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InFocus Programme on Social Dialogue,
Labour Law and Labour Administration

Guidelines on addressing HIV/AIDS in the workplace through employment and labour law

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Foreword

The ILO's In-Focus Programme on Social Dialogue, Labour Law and Labour Administration (IFP/DIALOGUE) has produced these Guidelines as a practical tool to assist policy-makers in choosing the right option in their fight against HIV/AIDS. Research has examined the labour force and demographic issues, the implications arising from the loss of household income and livelihood, the effects on agriculture and food security, productivity losses, and the implications for government macro-economic planning, including social protection schemes. Studies have also been published on the regulatory frameworks that can prevent further spread of infection and protect decent working conditions for persons living with HIV/AIDS.

This publication provides technical guidance on how best to incorporate, taking into account the various national circumstances and legal traditions, the body of international principles that have arisen in the field of labour law, in particular citing innovative and successful examples of the substantive content of employment and labour laws. In addition, it provides some examples in the area of enforcement.

The aim of this publication is to provide specific, workable and practical examples of how to include in labour and employment laws the concepts of prevention, protection and care/support of persons living with HIV/AIDS. It is designed for policy-makers within governments, legislators, workers' organizations, employers' organizations, national AIDS Councils, labour lawyers and judges and, indeed, all practitioners and technicians involved in labour rights and the quest for decent work.

I would like to convey my appreciation to Jane Hodges, Senior Labour Law Specialist, InFocus Programme on Social Dialogue, Labour Law and Labour Administration, who was responsible for preparing this paper.

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January, 2004

Chapter I - Addressing HIV/AIDS in the world of work through legislation

AIDS claimed more than 3 million lives in 2003, and an estimated 5 million people acquired the virus, bringing to 42 million the number of people globally living with the virus. Since the infection rate is highest among people in the prime of their working life – 15 to 49 years - the economic and social impact of the epidemic is disastrous. Clearly, HIV/AIDS has moved from being viewed solely as a public health issue, to a human rights issue, to recognition as an overall development issue with long-term and wide-ranging economic, social and cultural implications.

As early as the 1980s, many governments realized that the fight against the epidemic needed a legislative framework, particularly to address discrimination. The UN system reacted in a number of ways. The 1996 International Guidelines on HIV/AIDS and Human Rights[1] exhort States to "enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies." Revised Guideline 6 states: "States should enact legislation to provide for the regulation of HIV-related …information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information…" Guideline 11 reads: "States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV/AIDS, their families and communities." WHO[2] and UNAIDS have been providing HIV-related policy advice in relation to public health legislation for some time. Policy advice on the role of laws generally is given in the UNAIDS *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.[3] The Preface states: "Whether it be constitutional amendments to prohibit discrimination against people living with HIV/AIDS or against those most vulnerable to infection, legislation to ensure the rights of school children to be educated on how to protect themselves as they grow older, to name only a few areas of concern, the full engagement of legislators is crucial to ensuring effective responses to the epidemic and adequate fiscal and other resources to support them." The Handbook touches on employment by quoting the 1993 Australian *Code of Practice for Health Care Workers and Others at Risk*.

The importance of a legislative framework for establishing and defending basic principles concerning HIV/AIDS in the workplace was recognized in the UNGASS Declaration of Commitment adopted by the UN General Assembly's Special Session on AIDS (UNGASS) in June 2001. The Declaration includes this target:

> *By 2003, develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at the greatest*

[1] *Report of the Secretary-General to the Commission on Human Rights*, UN document E/CN.4/1997/37. The Guidelines were adopted at the Second International Consultation on HIV/AIDS and Human Rights, Geneva, 1996, and have been updated by Revised Guideline 6, adopted at the Third International Consultation on HIV/AIDS and Human Rights, Geneva, 2002.

[2] WHO: *Directory of Legal Instruments dealing with HIV infection and AIDS*, WHO/UNAIDS/HLE/97.1, Geneva, 1997.

[3] UNAIDS/IPU, 1999, Geneva, pp. 64-78.

risk of HIV/AIDS, in consultation with representatives of employers and workers, taking account of established international guidelines on HIV/AIDS in the workplace.

The ILO recognized that laws concerning the world of work provide an ideal channel for the fight against the spread of the virus and against the spread of damaging myths surrounding the disease[4]. All countries, whatever their infection rate, can benefit from a legal framework that brings workplace problems into the open, protects against employment discrimination, prevents workplace infection risks and ensures the participation of stakeholders in the mechanisms and institutions that might be created. Over 20 countries have now adopted legislation, which deals specifically with employment aspects of HIV/AIDS in the workplace.[5] Some have opted to do this in the framework of specific AIDS laws, equality laws, disability laws or employment or labour relations Acts, including Codes of Conduct adopted under such Acts and known as 'soft' law. Governments need to reflect on what *kinds* of labour laws best fit their national circumstances and the stage of the epidemic in their country. The ILO has prepared a study of good practice by type of labour law[6] that analysis the advantages of various types of legal frameworks.

Labour laws – a generic term covering all of the above options that cover the world of work – represent an important point of entry. The strategy promoted by the ILO emphasizes social dialogue and participation of the social partners, and other civil society groups having a stake in the subject matter being discussed, in the elaboration process. Regarding substance, Annex 1 contains a description of some of the ILO tools for labour law reform. The ILO also assists its constituents – labour administrations, in particular their inspectorates and dispute resolution mechanisms on the one hand, and trade unions and employers' organizations on the other – in meeting the challenge of applying the laws.

[4] *Policy and Legal Issues relating to HIV/AIDS and the World of Work*, prepared by the author as part of the ILO response to the Windhoek Platform of Action, (Namibia, 1999) and presented to the XIVth International AIDS Conference, Barcelona , 7-12 July 2002; J. Hodges: *An outline of recent developments concerning equality issues in employment for labour court judges*, Geneva, November 1997. This Paper is largely based on that earlier research. See also, for an international law context, M-C Chartier: *Promoting human rights through the ILO Code of Practice on HIV/AIDS and the world of work*, ILO/AIDS Working Paper No. 3, Geneva, November 2002.

[5] See ILOAIDS' website for listing www.ilo.org/public/english/protection/trav/aids/laws/index.

[6] ILOAIDS: *Legal initiatives that can help fight HIV/AIDS in the world of work*, Geneva, Sept. 2003.

Chapter II - The ILO's instruments

Code of Practice on HIV/AIDS and the World of Work

Acting on the 2000 Resolution on HIV/AIDS and the world of work,[7] the ILO adopted a Code of Practice on HIV/AIDS and the World of Work,[8] which now exists in more than 20 local languages (hereafter referred to as the ILO Code). It gives guidance to member States and workers' and employers' organizations on a number of specific areas, including the adoption, through social dialogue processes, of legislation to cover HIV/AIDS at work. Throughout the following Chapters, references will be made to specific clauses in the ILO Code that assist in framing workable labour law provisions.

Conventions and other texts relevant to HIV/AIDS

Broader ILO instruments can also be used to underpin the fight against HIV/AIDS in the world of work. The ILO's 1998 Declaration on Fundamental Principles and Rights at Work directs the Organization to give special attention to the problems of persons with special needs, and declares four principles as requiring respect, promotion and realization whether or not the Conventions on the subjects have been ratified by member States. The principle of non-discrimination in respect of employment and occupation is among these fundamental principles, and HIV/AIDS policy should base itself on that common value. A decade earlier, in 1988, the ILO and the WHO adopted a Joint Declaration on HIV/AIDS in the Workplace, which set out a number of general principles that should guide a workplace response.

There is no international labour Convention or Recommendation that specifically addresses the issue of HIV/AIDS in the workplace. There is, however, a large number of instruments that cover both protection against discrimination and prevention against infection that can be - and have been - used in this field.

- Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
- Termination of Employment Convention, 1982 (No. 158).
- Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159).
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
- Collective Bargaining Convention, 1981 (No. 154).
- Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Safety and Health Recommendation, 1981 (No. 164).
- Occupational Health Services Convention, 1985 (No. 161) and Occupational Health Services Recommendation, 1985 (No. 171).
- Employment Injury Benefits Convention, 1964 (No. 121).
- Social Security (Minimum Standards) Convention, 1952 (No. 102).
- Nursing Personnel Convention, 1977 (No. 149).
- Migration for Employment Convention (Revised), 1949 (No. 97) and Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).
- Part-Time Work Convention, 1994 (No. 175).

[7] Resolution concerning HIV/AIDS and the world of work, International Labour Conference, 88th Session, Geneva, June 2000, English, PDF 76K - Français, PDF 11K - Español, PDF 10K.

[8] Full text available via the ILOAIDS website: http://mirror/public/english/protection/trav/aids/.

Of principal interest is the key instrument on the right to equality at work which is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).[9] It prohibits any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in access to training, access to jobs, promotion processes, security of tenure, remuneration, conditions of work including leave, rest periods, occupational safety and health measures and social security benefits. It lists seven grounds of prohibited discrimination, and, in Article 1(1)(b), permits ratifying States to add, after consulting representative workers' and employers' organizations, additional grounds. The ILO's Committee of Experts on the Application of Conventions and Recommendations has recommended,[10] an additional Protocol to Convention No. 111 to include, among other grounds, "disability", which in turn would cover HIV/AIDS. Convention No. 111 not only prohibits discrimination, but also promotes proactive measures designed to meet the particular requirements of persons requiring special protection. Article 5(2) lists persons with a disability among the groups that might benefit from affirmative action or measures of accommodation at the workplace. Moreover, Recommendation No. 111, which accompanies the Convention, suggests the creation of appropriate agencies and advisory committees, composed of representatives of employers' and workers' organizations and of other interested bodies, to promote acceptance of the principle of non-discrimination in employment, and carry out specific activities such as information and education campaigns. This policy guidance is useful for all organizations working in the field of HIV/AIDS.

The Termination of Employment Convention, 1982 (No. 158)[11] sets out the international position concerning possible dismissals. Article 4 specifies that termination can take place only when there is a valid reason connected with the capacity or conduct of the worker, or based on the operational requirements of the undertaking, establishment or service. Article 6 makes it clear that temporary absence from work because of sickness or injury - whether occupationally related or not - is not a valid reason for dismissal. Both these provisions are relevant to workers with HIV infection and AIDS. The 1995 General Survey of the Committee of Experts on Convention No. 158[12] expands on how law and practice treat temporary absences due to illness, and extends the unjustified dismissal protection of the Convention to HIV/AIDS.

The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)[13] promotes equality of opportunity and treatment for persons with disabilities. Article 4 promotes special protective measures, such as workplace accommodation and transfers in order to enable persons with disabilities to continue to gain a living. The text has clear relevance for HIV/AIDS in the workplace, and the accompanying Recommendation No. 168 suggests measures on community-based care and highlights strategies for workers with disabilities in rural areas.

[9] Ratified by 159 member States of the ILO (2003).

[10] International Labour Conference, 83rd Session, 1996, *Equality in employment and occupation*, Special Survey of the Committee of Experts, para. 297 (additional criteria might include age, disability, family responsibilities, language, matrimonial status, nationality, property, sexual orientation, state of health, and trade union affiliation).

[11] Ratified by 33 member States of the ILO (2003).

[12] International Labour Conference, *Protection against unjustified dismissal*, 82nd Session, Geneva, 1995, paras.137 -141 and in particular para. 142 with regard to HIV infection and AIDS.

[13] Ratified by 75 member States of the ILO (2003).

The international labour standards dealing with negotiations and collective bargaining are tools that can be used to address HIV/AIDS in collective bargaining agreements and labour relations pacts. Of particular interest are the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)[14] and the Promotion of Collective Bargaining Convention, 1981 (No. 154).[15] These require member States to adopt policies to encourage the free negotiation of terms and conditions of employment – which could include measures for the protection and prevention of HIV/AIDS – between employers and workers' organizations leading to collective agreements.

A major group of international labour standards addresses occupational safety and health. The Occupational Safety and Health Convention, 1981 (No. 155)[16] sets out basic requirements to protect workers, such as the provision of protective clothing and equipment at no cost to the worker, the right to be transferred to less onerous jobs and the right to leave a situation of imminent danger to the worker, all of which are relevant to the field of HIV/AIDS. From the point of view of general policy, the Occupational Health Services Convention, 1985 (No. 161) requires ratifying States to adopt a comprehensive, coordinated national policy in this area. Its accompanying Recommendation, No. 171, lists a number of measures for workplace safety which make sense in an HIV/AIDS context. These include an assurance that health surveillance is not used for discriminatory purposes, confidentiality of medical examination data, collaboration in finding alternative employment where transfer is required for health reasons, worker counselling on the results of health examinations and the principle of no cost to the worker for the health related facilities provided by such services (which is also in the Convention). This Recommendation advises that occupational health services should, in so far as is reasonably practicable, be made available to self-employed persons, such as informal sector workers.

The social security instruments provide guidance on HIV/AIDS issues as well, not only from the point of view of benefit entitlements for occupational injury, through the Employment Injury Benefits Convention, 1964 (No. 121), but also through the principle of non-discriminatory coverage set out in the Social Security (Minimum Standards) Convention, 1952 (No. 102).[17]

Finally, there are several ILO Conventions that address specific groups of workers who, by the nature of their work, are groups at risk of HIV infection. The Nursing Personnel Convention, 1977 (No. 149) requires ratifying States to provide protective equipment and transfer to less onerous jobs. The Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) address the inequalities that migrant workers face generally. The technical requirements of Convention No. 97, such as medical testing to assess migrants' and their family members' state of health, merit attention form the point of view of HIV/AIDS, as do the provisions of Convention No. 143 on migrant workers' human rights, in particular on the question of treatment no less favourable than nationals when it comes to social security benefits (Article 6) or the non-expulsion because of illness of the workers or their authorised accompanying family members (Article 8). Regarding seafarers, the Conventions generally cover on board conditions, medical examinations and safe, and healthy work environments. The ILO has Guidelines concerning medical fitness

[14] Ratified by 153 member States of the ILO (2003).

