

HIV, ETHICS AND HUMAN RIGHTS

Review of legislation of Nauru

**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 Nauru. 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 2006.¹

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

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

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

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

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

² UNAIDS/IPU. Geneva, 1999.

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

Human rights principles

The principles of Human Rights relevant to HIV include—

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

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

Background⁴

There have been two reported cases of HIV in Nauru. Both involved foreigners. One case was identified through the routine testing of contract workers for HIV that resulted in the deportation of an Air Nauru flight attendant from Guam who tested positive for HIV. The other case involved a Senegalese fisherman who was hospitalized and died on the island.

STIs are thought to be highly prevalent. The majority of people with STIs do not seek treatment from health services. High levels of alcohol use may contribute to sexual risk taking. Women have low access to education and family planning. Although there is no

³ See *Consolidated Guidelines* paras 102-103.

⁴ C Jenkins (2005) *HIV/AIDS in the Pacific* ADB Manila.

national data regarding the sexual behaviour of young people, there is anecdotal evidence that youth become sexually active at an early age. Frequent travel by Nauruans could bring them in contact with HIV. Lack of awareness of HIV and knowledge of prevention places Nauruans at risk.

Exhaustion of phosphate reserves has transformed Nauru from a wealthy society to an increasingly poor society. Unemployment is estimated to be 90%. The economic crisis means that there is little attention to HIV issues.

There is one hospital accessible to all, several doctors, little specialist treatment, and limited access to drugs. Most health care workers were contracted from other Pacific Island countries and being repatriated due to the economic situation.

Legal system⁵

The law comprises pre-Independence Ordinances adopted at Independence, post-Independence Acts of the Nauruan Parliament and British common law. A District Court with a Resident Magistrate has limited civil and criminal jurisdiction. The Supreme Court is constituted by a visiting Chief Justice. Appeals may be taken by the Australian High Court in some circumstances. There is a Family Court which conducts business in closed court. Many cases never reach the formal legal process, since traditional reconciliation is often used. The Public Service Appeal Board is presided over by the Chief Justice.

The *Constitution* provides the following human rights protections:

Article 5: no person may be deprived of liberty except as authorised by law in various circumstances, including for the purpose of preventing the spread of disease.

Article 7: no person shall be subjected to torture or to treatment or punishment that is inhuman or degrading.

Article 9: no person shall without consent be subject to the search of person or property or the entry on his premises by other persons, except as authorised by law when reasonably required in the interests of, inter alia, public health.

Other rights and freedoms are:

- protection of the law
- freedom of conscience
- freedom of expression
- freedom of assembly and association.

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

The *Constitution* is based largely on the European Convention on Human Rights. Most of the rights are qualified by lists of exceptions. Part II does not expressly state whether the listed rights and freedoms can be enforced only against the state or also between private individuals, but it appears that some of the rights provisions do apply to the actions of private persons.

The Constitutional Review Commission reported in 2007 with a list of recommended amendments to the Constitution that would significantly strengthen human rights protections.⁶

International obligations

Nauru is a member of the UN. Nauru ratified the Convention on the Rights of the Child in 1994.

HIV policy framework

Nauru has a National Strategic Plan on HIV/AIDS which is not yet endorsed. The Plan has six priority areas—

- coordinating the response
- safe blood supply
- infection control
- testing for HIV
- reduced vulnerability
- care and support for people living with HIV/AIDS, their families and carers.

The Department of Health is the lead agency, and Ministerial responsibility is with the Minister for Health. In 1999 the multi-sectoral AIDS Task Force of four people with a number of advisers was formed, under the instruction of the President. The AIDS Task Force meets irregularly. The Government ministries, the churches, and civil society participated in a workshop held in December 1999 that formulated the National Strategic Plan. Department of Health prevention activities have largely centred on World AIDS Day.

The national response is increasingly shaped by Nauru's participation in the Global Fund to Fight AIDS, Tuberculosis and Malaria Western Pacific Multi-Country Round 7 grant, which provides access to regional resources. There are funds for an HIV and STI Coordinator to be employed to coordinate the national HIV response and to undertake planning and monitoring.

⁶ Nauru Constitutional Review Commission (2007) *"Naoero Ituga" Report*, Yaren Nauru

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 HIV or STI specific public health legislation. The *Public Health Ordinance 1967* regulates public provision of health services.

The Constitutional Review Commission recommended in 2007 that a right to health services be introduced into the Constitution in the following terms:

13C(1) Everyone has the right to access basic health services, including maternity and related care for every woman.

(2) The government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, and to progressively improve the standard of health services.

If this proposal is accepted, it will be important to clarify that HIV and STI prevention, treatment and care are considered to fall within the definition of “basic 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?**

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

Section 5 of the *Immigration Act 1999* provides for the medical testing of intending immigrants. If a person does not consent to testing they are a prohibited immigrant. Section 10 provides that a person suffering from a contagious or infectious disease such that presence in Nauru presents a danger to the community is a prohibited immigrant. It is not known whether HIV is considered a contagious or infectious disease under the Act.

