

EXTRAORDINARY



REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE

PUBLISHED BY AUTHORITY OF THE FIJI GOVERNMENT

Vol. 12

FRIDAY 4th FEBRUARY 2011

No. 12

[173]

GOVERNMENT OF FIJI

HIV/AIDS DECREE 2011 (DECREE No. 5 OF 2011)

SECTIONS

PART 1—PRELIMINARY

1. Short title, etc.
2. Interpretation
3. Guiding Principles
4. Decree prevails over other provisions
5. Application of the Decree

PART 2—THE HIV/AIDS BOARD

6. Establishment of the Board
7. Membership of the Board
8. Functions of the Board
9. Finance and gift provisions for the Board funds
10. Accounts and Annual Financial Report
11. Powers of the Board
12. Board to be responsible to Minister
13. Committees and working groups of the Board
14. Ambassador of the Board
15. Delegation of the Board functions
16. Administration of the Board
17. Conduct of the Board meetings
18. Disclosure of interest of the Board member
19. Annual Report
20. Immunity of Board members



PART 3—DISCRIMINATION AND OTHER UNLAWFUL ACTS

21. Unlawful discrimination
22. Situations of discrimination
23. Insurance and other risk assessment
24. Unlawful coercion
25. Unlawful stigmatization
26. Access to means of protection and post exposure prophylaxis

PART 4—COUNSELLING, TESTING, REPORTING AND CONFIDENTIALITY

27. Information to be provided by counselling
28. HIV testing of blood and blood products for transfusion
29. HIV testing
30. Confirmatory tests
31. Reporting of test results
32. Prompt reporting of positive results

33. Further provision for conduct of HIV tests
34. Confidentiality of information
35. Privacy of proceedings
36. Sexual partner notification

PART 5—SUPPLY OF BLOOD AND BLOOD PRODUCTS

37. Donation of blood
38. Limitation of liability in relation to transfusion of certified blood and blood products
39. Limitation of liability in relation to emergency transfusion of uncertified blood and blood products

PART 6—DEALING WITH UNLAWFUL ACTS

40. Deliberate or attempted infection
41. Unlawful acts

PART 7—MISCELLANEOUS

42. Guidelines for research
43. Immunity
44. Evidence of certain communications
45. Regulation making power

HIV/AIDS DECREE 2011 (DECREE NO. 5 OF 2011)

IN exercise of the powers vested in me as the President of the Republic of Fiji and the Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

TO PROVIDE HUMAN RIGHTS—BASED MEASURES TO ASSIST IN HIV PREVENTION, AND HIV/AIDS CARE AND SUPPORT AND FOR RELATED PURPOSES.

PART 1—PRELIMINARY

Short title and commencement

- 1.—(1) This Decree may be cited as the HIV/AIDS Decree 2011.
- (2) This Decree comes into force on a date or dates appointed by the Minister by notice in the *Gazette*.
- (3) The Minister may appoint different dates for the commencement of different provisions of this Decree.

Interpretation

- 2.—(1) In this Decree, unless the contrary intention is shown—

- “action” means a complaint, application or other process by which a proceeding of investigation is commenced concerning potential unlawful acts;
- “AIDS” means Acquired Immune Deficiency Syndrome;
- “Ambassador of Board” means the person appointed to be an Ambassador as provided in section 14;
- “approved testing procedure”, in relation to blood, means a testing procedure which has been approved in writing by the Permanent Secretary for Health;
- “authorised person” means a person (who is not the person to be tested) authorised in writing by the Permanent Secretary to request an HIV/AIDS test be performed;
- “authorised supplier”, in relation to blood and blood products for transfusion, means a supplier who has been approved by the Permanent Secretary in writing;
- “Board” means the HIV/AIDS Board established by section 6 (1);
- “blood product” includes any extract or derivative of blood;
- “CEDAW” means the United Nations Convention on the Elimination of all Forms of Discrimination against Women;

- “Chief Executive Officer” means the Chief Executive Officer of the Board;
- “condom” includes a female condom;
- “counselling” means the explanatory advisory and guidance process given by a person authorised in writing by the Permanent Secretary to conduct the process pursuant to directives issued by the Permanent Secretary with the advice of the Board;
- “CRPD” means the United Nations Convention on the Rights of Persons with Disabilities;
- “CRC” means the United Nations Convention on the Rights of the Child;
- “Deputy Secretary, Public Health” means the officer within the Ministry who is responsible for matters of public health;
- “discrimination” includes harassment and occurs when a distinction is made against a person which results in that person being treated by another person or body unfairly, inconsistently with normal practice in any given circumstance;
- “educational childcare institution or centre” means a pre-school facility, childcare centre, school, college, university or other institution that provides childcare, education or training;
- “harassment” means unjustifiable conduct, typically but not necessarily persistent and repetitive, aimed at an individual, that causes distress, embarrassment, fear or discomfort, and “harass” has a corresponding meaning;
- “health professional” means any medical practitioner, dental practitioner, nurse, nurse practitioner, midwife, pharmacist or other professional providing health care or health services who is required to be registered and to hold a licence or certificate to practise as such under written law and “health profession” has a corresponding meaning;
- “HIV infection” means Human Immunodeficiency Virus infection;
- “HIV test” means a test to determine the presence of HIV or HIV antibodies;
- “HIV/AIDS awareness material” includes—
- (a) written, drawn, constructed (including anatomical models), fabricated, photographic, film, video, electronic, theatrical, or audio material, however presented, performed, published or displayed, intended to raise awareness of the management and prevention of HIV/AIDS; and
 - (b) instructions or demonstrations for use of condoms and condom lubricant, and other means of minimising or preventing of HIV/AIDS transmission;
- “ICCPR” means the United Nations International Covenant on Civil and Political Rights;
- “ICESCR” means the United Nations International Covenant on Economic, Social and Cultural Rights;
- “infected” in relation to HIV, includes carrying HIV antibodies or antigen;
- “Minister” means the Minister for Health;
- “Ministry” means the Ministry of Health;
- “National Advisor for Family Health” means the officer within the Ministry of Health who is responsible for the national program on Sexually Transmitted Infections (STI) including matters relating to HIV/AIDS;
- “National HIV/AIDS Program Manager” means the person or authority for the time being responsible for the collection, collation and dissemination of statistical information relating to the prevalence of HIV/AIDS in Fiji;
- “negative”, in relation to the result of an HIV test, means a result that shows that a person tested for HIV was not, at the time the test was undertaken, infected with HIV or does not show any evidence of such infection;
- “partnership” means a partnership under the Partnership Act (Cap. 248);
- “Permanent Secretary” means the Permanent Secretary for Health;

