

Malaysian Business Consortium on HIV/AIDS
(MBCH)

GREEN PAPER

ON

Proposed

Prevention and Management of
HIV/AIDS at Workplace Regulation

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A. INTRODUCTION

More than 30 years after the first case of HIV in Malaysia, stigma and discrimination at the workplace against individuals living with HIV/AIDS remains rife. 54% of the respondents to the PLHIV Stigma Index survey reported discriminatory reactions from employers and co-workers who became aware of their HIV status¹. In 2015, one third of HIV-related discrimination complaints reported to the Malaysians Aids Foundation occurred at the workplace, including instances of termination, forced resignation and demotion².

The urgent need to address discrimination and stigma against people living with HIV/AIDS cannot be overstated. The access to meaningful employment, free from discrimination, is a fundamental human right of all Malaysians and is essential for building a prosperous society. If current levels of HIV-related discrimination at the workplace persist, significant portions of the workforce will be disenfranchised of their fundamental rights.

The Malaysian Aids Foundation therefore considers it imperative that a Regulation (“Proposed Regulation”) be passed under the Occupational Safety and Health Act, 1984 (“OSHA”) to legislate against discrimination at the workplace against people living with HIV/AIDS.

¹ GNP+, ILO, The PLHIV Stigma Index (2012) ‘Evidence Brief: Stigma and Discrimination at Work. Findings from the PLHIV Stigma Index’.

² Rahman F, *2015 HIV and Human Rights Mitigation Report*, Malaysian AIDS Council, Kuala Lumpur (2016).

B. POLICY OBJECTIVE

The objective of the Proposed Regulation is to provide a regulatory framework to address HIV-related discrimination and stigma at workplace. It covers the following key areas :-

- (i) Non-discrimination against people living with HIV at workplace;
- (ii) Confidentiality of HIV status at workplace;
- (iii) Education and awareness programmes on HIV; and
- (iv) Redress mechanism for HIV-related discrimination.

C. SOURCES OF LAW/POLICY

- a) Code of Practice on Prevention and Management of HIV/AIDS at the Workplace by the Department of Occupational and Health (“DOSH”), Malaysia (DOSH’s Code of Practice);
- b) The ILO Code of Practice on HIV/AIDS and the World of Work (“ILO Code of Practice”); and
- c) HIV anti-discrimination legislations in other countries, such as United States, England, Canada, Australia, New Zealand, India and Philippines.

D. PROPOSAL

I. Non-discrimination against People Living with HIV at the Workplace

(a) The relevant guidelines in the ILO Code of Practice

4. Key Principles

4.2. Non-discrimination

In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.

5. General Rights and Responsibilities

5.2. Employers and their organisations

- (e) *Personnel policies.* Employers should not engage in nor permit any personnel policy or practice that discriminates against workers infected with or affected by HIV/AIDS. In particular, employers should:
- not require HIV/AIDS screening or testing unless otherwise specified in section 8 of this code;
 - ensure that work is performed free of discrimination or stigmatization based on perceived or real HIV status;

- encourage persons with HIV and AIDS-related illnesses to work as long as medically fit for appropriate work; and
- provide that, where a worker with an AIDS-related condition is too ill to continue to work and where alternative working arrangements including extended sick leave have been exhausted, the employment relationship may cease in accordance with anti-discrimination and labour laws and respect for general procedures and full benefits.

(b) The relevant guidelines in DOSH's Code of Practice

3. Managing HIV/AIDS in the Workplace

3.3. Responsibility of Employers

3.3.4. Non-judgemental, Non-discriminatory Employment Practices

An employer should ensure that:

- (i) Employment practices should be based on the scientific and epidemiological evidence that people with HIV/AIDS do not pose a risk of transmission of the virus to co-workers through ordinary workplace contact.
- (ii) HIV-positive status should not be the sole criterion for disqualification from any form of employment.
- (iii) HIV-positive employees should have the right to continue in employment as long as they are able to work and as long as they do

not pose any danger to themselves, their co-workers and other individuals in the workplace.