[15] Ratified by 34 member States of the ILO (2003).

[16] Ratified by 40 member States of the ILO (2003).

[17] Ratified by 40 member States of the ILO (2003).

examinations for seafarers which specifically refer to the need to counsel seafarers on the dangers and methods of prevention of, among others, HIV/AIDS and which state that HIV positive status should not render the seafarer unfit for duty.[18] The Part-Time Work Convention, 1994 (No. 175) also provides useful guidance for policies to cover HIV infected workers who have to change working time arrangements because of the impact of the disease. Article 4 requires ratifying member States to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers in respect of, among others, occupational safety and health and discrimination in employment. The Convention also requires implementation of the principle of proportionality in the areas of wages and social security conditions.

Minimum statutory provisions

Read together in the context of a law on HIV/AIDS at work, the above clusters of international labour standards offer policy guidance not only on the *content* of legislative texts, but also, by extrapolation on the *structure* of the law. Based on ILO Conventions, the following framework provides a useful approach. As will be seen in the country examples which follow, this approach, is being used in the laws adopted in the late 1980s and in those adopted as recently as 2003. Legislation concerning HIV/AIDS in the workplace should, as a minimum, cover the following areas:

- clear delineation of the purpose of the text and appropriate definitions;
- basic right to non-discrimination at work;
- ban on dismissal based on HIV/AIDS until medically unfit to carry out adapted work;
- prohibition of non-consensual pre- and post-employment testing;
- medical confidentiality;
- prevention and containment of transmission risks;
- workplace accommodation, in particular working time flexibility;
- training and re-insertion options;
- benefits, including early retirement options, medical and funeral coverage;
- the scope for negotiation on these issues;
- grievance and disciplinary procedures;
- implementation/enforcement bodies and links to existing labour inspection systems;
- assistance for compliance and penalties for violations.

[18] *Guidelines for Conducting Pre-sea and Periodic Medical Fitness Examinations for Seafarers*, adopted by the ILO/WHO Consultation, Geneva, 25-27 November 1997, ILO/WHO/D.2/1997, p. 9.

Chapter III - Definitions and Scope

Definitions

HIV/AIDS

Regarding the term "HIV/AIDS", the ILO Code defines HIV as "the Human Immunodeficiency Virus, a virus that weakens the body's immune system ultimately causing AIDS." The Appendix to the Code describes in more detail the basic medical facts about the epidemic and its implications. Legislators who have adopted national texts appear to prefer that type of medical definition. Some more detailed definitions alert the reader to the known vectors of transmission, the link with opportunistic diseases and the asymptomatic time period, which is particular to the disease.

The Zambian Employment Act[19] uses the ILO Code's definition and adds, in section 4, the following definition:

> *AIDS: means Acquired Immune Deficiency Syndrome, a cluster of medical conditions often referred to as opportunistic infections and cancers.*

Likewise, the Mozambican AIDS Act[20] uses the ILO Code's definition of HIV, with the added statement about AIDS being a cluster (*conjunto*) of infections caused by the virus, being the one which attacks and destroys certain cells of the immune system.

The Philippines Act[21] contains a complete set of definitions:

> *Section 3: As used in this Act, the following terms are defined as follows:*
>
> *(a) Acquired Immune Deficiency Syndrome (AIDS) – a condition characterised by a combination of signs and symptoms, caused by HIV contracted from another person and which attacks and weakens the body's immune system, making the afflicted individual susceptible to other life-threatening infections…*
>
> *(e) Human Immunodeficiency Virus (HIV) – refers to the virus which causes AIDS…*
>
> *(h) HIV-positive – refers to the presence of HIV infection as documented by the presence of HIV antibodies in the sample being tested.*
>
> *(i) HIV-negative – denotes the absence of HIV or HIV antibodies upon HIV testing…*
>
> *(o) Person with HIV – refers to an individual whose HIV test indicates, directly or indirectly, that he/she is infected with HIV.*

The Kenyan HIV and AIDS Prevention and Control Act[22] is similar to the Philippines example:

[19] Chapter 268 of 2003.

[20] Act No. 5 of 5 February 2002, published in the *Bulletin of the Republic*, I Series No.7, of 13 February 2002.

[21] AIDS Prevention and Control Act, No. 8504 of 1998.

[22] Published in the *Official Gazette Supplement No. 76* (Bill No. 22), Nairobi, 23 September 2003.

Section 2: In this Act, unless the context otherwise requires "Acquired Immune Deficiency Syndrome (AIDS)" means a condition characterised by a combination of signs and symptoms, caused by HIV, which attacks and weakens the body's immune system, making the afflicted individual susceptible to other life-threatening infections.

"Positive" in relation to the result of an HIV test, means a result which shows that the person is infected with HIV or which shows evidence of such infection.

"Human Immuno/deficiency Virus (HIV)" means the virus which causes AIDS.

It adds a time element to the definition of "HIV-negative" which indicates sensitivity to the medical test timing requirements:

Negative, in relation to the result of an HIV test, means a result which shows that the person who is tested was not, at the time the test was undertaken, infected with HIV or which does not show any evidence of such infection.

An interesting example of a more detailed definition appears in the Viet Nam Ordinance on the Prevention and Fight Against HIV/AIDS Infection.[23] It states:

Article 2 (1): HIV is the virus causing the Acquired Immune Deficiency Syndrome in human beings. HIV may be contracted through sexual intercourse, through blood transfusion, or passed on by the mother to the child during pregnancy, childbirth or breastfeeding.

(2) AIDS is the terminal stage of the process of HIV infection which damages the immunity system and deprives the body of the capability of resisting disease – causing factors that finally lead to death.

(3) Opportunity infection is infection occasioned by deficiency of immunity of the body due to HIV infection.

The Zimbabwe Labour Relations (Amendment) Act[24] contains a shorter definition:

Section 2 of the Principal Act is amended by the insertion of the following definitions- "HIV/AIDS status," in relation to an individual, means the absence or otherwise in that individual of the human immuno-deficiency virus.

Wording like this raises the question of voluntary testing (discussed in more detail below) because it implies that individuals who wish to avail themselves of the protection of that Act must establish their status by reference to "absence or otherwise" of the virus. Since medical testing is the only way to identify that presence or absence of the virus, users of the law will find themselves under an obligation to test.

Sexually transmitted infections and diseases

The ILO Code specifically recognizes the medical link between HIV infection and sexually transmitted infections (STIs). The Code defines "STI" as "sexually transmitted infection, which includes, among others, syphilis, chancrous, chlamydeous, gonorrhoea. It also includes conditions commonly known as sexually transmitted diseases (STDs)."

Examples of linking the two in legislative definitions occur mainly in those laws, which are adopted specifically to cover HIV/AIDS, rather than in general labour laws. The common definition of sexually transmitted diseases is that found in the Philippines Act.

[23] Ordinance of 31 May 1995.

[24] Chapter 28:01 of 2002.

Section 3(s): Sexually Transmitted Diseases – refers to any disease that may be acquired or passed through sexual contact.

The Panama Act on Sexual Illness, HIV and AIDS[25] likewise defines the three terms, HIV, AIDS and STIs, separately.

Discrimination

Other terms frequently defined in the labour law include: discrimination, inherent occupational requirements and employment.

Regarding the concept of "discrimination at work", many laws use the ILO's Convention No. 111 as a reference point. Its Article 1(1)(a) covers both direct and indirect discrimination, and although listing seven grounds apart from HIV/AIDS status, national texts frequently add HIV/AIDS as an additional prohibited ground. The ILO Convention states that "the term discrimination includes (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies." Article 1(2) of that Convention permits an exception to the concept of discrimination, where the inherent requirements of a particular job require certain characteristics.

The use of the expression "has the effect of nullifying or impairing" is a drafting technique that addresses the issue of direct and indirect discrimination. At the national level, drafters should also be alert to the importance of preparing texts that cover both types of discrimination. Direct discrimination exists when unequal treatment stems directly from laws, rules or practices making an explicit difference on one particular ground. Indirect discrimination refers to situations, rules and practices which appear neutral, but which in practice lead to disadvantages primarily suffered by a specific category of persons. For example, requirements which are irrelevant for the job in question and which typically can only or disproportionately be met by men, such as certain height and weight levels, constitute indirect discrimination on the basis of sex. In short, care should be taken to draft a definition of discrimination irrespective of an intention to discriminate.

Inherent occupational requirements

With regard to Convention No. 111's exception relating to the inherent requirements of the job, legislators have to be careful to ensure that this exception covers genuine or bona fide needs in relation to a specific job, post or position. Some laws on this point make a general statement concerning the exemption of inherent requirements of the job. Others make a general statement and then detail a number of specific situations where a genuine occupational qualification would be permissible, despite the general legislative ban on discrimination in employment.

Zambia's Employment Act, 2002 is an example of using the terminology of Convention No. 111:

[25] Act No. 3 of 5 January 2000.

Discrimination means any distinction, exclusion or preference made on the basis of HIV status, real or perceived, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

Case law[26]

There is also a growing body of jurisprudence in the national labour courts and human rights bodies concerning HIV/AIDS,[27] possibly a reflection of growing awareness of the existence of laws on the subject, and also reflecting the impact HIV/AIDS is having in places of work, namely increased numbers of HIV-related dismissals and discriminatory acts. The courts have been particularly active in fine-tuning the concept of "inherent occupational requirements" with regard to HIV/AIDS, in particular in relation to jobs in the airline industry and the armed forces and police.

In South Africa, the 2000 decision in Hoffmann v. South African Airways[28] demonstrated that the judiciary was aware of the progressive nature of the disease and the circumstances of transmission. Mr. Hoffmann was refused a job as a cabin attendant at South African Airways (SAA) because he was HIV positive. SAA argued that its decision was based on medical, safety and operational grounds. It stated that harm would be done to its commercial interest if it were known that HIV positive people were in its employ. The Constitutional Court was asked to determine the constitutionality of excluding a job applicant solely on the basis of his HIV status. The Court found that:

An asymptomatic HIV positive person can perform the work of a cabin attendant competently. Any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary. Similarly, the risks to passengers and other third parties arising from an asymptomatic HIV positive cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised.

Concerning SAA allegations that hiring HIV positive persons would negatively impact on public opinion and favour its competitors, the Court sent a clear message about presumptions concerning public image:

Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the

[26] The summaries presented here are based on a number of sources: *Journal of African Law*, 45/2001, *School of Oriental and African Studies*, UK, pp.217-22; *Employment Equity Digest*, vol.8, No.6, South Africa, Jan. 2001; *Human Rights Quarterly*, 25/2003, Boston USA, pp. 791-819; *HIV/AIDS: the law and ethics*, paper delivered by the Lawyers Collective *HIV/AIDS Unit at the Colloquium on Law and Ethics*, New Delhi, Jan.2002; A. Bondyopadhay: *Training in HIV/AIDS Law in common law settings*, XIVth International AIDS Conference, Barcelona, 7-12 July 2002, Track G-Advocacy and Policy; M. Maculan: *HIV/AIDS in the Asia Pacific region: Policy and Legal Framework,* paper delivered at the ILO's Asia Pacific Regional Seminar on International Labour Standards and Equality Issues for Judges, Manila, Sept. 2003.

[27] For a resume, see: *Courts and Justice in the era of HIV/AIDS*, Justice Kirby, paper presented at the Judicial Colloquium on HIV/AIDS: The law and ethics, New Delhi, Jan. 2002.

[28] CCT 17/00, Constitutional Court of South Africa (28 September 2000).

marginalized, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected...

The Court ruled in favour of the applicant and ordered SAA to employ him.

In the 2000 Namibian case of N. v. Minister of Defence,[29] the Minister of Defence was sued by a potential recruit whose application to join the Namibian Defence Force (NDF) was refused on the sole basis of his HIV-positive status, revealed when undergoing his enlistment medical examination. The Labour Court ruled that the NDF may not exclude any person from joining the Namibian military only because the person, who was otherwise fit and healthy, had tested HIV positive. The Court found that the NDF had to determine to what extent an HIV positive applicant's immune system had been damaged and how far the HIV infection had developed. It found that an HIV test alone will not achieve the purpose of assessing fitness for employment and can thus only be undertaken as part of a broader assessment of physical fitness. The NDF's reaction to the recruit's HIV status constituted unfair discrimination as contemplated in section 107(1) of the Labour Act, 1992[30]. The Labour Court ordered that the NDF should enlist N. if he re-applied for enlistment, provided that he was still fit and healthy for work, measured by reference to his viral load.

In Canada, almost a decade earlier, an important decision was handed down concerning HIV and the armed forces in Thwaites v. Canada (Canadian Armed Forces).[31] Mr. Thwaites, a master seafarer of the Canadian Armed Forces (CAF), filed a complaint against the CAF alleging that it discriminated against him by terminating his employment and restricting his duties and opportunities because he was HIV positive. The human rights tribunal found that Mr. Thwaites had been discriminated against because of his disability. It found that the military had failed in its legal duty to accommodate him and to individually assess his capabilities in the context of the risk he potentially posed to himself and others. It also held that the increased risk posed by retaining a person with a disability in the CAF had to be more than minimal risk before the CAF could justify outright dismissal. The Court's strong statement concerning reasonable accommodation is interesting from the point of view of inherent requirements, since it echoes the ILO position that situations must be judged on a case by case basis:

The importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or to lessen any risk (if risk is a factor) is now the bedrock of human rights law in this country. Indeed without reasonable accommodation, the protection given by the Canadian Human Rights Act (CHRA) to certain groups, the disabled in particular, would be quite illusory… It is of critical importance that the accommodation of persons with disabilities be approached on an individual basis. Disabilities differ

[29] Haindongo Nghidipohamba Nanditume v. Minister of Defense, Case No. LC 24/98 delivered on 5 October 2000.