“person living with HIV” means a person who has tested positive for HIV antibodies or antigen by any authority accepted for the purpose of such testing by the Permanent Secretary including an authority outside Fiji;

“person affected by HIV/AIDS” includes partners, friends, close and extended family members, work colleagues and members of the same religion;

“positive”, in relation to the result of an HIV test, means a result that shows that the person tested is infected with HIV or that shows conclusive evidence of such infection;

“prisoner” has the meaning given to it under the Prisons and Corrections Act 2006;

“public facilities” includes all facilities, whether or not in public ownership, to which the public has lawful access;

“Registrar” means the Registrar responsible for the registration of Births, Deaths and Marriages;

“stigmatise” includes vilifying or subjecting a person or group to harassment or to incite hatred, ridicule or contempt against a person or group on the grounds that a person or member of a group is believed to be, or is known to be a person living with or affected by, or tested for HIV by—

- (a) another person;
- (b) the publication, distribution or dissemination to the public of any matter; or
- (c) the making of any communication to the public, including any action or gesture, that is with reference to HIV/AIDS threatening, abusive, insulting, degrading, demeaning, defamatory, disrespectful, embarrassing, critical, provocative or offensive,

and “stigmatisation” has a corresponding meaning;

“uniformed services” means members of the correction and the police services.

“United Nations International Guidelines and Declaration of Commitment” means the United Nations International Guidelines on HIV/AIDS and Human Rights and the United Nations Declaration of Commitment;

“unlawful or unlawful act” means any act for which remedies or penalties are provided by Part 6.

“voluntary informed consent”, in relation to the performance of a test for HIV, means a prior written consent specifically related to the performance of that test, freely given without force, fraud, coercion, duress, undue influence or threat and given with knowledge and understanding of the medical, domestic and social consequences of a positive or negative result, the nature of that test, that knowledge and understanding having been gained through counselling;

“WHO” means the World Health Organization;

“window period” means the period of time between first infection by HIV and the capacity to detect the presence of HIV by a positive HIV test;

(2) The Permanent Secretary may, on the advice of the Board, by notice in the Gazette, declare any material to be, or not to be, HIV/AIDS awareness material.

Guiding Principles

3.—(1) When interpreting or applying any provision of this Decree, and when exercising any prescribed power, duty or function, all persons and courts should as far as possible—

- (a) ensure that full regard is had to the recognised universal human rights standards and public international law applicable to the protection of rights and ensure that those standards and laws are applied to the fullest extent possible to protect all such rights including the highest attainable standard of physical and mental health including the availability and accessibility of HIV prevention and HIV/AIDS treatment, care and support for all persons regardless of age, gender, gender orientation or sexual orientation;
- (b) apply as far as practicable and subject to any written law and available resources currently accepted international practices and universal standards identified in the context of HIV/AIDS and, in particular, the United Nations International Guidelines and Declaration of Commitment saved from time to time and ensure that all persons living with or affected by HIV/AIDS receive health services that are consistent with their rights; and

- (c) apply, to the fullest extent possible within Fiji subject to written laws and available resources, the principles, rights and obligations of ICCPR, ICESCR, CEDAW, CRC and CRPD, in the administration of health facilities and the provision of health services to all persons living with or affected by HIV/AIDS.

- (2) These principles are enunciated for guidance of persons and bodies acting within Fiji.

Decree may prevail over other provisions

4.—(1) Where the provisions of any other written law are specifically inconsistent with the provisions of this Decree, this Decree prevails to the extent necessary for the purposes of this Decree.

(2) HIV/AIDS is not a quarantinable disease for the purposes of the Quarantine Act (Cap. 112) but the right of the State to refuse entry to Fiji of a person suffering from HIV/AIDS who is not a Fiji citizen or a Fiji resident is preserved together with the discretion to the Minister responsible for Health to permit a short term stay on reasonable grounds.

- (3) HIV/AIDS awareness materials prima facie—

- (a) should not be found to contain indecent words or representations or to use indecent or obscene language for the purposes of section 7 (1) of the Minor Offences Act (Cap. 18);
- (b) should not be found to be exhibited with an intention to insult the modesty of any person for the purposes of section 213 of the Crimes Decree 2009;
- (c) should not be found to be obscene publications for the purposes of section 377 of the Crimes Decree 2009; and
- (d) are not prohibited or restricted imports for the purposes of section 64 of the Customs Act 1986.

Application of the Decree

- 5.—(1) This Decree binds the State.

(2) This Decree does not apply to the Republic of Fiji Military Forces or any member thereof nor to applications to join the same or recruitment by the same of a member.

PART 2: THE HIV/AIDS BOARD

Establishment of the Board

- 6. There is established a Board to be called the HIV/AIDS Board.

