

# **HIV, ETHICS AND HUMAN RIGHTS**

## **Review of legislation of Samoa**

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

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

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

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

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

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

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

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.

## ***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>

In 2007, Samoa had a cumulative total of 15 reported HIV diagnoses since 1990. Infections have been mainly though not exclusively acquired overseas. Transmission is principally heterosexual. At least two cases were acquired by homosexual intercourse, and two from an infected mother to her child. Recent diagnoses of HIV in Samoa have been among people who were believed to have been infected several years earlier. Therefore it is likely that there is an additional population of people living with HIV that is, as yet, undiagnosed in the country.

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

<sup>4</sup> See C Jenkins (2005) *HIV/AIDS in the Pacific* ADB, Manila.

STI surveillance reveals high prevalence of other STIs. In 2005, the prevalence of genital chlamydia among antenatal women was 27%, with 41% of women aged less than 25 years testing positive for the infection. The prevalence of gonorrhoea was 2.3%.<sup>5</sup>

Gender roles are strict and females are expected to be submissive to males. Many people consider it acceptable for men to physically discipline their wives and to expect sex on demand. A study of partner violence has shown that physical and sexual abuse is more common in rural areas among the less educated sectors of the population.

A traditional alternative gender, the *fa'a'afafine*, has general public acceptability and is associated with male-to-male sex.

Sex work in night clubs, hotels, and brothels is reported. Growing unemployment among youth and problems with alcohol and substance use contribute to risk. Condoms are not easily available, particularly in rural areas. Socio-cultural factors relevant to HIV vulnerability also include:

- low condom use;
- high rates of STIs, which amplify the risk of HIV transmission;
- population mobility, with high levels of circular migration between Samoa and New Zealand;
- marked gender roles and taboos on discussion of sexual issues;
- young population;
- early-age sexual activity.

Village *fonos* have considerable powers at village level. Women enjoy increasing levels of equality in access to education and employment opportunities. An extensive network of women's committees co-manages publicly funded rural health services. Specialist treatment must be sought in New Zealand. There is a growing private sector in health care.

## ***Legal system***

Sources of the law are the *Constitution*, Acts of the Samoan Parliament, pre-Independence Ordinances continued after Independence, some New Zealand and United Kingdom Acts still applying, English common law and equity, and custom for the purpose of ascertaining land rights. There is a Supreme Court with right of appeal to the Appeal Court.

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<sup>5</sup> World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41

## ***International obligations***

Samoa is a member of the UN and has ratified the Convention on Elimination for all Forms of Discrimination Against Women and the Convention on the Rights of the Child.

## ***HIV policy framework***

HIV is addressed in the country's National Health Plan of Action. A National HIV/AIDS Policy was developed in 2001 and a National Plan of Action for HIV/AIDS and STIs 2003-2005. There is also a Strategic Plan on Responding to the Impact of HIV/AIDS on Women in Samoa 2001-2005. Samoa's NACC/CCM made a decision in 2004 to develop and formulate a Samoa National HIV/AIDS Strategy to be in line with the Principles of the Pacific Regional HIV/AIDS Strategy's eight thematic areas, Samoa's Global Fund Plan of Action 2003-2008 and Samoa's Millennium Development Goals.

Three key areas of the National Plan of Action are —

- strengthen national coordination for the planning and implementation of HIV/AIDS-STI programs and activities
- strengthen national health promotion and prevention programmes for HIV/AIDS-STI in Samoa
- strengthen the management, treatment and surveillance of HIV/AIDS-STI cases in Samoa.

The National AIDS Coordinating Committee is responsible for coordination of HIV programs. The National AIDS Coordinating Committee was formed in 1987 with a variety of government departments and NGOs represented. It also undertakes the functions of the country coordinating mechanism for the Global Fund Regional Project, though it has not met frequently. Most decisions on the national HIV response are made by the Technical AIDS Committee made up mainly of health personnel.

Responses by other government sectors besides the Ministry of Health have mainly consisted of awareness-raising for those employed in those sectors. Several NGOs have become active.