[30] Section 107(1) does not refer specifically to HIV/AIDS. It stipulates " [If] the Labour Court is satisfied that (a) any person has discriminated or is about to discriminate in an unfair manner or is so discriminating against him on the ground of his…. disability, in relation to his employment,…the Labour Court may (i) issue an order in terms of which such person is ordered in case of continuing acts of unfair discrimination to discontinue any such acts as may be specified; to perform or to refrain from performing any act specified (ii) make any such other order as the circumstances may require." This judgement represented a step forward in the fight against discrimination, but subsequently the National Assembly approved a Defence Amendment Bill, 2002 that appears to enable the Namibian Defence Force to exclude people solely on the basis of their HIV status.

[31] [1993] CHRD No. 9 (7 June 1993); affirmed Canada (Attorney General) v. Thwaites [1994] 3 FC 38 (TD).

dramatically, one from another. There are also great individual variations within the same group of disability group… It should be acknowledged that this may add some risks and make matters somewhat more burdensome for employers but this is a small price to pay for the higher value that society place on equal opportunity… An employer cannot rely on undue hardship unless it would be forced to take action requiring significant difficulty or expense which would clearly place upon the business enterprise an undue economic or administrative burden.

The tribunal decision was upheld on review by the Federal Court. However, shortly after the Thwaites decision, the Federal Court of Appeal decided in two cases[32] that the military can release or refuse to hire a person if retaining that person poses any greater risk than retaining an able-bodied member, regardless of how small that increase in risk may be.

In 1999,[33] in Australia, the High Court refused an appeal against the discharge of an HIV-positive enlistee by the Australian Defence Forces (ADF), on the grounds of the inherent requirements of "safe blood donation" in military occupations. The case concerned a solider who, upon testing positive, was immediately discharged pursuant to a policy within the ADF applicable to all new recruits requiring termination of their employment if they test positive to HIV. The case was won by the discharged soldier before the Human Rights and Equal Opportunity Commission. The ADF admitted that there was discrimination against the soldier contrary to the Disability Discrimination Act, 1992 but argued that it was lawful discrimination because, within one of the exceptions recognized by the Act, the soldier was unable to perform the "inherent requirements" of that particular employment. It was contended that one of the "inherent requirements" of a soldier was a capability to "bleed safely", if bleeding arose in circumstances of combat or training. The Commission held that the relevant exemption applied only where there was "a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question", and ruled the dismissal unlawful. The Commonwealth applied to the Federal Court of Australia for judicial review of the Commission's interpretation of the legislation's exception based on inherent requirements. Following the Federal Court's order to set the decision aside and remit the case to a differently constituted Commission for determination without adopting the "narrow and restrictive construction" the discharged soldier appealed to the High Court. A majority in that Court dismissed the appeal and agreed with the order to remit the case to a differently constituted Commission for a correct application of the inherent requirements law.

The judiciary's approach in India commenced with strong statements that "inherent requirements" in certain professions did not justify discriminatory dismissals. For example, in MX v. ZY AIR[34] the petitioner, who was a loader in a public company, was removed from the roster of casual labourers and his labour contract was cancelled when he tested HIV positive. The Bombay High Court granted his writ, holding that an HIV positive person could not be denied a job as long as he can perform his duties and as long as he does not pose a significant risk to others. In Chotulal Shambahi Salve v. State of Gujarat (2001) **t**he petitioner was selected for the post of unarmed police constable. At the medical fitness test he was diagnosed HIV positive and the respondent deleted his name from the list of appointments. The Gujarat High Court ruled that this action violated Article 14 (equality before the law) and Article 16 (equality of opportunity in matters of public

[32] Husband v. CAF and Robinson v. CAF. The Supreme Court of Canada refused an application of leave to appeal in the two cases.

[33] X v. The Commonwealth [1999] HCA 63 dated 2 December 1999.

[34] 1997 Bom 406.

employment)[35] of the Constitution. It ordered that the deletion of the petitioner from the list of selected applicants be quashed, and that the respondent restore the petitioner to the list.

Employment and occupation

With regard to the concept of employment and occupation, Article 1(3) of Convention No. 111 defines employment and occupation as including access to vocational training, access to employment and to particular occupations, and conditions of employment. The accompanying Recommendation No. 111, paragraph 2, states that a non-discrimination policy should be applied by means of legislation (or collective agreements or any other manner consistent with national conditions and practice) to cover the following:

> *Access to training and employment of the worker's own choice on the basis of individual suitability for such training or employment; advancement in accordance with the worker's individual character, experience, ability and diligence; security of tenure of employment; remuneration for work of equal value; conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and also facilities and benefits provided in connection with employment; employment in government agencies and in the civil service; and in the activities of vocational guidance, training and placement services under the control of the national authority.*

A number of labour laws that cover HIV/AIDS contain very detailed provisions prohibiting discrimination either directly or indirectly in all aspects of employment. The following extracts from the South African Employment Equity Act[36] show the drafters' intention to encapsulate all aspects of the working relationship:

> *Section 1: "employment policy or practice" includes, but is not limited to-*
>
> *(a) recruitment procedures, advertising and selection criteria;*

[35] Article 16 does not refer specifically to HIV/AIDS. It stipulates:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

[36] No. 55 of 1998.

(b) appointments, and the appointment process;

(c) job classification or grading;

(d) remuneration, employment benefits and terms and conditions of employment;

(e) job assignments;

(f) the working environment and facilities;

(g) training and development;

(h) performance evaluation systems;

(i) promotion;

(j) transfer;

(k) demotion;

(l) disciplinary measures other than dismissal; and

(m) dismissal.

Interestingly, under South Africa's Code of Good Practice, issued in 2000 under this Act and the Labour Relations Act,[37] the scope is enlarged with the addition of a reference to "occupational health and safety".

It is therefore clear that the principle of non-discrimination should be respected across the broadest range of work-related measures from hiring, training and advancement, to retaining a worker in employment, as well as in the fixing of terms and conditions of employment. Legislators attempting to incorporate the principle into all aspects of employment should take care to ensure that terms such as 'employment' and 'work' are clearly defined so as not to thwart that purpose.

With respect to the term "occupation", it is often defined as including the trade, profession or type of work performed by an individual, irrespective of the branch of economic activity to which he or she belongs or his or her professional status. This category of the labour force ranges from farmers to lawyers to craftspeople. Its heterogeneity is reflected in a wide variety of practical conditions governing access to these activities and requirements in respect of non-discrimination.

Scope

Labour legislation frequently applies to "employees" rather than "workers". The ILO Code of Practice and the core international labour standards are relevant to *all* workers, regardless of workplace or contractual status. However, it is clear that almost everywhere national labour legislation only covers work relations in the formal sector.

The ILO Director-General said in his report to the 1999 International Labour Conference:

> *Because of its origins, the ILO has paid most attention to the needs of wage workers - the majority of them male - in formal enterprises. But this is only part of its mandate, and only part of the world of work. Almost everyone works, but not everyone is employed. Moreover, the world is full of overworked and unemployed people. The ILO must be concerned with workers beyond the formal labour market - with unregulated age workers, the self-employed, and home workers. All those who work have rights at work. The ILO Constitution calls for the improvement of "the condition of labour" whether organized or not, and wherever work might*

[37] No. 66 of 1995, published in the *Official Gazette* No. 16861 of 13 December 1995.

occur, whether in the formal or the informal economy, whether at home, in the community or in the voluntary sector.

Even in those cases where labour laws and codes are stated to be applicable to informal employment relationships, the problem is that those laws are rarely enforced by legal bodies and judiciaries. The policy framework should try to ensure the widest possible application of laws which do cover HIV/AIDS, including in the informal economy.

An example of extending coverage to groups of workers who are often excluded from labour regulations can be found in the Mozambique HIV/AIDS Act No. 5:

Section 3 (Scope): This Act applies to all forms of discrimination to all workers and job applicants, in the public and private sectors, including domestic workers.

Chapter IV - The purpose of the legislation

A clear initial statement of the purpose of the law guides the approach in the subsequent provisions. In certain parliamentary traditions, the purpose appears in the full title or the preamble to the Act coupled with a declaration of the aim in the body of the text; in others, the purpose is stipulated in an initial, stand-alone, substantive provision. The completeness of the statement of intent is not just about drafting style, but it is a lens highlighting the actual problem that the legislation is meant to address. If the purpose is multifaceted, the subsequent provisions may be lengthy. If the purpose is to address HIV/AIDS only, the text can be relatively concise, with cross-references to other laws and regulations to give the full picture and full legislative protection.

An example of the first style listed above appears in the full title of the Philippines AIDS Prevention and Control Act:

> *An Act promulgating policies and prescribing measures for the prevention and control of HIV/AIDS in the Philippines, instituting a nationwide information and educational program, establishing a comprehensive HIV/AIDS monitoring system, strengthening the Philippine National AIDS Council, and for other purposes.*

This is followed by a relatively long explanation of the purpose of the Act:

> *Section 2: Declaration of Policies - Acquired Immune Deficiency Syndrome (AIDS) is a disease that recognizes no territorial, social, political and economic boundaries for which there is no known cure. The gravity of the AIDS threat demands strong State action today, thus:*
>
> *(a) The State shall promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV/AIDS through a comprehensive nationwide educational and information campaign organized and conducted by the State. Such campaigns shall promote value formation and employ scientifically proven approaches, focus on the family as a basic social unit, and be carried out in all schools and training centres, workplaces, and communities. This program shall involve affected individuals and groups, including people living with HIV/AIDS.*
>
> *(b) The State shall extend to every person suspected or known to be infected with HIV/AIDS full protection of his/her human rights and civil liberties.*
>
> *Towards this end:*
>
> *(1) compulsory HIV testing shall be considered unlawful unless otherwise provided in this Act;*
>
> *(2) the right to privacy of individuals with HIV, shall be guaranteed;*
>
> *(3) discrimination, in all its forms and subtleties, against individuals with HIV or persons perceived or suspected of having HIV shall be considered inimical to individual and national interest; and*
>
> *(4) provision of basic health and social services for individuals with HIV shall be assured.*
>
> *(c) The State shall promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission.*
>
> *(d) The State shall positively address and seek to eradicate conditions that aggravate the spread of HIV infection, including but not limited to, poverty, gender inequality, prostitution, marginalization, drug abuse and ignorance.*
>
> *(e) The State shall recognize the potential role of affected individuals in propagating vital information and educational messages about HIV/AIDS and shall utilize their experience to warn the public about the disease.*

An example of a shorter statement exists in the Guatemala General Act to Fight HIV/AIDS and Promote, Protect and Defend Human Rights in the Face of HIV/AIDS.[38]

Purpose and scope of the Act

Article 1: Infection with the Human Immunodeficiency Virus (HIV) - Acquired Immune Deficiency Syndrome (AIDS) is declared a social problem creating a national emergency.

[38] Decree No. 27-2000-06-26 of 2000.

Chapter V - The fundamental principle of non-discrimination

One of the pillars of the ILO Code is the right not to be discriminated against on the basis of real or perceived HIV/AIDS status.[39] Stigma and discrimination in the world of work on any ground are inimical to decent work, but when manifested against persons infected with, or presumed to have HIV/AIDS, they are even more dangerous because they undermine prevention by forcing the epidemic out of sight and underground: people are afraid to find out whether or not they are infected, to seek treatment, to stop and change risky behaviour in the belief that doing any of these things would raise suspicion about their HIV status.

In most of those countries that have adopted a specific AIDS statute, this vital statement on discrimination is enunciated early on in the text. Many statutes also include a statement that the law is anchored in a rights-based approach, using human rights as the standard. Some also make a specific link to the gender dimension of the epidemic and specify provisions that protect women in particular from discrimination.

ILO Convention No.111 appears to have provided the basis for a number of the texts. The wording of Article 1 is often used with the inclusion of "real or perceived HIV status".

The Bahamas Employment Act[40] provides a good example:

Section 6: Non discrimination and equal pay for equal work.

No employer or person acting on behalf of an employer shall discriminate against an employee or applicant for employment on the basis of race, creed, sex, marital status, political opinion or HIV/AIDS by-

(a) refusing to offer employment to an applicant for employment or not affording the employee access to opportunities for promotion, training or other benefits, or by dismissing or subjecting the employee to other detriment solely because of his or her race, creed, sex, marital status, political opinion, age or HIV/AIDS;

(b) paying him at a rate of pay less than the rate of pay of another employee, for substantially the same kind of work or for work of equal value performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions except where such payment is made pursuant to seniority, merit, earnings, by quantity or quality of production or a differential based on any factor other than race, creed, sex, marital status, political opinion, age or HIV/AIDS;

(c) pre-screening for HIV status: provided that this section does not affect any other law or contract term which stipulates a retirement age.

Non-discrimination regarding travel

This paper is not aimed at giving policy advice in the area of immigration law. However, a number of labour laws that address HIV/AIDS also cover requirements and

[39] Paragraph 4.2 of the Code of Practice on HIV/AIDS in the World of Work: "Non discrimination. In the spirit of decent work and respect for 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."