Contract workers and pregnant women are generally screened for HIV.

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

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

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

The *Notification of Infectious and Contagious Diseases Ordinance 1923* requires Masters of arriving vessels to report cases of venereal disease on board, and prevent the sufferers from disembarking except for the purpose of admission to hospital. Persons suffering from venereal disease must submit themselves for treatment and may be detained in hospital until cured or leaving Nauru.

There are no provisions for:

- reasonable notice of case to the individual;
- fixed periods of duration of restrictive orders (i.e. not indefinite);
- right of legal representation
- rights of appeal or review.

- 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?**

The *Notification of Infectious and Contagious Diseases Ordinance 1923* requires infectious and contagious diseases, including venereal diseases, to be reported within 24 hours to authorities. Reports of venereal diseases may be recorded by number or other private designation and names may be kept in a private roster.

There is no legislation relating to contact tracing of sexual contacts of people living with HIV, or defining the criteria to be applied by health care workers or the Department of Health before notifying sexual partners of a person's HIV or STI status.

English common law applies, which generally requires medical confidentiality to be maintained, but may allow disclosure in the public interest in circumstances where there is a substantial or significant physical risk to others. The common law has not defined the steps that need to be taken prior to disclosure of HIV status. The common law is ambiguous on these issues (*W v Egdell* [1990] 1 All ER 835; *X v. Y* [1988] All ER 648). Legislation would be helpful to clarify how health care workers should balance their duty of confidentiality to people living with HIV and their duty of care to third parties such as sexual partners.

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. HIV testing is carried out on donated blood.

CHECKLIST 2 – CRIMINAL LAW

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

No reports of injecting drug use in Nauru were found, so legislation relating to needles and syringes is not considered necessary. *Dangerous Drugs Ordinance 1952-1967* prohibits the import, export, making or disposal of a wide range of narcotic drugs.

- 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

Nauru adopted the *Criminal Code* of Queensland by adoption of the First Schedule to the *Criminal Code Act 1899* (Qld.) under the *Laws Repeal and Adopting Ordinance No.8 of 1922*.

Homosexual acts are criminal offences. The *Criminal Code* states the offences of having carnal knowledge against the order of nature, permitting a male person to have carnal knowledge against the order of nature (Section 208); attempts (Section 209); and indecent practices between males (Section 211).

Article 3 of the *Constitution* contains a reference to the right to respect for private life. The right to privacy has been interpreted in international human rights law to include rights for homosexual adults to have consensual sex in private. However, the Supreme Court of Nauru considered the meaning of Article 3 in the case of *Dogabe Jeremiah v Nauru Local Government Council* [1970] *Nauru Law Reports*, 1969-82, Part A, p.11. The Court held that Article 3 ‘is clearly not intended to refer to any pre-existing rights and freedoms but only to those set out in detail in Articles 4 to 13’. There is no further reference to privacy as a stand-alone human right in Articles 4 to 13. The reference to respect for private life is merely an introductory provision and does not provide a substantive right enforceable by the Court.⁷ Therefore it is unlikely that Article 3 could be relied on to claim the right to privacy in sexual relations including male to make sex.

⁷ D Paterson (2000). Legal Challenges For Small Jurisdictions in Relation to Privacy, Freedom Of Information and Access to Justice *Journal of South Pacific Law* 4(4).

The Constitutional Review Commission recommended in 2007⁸ that new protections of rights to privacy and personal autonomy be introduced to the Constitution by way of a new clause stating that “all persons shall be free from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into their privacy.”

Fornication or adultery

Adultery is not grounds for divorce or compensation under the *Matrimonial Causes Act 1973*.

Street sex work, brothel or escort sex work

Criminal Code Sections 217, 218 and 220 provide offences of procuring a prostitute. Sections 231 and 235 prohibit the keeping of a house, room, set of rooms or place of any kind for purposes of prostitution.

A person who at the time of entry into Nauru is a reputed prostitute, or who is living on or receiving, or who prior to entering Nauru lived on or received, the proceeds of prostitution, is a prohibited immigrant under Section 10 of the *Immigration Act 1999*.

Soliciting does not appear to be a specific offence. *Police Offences Ordinance 1967* provides offences for indecent behaviour in public.

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 are no exceptions 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)?

⁸ Nauru Constitutional Review Commission (2007) “*Naoero Ituga*” Report, Yaren Nauru

Taking a child for immoral purposes and sexual acts under coercion are offences under the Criminal Code.