A *fa'a'afafine* group called My Girls Association have provided HIV education for members of the group and promoted prevention to the community. The Samoa Family Health Association, the Samoa Red Cross Society, Sautima (Catholic social services), and the Samoa YMCA are active in HIV education. Samoa Umbrella of NGOs (SUNGO) conducts NGO capacity development.

# CHECKLIST 1 – PUBLIC HEALTH LAW

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

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

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

Section 7 of the *Health Ordinance 1959* provides that the principal functions of the Department of Health which include to prevent, limit and suppress infectious and other disease. The Minister of Health has powers under the *Minister of Health Act 2006* to ensure resources under the Ministry's control are applied to activities to improve, promote and protect the health of the people. The Ministry of Health has responsibilities under the *Minister of Health Act* Schedule 2 in relation to health promotion and preventive services, including:

- (a) Health Education and Health Promotion;
- (b) Preventive Services;
- (c) Public Health Services Surveillance; ...
- (g) Reproductive Health.

## 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 legislation in relation to informed consent to health care or blood tests. There is no specific power to require a person to submit to a blood test except for immigration purposes. There is a general power to medically examine.

HIV/AIDS has been declared an infectious disease under the *Health Ordinance 1959*.

Section 29(e) of the *Health Ordinance 1959* provides that the Director of Health may require persons to report themselves or submit themselves for medical examination at specified times and places.

The *Immigration Act 2004* at Section 7 permits the medical examination of anyone entering or about to leave Samoa. This may include requiring the person to provide samples of bodily tissue or other biological material. A person entering or about to leave Samoa may also be required to provide a medical certificate on any matter which the Minister by notice determines.

**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 *Health Ordinance 1959* provides extensive powers in relation to infectious diseases. Isolation and quarantine for infectious diseases are enabled under Sections 29 and 36 of the *Health Ordinance 1959*. Section 29 provides that the Director may from time to time, if authorised in writing by the Minister, exercise the following special powers for the purpose of preventing the outbreak or spread of any infectious disease:

- (e) require persons to report themselves or submit themselves for medical examination at specified times and places;
- (f) require persons, places, buildings, premises, animals, and things to be isolated, quarantined, or disinfected as he thinks fit;
- (g) forbid persons, ships, aircraft, animals, or things to come, or to be brought to any port or place in Western Samoa from any port or place which is or is supposed to be infected with any infectious disease;
- (h) forbid persons to leave the place in which they are isolated or quarantined until they have been medically examined and found to be free from infectious disease, and until they have undergone such preventive treatment as he may in such case prescribe.

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 review are not explicit in the Ordinance, however a person could apply to a court seeking judicial review of administrative action.

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

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change;**

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

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

The *Health Ordinance 1959* Sections 31-34 imposes obligations on medical practitioners, occupier of premises and masters of ships and aircraft to report any reasonable suspicion of a case of infectious disease. A register shall be kept of all cases, and there are no confidentiality provisions.

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

There is no blood safety legislation.

## CHECKLIST 2 – CRIMINAL LAW

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

No reports of injecting drug use in Samoa were found, so legislation relating to needles and syringe access for drug users is not considered necessary.

The *Narcotics Act 1967* regulates import, supply, possession and use of narcotics. Section 8 of the *Narcotics Act 1967* permits registration of and supply of opium to those addicted to the quasi-medicinal use of opium, and who are unlikely to be cured.

- 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**

Section 58D of the *Crimes Ordinance 1961* prohibits indecent acts between males, regardless of consent. Section 58E prohibits sodomy, including between adult males, and consent is not a defence.

Section 58J prohibits keeping of any premises used as a place of resort for the commission of indecent acts between males.

Section 58N prohibits the impersonation of a female by a male.

Section 58B prohibits indecent acts between women over 21 and girls under 16

### **Fornication or adultery**

Adultery is an offence under Sections 58 and 58A *Crimes Ordinance 1961*.

### **Street sex work, brothel or escort sex work**

Sections 58K-58M of the *Crimes Ordinance 1961* prohibit brothel-keeping, living on the earnings and procuring. Soliciting is prohibited under Section 16 *Police Offences 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 is no exception in criminal law for HIV prevention and care services.

