

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Vanuatu

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

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Introduction and methodology

This review uses the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV and STIs in Vanuatu. 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

In total, five people have been diagnosed with HIV in Vanuatu (as at 2008), two of whom have died. Sexual transmission is considered the most likely mode of HIV transmission and one of the cases was infected through mother to child transmission. The first HIV-positive case was reported in 2002, generating considerable public interest and giving impetus to health service improvements in the areas of counseling, blood safety and testing.

Public exposure and extreme levels of stigma were experienced by the first person to be diagnosed with HIV in Vanuatu and there is anecdotal evidence to suggest that this has led to reluctance by people who may have been exposed to HIV to come forward for

³ See *Consolidated Guidelines* paras 102-103.

testing. STI surveillance reveals high population prevalence of other STIs. 13% of pregnant women studied tested positive for genital Chlamydia and 2.4% for gonorrhoea.⁴ There is clear potential for a sexually transmitted HIV epidemic.

Socio-cultural factors contributing to HIV vulnerability include:

- high prevalence of STIs, which amplify HIV transmission risk;
- low condom use and limited availability of prevention information;
- tourist industry and transactional sex;
- increased urban and overseas migration;
- high birth rates and youthful population;
- low status of women and high incidence of domestic violence.

There is reasonable access to health facilities, however the quality of services delivered is inadequate due to limited resources. There are five main hospitals with a number of health centres (26), dispensaries (104) and aid posts (188) where awareness programs at community level are provided.

Representational health committees are established for each health area, which is an area served by one or more health facilities (other than hospitals). Medical services are free.

Reproductive and sexual health services are provided by the Ministry of Health through hospitals, health centres and dispensaries, and through the services of NGOs including Vanuatu Family Health Association, Wan Smol Bag and World Vision international. Since 2004 there has been an increase in NGOs working in sexual health and HIV. Wan Smol Bag, Vanuatu Family Health Association, Municipal Dispensaries, Catholic Dispensaries, World Vision international, Save the Children- Australia, Young People's Project, IZA Foundation, Oxfam and the Foundation of the People's of the South Pacific provide HIV awareness activities.

Legal system⁵

Vanuatu has a combined common law system, incorporating British, French and customary law. The law comprises the *Constitution*, common law, Vanuatu legislation and case law, British and French statutes and Joint Regulations applying at the time of Independence, plus Vanuatu customary law. A National Council of Chiefs may advise on any aspect of customary law in connection with Bills before Parliament (Art. 30(2)).

The Supreme Court has unlimited jurisdiction to hear and determine civil and criminal proceedings. Appeals lie to the Court of Appeal. Magistrates' Courts have limited civil and criminal jurisdiction. Island Courts have limited jurisdiction, and are empowered to

⁴ 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.115

⁵ Information on court and legal systems derived from Pacific Islands Legal Information Institute <www.pacii.org>

administer the customary law so far as it is not in conflict with written law and is not contrary to justice, morality and good order.

International obligations

Vanuatu is a member of the United Nations, and party to Convention of the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. Vanuatu ratified the two Optional Protocols to the Convention on the Rights of the Child and the Optional Protocol to CEDAW on 2007. Vanuatu ratified the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities in 2008.

HIV policy framework

The Ministry of Health has developed a *National HIV/AIDS Strategic Plan 2008-1012* covering four priority areas. These priorities are: to reduce the community vulnerability to HIV and STIs; to implement a comprehensive intervention of treatment, care and support for people infected and affected by HIV; to create a policy and social environment in which an effective HIV response can flourish; and to manage and implement the *National HIV/AIDS Strategic Plan* efficiently and effectively . The Government has also developed a Prevention of Mother to Child Transmission Policy and guidelines, and a draft HIV Workplace policy.

CHECKLIST 1 – PUBLIC HEALTH LAW

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

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

There is no legislation requiring provision of HIV prevention and treatment services. Legislation does not specifically recognise the human right to the highest attainable standard of health.

However, the Minister for Health is responsible for promoting the health of the population (*Public Health Act 1994* Section 2).

It is the duty of every local authority (municipal or local council) to take all lawful, necessary, and reasonably practicable measures for preventing the occurrence of preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred or imposed on it by the Public Health Act or by any other law (*Public Health Act 1994* Section 6).

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?**

Legislation does not address issues of informed consent to HIV tests or counselling. 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.

