

SUMMARY OF RECOMMENDATIONS:

PART 1:

- A. Examine existing relevant laws to see whether such laws are adequate as legislative framework to address legal issues and matters relating to HIV/AIDS.**

CONSTITUTION AMENDMENT ACT 1997

It may be premature to amend the following sections of the Constitution -

(1) section 38(2) to include "medical condition";

(2) section 33 to include "the right to an opportunity to gainful employment",

as the Courts have yet to decide on the interpretation of such terms.

PUBLIC HEALTH ACT (Cap.111)

The Act does not provide for the needs and rights of persons living with HIV/AIDS.

As HIV/AIDS is distinct from "infectious diseases" and "venereal diseases", it is

recommended that the Act be amended to incorporate provisions relating to

HIV/AIDS. This can be achieved by inserting a new Part VIIIA entitled "**PART**

VIIIA - HIV/AIDS" . The part should provide the following -

Interpretation

The following terms should be defined –

"AIDS" means Acquired Immune deficiency Syndrome;

"HIV" Human Immunodeficiency Virus;

"informed consent"

Testing for HIV/AIDS

A person must not be tested for HIV/AIDS without his or her informed consent, of if incapable of giving informed consent, without the informed consent of a lawful guardian.

Every test for HIV/AIDS must be kept confidential.

Procedure for testing for HIV/AIDS

The procedures for testing for HIV/AIDS must be clearly spelt out. This includes -

How tests are conducted - use of sterilised equipment must be compulsory. Any departure from use of sterilised equipment must be specified.

Testing of persons should be conducted in private.

Form of Informed consent

Consent may be expressed or implied, silence should not be taken necessarily as consent, each case should be decided on its own merit.

Procedure involved in giving consent

A person should sign a written consent form.

The standard consent form should state the nature and purpose of the operation or treatment have been explained to the patient.

A person should not sign a consent form when sedated.

Signing a consent form without understanding and appreciating the nature of procedure and all the consequences of the surgery does not constitute valid consent.

A person may withdraw consent even though a medical procedure is under way and the doctor must halt the process forthwith.

Recording of test results and other medical examinations

The recording of test results must be done in such a way to guarantee protection of the identity of a person's HIV/AIDS status. Access to such records must be restricted to the medical officer or practitioner dealing directly with a person, and any other caregiver directly involved in treating such person.

Notification of Partners

Persons living with HIV/AIDS should be encouraged through counseling to notify their partners

voluntarily; or to cooperate with their doctors to do so;

- Medical officers or practitioners should be able to notify unsuspecting partners and be protected against liability for doing so.
- Limitations to the rights to privacy of a person living with HIV/AIDS should be spelt out. Paragraph 7.3 of National HIV/AIDS Policy should be adopted.

Counselling

- Counselling should be compulsory prior to and before testing or carrying out any other related medical treatment or procedure.
- Procedure and conduct of counselling sessions must be specified.
- Persons authorised to counsel must be specified.
- Requirements if any for a counselor to meet.

Transmission of blood, blood products, donated organs, tissues, and body fluids

- Any specified product must be screened by authorised persons for HIV/AIDS before transmission.
- Persons authorised to screen specified products must be specified.
- Any equipment that needs to be sterilised that is used in transmission of any of the specified products must be sterilised.
- Any limitations to sterilising of equipment must be specified.

Research

- Any research on HIV/AIDS or related matters involving human subjects must not be undertaken -
 - (a) without approval of National Aids Council;
 - (b) without the person's informed consent.

Offences

The following should constitute an offence -

- Wilful transmission
- Wilful use of unsterilised equipment subject to limitations

- Transmission through unscreened blood, blood products, body organs, etc.

Penalties

The penalties prescribed for the offences must take into account the severity of the offences and be in line with sanctions imposed in modern time. The standard penalties are fines and term of imprisonment. Careful consideration though must be given to offenders who are living with HIV/AIDS as it may be futile for them to serve a prison term for want of medical care. The penalty should take into account the type of offenders so that effective punitive measures are imposed.

Other recommendations

- HIV/AIDS should not be a notifiable disease
- Persons living with HIV/AIDS should not be isolated or detained but integrated into society.
- There should be a code of Ethics for caregivers other than medical officers or practitioners that subjects caregivers to the same oath of secrecy as other professionals on keeping confidential knowledge of a person living with HIV/AIDS.
- Chapter 6 (except for paragraph 6.6) of the National HIV/AIDS Policy should be implemented wherever possible.

Education Act (Cap. 92)

No testing of students for HIV/AIDS without the students' informed consent or informed consent of lawful guardian.

The recommendations of the IJALS Report¹ should be implemented.

- The right to privacy of persons living with HIV/AIDS must be provided for
- Any limitations to that right of privacy must be specified

¹ IJALS Report (1998), p.25

Prisons Regulations

Repeal

1.0 INTRODUCTION:

- 1.1 HIV/AIDS has become a reality for the Fiji Islands in reaching new heights and require our concerted efforts to combat its spread. To date, there are 104 confirmed cases of HIV/AIDS in the Fiji Islands.
- 1.2 The challenge that lies ahead for the Fiji Islands is to provide for the rights and needs of persons living with HIV/AIDS and at the same time to protect the rights of persons not living with HIV/AIDS.
- 1.3 HIV/AIDS has been traditionally viewed as a medical problem; a problem best left to the medical profession to solve. To the contrary, HIV/AIDS and related matters are beset with legal issues which can be classified in two broad categories relating to -
- (1) rights of persons living with HIV/AIDS; and
 - (2) rights of persons not living with HIV/AIDS.
- 1.4 The Ministry of Health, in appreciating the various legal issues involved in HIV/AIDS and related matters, hosted a few 'legal' workshops for lawyers to contribute towards ironing out legal issues relating to HIV/AIDS.
- 1.5 As a result of such workshops, it was decided that such legal issues will need to be further examined, thus the reason for this consultancy.
- 1.6 This consultancy is divided into 3 parts and requires work to be carried out as follows-
- 1.6.1 **Part 1 Existing Laws**

Part 1 is required to examine existing relevant laws to see whether such laws are

adequate as legislative framework to address legal issues and matters relating to HIV/AIDS. Secondly, to make recommendation(s) as to whether a new law is required to be enacted or amend existing law(s) in respect of dealing with HIV/AIDS and related matters. Thirdly, to make any other relevant recommendation(s).

1.6.2Part 2 - Legislative framework for National Advisory Committee on Aids (NACA)

Part 2 of the consultancy is required to examine the current structure of NACA and make recommendations whether or not there is a need to establish NACA by law.

Secondly, if recommended that NACA be established by a law, to outline its legislative framework and specify the elements of such framework.

Thirdly, to make any other relevant recommendation(s) in respect of NACA.

Part 3 - Legal Issues Arising from the Draft Fiji National HIV/AIDS Policy

Part 3 of the consultancy is required to identify legal issues from the draft Fiji National HIV/AIDS Policy. The second task is to expound on the implications of such issues in respect of addressing HIV/AIDS in the Fiji Islands. Thirdly, to recommend solutions for dealing with such issues and make any other relevant recommendations.

METHODOLOGY:

This consultancy is coordinated by the Ministry of Health in liaison with the Legal Officer for the Ministry, Mrs. Rai Ligabalavu. As there are 3 distinct parts to the consultancy, it was decided that the 3 consultants would work with one part separately but in consultation with the other two.

Part 1 of the consultancy mainly involved examining the relevant laws of the Fiji Islands and the relevant international human rights treaties of which the Fiji Islands is a signatory in respect of their legislative adequacy to provide for HIV/AIDS and related matters.

It also took into account the recommendations of the IJALS Report and the National HIV/AIDS Policy.

