

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Cook Islands

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

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Introduction and methodology

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

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

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

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

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

¹ See <http://www.ohchr.org/english/issues/hiv/guidelines.htm> for the full text of the consolidated Guidelines.

² UNAIDS/IPU. Geneva, 1999.

Human rights principles

The principles of Human Rights relevant to HIV include—

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

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

Background⁴

Only one person is currently known to be living with HIV in the Cook Islands. This person was originally diagnosed in Fiji. A study in pregnant women in the late 1990s found a chlamydia prevalence of 12%.

There is a high rate of emigration, mainly to New Zealand, resulting in a declining population. Two thirds of the indigenous population live in other countries, and a considerable number travel. The islands receive high numbers of visiting tourists, and sex tourism exists. The islands are scattered over a large area, and there is inadequate infrastructure. There are high rates of teenage pregnancies, and low rates of condom use. Culture and religion are barriers to open discussion of sexuality and sexual health. The health care system operates on a user-pays basis for people between 16-60 years of age. Health care in Rarotonga is excellent, but not for the outer islands. There is a hospital on Rarotonga only.

³ See Consolidated Guidelines paras 102-103.

⁴ Information based on – Institute of Justice and Applied Legal Studies (IJALS) n.d. *The Pacific HIV/AIDS Law, Ethics and Human Rights Implementation Strategy Report* Suva, Fiji Islands; Pacific Regional HIV/AIDS Project (2005a) *HIV/AIDS situation and responses in seven Pacific Island Countries* Suva, January 2005; Pacific Regional HIV/AIDS Project (2005b) *Review of National AIDS Coordination Mechanisms in Pacific Island Countries* Final Draft Report Suva, December 2005; United States of America, Central Intelligence Agency *World Factbook* <<https://www.cia.gov/cia/publications/factbook/geos/cw.html>>; WHO (2006) *Country Health Information Profiles* <<http://www.wpro.who.int/countries/cok/>>

Legal system⁵

Cook Islands legal system consists of Anglo-New Zealand common law with a mixture of locally-enacted statutes: Acts, pre-self government Ordinances, specifically adopted New Zealand statutes, some old Acts of the British Parliament, English common law and equity, and customary law for determining land titles. The High Court is the first superior court of record. Appeals lie to the Court of Appeal. The Privy Council hears both civil and criminal appeals from the Court of Appeal.

The Ombudsman appointed under the *Ombudsman Act 1984* may investigate any decision or recommendation made, or act done or omitted relating to a matter of administration by government Departments, Ministries or statutory bodies.

International obligations

Cook Islands is not a sovereign nation and therefore not a member of the United Nations. It is a party to the Convention on the Rights of the Child and to the Convention on the Elimination of All Forms of Discrimination Against Women, via its free association with New Zealand.

HIV policy framework

Cook Islands has a *National Strategic Plan 2004-2008 for HIV/AIDS*. The five priority areas of the NSP are: Prevention of transmission of HIV; Prevention & control of other STIs; Infection Control & Blood Safety; Treatment, care & support for people living with HIV; and Management, Advocacy & Coordination.

A new policy is in draft form that will integrate HIV into an STI Policy (*National Policy and Priority Strategies For Prevention and Control of Sexually Transmitted Infections 2009*). The draft states the following principal strategies:

1. STI Response Structure
2. STI Resources
3. Health Education and Human Resource Development
4. Prevention, Treatment and Care
5. STI Monitoring and Research
6. Protection of People Living with HIV and AIDS

The draft states that the Ministry of Health, in collaboration with other national and international institutions, shall work to ensure that international human rights standards, including gender equality, are met in undertaking actions carried out under this policy, and that discrimination based on HIV status, whether actual or inferred, does not occur. The draft states that respect for international human rights standards will be a paramount consideration.