Section 11 of the *Public Health Act 1994* provides that if the Director is satisfied, subject to the approval of the Minister -

- (a) that there is reason to believe that a person is or has been suffering from a notifiable disease or, though not suffering from such a disease, is a carrier of the disease; and
- (b) that in the interest of such a person or in the interest of his family, or in the public interest, it is expedient that he should be medically examined; and

(c) that such a person is not under treatment of a medical practitioner or the medical practitioner who is treating him consents to the making of an order under this section,

the Director may make an order for such a person to be medically examined by a medical practitioner nominated by the Director.

HIV and AIDS are notifiable diseases under the *Public Health Act 1994*. The provisions of the *Public Health Act 1994* in relation to notifiable diseases commenced in 2002.

Under Section 4 of the *Immigration Act* [Cap 66], the Principal Immigration Officer may require any intending entrant to produce any necessary documents. Policy is that for any type of residence permit, an applicant must provide a Medical Certificate stating 'medical condition'. Under Section 4 of the *Immigration Act*, the Principal Immigration Officer may require any intending entrant to submit to a medical examination. A person suffering from a contagious or infectious disease 'which makes his presence in Vanuatu dangerous to the community' may be declared a prohibited immigrant (Section 15(2)).

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?**

The *Public Health Act 1994* includes powers of detention and isolation (Section 11) and there are numerous provisions in the Act relating to prevention of casual transmission of notifiable diseases (e.g. restrictions on riding on public conveyances, letting of houses etc). HIV and AIDS are notifiable diseases. Part 3 (Prevention and Suppression of Notifiable Diseases) of the 1994 Act includes the following provisions —

- the head of the family, owner or occupier of lodgings etc should notify the nearest registered nurse, medical officer or environmental health officer, who should notify senior/area medical officers (Section 8)
- the Minister may cause isolation hospitals to be established and order surveillance, restraint, isolation, removal and treatment of persons infected, vaccination programs, etc (Section 9) and order medical examinations of suspected infected persons and suspected carriers in some circumstances (Section 11)
- a medical officer may authorise the isolation or exclusion of persons exposed to infection and in the incubation stage (Section 12(1))

- a child may not attend school until or unless a medical practitioner certifies that there is no undue risk of communicating the disease to other children (Section 12(3))
- infected persons should not expose others to the risk of infection in public places, conveyances, or carry on business which might spread the disease, give, lend or sell bedding, clothes or rags which might spread infection (Section 13)
- public conveyances should be disinfected after conveying a person with a notifiable disease (Section 14)
- dwellings and premises where a person has suffered from a notifiable disease should also be disinfected before letting or hiring (Section 15) and a medical or environmental health officer may prohibit work on such premises (Section 18)
- infected persons shall not enter a swimming pool (Section 17)
- lengthy provisions for dealing with bodies of persons dying from a notifiable disease (Section 19).

All these provisions are discretionary only, and the Minister may, by Regulation, provide that all or any of them do not apply in relation to a specified notifiable disease.

The *Quarantine Act* [Cap 1] covers both human and animal disease. As well as the quarantine requirements placed on inbound vessels, it requires medical personnel to notify outbreaks of 'epidemic disease' and quarantine stations may be set up for isolation of infected persons disembarked from ships. Although it is unlikely that the *Quarantine Act* provisions would be applied to quarantine people living with HIV given the lack of risk to others, it would be helpful if legislation could specifically exclude HIV from the Act.

The *Education Act 2001* provides at Section 39 that all school students should be examined at regular intervals by a qualified medical practitioner, and students who have 'a condition likely to endanger the health of other students' may be excluded from school until no longer a danger. Parents may request the exemption of their children from this examination, provided the principal is satisfied that the student will be examined privately. There is a risk that this provision could be used to exclude a child with HIV from school, although there is no risk of transmission through casual contact.

- 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 defining the criteria to be applied by health care workers before notifying sexual partners of the person's HIV or STI status. English common law applies, which generally requires medical confidentiality to be maintained, but may allow disclosure in the public interest in circumstances where there is a specific and substantial or significant physical risk to others. The common law has not defined the steps that need to be taken prior to disclosure of HIV status. The common law is ambiguous on these issues (*W v Egdell* [1990] 1 All ER 835; *X v. Y* [1988] All ER 648). Legislation would be helpful to 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, such that disclosure only happens in exceptional circumstances.