Another task was to carry out research through available literature in ascertaining what the legal issues are and how such issues are dealt with in other jurisdictions for guidance. It is understood that the third consultant's report will elaborate on the legal issues involved and propose feasible solutions for the Fiji Islands.

PART 1

Term of Reference:

A. To examine existing relevant laws to see whether such laws are adequate as legislative framework to address legal issues and matters relating to HIV/AIDS.

Part 1 of the consultancy will focus mainly on domestic laws but mindful of Fiji's international obligations by virtue of being a signatory to certain International human rights treaties².

The existing relevant laws which this consultancy identified are -

1. Constitution Amendment Act 1997 ("the Constitution")
2. Public Health Act (Cap.111)
3. Employment Act (Cap. 92)
4. Prisons Act (Cap.86)
5. Royal Fiji Military Forces Act (Cap.81)
6. Education Act (Cap.262)
7. Penal Code (Cap.17)
8. Passports Act (Act No.25 of 2002)
9. Health and Safety at Work Act 1994

² United Declaration of Human Rights ("UDHR"), Convention on the Rights of a Child ("CRC"), Conventions on All Forms of Discrimination Against Women ("CEDAW")

10. Human Rights Commission Act (Act. No. of 1999)

11. Immigration Act (Cap.88)

Before embarking on examining our laws, we need to first know what are the legal issues and matters relating to HIV/AIDS. The third consultant's report will expound on such legal issues³ and propose solutions for those issues. For purposes of Part 1 of this consultancy, the legal issues that will be looked at⁴ are based on Chapter 4 of the Constitution thus assume a human rights perspective namely –

- (a) the right to privacy of a person living with HIV/AIDS (or the duty of confidentiality owed to such a person);
- (b) limitations (if any) to a person's right to privacy;
- (c) freedom from cruel or degrading treatment or medical treatment or procedure without informed consent;
- (d) the right to personal liberty;
- (e) the right to basic education and to equal access to educational institutions;
- (f) freedom of movement;
- (g) freedom of association;
- (h) equality before the law;
- (i) the right to labour relations;
- (j) freedom of expression.

CONSTITUTION AMENDMENT ACT 1997 ("the Constitution")

Being the supreme law of the State, the Constitution provides the backdrop for this exercise and contains provisions relating to HIV/AIDS and related matters that need to be examined. The relevant provisions are -

Supremacy of the Constitution

³ The legal issues discussed in the third consultant's report may not correspond to those discussed in this report.

2. (1) This Constitution is the supreme law of the State.

(2) Any law inconsistent with this Constitution is invalid to the extent of the inconsistency.

The effect of subsection(2) is that any law relating to HIV/AIDS or related matters that is inconsistent with the Constitution, is invalid to the extent of the inconsistency.

Right to life

22. Every person has the right to life. A person must not be arbitrarily deprived of life.

Section 22 brings to light the issue of whether a pregnant woman who is HIV positive should be compelled by law to terminate her pregnancy in view of there being a real risk of transmitting HIV to her unborn baby. Pursuant to the Penal Code, abortion is a criminal offence⁵. Paragraph 2.4.11 of the Code of Ethics of the Fiji Medical Association provides that termination of pregnancy is performed only if justified on medical grounds and thus the patient's consent only is necessary. Consent must be an informed consent pursuant to section 25(2) of the Constitution.

Personal liberty

23. (1) A person must not be deprived of personal liberty except -

(g) for the purpose of preventing the spread of an infectious or contagious disease.

Assuming that HIV/AIDS is an infectious disease⁶, section 23(1)(g) would deprive a person living with HIV/AIDS of personal liberty for the purpose of preventing the spread of HIV.

The international human rights standard provides that everyone has the right to liberty and security⁷. The World Health Organisation (“WHO”) has expressed the view that detention of any kind is not warranted for the prevention and control of the spread of

⁴ Legal issues discussed in this consultancy are not exhaustive.

⁵ See Penal Code, sections 172-174, p.70.

⁶ As expressed by the IJALS Report, HIV/AIDS is effectively an 'infectious disease' for purposes of the Immigration Act s 11(2)(d)(ii).

⁷ UDHR, article 3.

HIV/AIDS⁸. HIV is transmitted mainly through social behaviour such as sex and sharing of unsterilised needles. The other modes of transmission are through mother - to -child during pregnancy and breastfeeding, and transmission through blood, body fluids, body organs, tissues, etc. HIV therefore is not "infectious" disease in the ordinary sense such as being in proximity with other people or breathing in contaminated air.

Section 23(1)(g) may be justified however if there is a real risk of transmission of HIV by a person (given the person's history) if allowed to freely exercise his or her right to freedom of liberty.

In light of international human rights standard, and the nature of HIV transmission, a person living with HIV/AIDS should not be deprived of liberty merely on the basis of his or her HIV/AIDS status.

Freedom from cruel or degrading treatment

25. (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

Subsection (1) provides protection from torture of any kind, from any inhumane or degrading treatment relating to HIV/AIDS.

Every person has the right to freedom from scientific or medical treatment or procedures without his or her informed consent or, if incapable of giving his or her informed consent, without the informed consent of a lawful guardian.

Subsection (2) protects a person from being subjected to mandatory testing for HIV/AIDS or any other related medical treatment or procedure as a person's informed consent is required before the person can be tested or have any other medical treatment or procedure performed on him or her.

Freedom of expression

⁸ HIV/AIDS; Law, Ethics and Human Rights in Fiji (1998)

30. (1) Every person has the right to freedom of speech and expression, including -

(a) freedom to seek, receive, and impart information and ideas; and

(b) freedom of the press and other media

Subsection (1) provides every person the right to freely speak and express views on HIV/AIDS and related matters in this instance, without fear of sanction. This provision entitles the Ministry of Health and other persons the freedom to impart information to people about HIV/AIDS including use of press and other media to achieve this.

(2) A law may limit, or may authorise the limitation of, the right to freedom of expression in the interest of -

(a)public health;

A law made under subsection (2)(a) would limit the right to freedom of expression referred to in subsection(1) in the interest of public health. Such law would deal with protecting the rights of persons living with HIV/AIDS, and persons living without it. For instance, limiting the expression of a view that promotes non-use of condoms as condoms do not prevent transmission of HIV/AIDS, would be justified under subsection(2) as such view is misleading and against the interest of public health.

(b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons;

A law made under subsection 2(b) would protect the right to privacy, dignity, and rights of freedoms of persons living with HIV/AIDS by prohibiting the unwarranted announcement of such persons' identity and HIV/AIDS status, for instance. In view of the stigma attached to HIV/AIDS, protection of the right to privacy of persons living with HIV/AIDS is paramount.

(c) preventing the disclosure, as appropriate of information received in confidence;

A law made under subsection 2(c) would protect the right to privacy of a person living with HIV/AIDS by preventing the disclosure of a person's HIV/AIDS status obtained through information received in confidence. Such a law would apply especially to medical officers or practitioners, and other caregivers, and other persons who may be informed of a person's HIV/AIDS status in the course of their professional duty.

but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.

However, such laws that may be made under subsection (2), can be made only to the extent that is reasonable and justifiable in a free and democratic society.

This raises the question as to what is reasonable and justifiable for the Fiji Islands. This means that although the rights of persons living with HIV/AIDS are protected, there must be consideration also for the protection of the rights of those not living with HIV/AIDS. For instance, whilst respecting the right to privacy of a person living with HIV/AIDS, if a medical officer is of the view that there is a real risk of such person wilfully transmitting HIV despite being counselled to make appropriate behavioural changes, the disclosure of the person's HIV/AIDS status by the medical officer may be justifiable in our context.

Freedom of association

32. (1) Every person has the right to freedom of association.