Cook Islands has established a National AIDS Council, with its secretariat in the Ministry of Health. The Red Cross is the designated Capacity Development Organisation.⁶ The National AIDS Council is

⁵ Information on court and legal systems was derived from Pacific Islands Legal Information Institute www.paclii.org

⁶ Pacific Regional HIV/AIDS Project (2005) *Review of National AIDS Coordination Mechanisms in Pacific Island Countries* Final Draft Report Suva, December 2005

responsible for coordinating the national response and also serves as the country coordinating mechanism for the Global Fund to fight AIDS, Tuberculosis and Malaria project in the Cook Islands. The Council is multi-sectoral, with representation from different government ministries, NGOs, traditional leaders, the police, and the Airport Authority. It meets every quarter to discuss HIV related issues and policy matters, including World AIDS Day events.

CHECKLIST 1 – PUBLIC HEALTH LAW

Schedule 2 of the *Public Health Act 2004* declares that HIV and AIDS are both transmissible notifiable conditions and dangerous conditions.

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 provision of comprehensive HIV and STI prevention and treatment services.

The Secretary of Health must establish and implement a programme to educate the public for the purpose of encouraging and fostering compliance with the *Public Health Act 2004* (Section 135). The Act does not however require HIV prevention and care except referral to counselling. A medical practitioner who forms the opinion that a person has a notifiable medical condition is required under Section 80 of the *Public Health Act 2004* to advise the person on precautions to prevent transmission, and advise the person on the desirability of counselling. This constitutes limited authorisation to provide information and education, but does not satisfy the requirement of providing comprehensive information and education.

2. Does the legislation:

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

There is no legislative requirement of 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. Exceptions to individual testing with informed consent do not require judicial authorisation. The *Public Health Act* Section 102 provides that where the Director of Health or the Port Health Officer has reasonable grounds to suspect a person is infected with a dangerous condition, which includes HIV/AIDS, he may at any time direct the person to present for a medical examination. Failure to comply is an offence under Section 130. This provision appears to be sufficiently broad in scope to encompass compulsory HIV testing.

Prison regulations require prisoners to undergo a medical examination as soon as possible after admission.⁷ It was unclear from information available at the time of writing whether such medical examinations include compulsory HIV testing.

⁷ UNDP communication, January 2007

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?

Under the *Public Health Act 2004* Section 106 a person may be detained in any place if the official believes on reasonable grounds -

- (a) That the person is infected with a dangerous condition (defined to include HIV); and
- (b) That such detention is necessary to prevent the transmission of the condition from that person.

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

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

The *Public Health Act 2004* requires fixed periods of detention in that no person may be detained or kept in custody under Section 106 for a period exceeding 48 hours, except by a Court order made under Section 109 (which may extend to 30 days subject to review).

The Act does not provide for rights of review and appeal but preserves rights of judicial review under common law and equity, and appeal against court orders provided by other legislation. The *Cook Islands Act 1915* (NZ) Section 116 provides for a writ of habeas corpus for unlawful detention.

The Act does not provide for reasonable notice of case to the individual. There is a requirement to provide notice prior to a Court hearing to extend the detention period under Section 109, but not prior to a health officer exercising initial powers of detention under Section 106. There are no rights of legal representation.

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?**

Public Health Act 2004 Section 82 provides that a person who is or believes he or she is infected must take all precautions to prevent transmission, including advising everyone who is or may be at risk that the person believes himself or herself to be infected. Section 87 of the Act empowers the relevant authority to disclose information about a person's condition where disclosure is necessary to prevent or

lessen a serious and imminent danger to the life or health of the person concerned or another person. There is no requirement of graded interventions as specified in Question 4.

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

No blood safety legislation was identified.

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 not considered a risk factor for HIV in Cook Islands. Laws do not enable operation of needle and syringe programs. The *Narcotics Act 1965* (New Zealand) is extended to Cook Islands. It prohibits the importation, exportation, manufacture, sale distribution, use and possession of scheduled narcotics.

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

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

Homosexual acts e.g. sodomy

Sections 154 and 155 of the *Crimes Act 1969* provide offences of indecency between males, and sodomy. Consent is not a defence. It is an offence under Section 159 to keep a place of resort for homosexual or indecent acts. These provisions are inconsistent with the *International Guidelines*.