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 found providing for protection of the blood, tissue, and organ supply against HIV contamination. Blood safety legislation should be introduced that provides for screening of donated blood for HIV and other blood borne diseases.

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 Vanuatu were found, so legislation relating to needles and syringes is not considered necessary.

The *Dangerous Drugs Act* [Cap.12] prohibits the importation, sale, supply or possession in Vanuatu of listed narcotic drugs. Exception is made for listed medicinal drugs, and for the possession of a drug legitimately compounded and prescribed for medicinal purposes.

In 2001 the International Narcotics Control Board reported that Vanuatu had been identified as a country is used by drug traffickers as a transit point for consignments of heroin originating in South-East Asia.⁶ Use of injecting drugs often coincides with heroin trafficking routes. Therefore there may be a risk of injecting practices being introduced to the community in the future.

- 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 99 of the *Penal Code* provides that no person shall commit any homosexual act with a person of the same sex under 18 years of age, whether or not that person consents. Consensual sex between same-sex adults is therefore not criminalised.

Fornication or adultery

The law allows spouses to claim damages for adultery, which reflects custom. Allowing damages for adultery is demeaning and should be repealed. It may act as a disincentive to open and honest discussion of sexual relations, which is important in the context of HIV prevention. *Matrimonial Causes Act 1986* [Cap 192], Section 17A provides that a petitioner may on a petition for divorce claim damages on the ground of adultery. Adultery is a serious offence in custom and thus, customarily punishable so that damages

⁶ See: www.incb.org/pdf/e/ar/2001/incb_report_2001_notes.pdf

claimed in that respect are punitive but not compensatory: *Banga v Waiwo* Unreported Appeal Case No.1, 17/6/1996.⁷

Street sex work, brothel or escort sex work?

The *Penal Code* prohibits the procuring, aiding or facilitating the prostitution of another person, or sharing in the proceeds of or being subsidised by the prostitution of another person (Section 101). It also prohibits behaving in a disorderly or indecent manner in any public place for the purpose of prostitution, or soliciting for immoral purposes in any public place (Section 148).

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

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

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

There is no legislation prohibiting coercion of adults or children into sex work, or prohibiting trafficking or sex tourism.

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

There is no HIV-specific offence relating to HIV transmission. General *Penal Code* provisions relating to assault, aggravated assault, murder and manslaughter may apply to deliberate transmission of HIV. The *Penal Code* provides two offences that could be applied in the case of intentional or reckless transmission of HIV—

Section 107. No person shall commit intentional assault on the body of another person.

Penalty:

- (a) if no physical damage is caused, imprisonment for 3 months;

⁷ See: S Farran .What is the Matrimonial Property Regime In Vanuatu? (2001) *Journal Of South Pacific Law* 5 Working Paper 4

- (b) if damage of a temporary nature is caused, imprisonment for 1 year;
- (c) if damage of a permanent nature is caused, imprisonment for 5 years;
- (d) if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 10 years.

Section 108. No person shall unintentionally cause damage to the body of another person, through recklessness or negligence, or failure to observe any law.

Penalty:

- (a) if the damage so caused is purely temporary, imprisonment for 3 months;
- (b) if the damage so caused is permanent, imprisonment for 2 years;
- (c) if the damage so caused results in death, imprisonment for 5 years.

The year-and-a-day rule is found at Section 111, meaning that a murder or unlawful killing prosecution would not be possible (because death from HIV would have to occur within a year and a day of the act of HIV transmission).

The *Public Health Act 1994* Section 13 provides an offence for any person who -

- (a) knowing that he is suffering from any notifiable disease, wilfully exposes himself without proper precaution against spreading the notifiable disease, in any street, public place, shop, inn, public conveyance or vessel, or enters any public conveyance or vessel without previously notifying the owner, conductor, driver or master thereof that he is so suffering; or
- (b) being in charge of any person so suffering and in the knowledge that he is so suffering, so exposes such sufferer; or
- (c) knowing that he is suffering from a notifiable disease, engages in or carries on any trade, business or occupation which he cannot engage in or carry on without risk of spreading the disease;
- (d) gives, lends, sells, transmits or exposes, without previous disinfection, any bedding, clothing, rags or other things which have, to his knowledge, been exposed to infection from any such disease.