(2) A law may limit, the right to freedom of association:

(a) in the interests ofpublic health

Subsection (1) provides for every person (including persons living with HIV/AIDS) the right to freedom of association. Subsection(2) could result in discrimination against

persons living with HIV/AIDS from enjoying their freedom of association on the basis of their HIV/AIDS status, in the interest of 'public health'.

As earlier raised, it should be noted that limiting a person's right to freedom of association on the ground of HIV/AIDS is not warranted under international human rights standards.

Labour relations

33. (1) Workers have the right to form and join trade unions and employers have the right to form and join employers' trade unions.

Subsection (1) entitles workers living with HIV/AIDS the right to form and join trade unions, similarly for such employers, to join employers' trade union.

(3) Every person has the right to fair labour practices, including humane treatment and proper working conditions.

Subsection (3) entitles every person (including those living with HIV/AIDS) to fair labour practices, including humane treatment and proper working conditions.

A view expressed is that subsection (3) falls short of providing the right of a person living with HIV/AIDS to an opportunity to gainful employment of his or her choice pursuant to Article 23 of the UDHR⁹.

It can be argued that "fair labour practices" would include equal opportunity for a person living with HIV/AIDS as any other person, to gainful employment of his or her choice, provided the person meets the requirements demanded of such employment and is the best person suited for it. Section 33(3) has yet to be interpreted by the courts as to whether it excludes the right to an opportunity to gainful employment. It may be prudent to await the court's interpretation of the section before considering an amendment to the section.¹⁰

⁹ IJALS Report, 1998 p.9

¹⁰ It is recommended by the IJALS Report that the Constitution be amended to guarantee persons freedom from unfair discrimination in pursuit of gainful employment of his/her choice. (1998), p.9.

(4) A law may limit, or may authorize the limitation of, the rights set out in this section:

(a) in the interests of public health;

but only to the extent that the limitation is reasonable and justifiable in society.

A law made under subsection (4) may limit the right of a person living with HIV/AIDS from full enjoyment of his or her rights under section 33 if there is a real risk of transmitting HIV to other persons in the course of labour.

Freedom of movement

34. (7) A law may limit, or may authorise the limitation of, the right of a person to freedom of movement:

(a) in the interests ofpublic health;

but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.

A law made under section 34(7)(a) could effectively limit, or authorise the limitation of, the right to freedom of movement of a person living with HIV/AIDS, in the interest of public health.

Experts in HIV/AIDS¹¹ express the view that persons living with HIV/AIDS should not be restricted from entry and residence.

The question for us is, whether the Fiji Islands is prepared to adopt the approach taken by the experts. Leaving this issue aside for policy makers, a law made under section 34(7)(a) however must take into account Fiji's social, cultural and economical position in weighing the rights of persons living with HIV/AIDS against the rights of those living without HIV/AIDS. For similar reasons raised concerning freedom of liberty, a law made under section 34(7)(a) should not limit a person's freedom of movement merely on the basis of the person's HIV/AIDS status. Limitation of

¹¹ Recommendation of IJALS Report, p.9.

freedom of movement may be justifiable if there is a real risk of transmission of HIV by the person if allowed freedom of movement.

Equality

38. (1) Every person has the right to equality before the law.

(2) A person must not be unfairly discriminated against, directly or indirectly, or the ground of his or her:

(a) "disability"¹²

(3) Accordingly, neither a law or an administrative action taken under a law may directly or indirectly impose a disability or restriction on a person on a prohibited ground.

(4) Every person has the right of access, without discrimination on a prohibited ground, to shops, hotels,and public places.

It was contended in the IJALS Report¹³ that "disability" is the closest listed prohibited ground to cover HIV/AIDS. The concern raised is that the Courts may not apply a generous and purposive construction of the term thus render meaningless the right to equality before the law under section 38(1) and subsections (3) and (4), as persons living with HIV/AIDS would not be covered under a prohibited ground. It was recommended that section 38 of the Constitution be amended to include a more specific term "medical condition".

The interpretation of "disability" as regards inclusion of HIV/AIDS or not, has yet to be decided by the courts. Being mindful of protecting the right of persons living with HIV/AIDS from unfair discrimination, this report however is of the view that it may be prudent to await the courts' interpretation of the section, whether "disability" excludes HIV/AIDS, before considering an amendment to subsection(1).

Education

¹²In following discussion on this provision by IJALS Report, It is assumed that "disability" covers HIV/AIDS. See IJALS Report, pp.11-12.

¹³ Ibid.

39. (1) Every person has the right to basic education and to equal access to educational institutions.

Subsection(1) entitles persons living with HIV/AIDS the right to basic education and to equal access to educational institutions.

(3) The admission policy of a place of educationmay be administered on the need to maintain its special character but, ...those concerned in its management must ensure that it is open to all qualified students without discrimination on any ground prohibited by this Constitution.

Subsection (3) obliges those concerned with management of a school not to discriminate against a student living with HIV/AIDS (on prohibited ground of “disability”) a place in the school, provided the student is a qualified student.

Recommendation:

No amendments to section 33 or 38(1) of the Constitution until the courts make a ruling that “disability” excludes “HIV/AIDS” and “fair labour practices” excludes “right to gainful employment of his or her choice”, respectively.

2.0 Public Health Act (Cap.111)

2.1 The Act deals with public health matters including the management and control of diseases.

2.2 *Interpretation*

2.2.1 Is HIV/AIDS defined or covered in the Act?

Section 2 of the Act contains the following definitions –

“infectious disease” means any disease enumerated in the First Schedule and any other disease which the Minister may declare temporarily or permanently to be an infectious disease within the meaning of this Act;

“venereal disease” means gonorrhoea, granuloma venereum, gonorrhoeal ophthalmia, lymphogranuloma inguinale, soft chancre, syphilis and venereal warts”.

2.2.2 Venereal disease is listed in the First Schedule therefore it is an ‘infectious disease’ for the purposes of the Act. The First Schedule¹⁴ does not include HIV/AIDS.

2.2.3 Should HIV/AIDS be added¹⁵ to the First Schedule as a Class A¹⁶ or Class B¹⁷ infectious disease or defined as a venereal disease, or a separate category?

In answering the above, we need to ascertain the nature of contracting HIV/AIDS. HIV is transmitted through sex, mother to child during pregnancy, childbirth, or breastfeeding of an HIV positive mother, infected blood and blood products, and through intravenous drug use¹⁸.

2.2.4 HIV therefore is not an air-borne disease, nor can it be spread through casual contact, routine social contact in schools, the workplace or public places, nor through water or food, eating utensils, coughing or sneezing, insects, toilets or swimming pools¹⁹. This means that HIV/AIDS does not fall within Class A or B infectious disease, for purposes of the Act.

2.2.5 Recommendation: HIV/AIDS should not be added to the First Schedule as a Class A or Class B infectious disease.

2.2.6 Assuming that HIV/AIDS falls within the meaning of 'venereal disease', the relevant provisions to look at are contained in Part VIII of the Act.

Persons suffering from venereal disease to be treated until cured

¹⁴ See Public Health Act (PHA) (Cap.111) pp.46 - 47

¹⁵ Section 68 of PHA empowers the Minister to add any infectious disease to or delete such from the First Schedule.

¹⁶ Class A 'infectious disease' includes cholera, smallpox, yellow fever, etc.

¹⁷ Class B infectious disease includes anthrax, dysentery, leprosy, malaria, meningitis, etc.