Membership of the Board

7.—(1) The Board should as far as practicable, have a membership that recognises the desirability of achieving gender balance and shall consist of the following members—

- (a) the Permanent Secretary ex officio or his or her delegate who shall be the Chairperson;
- (b) the Deputy Secretary, Public Health ex officio or his or her delegate;
- (c) the Chairperson for the time being of any Country Coordinating Mechanism concerned with HIV/AIDS ex officio;
- (d) the Permanent Secretary or his or her delegate ex officio of each of the Ministries that have responsibilities for women, education, youth and the police force;
- (e) a medical practitioner of the Ministry of Health with professional expertise and experience in HIV/AIDS medicine appointed by the Minister;
- (f) a senior member of staff from either the Fiji National University (College of Medicine, Nursing and Health Sciences) or the University of the South Pacific or the University of Fiji and such staff member having the relevant knowledge and commitment to the field of HIV/AIDS nominated by the Vice-Chancellor of each University and appointed by the Minister;
- (g) a representative of the international community of donors, the United Nations and regional bodies nominated by the international community and appointed by the Minister; and
- (h) a representative of a maximum of 2 civil society organisations or coalitions that are concerned with the protection of the human rights of persons living with HIV/AIDS or affected by HIV/AIDS, nominated by the particular organisation or coalition that is seeking representation, appointed by the Minister, with at least 1 of those appointed being persons who publicly self-identify as a person living with HIV/AIDS.

(2) Each member may nominate an alternate member approved by the Minister where the nominating member is appointed, to attend meetings of the Board in her or his absence and has given prior written notice to the Board.

(3) An alternate member nominated under subsection (2) above is subject to the same conditions as the member for whom he or she is the alternate.

(4) All members who are not members ex officio shall hold office for a period of 2 years and shall be eligible for re-appointment for two further terms. If such a member fails to attend 3 consecutive meetings of the Board, whether represented or not on those occasions by his or her alternate, the Minister shall terminate and the former members alternate shall fill that persons place.

(5) The Board may from time to time —

- (a) appoint as co-opted members the Ambassador of the Board for the time being or other person who possesses expert or special knowledge or experience that will be advantageous or beneficial to the Board in the exercise of its functions; and
- (b) every such co-opted member shall be deemed to be a member of the Board for the specific purpose of her or his appointment but shall have no voting powers.

(6) Technical parties and representatives of funding agencies who are not members may be invited by the Chairperson to attend meetings of the Board as resource persons without voting rights.

Functions of the Board

8.—(1) The functions of the Board shall be to—

- (a) consider and recommend the goals and objectives for the national response to HIV/AIDS generally in Fiji to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines including traditional and herbal remedies, diagnostics and other technologies for preventive, curative and palliative care of HIV/AIDS including the management of the HIV/AIDS related illnesses;
- (b) advise the Minister on the—
 - (i) mobilising, disbursement and monitoring of resources including financial resources;
 - (ii) development, review, update and preparation of content for national strategic plans to respond to HIV/AIDS;
- (c) evaluate and review human rights-based policy guidelines, programmes and activities for the response to HIV/AIDS and report the same to the Minister;
- (d) consider and advise the Minister on training and support for programmes designed to increase HIV/AIDS awareness and protective measures against HIV;
- (e) promote research, awareness materials and information sharing on HIV/AIDS;
- (f) advise the Ministry on access to sustained, appropriate and affordable treatment for persons living with HIV or affected by HIV/AIDS, the prevention of infection with HIV and the promotion and protection of the rights of persons living with or affected by HIV/AIDS and those at risk of infection;
- (g) advise the Minister on any matter relating to HIV/AIDS as may be requested by the Minister from time to time;
- (h) foster national, regional and international networks among stakeholders engaging in continuing HIV/AIDS programmes and activities; and
- (i) to keep under review the appropriateness and effectiveness of this Decree, the regulations, policies, standards of practice, guidelines and codes of conduct made under it and to propose any changes or modifications, the Board deem necessary in writing to the Minister.

(2) The Board may perform any of its functions in co-operation with any other body, coalition, commission, committee, foundation, mechanism, person, association or organisation, whether situated in Fiji or elsewhere.

(3) For the purposes of this section, HIV/AIDS includes related illnesses.

Finance and gift provision for Board funds

9.—(1) The funding of the Board shall be part of the Ministry of Health Consolidated Funds and be paid from—

- (a) monies received by the Board appropriated by Government for the purposes of this Decree; and
- (b) monies that may be contributed (by way of a grant or otherwise), donated, earned on investments or otherwise lawfully received by the Ministry.

(2) The Ministry of Health may accept for any purpose connected with the Board and its operation any property by way of gift, devise or bequest given to the Board or otherwise and may agree to carry out the conditions that may be attached with them.

(3) If the gift, devise or bequest or otherwise is of property other than money then it shall be made to the Board on behalf of the Ministry.

(4) Details of the gift and any conditions attached to it must be accounted for by the Ministry in a Gift Register.

Accounts and Annual Financial Report

10.—(1) The CEO shall cause to be kept full and correct accounts of all monies received and expended by it and such accounts shall be audited by the Auditor-General or such other auditors as may be appointed to carry out such audit by the Minister responsible for Finance.

(2) The Board shall as soon as practicable after its financial year prepare and furnish to every member of the Board and to the Minister an annual financial report for the previous financial year including a copy of the audited accounts.

(3) After the Board notes and approves the financial report it shall, as soon as practicable, be forwarded to the Permanent Secretary for approval and onwards transmission to the Public Accounts Committee for scrutiny and thereafter to Cabinet.

Powers of the Board

11. The Board has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Decree.

Board to be responsible to Minister

12. The Board shall perform its functions and exercise its powers subject to any guidelines or directions on any matter or class of matters declared by the Minister on the recommendation of the Permanent Secretary to be guidelines for the purposes of this section.

Committees and working groups of the Board

13. The Minister may establish expert divisional or other committees or working groups of the Board that are advisory to the Board provided that in every case the committee or working group is chaired by a member of the Board approved by the Minister.

Ambassador of Board

14.—(1) On the recommendation of the Board, the Minister may invite any citizen or permanent resident of Fiji with a history of involvement and commitment to the rights of persons living with HIV or affected by HIV/AIDS and the provision of services and information for HIV/AIDS prevention, treatment, care and support to be the Ambassador of the Board for the time being on such terms and conditions as the Board recommends.

(2) The terms of such financial support shall be approved by the Minister in consultation with the Public Service Commission and the Higher Salaries Commission.