Fornication or adultery

Fornication and adultery are not illegal.

Street sex work

Under Section 163 of the *Crimes Act 1969* it is an offence for “any common prostitute who loiters and importunes passengers or other persons in any public place for the purpose of prostitution”. The male client does not commit any offence. These provisions are inconsistent with the *International Guidelines*.

It is likely that sex tourism is increasing in the Cook Islands.⁸

Brothel or escort sex work?

Sections 160-162 of the *Crimes Act 1969* provide offences of brothel-keeping, living on the earnings of prostitution, and procuring for the purposes of prostitution. These offences would apply to any ancillary workers involved in running an escort sex work business.

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)?**

⁸ UNDP communication, January 2007.

There are no exceptions for HIV prevention and care services, such as evidentiary immunity for carrying condoms in the prosecution of sex work offences. This is inconsistent with the *International Guidelines*.

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)?

Cook Islands law does not regulate health and safety conditions 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)?

At the time of writing there was insufficient information available to assess the degree of compliance with this requirement.

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

The *Crimes Act 1969*, Section 223 provides:

Infecting with disease - Every one is liable to imprisonment for a term not exceeding fourteen years who wilfully and without lawful justification or excuse, causes or produces in any other person any disease or sickness.

Under the *Public Health Act 2004*, a person who is or believes he or she is infected must, under Section 82, take all precautions to prevent transmission, including advising everyone who is or may be at risk of precautions to be taken to avoid infection. Under Section 84, a person engaging in an activity that the person knows or reasonably ought to know carries a risk of contracting the infection must take all precautions to avoid contracting the condition. Failure to comply with these requirements is an offence under Section 130.

These are generic rather than HIV-specific offences, and are consistent with the *International Guidelines*.

CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

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

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

The *Prisons Act 1967* was not available for review. Prisoners serving more than 6 months may be removed to a New Zealand prison.

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?

The *Crimes Act 1969* does not recognise the rape of a male as a crime, hence that particular law does not provide for the protection of prisoners from rape. No other information regarding relevant laws, regulations, or policies was available at the time of writing.

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

At the time of writing, there was insufficient information available to assess compliance with this requirement.

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

At the time of writing, there was insufficient information available to assess compliance with this requirement.

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?

At the time of writing, there was insufficient information available to assess compliance with this requirement.

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

Cook Islands law does not prohibit discrimination on the ground of HIV status. No other information regarding relevant laws, regulations, or policies was available at the time of writing.

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Discrimination on the grounds of disability or HIV is not prohibited. Section 64 of the *Constitution* provides for the following rights:

- The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;
- The right of the individual to equality before the law and to the protection of the law;
- Freedom of thought, conscience, and religion;
- Freedom of speech and expression;
- Freedom of peaceful assembly and association.

The fundamental rights and freedoms in the *Constitution* are declared by Section 64(1) to exist without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex.

Rights and freedoms may be limited by an enactment or rule of law so as not to infringe the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.

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?

The *Constitution* prohibits discrimination on the ground of sex, but not on the grounds of homosexuality, sexual identity or transgender status.

The *Race Relations Act 1972* prohibits various discriminatory actions (access to public places and facilities, provision of goods and services, employment, land, housing, and accommodation) on the grounds of the colour, race, or ethnic or national origins of that person or of any relative or associate of that person. Refusing access to a place, vehicle or facility is also a criminal offence. It is also an offence to incite racial disharmony.

3. Does the legislation contain the following substantive features:

- Coverage of direct and indirect discrimination;
- Coverage of those presumed to be infected, as well as carers, partners, family, or associates;
- Coverage of vilification;
- The ground complained of only needs to be one of several reasons for the discriminatory act;
- Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data);
- Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)?

There is no HIV or disability discrimination legislation.