¹⁸ Fiji HIV/AIDS National Policy

¹⁹ Social Aspects of AIDS Prevention and Control Programmes (WHO, Geneva, 1987)

- 84. (1) Every person who knows or has reason to believe that he is suffering from a venereal disease shall forthwith consult a medical practitioner with respect thereto and shall place himself under treatment by that medical practitioner...or shall attend for treatment at any hospital or other place available for treatment of venereal diseases.**
- (2) Every person undergoing treatment for any venereal disease... until cured or free from such disease in a communicable form, continue to submit himself for treatment....as may be prescribed by such medical practitioner.**
- (3) Any person who fails to comply with this section is guilty of an offence.**

2.2.7 The requirement to place oneself under treatment as referred to in subsections (1) and (2) above would effectively subject a person to mandatory testing for HIV/AIDS.

2.2.8 The above provision therefore breaches section 25(2) of the Constitution which provides that every person has the right to freedom from scientific or medical treatment or procedures without his or her informed consent, or, if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.

2.2.9 According to a publication by the World Health Organisation, “mandatory testing and other testing without informed consent has no place in an AIDS prevention and control programme”²⁰ for the following reasons –

- (a) stigmatization and discrimination directed at HIV-infected people, individuals who might be infected tend to go underground to escape mandatory testing;

²⁰ World Health Organisation (1992)

- (b) testing without informed consent damages credibility of health services and may discourage those needing services from obtaining them;
- (c) mandatory testing can create a false sense of security;
- (d) mandatory testing programmes are expensive and divert resources from effective prevention measures.²¹

2.30 The right of a person to privacy, including the right to privacy of personal communications²² is also violated by section 84 although the person's right to privacy may be made subject to limitations prescribed by law as are reasonable and justifiable in a free and democratic society.

2.3.1 The issue for the Fiji Islands is whether it is justifiable to limit a person's right to privacy in respect of the above provision. Such limitations²³ will need to be prescribed by law.

2.3.2. There is no cure for AIDS at present therefore the requirement to be subjected to treatment until cured from disease (AIDS) is not applicable for a person living with HIV/AIDS.

2.3.4 Being treated for HIV/AIDS by a medical practitioner impinges on the right to privacy of the person living with HIV/AIDS under section 37 of the Constitution. The person is entitled to have his or her HIV status kept confidential by the practitioner although that right may be made subject to limitations prescribed by law as are reasonable and justifiable in a free and democratic society²⁴.

2.3.5 Section 84 does not provide for protection of the right to privacy of a person living with HIV/AIDS, nor whether information obtained by a medical practitioner in the course of treating such a person be kept

²¹Ibid.

²² 1997 Constitution, section 37(1)

²³ Paragraph 6.3 of the National Policy is relevant for consideration in this regard.

²⁴ Ibid, section 37(2)

confidential (subject to prescribed limitations referred to earlier). Non-medical staff such as nurses who may care for such a person in their course of employment are also not required to keep confidential information about a person living with HIV/AIDS.

- 2.3.6 It is noted that the Fiji Medical Association ("FMA") has a code of ethics ("Code") which specifies the medical practitioners' ethical obligations to each other and towards their patients. The Code deals with issues relating to privacy and confidentiality. However, those persons who are not members of the FMA and are aware of a person's HIV/AIDS status through the course of their work, are not bound by the Code. Such persons could easily reveal a person's HIV/AIDS status without sanction.

Compulsory examination and treatment of venereal disease

85. (1) A medical officer of health in any case where in the interests of public health he thinks expedient so to do, may by order in writing -

(a) direct any person suffering or suspected to be suffering from any venereal disease or suspected to be suffering from any venereal disease to attend a hospital or registered medical practitioner for examination and treatment if necessary....;

(b) direct that any such person who is found to be suffering from venereal disease be detained and remain in hospital until discharged therefrom....

(2) Any sanitary inspector or officer of the Board authorised to remove any person to hospital under the provisions of paragraph(1) may remove and convey such person to hospital.... and may use degree of force as necessary.

- (4) If a person found by a medical officer of health or a practitioner to be suffering from a venereal disease gives to him information as to a person from whom the patient suspects that the disease was contracted, such info shall be deemed, for the purposes of the law relating to defamation, to have been communicated in pursuance of a statutory duty.**

Paragraph (a) of section 85(1) raises the issue whether it is "justifiable" to subject a person to mandatory testing for HIV/AIDS in the interest of public health.

Section 25(2) of the Constitution states that every person has the right to freedom from medical treatment or procedures without his or her informed consent, or if incapable of giving informed consent, without the informed consent of a lawful guardian. The right provided for under section 25(2) is absolute which means it cannot be limited; even for justifiable purposes such as the interest of public health.

Paragraph (a) of section 85(1) would therefore be invalid²⁵ to the extent that it subjects a person to medical treatment or procedure (mandatory testing for HIV/AIDS in this instance) without the person's informed consent.

and security and must not be subjected to arbitrary arrest or detention. This includes possible public health measures such as quarantine by, for instance enforced confinement or isolation in hospital. To justify any compulsory quarantine measures, the State must establish that the individual concerned has the infection and that his or her detention was necessary for the prevention of its spread.

Paragraph(b) of section 85(1) therefore breaches international human rights standard.

Infection by employees

- 87. Every person who while suffering from a venereal disease in a communicable form accepts or continues employment in or about any dairy, factory, shop, hotel, restaurant, house or other place in any capacity entailing the care of children or the handling of food or food utensils intended for consumption or use by any other person, and any person who employs any such person, shall be guilty of an offence.....**

Section 87 would make it an offence for a person living with HIV/AIDS to accept or continue employment in any of the places specified in that section, on the basis of his or her HIV/AIDS status. Similarly, a person who employs such a person commits an offence.

Every person has the right to equality before the law and a person must not be discriminated against, directly or indirectly, on the ground of his or her 'disability'²⁶.

Conveyance of infection an offence

- 88. Every person who wilfully or by culpable negligence infects any other person with venereal disease or does or permits or suffers any act likely to lead to the infection of any other person with any such disease shall be guilty of an offence.**

Section 88 supports the view stated in paragraph 6.6 of the National Aids Policy that the wilful transmission of HIV/AIDS should be criminalised.

²⁵ S2(2) of the Constitution states "Any law inconsistent with this Constitution is invalid to the extent of the inconsistency".

²⁶

Penalty

89. Any person guilty of an offence against this Part for which no penalty is otherwise expressly provided shall be liable to a fine not exceeding twenty dollars.

The penalty of twenty dollars in section 89 does not reflect at all the severity of HIV/AIDS-related offences such as wilful transmission, therefore it needs to be revised in line with penalties imposed in modern time.

Having examined relevant provisions of the Public Health Act, it is clear that the Act does not provide for HIV/AIDS and related issues. HIV/AIDS seems a distinct category and does not fall within the categories of infectious diseases or venereal diseases for the following reasons –

- the relevant provisions would allow for mandatory testing for HIV/AIDS which breaches constitutional rights and international human rights principles to privacy, freedom from cruel, inhumane or degrading treatment, right to employment, of persons living with HIV/AIDS;
- in light of the stigma attached to HIV/AIDS, confidentiality of a person's HIV/AIDS status is not safeguarded, nor the justified limitations to such confidentiality;
- Unlike infectious diseases, detention of persons living with HIV/AIDS is not warranted
- Having HIV/AIDS as a notifiable disease such as infectious or venereal diseases defeats the right to privacy and confidentiality of a person's HIV/AIDS status.