Delegation of Board functions

15. The Board may, acting on the advice of the Permanent Secretary delegate to any person, Chief Executive Officer, committee, working group or secretariat all or any of its powers and functions under this Decree except power to delegate under this section and powers.

Administration of Board

16.—(1) There shall be a full time Chief Executive Officer of the Board and such other officers and staff as the Board shall recommend and is to be appointed by the Minister.

(2) The Chief Executive Officer may be a public officer and shall—

- (a) be paid such salary by the Board and approved by the Minister responsible for Finance and, if a salary limit demands, by the Higher Salaries Commission;
- (b) lead a secretariat responsible for the administration, management and finances of the Board and the implementation of its decisions as necessary for the purpose of carrying out its objects, powers and functions under this Decree; and
- (c) subject to the Permanent Secretary's agreement appoint, discipline, suspend or dismiss employees as are necessary for the administration and management of the functions of the Board.

Conduct of Board meetings

17.—(1) The Board shall meet at least quarterly.

(2) Two-thirds of the members of the Board shall constitute a quorum.

(3) Meetings of the Board shall be chaired by the Chairperson or, in the absence of the Chairperson; members present shall appoint a member present to be the Acting Chairperson for that meeting.

(4) Decisions shall be taken by simple majority but in the event of a tied vote the Chairperson shall have a casting vote as well as a deliberative vote.

(5) Subject to this section and section 18, all other procedures and rules governing its meetings shall be determined by the Board.

Disclosure of interest of Board member, alternate and co-opted member

18.—(1) If any member is present at a meeting of the Board at which a matter is being considered in which he or she has direct or indirect any financial or other interests, he or she shall, as soon as practicable after the commencement of the meeting disclose that fact and take no further part in the consideration of that matter or vote on any question with respect to that matter.

(2) Notwithstanding subsection (1) that such an interest, if so disclosed, shall not disqualify the interested member for the purpose of constituting a quorum.

(3) A failure to disclose as required by subsection (1) results in the member's vote being invalid and the matter reported to the Minister.

Annual Report

19. The Board shall prepare and submit to the Minister for Health by 31 March of each year an annual report of its activities progress and performance of its functions for the previous calendar year.

Immunity of Board members

20. No act or omission made in good faith and without negligence in the exercise a Board member's duties under this Decree or any such act or omission so made by the Minister, Chief Executive Officer, Chairperson or any Council, committee, working group member or Ambassador of Council shall subject that person to any personal liability.

PART 3: DISCRIMINATION AND OTHER UNLAWFUL ACTS

Unlawful discrimination

21. Subject to section 23 and without prejudice to the safety and human rights of the public of Fiji and elsewhere, it is unlawful to discriminate, directly or indirectly, against a person having HIV/AIDS or affected by HIV/AIDS.

Situations of discrimination

22. Without limiting section 21, an act of unlawful discrimination may occur—

- (a) in relation to employment, contract work and membership of the uniformed services, in—
 - (i) the arrangements an employer or contracting principal makes for the purpose of determining who should be offered employment, contract work or membership;
 - (ii) the terms on which an employer or principal offers employment, contract work or membership;
 - (iii) the refusal or deliberate omission by an employer or principal to offer employment, contract work or membership;

- (b) in relation to a business partnerships for profit—
 - (i) determining who should be invited to become a partner;
 - (ii) the terms and conditions on which the partnership is offered;
- (c) in relation to any industrial or professional organization, club, sporting or other association, in—
 - (i) the terms of admission to membership or qualification;
 - (ii) the refusal or deliberate omission to accept applications for membership or qualification;
- (d) in relation to childcare, education and training, in—
 - (i) refusal or failure of an educational or childcare institution or centre to accept an application for admission as a child to be cared for or as a student;
 - (ii) the terms or conditions on which an educational or childcare institution or centre is prepared to admit the child or student;
- (e) in relation to prisoners and persons in custody, in—
 - (i) the application of detention, restriction or segregation procedures or conditions and the availability of access to privileges, recreational and social services;
 - (ii) the provision of and access to health facilities and care; or
 - (iii) the subjecting of a prisoner or person in custody to any other detriment in relation to detention or custody;
- (f) in relation to the provision or retention of accommodation, including rental accommodation, hotel and guesthouse accommodation, in—
 - (i) the refusal or deliberate omission to accept requests, applications for or to provide or to continue to provide accommodation;
 - (ii) the terms or conditions on which, or the manner in which, the accommodation is provided;
- (g) in relation to entry or presence in a community or place of residence, in—
 - (i) the refusal to permit a person to be present or reside within a community;
 - (ii) the terms or conditions on which, or the manner in which, presence or residence in the community is permitted;
 - (iii) eviction from a residence or a community; or
 - (iv) the subjecting of a person to any other detriment in relation to presence or residence in a community;
- (h) in relation to surveillance or research related to HIV/AIDS other than for the benefit of persons living with HIV/AIDS whether or not that is the primary purpose of the surveillance or research, in—
 - (i) the selection of subjects for surveillance or research;
 - (ii) the access to benefits of the surveillance or research; or
 - (iii) the maintenance of confidentiality of personal information acquired for, during or from the surveillance or research; and
- (i) subject to section 23, in relation to the provision of or access to goods, services or public facilities, in—
 - (i) the refusal to provide goods, services or public facilities;
 - (ii) the terms or conditions on which, or the manner in which the goods, services or public facilities are provided;
 - (iii) the supply of health services.

Insurance and other risk assessment

23. Nothing in section 22 renders unlawful any discrimination in relation to any class of insurance or superannuation business, membership of a superannuation or provident fund or scheme or similar matter involving the assessment of risk where the discrimination—

- (a) is effected by reference to relevant and applicable actuarial or statistical data relating to HIV/AIDS on which it is or was at the relevant time reasonable to rely; and
- (b) is reasonable having regard to the content of the data and any other relevant factors.