[40] No. 27 of 2001, published in the *Official Gazette* of 31 December 2001.

protections concerning workers and students entering a country. Travel for work and studies, or work-related reasons and migration are areas where ignorance and fear of HIV/AIDS has led to the introduction of restrictions. In 2002, the United States State Department published a list of 60 countries that require, under various circumstances, foreigners to be tested for HIV prior to entry into their territory.[41]

Some countries, in their general AIDS laws, require foreigners to declare their HIV status upon entry into the national territory. Whether this is an efficient method of tackling the stigma often attached to the virus and the disease could be questioned. The Vietnamese Ordinance on the Prevention and Fight Against HIV/AIDS Infection[42] contains the following provision:

> *Article 19: A foreigner infected by HIV/AIDS must declare his/her infection when entering Vietnam. The procedure for the declaration shall be stipulated by the Government.*

Other countries make it clear, in accordance with the purpose of their AIDS legislation, that non-discrimination extends to free movement in and out of the national territory. For example, the Cambodian Act,[43] lists, in addition to its specific ban on discrimination at work, the areas in which HIV-based discrimination is banned (access to educational institutions, holding of public office and entry to public service, access to financial services including insurance and access to health institutions). It also contains a clear prescription against isolating and restricting the travel of HIV/AIDS infected persons:

> *Section 38: All persons who have HIV/AIDS shall have full rights to freedom of residence. No person shall be detained separately, held isolated or refused authorization to enter or travel within the country, or be expelled based on the knowledge or suspicion that the person and his/her family has HIV/AIDS.*

[41] www.travel.state.gov/HIVtestingreqs.

[42] Of 31 May 1995, published in the *Official Gazette* No. 17 of 15 September 1995.

[43] Of 8 December 2002, adopted by the National Assembly on 14 June 2002 and by the Senate on 10 July 2002.

Chapter VI - Prohibited grounds of discrimination

As already noted, Convention No. 111 lists seven specific grounds of discrimination, but not HIV/AIDS. Suggestions for broadening the protection provided by the Convention have been made in several ILO fora. In these discussions, discrimination based on HIV/AIDS has been treated under the ground of "state of health".

When the first AIDS cases came to be recorded in the early 1980s, most countries had laws on their statute books dealing with communicable diseases. It was these public health frameworks that were often used, in that early climate of ignorance and fear, to deal with HIV/AIDS generally, and at workplaces when contagion was thought to be possible. The most common legislative approach was to require notification of HIV-infected persons to the authorities. Case reporting certainly has a role to play in tracking the spread of HIV/AIDS, but those early statutes and public health monitoring systems were not necessarily structured around the concept of confidentiality. With growing pressure to protect medical confidentiality and the human rights and dignity of people living with HIV/AIDS, that type of notification law has been amended. However, as recently as 1997, the WHO listed hundreds of statutes that still require compulsory notification of HIV.

As a ground in its own right

There are now numerous examples, particularly in sub-Saharan Africa, of legislative prohibitions on discrimination based on real or perceived HIV status in specific AIDS laws or in labour laws. Some date back to the late 1980s, while others have been adopted only in the last few years.

Zimbabwe's Labour Relations (HIV and AIDS) Regulations of 1998[44] outlaw workplace discrimination. To back this up, non-consensual testing is prohibited, wide dissemination of the Regulations is required and strong penalties are prescribed for employers who violate the Regulations. The use of severe penalties (such as imprisonment) can be controversial: it shows the Government's commitment to action but may alienate employers rather than encouraging their cooperation.

Namibia's National Code on HIV/AIDS and Employment,[45] with accompanying Guidelines, protects against victimization and stigmatization and adopts a ban on testing similar to the Zimbabwean Regulations. There is no provision for enforcement.

The South African Employment Equity Act of 1998,[46] prohibits discrimination based on HIV status. Testing is also banned, except where authorized by the Labour Court. The onus is on an employer to demonstrate that testing is necessary. In any legal proceedings in which it is alleged that an employer has discriminated, the employer must prove that any discrimination was justified. The Act as a whole contains strong financial penalties for non-compliance.

[44] Supplement to the *Government Gazette*, 14 August 1998. The principal Act was amended in 2002.

[45] Government Notice No. 78, published in the *Government Gazette* of 3 April 1998.

[46] Act No. 55 of 1998 and Code of Good Practice, issued under that Act as Notice No. R. 1298 in the *Government Gazette* of 1 December 2000.

The Philippines AIDS Prevention and Control Act of 1988 affirms that "The State shall extend to every person suspected or known to be infected with HIV/AIDS full protection of his/her human rights and civil liberties." The Act bans compulsory testing, discrimination "in all its forms and subtleties" and termination of employment on the basis of real or perceived HIV status. It requires coordination among a number of government ministries and departments in education and information, safe practices and procedures, voluntary testing, screening and counselling and monitoring, and sets up the National AIDS Council with a generous initial budget. The Act also requires training for livelihood and self-help cooperative programmes for people living with HIV/AIDS in order that they continue to contribute, to the extent possible, to their own livelihood. Penalties for violations of the Act's protective provisions include imprisonment from six months to four years, fines and revocation of licenses.

State of health

A number of countries have used existing provisions banning discrimination on the basis of health status as a way of addressing HIV/AIDS. The ILO's Governing Body described this approach in the following way:[47]

> *A worker's state of health should not be an acceptable motive for refusing to employ or for dismissing him or her, unless there is a very strict relationship between the worker's present state of health and the normal occupational requirements of a given job. A variety of measures have been adopted in this regard in different countries, some concerning the state of health generally, bearing in mind that one of the current problems linked to state of health is discrimination against workers who are HIV-positive or who have contracted AIDS. Those countries with legislation and regulations on this subject consider that a definition of unlawful discrimination based on the HIV status of a worker should be as broad and universal as possible. Such a definition should include discrimination against both symptomatic and asymptomatic carriers of the virus, as well as that based on the mere suspicion that an individual could be a carrier because he or she belongs to a so-called high-risk group, or because of his or her relationship with a carrier. More than 15 countries have incorporated in their legislation a prohibition of any kind of discrimination based on health status including people who are HIV-positive or who have contracted AIDS including Colombia, Costa Rica, Ecuador, Finland, France, Italy, Hong Kong, New Zealand, Philippines, Portugal, South Africa, Thailand and Zimbabwe. Several member States specifically define disability to include individuals infected by HIV/AIDS, e.g. Australia, Canada and the United Kingdom. Inclusion of such a provision would be in agreement with the recently adopted ILO Code of Practice on HIV/AIDS and the world of work.*

The Disability Discrimination Ordinance, 1995 of China (Hong Kong Special Administrative Region), discussed in more detail in the "Disability" section below, echoes the earlier, health-status approach and the need to contain infectious diseases, but with an interesting proviso that reflects the medical facts concerning the spread of the virus:

> *Section 61(1): Subject to subsection (2), nothing in this Ordinance shall apply to a person who discriminates against another person with a disability if:*
>
> *that person's disability is an infectious disease; and*
>
> *the discriminatory act is reasonably necessary to protect public health.*
>
> *(2) For the avoidance of doubt, it is hereby declared that subsection (1) has no application to a person who is HIV-positive or has acquired immune deficiency syndrome (commonly known as AIDS) merely because of the fact that the person has such a condition.*

[47] Governing Body document GB.285/2, op.cit., para. 26.

Disability

As recognition of the epidemic as a human rights issue developed, the legislation on disability – in particular banning disability-based discrimination – served as the main protection for people living with HIV.[48] Recent disability laws aim at protecting people with disabilities against discrimination and integrating them as much as possible into the world of work and society generally. To ensure equal treatment, these laws often contain detailed provisions on the obligation of employers to physically modify their workplace or work organization/schedules – called making "reasonable accommodation". Such special measures enable persons with disabilities to remain in work as long as possible, which has the two-fold benefit of reducing pressure on social protection schemes and empowering the concerned individual to live in dignity. These laws can be very useful to provide protection for persons who have started to develop HIV-related symptoms, but continue to be fit for some work. However, the legislator must take care in drafting the definition of disability and the concomitant rights and obligations under the laws, since narrow interpretations by the courts and tribunals can give rise to uncertainty (see the armed forces cases analysed above). For example, while most United States courts have accepted that HIV is a disability per se, a recent Supreme Court decision[49] has introduced a narrow interpretation of the relevant law. The standard for benefiting from the federal law protection is now that the complainant must prove that HIV substantially limits a major life activity prior to accepting that HIV is a disability. This has affected the scope of protection under the federal legislation for people with asymptomatic HIV.

Despite that United States Supreme Court decision, the Americans with Disabilities Act of 1990 (in full force since 1994) heralded a major advance for HIV prevention and protection in the workplace. To benefit from the Act's provisions, workers must declare their disabled status, and therefore the fact that they are HIV positive, to their employer. The benefits of the law may counter the risk of stigmatization. Persons living with HIV/AIDS have to be recognized as "otherwise qualified" i.e. capable of fulfilling the essential functions of their job with or without accommodations at the workplace. The Act obliges employers, within the scope of their financial capacities, to make reasonable accommodations for an employee who is HIV-infected or has AIDS, such as job restructuring, reassignment, adjustment of equipment and devices, modification of examinations and training modules, flexible working hours and additional sick leave. Employees with full-blown AIDS who can no longer fulfil the essential functions of their jobs are covered by the social security system or the employers' private invalidity insurance.

A useful example is the approach taken in the United States Rehabilitation Act, 1973 (as amended in 1974 and 1978):

> *"Disability" means, with respect to an individual:*
>
> *(1)(i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment…*
>
> *(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and non-contagious diseases and conditions as orthopedic, visual, speech and hearing*

[48] This was the conclusion of a United States study *Legal protections against HIV-related discrimination in the USA: A 50-state analysis*, B. Schatz, abstract presented at the International Conference on AIDS, 4-9 June 1989.

[49] Toyota Motor manufacturing, Kentucky, Inc v. Williams (No. 00-189, 8 January 2002) [2002] SCT-QL5.

impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), *tuberculosis, drug addiction, and alcoholism…*

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. [emphasis added]

Another approach is that of China (Hong Kong Special Administrative Region). The Disability Discrimination Ordinance, 1995 (DDO), prohibits discrimination, harassment or vilification based on disability in several areas, including all aspects of employment and education. The definition of disability includes the presence of organisms in the body that cause or are capable of causing disease or illness. This definition comprises HIV/AIDS even when asymptomatic. Protection against discrimination extends to the associates of a person, including: a spouse or a person who is living with the person on a genuine domestic basis, a relative, a care giver and a person who is in a business, sporting or recreational relationship with the infected individual. Under the DDO, it is unlawful for an employer to dismiss an employee on the sole basis of his/her HIV status. The employer has to first determine whether the employee can perform the inherent requirements of the job. The employer also has the duty to provide any special services or facilities to help the employee perform the job when that does not impose unjustifiable hardship, as well as a workplace that is free from harassment and vilification. Complaints can be lodged to the Equal Opportunities Commission (EOC) which will investigate with the aim of settling the matter by conciliation. If the complaint cannot be resolved, the case can be taken to a tribunal. Furthermore, assistance in enforcing one's rights can be obtained from the EOC, including legal assistance. A Code of Practice on Employment has been issued under the DDO to assist employers and employees in understanding their responsibilities and to provide practical guidelines to management on procedures and practices that can help prevent discrimination and other unlawful acts in the workplace. This code defines "disability" as including:

physical, intellectual, psychiatric, sensory, neurological or learning disabilities. It also includes physical disfigurement, chronic illnesses, and the presence of some disease-causing organism in the body (for example HIV).

The United Kingdom's Disability Discrimination Act, 1995 (DDA), prohibits discrimination against a worker or job applicant with disability in all aspects of employment. The definition of disability specifically includes HIV/AIDS. However, it covers only HIV at the symptomatic stage of the disease. A Bill amending the DDA to cover HIV from the moment of diagnosis was announced in the Queen's Speech to Parliament on 26 November 2003. The Act applies only when there are 15 or more employees in the workplace. Under the DDA, it is illegal to dismiss a person simply because she/he has HIV. Employers are also required to make reasonable adjustments to help people with HIV and other disabilities remain in work. These may include adjustments to the premises, altering an employee's working hours, allowing an employee to be absent during working hours for treatment or rehabilitation, allocating some of an employee's duties to another colleague or transferring him/her to fill an existing vacancy. Employers are liable for the discriminatory acts of their employees or agents, even if the discrimination occurs without their knowledge or approval, unless they can provide sufficient evidence that they took "reasonable steps" to prevent such discrimination from occurring (such as having policies and training on non-discrimination at the workplace). Complaints may be presented to an Employment Tribunal that can award compensation for moral injuries, loss of earnings and other expenses. It can also order any reasonable action to prevent or reduce the adverse effects on the complainant. Notwithstanding the possible

problems arising from the definition of disability, the Act has been used successfully by persons living with HIV/AIDS to uphold their employment rights.[50]

Another innovative example of including virus-based disability in a law without specifically referring to HIV appears in the New Zealand Human Rights Act, 1993:[51]

> *Section 21: Prohibited grounds of discrimination.*
>
> *(1) For the purposes of this Act, the prohibited grounds of discrimination are -…(h) disability, which means…(viii) the presence in the body of organisms capable of causing illness.*

Marginalized or disadvantaged groups

Section 2 of the Emergency Ordinance No. 137/2000 of Romania on preventing and punishing all forms of discrimination,[52] prohibits discrimination based on several grounds including "appurtenance to a disfavoured category". This term in turn is specified to cover "categories placed in a position of inequality as opposed to the majority of citizens due to their social origin or a handicap, or persons who are faced with rejection or marginalization due to specific circumstances including HIV/AIDS infection". Regarding equality in employment and occupation, the Ordinance prohibits discrimination with respect to the conclusion, suspension or modification of employment contracts, remuneration and benefits, training and promotion.

[50] S. Deutz, S. Pitt, L. Joseet in *Canadian HIV/AIDS Policy and Law Review*, vol. 5, Number 2/3, Ottawa, Spring/Summer 2000.

[51] No. 82 of 10 August 1993.

[52] January 2002.