Recommendation:

- 1. Assuming that the Public Health Act is to provide for HIV/AIDS and related matters, it will need to be amended taking into account the factors discussed earlier.**

- 2. HIV/AIDS should not be defined as an infectious disease or a venereal disease but for what it is - HIV/AIDS; a separate category.**

- 3. HIV/AIDS and related matters should be provided for separately. This can be achieved by inserting a new part VIIIA in the Act entitled - "PART VIIIA - HIV/AIDS" . The Part should contain or deal with the following matters²⁷ -:**

Interpretation

The following terms should be defined -

"AIDS" means Acquired Immune Deficiency Syndrome;

"HIV" means Human Immunodeficiency Virus;

"informed consent" means a voluntary consent, a person has the mental capacity to understand the nature of the procedure to which he or she is consenting, and must also have a minimal amount of information about the procedure.²⁸

"wilful transmission" means the deliberate spreading of HIV by any means that causes or is likely to cause a person to be infected by HIV. (The definition should cover indirect and direct transmission and the mode of

²⁷ Refer to the National Policy which has outlined HIV/AIDS related matters. Matters specified are not exhaustive.

²⁸ Medical Negligence, Sweet & Maxwell (1996) (6-002, p.284)

transmission should be broad to cover situations which may not be anticipated at present.)

Testing for HIV/AIDS

1. (1) A person must not be tested for HIV/AIDS without his or her informed consent.

Note that this right is absolute under section 25(2) of the Constitution. This means that mandatory testing of pregnant women and blood donors (without their informed consent) for instance, would breach section 25(2).

- (2) Every personal testing for HIV/AIDS must be kept confidential.

Forms of informed consent

- (1) Forms of consent - Consent may be either expressed or implied. Silence is not necessarily consent, it will depend on the circumstances of each case, and whether the doctor's inference of consent was reasonable.²⁹

Procedure -

- A person should sign a written consent form. Standard consent form should state the nature and purpose of the operation or treatment have been explained to the patient.³⁰

²⁹ Ibid. (6-004)

³⁰ Ibid, (6-015, p.292) The consent form could state that the patient agrees "to what is proposed which has been explained to me by the doctor named on this form"

- **A person should not sign a consent form when sedated as the drug may impair a person's ability to comprehend, and render an apparent consent invalid³¹**

Other points to note regarding consent include -

As a general rule, patients cannot be required to accept treatment that they do not want no matter how painless, beneficial and risk-free the treatment may be and no matter how dire the consequences of a refusal of treatment. This principle is founded on the patient's right to self-determination³².

Consent forms are not conclusive against a person, they are merely evidence that the person consented to the procedure in question.³³

Signing a consent form without understanding and appreciating the nature of a procedure does not constitute a valid consent.³⁴

A person may withdraw consent even though a medical procedure is under way and the doctor must halt the process.³⁵

(2) Procedures for testing for HIV/AIDS must be clearly spelt out.

This includes –

- **(a) How tests are conducted**

³¹ See *Beausoleil v. La Communauté des Soeurs de la Charite de la Providence* (1964) 53 D.L.R (2d.) 65 (Que.Q.B. Appeal Side).

³² Sweet & Maxwell (1996), 6-001, p.283

³³ In *Chatterton v Gerson* Bristow J. stated "...getting the patient to sign a pro forma expressing consent to undergo the operation 'the effect and nature of which have been explained to me.... Should be a valuable reminder to everyone of the need for explanation and consent. But it would be no defence to an action based on trespass to the person if no explanation had in fact been given. The consent would have been expressed in form only, not in reality." [1981] 1 All E.R 257, 265

³⁴ *Couplin v. Kuntz* (1987) 42 C.C.L.T. 142 (B.S.C)

- **the use of sterilized equipment (where applicable) is compulsory;**
- **exceptions (if any) to use of sterilised equipment (e.g emergency situation)**

Recording of medical test results and other examinations

- **the recording of test results must be done in such a way to guarantee protection of the identity of a person's HIV/AIDS status. Access to such records must be restricted to the medical officer or practitioner dealing directly with the person, and any other caregiver directly involved in treating the person.**

Notification of Partners

Persons living with HIV/AIDS should be encouraged to notify partners voluntarily; or to cooperate with their physicians to do so³⁶

Physicians who notify partners should be protected against the potential for liability as a result of notifying partners³⁷.

-
- **Limitations (if any) to maintaining the rights to privacy of a person tested positive for HIV/AIDS must be spelt out.**

Such limitation should adhere to the following guideline as adopted in paragraph 7.3 of the National HIV/AIDS Policy -

- (a) the HIV positive person has been thoroughly counseled;**

³⁵ See Ciarlariello v. Schacter (1993) 100 D.L.R. (4th) 609 (S.C.C) [6-009, p.289)

³⁶ Ontario Law Reform Commission Report (1992), p9

³⁷ Ibid, p9

- (b) counselling of the HIV positive person has failed to achieve appropriate behavioural changes;**
- (c) the HIV positive person has refused to notify, or consent to the notification of his or her partner**
- (d) a real risk of HIV transmission to the partner(s) exists;**
- (e) the HIV positive person is given reasonable notice that his or her partner(s) will be notified.**

Counselling

- (1) Counselling should be compulsory prior to and before testing a person for HIV/AIDS.**

- (2) Procedure for and conduct of counselling sessions must be specified (e.g counselling must be held in private, in person, the matters to be discussed with the person counseled. This includes encouraging the person to notify his or her partner if tested positive for HIV)**

- (3) The persons authorized to counsel must be specified**

- (4) Requirements (if any) for a counselor to satisfy before being able to counsel (e.g should a counsellor be a registered medical officer or medical practitioner)**

Transmission of blood, blood products, donated organs, tissues and body fluids

Any blood, blood product, donated organ, tissue or body fluid provided for the purpose of transmission, must be screened by authorised persons for HIV/AIDS before transmission.

Persons authorised to screen blood, blood products, etc. must be specified

Similar to paragraph 2, any equipment that is used for transmitting of any of the specified products that needs to be sterilised must be sterilised and any exceptions must be specified.

Research

Any research on HIV/AIDS or related matters involving human subjects must not be undertaken -

- (a) without the approval of a recognised health body (National Aids Council)**
- (b) without the persons' informed consent.**

Such research must conform to the Medical Practitioners and Dentists Ordinance and to the International Guidelines for Biomedical Research and follow procedures outlined in paragraph 6.8 of the National HIV/AIDS Policy.

Criminal Offences

- (1) Wilful transmission**

Wilful transmission of HIV/AIDS should be an offence.

- (2) Use of unsterilised equipment**

Wilful use of unsterilised equipment should be an offence subject to the following exception –

- (a) there is a life-threatening situation;**
- (b) there is a real risk of the person losing his or her life if not treated immediately;**
- (c) it is necessary to use a particular equipment for treating a person;**
- (d) there is no sterilized equipment of the same available at the time;**
- (e) the person is well advised of the situation;**
- (f) the person gives his or her informed consent to have the treatment and risks any consequences arising from use of unsterilised equipment**

Transmission of unscreened blood, blood products, body organs, etc.

Wilful transmission of unscreened blood, blood products, body organs, tissues and body fluids should be an offence.

Penalties

The penalties prescribed for the offences must take into account the severity of the offences and type of offenders so that penalties meted out are appropriate punitive measures.

For instance, in the case of willful transmission –

- (a) for a medical officer, practitioner, or other related professional, cancellation of registration as a medical officer, practitioner or professional and fine would be an appropriate penalty;**

- (b) for a person living with HIV/AIDS, imprisonment may not serve any useful purpose, but supervised community work and disclosure of person's identity may be effective.
- (d) for a person not living with HIV/AIDS (e.g healthy person using infected needles on others), imprisonment/ fine may be appropriate.

HIV/AIDS should not be a notifiable disease as it defeats the purpose of maintaining the right to privacy of a person living with HIV/AIDS.

In view of international human rights standard, and the nature of contracting HIV/AIDS, persons living with HIV/AIDS should not be isolated or detained in hospital but integrated into the society.