Unlawful coercion

24.—(1) Subject to the human rights of the public and this Decree, it is unlawful to coerce or require a person to undergo a HIV test, produce proof that she or he is not infected with HIV or answer any questions the answer to which may tend to show directly or indirectly that she or he is a person of a kind referred to in subsection 21 (1), except in accordance with this Decree.

(2) The consent, written or otherwise, by a person referred to in subsection (1) to the provision of a medical service or to the performance of a general medical review does not of itself constitute voluntary informed consent to an HIV test.

Unlawful stigmatisation

25.—(1) Subject to subsection (2), it is unlawful to stigmatise a person on the ground that the person is living with HIV/AIDS or affected by HIV/AIDS.

(2) Subsection (1) does not apply to—

- (a) a fair report of an act of stigmatisation referred to in subsection (1);
- (b) the communication, dissemination, distribution or publication of any matter that entitles a person to a defence of absolute privilege under the Defamation Act (Cap. 34).
- (c) a complaint by a victim or deliberate infection or attempted infection of HIV.

Access to means of protection and post exposure prophylaxis

26.—(1) For the purposes of this section, “person” includes an unborn child.

(2) It is unlawful to knowingly—

- (a) deny a person access to a means of protection from infection of her or himself or another by HIV; or
- (b) deny a person access to post exposure prophylaxis in accordance with any guideline, standard of practice, protocol or code of conduct after their risk of exposure to HIV has been assessed and determined by a health professional who is competent to make the assessment and determination.

(3) Without limiting subsection (2), “means of protection” includes—

- (a) HIV/AIDS awareness materials;
- (b) condoms, condom lubricant and any other means of reducing the risk of the prevention of HIV transmission including effective treatment of a pregnant woman to prevent mother to child transmission of HIV;
- (c) exclusive personal use of skin penetrative instruments, including razors, needles and syringes; and
- (d) means of disinfecting skin penetrative instruments.

PART 4: COUNSELLING, TESTING, REPORTING AND CONFIDENTIALITY*Information to be provided by counselling*

27.—(1) Except in the routine testing of blood or blood-products donated for transfusion authorised under Part 5 of this Decree, pre-test counselling must be provided in the manner directed by the Permanent Secretary from time to time in gaining the voluntary informed consent to a HIV test under section 29 (2) and must include information in a form that is capable of being understood by the person being counselled about—

- (a) the nature of HIV/AIDS;
- (b) the nature and purpose of a HIV test;
- (c) the testing process, including any initial screening and confirmatory testing process, the confidentiality of the process and the probable time-frame for obtaining test results;
- (d) the existence of the window period and, if the screening or confirmatory test result is negative, the desirability of repeating the test after a specified time;
- (e) the legal and social consequences of positive results, including the possibility of notifying sexual partners, of—
 - (i) the person being counselled having an HIV test;
 - (ii) the person being counselled having HIV/AIDS;
- (f) the treatment available to mitigate the effects of infection and the care available, together with any necessary referral to an appropriate care service; and
- (g) the ways to prevent and reduce the risk of transmission of HIV including, when appropriate, the treatment and ways to prevent mother to child transmission of HIV;

(2) In the case of screening testing of blood or blood-products donated for transfusion authorised under Part V of this Decree, prior to the seeking of the declaration required by section 37 (1) (b), written information as approved by the Council shall be given to a potential donor in a language that the donor is capable of understanding and she or he shall be given the opportunity to have any questions about the information answered.

(3) Post-test counselling must be provided after the conduct of a HIV test to which section 29 (2) or section 37 (1) (e) (ii) b. applies and must include in a form that is capable of being understood by the person being counselled—

- (a) where the HIV test result is negative, information about—
 - (i) the nature of HIV/AIDS;
 - (ii) the effects of the window period and the desirability of repeating the test after a specified time; and
 - (iii) the ways to prevent and reduce the risk of infection by HIV; and
- (b) where the HIV test result is positive, information about—
 - (i) the nature of the HIV/AIDS;
 - (ii) the legal and social issues associated with HIV/AIDS;
 - (iii) the ways to prevent and reduce the risk of transmission of the HIV including, when appropriate, the treatment and ways to prevent mother to child transmission of HIV;
 - (iv) the treatment available to mitigate the effects of infection;
 - (v) the care available, together with any necessary referral to an appropriate care service;
 - (vi) the desirability of informing the tested person's sexual partner or partners of the test result, the assistance that is available to facilitate the sexual partner or partners being informed and the action that may be taken under section 36 in the event of failure or refusal by the tested person to inform the sexual partner or partners; and
 - (vii) any other matter relevant to the personal circumstances of the tested person.

HIV testing of blood and blood products for transfusion

28. Section 29 applies to all HIV tests except HIV screening tests or HIV confirmatory tests authorised by section 37 and performed on blood or blood products donated for transfusion or to a test carried out as a consequence of the performance of a post mortem.

HIV testing

29.—(1) It is unlawful for any person who is not the person who is to be tested—

- (a) not being the person who is to be tested, a health professional or other authorised person, to request a HIV test be performed on a sample capable of being tested; or
- (b) subject to subsection (2), to perform a HIV test except on the request of a health professional or other authorised person.

(2) It is unlawful to request that a HIV test be performed except—

- (a) with the voluntary informed consent of the person who is to be tested;
- (b) where the person who is to be tested is aged under 18 and is, in the opinion of the person providing the pre-test information, capable of understanding the meaning and consequences of a HIV test, as appropriate, with the voluntary informed consent of the person;
- (c) where the person who is to be tested is aged under 18 and is, in the opinion of the person providing the pre-test information, not capable of understanding the meaning and consequences of a HIV test, as appropriate, with the voluntary and informed consent of a parent or guardian of the person or if such parent or guardian refuses to give such consent with the consent of a court following a hearing at which the person aged under 18 must be represented by legal counsel;
- (d) subject to subsection (3), where the person who is to be tested has a disability which, in the opinion of the person providing the pre-test information, renders the person incapable of understanding the meaning and consequences of a HIV test, as appropriate, and incapable of giving informed consent to a HIV test, as appropriate, with the voluntary informed consent, in order, of—
 - (i) a guardian of the person;
 - (ii) a spouse or partner of the person;

- (iii) a parent of the person; or
- (iv) an adult child of the person; or
- (e) where a person is required to undergo a HIV test in accordance with any written law; or
- (f) in any other case with the consent of the Minister acting with the advice of the Permanent Secretary and the Board.

