

# **HIV, ETHICS AND HUMAN RIGHTS**

## **Review of legislation of Tokelau**

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

**March 2009**

## ***Introduction and methodology***

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Tokelau. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006.<sup>1</sup>

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

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

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

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

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

<sup>2</sup> UNAIDS/IPU. Geneva, 1999.

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

## ***Human rights principles***

The principles of Human Rights relevant to HIV include—

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

Particular attention is paid to the rights of women and children.<sup>3</sup>

## ***Background***

There are no reported cases of HIV infection in Tokelau, which comprises three villages on three small, remote atolls. Tokelau's isolation reduces opportunities for introduction of new diseases. There is no airstrip, so the islands are only accessible by sea. However there is increasing population mobility and most Tokelauans live overseas, mainly in New Zealand and Samoa. Alcohol consumption is increasing.

Each of the three atolls has a school and hospital. There is a Director of Health based in Apia and a Chief Clinical Advisor who moves from atoll to atoll as required to assist the doctors attached to each hospital.

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<sup>3</sup> See *Consolidated Guidelines* paras 102-103.

## ***Legal system<sup>4</sup>***

Tokelau is a self-administering territory of New Zealand. The legal system is English common law, and certain New Zealand and United Kingdom statutes are applicable. New Zealand statutes do not apply unless expressly extended. The General Fono has power to make local rules. Villages may make laws for village affairs. The Governor-General of New Zealand by Order in Council may also make regulations. Custom is now almost completely overridden by Rules and other statutes, including the criminal law, except in relation to land.

The NZ High Court is constituted as a court of Tokelau. Each Island has a Tokelauan Commissioner, who has limited civil and criminal jurisdiction. There is no standard court hierarchy, and only one level of courts. Most matters are dealt with outside the formal court system by a Council of Elders. There is little crime apart from petty theft and there are no prisons. Punishment generally takes the form of public rebukes, fines or labour.

## ***International obligations***

Tokelau's foreign affairs are managed by New Zealand, which is a member of the United Nations and party to all Rights conventions. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, ratified by New Zealand in December 1978, apply in Tokelau.

## ***HIV policy framework***

There is no HIV or STI policy.

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<sup>4</sup> Information on court and legal systems derived from Pacific Islands Legal Information Institute <[www.paclii.org](http://www.paclii.org)>

# CHECKLIST 1 – PUBLIC HEALTH LAW

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

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

There is no legislation empowering public health authorities to provide comprehensive HIV and sexual and reproductive health services.

**2. Does the legislation:**

- **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
- **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization**

The *Tokelau Health Rules 2003* make provision for ‘infectious diseases’ and ‘communicable diseases’ without defining them.

There is no legislation in relation to informed consent to health care or blood tests. There is no power to require a person to submit to a blood test. There is a general power to medically examine. The Director or a medical practitioner may enter premises and medically examine any person suspected of suffering or having recently suffered an infectious disease (Rule 9).

The common law of England applies, which requires consent to a blood test. If consent is not given, the person taking blood may be liable under civil and/or criminal law for assault. Common law does not require pre and post test counselling.

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

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

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

- **Right of legal representation?**

A person suffering from either an infectious or a communicable disease may not prepare, cook, or offer for sale or public use any food (Rule 7).

Rule 9 requires that where an infectious disease is suspected in premises or on board ship, the occupier of the premises or master of the ship must notify the Director of Health, and places certain restrictions on a person suffering from an infectious disease.

The Director of Health may quarantine a vessel or person in order to 'prevent the spread of disease in Tokelau' (Rule10).

There are no due process protections such as:

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

Under the *Immigration Regulations 1991*, an application for a visitor's, residence or work permit in Tokelau includes a question as to medical treatment needed (Schedule Form 1). A permit will not be granted, and a foreigner in Tokelau may have his or permit revoked, if the applicant/permit holder needs or is likely to need medical or other similar treatment that is not available in Tokelau; or the permit holder has 'an infectious or contagious medical condition' contracted outside Tokelau (Regs. 9 and12).

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

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

There are no rules or other legislation addressing confidentiality of medical information or the duty of health care professionals to notify third parties of risks posed by their patient to others.

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

There is no blood safety legislation.

## CHECKLIST 2 – CRIMINAL LAW

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

Injecting drug use is considered not to occur.