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

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

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

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

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

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

There is no specific legislation on deliberate HIV transmission. Deliberate transmission of HIV could be prosecuted under the criminal offence of causing grievous bodily harm (*Crimes Ordinance 1961* Section 79).

HIV is an infectious disease and the *Public Health Ordinance 1959* provides offences for a person who:

- (a) While (knowingly) suffering from any infectious disease wilfully is in any public place without having taken proper precautions against the spread of infection;
- (b) While in charge of any person suffering as aforesaid takes him into or allows him to be in any public place without having taken proper precautions against the spread of infection;
- (c) While suffering as aforesaid enters any public conveyance, or while in charge of any person so suffering takes him into any public conveyance, without in every such case notifying the driver or conductor of the fact;
- (d) Being the owner or driver or conductor of a public conveyance fails or neglects to disinfect the conveyance or cause the same to be disinfected forthwith after it has to his knowledge been entered by any person suffering as aforesaid.

## 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)?**

There are no specific provisions relating to HIV testing, prevention or treatment in prisons.

**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?**

Section 34 of the *Prisons Act 1967* provides that assault is a prison offence.

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

The *Prisons Act* does not provide for confidentiality of medical information including HIV status. Infectious diseases must be notified by the prison medical officer under the *Prisons Regulations 1954*.

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

The *Prisons Act* does not require segregation of prisoners on the basis of HIV status. The Act makes provision for transfer of sick prisoners to hospital (*Prisons Act 1967* Section 45).

**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?**

The grounds for remissions of sentences under the Act are good conduct and industry, not ill health (Section 39B). There is a general discretion to release on parole (Section 39A). There is a discretion at common law to take AIDS into account in mitigation when deciding a prison sentence if imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk that imprisonment will have a gravely adverse effect on the offender's health (see e.g. *PP v Lim Kim Hock* [1998] SGHC 274; *Bailey v DPP* (1988) 78 ALR. 116; *R v Bernard* [1997] 1 Cr App R (S) 135).

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

Legislation does not provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners.

## 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 protection from discrimination on the grounds of disability or HIV status.

### 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 is no legislation specifically providing for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS and there is no anti-vilification legislation.

Article 15 of the *Constitution* provides that no law and no executive or administrative action of the State shall subject anyone to any disability or restriction, or confer any privilege or advantage on anyone, on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth or family status. This may offer some protection to women who are subject to discrimination. The provision does not apply to discrimination in the private sector.

### 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?

In some cases it may be possible to make a complaint of discrimination or unfair treatment by government officials to the Ombudsman office. Under the *Komesina O Sulufaiga (Ombudsman) Act 1988*, the Ombudsman has power to investigate any decision or recommendation made (including any recommendation made to a Minister of Cabinet), or any 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 any government Department, board or agency, or by any of their officers, employees or members (Section 11). Investigations are conducted in private and Ombudsman office staff must maintain secrecy (Section 15 and 18).

A sex discrimination complaint relating to Article 15 of the *Constitution* should be made to the Supreme Court. The *Constitution* Article 9 guarantees the right to a fair and public trial, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

There are no procedures in respect of:

- representative complaints;
- speedy redress;
- access to free legal assistance;
- investigatory powers to address systemic discrimination.

**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. The Ombudsman has general investigatory powers into discriminatory conduct of public agencies but does not educate and promote human rights or monitor compliance with international human rights law and norms. The Ombudsman office reports to government on results of investigations and reports periodically on its activities.

The Ombudsman can recommend action be taken to remedy any decision, recommendation, act, or omission that is found to be “unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory” (Section 19). The Ombudsman can recommend that any law on which a discriminatory decision, recommendation, act, or omission was based should be reconsidered.

## 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

Women in Samoa do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property. Patrilineal inheritance is given legislative status. Men control many aspects of land and property.

Inheritance laws apply equally to males and females in Samoa under the formal law (*Administration Act 1975* Section 44.), although patrilineal customary rules of inheritance may lawfully operate taking precedence over the formal law. The Constitution gives status to custom in a range of contexts. In the absence of a guarantee that equality between men and women takes precedence over custom, traditional practices that discriminate against women may be lawful.