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

The law provides for general offences. The assault offences under the *Criminal Code* are sufficient to provide for prosecution of an offence of wilful transmission of HIV. The assault offences under the *Criminal Code* are—

- grievous bodily harm (Section 320)
- unlawful wounding (Section 323)
- assault occasioning bodily harm (Section 339).

The *Criminal Code* includes the year and a day rule at Section 299.

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)?**

Nauru has only one prison that is adjacent to the Central Police Station. The *Prison and Gaol Ordinance 1921* is archaic and requires significant amendments to reflect a more modern approach to managing risk within the Prison system.⁹ There are no provisions in legislation relating to HIV or STIs.

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?

Assault is an offence.

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

No provisions

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

Police / prison authorities have broad powers to separate prisoners.

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?

No provisions.

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

No provisions.

⁹ Nauru Police Force (2005) *Jurisdictional Report Information – Nauru, presented to Pacific Regional Heads of Prisons Meeting June 1-3, 2005, Brisbane Australia*

CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

There is no disability discrimination legislation or other laws protecting against discrimination on the grounds of HIV.

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

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 are only limited legal protections against discrimination for vulnerable groups.

Every person in Nauru is entitled to the rights and freedoms in the *Constitution*, whatever the person's race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest. This provides protection from discriminatory laws for women.

Article 14 provides that a right or freedom conferred under the *Constitution* is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom, and the Supreme Court may make such orders and declarations as are necessary or appropriate. The Supreme Court has final jurisdiction over matters concerning interpretation or effect of the *Constitution*, and no appeal lies to the High Court of Australia.

The Constitutional Review Commission recommended in 2007 that the Constitution be amended to provide that no law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender, race, colour, language, religion, political or other opinion, national or social origin, place of birth, age, disability, economic status, sexual orientation, family status or descent. This amendment would significantly strengthen the protection of vulnerable groups from discrimination.

- 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?**

Legislation does not provide these features.

- 4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:**
- **Education and promotion of human rights;**
 - **Advising government on human rights issues;**
 - **Monitoring compliance with domestic legislation and international treaties and norms;**
 - **Investigating, conciliating, resolving or arbitrating individual complaints;**
 - **Keeping data/statistics of cases and reporting on its activities?**

There is no Human Rights Commission or Ombudsman.

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

The Constitutional guarantee of equality under the law for women provides a means for challenging laws that discriminate against women.

Property and inheritance laws do not discriminate against women. Under the *Succession, Probate and Administration Act 1976*, if intestacy occurs, there is equal division between children. There is a power to appoint a Curator to administer intestate estates.

Nauruan customary laws concerning title to land (other than by lease), rights to transfer inter vivos or by will, and succession on intestacy are given statutory recognition by the *Custom and Adopted Laws Act 1971*. It is not suggested that customary property laws favour men, although custom is difficult to ascertain with certainty.¹⁰ Brothers and sisters share equally in succession. In the past, under custom, the eldest daughter was usually responsible for distribution of land between family members after a parent's death.

Under the *Administration Order no.3. 1938*, the immediate family of the deceased should meet to consider how a deceased estate is to be disposed of. An agreement, if one is reached, is given to the Nauru Lands Committee to notify in the Government Gazette. If there is no agreement, the Committee divides the land equally amongst the deceased's children and his wife (for her life-time only). If there are no children, the land goes to the wife.¹¹

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

¹⁰ P MacSporran. Land Ownership and Control In Nauru. (1995) *Murdoch University Electronic Journal of Law* 2(2);

¹¹ L Keke Land Tenure and Administration in Nauru. in Guy Powles and Mere Pulea (1988) *Pacific Courts and Legal Systems* Institute of Pacific Studies.

Women are treated equally under family law, however de facto relationships are not recognised.

Under the *Matrimonial Causes Act 1973* the only ground for divorce is that marriage has broken down irretrievably.

Spousal maintenance orders may be made “as the Court thinks reasonable having regard to the respective fortunes, if any, ability and conduct of the parties” (Section 31). The Court may make “such order as it thinks just” for the maintenance of education of children and such other maintenance sums “as the Court thinks reasonable” (Section 41).

Custody and access orders may be made under the *Guardianship of Children Act 1973*. The court has broad powers to make such orders as “it thinks fit” (Sections 14 and 16).

Access to reproductive and STD health information services

The law does not give women a right of non-discriminatory access to health services.

Criminal Code Sections 224, 225 and 226 prohibit the procuring of abortion and the supply of drugs or instruments for abortion.

Protection from sexual violence, including rape in marriage

Rape is an offence when committed by a man against a woman, not being his wife (*Criminal Code* Section 347). Rape in marriage is not criminalised.

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

There are no laws prohibiting mandatory testing of groups.

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

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

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

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

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

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

The *Criminal Offences Act* sections 121, 125, 129 provide offences for sexual assault (carnal knowledge and indecent assault) and abduction 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?