- (iv) The procedure for termination or employment on medical grounds for HIV-positive employees should be the same as for any other disease.
- (v) Disciplinary action should be taken against any employee who discriminates or stigmatises HIV-positive or perceived HIV-positive employees.

(c) Issue

Discriminatory actions taken against Malaysian citizens living with HIV violate their fundamental human rights to equality in treatment with other citizens of Malaysia. In addition to being a violation of human rights in itself, HIV-related discrimination also leads to the violation of other human rights, such as the right to dignity, privacy and productive employment. Therefore, HIV is, and ought to be, statutorily recognised as a workplace issue.

Ensuring the protection and respect of human rights of HIV-positive citizens is critical towards combating HIV-related stigma and discrimination at the workplace. In this regard, Malaysia does not have comprehensive national HIV laws in place, lagging behind its ASEAN counterparts, such as Cambodia, Indonesia, Laos, Philippines and Vietnam, as well as more mature jurisdictions such as the USA, UK, Australia, India, Canada and New Zealand.

(d) Proposal

The Proposed Regulation should expressly prohibit discrimination against employees at the workplace on the grounds of HIV, and should describe, in as general terms as possible, the instances in which discrimination can occur at the workplace. We propose that the provision in the Indian Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 be adopted in the Proposed Regulation :-

Proposed Provision:

No person shall discriminate against a person who is HIV-Positive at workplace on any ground, including any of the following –

- a) *the denial of, or termination from employment or occupation, unless, in the case of termination, the person, who is otherwise qualified is furnished with –*
 - (i) *a copy of the written assessment of a qualified and independent healthcare provider competent to do so that such protected person poses a significant risk of transmission of HIV to other person in the workplace, or is unfit to perform the duties of the job; and*
 - (ii) *a copy of a written statement by the employer stating the nature and extent of administrative or financial hardship for not providing reasonable accommodation; and*
- b) *treatment that is less favourable than that accorded to employees with any other serious illnesses in, or in relation to, employment or occupation;*

c) *HIV testing as a pre-requisite for obtaining employment.*

Provided that, in case of failure to furnish the written assessment under sub-clause (i) of clause (a), it shall be presumed that there is no significant-risk and that the person is fit to perform the duties of the job, as the case may be, and in case of the failure to furnish the written statement under sub-clause (ii) of that clause, it shall be presumed that there is no such undue administrative or financial hardship.

Definition:

- a) **“discriminate”** means any act or omission which directly or indirectly, expressly or by effect, immediately or over a period of time –
- (i) *imposes any burden, obligation, liability, disability or disadvantage on any person or category of persons, based on actual, perceived or suspected HIV/AIDS status; or*
 - (ii) *denies or withholds any benefit, opportunity or advantage from any person or category of persons, based on actual, perceived or suspected HIV/AIDS status.*

(e) Points for Discussion

1. What is HIV-related discrimination? Please provide us with examples and frequency of the types of actual discrimination faced.
2. Who should be protected from HIV-related discrimination?
3. Are the prohibitions outlined above sufficiently comprehensive to eliminate HIV-related discrimination at workplace?
4. What other prohibitions should be included?
5. Are the pre-requisites (*employer's written statement, etc*) to terminate HIV-positive employees sufficient to protect them from discriminatory termination?
6. What should be the penalty for HIV-related discrimination?

II. CONFIDENTIALITY OF HIV STATUS

(a) The relevant guidelines in the ILO Code of Practice

4. Key Principles

4.6. Screening for purposes of exclusion from employment or work processes

HIV/AIDS screening should not be required of job applicants or persons in employment.

4.7. Confidentiality

There is no justification for asking job applicants or workers to disclose HIV-related personal information. Nor should co-workers be obliged to reveal such personal information about fellow workers. Access to personal data relating to a worker's HIV status should be bound by the rules of confidentiality consistent with the ILO's Code of practice on the protection of workers' personal data, 1997.

