

# **HIV, ETHICS AND HUMAN RIGHTS**

## **Review of legislation of Kingdom of Tonga**

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

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

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

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

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

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

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

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

## ***Human rights principles***

The principles of Human Rights relevant to HIV include—

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

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

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

Tonga has recorded 14 cases of HIV. Among the 14 people diagnosed, the groups affected were almost exclusively men who have sex with men, and their female partners.<sup>5</sup> Injecting drug use is not known to occur. There is very high prevalence of other sexually transmitted infections (STIs). A 2005 study<sup>6</sup> found that the prevalence of chlamydia among antenatal women was 15%, with 28% of women aged less than 25 testing positive

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

<sup>4</sup> C Jenkins (2005), *HIV/AIDS in the Pacific* Asian Development Bank Manila; UN Human Rights Council (2008) *Universal Periodic Review by the United Nations Human Rights Council National Report by The Kingdom Of Tonga*.

<sup>5</sup> Ministry of Health (2007) *Round 7 Proposal to Global Fund to Fight AIDS TB and Malaria*

<sup>6</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, 96

for the organism. The gonorrhoea prevalence was 3% overall and 5% among women aged less than 25.

HIV risk factors are associated with youth and migrants. Tonga reports rising rates of teenage pregnancies and increasing substance abuse (tobacco, kava, alcohol, marijuana and solvents). Tonga's *National Strategic Plan on HIV/AIDS and STIs* lists the following as risk factors:

- rising teenage pregnancies and low use of condoms;
- rising and fluctuating levels of STIs and HIV;
- high mobility of people, especially returning residents;
- increased availability and use of alcohol and drugs, especially marijuana; and
- increasing number of vulnerable groups including youth, seafarers, sex workers, recipients of blood donations and defence force staff.

Other factors that may contribute to HIV vulnerability include:

- high urban population growth;
- high mobility of people internally and overseas;
- rising incidence of domestic violence, which makes women more vulnerable;
- low use of condoms which are used mainly for birth control within marriage;
- cultural and religious constraints to open discussion of sexual issues.

As in other Polynesian societies, a third gender identity, the fakaleiti or fakafefine, is traditional. Some fakaleiti have been sex workers both in Tonga and abroad, and some have acquired HIV elsewhere and died in Tonga. The perception of homosexuality differs slightly from that of a fakaleiti. Homosexuality implies having a sexual relationship with someone of the same sex. Fakaleiti refers to males who adopt feminine characteristics in aspects of their lives such as dress and speech. Sex with other men is not part of a definition of a fakaleiti. Fakaleiti are accepted in most Tongan communities.

## ***Legal system***<sup>7</sup>

The Kingdom of Tonga is a constitutional monarchy. Sources of the law are the *Constitution*, local legislation, colonial legislation, English Acts of parliament that specifically apply to Tonga, and common law and equity.

Power is soon to be transferred from monarch to parliament. Elections in 2010 will see an increase in the number of parliamentarians directly elected by the Tongan people.

A Privy Council is appointed by the monarch, which has jurisdiction to hear appeals regarding hereditary systems and entitlements. With the addition of the Chief Justice of the Supreme Court, it constitutes the Court of Appeal. Magistrates' Courts are constituted for specific districts, and there are Land Courts.

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<sup>7</sup> Information on court and legal systems derived from Pacific Islands Legal Information Institute <[www.paclii.org](http://www.paclii.org)>. Additional information was provided by RRRT.

Tonga's *Constitution* contains a Declaration of Rights, which covers:

- Clause 1: Declaration of freedom.
- Clause 2: Slavery prohibited.
- Clause 4: Same law for all classes.
- Clause 5: Freedom of worship.
- Clause 6: Sabbath Day to be kept holy.
- Clause 7: Freedom of the press.
- Clause 8: Freedom of petition.
- Clause 9: Habeas Corpus.

Customary law is not formally recognised in legislation.

The Courts may make reference to international human rights laws. In *Tone & Ors v Police* [2004] TOSC 36 the Supreme Court took international human rights law into account in ruling that child offenders were entitled to have their parents present during police questioning in line with the Convention on the Rights of the Child.

### ***International obligations***

Tonga has only ratified two international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. Tonga became a member of the United Nations in 1999 and is a member of the World Trade Organization.