There should be a Code of Ethics produced for caregivers other than medical officers or practitioners imposing on such persons duties as regards protecting the rights to privacy of persons living with HIV/AIDS and to issue guidelines on the steps to be followed if there is a need to depart from such duties.

The policies contained in 6.12 to 6.20.5 of the National HIV/AIDS Policy should be implemented wherever possible.

Remark:

Implication of not defining "AIDS" or "HIV" as an infectious disease

The implications of not defining "AIDS" or "HIV" as an "infectious disease" are –

- (a) HIV/AIDS would not be covered under section 23(1)(g) of the Constitution which allows for depriving a person of personal liberty for the purpose of preventing the spread of an 'infectious disease';

(b) covered under

(c)

3. **Education Act (Cap.)**

Medical Inspection

27. (1) **Every pupil in attendance at a school shall be liable to medical inspection and medical and dental treatment by a school health officer.**

(2) **If any pupil, whether excused from medical inspection by the school health officer or not, appears to the Head Teacher or Principal to require medical inspection, such Head Teacher or Principal may require such pupil to be medically examined and to produce to him a certificate signed by a medical practitioner that he is free from any condition liable to endanger the health of others and may exclude such pupil from attendance at school until he shall produced such a certificate.**

Obliging a pupil to be subjected to a medical examination under section 27 of the Act would result in the mandatory testing of a pupil for HIV/AIDS, as HIV/AIDS would fall within the meaning of a ‘condition liable to endanger the health of others’.

Pursuant to section 25(2) of the Constitution, a person must not be subjected to any medical treatment or procedure without his or her

informed consent, or if incapable of giving informed consent, without the informed consent of a lawful guardian. The pupil's right to privacy under section 37(1) of the Constitution is violated although the right can be limited on the ground that being HIV positive is a condition 'liable to endanger the health of others'.

The Act does not specify how the results of the medical examinations are to be kept nor require the Head Teacher or Principal, or any other person who handles recording of results, to keep information obtained confidential.

Section 39(1) of the Constitution provides that every person has the right to basic education and to equal access to educational institutions.

Subsection(2) may deny a pupil such right on the basis of his or her HIV/AIDS status.

Recommendation:

The Ministry of Education should be made aware that the requirement to have a pupil medically examined (including testing for HIV/AIDS in this instance) without the informed consent of the pupil/ lawful guardian of a pupil, is unlawful pursuant to sections 25(2) and 2(2) of the Constitution.

The following recommendations of the IJALS Report³⁸ should be implemented –

- (a) no testing of students for HIV without their informed consent or informed consent of lawful guardian
- (b) update, improve and expand on the secondary school curriculum on sexually transmitted disease, including HIV/AIDS;

³⁸IJALS Report (1998), Recommendation 8 pp.29-30.

- (c) confidentiality regarding all medical records of students;
- (d) security of education for students with HIV/AIDS;
- (e) adequate first aid kit and accessibility in schools;
- (f) protection against stigmatization and discrimination of students with HIV/AIDS;
- (g) access to information and education on HIV/AIDS - this could be done by schools being visited by the AIDS Task Force of Fiji for lectures and seminars on HIV/AIDS and related issues.

1. Immigration Act (Cap.88)

Powers of Immigration officer

4. For the purpose of exercising his powers and functions any immigration officer may -

- (d) require any person who desires to enter Fiji to be examined by a Government medical officer, and to undergo, and to assist in the carrying out of, any test or investigation which such medical officer shall require.

Paragraph(d) of section 4 would effectively subject a person to mandatory testing for HIV/AIDS thus breaches the person's right to privacy and freedom from medical treatment without his or her informed consent.

Prohibited immigrants

- 11. (1) Any person who -
 - (b) is a member of any of the prohibited class as defined in subsection (2) shall be a prohibited immigrant and, save as otherwise therein provided, his entry into or presence in Fiji shall be unlawful.

- (2) **The following persons are members of the prohibited classes -**
- (d) **any person -**
- (ii) **who at the time of his entry into Fiji is certified by a government medical officer to be suffering from a contagious or infectious disease which makes his presence in Fiji dangerous to the community.**

Section 11(2)(d)(ii) would effectively make unlawful the entry of a person living with HIV/AIDS into the Fiji Islands if certified by a medical officer, for HIV/AIDS would be considered a contagious or infectious disease which makes his or her presence in Fiji dangerous to the community.

The section is consistent with section 34(7)(a) of the Constitution however, as mentioned earlier, international human rights standard and experts in AIDS share the view that limiting a person's freedom of movement on the basis of HIV/AIDS is unwarranted.

Recommendation:

There should be no mandatory testing for HIV/AIDS of persons wishing to enter into the Fiji Islands.

Any medical examination

5. **Prisons Act (Cap.86)**

Appointment and general duties of Medical officers

42. (2) **The medical officer shall perform such duties as may be prescribed and, subject to the control of the officer in charge, shall have general care of the health of prisoners.**

Prisons Regulations

Medical examination of prisoners

32. (1) The medical officer, or his subordinate shall -

- (a) where practicable examine every prisoner on first admission to the prison and before such prisoner is made to do or carry out work;**

The requirement to medically examine a prisoner under paragraph(1)(a) above would effectively subject a prisoner to mandatory testing for HIV/AIDS, in breach of the prisoner's right to privacy and freedom from degrading or inhumane treatment and the right not to be subjected to medical treatment without his or her informed consent.

- (2) After every medical examination carried out under ...sub-paragraph(a) of paragraph(1), the medical officer shall enter in the prisoner's medical record the state of health of the prisoner.....**

The requirement to record a prisoner's state of health under subregulation(2) would impinge on the right to privacy of a person living with HIV/AIDS as the medical officer is not bound by law to keep information confidential although the FMA dictates that he or she does so subject to limitations.

- (3) The medical officer shall after the medical examination of a prisoner enter in the prisoner's medical record whether or not the prisoner is fit for normal labour and whether there shall be any restriction or condition regarding the type of labour to which the prisoner may put.**

Subsection (3) could result in a prisoner living with HIV/AIDS being declared "unfit for normal labour" merely on the basis of his or her HIV/AIDS status. Such a situation would breach section 38(2) of the Constitution which provides that a person must not be discriminated against on the ground of his or her

“disability”. However, it would be proper to declare such a person “unfit for normal labour” if the person can no longer perform work.

Keeping of records

34. The medical officer shall enter or cause to be entered in the medical officer's day book and the prisoner's medical record, an account of the name, disease, state and treatment of every prisoner reporting sick and such book and record shall be accessible to the officer in charge.

Section 34 would oblige a medical officer to record in the medical book and a prisoner's medical record, that the prisoner is living with HIV/AIDS. The medical officer is not bound by law to keep such information confidential, thus impinge on the prisoner's right to privacy to not have his or her HIV/AIDS status made known.

Reports on sick prisoners to officer in charge

35. The medical officer shall report in writing to the officer in charge any case of a prisoner..... which, in his opinion, based on medical grounds, should be brought to the notice of the officer in charge as regards discipline of treatment of such prisoner.....

Section 35 would oblige the medical officer, if in his or her opinion, based on medical ground, to report to the officer in charge of a prisoner living with HIV/AIDS. This effectively makes HIV/AIDS a ‘notifiable’ disease.

Similar to section 34, the medical officer or officer in charge are not bound by law to keep information about the prisoner's HIV/AIDS status confidential, although the Code dictates that such information be kept confidential. The right to privacy of the prisoner is compromised under this section.