Homosexual acts are illegal at all ages. 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?**

There is no privacy or confidentiality legislation relating to medical records. Medical records are subject to common law confidentiality protections.

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

There is no legislation. Common law allows disclosure of medical records in limited public interest circumstances, such as to prevent injury to third parties.

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

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

There is no legislation.

The Constitutional Review Committee in 2007 recommended an amendment to introduce a right to information in the Constitution in the following terms:

13B.(1) Everyone has the right of access to information held by the government and its instrumentalities.

(2) As soon as practicable after the commencement of this Article, Parliament must enact legislation to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the government and to protect Cabinet confidentiality and sensitive information relating to foreign affairs or national security.

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

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

There is no legislation.

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

There are no HIV specific provisions. Court proceedings are generally in public but can be closed for the protection of the private lives of persons concerned. Article 10 of the *Constitution* provides:

(10) Except with the agreement of the parties thereto, proceedings of a court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(11) Nothing in clause (10) of this Article shall prevent the court or other authority from excluding from the hearing of the proceedings persons, other than the parties thereto and their legal representatives, to such extent as the court or other authority-

(a) is by law empowered to do and considers necessary or expedient in the interests of public morality or in circumstances where publicity would prejudice the interests of justice, the welfare of persons under the age of twenty years or the protection of the private lives of persons concerned in the proceedings; or

(b) is by law empowered or required to do in the interests of defence, public safety or public order.

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.

The Constitutional Review Commission Report in 2007 recommended that employment rights be stated in the Constitution, including that every person has the right to fair labour practices.

- 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/AIDS.

- 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. Nauru has Social Services Ordinances, which provide for an Invalids Pension the qualification for which is an 85% incapacity for work, or blindness. There are means and income tests. There is also a widow's benefit, a sickness benefit for those temporarily incapacitated by sickness or accident, and a Child Endowment scheme for children who are ill or infirm.

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

Legislation does not provide for confidentiality of employees' medical and personal information including HIV status.

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

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?

Complaints of professional misconduct can be made to a magistrate against a medical practitioner under the *Health Practitioners Act 1999*.

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)?

Nauru is not a member of the WTO. The *Patents Registration Act 1972* provides for the registration in Nauru of patents for which registration application has been made in

Australia, the United Kingdom or the USA. There is no provision for compulsory licensing or parallel importing of medicines.

CHECKLIST 9 – ETHICAL HUMAN RESEARCH

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

There is no legislation in relation to research.

- 2. Does the legislation require subjects to be provided before, during and after participation with:**
 - **Counselling**
 - **Protection from discrimination;**
 - **Health and support services?**

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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?

There is no general right to freedom of movement in the *Constitution* or legislation.

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

The Constitution provides a right to assemble and associate. This may be difficult to enforce in practice, particularly in the case of associations of sex workers or men who have sex with men, as aspects of sex work and homosexual behaviour remain crimes. Section 13 of the Constitution provides:

“(1) Persons have the right to assemble and associate peaceably and to form or belong to trade unions or other associations.

...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of this Article to the extent that that law makes provision that is reasonably required-

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for protecting the rights and freedoms of other persons.

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

There are no exceptions for HIV information that contains sexually explicit information or images, although a defence may be available that disseminating the information or image is for public benefit.

The *Cinematograph Censorship Ordinance 1927* requires all films for public display to be first submitted to a censor.

The *Criminal Code* prohibits the doing of indecent acts in public, and the sale, exhibition, making, producing, possessing, dealing in, exhibiting, lending, importing, exporting or circulating any obscene writing, drawing, print, painting, picture, poster, emblem, photograph or cinematograph film, or any other obscene object (Sections 227 and 228). Public benefit is a defence.

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

Adoption of recommendations of the 2007 Report of the Constitutional Review Commission would significantly improve the human rights context for HIV and STI responses. The Commission made important recommendations that would be helpful in supporting effective HIV and STI responses, in relation to introducing:

- the right to non-discrimination including on the grounds of disability, gender and sexual orientation,
- the right to health care, and
- the right to be free from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into their privacy.

The existing provisions of public health and immigration legislation are not suitable for management of HIV and AIDS. Public health legislation should be amended to introduce provisions for confidential notification of HIV and STIs, voluntary and confidential testing and counselling, contact tracing with consent, and right to access information about sexual and reproductive health and means of prevention of HIV and STIs.

The offences related to male-male sex and prostitution involving consenting adults in private, the gendered definition of rape, and the lack of provision for marital rape all contravene human rights. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices.

De facto relationships including same sex partnerships should be recognised by law. Blood safety laws should be introduced that require screening of donated blood for HIV and other blood borne viruses.

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

Patents legislation should be drafted that clarifies the legality of parallel importing and government use of generic medicines for non-commercial use in the health system.

Nauru's current crisis will seriously inhibit any ability on the part of the government to attend to HIV and sexual health.