### ***HIV policy framework***

Tonga's National AIDS Council (NAC) was established in 1988. Subsequently Tonga joined other Heads of Health Ministries throughout the Pacific in a collaborative effort to combat STIs and HIV. This led to the development of the *National Strategic Plan for Responding to HIV/AIDS and STIs in the Kingdom of Tonga for the years 2001-2005*. A *National Strategic Plan* for 2009-2013 has been developed. The Strategy calls for urgent attention to minimize and control the impact of STIs and HIV on society, especially on youth and the economically active groups.

The Ministry of Health, Churches, Tonga Family Health Association and other NGOs are active in HIV prevention.

A Strategic Planning Process initiated formation of the Strategic Planning Co-ordinating Committee for STI/HIV/AIDS (SPCC). This SPCC is the pivotal body for the National Strategic Plan. The national HIV response involves Government, NGOs, community based organisations, Churches including the Council of Churches, donors and SPC.

The *National Strategic Plan* priorities are:

- Prevention and control of sexually transmitted infections.
- Reducing the vulnerability of specific groups and promotion of safer sexual behaviour.

- Safe blood supply.
- Care and support for people living with HIV/AIDS and their families.
- Human rights.
- Coordinating the multi-sectoral response.

Ethical principles to protect persons with HIV and their families are listed in the Strategic Plan. These include the endorsement of caring and supporting people living with HIV according to Christian and Tongan traditional community values. HIV testing is not approved unless it is voluntary and includes pre- and post-test counselling.

Health care services in Tonga are free of charge and considered of good standard in comparison to other Pacific island countries. There are four hospitals, 14 health centres and 34 maternal health clinics. Private providers are increasing in number.

In the Tongan social structure women outrank their male relatives. The Department of Women within the Ministry of Education, Women, and Culture is responsible for facilitation of development projects for women.

# CHECKLIST 1 – PUBLIC HEALTH LAW

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

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

There is no HIV or STI specific public health legislation.

The Health Promotion Foundation was established by *Health Promotion Foundation Act 2007*. The functions of the Foundation include making grants for activities, facilities, projects or research programmes related to the promotion of good health, safety and the prevention and early detection of diseases.

Under the *Health Services Act 1991* Section 9, it is the duty of the Minister to provide such hospitals, health centres, clinics and other establishments as are necessary to meet the needs of public health, and to provide such specialist or medical, dental, nursing, midwifery, paramedical and technical staff as are necessary to meet the needs of public health.

Under the *Therapeutic Goods Act 2001*, the National Drugs and Medical Supplies Committee is established which maintains a List of Essential Drugs which is the basis for public sector drug procurement.

**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 that makes specific provision for informed consent and counselling in relation to HIV tests. The common law of England applies, which requires consent to a blood test. If consent is not given, the person taking blood may be liable under civil and/or criminal law for assault. Common law does not require pre and post test counselling.

Medical officers have powers to conduct medical examinations of persons suspected of having a notifiable disease including HIV under the *Public Health Act 1992*.

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?**

Part X of the *Public Health Act 1992* deals with notifiable diseases, which are listed in Schedule 4, and include AIDS, AIDS-related Complex (ARC), HIV-1 and HIV-2.

The implications of this scheduling are that HIV is subject to far reaching provisions that apply to diseases that are transmitted through casual contact. Section 140 empowers a medical practitioner to order removal to hospital or isolation of any case of a notifiable disease. Section 143 gives wide powers of detention and isolation of persons suspected to have or have been in contact with a person who has a notifiable disease.

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 Act however a person could apply to a court seeking judicial review of administrative action (e.g. seeking certiorari to quash a decision).

Part IX of the *Public Health Act* deals with port health, and refers to communicable diseases, which are defined as diseases caused by an infective agent and transferable directly or indirectly, but do not appear to include HIV and STIs. The *Quarantine Act 1988* also does not appear to list HIV or AIDS as quarantinable diseases. Discretion is given to the Prime Minister to gazette further quarantinable diseases.

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?**

Legislation does not specifically authorise health-care professionals to notify sexual partners.