(3) The voluntary informed consent required under subsection (2) (d) shall be obtained in the following manner—

- (a) the consent of the person in the categories referred to in subparagraphs (2) (e) (i), (ii), (iii) and (iv) shall be sought in the order of those subparagraphs; and
- (b) where there is no person in a category or a person in such category cannot, after reasonable inquiry, be contacted, a request may be made to the person in the next category.

Confirmatory tests

30. A person who requests, performs or is otherwise involved in the performance of a HIV test that is designed to confirm the presence or otherwise of HIV, must take all measures within that persons control to ensure that the confirmatory testing process is carried out and the results reported promptly and efficiently and in confidence and any breach of confidence is unlawful.

Reporting of test results

31.—(1) It is unlawful for a person who has requested, performs or is otherwise involved in the performance of an HIV test to disclose information about the result of that test except—

- (a) to the authorised person who requested the performance of the test;
- (b) to the person who has been tested;
- (c) where another person gave the voluntary informed consent to the test in accordance with section 29 (2) (c) or (d), to that person;
- (d) to a person who is directly involved in providing care, including antenatal, postnatal and paediatric care, treatment or counselling to the person tested or her child, where the provision of that information is required in connection with providing the care, treatment or counselling of the person tested or the child, whether born or unborn as applicable;
- (e) for the proper purpose of maintaining the medical or mandatory record keeping permitted under this Decree;
- (f) by order of a court which may in any case require evidence to be heard; or
- (g) in accordance with section 32.

(2) It is unlawful to inform a person of the result under subsection 1 (b) or (c), either positive or negative, of a HIV test without also offering post-test counselling.

Prompt reporting of positive results

32.—(1) A person who in a public or private testing facility performs a HIV test that produces a positive result shall, as soon as practicable, send to—

- (a) the National HIV/AIDS Program Manager, a written report of the de-identified test result in the form approved by the National HIV/AIDS Program Manager; and
- (b) the person lawfully requesting the test, and to no other person, the written result of the test.

(2) A person within Fiji and requesting a HIV test to be performed in a testing facility outside Fiji who receives a notification of a positive result shall forthwith send to the National HIV/AIDS Program Manager a written report of the de-identified test result in the form approved by the National HIV/AIDS Program Manager.

(3) It is unlawful to send or to fail to send a written result of a positive HIV test contrary to subsections (1) or (2).

Further provision for conduct of HIV tests

33.—(1) Subject to this Decree, the Board may from time to time recommend to the Permanent Secretary and the Minister policies, guidelines, standards of practice, standard operating procedures or codes of conduct consistent with internationally recognised human rights principles, norms and standards in respect of—

- (a) the conduct of HIV tests;

- (b) the provision of counselling and the qualifications of those able to provide counselling;
- (c) the informing of the results of HIV tests;
- (d) the reporting of test results;
- (e) the tracing of contacts;
- (f) the notification of sexual partners and the making of decisions about notification;
- (g) the provision of treatment to prevent mother to child transmission;
- (h) conducting of surveillance of data with respect to the incidence and prevalence of HIV/AIDS in the community;
- (i) the prescribed form of notification to the National HIV Program Manager of deaths from AIDS or AIDS-related illness by a medical practitioner or other authorised health professional;
- (j) the making of decisions regarding the availability of post-exposure prophylaxis; and
- (k) any other matter necessary or convenient to be prescribed in relation to HIV tests and reporting of results.

(2) It is unlawful to request or conduct a HIV test, provide or fail to provide information on the result of a test or report or fail to report the result of a test except in accordance with—

- (a) this Part;
- (b) any regulations; and
- (c) any policies, guidelines, standards of practice, standard operating procedures or codes of conduct issued under subsection (1).

Confidentiality of information

34.—(1) Subject to the permitted and required disclosures under sections 31 and 32, subsection (2), sections 35 (3) and 36, any person who—

- (a) while providing, or being associated in the course of his or her duties whether paid or unpaid with the provision of HIV testing, treatment, care, counselling, or associated health care service;
- (b) while acting or assisting in the administration of this Decree;
- (c) while present in any room or place where a matter is being investigated, inquired into or heard under this Decree;
- (d) while acting under his or her professional duty to the person who has tested positive as clergy of a church or other religious leader of any religious denomination; or
- (e) is approved under section 43;

acquires information that another person, whether dead or alive, is or was living with a HIV or AIDS or affected by HIV/AIDS, must not make and must not so far as possible to prevent unauthorised disclosure of the information to any other person.

(2) The information referred to in subsection (1)—

- (a) may be disclosed—
 - (i) with the consent of the person to whom it relates, in accordance with the terms of that consent;
 - (ii) where the consent to testing of the person was given by another person under section 29 (2) (c) or (d), to the person who consented to the testing;
 - (iii) by order of a court or person acting judicially or otherwise empowered to examine witnesses, where the information is directly relevant to proceedings in the court or before the person;
 - (iv) where all identifiers have been removed from the information, is statistical only or cannot otherwise reasonably be expected to lead to the identification of the person to whom it relates or group or classification to which that person belongs; or
 - (v) to the extent authorised by this Decree, any policy, guidelines, standard of practice, standard operating procedure or code of practice or any other law, and
- (b) must be disclosed to the National HIV/AIDS Program Manager and the Registrar using the prescribed form of notification of deaths from HIV/AIDS or HIV/AIDS related illness by a medical practitioner or other authorised health professional.

(3) Any person who makes a disclosure in any manner other than as permitted under subsections (1) and (2) commits an offence.