Penalty is a fine not exceeding VT300.000 and/or imprisonment for a term not exceeding 3 years. HIV is a notifiable disease.

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 three prisons. There are no specific provisions relating to HIV testing, prevention or treatment in prisons.

The *Correctional Services Act 2006* Section 22 states that prisoners have the right of access to medical care and treatment, and regular health inspections. The correctional centre manager must ensure that all detainees are kept in a correctional centre that is safe and secure with humane living conditions (Section 21).

In 1999 the Ombudsman Commission reported that the physical condition of the prisons, in particular Central Prison, violated prisoners' fundamental constitutional right to security of the person, i.e. a safe, healthy environment. In 2008 the Stade Prison was burnt down by prisoners protesting concerns about conditions.

A 2007 US Government report found that conditions were poor at the small, dilapidated prisons and below international standards.⁸ In 2006 the government began a modernization program to replace outdated prisons. The *Correctional Services Act* created a new Department of Correctional Services. The Government permits prison visits by human rights monitors.

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?

There are no specific provisions relating to protection of prisoners from intentional transmission of disease. Assaults are prison offences (Section 26 *Correctional Services Act*).

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

⁸ Government of USA (2007) *State Department Country Report on Human Rights: Vanuatu*
<http://www.state.gov/g/drl/rls/hrrpt/2006/78795.htm>; <http://www.state.gov/g/drl/rls/hrrpt/2007/100542.htm>

Legislation does not provide for the confidentiality of prisoners' HIV status or medical/personal information.

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

There are no requirements for segregation of prisoners with HIV. Section 38 of the *Correctional Services Act* provides for confinement of a prisoner who is a risk to other detainees. A detainee subjected to separate confinement is entitled to be regularly examined by a medical practitioner or a registered nurse who may make a recommendation on medical grounds that the correctional centre manager remove the detainee from such confinement.

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?

Legislation does not provide for compassionate release on medical grounds or reduction in sentence. Common law provides that ill health of an offender may be taken into account on sentencing as a mitigating factor in some circumstances e.g. where the illness would potentially be aggravated by imprisonment making the punishment harsher.

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

Legislation does not provide for non-discriminatory access to facilities for prisoners with HIV. However, all prisoners have equal rights under the *Correctional Services Act* to:

- (a) have a bed and clean beddings; and
- (b) have access to washing facilities so that every detainee may have a bath or shower as necessary for hygiene; and
- (c) have access to clean drinking water and food; and
- (d) have natural or artificial light; and
- (e) have access to sanitary facilities and products; and
- (f) shaving facilities; and
- (g) have clean and acceptable clothing; and
- (h) have a minimum of two hours of outdoor physical exercise in fresh air and sunlight every day; and
- (i) have access to private visitors; and
- (j) have access to a legal counsel and to communicate with him or her freely, without censorship and in confidence; and
- (k) have access to medical care and treatment, and regular health inspections; and
- (l) receive and send correspondences and telephone communications.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Vanuatu has ratified the Convention on the Rights of Persons with Disabilities (*Convention on the Rights of Persons with Disabilities (Ratification) Act 2008*). There is no law specifically prohibiting HIV discrimination or discrimination against persons with physical or mental disabilities. There is a national policy designed to protect the rights of persons with disabilities. The protection and care of people with disabilities is primarily left to the traditional extended family and to NGOs.

The *Education Act 2001* provides at Section 8 that a child is not to be refused admission to any school on account of his or her gender, religion, nationality, race, language or disability. Disability is not defined, but arguably may include HIV.

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

There are 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.

The *Penal Code* Section 150 provides that no person shall discriminate against another person with respect to the right to the supply of goods or services, or to gain or continue in any employment, or to be admitted to any public place, by reason of the sex, ethnic or racial origin, or the religion of such other person. Penalty: Imprisonment for 2 years. As it is a criminal offence there is a high standard of proof i.e. beyond reasonable doubt.

This legislation may provide some protection to women living with HIV if they are refused services, access to a place or employment in part because of their sex, particularly in the context of Constitutional protections for women. There are no protections from discrimination for men who have sex with men, transgender persons or sex workers.