Sections 138(1) and 139 of the *Public Health Act 1992* require anyone who is suffering from a notifiable disease (i.e. including HIV) to notify a medical practitioner, nurse or an authorised officer/health officer of the district where the person resides.

Section 139(2) imposes a duty on the head of the family of that person; the nearest relative living in the same premises as that person; anyone in attendance on that person; or the occupier of the premises in which that person resides to enquire whether notification of diseases has been made and make notifications themselves if necessary.

Section 141 requires the medical practitioner to notify the Director of Health

A Communicable Disease Section under the Public Health Division handles STI/HIV cases in terms of contact-tracing. Tests are coded so as to provide confidentiality.

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

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

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

There is no blood safety legislation. Prospective blood donors are required to fill out a form disclosing personal details including HIV risk behaviour.

## 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 Tonga were found, so legislation relating to needles and syringes is not considered necessary.

The *Illicit Drugs Control Act 2003* provides offences for importing, exporting, possession, manufacture, cultivation, use and supply of illicit drugs.

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

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

### **Homosexual acts e.g. sodomy**

“Sodomy” and indecent assaults upon males are illegal under Sections 136-140 of the *Criminal Offences Act*. There have been cases of convictions for homosexuality.<sup>8</sup>

Section 81 *Criminal Offences Act* provides that ‘Any male person who, whilst soliciting for an immoral purpose, in a public place with intent to deceive any other person as to his true sex, has on or about his person any article intended by him to represent that he is a female or in any other way impersonates or represents himself to be a female shall be guilty of an offence’.

### **Fornication or adultery**

The *Adultery and Fornication Act* [Cap 21] provides that adultery or fornication with any unmarried woman under the age of 18 years is an offence punishable by fine or imprisonment. Nine-tenths of the fine is to be paid to the complainant.

The *Divorce Act* Section 13 provides that a petitioner on a petition for divorce may claim damages from any person on the ground of adultery.

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<sup>8</sup> Minister of Police *Annual Report* 1998.

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

Prostitution is illegal. Section 80 of the *Criminal Offences Act* prohibits brothel keeping.

Section 81 of the *Criminal Offences Act* prohibits living on the earnings of prostitution (with separate definitions in respect of male pimps and female procurers); and any person soliciting or importuning for immoral purposes in a public place.

### **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)?**

While the law does not specifically address trafficking, violators could be prosecuted under anti-slavery provisions of the *Constitution* and provisions of the *Criminal Offences Act*. Sections 126 and 127 of the *Criminal Offences Act* prohibit procurement for commercial sex.

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

Assault provisions in the *Criminal Offences Act* can be applied to deliberate HIV transmission. A person could be charged for causing grievous bodily harm (Section 106), an offence which has been applied successfully in the UK to cases of deliberate HIV transmission.

Section 144 of the *Public Health Act 1992* provides that a person who has contracted a notifiable disease (which includes HIV) and has knowingly exposed other people to the risk of being infected is guilty of an offence. Any person shall be guilty of an offence who:

- (a) knowing or believing that he is suffering from a notifiable disease exposes other persons to the risk of infection by his presence or conduct in any street, public place, public transport vehicle, place of entertainment, assembly, club, hotel, restaurant or shop;
- (b) having care of a person whom he knows or believes to be suffering from a notifiable disease, causes or permits that person to expose other persons to the risk of infection by his presence or conduct in any of the aforementioned places;
- (c) gives, lends transmits or exposes without previous disinfection any clothing or bedding or any other article which he knows or has reasonable grounds to believe may carry infection from a notifiable disease;
- (d) rents, hires leases or sells any premises where he knows or believes there is or has been a case of notifiable disease before any necessary disinfection has been completed.

HIV transmission should not be an offence under section 144 *Public Health Act*. Instead, deliberate transmission should be charged under the general criminal law provisions of the *Criminal Offences Act*.

## 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?**

The Prison Rules provide that assault is a prison offence (Rule 159).

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

Legislation does not provide for the confidentiality of prisoners' HIV status or medical/personal information.