Prisoners unfit for imprisonment

36. Whenever the medical officer is of opinion that -

- (a) **the life of a prisoner is likely to be endangered by his continued imprisonment; or**
 - (b) **a sick prisoner will not survive his sentence; or**
 - (c) **a prisoner is totally unfit for prison discipline,**
- he shall submit his opinion and the grounds thereof in writing to the officer in charge who shall forward the same to the Controller.**

Section 36 would effectively compromise the right to privacy of a prisoner living with HIV/AIDS if his or her condition is reported based on any of the grounds specified in the section.

Infectious disease

42. On the appearance of any infectious disease in a prison, the medical officer shall immediately inform the officer in charge and the Permanent Secretary for Health thereof and shall take such steps including the giving of written directions in relation thereto to the officer in charge and shall superintend the steps for this purpose.

Section 42 would oblige the reporting of a person's HIV/AIDS status to the officer in charge and Permanent Secretary for Health, thus compromise the right to privacy of person living with HIV/AIDS. The Permanent Secretary is not bound by law to keep knowledge of a person's HIV/AIDS status confidential.

Medical examination of sick offenders

167. If any person released to extramural punishment becomes sick the person appointed to supervise the extramural punishment shall arrange for him to be medically examined by any Government medical officer.

Section 167 would effectively subject a person to mandatory testing for HIV/AIDS.

Recommendation:

6. Penal Code

Section 168 makes it an offence to solicit for the purposes of prostitution.

Section 177 makes it a felony for men to engage in sexual intercourse with other men

It was

Adulteration of food or drink intended for sale

S194 Any person who subjects any article of food or drink to such treatment as to make such article noxious as food or drink or of less nutritive value, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, is guilty of a misdemeanour.

Sale of noxious food or drink

S195 (1) Any person who sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, is guilty of a misdemeanour.

(2) Any person selling any article which has been rendered or has become noxious shall be taken to have knowledge that the same is noxious until the contrary be proved.

The above provisions are relevant for consideration as regards wilful transmission of HIV/AIDS through transmission of body fluids (e.g mixing infected blood with orange juice that is sold to the public)

7. Passports Act (Act No.25 of 2002)

Restrictions on issue of passports to unmarried minors

S4(5) The Minister may issue written guidelines relating to the issuing of a Fiji Islands passport to an unmarried minor”

It is possible under section 4(5) for the Minister to issue written guidelines restricting the issue of a passport to an unmarried minor on the basis on his or her HIV/AIDS status.

As discussed earlier, restriction of the movement of a person living with HIV/AIDS is not warranted under international human rights standard.

It should be noted that in issuing written guidelines, the Minister should take into account our international human rights obligations concerning freedom of movement and non-discrimination of a person on the ground of his or her 'disability' (living with HIV/AIDS) under section 38(2) of the Constitution.

Passports not to be issued in certain circumstances

- 6. (1) If the Minister –**
- (a) has formed the opinion that, if a Fiji Islands passport were issued to a person, that person would be likely to engage in conduct that –**
 - (ii) might endanger the health or physical safety of other persons; and**
 - (b) considers, in that, in the circumstances, action to prevent that person engaging in that conduct should be taken by way of not issuing a Fiji Islands passport to that person,**
the Minister may in writing declare that, by virtue of this section, Fiji Islands passport must not be issued to that person.

- (2) A passport officer must not issue a Fiji Islands passport to a person who is the subject of a declaration under subsection (1).**

Effectively section 6(1)(a)(ii) would allow the Minister to not issue a Fiji Islands passport to a person living with HIV/AIDS. In forming an opinion under paragraph (1)(a), the Minister should look at the merit of each case. That

Cancellation of passports

- 8. (1) A Fiji Islands passport may be cancelled by the Director of Immigration and thereupon becomes void.**

- (2) Without limiting subsection (1), the Director of Immigration may cancel a Fiji Islands passport if the Director of Immigration –**
- (a) becomes aware of circumstances which, if they had existed immediately before the passport was issued (whether or not they did exist at that time) may have or would have prevented the issue of the passport by virtue of section 4, 5, 6;**
- (b) has formed an opinion that the person to whom the passport was issued is likely to engage in conduct that –**
- (ii) might endanger the health or physical safety of other persons; and**

considers that, in the circumstances, action to prevent the person engaging in that conduct should by way of cancelling the passport.

Regulations

- S21 The Minister may make regulations for carrying into effect the provisions of this Act and in particular –**
- (a) the conditions to be satisfied for the issue of Fiji Islands passports;**
 - (b) the issue or endorsement of Fiji Islands passport.**

Employment Act (Cap.92)

Medical examination

- 36. (1) Every employee who enters into a contract shall be examined by a medical officer.**
- (2) Whenever it is practicable, the employee shall be medically examined and a certificate issued before the attestation of the contract.**
- (3) Any employee who has been rejected after such examination.....mentioned as physically unfit for the work contemplated by the proposed contract, shall be returned to the place of engagement.....**

Medical certificate

- 70. (1) No child or young person shall be employed in any ship unless he is in possession of a certificate signed by a medical officer to the effect that he is fit for such employment.**

The requirement for medical examination of an employee upon entering into a contract would effectively subject such person to mandatory testing for HIV/AIDS.

8. Health and Safety at Work Act 1996

The Act provides for the health and safety of workers at a workplace. It specifies the duties of workers and employers as regards keeping the workplace safe.

Duties of employers to workers

- 9. (1) Every employer shall ensure the health and safety at work of all his or her workers.**
- (2) Without prejudice to the generality of subsection (1) of this Section, an employer contravenes that subsection if he or she fails –**
- (a) to provide and maintain plant and systems of work that are safe and without risks to health;**
 - (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;**
 - (c) to provide, in appropriate languages, such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of his or her workers and to take steps as are necessary to make available in connection with the use at work of any plant or substance adequate information in appropriate languages -**

- (b) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe without risks to health; or**
- (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.**

Duties of workers

13 (1) Every worker, shall, at all times while at work, take all reasonable care –

- (a) not to take any action, or make any omission, that creates a risk, or increases an existing risk, to the health or safety of any worker including himself or herself or of other persons (whether workers or not) at his or her workplace; and**
- (b) in respect of any duty or obligation imposed on the worker's employer, or on any other person by or under this Act, to cooperate with the employer, or that other person, to the extent necessary to enable the employer or that other person, to the extent necessary to enable the employer or other person to fulfil that duty or obligation; and**
- (c) to use equipment, in accordance with any instructions given by the worker's employer consistent with its safe and proper use, that is –**

- (i) supplied to the worker by the employer and;
 - (ii) necessary to protect the health and safety of the worker, or of other persons (whether workers or not) at the worker's workplace.
- (2) Any worker who contravenes or fails to comply with any provision of subsection (1) of this section shall be guilty of an offence and shall be liable to a fine of not more than \$1,000.

Duties applicable to all persons

14. (1) A person shall not intentionally or recklessly interfere with or misuse anything provided in the interests of health and safety in pursuance of this Act or the associated health and safety legislation.

(2) Any person who contravenes or fails to comply with the provision of Subsection (1) of this section shall be guilty of an offence and shall be liable to a fine of not more than \$5,000.

Functions of health and safety representatives

17. (1) A health and safety representative may for the purpose of health and safety at workplace –

- (a) inspect the whole or part of the workplace –
 - (ii) immediately in the event of any accident, hazardous situation, dangerous occurrence or immediate threat or risk to the health and safety of any person and facilitate necessary procedures under section 25 of this Act;
- (c) with the consent of the worker, be present at any interview between worker and an inspector or between the employer or the

representative of the employer and a worker concerning health and safety;

(d) investigate complaints relating to occupational health and safety made by workers in the workplace;

Functions of health and safety committees

20. (1) The functions of a health and safety committee are to –

(c) investigate any matter at the workplace –

(i) which a member of the committee or a person employed thereat considers is not safe or is at risk to health; and

(ii) which has been brought to the attention of the employer;

(a) attempt to resolve any such matter but, if unable to do so, shall request an inspector to undertake an inspection of the workplace for the purpose; and

(b) have such other functions as are prescribed.