4. 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 Ombudsman may have some scope to investigate HIV discrimination as misconduct by a public office. The Ombudsman appointed under the Cook Islands *Ombudsman Act 1984* may investigate, either on complaint or of his own motion, any decision or recommendation made, or act done or omitted relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by government Departments and Ministries, or statutory bodies, or officers of them. However, the Ombudsman is not authorised to investigate any matter for which there is a statutory right of appeal, objection or application for review to any court or tribunal except in certain special circumstances; or any matter the subject of a police enquiry into its members.

5. 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?**

The Ombudsman does not administer anti-discrimination legislation in the Cook Islands.

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?

Historically men dominated some aspects of society and this is reflected in custom. Property and family legislation increasingly promotes gender equality.

Ownership of property and inheritance⁹

Cook Islands Act 1915(NZ), Section 422 provides that 'Every title to and interest in customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands'. Customary laws may disadvantage women. The role of women in traditional land tenure was very limited. However, when the Land Court was established , it was legislated that women could inherit land and properties equally with men. In Mangaia in the 1980s traditional land tenure still prevailed and women were not recognised as having any significant land rights. Matters dealing with land are either discussed in the Land Court or at family meetings, in which women take active part.

Marital relations e.g. divorce and custody

Matrimonial Property Act 1976 (NZ) applies in the Cook Islands. The Act promotes equality of women in marital relations. The Act aims to put the parties in the same position by dividing matrimonial property equally. The Act may disadvantage women in some circumstances as it treats ex-partners similarly even though they do not have the same future capacity to earn income.

Capacity to enter into contracts, mortgages, credit and finance

There are no legal impediments to women entering contracts, or accessing mortgages, credit and finance. However there are no anti-discrimination protections for women in these areas.

Access to reproductive and STD health information services

Abortion is illegal under Sections 202-207 of the *Crimes Act 1969*. The only defence is use of means employed in good faith for the preservation of the life of the mother. Although these provisions provide

⁹ See: A Singh (2001) *Philosophical Perceptions of Pacific Property: Women and Land Tenure*
http://www.prrs.net/papers/Singh_Philosophical_Perceptions_of_Pacific_Property.pdf

some measure of choice in extreme circumstances (i.e. where the life of the mother is threatened), the extremity of the situation required to exercise choice is inconsistent with the *International Guidelines*.¹⁰

Protection from sexual violence, including rape in marriage

The offence of rape is committed by a male on a woman or girl under Section 141(1) of the *Crimes Act 1969*. However, no man can be convicted of rape against his wife unless there is a decree nisi of divorce or nullity, or a decree of judicial separation or a separation order. The law does not otherwise recognise the crime of rape where the perpetrator is married to the woman or the girl. The law also does not recognise rape of a male as a crime.

Recognition of de facto relationships

De facto relationships are not recognised by law.

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?

The *Public Health Act* Section 102 provides that where the Director of Health or the Port Health Officer has reasonable grounds to suspect a person is infected with a dangerous condition, which includes HIV/AIDS, he may at any time direct the person to present for a medical examination. Failure to comply is an offence under Section 130. The legislation does not prohibit the mandatory testing of targeted or vulnerable groups, and the power accorded authorities by Section 130 could be used for such a purpose.

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

Cook Islands law does not require children to be provided with age-appropriate information, education and 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?**

Cook Islands law does not enable children to be involved in decision-making in line with their evolving capacities in regard to consent to voluntary counselling with pre- and post-test counselling 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?

¹⁰ See Consolidated Guidelines, paragraph 60(f).

The Cook Islands *Crimes Act* creates a specific offence of assaults on children under 14 years.

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?

Cook Islands law does not recognise consent to male homosexual acts, and does not recognise same sex relationships. The *Marriage Amendment Act 2007* provides that no person shall be permitted to marry another person who is of the same gender as him or herself.

CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

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

There is no general Constitutional or legislative right to privacy for medical or personal information, however there is a legal duty to protect the privacy of HIV-related information. Section 87 of the *Public Health Act 2004* prohibits any person from disclosing information regarding transmissible notifiable conditions (which include HIV and AIDS), regardless of whether the information is true or not, and whether the person is no longer alive, except for various official purposes, or if the disclosure is rendered anonymous, or an 'office-holder' (the Secretary, the Port Health Officer or the Director of Health) authorises it, or the disclosure is necessary to prevent or lessen a serious and imminent danger to the life or health of the person concerned or another person.