Chapter VII - Terms and conditions of employment

General terms and conditions

The meaning of "terms and conditions of employment" is spelt out in the Discrimination (Employment and Occupation) Recommendation (No. 111) as follows:

> *Advancement in accordance with the individual's character, experience, ability and diligence; security of tenure of employment; remuneration for work of equal value; and conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and health measures, as well as social security and welfare facilities and benefits provided in connection with employment.*

In Botswana, where no specific law on HIV/AIDS in the workplace exists, the approach is captured in "soft" law under the Trade Disputes Act. The National Industrial Relations Code of Good Practice, approved by the Botswana Labour Advisory Board on 23 August 2002, provides as follows:

> *12. HIV/AIDS at the workplace*
>
> *12.1 In recognition of the potential danger of the spread of HIV/AIDS, and other contagious and infectious diseases, all employers should conform to the provisions of the National Policy on HIV/AIDS and Employment.*
>
> *12.2 Employers, employees and their organizations should have regard to and comply with the Code of Good Practice: HIV/AIDS and Employment.*

Annexed to this Code is the specific HIV/AIDS and Employment text, which covers a large number of terms and conditions of employment.

Healthy work environment

A healthy and safe workplace serves the interests of both employers and workers. A healthy work environment includes, but is not limited to, the prevention and treatment of occupational hazards associated with exposure to HIV infection. It includes the establishment of an environment that facilitates optimal physical and mental health in relation to work and adaptation of work to the capabilities of staff in light of their state of physical and mental health, and may include measures to reasonably accommodate staff with AIDS-related illness. The ILO Code recognizes this important principle in Paragraph 5.2(h).

The following comprehensive listing of employers' obligations in the area of safety and health at work, along with those of employees and their representatives, is found in Botswana's draft Code of Good Practice: HIV/AIDS and Employment, 2002:

> *7. Promoting a Safe Workplace and Safe Society*
>
> *7.1 An employer is obliged to provide and maintain, as far as is reasonably practical, a workplace that is safe and without risk to the health of its employees.*
>
> *7.2 Employers, employees and trade unions, as part of their commitment to reducing HIV/AIDS in society generally, should support education and training aimed at reducing the risk of HIV/AIDS outside the workplace. This should include the risks resulting from unprotected sex, sex with more than one partner, and information about the most common ways in which HIV/AIDS is transmitted.*

7.3 The risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every workplace should ensure that it has policies dealing with, amongst others:

(1) the risk, if any, of occupational transmission within the particular workplace;

(2) appropriate training and education on the use of infection control measures so as to reduce the risk of HIV transmission outside or in the workplace;

(3) providing appropriate equipment and materials to protect employees from the risk of exposure to HIV at the workplace;

(4) the steps that should be taken following an occupational accident at the workplace;

(5) the procedures to be followed in applying for compensation for occupational infection;

(6) the reporting of all occupational accidents; and

(7) adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.

Dismissals and job security

Many commentators have documented dismissals as the major by-product of HIV infection among workers. Most of the case law that has evolved over the last two decades has been based on claims that workers were dismissed because they had HIV/AIDS. The ILO Code makes the international standard clear: there may be no dismissals based solely on real or perceived HIV status (Key Principle 4.5).

The Philippines Act bans dismissal under the general provision concerning discrimination in the workplace:

Section 35: Discrimination in any form, from pre-employment to post-employment, including hiring, promotion or assignment, based on the actual, perceived or suspected HIV status of an individual, is prohibited. Termination from work on the sole basis of the actual, perceived or suspected HIV status is deemed unlawful.

The Caribbean Community (CARICOM) adopted, in 1995, Model Labour Legislation for its member States, including a text on termination of employment. It specifically addresses HIV as a prohibited ground, but with a proviso linked to inherent requirements of particular jobs in health care:

Section 16: Unfair dismissal

The following reasons do not constitute valid reasons for dismissal or for imposition of disciplinary action:…

(f) an employee's being diagnosed with the HIV virus unless the employee is engaged in health care work…

Botswana's Code of Good Practice: HIV/AIDS and Employment, 2002, demonstrates how cross-referencing between specific and general texts can provide a clear, across-the-board standard in the area of termination of employment:

Dismissal

7.1 Employees with HIV/AIDS may not be wrongfully dismissed solely on the basis of their HIV/AIDS status.

7.2 If an employee becomes too ill to perform the employee's work, an employer should follow accepted guidelines regarding dismissal for incapacity before terminating an employee's services, as set out in the Code of Good Practice: Dismissal.

The employer must ensure that as far as possible, the employee's right to confidentiality regarding the employee's HIV status is maintained during any incapacity proceedings.

In Botswana, the Industrial Court has referred to ILO Convention No. 158 in deciding that the dismissal of a probationary employee because he tested HIV-positive in a compulsory company medical examination was substantially and procedurally unfair.[53] The probationary employment was subject to passing a medical examination by a doctor chosen and paid for by the company. However, an HIV test was not part of the medical check of general physical fitness for work and several days after passing the prescribed medical exam the employer issued a letter requiring an HIV test of the probationer. This, in the Court's opinion, amounted to an unlawful unilateral alteration of a contract. Conscious that there is no "hard" anti-HIV discrimination law in the country, the Court ruled that it could not base its decision on the National AIDS Policy; courts have to apply the law not policy. It nevertheless used the national policy advice in relation to pre- and post-test counselling in deciding the procedural unfairness of the 48-hour dismissal notice, to which the employer "callously" attached the positive results of the HIV test. The Court stated:

The ethical issues raised in the [policy] document are an appeal to the national conscience. Failure to observe these can only amount to an aggravation of the unfairness of the procedural aspects of the case. That is why the [Employment] Act requires the Court to look into the circumstances of the dismissal in assessing the amount of compensation. A morally reprehensible treatment of an employee is an aggravating factor. A humane approach is always a mitigating factor.

Another example of "soft" law is the Lesotho Code of Good Practice on Termination of Employment issued under the Labour Code Order, 1992. Part 3.5, entitled "Incapacity - ill health or injury", contains a special section discouraging dismissal in the following terms:

No employee should be dismissed merely on the basis of HIV status. HIV infected employees should continue to work under normal conditions in their current employment as long as they are medically fit to do so. If a HIV infected employee cannot continue with normal employment because of an HIV-related illness, the employer must endeavour to find alternative employment without prejudice to that employee's benefits. When an employee becomes too ill to continue in employment, the provisions of this Code or any collective agreement dealing with incapacity on grounds of ill-health must be applied.

Testing and confidentiality

One of the principal areas of concern and confusion regarding HIV/AIDS and the world of work is that of job screening and employment testing. It is here, above all the other areas of labour law, that the trade-off between public health responsibilities and non-discrimination comes up.

The ILO Code is clear that HIV/AIDS screening should not be required of job applicants or persons in employment (Key Principle 4.6), and devotes a whole Chapter to testing. The policy advice contained in the Code is that testing for HIV should not be carried out at the workplace except as specified in the three areas laid down in the Code. Such testing is unnecessary and imperils the human rights and dignity of workers: test results may be revealed and misused, and the informed consent of workers may not always be free or based on an appreciation of all the facts and implications of testing. The three permissible workplace testing situations are: epidemiological surveillance (provided it is anonymous and undertaken in accordance with the ethical principles of scientific research

[53] R. Jimson v. Botswana Building Society, Case No. IC 35/03, delivered on 30 May 2003.

and protection of individual rights and confidentiality); following risk of occupational exposure to potentially infected material; and lastly, voluntary testing at the worker's own initiative provided that it is carried out by suitably qualified personnel in conditions of strict confidentiality, preceded by written informed consent and accompanied by pre- and post-test counselling.

Forcing someone to undergo medical testing of any kind is an invasion of privacy and a violation of human rights. The UN Human Rights Committee in 1988 elucidated the right to privacy in Article 17 of the International Covenant on Civil and Political Rights, clarifying that the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law and that such information must never be used for purposes incompatible with the Covenant, like employment discrimination.[54] In 1992, the World Health Organization issued a Statement from the Consultation on Testing and Counselling for HIV Infection.[55] Revised Guideline 6 of the International Guidelines on HIV/AIDS and Human Rights addresses testing in the section dealing with implementation.[56] UNAIDS has published policy advice and also disseminated in 2000, practical technical information on voluntary counselling and testing (VCT),[57] which specifically recognizes the importance of having anti-discrimination legislation in place to support people who would otherwise be reluctant to undergo VCT. ILO research on workers' privacy, in the early 1990s, documented the worldwide trend to outlaw non-voluntary HIV testing in the workplace.[58]

Regarding the issue of testing of health workers after occupational exposure, ILO and WHO adopted a position in 1989[59] which also covers the medical aspect of post-exposure procedures, alternative working arrangements if required by the workers' health status or emotional reaction resulting from exposure. It specifically reinforces the continuation of the employment relationship since exposure of health care workers to HIV infection is not grounds for dismissal. The ILO Code gives advice for all situations of workplace exposure and provides a description of the Universal or Standard Precautions. Most AIDS laws provide for such an eventuality on condition that the employee or worker has asked for the test. The South African Code of Good Practice states:

> *7.1.5 Permissible testing*
>
> *(a) An employer may provide testing to an employee who has requested a test in the following circumstances:…*

[54] General Comment No. 16, reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN document, Geneva, HRI/GEN/1/Rev.2 of 29 March 1996.

[55] WHO/GPA/INF/93.2, Geneva, 1992.

[56] OHCHR & UNAIDS: "International Guidelines", Third Consultation on HIV/AIDS and Human Rights, Geneva, 25-26 July 2002, p. 17.

[57] UNAIDS: Policy Statement on HIV Testing and Counselling, Geneva, 1997; Best Practice Collection: Technical Update on VCT, Geneva, May 2000.

[58] *Conditions of Work Digest: Workers' privacy*, Part III testing in the workplace, Vol.12, Geneva, 2/1993.

[59] *WHO/ILO: Report of the Consultation on action to be taken after occupational exposure of health care workers to HIV*, Geneva, 2-4 October 1989.

(ii) in the event of an occupational accident carrying a risk of exposure to blood or other bodily fluids.

Most general AIDS laws and some of the labour laws that address HIV/AIDS at the workplace have specific sections dealing with compulsory and voluntary testing. Most simply ban forced testing. Others lay down a general ban, then add exceptions to that ban. The breadth of permitted exceptions is an indication of the legislature's stand against HIV-based discrimination.

The Italian Act of 1990 on urgent measures for the prevention of and fight against AIDS[60] bans pre- or post-employment testing by private or public sector employers with severe penal sanctions.

Kenya's HIV and AIDS Prevention and Control Act[61] prohibits compulsory testing, permits voluntary testing and adds the possibility of a test in connection with sex-related crimes:

Section 13(3): Notwithstanding the provisions of subsection (1), a person charged with an offence of a sexual nature under Chapter XV of the Penal Code may be compelled to undergo an HIV test.

It also covers situations of tissue donation:

"Section 14(2): Notwithstanding the provisions of subsection (1)-

(a) a person who offers to donate any tissue shall be deemed to have consented to the HIV test required under[Part III – Safe practices and procedures]

The South African Employment Equity Act is an example of a statute that permits non-voluntary testing of workers by an employer if the employer can persuade the Labour Court to allow it:

Section 7(2): Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act…

Section 50(4): If the Labour Court determines that the medical testing of an employee as contemplated by section 7 is justifiable, the Court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to:

(a) the provision of counselling;

(b) the maintenance of confidentiality;

(c) the period during which the authorization for any testing applies; and

(d) the category or categories of jobs or employees in respect of which the authorization for testing applies.

The Code of Good Practice issued under the Act explains this wide exception:

7.1.1: No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorization for testing…

[60] Act No. 135 published in the *Official Gazette* 8 June 1990.

[61] Published in the *Official Gazette Supplement No. 76* (Bill No. 22), Nairobi, 23 September 2003.

7.1.6: All testing, including both authorized and permissible testing, should be conducted in accordance with the Department of Health's National Policy on Testing for HIV issued in terms of the National Policy for Health Act, No. 116 of 1990.

In 2001, the Labour Court granted employers' requests to carry out HIV testing without the consent of employees. In 2002, the first comprehensive Labour Court case was heard where an employer invoked section 7(2). Joy Mining Machinery, a Division of Harnischfeger (SA) (Pty) (Ltd) v. National Union of Metalworkers of SA & Others[62] concerned an application by the company for permission to conduct 'voluntary' HIV testing of 800 employees to determine the prevalence of HIV infection in the workplace so as to be better able to deal with the pandemic. The Court noted that section 7(2) is "unhappily worded" since it refers to section 50(4) which in turn sets out the powers of the Court on the premise that the testing has been determined to be justifiable. The detailed provisions of the 2000 Code of Good Practice were not found to be helpful. In granting the employer's request, the Court checked the facts produced by Joy Mining with regard to the need to test, the purpose, the preparation of the employees before testing, genuine voluntary participation and informed consent, as well as the enterprise's efforts for counselling and confidentiality. A judicial test was introduced, comprising a series of nine considerations that should guide the interpretation of section 7(2):

- the prohibition of unfair discrimination;
- the need for HIV testing;
- the purpose of the test;
- the medical facts;
- employment conditions;
- social policy;
- the fair distribution of employee benefits;
- the inherent requirements of the job; and
- the category or categories of jobs or employees concerned.

Later in 2002, year a different approach was taken by the Labour Court, relying on the evidence that the on-going tests would be voluntary and anonymous. The employer's request under section 7(2) was put aside on the ground that the anonymous and voluntary testing which the company wished to arrange for its employees did not fall within the ambit of that section, and the company thus did not require a Labour Court order to go ahead with the testing.[63] The Labour Court used the 2002 Code of Good Practice to support its reading of the Act that voluntary and anonymous testing – contemplated by the trawling company – should be permitted without prior authorization of the Court. In a 2003 decision,[64] the Labour Court again decided that it need not grant an order where employers request permission to carry out voluntary testing, since procedures would be in place to ensure that the workers in question were giving their informed consent to the test. The Court used Convention No. 111 and the ILO Code of Practice in taking a narrow approach to the section 7(2) requirement for a Labour Court order for workplace testing.