3. Does the legislation contain the following substantive features:

- **Coverage of direct and indirect discrimination;**
- **Coverage of those presumed to be infected, as well as carers, partners, family, or associates;**
- **Coverage of vilification;**
- **The ground complained of only needs to be one of several reasons for the discriminatory act;**
- **Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);**

- **Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?**

The legislation in respect of discrimination on the grounds of sex does not have these features.

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?**

The legislation in respect of discrimination on the grounds of sex does not have these features.

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 that can address human rights complaints and conduct inquiries. The Office of the Ombudsman has handled discrimination and human rights related actions, however the office primarily addresses malpractice within government.

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

The *Administration of Estates Act 1935* (UK) applies to Vanuatu and provides for rules of inheritance to property other than land. The *Wills Act* [Cap 55] 1969, Section 3 preserves customary succession to land. Although the inheritance laws for assets other than land are equal for men and women, land inheritance is based on custom. Customary law varies. Some islands have matrilineal inheritance and others patrilineal.

Equality of women in inheritance and property rights has been recognised by the courts, based on the Constitution. In *Noel v Toto* [1995] VUSC 3 the Supreme Court cited international law to support its decision to grant a woman equal rights to land. The Supreme Court held that the constitutional guarantee of equality for women should extend to qualifying customary rules of land tenure that give less land rights to women. Customary law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied. The Supreme Court referred to international law and obligations under the Convention of all forms of Discrimination Against Women to support its decision to grant descendants of the female line equal rights to land entitlements.

The application of the Convention of all forms of Discrimination Against Women and the constitutional rights of women to equality were also considered by the Supreme Court in *Joli v Joli* [2003] VUSC 63. In dividing of matrimonial property, the court applied the equality principles of the Convention along with those in the *Constitution* to set aside the principles in the *Married Women's Property Act 1882* (United Kingdom) and recognise full equality between men and women. However this was overturned by the Court of Appeal *Joli v Joli* [2003] VUCA 27.⁹

There is ongoing lack of clarity as to how the law settles conflicts between customary law and formal law in relation to property rights. This lack of clarity means that women do not yet enjoy equal legal status in ownership of property, as men are still given preferential treatment under customary law.

The fundamental rights of the *Constitution* are available to all people without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex. Fundamental rights include equal treatment under the law or administrative action.

⁹ S Farran, *A Microcosm of Comparative Law: the Overlay of Customary, French and English Family Law in Present Day Vanuatu* (2004) Oxford U Comparative L Forum 4

Rights are subject to —

- respect for the rights and freedoms of others
- the legitimate public interest in defence, safety, public order, welfare and health
- any restrictions imposed by law on non-citizens.

The *Constitution* Article 47(1) states that: ‘If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.’ Article 93(3) states : ‘Customary law shall continue to have effect as a part of the law of the Republic.’ Section 10 of the *Island Court Act* [CAP 167] states that ‘Subject to the provisions of this Act an Island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order’. Legislation gives Chiefs the discretion to define justice, morality and good order based on their own cultural values. Decisions of the Island Courts, which are the most relevant courts for the majority of the population, are based on customary laws that are often discriminatory against women.

To address confusion, the law should be amended so that where there are conflicts, constitutional guarantees of equality prevail over customs that discriminate against women.

- **Marital relations e.g. divorce and custody**¹⁰

Legislation prescribes different ages of consent to marriage for men and women: 18 for males and 16 for females with parental consent; 21 for both without consent (*Control of Marriage Act* [Cap 45] 1966).

The law recognizes customary marriages and allows for registration including polygamous marriages. Traditional culture is characterized by male dominance and belief that women should devote themselves to childbearing. The majority of marriages were secured through bride price payments, which encourage men to view women as property. The Council of Chiefs revoked the minimum bride price in 2006 and encouraged the exchange of gifts between families instead. However, bride price is still practiced.

Under the *Matrimonial Causes Act* divorce is fault based. The grounds of divorce include adultery, desertion for three years, habitual cruelty, rape, sodomy and bestiality, a criminal conviction, insanity and presumption of death. Fault-based divorce disadvantages women where women, who may fear violent retribution, have to prove habitual cruelty.

Although the legislation states that the best interests of the child is the basis of custody decisions, some lower courts favour the father on the basis of bride price. It is argued that the customary practice of bride price secures rights to children after separation and

¹⁰ The Vanuatu Rural Development & Training Centers’ Association (2007) *Vanuatu NGO Shadow Report on Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women*

divorce because the child is considered the property of the father. Legislation may be required to explicitly disallow the granting of custody on the basis of bride price.

