

# **HIV, ETHICS AND HUMAN RIGHTS**

## **Review of legislation of Niue**

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

To assist parliamentarians and other 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*.<sup>2</sup> The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

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

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

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

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

<sup>2</sup> 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.<sup>3</sup>

## ***Background***<sup>4</sup>

There have been no reported cases of HIV infection in Niue. The population, estimated at 1,761 in 2004, continues to decline with substantial emigration to New Zealand. Infant and maternal mortality is low, while the prevalence of STIs and teenage pregnancy is high.

Many of the legislative measures that are recommended by the *Guidelines* to provide an enabling environment for HIV responses also facilitate improved responses to other STIs, and other aspects of sexual and reproductive health. Therefore they can significantly benefit communities that are yet to experience HIV, but are experiencing poor standards of sexual and reproductive health.

The only hospital was destroyed by cyclone in 2004. Community health outreach is maintained through village visits by public health nurses and regular village inspections by public health officers. Medical services are free for local residents; however, payment is required for some prescribed medicines.

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

<sup>4</sup> Information based on Pacific Regional HIV/AIDS Project (2005) *Review of National AIDS Coordination Mechanisms in Pacific Island Countries* Final Draft Report Suva, December 2005; Government of Niue *Millennium Development Goals (MDG) Report 2007*.

Niue's *Millennium Development Goals (MDG) Report 2007* made the following observations relating to HIV:

Contraceptives are not widely used unless prescribed by a doctor or a family planning nurse according to Government Policy Guidelines. Condom use on the other hand is promoted through Reproductive Health Awareness Programs conducted by the Health Department and the Niue Youth Council, which are cofounded by international donor agencies such as the WHO, UNDP, UNFPA, etc.

*Key Challenges*

- Niue should focus on the issue of keeping Niue free of HIV/AIDS, Malaria and TB.
- Low use of condoms by men as means of protection of sexual transmitted infections (STIs) is a serious concern.

## **Legal system**

Niue is self-governing in free association with New Zealand. Laws consist of Niue Acts; certain British and New Zealand Acts; common law; and customary law. Article 36 of the *Constitution of Niue*, which is created by Schedule 2 of the *Niue Constitution Act 1974* of New Zealand, allows the Niue Assembly to extend the provisions of New Zealand law to Niue, by resolution requesting and consenting to such extension.

The High Court has jurisdiction in civil and criminal matters. The Court of Appeal hears appeals from decisions of the High Court.<sup>5</sup>

There is no Bill of Rights or other statement of human rights in the Niue *Constitution* (which is a Schedule to the *Niue Constitution Act 1974* (NZ)). There is no acknowledgement of custom other than in relation to customary title to land.

## **International obligations**

Niue is a Member of the United Nations. It is a State party to the Convention on the Rights of the Child, and is bound by the Convention on the Elimination of all Forms of Discrimination Against Women by virtue of its free association with New Zealand.

## **HIV policy framework**

Niue does not have an HIV national strategic plan, and HIV is not mentioned in other policies or professional codes of conduct. The Ministry of Health has an HIV Co-ordinator and is responsible for implementing a National HIV and STI Policy and Action Plan.<sup>6</sup> The Education Department is responsible for integration of HIV education into the school curriculum and for promoting HIV education in partnership with Niue Youth Council. There are no other agencies or ancillary bodies with responsibility for HIV.

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<sup>5</sup> Information on court and legal systems derived from Pacific Islands Legal Information Institute <[www.paclii.org](http://www.paclii.org)>

<sup>6</sup> Government of Niue *MDG Report 2007*

## 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?

Section 61 of the *Constitution* of Niue provides that the Cabinet shall be responsible for establishing and maintaining such hospitals and other institutions and for providing such other services as it considers necessary for the public health.

Niue's public health legislation, the *Public Health Ordinance 1965*, includes provisions for notifiable infectious diseases at Part IV. These include venereal diseases and any other declared infectious disease. The *Public Health Ordinance 1965* makes no specific provisions regarding HIV.

2. Does the legislation:

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

The *Public Health Ordinance 1965* makes no specific provisions regarding HIV. There are mandatory testing powers for other diseases.

1. Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relation 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?