The Medical Officer is required to enter in a journal, to be kept at the prison in the custody of the Gaoler, an account of the state of each prisoner on admission, and, with any prisoner who is sick, the name of his disease, a description of the medicines and diet, and any other treatment ordered for the prisoner. (Rule 42)

Under the Prison Rules, the Medical Officer is required to report infectious disease to the Minister of Police and the Director of Health, and “shall take steps to preserve prisoners against it and shall superintend the measures necessary for this purpose.” (Rule 47)  
However HIV is not specifically defined as an infectious disease.

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

There are no requirements for segregation of prisoners with HIV. Rule 141 of the Prison Rules provide that prisoners suspected of having infectious diseases shall be separated from other prisoners, and, as soon as it can be done with safety, shall be removed to the infirmary or other authorized place. HIV is not defined as an infectious disease.

**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?**

Legislation does not provide for compassionate release on medical grounds or reduction in sentence. 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 for prisoners with HIV.

## CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

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

Clause 4 of the *Constitution* provides for the equality of all before the law, but there is no specific reference to equality and non-discrimination rights of particular groups such as women or people with a disability. There is no disability discrimination legislation. Discrimination on the grounds of HIV or AIDS status is not unlawful.

Tonga Law Reform Committee has proposed employment relations legislation similar to that of Fiji. During the development of law reform proposals, a debate occurred relating to a provision regarding discrimination against people living with HIV in the process of job applications. Some members of the Law Reform Committee wanted to omit a protection from discrimination in job applications on the basis that people living with HIV should not be given “special” treatment and should be treated as if infected with any other disease.<sup>9</sup>

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

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

There are no legal protections against discrimination for vulnerable groups.

### 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?

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<sup>9</sup> Information conveyed to RRRT from Crown Law Solicitor in Tonga, August 2006.

There are no legal protections against discrimination for vulnerable groups.

There is no Human Rights Commission or Ombudsman. However there is a Public Complaints Commission that receives and investigates public complaints about government departments.

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

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

There is no Human Rights Commission or Ombudsman, see above.

## 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**

Tonga does not give formal recognition to customary law. However, customary law has occasionally been referred to by the courts, when exercising a discretion or interpreting the law.<sup>10</sup>

Inheritance issues are addressed by the *Probate and Administration Act* [Cap 16] and the *Land Act* [Cap 132].

Inheritance laws concerned with land discriminate against women. There is no freehold title to land. Anyone can lease land. While women can lease land, inheritance rights pass through the male heirs. The *Land Act* Sections 41 and 82 provides that male issue shall be preferred to female issue of the same degree. Only the eldest male can succeed to hereditary title.

If there are no male relatives, a widow is entitled to remain on her husband's land as long as she does not remarry or have sex. The *Land Act* Section 80 provides that on the death of the lawful male holder of a town allotment his widow shall be entitled to a life estate in such allotment which estate shall terminate on her re-marriage or upon proof of her having committed fornication or adultery.

The *Probate and Administration Act* Section 16 provides that the widow shall inherit the dwelling house on the town allotment (and if more than one the Court shall decide which one shall go to the widow), the growing crops, pigs and poultry and ngatu whether the

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<sup>10</sup> J Corrin Care. For better or worse: marriage and divorce laws in the Kingdom of Tonga in B Atkin *The International Survey of Family Law*, 2007 p.293.

deceased left a will or not. The rest of the property of an intestate is divided according to the Schedule I of the Act. If a man dies leaving a wife and children, one-third of other personal possessions go to the widow and two-thirds to the children in equal shares.

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

Family law may disadvantage women because it is to some extent fault based. Women may have difficulties raising domestic violence in proceedings, for fear of reprisals. A system that focuses on past contributions to the matrimonial property, including non-financial contributions such as child care, future needs and best interests of the children would likely result in fairer outcomes for women.

Divorce is fault based, with the exception that divorce is available on a no fault basis if there has been separation for 2 years, no payment of maintenance or intention to maintain, and no intention to renew normal marital relations or cohabit. Grounds for divorce include adultery, desertion, bigamy and “infliction with an incurable disease capable of being transmitted to the petitioner” *Divorce Act* [Cap29] Section 3(1)(d).

Bigamy is also a crime under the *Criminal Offences Act* [Cap18]. Customary marriages are not recognised.