Maintenance for women and children requires the wife to obtain a criminal conviction prior to a civil action for maintenance. *Maintenance of Family Act* [Cap 42] provides that it is criminal offence for a husband not to support either his wife or legitimate children. Where a conviction is obtained the court may order that 'adequate' provision be made for his wife or children. The requirement that a conviction be obtained is an extra barrier for women in accessing maintenance and should be repealed.

Obtaining a share in land under custom varies between the islands, but generally favours men. There is no legislation covering the sharing of matrimonial property after divorce, so women have no legal protection unless their names are on the title to property or unless they can prove a constructive trust. To establish a constructive trust, under English equity law, a woman must prove that she has made financial contributions to the acquisition of the property, or contributed to the family income, and that there was a common intention and understanding between husband and wife that both "owned" the property together. It is difficult for women to prove either a financial contribution or a common intention of mutual ownership. Legislation should allow for property distribution on the basis of both financial and non-financial contributions recognizing women's domestic contributions and their future needs.

- **Capacity to enter into contracts, mortgages, credit and finance**

The *Penal Code* [Cap 135] at Section 150 provides that 'no person shall discriminate against another person with respect to his right to the supply of goods or services, or to gain or continue in any employment, or to be admitted to any public place, by reason of the sex ... of such other person.'

This provision affords women some protection against discrimination in access to financial services.

- **Access to reproductive and STD health information and services;**

Abortion is illegal. It is an offence under *Penal Code* Section 117 for a woman to procure her own abortion, or a person to procure an abortion for a woman, unless for good medical reasons. There is no legislation guaranteeing access to sexual and reproductive health services.

- **Protection from sexual and other violence, including rape in marriage;**

The *Family Protection Act 2008* enables victims of domestic violence to seek protection orders. The Act states that the custom of bride price is not an acceptable excuse for violence in the home. The Police Department has established an internal Family Protection Unit to address the high levels of domestic violence and other related matters.

The criminal offence of rape relates to assaults of women or girls only. Rape in marriage is a crime (*Penal Code* Section 90).

- **Recognition of de facto relationships**

De facto relationships are not legally recognised.

- **Prohibition of harmful traditional practices e.g. female genital mutilation?**

Customary laws that are contrary to justice, morality and good order are not enforceable.

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 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?**

Penal Code [Cap 135] provides a range of offences including unlawful sexual intercourse by male with girl aged under 20 who is under protection; unlawful sexual intercourse with a girl aged under 13; unlawful sexual intercourse with a girl aged 13-15 years; and indecent assault of a girl under 13.

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

The law does not recognize same sex relationships. The age of consent for homosexual sex is 18 and for heterosexual sex is 16.

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. Article 5 of the *Constitution* provides citizens with the right to protection for the privacy of the home and other property.

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

There is no legislation. Common law allows disclosure of medical records in the public interest in limited circumstances e.g. if there is a risk of serious injury to third parties.

- 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 legislation relating to privacy in legal proceedings. Following common law principles, Courts are generally open to the public. Article 5 of the *Constitution* provides a right to a fair hearing by an independent and impartial court. The Constitution includes

the right to freedom of expression which may weigh in favour of open proceedings to enable reporting. Courts nonetheless have discretion at common law to close hearings to ensure a fair trial where there are exceptional public interest factors outweighing the public interest in open hearings.

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. Section 8 of the *Public Health Act* requires medical practitioners to notify HIV and AIDS cases to health authorities.

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 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. The *Health and Safety at Work Act* [Cap195] Section 2 provides that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees, including:

- 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 his 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 these duties.

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, but there is a general duty under *Health and Safety at Work Act* [Cap195] Section 2 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:**

Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and

Social security and other benefits where workers are no longer able to work?

There is no unfair dismissal legislation or other legislation prohibiting discrimination on the grounds of HIV against employees.

Employee benefits are provided through provident fund membership (*Vanuatu National Provident Fund Act 1986*). Disability benefit is available if the member is permanently incapable of any employment due to a physical or mental disability assessed by two registered medical practitioners.

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 1987* 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 *Sale of Medicines (Control) Act* [Cap 48] prohibits the sale of medicines by anyone other than a licensed pharmacist within 5 miles of a licensed pharmacy. Outside the 5-mile zone, a licensed druggist may sell medicines. Categories of medicines are listed in the Regulations. Issues of safety and efficacy are likely to have been considered in decision to place medicines on the lists contained in the Regulations.