The Preamble to the *Constitution* declares that ‘Samoa should be an Independent State based on Christian principles and Samoan custom and tradition’. The definition of ‘law’ in Article 111 includes ‘any custom or usage which has acquired the force of law’. The *Village Fono Act 1990* validates the exercise of power and authority by Village Fono (Village Councils) in accordance with the custom and usage of their villages.

Rights to reside on and use land are granted to members of a kin group who request them, subject to availability. Rights lapse at death. Since neither lands nor titles can be formally transmitted without the consent of the kin group, the only property that can be assigned is personal property.<sup>6</sup>

Under the *Administration Act 1975* Part IV, an application for further and better provision from an estate can be made by a widow where "insufficient provision" for them has been made.

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<sup>6</sup> C Macpherson (n.d.) *Culture of Samoa* <http://www.everyculture.com/No-Sa/Samoa.html>

There are no legal impediments to women entering contracts, or accessing mortgages, credit and finance. However there are no legal remedies for discrimination on the grounds of sex in the private sector.

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

Divorce is fault based and includes grounds of adultery and desertion. Providing a no-fault system for divorce, and allowing women's non-financial contributions to be taken into account in maintenance proceedings would promote women's equality.

The *Maintenance and Affiliation Ordinance 1967* (District Court) and *Divorce and Matrimonial Causes Ordinance 1961* (Supreme Court) provide for maintenance orders during separation and after divorce for both children and spouses.

*Divorce and Matrimonial Causes Ordinance 1961* Section 22 provides for the payment of a lump sum to the wife after divorce having regard to 'her conduct, her fortune and the ability of her husband' that the Court may deem to be reasonable.

*Divorce and Matrimonial Causes Ordinance 1961* Section 24 provides that the Court may make such provision for custody as appears 'just' with respect to the custody, maintenance, and education of the children.

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

The law does not give women a right of non-discriminatory access to health services. Women do not have access to safe abortion facilities as of right.

Sections 73A-73D of the *Crimes Ordinance 1961* provide the offences of abortion, either performed by another or by the woman herself, or supplying the means of procuring miscarriage.

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

Rape by a man of a woman is an offence, but not against his wife unless at the time there was in force in respect of the marriage a decree of judicial separation or a separation order (Section 47 of the *Crimes Ordinance 1961*).

### **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?**

*Crimes Ordinance 1961* provides for offences of:

Section 50 Sexual intercourse by man with young related girl living in his family;

Section 51 Sexual intercourse with girl under 12;

Section 52 Indecency with girl under 12;

Section 53 Sexual intercourse or indecency with girl between 12 and 16;

Section 54 Indecent assault on woman or girl.

**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 and the law does not recognize same sex relationships.

## CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

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

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

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

### **2. 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.

### **3. 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.

### **4. 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)?**

Section 9 of the *Constitution* provides that court Judgments shall be pronounced in public, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.

**5. 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 privacy protections in reporting of HIV or AIDS cases to public health authorities. Section 31 of the Public Health Ordinance provides that the Director shall keep a register of every case of infectious disease to his knowledge occurring in Samoa, and every medical practitioner who becomes aware that any person is suffering from an infectious disease shall forthwith notify the Director.

## CHECKLIST 7 – EMPLOYMENT LAWS

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

HIV screening for employment is not prohibited.

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

Legislation does not prohibit mandatory testing of specific employment groups

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

Legislation does not specifically require implementation of universal infection control measures. Section 24 *Occupational Safety and Health Act 2002* provides that all employers and employees shall take measures and adopt work practices which will eliminate, isolate or minimise risks to the health and safety of employees by ensuring that:

(l) Effective arrangements are taken to eliminate, isolate or minimise the harmful and potentially harmful effects to employees of any ... substances which are either stored or used in the workplace;

(n) There is provision and maintenance of suitable and adequate supplies of first aid facilities, appliances and requisites, and the availability at all times of persons who have Red Cross approved or equivalent qualifications in the application of basic first aid.