8. Testing

8.1. Prohibition in recruitment and employment

HIV testing should not be required at the time of recruitment or as a condition of continued employment. Any routine medical testing, such as testing for fitness carried out prior to the commencement of

employment or on a regular basis for workers, should not include mandatory HIV testing.

(b) The relevant guidelines in DOSH's Code of Practice

3. Managing HIV/AIDS in the Workplace

3.3. Responsibilities of Employers

3.3.5. Confidentiality and Privacy

An employer should ensure that HIV-positive employee is not required to disclose his/her HIV status to the employer or anyone at work. In situations where the employee needs to reveal his/her status, confidentiality and privacy regarding all medical information related to his/her HIV/AIDS status should be maintained at all times.

3.3.6. Screening/HIV-antibody Testing

Employers should not practice screening on HIV-antibody testing as a precondition to employment, promotion, or other employee benefits.

(c) Issue

Disclosure of HIV status is likely to lead to stigmatisation and discrimination against individuals living with HIV. Any improper disclosure of their status may result in denial of promotions/advancement, training opportunities, and other collateral consequences at the workplace. Further, a failure to preserve the confidentiality of an HIV-positive person's status is a direct violation of that person's right to privacy, which is a basic and fundamental right enshrined in the Federal Constitution of Malaysia and recognized by our Courts.

(d) Proposal

We propose that the Proposed Regulation should contain an express prohibition against mandatory disclosure of HIV status at the workplace. Any routine medical testing carried out on regular basis should not include mandatory HIV testing.

An employee should only disclose his/her status depending on his/ her scope of work and any work activity that may pose potential risks of HIV transmission. Should the status need to be disclosed, confidentiality and privacy regarding all medical information related to the employee living with HIV must be maintained at all times.

(e) Points for Discussion

1. Under what circumstances, must an employee disclose his/her HIV status to the employer? What if disclosure is required by insurance companies with which the employer maintains coverage for its employees?
2. How to prohibit HIV-related discrimination if the employer does not know his/her employees are infected or affected with HIV (Eg. Employees living with HIV may be terminated on the grounds of absenteeism by if the employers do not know the employees' HIV status)?
3. Is it necessary to impose a penalty on breach of HIV-positive employee's privacy and confidentiality? If so, what should be the penalty?

III. EDUCATION AND AWARENESS PROGRAMMES

(a) The relevant guidelines in the ILO Code of Practice

5. General Rights and Responsibilities

5.2. Employers and their organisations

- (c) *Education and training.* Employers and their organizations, in consultation with workers and their representatives, should initiate and support programmes at their workplaces to inform, educate and train workers about HIV/AIDS prevention, care and support and the enterprise's policy on HIV/AIDS, including measures to reduce discrimination against people infected or affected by HIV/AIDS and specific staff benefits and entitlements.

6. Prevention through Information and Education

6.2. Educational programmes

- (a) Educational strategies should be based on consultation between employers and workers, and their representatives and, where appropriate, government and other relevant stakeholders with expertise in HIV/AIDS education, counselling and care. The methods should be as interactive and participatory as possible.

- (b) Consideration should be given to educational programmes taking place during paid working hours and developing educational materials to be used by workers outside workplaces. Where courses are offered, attendance should be considered as part of work obligations.

(b) The relevant guidelines in DOSH's Code of Practice

3. Managing HIV/AIDS in the Workplace

3.5. Developing a Workplace HIV/AIDS Programme

3.5.2. Education, Training and Awareness Programme

- i) An employer should implement a workplace education, training and awareness programmes in order to fight the spread of the disease and to foster greater tolerance for HIV-positive employees. Effective education can contribute to the capacity of employees to protect them against HIV infection, reduce HIV-related anxiety and stigmatisation, minimise disruption in the workplace, and bring about attitudinal and behavioural change,
- ii) An employer should develop the programmes through consultation with employees and their representatives, and where appropriate, government and non-governmental organisations with expertise in HIV/AIDS education, counselling and care to ensure support at the highest levels and the fullest participation of all concerned. The

programmes should be based on correct and up-to-date information about how HIV is and is not transmitted, the facts and myths of the disease, the impact of AIDS on individuals, and possibilities for care and alleviation of symptoms. The programmes should be:

- integrated into existing education and human resource programmes as well as occupational safety and health;
- conducted as part of an orientation or induction programme for new employees;
- regularly repeated to employees as an on-going basis;
- related to the work activities in the workplace; and
- regularly monitored, evaluated, reviewed and revised as necessary.

iii) An employee should also be provided with standardised basic information and instruction on HIV/AIDS in order to improve understanding of HIV/AIDS issues, which may include but may not necessarily be limited to the following topics:

- The company's policies, practices and guidelines concerning HIV/AIDS;
- Universal precautions and measures;
- Application of safe working procedures;
- Confidentiality and privacy requirements regarding the medical condition of an employee;
- Where to go for additional confidential information; and
- Attitude towards HIV-positive employees

(c) Proposal

We propose that it be mandatory for businesses and employers to provide education and awareness programmes on HIV to their employees.

(d) Points for Discussion

1. Education/awareness programmes are aimed at reducing stigmatisation against and fear of people living with HIV. Should education/awareness programmes be mandatory and compulsory? If so, how should they be implemented?
2. Are there any courses which employees are already obliged to attend?
3. What should the educational and awareness programmes be?
– HIV 101 by the Malaysian AIDS Foundation?
4. Who is responsible for creating and developing the contents of the educational and awareness programmes?
5. Is there a way to require employers to send one employee every year to attend this course and then teach others what he or she learned as part of employee training?
6. What are the challenges that businesses and particularly, small and medium enterprises (SMEs) will face in implementing the education and awareness

programmes? What should be done to address the challenges? Should these obligations only be imposed on companies employing more than a minimum number of employees, say 50?

7. What type of other measures should be implemented? Please support your proposed measures with examples practiced in other jurisdictions and cost-benefit analyses and evidence of post-implementation measures of effectiveness.

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IV. REDRESS MECHANISM

(a) The relevant guidelines in the ILO Code of Practice

5. General Rights and Responsibilities

5.1. Governments and their competent authorities

- (k) *Enforcement.* The competent authorities should supply technical information and advice to employers and workers concerning the most effective way of complying with legislation and regulations applicable to HIV/AIDS and the world of work. They should strengthen enforcement structures and procedures, such as factory/ labour inspectorates and labour courts and tribunals.

(b) DOSH's Code of Practice

- DOSH's Code of Practice is silent on this issue.

(c) Proposal

We propose that the existing redress mechanism under the OSHA be adopted for the Proposed Regulation, whereby the occupational safety and health officer will have the power to investigate the offences under the Proposed Regulation. The redress mechanism, however, will have the following specific features :-

- (i) The proposed regulation should allow the complainants to use pseudonyms to protect their identity and permit representative complaints (witness or public interest organisations such as Malaysian AIDS Council on behalf of individuals);
- (ii) Publication of any details of a complaint in a manner that may lead to the disclosure of the name or status or identity of the complainant is prohibited;
and
- (iii) Fines collected under the Proposed Regulation could be placed in a segregated Fund, to be administered for the purpose of paying monetary compensation as redress to the affected HIV-Positive employee.

(d) Points for Discussion

1. Do you think the redress system is effective? If not, what are the other options that should be considered? Please support your proposed redress system with examples practiced in other jurisdictions and cost-benefit analyses and evidence of post-implementation measures of effectiveness?
2. Do you think an HIV-positive employee will utilise the redress mechanism? If not, what obstacles do you anticipate in terms of barriers to use the mechanism?
3. Do you think fine and/or monetary compensation is sufficient to deter companies from adopting discriminatory practices towards HIV-Positive employees? What are the other penalties that should be considered?
4. Do you think the establishment of the Fund with the fines collected under the Proposed Regulation to pay monetary compensation to the affected HIV-positive employee is feasible? Why?