Provisions in the *Public Health Ordinance 1965* include the requirement to notify diseases, detention orders, mandatory testing, restrictions on work and occupation, and restrictions on change of abode, for notifiable infectious diseases including venereal disease and any other declared infectious disease. There are no specific provisions in the *Ordinance* making these measures applicable to HIV.

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 *Public Health Ordinance 1965* makes no specific provisions regarding HIV.

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)?

The *Public Health Ordinance 1965* makes no specific provisions regarding HIV. 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).**

The *Misuse of Drugs Act 1975* of New Zealand applies to Niue.<sup>7</sup> The New Zealand Act provides for the legal operation of needle and syringe programs, including immunity from prosecution by intermediaries where a needle and syringe is lawfully obtained. Section 13(1)(aa) of the New Zealand Act provides that possession of needles and syringes for the purpose of using an illegal drug is lawful where a person or someone who acquires a needle and syringe on their behalf reasonably believes they are acquiring the needle and syringe from a pharmacist, a pharmacy employee, an approved medical practitioner, or an authorised representative. Section 13(4) allows for the Director General of Health to approve medical practitioners and authorise representatives to distribute needles and syringes by regulations made pursuant to Section 37, and Section 13(2A) provides that no pharmacist, pharmacy employee, approved medical practitioner, or authorised representative commits an offence by selling or supplying any needle or syringe in accordance with regulations made under Section 37 of the Act.

The *Health (Needle and Syringes) Regulations 1998* provide for the legal sale of needles and syringes by pharmacists and pharmacy employees, who do not need special authorisation from the Director General of Health<sup>8</sup>. Medical practitioners and authorised representatives can sell needles and syringes if authorised by the Director General of Health to do so.<sup>9</sup>

Regulation 9 of the *Health (Needle and Syringes) Regulations 1998* requires anyone lawfully selling needles and syringes to accept needles and syringes for disposal in containers of a kind approved by the Director General of Health. It is an offence to offer a used needle and syringe for re-use by another person, or to accept a used needle and syringe for re-use, or to dispose of a used needle and syringe in a public place.<sup>10</sup>

Section 34 of the *Misuse of Drugs Act 1975* confers immunity from prosecution on any person carrying out a function conferred on them by the Act, which presumably extends to functions conferred on persons by regulations made pursuant to the Act, and hence to the possession of trace elements of drugs by persons authorised to collect used needles and syringes. Section 29A of the Act by implication allows a person charged with possession of an illegal drug to defend the charge on the ground that they were not in possession of a “useable quantity” of the drug. By implication this would allow a person charged with possession of an illegal drug, based on possession of traces of a drug remaining in used injecting equipment, to defend the charge on the ground that they were not in possession of a “useable quantity”. The effect of this provision, in providing a defence to a charge, rather than immunity from prosecution, goes only part of the way to achieving the object of ensuring that the criminal law does not act as a disincentive to the acquisition of new needles and syringes, and the safe disposal of used needles and syringes, by people who inject illegal drugs.

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<sup>7</sup> See *Misuse of Drugs Act 1975* (New Zealand) section 41.

<sup>8</sup> See Regulation 3.

<sup>9</sup> See Regulations 4 and 5.

<sup>10</sup> See Regulation 11.

**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**

Under the *Niue Act 1966* (New Zealand) “buggery” is an offence (Section 170). Attempted buggery and indecent assault between males are offences and consent is no defence (Section 171).

**Fornication or adultery**

Fornication and adultery are not crimes.

**Street sex work**

Section 220 of the *Niue Act 1966* provides that ‘any prostitute is liable to imprisonment ...who loiters and importunes any person in any public place for the purpose of prostitution’.

**Brothel or escort sex work?**

Keeping a brothel is an offence under Section 175 of the *Niue Act*. Escort sex work is not explicitly prohibited by the Act.

**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, such as evidentiary immunity for carrying condoms, in the prostitution-related offences.

**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)?**

Niue law does not regulate occupational health and safety laws that apply to the sex industry. There is no organised 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)?**

Niue law does not specifically prohibit coercion and trafficking in the sex industry. Section 157A of the *Niue Act 1966* prohibits cruelty to a child, the terms of which would encompass the coercion of or trafficking of children into the sex industry. Abduction of girls under the age of 15, and abduction of children, are prohibited by Sections 159 and 160 respectively. Sexual intercourse or indecency with a girl under the age of 12 is prohibited by Section 163, and sexual intercourse or indecency with a girl between

the ages of 12 and 15 is prohibited by Section 164. Rape of a woman or a girl is prohibited by Section 162. These sections do not criminalise the behaviour of the people against whom the offences are perpetrated. The offence of rape is limited to a male having sexual intercourse with a woman or girl without her valid consent. The law does not recognise rape of a male by another male, or of a woman by her husband, unless there is a decree nisi, a decree of nullity, judicial separation or a separation order in existence (see Section 162).