The *Immigration Act* requires any person entering Cook Islands to declare whether they have suffered from any infectious or contagious disease in the past year. This is inconsistent with the right to privacy regarding one's HIV status, as provided for in the *International Guidelines*.

A person who is or believes he or she is infected must, under Section 82 of the *Public Health Act*, take all precautions to prevent transmission, including advising everyone who is or may be at risk that the person believes himself or herself to be infected. Failure to comply with this requirement is an offence under Section 130 of the Act. The requirement to disclose one's HIV status, rather than ensure protective measures are employed where there is a risk of HIV transmission, is inconsistent with the right to privacy, as provided for in the *International Guidelines*.

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

The *Public Health Act 2004* prohibits the unauthorised use and disclosure of HIV-related information.

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?

The privacy protections in the *Public Health Act 2004* do not provide for the above rights, hence this requirement is not satisfied.

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?

As there is no general privacy legislation in Cook Islands, there is no independent agency to administer privacy legislation.

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

There is an exemption to the requirement of non-disclosure of HIV status in the *Public Health Act* Section 87 "for the conduct of proceedings before any Court." Common law generally requires courts to be open. Judges have discretion under common law to close hearings or restrict publication where there are public interest factors (e.g. relating to ensuring a fair trial), outweighing the public interest in open court proceedings.

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

Section 80 of the *Public Health Act 2004* requires a medical practitioner who forms an opinion that a person has a transmissible notifiable condition (which includes both HIV and AIDS) to notify the Director of Health. Section 81 requires the medical practitioner to also notify after examining human remains. Section 87, prohibits any person from disclosing information regarding transmissible notifiable conditions, regardless of whether the information is true or not, and whether the person is no longer alive, except for various official purposes, or the disclosure is rendered anonymous, or an 'office-holder' authorises it, or the disclosure is necessary to prevent or lessen a serious and imminent danger to the life or health of the person concerned or another person. These provisions provide some measure of privacy protection by prohibiting disclosure of information except for official purposes, however it does not stipulate that HIV and AIDS cases reported to public health authorities for epidemiological purposes be reported in coded form.

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 general employment purposes is not specifically prohibited by Cook Islands law.

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

Cook Islands law does not prohibit mandatory HIV testing, and provides that where the Director of Health or the Port Health Officer has reasonable grounds to suspect is infected with a dangerous condition, which includes HIV and AIDS, he may at any time direct the person to present for a medical examination. Failure to comply is an offence under Section 130. This power could be used implement mandatory HIV 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?**

Section 83(2) of the *Public Health Act 2004* requires a person responsible for the care of another person that the former believes or suspects to be infected with a transmissible notifiable condition to take all precautions to prevent transmission of the condition to others. This affects the families and caregivers of people with HIV, as well as health care professionals. Failure to comply with Section 83(2) is an offence under Section 130 of the Act. This provision does not comply with the requirement of universal infection control measures, as it only applies where the carer knows or suspects that the person for whom they are providing care has a transmissible notifiable disease.

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?**

Cook Islands legislation does not require provision of access to information and education about HIV for occupational health and safety reasons, e.g. workers travelling in areas of high incidence.

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?**

Employment security

Cook Islands law does not prohibit unfair dismissal of HIV-positive workers who are able to work.

Social security

The *Welfare Act 1989* provides for child benefits, old age pensions for people over 60 years of age, and benefits for destitute and infirm persons as decided by a committee. Cook Islanders also have access to New Zealand welfare benefits.