Privacy of proceedings

35.—(1) Where, in any proceedings before any court or body acting in a judicial or quasi-judicial capacity it appears that information of a kind referred to in section 34 (1) is proposed to be given, the court or body shall, if requested by the person to whom the information relates or with whom he or she is associated and may, where it considers that, because of the social, psychological or economic consequences to the person to whom the information relates, the information should not be publicly disclosed, make all or any of the following orders—

- (a) that all or any persons be excluded from the room or place in which the proceedings or any part of the proceedings are being conducted;
- (b) that only persons specified by it may be present during the whole or any part of the proceedings;
- (c) that the publication of a report of the whole or any part of the proceedings be prohibited or a pseudonym used in place of the name of any person in any such report.

(2) Subject to subsection (1), it is unlawful to print or publish, except on the written authority of the Permanent Secretary a report of any proceedings or matter heard in camera or in private or general discretion or recommendation by a person acting judicially under subsection (1) or Part 6 of this Decree.

Sexual partner notification

36.—(1) Notwithstanding section 34, it is unlawful for a person providing a treatment, care or counselling service to a person living with HIV/AIDS to notify a sexual partner of the person that the person is infected unless the notification is in accordance with any written law, policy, guideline, standard of practice, standard operating procedures or code of conduct and, in the case of a notification of HIV/AIDS unless—

- (a) the person notifying is the infected person or is a person requested by the infected person in writing to give that notification;
- (b) in the opinion of the person deciding that notification is required, that decision being upon reasonable grounds and in all cases subject to the Permanent Secretary endorsing that opinion, counselling of the infected person has failed to achieve appropriate behavioural change and the infected person has refused to notify, or consent to the notification of, the sexual partner or partners; or
- (c) the infected person is dead or unconscious and unlikely to regain consciousness or the ability to give consent; and

in the case of a proposed notification, in the opinion of the person deciding that notification is required and of the Permanent Secretary, that decision being upon reasonable grounds, there is or was a real risk of past or future transmission of HIV by the infected person to the sexual partner or partners or to a child, born or unborn.

(2) It is unlawful for a notifying person other than an infected person who notifies his or her sexual partner to fail to offer appropriate counselling to the person to be notified in writing prior to notifying that person and if further requested by the notified person thereafter.

PART 5: SUPPLY OF BLOOD AND BLOOD PRODUCTS

Donation of blood

37.—(1) Where any person takes, or proposes to take, blood, organs or tissues from a person for the purpose of it being used, if suitable, for transfusion or for the derivation of a blood product that may be used for transfusion, or transplant to another person all the following provisions apply—

- (a) the person from whom the blood, organs or tissues is to be taken shall receive the written information required to be given under section 27 (2).
- (b) the blood shall not be taken unless the donor has, not more than 12 hours previously, signed a declaration in an approved form that includes the consent or otherwise of the donor to being informed of any positive result of an HIV or any other conditions transmissible by blood test.
- (c) as soon as practicable after taking the blood, the authorised supplier shall cause an approved testing procedure that provides for screening tests and confirmatory tests as appropriate to be carried out in relation to the blood, organs or tissues.

- (d) where the results of a screening test carried out in relation to blood indicate the presence of HIV/AIDS or other conditions transmissible by blood, tissues or organ transplant the authorised supplier shall cause the screening test to be repeated.
- (e) if the repeated screening test also indicates the presence of HIV the authorised supplier shall —
 - (i) dispose of the blood and any blood product derived from the blood in a manner approved by the Permanent Secretary;
 - (ii) where the donor has consented to being informed of a positive result, if the positive result of the repeated screening test relates to HIV, cause confirmatory testing to be conducted in accordance with section 30 and, where that confirmatory test confirms the presence of HIV, ensure that the donor is contacted and an appointment with an appropriate health professional arranged so that the test result can be given to the donor in circumstances where the donor is provided with post-test counselling in accordance with section 27 (3) (b).
- (f) Where the screening tests do not indicate the presence of HIV, or another disease transmitted by blood, organs or tissues, the authorised supplier may, in an approved manner, certify that the blood is free from such infection except to the extent that the window period cannot be provided for in relation to HIV.

(2) Where an authorised supplier, in accordance with approved procedures, derives a blood product from material each portion of which is certified blood or a certified blood product, the authorised supplier may, in an approved manner, certify that the blood product is free from HIV or another disease transmitted by blood, organs or tissues, except to the extent that the window period cannot be provided for in relation to HIV.

(3) Where an authorised supplier has reasonable cause to suspect that blood or a blood product supplied by the authorised supplier may be contaminated by HIV or another disease transmitted by blood, organs or tissues, the authorised supplier shall take all reasonable steps to ensure that the blood or blood product is not used for the purpose of transfusion or for the derivation of a blood product, organs or tissues, that may be used for transfusion.

Limitation of liability in relation to transfusion of certified blood and blood products

38.—(1) Subject to this section, no civil or criminal liability attaches to any person in respect of the transmission to another person of HIV or any other disease that is attributable to HIV or transmitted by blood, organs or tissues, by reason of the transfusion of certified blood or a certified blood product except—

- (a) a person who knowingly makes a false declaration under section 37 (1) (b) or under section 39 (b) is not entitled to the protection of this section in relation to the blood, or any blood product in any way derived from the blood, organs or tissues, in relation to the taking of which the declaration was made;
- (b) an authorised supplier is not entitled to the protection of this section in relation to blood or a blood product, organs or tissues, if the supplier fails to observe a requirement imposed on it by or under this Decree in relation to the blood or the blood product, organs or tissues, or in relation to blood from which the blood product was derived;
- (c) a person who is an employee of, or a person working without payment for, an authorised supplier is not entitled to the protection of this section in relation to blood or a blood product if that person knowingly fails to observe a requirement imposed on the supplier by or under this Decree in relation to the blood or blood product, organs or tissues, or in relation to blood from which the blood product, organs or tissues, was derived, being a requirement applicable to the duties of that person in relation to the operations of the supplier;
- (d) a person is not entitled to the protection of this section in relation to blood or a blood product, organs or tissues, if—
 - (i) that person had reasonable cause to suspect that the blood or blood product, organs or tissues, may be contaminated with HIV or other disease transmissible by blood; or
 - (ii) that person, or an employee of, or a person working without payment for, that person, was guilty of any negligence or wilful misconduct or with the intent to infect another person that exposed, or was likely to expose, the blood or blood product, organs or tissues, to contamination with HIV, any other disease transmissible by blood.