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

The *Sale of Medicines Act* and Regulations prescribe the labelling that must accompany listed drugs. A common law action for breach of contract may be available. There is no Fair Trading Act or equivalent consumer protection law.

- 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?**

There is no legislation ensuring access and availability of condoms or other prevention measures.

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)?

Legislation has been enacted but is not yet in operation. The legislation provides for compulsory licensing in narrow circumstances. The *Patents Act 2003* (not commenced) provides for the issue of compulsory licences three years from the date of the grant of a patent or four years from the filing date of a patent application, whichever is the later, on the grounds that in Vanuatu a market for the patented invention is not being supplied at all or not being supplied on reasonable terms.

Section 35 of the Act provides a broad “government use” provision. This allows the Government, and any person authorised in writing by the Government, to make, use, exercise and sell any patented invention for the services of the Government. Government must pay the owner for the use an amount agreed on, or determined by a method agreed between the Government and the owner, having regard to the economic value of the patented invention. This would enable the importation by Government of generic ARVs for public provision.

Exhaustion of patent rights by putting a medicine on the market domestically or internationally does not appear to be addressed by the legislation. This means that the legislation does not enable parallel importing of brand name medicines from countries where they are marketed more cheaply.

The *Patents Act* should also be amended to include a ‘bolar’ provision, so that generic medicines can be approved for marketing as soon as possible after patent expiry.

As a least developed country, should Vanuatu join the World Trade Organization it does not have to apply patent legislation to pharmaceuticals until 2016. Medicines should be exempted from the Act until 2016.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

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

There are no specific legislative requirements. The Health Research and Ethics Committee has oversight of medical research.¹¹

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

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

No.

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

No. Ethics Committee approval may consider consent issues.

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

No. Ethics Committee approval may consider confidentiality issues.

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

No. The National Research Policy of the National Cultural Council provides that where research is undertaken with a local community, the research will include a product of immediate benefit and use to that community. This product will be decided upon by the researcher, the local community and the Cultural Centre in the early part of the fieldwork, and the Cultural Centre may have a role in assisting the researcher in its provision.

¹¹ 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.107

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

There is no legislation regulating these aspects of the conduct of research on humans.

Under the *Vanuatu National Cultural Council Act 1988*, the Vanuatu National Cultural Council is responsible for research in Vanuatu. [Cap 186, 6(2)(e)].

It is the role of the National Cultural Council to define and implement national research policies, to define national research priorities, and to sponsor, regulate and carry out programs of research. The Vanuatu Cultural Centre is the executing arm of the National Cultural Council.

The standard Research Agreement of the National Cultural Council¹² requires researchers to:

- (a) recognise the rights of people being studied, including the right not to be studied, to privacy, to anonymity, and to confidentiality;
- (b) recognise the primary right of informants and suppliers of data and materials to the knowledge and use of that information and material, and respect traditional copyrights, which always remain with the local community;
- (c) assume a responsibility to make the subjects in research fully aware of their rights and the nature of the research and their involvement in it;
- (d) respect local customs and values and carry out research in a manner consistent with these;
- (e) contribute to the interests of the local community in whatever ways possible so as to maximise the return to the community for their cooperation in the research work;
- (f) recognise their continuing obligations to the local community after the completion of field work, including returning materials as desired and providing support and continuing concern.

¹² *Vanuatu Cultural Research Policy* (2000)

http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/vanuatu_policy.pdf

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* 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.

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

The *Constitution* 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, as soliciting remains 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 public benefit.

Under Section 93 of the *Penal Code*, it is an offence to sell or distribute indecent models or objects, or publicly exhibit an indecent object, conduct an indecent show or performance. It is a defence that the public good was served by the alleged act. It is a question of law whether that act may in the circumstances serve the public good, but a question of fact whether or not the acts complained of did serve the public good.

Under Section 147, of the *Penal Code* it is an offence to manufacture, hold for sale, distribution, lease or display, import, export or transport, sell or hire, any printed matter, writing, drawing, sign, engraving, printing, photograph, film, sound recording, emblem or other object or representation whatsoever of obscene nature. A publication or other article is obscene if it tends to deprave and corrupt those whose minds are open to such influences and into whose hands it may fall.