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

The *Public Health Act 2004* at Part 11, Section 87, prohibits any person from disclosing information regarding transmissible notifiable conditions, regardless of whether the information is true or not, and whether the person is no longer alive, except for various official purposes, or the disclosure is rendered anonymous, or an office-holder (the Secretary, the Port Health Officer or the Director of Health) authorises it, or the disclosure is necessary to prevent or lessen a serious and imminent danger to the life or health of the person concerned or another person. The information available at the time of writing did not make clear the scope of the exemption from the duty of confidentiality "for various official purposes". Section 87 may provide protection for the confidentiality of HIV-related information in the context of employment, depending on the scope of this exemption.

There is nothing in Cook Islands employment law requiring employers to protect the confidentiality of employees' medical and personal information including HIV status. There is a general duty of confidentiality regarding HIV information in Section 87 of the *Public Health Act 2004*, which prohibits any person from disclosing information regarding transmissible notifiable conditions (which include HIV and AIDS), however it is not clear whether any of the exceptions in Section 87 apply in the context of employment.

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

The *Cook Islands Workers Compensation Ordinance 1964* does not recognize HIV transmission.

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 was insufficient information available at the time of writing to assess the degree of compliance with this requirement.

- 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 was insufficient information available at the time of writing to assess the degree of compliance with this requirement.

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

There was insufficient information available at the time of writing to assess the degree of compliance with this requirement.

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

There was insufficient information available at the time of writing to assess the degree of compliance with this requirement.

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

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

No legislation was identified that ensures access to HIV and STI prevention measures.

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

Cook Islands has no patents legislation.

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?**

No legislation relating to research was identified.

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?

Because of the criminal status of sex work and related activities, and the criminal status of sex between men, the law in Cook Islands does not enable the unrestricted movement of people because of their membership of vulnerable groups. Both sex workers and men who have sex with other men are subject to arrest if their status becomes known to law enforcement authorities.

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

Please see the response to Question 1 above. The same legal provisions which can impede the unrestricted movement of people because of their membership of vulnerable groups such as sex workers, and gay men or other men who have sex with men, also impede the association between the members of those groups. Because of the illegal status of their behaviours, sex workers and men who have sex with men risk arrest and prosecution if they form associations or groups.

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

The *Films and Censorship Act 1985* permits classification of films and documents. Films may be refused screening if they depict any matter which is contrary to public order or is indecent or the exhibition of which would for any other reason be undesirable in the public interest. Documents may be classified as indecent. The censor may on application exempt any film from censorship requirements on given grounds including educational and instructional purposes. The wording of the exception is sufficiently broad to encompass HIV-related materials, and a strong argument could be made on the grounds of education and instruction.

Sections 135-139 of the *Crimes Act 1989* deal with the distribution of indecent matter, the doing of indecent acts in public, prints, exhibits, and indecent documents. A defence of the public good is available. No-one may be prosecuted for an offence in relation to indecent documents without the leave of the Minister for Justice. The wording of the exception is sufficiently broad to encompass HIV-related materials, and a strong argument could be made on the ground of public good.

The *Customs Import Prohibition (Indecent Documents) Order 1980* prohibits the importation of all indecent documents within the meaning of the *Crimes Act 1969*, and all other indecent or obscene articles. There is no exception for information and education materials, or for acts done in the public good.

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)?**

No laws require professional groups to develop and enforce appropriate HIV/AIDS 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 of Practice are required.

SUMMARY AND RECOMMENDATIONS

Public health law

More comprehensive public health legislation is required to address the range of issues raised by HIV, including: provision of HIV services by public health authorities; ensuring voluntary informed consent to testing with counselling where the person will receive their test result, and the requirement of judicial approval for any exceptions; appropriate limits on the use of coercive powers; and a requirement to use graded interventions, beginning with the least intrusive, in cases where a person with HIV is suspected of placing others at risk of infection. Legislation is required for screening of the blood supply for HIV.

Criminal law

Reforms which would contribute to a more enabling environment for the response to HIV include:

- Decriminalisation of sex work, or ensuring that laws against sex work do not impede the provision of HIV prevention, treatment, and care interventions (such as evidentiary immunity for the carrying condoms);
- Decriminalisation of consensual sex between men in private, to comply with international human rights standards and to facilitate access by men who have sex with men to HIV prevention, treatment, and care interventions.
- The criminalisation of abortion is contrary to human rights protections concerning the sexual and reproductive rights of women, as discussed in Guideline 8 of the *International Guidelines* and should be decriminalised.