(2) An inspection by an Inspector to resolve a matter pursuant to paragraph (d) of subsection(1) of this section shall be undertaken as soon as possible after the request is made by the health and safety committee.

Responsibilities of employers to health and safety representatives and committees

- 21. (1) An employer shall –**
- (a) permit a health and safety representative or a health and safety committee member to have access to such info as the employer possesses –**
 - (ii) concerning the health and safety of the workers of the employer, and when requested to do so, supply a copy of that info to the health and safety representative or committee represents;**
 - (a) immediately notify a health and safety representative or committee member of the occurrence of an accident, injury, dangerous occurrence, immediate threat or risk of hazardous situation that affects or may affect any worker that the health or safety representative or committee represents;**
- (2) An employer is not required to give to a health and safety representative or a committee member under paragraph (d) of subsection (1) of this section –**
- (a) personal information regarding the health of a worker without the consent of the worker;**

Disqualification of health and safety representatives or committee members

22. (1) Any employer or worker may apply to the Permanent Secretary to have a health and safety representative or a committee member disqualified on any one or more of the following grounds –

(b) that the health and safety representative or committee member has intentionally used or disclosed to another person any information acquired from the employer by the representative or committee member, for a purpose which is not connected with the performance of any function or duty under this Part;

(2) For purpose of determining what (if any) action should be taken under subsection (2) (to disqualify health & safety rep or committee member) for a specified period or permanently) the PS shall take into account –

(a) whether the action of the health & safety rep or comm. Member was contrary to public interest.

Human Rights Commission Act (Act No. 10 of 1999)

Areas where unfair discrimination prohibited

17. (1) It is unfair discrimination for a person, while involved in any of the areas set out in subsection (3), directly or indirectly to differentiate adversely against or harass any other person by reason of a prohibited ground of discrimination.

(3) The areas to which subsection (1) applies are -

- (a) the making of an application for employment, or procuring employees for an employer, or procuring employment for other persons;
- (b) employment;
- (c) participation in, or the making of an application for participation in, a partnership;
- (d) the provision of an approval, authorisation or qualification that is needed for any trade, calling or profession;
- (e) the provision of training, or facilities or opportunities for training, to help fit a person for employment;
- (f) subject to subsection(4), membership, or the making of an application for membership, of an employers' organisation, an employees' organisation or an organisation that exists for members of a particular trade, calling or profession;
- (g) the provision of goods or services or facilities, including facilities by way of banking or insurance for grants, loans, credit or finance;
- (h) access by way of any public to any place, vehicle, vessel, aircraft or hovercraft....
- (i) The provision of land, housing or other accommodation;
- (j) Access to, and participation in, education.

(4) Subsection (3)(f) does not apply to access to membership of a private club or to the provision of services or facilities to member of a private club.

Royal Fiji Military Forces (Cap. 81)

Royal Fiji Military Forces Regulations

Medical standards

- 28. (1) All soldiers shall be medically examined before enlistment and the required physical standards shall be laid down from time to time by the Commander.**

Section 28(1) would subject a soldier to mandatory testing for HIV/AIDS thus breaching international human rights principles and the constitutional rights to privacy and freedom from degrading or inhumane treatment. The informed consent of a soldier must first be obtained before testing for HIV/AIDS as required under section 25(2) of the Constitution.

Discharge

- 31. (1) A soldier who desires to be discharged from the Forces or who, prior to completion of his engagement desires to be transferred to the Reserve, shall apply in writing to the Commander stating the reasons for his application.**

If a soldier desires to be discharged from the Forces on the ground of living with HIV/AIDS which has made him unable to continue work in the Forces, his right to privacy of his HIV/AIDS status is not protected by section 31. That is, the Commander, and those who may view the soldier's

written application are not bound by law to keep such knowledge confidential.

Recommendation:

Amend the Regulations by repealing regulation 28 and substitute similar provisions as those in the proposed new Part VIIIA under the Public Health Act.

The provisions should include -

- (a) that any medical examination carried out must be voluntary and has the informed consent of person tested;
- (b) the rights to privacy of person tested to be observed;
- (c) pre- and post-test counselling to be given and such counselling should encourage voluntary testing for HIV/AIDS.

FIJI MEDICAL ASSOCIATION

CODE OF ETHICS AND CONSTITUTION

The FMA should be guided by and conform to the Constitution and any other relevant laws of the Fiji Islands.

2.4.5 The injured, Unconscious, Patient, whatever his age, should be treated immediately in whatever way is necessary, without wasting time in seeking the consent of relatives, which in any event would probably have no legal validity.

2.4.6 The mentally Incapable. A mentally ill patient not legally detained still has his right of decision, and his consent to surgical procedure must be obtained. The consent of his relatives would probably have no validity in law.

Paragraphs 2.4.5 and 2.4.6 above are inconsistent with section 25(2) of the Constitution which provides a person the right to freedom from medical treatment or procedures without the person's informed consent, or if incapable of giving informed consent, without the informed consent of a lawful guardian.

Recommendation:

Paragraphs 2.4.5 and 2.4.6 should be amended to the effect that the informed consent of a lawful guardian of such persons must be obtained as far as practicable.

B. To make recommendations as to whether a new law is required to be enacted or amend existing law(s) in respect of dealing with HIV/AIDS and related matters.

Having examined the relevant existing laws and being appraised of the nature of HIV/AIDS, it is recommended that amending the various relevant existing laws earlier examined by incorporating provisions relating to HIV/AIDS is a more appropriate method to adopt than enacting a self-contained law on HIV/AIDS.

C. Other Recommendations

Immediate/Short term phase of action

If the Ministry of Health agrees to the recommendation incorporation of the new "**Part VIII A - HIV/AIDS AND RELATED MATTERS**", the Ministry

- This consultancy endorses the recommendations of the IJALS Report that guidelines, policies and strategies for the prevention and control of HIV/AIDS should adopt the WHO recommended strategy for the prevention of the spread of HIV. That means persons suspected or living with HIV/AIDS should remain integrated within society to the maximum possible extent.
- Education and public awareness campaigns on HIV/AIDS and related matters should be promoted and carried out at every possible level, from schools to villages, etc.

CONCLUSION:

It is apparent that most of the relevant existing laws are inadequate as legislative framework in providing for HIV/AIDS and related matters in respect of the rights of persons living with HIV/AIDS and those living without.

Pursuant to section 2(2) of the Constitution, the laws are invalid to the extent that they effectively subject a person to mandatory testing for HIV/AIDS or any other medical treatment or procedure (relating to HIV/AIDS in this instance) without the person's informed consent. Given the stigma associated with HIV/AIDS, and the need for privacy of persons living with HIV/AIDS, the laws also do not protect the right to privacy of a such a person, nor do they prescribe limitations to that right of privacy.

One of the biggest challenges that the medical profession will continually face is striking the right balance between 2 competing public interest - the duty of confidentiality against the duty of disclosure. In what circumstances should a person's HIV/AIDS status

be kept confidential and in what circumstances should it be disclosed? If disclosed, to whom?

Another challenge posed by the HIV/AIDS epidemic concerns freedom of movement, personal liberty, and rights to privacy of persons living with HIV/AIDS. The Constitution provides for these rights but they may be subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society.

The law can only do so much in terms of protecting the rights of individuals and preventing the transmission of HIV/AIDS. The real task in preventing the transmission of HIV/AIDS lies within each individual, as HIV/AIDS is transmitted mainly through social behaviour.

Public awareness and education about HIV/AIDS therefore can never be over-emphasised.