.

Under the *Customs Act* [Cap 121] ‘indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles’ are prohibited imports.

Sections 173 and 174 of the *Penal Code* prohibits the possession, sale, exhibition, or publication of obscene articles or those tending to corrupt public morals, and of obscene videos or photographs.

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

No broadcasting standards were identified. Under Section 24 of the *Broadcasting Act* [Cap 112] the Minister may prohibit the Solomon Islands Broadcasting Corporation from broadcasting any material, in which case the prohibition must be reported to Parliament.

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)?**

There is no legislation requiring professional groups to develop or enforce HIV Codes of Practice. Section 26 of the *Safety at Work Act* gives the Minister power to approve Codes of Practice as guidance. 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 to address issues such as workplace discrimination and universal infection control procedures.¹⁴

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 are required.

¹⁴ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work*
www.ilo.org/aids

SUMMARY AND RECOMMENDATIONS

Current Solomon Islands law is not appropriate for management of HIV, although current national policy is to respect human rights e.g. by promoting voluntary and confidential counselling and testing.

Criminal law and prisons

The criminal offences relating to prostitution and homosexuality involving consenting adults in private contravene human rights and undermine prevention efforts. These offences should be repealed or amended.

The criminal offence of abortion should be repealed as it contravenes the rights of women and girls to make their own reproductive choices.

The offence of causing grievous harm under the *Penal Code* appears sufficient to cover situations of intentional transmission.

The offence in the *Pharmacy and Poisons Act* [Cap 105] Section 42(1) relating to promotion of means of preventing conception should be amended so that it does not deter or prevent promotion of condoms.

Censorship legislation should not criminalise sexual health promotion. Exceptions for bona fide HIV information and education materials should be introduced into censorship legislation.

The *Correctional Services Act* should require that condoms and HIV/STI prevention information be made available to prisoners.

Regulation 135 *Correctional Services Regulations 2008* provides that when a Commandant is informed that a prisoner has a serious illness or injury, the Commandant shall notify the most accessible known relative of the prisoner or the next of kin. As consent of the prisoner to disclosure is not specified, this regulation may lead to breach of confidentiality. It is recommended that this Regulation be amended to only permit notification of relatives and next of kin if consent of the prisoner has been obtained or if the prisoner is not able to consent due to ill health.

The *Correctional Services Regulations 2008* should be amended to guarantee non-discriminatory access to facilities and privileges for people living with HIV or other infections that are not transmitted through casual contact.

Public health

Blood safety legislation should be introduced which provides for screening of donated blood for HIV and other blood borne diseases.

The notifiable diseases provisions of the *Environmental Health Act* should not apply to HIV. Rather, a new part to the Act should be introduced to regulate management of HIV and sexual health. Such legislation should:

- require confidential notification of HIV and AIDS cases, and informed consent including pre and post-test counselling in relation to HIV tests
- clarify how health care workers should balance their duty of confidentiality to people living with HIV and their duty of care to third parties such as sexual partners.
- require male and female condoms, and HIV and STI test kits to comply with international quality standards.

Health privacy legislation should be introduced that protects medical information from disclosure and gives people rights of access to data relating to them.

Discrimination, equality and employment

It is recommended that discrimination on the grounds of HIV or AIDS status, disability, sexual orientation and transgender status be made unlawful.

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,¹⁵ for approval under Section 26 of the *Safety at Work Act*. A Code of Practice should be developed that promotes universal infection control procedures in health care settings and non-discrimination in workplaces.

Parliament may confer additional powers on the Ombudsman. It is recommended that consideration be given to providing powers for the Ombudsman to investigate and report on discrimination matters relating to disability and HIV.

A comprehensive definition of discrimination is needed which prohibits both direct and indirect discrimination. Complaints of discrimination should be able to be made to an accessible body that has powers of investigation and conciliation, and that can refer matters to courts for hearing, determination and enforcement.

Status of women in family law, property and inheritance

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

¹⁵ International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work*
www.ilo.org/aids

law and domestic legislation would improve women's status. This would prevent application of discriminatory customary laws in property and inheritance. It may however require amendment to Section 15 of the Constitution.

Legislation relating to administration of wills and estates should be amended to provide for family provision orders and statutory legacies to prevent women from being left financially destitute after a husband's death.

Consideration should be given to moving to a no-fault model for family law. Legislation should abolish the husband's right to claim compensation for adultery.

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

Access to medicines

Patents legislation should be drafted that allows for:

- parallel importing of medicines that are marketed more cheaply in other countries, by incorporating international exhaustion of patent rights after first use into law;
- compulsory licensing including government use of generic medicines for non-commercial use in the health system;
- early working exception through including a bolar provision, so that generic medicines can be placed on the market as soon as possible after patent expiry.