The *Censorship of Films Act* [Cap 72] establishes censorship boards for certain areas of Vanuatu, which may classify and prohibit exhibition of films.

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)?**

There is no legislation requiring professional groups to develop or enforce 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 are required.

SUMMARY AND RECOMMENDATIONS¹³

Public health and criminal laws require amendment to enable a human rights-based approach to HIV and sexual and reproductive health in Vanuatu.

Public Health

HIV and AIDS should not be subject to Part 3 of the *Public Health Act 1994*. Provisions of the *Public Health Act 1994* relating to isolation, restrictions on accommodation etc that have been drafted for diseases that are casually transmitted should not apply to HIV.

Legislation should require confidential notification of HIV and AIDS cases.

Legislation should 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. Privacy legislation should be introduced that protects medical information from disclosure without patient consent and gives people rights of access to data relating to them.

A draft Act called the *Public Health Act 2000* was prepared in 2000. The Bill made specific reference to HIV/AIDS education, confidential testing for HIV, duty of the STD counsellor upon learning of a positive HIV test result, duty to inform the sexual partner of HIV status, and work place testing for HIV. However, the Bill was not supported.¹⁴ Provisions of the Bill provide useful precedents for the Government to consider in the law reform process. The Government is reviewing the *Public Health Act* in 2009.

Legislation requiring screening is required for protection of the blood, tissue, and organ supply from HIV and other blood borne viruses.

Legislation should require condoms and HIV test kits to comply with international quality standards.

Criminal offences

The offences relating to prostitution involving consenting adults in private, the gendered definition of rape, and the lack of provision for marital rape all contravene human rights and require repeal or amendment. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices.

¹³ See: Amnesty International (2008) *Vanuatu Amnesty International Submission to the UN Universal Periodic Review Fifth session of the UPR Working Group of the Human Rights Council May 2009*; The Vanuatu Rural Development & Training Centers' Association (2007) *Vanuatu NGO Shadow Report on Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women*.

¹⁴ P Mae, *Medical Confidentiality and the Public Disclosure Of HIV Status* (2004) *Journal of South Pacific Law* 8(1)

The offences of intentional and unintentional harm causing permanent damage under the *Penal Code* appear sufficient to cover situations of intentional and reckless transmission. It may however be desirable to include defences of condom use and the consent to sex of a fully informed partner, and to exclude mother-to-child transmission of HIV.

Prisoners

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

Anti-Discrimination Law and Equality of Legal Status of Vulnerable Populations

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

The current *Penal Code* prohibition on discrimination does not apply to HIV. HIV discrimination should be included in the Penal Code. Anti-discrimination legislation that allows civil courts to hear complaints should be introduced. This would allow people living with or affected by HIV to claim civil remedies such as damages or reinstatement. Civil claims are easier to prove than criminal prosecutions (requiring proof on the balance of probabilities rather than the criminal standard of beyond reasonable doubt) and do not require police resources.

There is a risk of human rights violations against marginalised groups if there are no legal guarantees of protection. Irene Malachi was the first Ni-Vanuatu person whose HIV status was made public. She experienced discrimination by government authorities. Irene was a nurse for 17 years and decided to resign in 2002 after it was declared publicly that she was HIV positive. Her case highlights the importance of guaranteeing protection of people living with 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.

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 the human rights chapter of the Constitution prevails when there is conflict between customary law and domestic legislation would improve women's status. This would prevent application of discriminatory customary laws in property and inheritance.

Reform of succession law to provide for family provision orders and statutory legacies could 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, recognition of de facto relationships and abolition of the requirement that the husband's conviction be obtained as a precondition for maintenance.

Access to medicines and condoms

As a least developed country, under the terms of the TRIPS Agreement, Vanuatu does not have to apply patent legislation to pharmaceuticals until 2016. Medicines should be exempted from the *Patents Act* until 2016 (or a later date if Vanuatu does not proceed to become a WTO member).

The *Patents Act* could also support access to affordable medicines by inserting:

- an international exhaustion provision, to allow for parallel importing of medicines that are marketed more cheaply in other countries;
- an early working exception through including a ‘bolar’ provision, so that generic medicines can be approved for marketing as soon as possible after patent expiry.

Legislation should require compliance of condom quality with the International Condom Standard.