Section 23 *Occupational Safety and Health Act 2002* provides that all employers and employees shall take measures and adopt work practices which will eliminate, isolate or minimise the incidence of accidents and injuries which might derive from:

...(b) Storage, stacking or securing any material which is or is likely to be corrosive, irritant, toxic, explosive or otherwise capable of endangering safety or health;

An employer's failure to provide effective infection control systems in health care workplaces may be a breach of these duties.

- 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 unfair dismissal rights for HIV positive workers. The *National Provident Fund Act 1976* provides for a scheme that includes disability benefits to members with a total incapacity for work.

**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.

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

Workers' compensation legislation does not recognize occupational transmission of HIV. The *Occupational Safety and Health Act 2002* applies to all employers and employees. It makes general provision for safety in the workplace and permits more detailed and specific regulations and Codes of Practice (Section 33).

## 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)?**

The *Food and Drugs Act 1967* provides that, prior to marketing, information must be submitted to health authorities on tests conducted to establish the safety of drugs and medical devices and to control the strength, quality, purity or safety of devices. Standards may be issued by regulation.

**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?**

The *Food and Drugs Act 1967* provides that, prior to marketing, information must be submitted to health authorities on tests conducted to establish the safety of the drug or device and to control the strength, quality, purity or safety of the drug or device. Standards may be issued by regulation. Section 8(2) provides that it is an offence to sell a drug or device which does not comply with any standard prescribed by regulation.

The *Pharmacy Act 2007* provides that the Pharmacists Council may approve standards to ensure that the medical and pharmaceutical services provided to all persons in Samoa meet accepted international standards and are consistent with the human rights applying to all persons in Samoa.

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

The *Food and Drugs Act 1967* regulates sale of drugs, which are defined to include vaccines and any device or contrivance sold for the purpose of prevention of disease. Section 8(3) provides that every person commits an offence who sells any drug in any package which bears or has attached thereto any false or misleading statement, word, brand, label, or mark purporting to indicate the nature, quality, strength, purity, composition, weight, origin, age, effects, or proportion of the article contained in the package or of any ingredient thereof.

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

The *Food and Drugs Act 1967* regulates sale of any device or contrivance sold for the purpose of prevention of disease. This legislation and the *Pharmacy Act 2007* could be used to monitor condom quality if regulations are issued requiring compliance with the International Condom Standard.

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

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

There is no legislation ensuring free availability of condoms or other prevention tools.

**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)?**

Samoa is seeking to accede to the World Trade Organization, which will require compliance with patents legislation standards of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Under the *Patents Act 1972*, foreign patents may be re-registered. There is no provision for compulsory licensing to enable government use of generic versions of patented medicines in the public system, or for parallel importing of patented drugs marketed more cheaply in other countries.

## 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 however there is a Samoan Health Research Committee at the Ministry of Health.<sup>7</sup> Approval may also be sought from the Technical Advisory Committee (TAC) of the National AIDS Coordinating Committee (NACC).

- 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?**

These matters may be considered by the Health Research Committee.

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<sup>7</sup> World Health Organisation Regional Office for the Western Pacific, Secretariat of the Pacific Community & the University of New South Wales (2006) *Second Generation Surveillance Surveys of HIV, other STIs and Risk Behaviours in Six Pacific Island Countries (Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Vanuatu)* WHO WC 503.41, 65

## 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?

The *Constitution* provides the right to freedom of movement (Article 13). This may be difficult to enforce in practice, particularly in the case of restrictions on movement of sex workers or men who have sex with men, as soliciting and homosexual behaviour remain crimes. This Article does not prevent the State from making laws that impose reasonable restrictions on the exercise of the right in the interests of public order or morals.

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

The *Constitution* provides rights to freedom of assembly and association (Article 13). 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 soliciting and homosexual behaviour remain crimes. This Article does not prevent the State from making laws that impose reasonable restrictions on the exercise of the right in the interests of public order or morals.

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

There are no exceptions in censorship laws for HIV information that contains sexually explicit information or images, although a defence may be available that the activity was not immoral or mischievous.