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

The *Public Health Ordinance 1965* provides an offence of knowingly infecting another person with a venereal disease. It was not clear at the time of writing whether this includes knowingly infecting another person with HIV.

General criminal provisions which might be used to prosecute cases of deliberate or intentional transmission of HIV include the following sections of the *Niue Act 1966*:

- Grievous bodily harm (Section 151);
- Actual bodily harm (Section 152);
- Omissions resulting in bodily harm (Section 153);
- Assault (Section 157).

## 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)?**

Under the *Niue Act 1966* (NZ), there are special provisions for the transfer of convicted persons to serve sentences of imprisonment in New Zealand.

Sections 26-29A of the *Niue Act 1966* provide for the establishment of prisons, detention of persons in custody, the substitution of labour for all or part of a prison sentence, the appointment of police and prison officers, and the issue by Cabinet of a Penal Manual for the management and supervision of offenders. The Act does not make any specific provisions regarding access to HIV information and education, voluntary counselling and testing, access to the means of HIV prevention, access to treatment, or participation in HIV-related clinical trials.

**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 and buggery are offences. Anal sex (“buggery”) with either a man or a woman is prohibited by section 170 of the *Niue Act 1966*. Section 171 prohibits attempted anal sex, and indecent assault on a male by another male. The law does not recognise consent to anal intercourse, or to any “indecent” acts between males.

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

These matters may be dealt with by the Penal Manual.

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

Legislation does not require segregation of prisoners with HIV.

**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?**

Section 27 of the *Niue Act 1966*, dealing with detention of persons in custody, makes no provision for compassionate early release or diversion to alternatives other than incarceration on the grounds of serious medical conditions such as AIDS.

Ill health may be a relevant consideration when determining parole.

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

The *Niue Act 1966* does not address this issue.

## CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Niue law does not prohibit discrimination, either in its Constitution or its statutes.

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?
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)?
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?
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?

See above: there is no anti-discrimination legislation.

## 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?**

There is no legislative or constitutional guarantee of gender equality.

### **Ownership of property and inheritance**

Customary law determines land ownership (Section 33 *Constitution*). Women are disadvantaged by custom. Under customary law, land is owned by line of descent (mangafaoa). Land is passed preferentially to the eldest son. Land cannot be bought or sold, except the Government of Niue can purchase land for public purposes with the consent of the land owners. Under customary law, Niuean land tenure consists of family ownership, with rights of occupation that pass by descent. Rights can be lost by continued absence from the land. Niuean customary tenure is difficult to reconcile with individualised freehold titles registered under the *Niue Act 1966*, derived from the New Zealand Maori Land Act.

### **Marital relations e.g. divorce and custody**

Information on this topic was not available at the time of writing.

### **Capacity to enter into contracts, mortgages, credit and finance**

Information on this topic was not available at the time of writing.

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

There is no right to access sexual and reproductive health services. Abortion is illegal. "Procuring a miscarriage", of another woman, or of oneself, is prohibited by Sections 166-167 of the *Niue Act 1966*. Supplying the means of procuring a miscarriage is prohibited by Section 168.

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

Abduction of girls under the age of 15, and abduction of children, are prohibited by Sections 159 and 160 of the *Niue Act 1966* respectively. Sexual intercourse or indecency with a girl under the age of 12 is prohibited by Section 163, and sexual intercourse or indecency with a girl between the ages of 12 and 15 is prohibited by Section 164. Rape of a woman or a girl is prohibited by Section 162. The offence of rape is limited to a male having sexual intercourse with a woman or girl without her valid consent. The

law does not recognise rape of a male by another male, or of a woman by her husband, unless there is a decree nisi, a decree of nullity, judicial separation or a separation order in existence (see Section 162).