In 2001, HIV activists in El Salvador initiated proceedings before the Supreme Court of Justice (Constitutional Chamber) challenging section 16(d) of Act No. 588 of 2001 on

[62] (2002) 23 ILJ 391 (LC), delivered on 31 January 2002.

[63] Irvin & Johnson Ltd. v. Trawler and Line Fishing Union and Others (2003) 24 ILJ 565 (LC).

[64] PFG Building Glass (Pty) Ltd. v. Chemical Engineering, Pulp Paper Wood & Allied Workers Union and Others (2003) 24 ILJ 974 (LC).

the prevention and control of HIV/AIDS.[65] This provision contained a general prohibition on compulsory testing, but allowed employers or administrative authorities to impose testing on workers, whenever required, in order to verify their health status. In October 2002, the Legislative Assembly of El Salvador repealed section 16(d).

The European Council of Ministers of Health adopted conclusions on AIDS and the workplace in 1988[66] with a special reference to the impracticality of workplace screening:

> *People infected with the HIV virus or suffering from AIDS pose no danger to their colleagues at work. There are hence no grounds for screening potential recruits for HIV antibodies. Screening for AIDS during regular medical check-ups at work is likewise an inappropriate way of combating AIDS.*

Interestingly, despite recent European Union legislative action to extend protection against discrimination to areas not previously covered, like disability and sexual orientation,[67] these 1988 conclusions remain the only "soft" law at European level on this issue.

The Viet Nam Ordinance offers a different approach, permitting medical personnel to decide, at their sole discretion, whether or not to test. Such broadly worded legislation, even where it attempts to protect confidentiality, runs the risk of dissuading workers to come forward for regular health checks:

> *Article 17: At the periodical [workplace] health checks, the responsible person of the medical establishment has the right to decide to test for detection of HIV/AIDS infection in persons likely to be infected by HIV/AIDS.*
>
> *Article 18(1): The laboratory physicians and the laboratory of the medical service have to keep the confidentiality of the names, ages and addresses of the persons who come to test for detection of HIV/AIDS infection.*
>
> *(2) Only the responsible person at the medical establishment has the right to notify the result of the test of HIV/AIDS positive to the wife or husband or next of kin of the family of the HIV/AIDS infected person, and to the office, organization or the responsible person who directly looks after the health of the HIV/AIDS patient.*
>
> *(3) The publication of the names, ages, addresses or pictures of the HIV/AIDS infected persons without their consent is strictly forbidden.*

Affirmative action

Article 5(2), Convention No. 111, and Article 4, Convention No. 159 permit special measures to be taken in an effort to achieve effective equality of opportunity and treatment for disadvantaged groups in the world of work. Many countries have a legislative history going back three or four decades of requiring, or at least permitting, special measures to be taken in relation to disadvantaged groups at work, especially on the basis of race and sex. In the European Union, Council Directive 2000/78/EC establishing a general framework

[65] Act No. 588 as amended was published in the *Official Bulletin* No. 222 on 23 November 2001.

[66] *Official Journal of the European Communities*, Vol. 32, No. C.28, 3 February 1989, p.1.

[67] In addition to the Council Directives on gender equality, Council Directive 2000/43/EC of 29 June 2000 implemented the principle of equal treatment between persons irrespective of racial or ethnic origin; and Council Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation, adding as banned grounds religion or belief, disability, age or sexual orientation.

for equal treatment in employment and occupation, encourages member States to adopt positive action for persons with a disability. Several national jurisdictions have adopted a similar approach to disability. Where disability is statutorily defined to include HIV/AIDS or is so interpreted by the courts, this form of labour market intervention, commonly referred to an affirmative action, can be extremely useful.

The Romanian Government adopted Emergency Ordinance No. 137/2000 on preventing and punishing all forms of discrimination. It provides for the adoption of affirmative action measures as well as sanctions to ensure the elimination of discrimination based on a number of grounds, including "disfavoured category" which is specified to cover HIV/AIDS infection. Complaints under the Ordinance are lodged with a specialized body, the National Council for the Prevention of Discrimination. Victims may also have recourse to the courts, where non-governmental human rights organizations can appear as parties in discrimination cases.

The United States Rehabilitation Act prohibits discrimination on the basis of disability in programmes conducted by federal agencies, in programmes receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act. Section 501 of the Rehabilitation Act requires affirmative action in employment by federal agencies of the Executive Branch, monitored by each agency's Equal Employment Opportunity Office. There is also a contract compliance requirement: section 503 requires affirmative action and prohibits employment discrimination by federal government contractors and subcontractors with contracts of more than $10,000.

Reasonable accommodation

Given the nature of HIV infection, workers may be fit and healthy to carry out their tasks for many years. By accommodating the workplace and the work schedule as the disease progresses – a workplace approach that has been successful for decades in the field of disability – an enterprise will be able to benefit from its staff and avoid the economic consequences that are often associated with rapid staff turn-over and workforce disruption. Accommodations may take many forms based on the type of disability and the needs of the individual. According to the ILO Code, the concept covers any modification or adjustment to a job or to the workplace that is reasonably practicable and will enable persons living with HIV/AIDS to have access to or participate or advance in employment.

The Nicaraguan Act to promote, protect and defend human rights in the face of AIDS of 14 October 1996 gives the example of a simple statement of obligation in the text:

> *Section 22: Persons living with HIV have the right to work and may undertake tasks commensurate with their capacity. HIV infection shall not be considered as an obstacle to hiring nor as a cause for termination of the employment relationship.*

The United States Rehabilitation Act, 1973 (as amended in 1974 and 1978) offers a more detailed example of what is expected of an employer. It is also an example of what, by law, would be the factors to take into consideration in exempting an employer from the obligation to adapt the work to the needs of persons living with HIV/AIDS. The following is an extract from the appendix to the Act, which contains an extensive, non-mandatory list of such accommodations:

> *Appendix A*
>
> *(a) Job restructuring means the procedure which includes: (1) Identifying the separate tasks that comprise a job or group of jobs; (2) Developing new position descriptions which retain some of the tasks of the original job; and (3) Developing a career ladder which builds upward*

from the new positions which contain the lesser skilled tasks to regular jobs. A restructured job can be clearly different from the original one in terms of skills, knowledge, abilities, and work experience needed to perform the work. Job restructuring is intended to maximize the abilities of the particular handicapped person and is not intended to permit a recipient to under-employ or job-stereotype that person. A restructured job, for example, could be one in which the more highly skilled but physically less demanding duties are retained, e.g. operating controls and switches in a steel mill, and less skilled, physically taxing duties, e.g. lifting, pulling, are reassigned to non-handicapped employees.

(b) Modify job or program schedules, for example, by allowing for a flexible schedule a few days a week so that a participant or employee may undergo medical treatment or therapy. Work-times or participation in program activities may also be altered to permit handicapped individuals to travel to and from work during non-rush hours. For employees or participants who become unable to perform the duties of their positions because of a physical or mental condition, recipients may be required to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization.

(c) Modify program and work procedures and training time.

(d) Relocate particular offices or jobs or program activities so that they are in facilities accessible to and usable by qualified handicapped persons. For example, an employee or participant with a respiratory ailment can be placed in a "non smoking" and/or well-ventilated office.

(e) Acquire or modify equipment or devices. For hearing-impaired participants or employees, this may include placing amplifiers on telephone receivers, making telephone equipment compatible with hearing aids, providing flashing lights to supplement telephone rings or installing telecommunications devices. For blind employees, this may include providing tape recorders or dictating machines for those who cannot type. For wheelchair-users, this may include raising on blocks a desk that is otherwise too low for the employee, rather than purchasing a specially-made desk."

This legislation also offers an example of the concept of "undue hardship". Policy makers and legislators are often obliged to balance the needs of workers having special needs against enterprise concerns regarding the extent and sophistication of measures that might be made available. One option is to make it clear in the law that accommodations do not become burdensome.

Section 32.13

(a) A recipient [company, agency or entity] shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant, employee or participant unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include: (1) the overall size of the recipient's program with respect to number of employees, number of participants, number and type of facilities, and size of budget; (2) the type of the recipient's operation, including the composition and structure of the recipient's workforce, and duration and type of training program; and (3) the nature and cost of the accommodation needed. [emphasis added]

Remuneration issues

One of the well-documented economic impacts of the epidemic is the loss of direct wages, loss of or reduction in livelihood due to the diversion of income and working time to medical care and treatment. Death results in direct remuneration issues through permanent loss of income whether from farm work, wages or remittances, as well as funeral and mourning expenses. But, there are also long term indirect remuneration issues, as removal of children from school and training – both to save money and ease the care

burden in the home – results in loss of the family's future earning potential. There are few examples of specific AIDS laws, or general labour laws that address to this risk.

The Bahamas Act is a notable exception:

Section 6: Non-discrimination and equal pay for equal work.

No employer or person acting on behalf of an employer shall discriminate against an employee or applicant for employment on the basis of race, creed, sex, marital status, political opinion or HIV/AIDS by…

(b) paying him at a rate of pay less than the rate of pay of another employee, for substantially the same kind of work or for work of equal value performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions except where such payment is made pursuant to seniority, merit, earnings, by quantity or quality of production or a differential based on any factor other than race, creed, sex, marital status, political opinion, age or HIV/AIDS.

Working time, sick leave/medical visits, part-time schedules

Provision for sick leave that adjusts to the progressive nature of HIV infection and the onset of AIDS is a form of reasonable accommodation at the workplace. The importance of an appropriate rest and recuperation scheme merits particular attention in labour legislation since working time traditionally appears in a stand-alone section of the statutes, and is often readjusted in regulations and in collective bargaining agreements. As with all labour regulation, it is important to strike a balance with the needs of the enterprise so that repeated absences, sometimes seen as disturbing the smooth running of operations, are accommodated.

The ILO Termination of Employment Convention, 1982 (No. 158) sets the international standard regarding protection against punishing workers who are temporarily absent on sick leave, stating:

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation [laws, awards, bargaining agreements etc.] referred to in Article 1 of this Convention.

In its General Survey on the application of the Convention,[68] based on comparative labour law and detailed examples of practical implementation, the ILO has given guidance on how Article 6 can influence sick leave on the basis of HIV/AIDS-related illness. The regulatory regime of many countries covers this eventuality, permitting absences from 30 days, to as long as two years. During this time, in most legal systems, the employment contract is suspended, and the sick person may not be dismissed. A medical certificate is normally required for absence of more than a specified number of days. The ILO's recommendation to employers and their organizations concerning personnel policies

[68] *Protection against unfair dismissal*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 82nd (1995) Session, Report III (Part 4B), Geneva, paras.137 and 142.

(Paragraph 5.2(m) of the Code) refers specifically to extended sick leave as a welcome practice for HIV/AIDS infected employees. It states that employers should provide that, where workers with an AIDS-related condition are too ill to continue to work, alternative working arrangements including extended sick leave should be offered; when these have been exhausted, the employment relationship may be terminated by either party.

In certain jurisdictions, the provisions of the general labour law concerning sick leave are generous enough to cover the progressive nature of HIV. In others, the right exists to allow the parties to the employment relationship to negotiate arrangements, building on the statutory amount of sick leave. The issue of full pay vis-à-vis reduced pay on extended leave appears to be mainly left to each enterprise to determine. This topic is most appropriately dealt with through negotiations.

By specifying that the contract has been suspended, a law can provide protection for the HIV infected worker. The Labour Code of the Democratic Republic of Congo.[69] provides as follows:

> *Section 47: A contract may not be terminated while it is suspended, except in the following circumstances: a. in case of sickness or accident, not being work-related accidents of occupational illnesses, the employer may notify the worker that the contract is terminated after six months' incapacity to carry out the contract.*

In a number of jurisdictions, the public service legislation demonstrates flexibility regarding working time arrangements and extended leave, which could be a useful model for managing HIV/AIDS at work. The Burkina Faso Act of 1998 establishes the legal regime applicable to public servants and employees:[70]

> *Section 120: The authorization of public servants to take extended leave (mise en disponibilité) may be granted at their request only under the following circumstances: (1) serious accident or illness of spouse or a child…*
>
> *Section 121: Leave for serious accident or illness of a spouse or a child shall not exceed 2 years, but may be renewed for intervals amounting to a maximum total period of 6 years.*
>
> *Section 128: Except for the leave foreseen in section 124 [to raise small children], a public servant placed on extended leave shall not be entitled to receive any remuneration.*

In the United States, the Family and Medical Leave Act[71] requires the employer to give up to 12 work weeks of leave per year for a serious illness or to care for a family member who has a serious illness. The job of the person living with HIV/AIDS is protected during the leave period, but entitlement to full salary is often scaled down during these absences. The United States Act applies only to companies having at least 50 employees; the employee must have worked in the enterprise for more than one year to be eligible. Medical staff may request proof of illness; this is where the ethical requirements of medical confidentiality come into play:

> *Section 10: Leave requirement*
>
> *(a)(1) Entitlement to leave:*

[69] Legislative Ordinance 67/310 of 9 August 1967 establishing the Labour Code, as amended at 31 December 1996.

[70] Act No. 013/98/AN of 28 April 1998, published in the *Official Journal* dated 25 June 1998.

[71] Public Law 103-3, approved 5 February 1993.

Subject to section 103 [employer's right to request certification from the health care provider], an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period for one or more of the following:…

(C) In order to care for the spouse or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee…

Unpaid leave permitted.

Relationship to paid leave: (1) if an employer provides paid leave for fewer that 12 work weeks, the additional weeks of leave necessary to attain the 12 work weeks if leave required under this title may be provided without compensation.

Foreseeable leave: …(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of section (a)(1) is foreseeable based on planned medical treatment, the employee: (A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider… (B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph…

Labour law can also accommodate the progressive nature of HIV infection and related illnesses and the needs of carers through part-time work. ILO's Part-Time Convention, 1994 (No. 175), provides guidance in general on this flexible option, stressing the principle of the maintenance of basic rights for workers under this regime and proportionality in wages.