The *Indecent Publications Ordinance 1960* prohibits the possession, exhibition etc of any book, newspaper, picture, photograph, print, or writing, containing any indecent word, statement, significant sign, or any indecent picture, illustration, or representation, or which unduly emphasises matters of sex. Section 5 of the Act provides that in determining whether any document or other matter is indecent the Court shall take into consideration:

- (a) the nature of the document or matter;
- (b) the nature and circumstances of the act done by the defendant with respect thereto, and the purpose for which the act was done;
- (c) the literary or artistic merit or medical, legal, political, or scientific character or importance of the document or matter;
- (d) the persons, classes of persons, or age groups to or amongst whom the document or matter was or was intended or was likely to be published,

distributed, sold, exhibited, given, sent, or delivered, and the tendency of the matter or thing to deprave or corrupt any such persons, class of persons, or age groups (notwithstanding that persons in other classes or age groups may not be similarly affected thereby).

Section 5 (2) of the Act provides that no document or matter shall be held to be indecent unless, having regard to the aforesaid and all other relevant considerations, the Court is of opinion that the act of the defendant was of an immoral or mischievous tendency.

It is an offence under the *Crimes Ordinance 1961* to sell, distribute etc. indecent models, objects, shows, performances, or to do an indecent act in a public place.

Section 49 of the *Customs Act 1977* prohibits the importing of indecent documents within the meaning of the *Indecent Publications Ordinance 1960*. It is a defence to a charge under this section to prove that the public good was served.

The *Film Control Act 1987* 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 depict any matter which is contrary to public order or decency or the exhibition of which would for any other reason be undesirable in the public interest.

#### **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)?**

Codes may be issued under the *Occupational Safety and Health Act*. Standards may be issued under the *Healthcare Professions Registration and Standards Act 2007* relevant to:

(a) the observance of Codes of Conduct and standards of professional practice relevant to the duties and activities of the relevant profession;

(b) the observance of legal requirements applying to healthcare professionals and the implementation of processes prescribed by any applicable Professional Act and other

relevant laws;

(c) the legal and human rights of patients and users of health services and pharmaceuticals.

**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?**

There are no requirements for Codes of Practice to address HIV or related matters.

## SUMMARY AND RECOMMENDATIONS

Addressing HIV and AIDS as infectious diseases under the *Health Ordinance 1959* is inappropriate for human rights-based management of HIV.

Priority actions to build a human rights framework for addressing HIV in Samoa include:

- (i) amending the *Health Ordinance 1959* to remove HIV and AIDS from the list of notifiable diseases, and to introduce provisions for confidential notification, 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;
- (ii) enacting anti-discrimination legislation that covers discrimination on the grounds of HIV status, disability, sex, sexuality, and transgender status; and
- (iii) decriminalizing homosexuality, transvestism, sex work and abortion.

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

Introducing a no fault model of divorce and allowing for women's non-financial contributions to a marriage to be taken into account in property proceedings after separation would improve women's social and economic status. Women may be reluctant or afraid to seek divorce if they are required to prove fault. De facto relationships including same sex partnerships should be recognised by law.

Legislation should guarantee that customary law in relation to inheritance and property does not have precedence over rights to equality between men and women.

It would be beneficial to develop a Code of Practice on HIV and employment, drawing on the International Labor Organization Code of Practice on HIV/AIDS.<sup>8</sup> A Code of Practice should be developed that promotes universal infection control procedures in health care settings, confidentiality and non-discrimination in workplaces.

Blood safety legislation is required.

Legislation to ensure that condoms and HIV test kits comply with international quality standards is required. Condoms and HIV/STI prevention information should be available in prisons.

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<sup>8</sup> International Labor Organization (2001) *ILO Code of Practice on HIV/AIDS and the World of Work*  
[www.ilo.org/aids](http://www.ilo.org/aids)

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

In anticipation of WTO accession, patents legislation should be drafted that takes full advantage of TRIPS flexibilities and allows for:

- parallel importing of medicines that are marketed more cheaply in other countries, by incorporating international exhaustion of patent rights after first use into law;
- compulsory licensing including government use of generic medicines for non-commercial use in the health system;
- an ‘early working’ exception through including a ‘bolar’ provision, so that generic medicines can be approved for marketing as soon as possible after patent expiry.