Conduct of the parties is taken into account in maintenance claims. Spousal maintenance orders may be made as the Court “thinks reasonable having regard to his fortune (if any), his ability and the conduct of the parties” (Section 18). There is a broad discretion of the Court in divorce proceedings to make “such orders as appear just” with respect to the custody, maintenance and education of the children of the family (Section 19).

De facto relationships are not recognised by law.

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

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

Abortion is illegal. Sections 103-105 of the *Criminal Offences Act* prohibits procuring a woman’s miscarriage. The procurer, the woman herself and the supplier of any means of procurement are all criminalised. According to Tonga Family Health Association and Ministry of Health,<sup>11</sup> people seeking an abortion are given the option of going overseas to countries like Fiji, New Zealand, Australia or Hawaii for that procedure.

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

Under Section 118 of the *Criminal Offences Act* rape is gender-specific. Sexual intercourse by a man with his wife is deemed not to be rape.

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<sup>11</sup> Information provided to RRRT.

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

There are no laws prohibiting mandatory testing of groups.

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

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

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

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

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

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

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

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

The law does not recognize same sex relationships.

## CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

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

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

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

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

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

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

There is no legislation.

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

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

There is no legislation.

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

There is no legislation enabling privacy in legal proceedings for people living with HIV. Courts have discretion under common law to close hearings where there are exceptional public interest factors (e.g. relating to ensuring a fair trial), outweighing the public interest in open court proceedings. The Constitutional right to freedom of the press may weigh in favour of open proceedings.

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

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

## CHECKLIST 7 – EMPLOYMENT LAWS

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

HIV screening for employment is not prohibited.

Tonga does not have legislation on employment relations. The delay in enacting the Employment Bill has had a negative impact on the passing of other laws such as an Occupation and Health and Safety Bill.<sup>12</sup> The government has issued a Labor Code establishing provisions for workers' compensation.

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

Legislation does not prohibit mandatory testing of specific employment groups.

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

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

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

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

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

- 5. Does the law provide for:**

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

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<sup>12</sup> A Chand (2004) *Employment, the Labour Market, and Industrial Relations in Tonga* Pacific Institute of Advanced Studies in Development and Governance Working Paper No. 4/2004 University of South Pacific p.2

There are no specific social security laws. Government employees may pay into a scheme and under the *Retirement Fund Act 1992*. There are benefits for total and permanent disability.

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

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

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

Legislation does not recognize occupational transmission of HIV.

## CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

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

There is no legislation specifically regulating HIV test kits.

HIV tests could be subject to quality control as therapeutic devices under the *Therapeutic Goods Act 2001*. This may require introduction of amending legislation to clarify that devices as well as drugs need to be registered. Section 13 of the Act makes it an offence for a person to import, manufacture, or supply therapeutic goods unless the goods are included in the registered list, and if imported are imported under a licence under section 12 or the goods are the subject of an authorisation by the Minister.

### 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 *Therapeutic Goods Act 2001* requires registration of pharmaceutical drugs and other therapeutic goods based on safety and efficacy data. Section 7 provides that a drug may be included in the registered list if the drug-

- (a) is of acceptable quality;
- (b) meets and acceptable safety profile;
- (c) is of demonstrated efficacy;
- (d) is of United States Pharmacopoeia or British Pharmacopoeia standard or proven equivalent standard;
- (e) has been proven by the manufacturer to be registered in one of the countries listed in the Schedule, or following assessment of a detailed submission by the manufacturer is found to meet the requirements of subsections (1) to (4); and
- (f) would be appropriate for use in Tonga.

Countries of manufacture are Australia, Canada, Fiji, Sweden, United Kingdom, United States of America and New Zealand.

The Act requires registration applications to be accompanied by a World Health Organization Certificate for a Pharmaceutical Product Moving in International Commerce, signed by the government regulatory authority in a country which is a signatory to the World Health Organization Certification Scheme, the country being that in which the manufacture has occurred, so long as the medicinal drug has been registered for sale on the local market in the country of manufacture.

