

**The UNGP Protect, Respect and Remedy Framework as a Best Practice Model for Dispute Resolution for Tokelau**

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| **SUMMARY OF KEY ISSUES FROM PREVIOUS UPR CYCLES** |
| In the Report of the Working Group on the Universal Periodic Review: New Zealand dated 7 April 2014, the Working Group simply noted New Zealand’s statement that after Tokelauans voted to remain a territory of New Zealand, New Zealand continued to have ‘special responsibilities’ to Tokelau. |

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| **NATIONAL FRAMEWORK** |
| There is no national framework. Tokelau is part of New Zealand and all Tokelauans are New Zealand citizens under the Citizenship Act 1977.[[1]](#footnote-1) Tokelau’s substantive law is contained primarily in the Tokelau Act 1948. The law of Tokelau has a number of interesting features including that:   * + Tokelau is part of New Zealand;[[2]](#footnote-2)   + The Act is administered by the New Zealand Minister of Foreign Affairs and Trade;[[3]](#footnote-3)   + The substantive law of Tokelau is the common law of England as it was on 1 January 1949 when the Act came into force, rules made by the GF and any regulations made by the New Zealand Governor-General in respect of Tokelau;[[4]](#footnote-4)   + New Zealand statutes are not applicable to Tokelau law unless they expressly provide otherwise;[[5]](#footnote-5)   + In 2007, the GF passed the Constitution of Tokelau into law. The Constitution provides for the consequential repeal of the Act but the Constitution, itself, does not come into force until the Act has been repealed;[[6]](#footnote-6)   + Under the Constitution, the sources of law include the Constitution, the General Fono Rules, the custom of Tokelau, and general principles of international law. Currently, general principles of international law are excluded;[[7]](#footnote-7)   + Under the Tokelau Amendment Act 1986 (the 1986 Act), the High Court of New Zealand is a court of law for Tokelau, sitting as a separate court of justice in and for Tokelau;[[8]](#footnote-8)   + Under the 1986 Act, the New Zealand Court of Appeal can hear appeals from any judgment or decision of the High Court sitting as a court of justice for Tokelau;[[9]](#footnote-9) and   + In a recent decision, the High Court held that the atolls of Tokelau are currently unable to hear cases due to a lack of air travel and other infrastructure but that may change in the future.[[10]](#footnote-10) |

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| **CHALLENGES** | **IMPACT** |
| *Critical human rights challenges include:*   * *Inability of Tokelauans to access official information and their personal information.* * *Inability of Tokelauans to make complaints to any Ombudsman in respect of the actions of the Government of Tokelau.* * *Inability of Tokelauans to challenge whether any Tokelauan agency has complied with basic privacy law contained in New Zealand’s information privacy principles.* * *Inability of Tokelauans to bring employment claims to the New Zealand employment institutions. Safeguards provided by New Zealand employment statutes and regulations do not apply to Tokelauans.* * *Inability of Tokelauans to access the protection of their human rights that New Zealanders can access under the Human Rights Act 1993 and to obtain remedies through the New Zealand human rights institutions including the Human Rights Review Tribunal.* | *There is no basis in law for citizens to request the government of Tokelau to provide official information. There is no requirement for the government of Tokelau to comply with the provisions of New Zealand’s Official Information Act 1982 which requires the New Zealand government to make available all official information to New Zealand citizens including Tokelauans unless there is good reason for withholding it. Further, even if the same information is held by the New Zealand government, the New Zealand government can withhold any information that might prejudice the security or defence of Tokelau. Similarly, there is no requirement for the government of Tokelau to comply with the privacy principles contained in the New Zealand Privacy Act 1993. Again, any New Zealand agency (including MFAT) can refuse to disclose personal information if disclosure would be likely to prejudice the security or defence of Tokelau. These arbitrary and unnecessary limits on access to information exacerbate the imbalance in power between Tokelauans and the Government of Tokelau.*  *Tokelauans have no ability to make complaints to the New Zealand Ombudsman in respect of the actions of the government of Tokelau. There is no independent scrutiny of the actions of the Government of Tokelau.*  *Tokelauans have no ability to make any complaint to the Office of the Privacy Commissioner in respect of any action by any agency governed by the law of Tokelau. There are no safeguards in place for protecting the personal information of Tokelauans and no independent oversight over agencies holding the personal information of Tokelauans.*  *Tokelauans have no ability to bring any employment matter to the New Zealand employment institutions (the Employment Relations Authority or the Employment Court). Employee protections contained in the Employment Relations Act 2000 (and other New Zealand employment legislation) including the duty of good faith and protection from discrimination do not apply to Tokelauans employed by the government of Tokelau.*  *The New Zealand Human Rights Act 1993 which protects New Zealand from discrimination based on specified prohibited grounds including race does not protect Tokelauans. The Human Rights Commission and its institutions have no jurisdiction in respect of Tokelau.* |

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| **RECOMMENDATIONS** |
| WCM Legal recommends that the New Zealand government must:   * + Urgently extend protections provided by the Ombudsmen Act 1975, the Official Information Act 1982 and the Privacy Act 1993 to Tokelau.   + Urgently extend the application of the Employment Relations Act 2000 to Tokelau.   + Urgently extend application of the Human Rights Act 1993 to Tokelau.   + Repeal s 6 of the Tokelau Act 1948 so that New Zealand statute law is in force in Tokelau unless expressly excluded. |

References/sources:

1. Citizenship Act 1977.
2. Employment Relations Act 2000.
3. Official Information Act 1982.
4. Ombudsmen Act 1975.
5. Privacy Act 1993.
6. Human Rights Act 1993.
7. Tokelau Act 1948.
8. Tokelau Amendment Act 1986.
9. Constitution of Tokelau.
10. United Nations “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (United Nations, New York and Geneva, 2011).

1. Citizenship Act 1977, ss 2 and 6. [↑](#footnote-ref-1)
2. Tokelau Act 1948, s 3. [↑](#footnote-ref-2)
3. Tokelau Act 1948, s 9. [↑](#footnote-ref-3)
4. Tokelau Act 1948, ss 3A, 4, 4A and 4B. [↑](#footnote-ref-4)
5. Tokelau Act 1948, s 6. [↑](#footnote-ref-5)
6. Government of Tokelau “Constitution of Tokelau” (2007) <www.tokelau.org.nz>. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Tokelau Amendment Act 1986, s 3. [↑](#footnote-ref-8)
9. Tokelau Amendment Act 1986, s 4. [↑](#footnote-ref-9)
10. *Suveinakama v Council for the Ongoing Government of Tokelau* [2018] NZHC 1670 at [17]. [↑](#footnote-ref-10)