## CREATING A FRAMEWORK FOR HIV/AIDS RELATED LEGAL REFORM IN THE SOUTH PACIFIC

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## INTRODUCTION

HIV/AIDS is not just a health issue but is also a development issue. It is widely recognised that, just as the causes of HIV/AIDS have a number of facets, so too must the response be multifaceted or multisectoral.[1] It is also recognised that human rights are fundamental to managing the HIV/AIDS epidemic. This is not only because of inherent respect for human rights, or because countries have obligations to comply with various instruments of international law but also because, more pragmatically, experience shows that failure to respect human rights fuels the epidemic.[2] Public health and human rights are complementary goals.

The role of the law within the response to the HIV/AIDS epidemic is closely linked to the protection of human rights.[3] Law is generally envisaged as being a device for engendering social change by proscribing discrimination and thereby helping to create a society that is supportive of people with HIV/AIDS. It also helps to shape society by providing an institutional framework that is supportive of people with HIV/AIDS. This view of the role of the law in response to HIV/AIDS is reflected in*The Regional Strategy for the Prevention and Control of STD/AIDS in Pacific Island Countries and Territories* (the Regional Strategy)[4]:

> policies and laws that are based on an ethic of compassion for people with HIV will increase the effectiveness of prevention programmes. Alienating people with HIV breeds indifference and low self esteem, creating perfect conditions for the spread of the virus, and discouraging voluntary changes in behaviour. A supportive social and legal environment encourages people infected with HIV and/or STD and people whose behaviours might put them at risk of HIV and STD to respond to education campaigns and resources, and to make use of services such as STD clinics or counselling.

The Regional Strategy provides a number of concrete actions to ensure the creation of this supportive social and legal environment, including that countries identify and review laws ‘that may assist in increasing HIV transmission, rather than aiding in reducing transmission or being transmission neutral.’[5]

There are considerable resources to assist Pacific Island countries in such law reform initiatives. The *International Guidelines on HIV and Human Rights* provide a clear set of twelve normative standards for governments to base HIV/AIDS and human rights initiatives upon. The *Handbook for Legislators on HIV/AIDS, Law and Human Rights*[6] makes these guidelines more accessible by providing examples of good legislative and regulatory practices for each guideline. There are also numerous examples of legislation from various countries that Pacific Island countries could use as models for the development of

legislation.

**Current Pacific Islands legal responses**

Despite regional and international statements on the importance of integrating human rights sensitive law reform measures into HIV/AIDS management programmes there have been very few legal changes in the Pacific Islands region in response to HIV/AIDS. The only HIV specific legal changes in the region that have actually been commenced are to be found in Tonga and Samoa. Both of these countries have included HIV/AIDS in the schedule of notifiable or infectious diseases in their *Public Health Acts*.[7] Vanuatu's *Public Health Act 1994* makes similar changes, although the relevant parts of this Act have never come into force.[8]

These changes cannot be said to engender a supportive environment for people living with HIV/AIDS. The statutory regime surrounding notifiable diseases in public health legislation is not aimed at looking after the rights of people with a notifiable disease. Instead such laws aim to give the State the power to manage a disease outbreak by identifying, isolating and/or compulsorily treating people infected with particular diseases.[9] Tonga's legislation provides a striking example of the "anti-human rights" approach that notifiable disease regimes entail. Between 1989, when HIV/AIDS was first added to the schedule of notifiable diseases in Tonga, and the commencement of the revised *Public Health Act 1992* in May of 1993 if you were HIV/AIDS positive you were:

- required to consult a medical officer and submit to treatment
- required to inform the person in charge of any public conveyance that you were HIV/AIDS positive
- not allowed employment in or about any dairy, factory, shop, hotel, restaurant, child care place or food related business
- not allowed to attend college
- not allowed to use public wells to draw water[10]

Whilst the *Public Health Act 1992* (Tonga) removes these harsh limits on ones' freedom, the underlying approach to the law reform is not based upon notions of human rights, but is instead based upon notions of identification and control through restrictive measures. Sections 140 and 143 give medical practitioners and authorised government officials the power to isolate and treat a PLWHA, and to restrict his or her employment opportunities.

The only significant legislative change in the region that has been drafted from a human rights perspective is the *HIV/AIDS Management and Prevention Act 2003*(PNG). The aims of the Act, below, explicitly incorporate a human rights approach into the management of the epidemic:

> *(f)* the prevention of the spread of HIV/AIDS; and
> (g) the management of the lives and protection from discriminatory practices of people who are infected or affected by HIV/AIDS; and
> (h) the protection of public health,

The review of HIV/AIDS related law in Papua New Guinea was explicitly based upon the human rights framework. The stated reasons for adopting this approach were:

> All member states of the United Nations are bound to promote and encourage respect for human rights under the UN charter. In addition, States are bound to implement human rights under Conventions to which they are party.
> States should also direct management efforts within the framework of human rights, because two decades of attempts at epidemic management have proved that denial, discrimination,