(2) Any person to whom any of subparagraphs (a) to (e) inclusive applies in any case commits an offence.

Limitation of liability in relation to emergency transfusion of uncertified blood and blood products

39. Where—

- (a) HIV is transmitted by reason of the transfusion of blood or a blood product that was, in whole or in part, not certified and
- (b) if circumstances permit so much of the blood or blood product as was not certified was taken, or derived from blood taken, from a person who, not more than 12 hours before the taking of the blood, signed a declaration in an approved form or from another source approved by a medical practitioner; and
- (c) immediately before the carrying out of the transfusion, not less than 2 medical practitioners or where no second medical practitioner is available, one medical practitioner and one health professional are of the opinion that the condition of the person in the treatment of whom the transfusion was carried out was such that the person was likely to die unless that blood or blood product was administered to her or him before sufficient quantities of certified blood, or a certified blood product, of an appropriate kind could reasonably be expected to be available for administration to the person; or
- (d) if none of (a), (b) or (c) are available or satisfied then any adult person at the scene of an emergency reasonably believes that without an immediate transfusion the person requiring it will die,

section 38 applies as if all of the blood or blood products referred to in paragraph (a) were certified and section 29(2) complied with.

PART 6: DEALING WITH UNLAWFUL ACTS

Deliberate or attempted infection

40.—(1) The deliberate or attempted infection of a person by a person who knows he or she carries HIV is an offence under this Decree.

(2) Where a person who knows he or she carries HIV virus acts in a manner which in the opinion of the Permanent Secretary may on the balance of probabilities transmit HIV to another person or persons the Permanent Secretary may seek an ex-parte injunction requiring the person to cease and desist from such behaviour.

(3) A failure by the person to cease and desist from such behaviour as in subsection (2) the person shall be liable for imprisonment for a term not less than 14 days and not more than 6 months.

Unlawful acts

41.—(1) An unlawful act under this Decree—

- (a) is an offence punishable upon conviction or a finding of guilt, where no penalty is otherwise provided, to—
 - (i) in the case of a corporation, a fine not exceeding 1000 penalty units; and
 - (ii) in the case of a natural person, a fine not exceeding 500 penalty units or imprisonment for a term not exceeding 2 years, or both.
- (b) if carried out by a health professional is a breach of the standard of conduct required to be attained by members of the particular health profession under any written law regulating the practice of that health professional who may be subject to disciplinary measures under any written law in addition to any action taken for breach of this Decree;

(2) Nothing in this section affects the right of any person to seek civil remedy.

PART 7—MISCELLANEOUS

Guidelines for research

42.—(1) The Board may from time to time issue guidelines for the conduct of research relating to HIV/AIDS.

(2) No person shall conduct research relating to HIV/AIDS, whether or not that is the primary purpose of the research, without the approval of the Fiji National Research Ethics Review Committee and that Committee shall report to the Board at the end of the calendar year with a list of all approved protocols for research relating to HIV/AIDS.

(3) It is unlawful to conduct research relating to HIV/AIDS except in accordance with—

- (a) this Decree;

- (b) any guidelines issued under subsection (1); and
- (c) approval under subsection (2).

Immunity

43.—(1) Subject to subsection (2), a person is not liable to any civil or criminal liability, and does not act unlawfully, in respect of any exercise or supposed exercise of the powers conferred by; or any omission or failure to act under this Decree, where the exercise of the powers or the omission or failure to act was done in utmost good faith and without negligence or carelessness.

(2) Notwithstanding subsection (1), the protection afforded by that subsection does not extend to a person where it can be shown on the balance of probabilities that the person failed without reasonable excuse to act in accordance with this Decree or any regulations or directives or guidelines for the control of infections in health facilities issued from time to time by the Ministry.

(3) A certificate, notice or other communication, oral or written, given in good faith and without negligence by a person for the purposes of this Decree shall not be made the ground of any legal proceedings, civil or criminal, against the person.

(4) In particular, any communication made in good faith and without negligence in the exercise or supposed exercise of the powers conferred by section 35 is absolutely privileged.

Evidence of certain communications

44. Any communication relating to the sexual behaviour of a person made by another person undergoing a HIV test, surgical or dental procedure or counselling under this Decree is not admissible in any proceedings under the Criminal Procedure Decree 2009, but must be reported to the Permanent Secretary.

Regulation making power

45. The Minister may make regulations prescribing all matters that by this Decree are required or permitted to be prescribed, or that are necessary or convenient to be prescribed for carrying out and giving effect to this Decree and in particular prescribing matters for and in relation to—

- (a) policies, standards, standard operating procedures, guidelines, codes of practice for the performance or conduct of any matter under this Decree;
- (b) the authorisation of persons who may request the carrying out of HIV tests;
- (c) the authorisation of persons who may take blood for the purposes of transfusion or for the creation of blood products for transfusion;
- (d) the registration or other means of authorisation of persons involved in care or counselling work of those living with or affected by HIV/AIDS;
- (e) the recognition and means of authorisation of persons working without pay in connection with the prevention of HIV and management of HIV/AIDS;
- (f) the advertising of treatment for HIV/AIDS and the making of claims regarding availability of cures; and
- (g) providing for penalties upon conviction of offences against the regulations of—
 - (i) in the case of a corporation, a fine not exceeding 500 penalty units; and
 - (ii) in the case of a natural person, a fine not exceeding 250 penalty units or imprisonment for a term not exceeding 1 year, or both.
- (h) any other matter not included in subparagraphs (a)–(g) consistent with this Decree.

Given under my hand this 29th day of January 2011.

EPELI NAILATIKAU
President of the Republic of Fiji