Psychotropic and narcotic drugs, and marijuana, may not be imported into Tokelau except by and under the supervision of registered medical practitioners, dentists, pharmacists or veterinary surgeons (*Customs Regulations 1991*). Importing or possessing a drug is an offence under Rule 49 of the *Crimes, Procedure and Evidence Rules 2003*.

- 2. Does the law allow the following sexual acts between consenting adults in private:**

- **Homosexual acts e.g. sodomy;**
- **Fornication or adultery;**
- **Street sex work;**
- **Brothel or escort sex work?**

Under *Tokelau Islands Crimes Regulations 1975* (NZ), the criminal law provisions of the *Niue Act* (NZ) were adopted for application in Tokelau. These included crimes relating to homosexuality, adultery and sex work. However, since the commencement of the *Tokelau Amendment Act 2007* (NZ) the *Tokelau Islands Crimes Regulations 1975* were amended such that the criminal law provisions of the *Niue Act 1966* no longer apply to Tokelau. Since 2007, crimes in Tokelau are defined by the *Crimes, Procedure and Evidence Rules 2003*.

Sexual acts between persons over the age of sixteen are legal (Rule 19 of the *Crimes, Procedure and Evidence Rules 2003*). Homosexual sex between consenting adults is not illegal.

Rule 25 of the *Crimes, Procedure and Evidence Rules 2003* provide that any person who loiters and importunes any person in any public place for the purpose of prostitution commits an offence. There are no rules in respect of keeping a brothel.

Adultery and unmarried persons living together are offences under Rules 22 and 23 of the *Crimes, Procedure and Evidence Rules 2003*.

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

There is no exception in criminal law for HIV prevention and care services.

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

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

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

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

There are no laws in relation to trafficking or coercion of people into sex work.

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

There is no specific offence. Deliberate transmission of HIV could give rise to a charge of causing 'bodily harm' under Rule 14 of the *Crimes, Procedure and Evidence Rules 2003*.

## CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

*There are no prisons in Tokelau. Sections 243-245 of the Niue Act apply to Tokelau and facilitate transfer of prisoners from Tokelau to New Zealand.*

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

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

**2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?**

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

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

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

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

There is no prisons legislation.

## CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

A complaint of discrimination on the grounds of HIV status or disability could be made under the *Tokelau Human Rights Rules 2003*.

The *Tokelau Human Rights Rules 2003* declare —

1. Individual human rights for all people in Tokelau are those stated in the Universal Declaration of Human Rights, and reflected in the International Covenant on Civil and Political Rights (ICCPR).
2. The rights of individuals in Tokelau shall be exercised having proper regard to the rights of other individuals and to the community to which the individual belongs.

If a person thinks that one of their human rights provided by these rules has been denied or may be denied, that person may apply to the Council of the Ongoing Government for protection of that right, and if the Council of the Ongoing Government agrees with that complaint, it may make any order it thinks appropriate for the protection of that right. (Rule 3).

ICCPR Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any such ground as race,... birth or *other status*." International human rights law defines disability including HIV as an *other status* for the purposes of this provision.<sup>5</sup>

The Constitution of Tokelau, which will come into effect should Tokelau vote for independence from NZ at a future time, provides identical protections at Article 16.

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

- Coverage of direct and indirect discrimination;
- Coverage of those presumed to be infected, as well as carers, partners, family, or associates;
- Coverage of vilification;

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<sup>5</sup> Commission on Human Rights (1995) *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)* Resolution 1995/44

- **The ground complained of only needs to be one of several reasons for the discriminatory act;**
- **Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);**
- **Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?**

A person who is a member of a vulnerable group such as men who have sex with men could make a discrimination complaint under the Human Rights Rules, on the basis that their membership of a group is an “other status” under Article 26 ICCPR.

Article 26 provides that all persons are equal before the law and are guaranteed the protection of the law against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Sexuality is an “other status” under international human rights law.<sup>6</sup>

The legislation provides a broad discretion to accept complaints and make orders, so may cover cases of indirect discrimination and conduct in the private sector. Exceptions are not defined except that a person must exercise their human rights “having proper regard to the rights of other individuals”.

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

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

The legislation does not provide these administrative features.