Article 4. Measures shall be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers in respect of:

(a) the right to organize, the right to bargain collectively and the right to act as workers' representatives;

(b) occupational safety and health;

(c) discrimination in employment and occupation.

Article 5. Measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers, calculated according to the same method.

Many European Union Member States have adopted laws on this following the Council Directive 97/81/EC dated 15 December 1997 concerning the framework agreement on part time-work signed by UNICE, CEEP and ETUC. One example, which does not specifically refer to workers with HIV/AIDS, but whose provisions can be used as inspiration for their needs is the Worker Protection (Regular Part-time Employees) Act, 1991, of the Republic of Ireland:[72]

Section 1(1). Interpretation.

"regular part-time" in relation to an employee under a relevant enactment, means an employee who works for an employer and who - (a) has been in the continuous service of the employer for not less than 13 weeks, and (b) is normally expected to work not less than 8 hours a week for that employer, and to whom, but for this Act, a provision of the relevant enactment [Acts on workers' participation, dismissals, notice and redundancy, holidays, insolvency and maternity] would not apply because of an excluding provision.

[72] Act No. 5 of 26 March 1991.

A further aspect of the impact of HIV/AIDS and leave entitlements is the issue of mutually agreed early retirement. Several countries offer this option when statutory sick leave has been exhausted and when illness due to HIV has reached a stage where the worker is no longer capable of carrying out the task. Many labour texts provide that either party may terminate the contract before time upon giving notice to the other party, or on paying compensation in lieu of notice; some require that valid reasons must be stated. The 1998 Burkina Faso Act establishing the legal regime applicable to public servants and employees states:

> *Section 157: Any public servant who has served a minimum of 15 years may request early retirement before having reached the official retirement age. In such circumstances, he/she shall have the right to a pension under conditions determined by the general pension scheme applicable to public servants. This early retirement is subject to the overriding interests/needs of the service.*

Chapter VIII - Training and vocational guidance

This section covers training of workplace actors to better understand HIV/AIDS (as covered in Part 7 of the ILO Code) and training and re-training possibilities for persons living with HIV/AIDS in order to help them remain in jobs appropriate to the stage of their illness and to help mitigate the impact of the disease on that individual and on his or her family.

As noted under the Chapter on "Definitions", most general labour laws and specific AIDS laws define employment to include access to training and/or vocational guidance. This is consistent with the definition given in the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). But some laws take care to list non-discrimination in access to training as a separate section, thus giving emphasis to the importance of training and re-training for progressive diseases like HIV/AIDS. An example of this latter approach is the Philippines AIDS Regulations, issued under Act No. 8504.

> *Section 35: Livelihood Programs and Training*
>
> *Government agencies such as the Department of Social Welfare and Development (DSWD), Department of Labour (DOLE), Department of Education, Culture & Sports (DECS), Technical Education & Skills Development Authority (TESDA) and Department of Trade and Industry (DTI) and private agencies as well, shall provide opportunities for PLWHA to participate in skills training, skills enhancement and livelihood programs. No PLWHA shall be deprived of participation by reason of HIV/AIDS status alone. Skills training and enhancement programs suited to the interest and capacity of PLWHA and livelihood assistance in the form of capital assistance, marketing assistance and job placement shall be rendered. The DSWD with DOLE, DILG and private agencies, and utilizing existing mechanisms and strategies, shall jointly set up a referral system to assist PLWHA in accessing skills training and livelihood assistance programmes at the regional and provincial levels.*

In the United States, the Individuals with Disabilities Education Act (IDEA)[73] (formerly called the Education of the Handicapped Act of 1970) requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs. Taken that disability in this jurisdiction covers HIV infection, this example can be a useful model for designing training programmes that meet the needs of children and young persons as the disease progresses. IDEA requires public school systems to develop appropriate Individualized Education Programs (IEPs) for each child. The special education and related services outlined in each IEP reflect the individualized needs of each student. IDEA also mandates that particular procedures be followed in the development of the IEP. Each student's IEP must be developed by a team of knowledgeable persons and must be reviewed at least annually. The team includes the child's teacher; the parents, subject to certain limited exceptions; the child, if determined appropriate; an agency representative who is qualified to provide or supervise the provision of special education; and other individuals at the parents' or agency's discretion. If parents disagree with the proposed IEP, they can request a due process hearing and a review from the State educational agency if applicable in that jurisdiction. They can also appeal the State agency's decision to the State or Federal Court.

The role of education and information campaigns has been long recognized as essential in the fight against AIDS. Most of the specific AIDS statutes contain provisions

[73] Pub. Law No. 101-476, 1990.

on this. Take, for example, the Costa Rican General Act on AIDS of 1998[74] which contains a whole Chapter on "Education and Training":

> *Section 30: The role of the State in education*
>
> *The State, through its Health Ministry, shall inform the general population as well as the most vulnerable sectors, in an adequate and appropriate manner, about the HIV/AIDS issue using up-to-date scientific data concerning the ways to prevent the spread of this disease.*
>
> *Section 31: Education as a means of prevention*
>
> *The Superior Council for Education, in coordination with the Health Ministry, shall include in education programmes information on the risks, consequences and HIV transmission vectors, on how to avoid infection and on respect for human rights.*

[74] Act No. 7771 of 29 April 1998, published in the *Official Gazette* No. 96 of 20 May 1998 and accompanied by Regulations, No. 27894-S, dated 3 June 1999.

Chapter IX - Care and support issues

Solidarity, care and support are critical elements which should guide a policy text that addresses HIV/AIDS in the workplace. The ILO Code recognizes an entitlement to affordable health services and to non-discriminatory benefits from both statutory and occupational social security schemes (Key Principle 4.10).

Mirroring the view expressed in the ILO Code, the South African Code of Good Practice establishes that an employee may be compensated if he or she becomes infected with HIV as a result of an occupational accident. It also places a duty on employers to assist with the application for benefits.[75] This includes giving information to the affected employee on the procedures that need to be followed, and providing help with the collection of information that will allow the employee to establish the link between the injury on duty and the HIV-infection.[76]

The Zambia Employment Act (amended 1982),[77] gives a good example of sending a strong message of workplace care and support, despite the fact that a specific reference to HIV/AIDS is not present:

> *Section 43 (1): Every employer shall, during the illness of any employee, use his best endeavours to provide such employee with medical attention and medicines: Provided that nothing in this section unless otherwise agreed between the parties, shall be construed to make the employer liable for the cost of any medicines, medical attention or hospital accommodation provided to any employee.*
>
> *(2). Every employer shall, without expense to the employee, take all reasonable steps to arrange for the transport to hospital of any employee suffering from illness or accident not occasioned by wilful misconduct or of any member of an employee's family who has been authorized to accompany him to the place of employment and who becomes incapacitated by illness or accident not occasioned by wilful misconduct, and if an employer shall fail to arrange such transport a proper officer or a medical officer may do so and all reasonable expenses incurred in doing so shall be recoverable from the employer as a debt due to the Government.*

Two pieces of legislation regulate the issue of compensation in South Africa - one of general application and one specific to the mining industry. The general law, the Compensation for Occupational Injuries and Diseases Act (COIDA),[78] governs the reporting of all injuries and occupational diseases, excluding miners with occupational lung disease.[79] HIV infection acquired as a result of an occupational injury is one for which compensation can be claimed under COIDA.[80] The process is quite complex. For the purposes of compensation, the employee must prove a link between the injury on duty and

[75] See ILO Code of Practice, Part 8.5(b) and Clause 9(1) and 9(2) of the SA Code.

[76] Clause 9(i) and 9(ii).

[77] Act No. 18, of 21 August 1982, amended the principal Act of 1965, Cap.512.

[78] No. 130 of 1993.

[79] Miners with lung disease acquired as a result of occupational exposure are governed by the Occupational Diseases in Mines and Works Act, No. 78 of 1973.

[80] South Africa's Department of Health publication: *Management of Occupational Exposure to the Human Immunodeficiency Virus (HIV)* (1999), Appendix 2, p.7.

the HIV-infection, a link that in practice can be very difficult to establish. It is true, as pointed out above, that there is an obligation upon the employer (in terms of the Code) to assist the employee with this task. But the law places the onus squarely on the employee. Schedule 3 of COIDA lists 28 occupational diseases together with a list of work duties that could potentially involve the handling of or exposure to certain listed substances. If an employee contracts any of the listed diseases and was employed on a listed duty, it is *presumed*, until the contrary is proven, that the disease was contracted in the course of employment.

However, HIV infection is not one of the diseases listed, which means that the employee has to establish that the infection arose out of and in the course of employment. For this reason, it becomes a vital evidentiary issue to have information about the HIV status of the employee lodging a compensation claim *as well as* that of the source employee, i.e. the one that is claimed to have transmitted the virus. The Compensation Commissioner must judge every claim on its merits, and may take the surrounding circumstances of the injury into consideration. This means that while information about the HIV status of the source employee will strengthen the claim of the employee concerned, it is not absolutely necessary for a claim to be successful. Should the status of the source employee not be available, it rests on the employer to demonstrate that every effort was made to assess the HIV status of the source employee (not non-consensual testing, but other clinical observation), and that this permission was refused. Finally, the employee applying for compensation has to demonstrate an HIV negative status at the time of the injury. In this respect, a sero-conversion[81] within three months of the injury is considered by the South African Compensation Commission to be reasonable evidence that this came about as a result of the injury.

The Costa Rican General Act on AIDS of 1998[82] places the treatment responsibility clearly on the National Social Security system:

> *Section 7: Right to full health care*
>
> *Every HIV/AIDS-infected person has the right to medical, psychological and surgical assistance, as well as counselling. In addition, they have the right to all treatments that will guarantee alleviation of suffering and minimize as far as possible the complications that arise form this sickness.*
>
> *To achieve this, the Costa Rican Social Security Fund shall import, purchase and maintain antiretroviral drugs, specifically to treat HIV/AIDS, for direct administration to patients.*
>
> *The doctors involved shall present to the Costa Rican Social Security Fund reports on the administration of these drugs. The Regulations under this Act shall stipulate the conditions and periodicity of such reports, and any other requirements concerning the reports...*
>
> *Section 24: Condoms as a means of prevention*
>
> *Condoms constitute a means of prevention against the spread of HIV; consequently, the Health Ministry and the Costa Rican Social Security Fund shall ensure that establishments offer access to them and have them available, in sufficient quantities, in appropriate places and under optimal conditions for use by the population.*
>
> *These institutions shall also strengthen the education campaigns concerning the appropriateness and use of condoms.*

[81] Sero-conversion means the moment a person's HIV status converts or changes from being HIV negative to HIV positive. It usually occurs four to eight weeks after an individual has been infected with the HIV-virus (http://www.afroaidsinfo.org).

[82] Act No. 7771 of 29 April 1998, published in the *Official Gazette* No. 96 of 20 May 1998 and accompanied by Regulations, No. 27894-S, dated 3 June 1999.

Chapter X - Enforcement bodies and issues

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) leaves it to the domestic authorities to determine how legislation should implement and enforce the chosen national non-discrimination policy. While the Convention itself is silent on enforcement measures, its accompanying Recommendation (No. 111) urges that "appropriate agencies" be established to receive, examine and investigate complaints of non-compliance. The policy advice here is flexible: the agencies should be able, through conciliation or other means, "to secure the correction" of those practices that conflict with the national policy and its law. The ILO has examined the advantages and disadvantages of various enforcement bodies in the areas of gender, migration for work and from the point of view of good labour administration practice.[83] The ILO's supervisory bodies have also examined various non-discrimination monitoring systems, and noted a recent trend towards quasi-jurisdictional functions of these bodies.[84] In most countries, the institutions set up to oversee equality laws are not the civil courts - although appeal to the civil court may be possible as a last recourse at the national level. However, their structure and investigatory and decision-making powers give them similar status. These equality bodies are often distinct from the labour courts as well, the latter having broader jurisdiction over any dispute concerning worker-employer relations.

In designing a system, consideration should be given to the composition of the body. On the one hand, provisions requiring the appointment of members with technical and legal knowledge will ensure sensitivity to the medical characteristics of the disease and the workability of the strategy being pursued by the law. On the other hand, provisions requiring the appointment of a tripartite or tripartite "plus" membership ensure that the workplace actors and representatives of persons living with HIV/AIDS oversee the realistic implementation of the law. In all cases, care should be taken to ensure gender balance among the members given the particular gender dimension of HIV/AIDS. The epidemic affects women and men differently in terms of vulnerability and impact. In addition to the biological factors that make women more vulnerable to infection than men, structural inequalities in the status of women, which show up particularly in the world of work, make it harder for women to protect themselves against infection and obtain treatment, and leave them often as primary care givers and heads of households.

Specialized and general equality bodies

In some countries, claims of discriminatory employment practices can go to a number of fora. Multiple institutions cause strains even in countries with well-endowed systems. In the United Kingdom, a recent review of the race and gender equality laws recommended

[83] C. Thomas & R. Taylor: *Enforcement of equality provisions for women workers*, ILO Inter-Departmental Project on Women, Working Paper No. 20, Geneva, 1994; I. McClure & M. Reischle: *Law and Practice in combating discrimination against immigrant workers*, International Migration Branch Working Paper, Geneva 2002; B. Lust.(ed.): *Labour administration: A powerful agent of a policy of gender equality in employment and occupation*, Labour Administration Branch Working Paper No. 55-1, Geneva, 1999.