Prisons/correctional laws

More information is needed to properly assess this area of law against the standards in the *International Guidelines*, in particular laws concerning: provision of HIV-related services and information in prisons; confidentiality protections for prisoners' personal information including HIV status; whether prisoners are segregated merely on the basis of their HIV status; and provision for medical conditions such as AIDS as grounds for compassionate early release or diversion to alternatives other than incarceration. Amendment of the rape law to penalise rape against males would provide some measure of protection against sexual violence capable of causing HIV transmission. Anti-discrimination legislation should protect the right of HIV-positive prisoners to equal access to facilities and privileges.

Anti-discrimination legislation

Legislation should be enacted to prohibit discrimination based on HIV status, or based on membership of a group made vulnerable, or believed to be vulnerable, to HIV infection. Discrimination on the grounds of gender, sexuality or sexual orientation, and transgender status should be unlawful.

Equality of legal status of vulnerable populations

Cook Islands law provides specific criminal offences for assaults on children under the age of 14, in line with the standards in the *International Guidelines* regarding protection of children from abuse and exploitation. Reforms that would contribute to a more enabling legal environment include:

- Amending the rape law to recognise rape in marriage, and rape of males;
- Amending the *Public Health Act 2004* to prohibit mandatory testing of targeted populations or vulnerable groups, to enable the provision of age-appropriate information, education, and means of HIV prevention, to enable children and adolescents to be involved in decision-making in line with

their evolving capacities regarding consent to voluntary testing with counselling and access to confidential sexual and reproductive health services.

- Decriminalising male homosexual acts, and recognising same sex relationships.

Privacy/confidentiality laws

The *Public Health Act 2004* imposes a duty of confidentiality in relation to information about transmissible notifiable diseases (including HIV). Exemptions to the duty of confidentiality include when disclosure is authorised by any one of three “office holders”. Further information is needed regarding the grounds on which such authorisations are or can be given, before determining the appropriateness of this exemption.

The requirement in the *Immigration Act* that all people entering Cook Islands disclose their HIV status is contrary to the right to privacy and to the *International Guidelines*, and should be repealed.

Privacy legislation should provide for a right of access to one’s own personal data, and the right to correct or update incorrect or outdated information. The *Public Health Act 2004* should be amended to clarify that HIV-positive people involved in court proceedings have a right to apply for a hearing in camera, or for the suppression of information that would allow them to be publicly identified as HIV-positive. The Act should also be amended to require notification of HIV and AIDS cases to public health authorities in coded rather than nominal form, to enhance privacy protection.

Employment laws

Employment legislation should be enacted to protect the confidentiality of employees’ personal information including information about HIV status held by employers, prohibit the mandatory testing of specific employment groups, provide HIV information to workers travelling to areas of high HIV prevalence, to protect workers against unfair dismissal on the ground of their HIV-positive status.

Therapeutic goods, consumer protection laws

Insufficient information was available to assess laws concerning the quality and availability of HIV test kits, requirements of safety and efficacy for sale and distribution of pharmaceuticals, vaccines, and medical devices, protection of consumers against fraudulent claims regarding these same products, regulation of the quality of condoms, access to the means of HIV prevention such as condoms, bleach, and sterile injecting equipment, and access to affordable treatments for HIV infection and related conditions.

Ethical human research

Legislation is required concerning protection of the human rights of human subjects in HIV research..

Association, information, codes of practice

Reforms to laws in several areas could enhance the legal environment in the response to HIV:

- Decriminalise sex work and sex between men, to respect the rights of freedom of movement and association of these vulnerable groups;
- Amend the *Films Censorship Act 1985*, the sections of the *Crimes Act 1989* to ensure they do not impede effective HIV information and education;
- Amend the *Customs Import Prohibition (Indecent Documents) Order 1980* to exempt HIV information and education materials from the censorship provisions.