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

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

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<sup>6</sup> Human Rights Committee Communication No. 941/2000 (*Young v Australia*) UN Doc CCPR/C/78/D/941/2000 (12 August 2003)

The Council of the Ongoing Government has power to resolve or arbitrate complaints, and to report on its activities, but does not have powers in relation to:

- Education and promotion of human rights;
- Advising government on human rights issues;
- Monitoring compliance with domestic legislation and international treaties and norms.

## CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

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

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

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

Men and women are generally treated equally in relation to property, inheritance, contracts, credit and finance. However, authority over land is usually exercised by the senior male member of the family.

Most matters in respect of land are dealt with through customary law. Traditional authority in Tokelau is vested in its villages, and the needs of Tokelau at a local level are generally met through the administration of customary practices by elders: *Tokelau Amendment Act 1996* (NZ) Preamble.

Most land is held communally by families. Land is not sold or transferred by succession.<sup>7</sup>

The *Wills Act 1837* (UK) applies to Tokelau. *Inheritance (Family Provision) Act 1938* (UK) applies to Tokelau, enabling orders to be made to ensure adequate provision for a widow from an estate. However customary land is not subject to inheritance legislation.

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

No legislation directly disadvantaging women was identified. Organisation of families is in accordance with custom, which recognises the family as a landholding and labour sharing organisation.

Divorce is partly fault based. Tokelau *Divorce Rules 1987* provide grounds for divorce of adultery, cruelty or three years living apart.

There is a broad discretion in relation to adjudicating custody and maintenance. Under Rule 13, the Administrator may make such orders as thought fit relating to:

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<sup>7</sup> Michael A. Ntomy (1993) *South Pacific Island Legal Systems* University of Hawaii Press, p.309

- (i) The custody of any children of the marriage;
- (ii) The payment, by one party to the marriage, of maintenance for the other party;
- (iii) The payment of maintenance in respect of any child of the marriage by either party to the marriage;
- (iv) The division, between the parties, of any property belonging to the parties to the marriage on its dissolution.

De facto relationships are not recognised by law.

### **Access to reproductive and STD health information services**

The law does not give women a specific right of non-discriminatory access to services, however a complaint under the *Human Rights Rules 2003* of discrimination on the grounds of sex in breach of ICCPR could be made.

Women do not have access to safe abortion facilities as of right. Abortion is illegal under Rule 24 the *Crimes, Procedure and Evidence Rules 2003*, which provides:

- (1) A person who without lawful excuse does anything with intent to procure the miscarriage of a woman or girl, whether pregnant or not, commits an offence.
- (2) A woman who, whether pregnant or not, unlawfully administers to herself or permits to be administered to her a poison or a drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means, with intent to procure miscarriage commits an offence.
- (3) A person who supplies or procures anything, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of a woman or girl commits an offence.

### **Protection from sexual violence, including rape in marriage**

Rape includes rape in marriage. Rule 19 of the *Crimes, Procedure and Evidence Rules 2003* provides for the offence of unlawful carnal knowledge which includes sex without consent or with consent that has been extorted by threats or bodily harm or obtained by false representations as to the nature of the act.

### **2. Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

There are no laws prohibiting mandatory testing of groups.

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

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

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

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

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

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

Rule 13, 19 and 21 of the *Crimes, Procedure and Evidence Rules 2003* provide offences for abduction, unlawful carnal knowledge and indecent assault of children.

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

There is an equal age of consent (16) for heterosexual and homosexual acts. The law does not recognize same sex relationships.

## CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

**1. Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data?**

Complaints for breach of privacy could be made under the *Human Rights Rules 2003*. Article 17 of the ICCPR guarantees freedom from arbitrary interference with privacy, family, home and correspondence, and attacks on honour and reputation.

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

Disclosure of data without the consent of the person to whom the data relates may be a breach of the ICCPR privacy protection, giving rise to grounds for a complaint under the *Human Rights Rules 2003*.

Common law allows disclosure of medical records in exceptional public interest circumstances, such as to prevent injury to third parties.

There is no specific guarantee of confidentiality of information concerning infectious diseases in the *Health Rules 2003*. Rule 9 imposes obligations on occupiers of land and commanders of vessels to report suspicions of infectious disease. ‘Infectious disease’ is not defined.

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

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

There is no legislation.

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

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

There is no legislation.