## **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?**

Section 14 of the *Public Health Ordinance* permits the Chief Medical Officer to order a person to undergo medical examination in relation to infectious disease. Niue has instituted a policy of requiring HIV testing for all visitors staying longer than two months.<sup>11</sup>

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

There is no law requiring 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?**

There is no legislation enabling children and adolescents to be involved in decision-making in line with their evolving capacities. Common law rules apply, which recognise children's evolving capacities.

### **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?**

Section 157A of the *Niue Act 1966* prohibits cruelty to a child. Abduction of girls under the age of 15, and abduction of children, are prohibited by Sections 159 and 160 of the Act respectively. Sexual intercourse or indecency with a girl under the age of 12 is prohibited by Section 163, and sexual intercourse or indecency with a girl between the ages of 12 and 15 is prohibited by Section 164. These provisions do not subject the survivors of the relevant criminal offences to penalties.

### **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?**

Sections 163 and 164 of the *Niue Act 1966* prohibit sexual intercourse, indecent assault, or act of indecency with a girl under the ages of 12 and 15 respectively. Section 164 exempts such acts from criminal liability where the person committing the act is married to the victim (being a girl between the

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<sup>11</sup> Associated Press 'Some tiny Pacific islands fear HIV/AIDS could decimate them if left unchecked' *International Herald Tribune* (21 September 2006) <[http://www.ihf.com/articles/ap/2006/09/21/asia/AS\\_MED\\_Asia\\_WHO\\_HIV-AIDS.php](http://www.ihf.com/articles/ap/2006/09/21/asia/AS_MED_Asia_WHO_HIV-AIDS.php)>

ages of 12 and 15). By implication, Section 164 indicates that the age of consent is 12 for a female in respect of heterosexual sex with a man who is her husband, and that the age of consent is 16 for a female in respect of heterosexual sex where the male sexual partner is not her husband. The law is silent as to the age of consent for men in respect of heterosexual sex.

Niue law does not recognise consent to homosexual acts between men. Anal sex in any circumstances is prohibited by Section 170 of the *Niue Act 1966*, and "acts of indecency" between males are prohibited by Section 171. The law does not recognise consent as a defence to a charge under either section. The law is silent on the issue of sexual acts between females, and does not recognise same-sex marriages or domestic 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 legislation providing for general privacy or confidentiality protections.

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

There is no legislation providing for privacy or confidentiality protections. A permit to buy land in Niue should be accompanied by supporting documents including health clearances from the applicant's home country.<sup>12</sup> This may result in breaches of confidentiality concerning 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?**

There is no legislation.

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

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

There is no independent privacy agency created by 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 no legislation. Common law requires courts generally to be open to the public, but also enables courts to control proceedings including by closing courts or non-publication orders if there is a compelling public interest e.g. to ensure a fair trial.

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 public health legislation providing for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes.

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<sup>12</sup> UNDP, January 2007.

## CHECKLIST 7 – EMPLOYMENT LAWS

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

Section 14 of the *Public Health Ordinance* permits the Chief Medical Officer to order a person to undergo medical examination in relation to infectious disease. Further information on this topic was not available at the time of writing.

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

Please see question 1 above.

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?**

Information on this topic was not available at the time of writing.

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?**

Information on this topic was not available at the time of writing.

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?**

Information on this topic was not available at the time of writing.

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

Information on this topic was not available at the time of writing.

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

Information on this topic was not available at the time of writing.

## 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)?

Information on this topic was not available at the time of writing.

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?

Information on this topic was not available at the time of writing.

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

Information on this topic was not available at the time of writing.

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

Information on this topic was not available at the time of writing.

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

- Condoms
- Bleach
- Needles and syringes?

The *Misuse of Drugs Act 1975* of New Zealand as in force and amended from time to time, applies to Niue.<sup>13</sup> The New Zealand Act provides for the legal operation of needle and syringe programs, including immunity from prosecution by intermediaries where a needle and syringe is lawfully obtained.

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)?

Information on this topic was not available at the time of writing.

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<sup>13</sup> See *Misuse of Drugs Act 1975* (New Zealand) section 41.

## **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 legislative requirements relating to research were 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?

There is no constitutional right to freedom of movement. Section 220 of the *Niue Act 1966* provides that 'any prostitute is liable to imprisonment ...who loiters and importunes any person in any public place for the purpose of prostitution'. Injecting drug users are enabled to purchase sterile injecting equipment for themselves or another person, and to dispose of used injecting equipment, by virtue of the application of the *Misuse of Drugs Act 1975* of New Zealand. See Checklist 2, Question 1, above. A person suffering a notifiable disease within the meaning of the *Public Health Ordinance 1965* is a prohibited immigrant.