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

The *Therapeutic Goods Act 2001* requires accurate labelling of drugs (Section 23). Section 15 makes it an offence for a person to manufacture, import, export, compound, store, sell, advertise or distribute a medicinal drug that-

- (a) is unfit for use in humans or in animals;
- (b) is adulterated;
- (c) has upon it any natural or added deleterious substance which renders it injurious to health;
- (d) has been manufactured, prepared, preserved, packaged or stored for sale under insanitary or unfavourable conditions;
- (e) has been labelled, packaged or advertised in a manner that is false, misleading, deceptive or likely to cause an erroneous impression regarding its source, character, value, quality, composition, potency, merit or safety;
- (f) contains any counterfeit starting materials or is known to be counterfeit or suspected to be a counterfeit.

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

There is no legislation regulating the quality of condoms. Condoms are a form of therapeutic device, so could be regulated under the *Therapeutic Goods Act 2001*. This may require amendment to the Act to clarify that devices are required to be registered.

**5. 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)?**

Tonga is a WTO member and therefore is required to introduce patent legislation that complies with the requirements of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It is recommended that Tonga make full use of Flexibilities within TRIPS in relation to promoting access to medicines. Legislation is required enabling (i) parallel importing of medicines, (ii) compulsory licensing of medicines, and (iii) early working of patented medicines so that cheaper, generic versions of medicines can be placed on the drug register as early as possible after patent expiry.

## 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?**

The National Health Ethics and Research Committee has been established to assess ethical approval of medical research.<sup>13</sup>

- 2. Does the legislation require subjects to be provided before, during and after participation with:**

- **Counselling**
- **Protection from discrimination;**
- **Health and support services?**

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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

There are no specific legislative requirements.

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<sup>13</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, 96

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

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

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

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

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

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

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

The *Pornography Control Act 2002* defines “pornographic material” as any display in print, audio visual, electronic or other similar medium that describes or exhibits sexual activity that is intended to stimulate immorality. The production, sale or hire of pornographic material is prohibited.

The *Censorship Regulations 1934* made under the *Cinematograph Act 1927* require censorship of films and posters which encourage or justify crime or immorality.

The *Educational Films (Exempt from Duty) Act 1988* applies the exemption of duty to films that deal with scientific/technical research designed to spread scientific knowledge and films dealing with health questions, physical training, social welfare or relief.

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

No broadcasting standards were identified.

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

- Health care workers
- Other industries where there may be a risk of transmission, e.g. sex or funeral workers;
- Media;
- Superannuation and insurance;

- **Employers (in a tripartite forum involving unions and government)?**

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

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

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

No Codes are required by legislation.

## SUMMARY AND RECOMMENDATIONS

Priority actions to build a human rights framework for addressing HIV in the Kingdom of Tonga include:

- (i) amending the *Public Health Act 1992* to remove HIV and AIDS from the list of notifiable diseases, 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; and
- (ii) enacting anti-discrimination legislation that covers discrimination on the grounds of HIV status, disability, sex, sexuality, and transgender status.
- (iii) decriminalizing homosexuality, 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.

HIV transmission should not be an offence under Section 144 *Public Health Act* as general criminal law provisions already exist and are sufficient.

The Employment Bill should include protection from discrimination on the grounds of disability including HIV status through unfair dismissal proceedings. 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>14</sup> A Code of Practice should be developed that promotes universal infection control procedures in health care settings and non-discrimination in workplaces.

Blood safety laws should be introduced that require screening of donated blood for HIV and other blood borne viruses.

Inheritance laws should not disadvantage women. The *Land Act* should be amended so that men and women are treated equally in inheritance. Amendments should be made to the *Land Act* to allow women to inherit registered land allotments.

Legislation relating to administration of wills and estates should be amended to provide for family provision orders to prevent women from being left financially destitute after a husband's death.

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<sup>14</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)

Consideration should be given to moving to a no-fault model for family law. Legislation should abolish the husband's right to claim compensation for adultery. Infliction with an incurable disease capable of being transmitted should not be a ground for divorce as this may compound stigma associated with HIV and STIs.

De facto relationships including same sex partnerships should be recognised by law.

The *Therapeutic Goods Act* should be amended, or regulations introduced, to require male and female condoms, and HIV and STI test kits to comply with international quality standards. Condoms and HIV/STI prevention information should be made available in prisons.

Censorship legislation should not criminalise sexual health promotion. Exceptions for bona fide HIV information and education materials should be introduced into censorship legislation.

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 placed on the national drugs register and approved for marketing as soon as possible after patent expiry.