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

There are no HIV specific laws. Common law generally requires courts to be open to the public. In exceptional circumstances, courts have discretion under common law to close hearings where there are public interest factors relating to ensuring a fair trial that outweigh the public interest in open court proceedings. The ICCPR includes the right to a fair and public hearing as well as the right to privacy.

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

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

## CHECKLIST 7 – EMPLOYMENT LAWS

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

HIV screening for employment is not prohibited.

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

Legislation does not prohibit mandatory testing of specific employment groups

3. **Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

Legislation does not specifically require implementation of universal infection control measures.

An employer's failure to provide effective infection control systems in health care workplaces may be a breach of common law duty of care to employees and patients.

4. **Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

Legislation does not specifically require provision of access to information and education about HIV.

5. **Does the law provide for:**

1. **Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
2. **Social security and other benefits where workers are no longer able to work?**

There are no specific social security laws. Tokelauans may have rights to social security payments from New Zealand.

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

Employees could make a complaint of violation of the right to privacy as guaranteed by Article 17 of the ICCPR. Privacy Legislation does not otherwise provide for confidentiality of employees' medical and personal information including HIV status.

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

Legislation does not recognize occupational transmission of HIV.

## CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

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

There is no legislation.

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

There is no legislation.

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

There is no legislation, however a consumer may have common law rights e.g for breach of contract.

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

There is no legislation.

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

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

There is no legislation.

- 6. Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?**

Tokelau is not independent and is not a WTO member. The *Patent Act 1953* (NZ) applies to Tokelau, and includes provision for compulsory licensing including government use of generic versions of patented medicines in the public health system. Parallel importing is also allowed under New Zealand law.

## **CHECKLIST 9 – ETHICAL HUMAN RESEARCH**

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

There are no specific legislative requirements in relation to research in Tokelau.

## CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

### 1. Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?

Complaints for breach of right to movement could be made under the *Human Rights Rules 2003*. Article 13 of the Universal Declaration of Human Rights guarantees freedom of movement.

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

Complaints for breach of the rights to assemble and associate could be made under the *Human Rights Rules 2003*. Article 20 of the Universal Declaration of Human Rights and Articles 21 and 22 of the ICCPR guarantee rights of assembly and association.

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

There are no exceptions for HIV information that contains sexually explicit information or images, although a defence may be available. There is a defence of ‘lawful excuse’ to the offence of exposing obscene documents to the public.

Rule 39 of the *Crimes, Procedure and Evidence Rules 2003* provides that it is an offence to knowingly and without lawful excuse—

- (i) sell or exposes for sale or to public view, an obscene or indecent book, picture, film, tape, photograph, document, or object or thing; or
- (ii) publicly exhibits an obscene or indecent show.

Any person who has in his or her possession an obscene or indecent book, picture, film, tape, photograph, document, or object, or thing, commits an offence under Rule 39.

‘Indecent or obscene documents or articles’ are also prohibited imports under the *Customs Regulations 1991*.

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

No broadcasting standards were identified.

### 5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:

- **Health care workers**
- **Other industries where there may be a risk of transmission, e.g. sex or funeral workers;**
- **Media;**
- **Superannuation and insurance;**
- **Employers (in a tripartite forum involving unions and government)?**

There is no legislation requiring professional groups to develop or enforce HIV Codes of Practice.

**6. Are such Codes of Practice required to contain the following elements:**

- **Confidentiality/privacy protections;**
- **Informed consent to HIV testing;**
- **Duty not to unfairly discriminate; and**
- **Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?**

No Codes are required by legislation.

## **SUMMARY AND RECOMMENDATIONS**

Tokelau's health, quarantine and immigration Rules are inappropriate for the management of HIV and STIs.

Legislation that provides for confidentiality of data relating to health status including test results would assist efforts to encourage people who may have been at risk to test for STIs and HIV.

The offences related to prostitution involving consenting adults in private contravene the human right to privacy guaranteed under the Universal Declaration of Human Rights.

The offence of abortion (miscarriage) contravenes the rights of women and girls to make their own reproductive choices.

It should be noted that prostitution and miscarriage offences were applied some time ago to Tokelau from New Zealand law, where they no longer apply.

Blood safety legislation is required.

Legislation to ensure that condoms comply with international quality standards is required.

Legislation that requires the teaching of sex education and STI/HIV prevention in schools within the context of life skills education would help prevention efforts.