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

There is no constitutional right to freedom of association. Under the *Niue Act 1966* (New Zealand) "buggery" is an offence (Section 170). Attempted buggery and indecent assault between males are offences and consent is no defence (Section 171). The existence of these criminal prohibitions against sex between men, and the absence of laws against discrimination, suggest that association between men who engage in homosexual acts may carry a risk of criminal prosecution under either Section 170 or 171 for ancillary offences such as aiding, abetting, counselling, procuring, or attempts, in relation to anal sex ("buggery"), other sex acts between men ("indecent assault").

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

It is an offence under Section 174 of the *Niue Act 1966* to sell, expose for sale or distribute any obscene or indecent book, picture, photograph, document, film, video-tape or other object tending to corrupt morals, or publicly exhibit any obscene or indecent show tending to corrupt morals. The Act does not provide any exemptions for HIV/AIDS information. The *Film and Public Entertainment Act 1979* provides for licensing of exhibitors (with the exception of exhibitors of films for medical, educational, instructional or religious purposes) and the censorship of films, which may be refused permission for showing if they are indecent, obscene, injurious to morality or likely to encourage public disorder or crime. Neither law contains exceptions for HIV information.

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

See question 3 above.

### 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)?**

Information on this topic was not available at the time of writing.

**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?**

Information on this topic was not available at the time of writing.

## SUMMARY AND RECOMMENDATIONS

### Public health law

Niue's *Public Health Ordinance 1965* needs to be reformed to address the particular public health and human rights issues posed by the HIV epidemic. There is currently no legislative framework for a public health response to HIV. If existing provisions concerning "notifiable" and "infectious" diseases were used in the context of HIV, the result could be inappropriate interventions which would breach human rights, and undermine the effectiveness of the response to an HIV epidemic in Niue.

Blood safety legislation is required to ensure blood supply is not contaminated by HIV or other viruses.

### Criminal law

The *Niue Act 1966* should be amended as follows:

- The crimes of "buggery" and "attempted buggery" should be abolished by repealing Sections 170 and 171 respectively;
- Consent should constitute a defence to a charge of indecent assault by a male against another male, with an equal age of consent for homosexual and heterosexual sex;
- Section 162 of the *Niue Act 1966* should be amended to criminalise the rape of a woman by her husband, and rape of a male person;
- Offences criminalising sex work and related activities such as keeping a brothel should be abolished;

These provisions of the *Niue Act 1966* should be repealed as they impede access to HIV information, education, treatment, care and support programs, by driving those who may be most vulnerable to HIV infection into hiding, and out of reach of such programs. It is in this way that the criminalisation of such behaviours impedes the effectiveness of responses to the HIV epidemic.

### Anti-discrimination legislation

There are no legislative provisions addressing discrimination in Niue. Anti-discrimination legislation is recommended to provide protection against and remedies for discrimination on the basis of disability (broadly defined to include HIV or health status), gender, sexual orientation and transgender status. Such legislation would be in accordance with the principles to which Niue is committed as a member of the United Nations, and a State party to international human rights covenants and conventions.

### Equality of status of vulnerable populations

The lack of gender equality laws, and the criminalisation of sex between men and sex work undermine the effectiveness of HIV and STI prevention, treatment, care and support interventions for those communities which may be most at risk of HIV and STI infection. These provisions of the *Niue Act 1965* are inconsistent with the *International Guidelines*, as are the consequent limitations on freedom of movement and association for sex workers and men who have sex with other men, which could result from enforcement of these laws.

### Privacy/confidentiality laws and Employment laws

No legislation relating to privacy and human rights in employment was identified.

### Therapeutic goods, consumer protection laws

Information on the issues dealt with in this checklist was not available at the time of writing, with the exception of needle and syringe exchange programs, which are legal in Niue under the terms of the *Misuse of Drugs Act 1975* (New Zealand).

## **Censorship**

It is recommended that:

- Sex work and sex between men be decriminalised.
- It is recommended that Section 174 of the *Niue Act 1966* and the *Film and Public Entertainment Act 1979* be amended to provide an exception in censorship laws for HIV information and education materials and activities.