[84] *Equality in employment and occupation*, Special Survey on Convention No. 111 by the Committee of Experts on the Application of Conventions and Recommendations, ILC, 83rd (1996) Session, Report III (Part 4B), Geneva, paras. 225-234.

fusion of the two current bodies, the Commission for Racial Equality and the Equal Opportunities Commission.[85]

In the United States, under the Americans with Disabilities Act, the Equal Employment Opportunities Commission (EEOC) hears cases alleging violations of the Act. This has the advantage of being a body well-versed in discrimination issues generally, but here again obstacles to enforcing rights arise from the costs involved in such legal proceedings and the time involved. Creating a special body for HIV/AIDS at work might duplicate already existing structures that are empowered to examine discrimination issues generally. It could be argued, especially in countries hard-hit by the epidemic, that this drains scarce financial resources and human capacity. The policy choices regarding the type of enforcement body should therefore reflect the national prevalence rate and local capacity to finance and staff the institution. One option could be to establish a general anti-discrimination enforcement body, encompassing all manner of unlawful discrimination, but with specialized commissioners or chambers.

In the area of HIV/AIDS, as in most sensitive areas of discrimination, there are a number of considerations that should be taken into account when designing an enforcement system. The architecture of the system should be sensitive to the need for confidentiality, and should prohibit reprisals being taken against those who bring complaints. The following advice is relevant to boards, councils or commissions dealing with discrimination in the world of work:

- *Standard-setting*. In order to maintain a leadership role and be at the cutting edge of policy in the area of HIV/AIDS, the machinery should be able to review the primary legislation and propose new standards. This part covers not only "hard" law, but also guidelines to the legislation, brochures and forms explaining the procedures, and the issuing of codes of practice. The issuing of codes is a relatively common tool available to enforcement bodies empowering them to increase knowledge about the relevant laws and about employment discrimination in all its forms. Several governments have adopted such codes in the area of HIV/AIDS, as noted above (Botswana, Lesotho, Namibia, South Africa), but it is also frequently done by equality commissions.

- *Receipt of complaint*. This is also a basic feature of systems that wish to take a rigorous approach to the elimination of discrimination. It sends a powerful message that the legal proscriptions "have teeth". But to be effective, it relies on victims having the courage and material capability to lodge such complaints, an assumption that might not be tenable in the area of HIV/AIDS.

- *Wide investigatory power.* This is a useful element of any system that wishes to go beyond complaints-based decisions. It allows a specialized body to examine, for instance, systemic or institutionalised discrimination, where no one victim may be able to come forward to institute proceedings.

- *Power to bring complaints itself*. This feature of the system meets the shortcomings mentioned above, and goes hand-in-hand with the body having investigatory powers. It usually comes into play when attempts to resolve the dispute through conciliation, mediation or arbitration have been unsuccessful and the victims, for whatever reason, refuse to take the matter further themselves. This power is useful in

[85] See B. Hepple et al.: *Equality: a new framework-Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation*, University of Cambridge Centre for Public Law, Oxford-Portland Oregon, 2000, pp. 51-53.

situations where the commission could bring cases on behalf of individuals or groups (class actions).

- *Conciliation/mediation.* Both victims and alleged discriminators benefit from a system that handles complaints outside the courtroom, in a context of problem-solving. Alternative dispute settlement (ADR) is a well-accepted approach in North American and some African, Asian and European jurisdictions, and has proven its worth in the discrimination domain.

- *Power to issue orders.* This power mirrors the trend in the laws themselves, that are moving away from a rigid criminalization of discriminatory practices in the workplace with emphasis on punishing the perpetrator and - occasionally - compensating the victim, in favour of laws that seek to make all parties understand that employment discrimination can be averted and help them comply with the law in this area. Orders can cover a variety of situations beyond remedying the violation that has been found, including an order to take remedial measures and put prevention in place; orders to report regularly on measures being taken to end discriminatory practices by the enterprise or individual; orders to undertake equality training in the workplace.

- *Legal aid*. This pillar of systems is important where complainants face the practical difficulty of accessing justice systems. Even where systems are designed to be informal and free, there are invariably indirect costs (like interpreters, translations and copying) that might dissuade complainants from initiating proceedings or encourage them to abandon a case. The enforcement body should be able to offer free legal advice – both at the stage of conciliation and when a case is formally being heard – if the victim or their representatives would otherwise be unable to pursue the file. The ILO Committee of Experts on the Application of Conventions and Recommendations has also supported the introduction of legal aid for discrimination cases generally. Guideline 7 of the International Guidelines on HIV/AIDS and Human Rights calls on States to implement and fund legal support for education on HIV-related rights and for free legal services for the enforcement of those rights.[86]

- *Data collection and analysis*. Enforcement bodies need to be able to monitor progress and the impact of the legislation they are responsible for, by reference to reliable benchmarks and meaningful indicators.

- *Awareness raising and education/training*. Many of the legislative examples given above demonstrate the importance of information and education in the programmes of national AIDS Councils and other national bodies in combating the myths surrounding HIV/AIDS.

National AIDS Commissions and Councils

Since the mid-1980s, the creation of commissions or councils to address the HIV epidemic is common throughout the world. Indeed, some of the first non-public health laws, were general framework laws establishing a national body and enumerating its functions. For the ILO, the involvement, on an equal footing, of the representatives of government, employers and the workers in such consultative or decision-making bodies is

[86] *Equality in employment and occupation*, 1996, op. cit., para. 234; see also the responses from some governments concerning the implementation of the Guidelines: UN Commission on Human Rights document E/CN.4/2001/80, Geneva, 20 December 2000.

the norm. Direct representation of the workplace actors, as well as other concerned stakeholders, ensures the legitimacy, sustainability and national ownership of the process and its outcomes. Paragraph 5.1(a) of the ILO Code, stresses that governments should ensure coherence in national HIV/AIDS strategies including the world of work, for example by ensuring that the composition of national AIDS councils includes representatives of employers, workers, persons living with HIV/AIDS, and ministries responsible for social and labour affairs.

In the Americas, the laws of Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua and Puerto Rico all provide for the creation of national AIDS commissions. The Costa Rican Act gives an interesting example of special emphasis on the role of non-governmental organizations (NGOs) in the fight against HIV/AIDS, placing the relevant provision under the Chapter dealing with "Other prevention methods":

> *"Section 25: Role of non-governmental organizations*
>
> *NGOs shall register with the Health Ministry, which is not permitted to refuse any such registration unless the applicant organization is devoted to activities unconnected with the prevention of the spread of the virus and the protection of PLWHA and related activities.*
>
> *Activities carried out by NGOs dedicated to preventing and caring for HIV/AIDS may, by virtue of a decision of the Health Ministry, be considered as part of the National AIDS Programme. Nevertheless, the absence of any such decision/approval shall not mean that, as far as the Ministry is concerned, the actions undertaken by the concerned organization do not exist, and they shall be included in the corresponding records. NGOs may offer the support required by the health authorities with a view to guaranteeing better results for activities in the field of HIV prevention and HIV/AIDS treatment and care.*

The 1999 Regulations issued under the Costa Rican Act establish a seven-person National Coordination Council for HIV/AIDS. Although direct mention of the ministry of labour is missing, the appointment of a high-level representative of the Social Security Fund ensures a world of work perspective in the Council's agenda. Likewise, although direct representation of employers and workers is not envisaged, the wording appears to be broad enough to permit trade unions, which have a direct interest in fighting HIV/AIDS, to gain a seat on the Council:

> *Section 2: The National Coordination Council for HIV/AIDS shall be composed of (a) the Minister or Deputy Minister of Health or their representative; (b) a representative of the Ministry of Public Education; (c) a representative of the Ministry of Justice and Grace; (d) a representative of the Governing Board of the Costa Rican Social Security Fund; (e) a representative of the Dean of the University of Costa Rica; (f) two representatives of NGOs addressing issues related to HIV/AIDS, of whom one must be a PLWHA so as to represent the infected population.*

The Philippines AIDS Prevention and Control Act establishes a 26-person National AIDS Council, comprised of high-ranking representatives of key government departments including labour, health, education, social welfare and development, interior and local government, justice, tourism, budget, foreign affairs and various government agencies, as well as of non-governmental organizations involved in HIV/AIDS prevention and control and a representative of an organization of persons living with HIV/AIDS.

In India, the Government established the National Aids Control Organisation (NACO) in the 1980's, under the chairpersonship of the Union Ministry of Health and Family Welfare with representatives from various sectors. The Committee was formed with a view to bringing together various ministries, non-governmental organizations and private institutions for effective coordination of the fight against HIV/AIDS in the country. Using the powers given to it under the statute, it has issued the National Aids Prevention and Control Policy, declaring its firm commitment to prevent the spread of HIV infection and envisaging effective containment of the infection levels in the general population in

order to achieve zero-level of new infections by 2007. Among other specific objectives, the policy recognizes that when human rights are protected, fewer people become infected and those living with HIV/AIDS and their families can better cope with HIV/AIDS. It sets up a range of measures to implement an effective rights-based response that include review and reform of the legislation, HIV prevention and care, information and services, legal services to enforce these rights and develop expertise on HIV-related legal issues, the promotion of special measures for vulnerable groups and the promotion of cooperation with United Nations bodies. The policy declares that all participating agencies in the Government and non-governmental sectors, international and bilateral agencies, must adopt policies and programmes in conformity with this national policy in their efforts to prevent and control HIV/AIDS.

Human Rights Commissions

The United Nations Commission on Human Rights has examined how HIV/AIDS is dealt these national bodies, which have become particularly popular in the past decade, and which often have broad investigatory and complaints functions that can be helpful in fighting discrimination at work based on HIV/AIDS. In the Report of the Secretary-General entitled *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS),*[87] some examples are cited:

> *28. The National Human Rights Commission of Mexico underscored the fact that no human condition may justify an infringement on the enjoyment of human rights. The Commission reported that it gives priority to issues reflected in the Official Rule on the Prevention and Control of HIV/AIDS, including the provision of information on prevention, protection, care and treatment of HIV/AIDS. The Commission addresses issues related to access to treatment and care for people affected by HIV/AIDS; training of medical staff on HIV/AIDS; access to psychotherapeutic assistance; and prevention of HIV transmission through blood transfusions. The Commission reported that it receives complaints related to denial of medical care, failure to notify a person of their HIV status, denial of social security benefits, and wrongful disclosure of HIV or AIDS status. The Commission noted its concern over delays in addressing and redressing instances of discrimination in the context of HIV/AIDS, due to complex bureaucratic procedures. Discrimination by health professionals against people affected by HIV/AIDS is of particular concern. The Commission noted that in Mexico, a lack of willingness to discuss sexual relations in an open and frank manner continues to impede efforts to address the epidemic and to prevent discrimination against sexual minorities, as well as people affected by HIV/AIDS.*

Labour inspection

The classic role of labour inspection in enforcing labour laws has evolved to include counselling and advisory services in recent years. The role that it could play, therefore, in both prevention and protection against HIV-based discrimination is obvious. The ILO's principal texts - the Labour Administration Convention, 1978 (No. 150), the Labour Inspection Convention, 1978 (No. 81) and the Labour Inspection (Agriculture) Convention, 1969 (No. 129) - give guidance on how to structure labour administration services so that they can be as efficient and useful as possible. The inclusion of functions related to HIV/AIDS information, education and counselling could well be part of enforcing a national policy in this field. The ILO Code devotes part of its training chapter to policy advice on how to upgrade the skills and knowledge of factory and labour inspectors with regard, in particular, to HIV/AIDS prevention in enterprises. Several AIDS laws specify the role of labour inspection, in particular as the appropriate body to settle

87 UN document E/CN.4/2003/81, Geneva, 20 January 2003.

disputes concerning non-respect of the ban on HIV-based discrimination in hiring and firing cases.

The Regulations of 14 October 1996 issued under the Nicaraguan Act to promote, protect and defend human rights in relation to AIDS make it clear that persons living with HIV/AIDS can complain to the local labour inspectorate:

> *Section 22: To give effect to section 21, persons who because of their HIV/AIDS status, have not been hired or have been dismissed may complain to the local Labour Inspectorate, which is the competent authority to ensure the implementation of this right in accordance with the Labour Code.*

Ombuds Office

This institution has its origins in Sweden. In that country, under a number of separate laws prohibiting discrimination relating to gender, ethnicity, belief, disability and sexual orientation, Ombuds are created as both complaint and investigatory bodies to enforce the laws. Ombuds can exist side by side with more formal institutions; their purpose is to facilitate the elimination of discrimination at work, as demonstrated by the terms of the texts establishing them.

Although not covering HIV/AIDS discrimination, some examples below show the usefulness of this type of office, with its emphasis on conciliation of disputes and broader information and education functions. The Swedish Equal Opportunities Act of 1991,[88] which aims to promote equal rights at work for women and men, provides as follows:

> *Section 30: There shall be established an Equal Opportunities Ombudsman and an Equal Opportunities Board to ensure compliance with this Act. The Equal Opportunities Ombudsman and members of the Equal Opportunities Board shall be appointed by the Government.*
>
> *Section 31: The Equal Opportunities Ombudsman shall primarily endeavour to induce employers to comply with the provisions of this Act on a voluntary basis. The Equal Opportunities Ombudsman shall also cooperate in efforts to promote equality at work in other ways.*

A similar arrangement is created under the Swedish Ethnic Discrimination Act of 1994,[89] giving more detail concerning the powers and duties of the Ombud:

> *Section 2: The Government shall appoint an Ombudsman whose work shall be to prevent discrimination from occurring in working life and in other areas of life in society.*
>
> *Section 3: The Ombudsman shall, by giving advice and in other similar ways, assist persons subjected to ethnic discrimination to safeguard their rights. The Ombudsman shall, through discussion with authorities, enterprises and organizations and by influencing public opinion, disseminating information and other similar ways, initiate further measures to prevent ethnic discrimination.*
>
> *Section 4: The Ombudsman shall, in particular, work to prevent jobseekers from being subjected to ethnic discrimination. The Ombudsman shall, through contacts with the employers' and workers' organizations concerned, promote good relations between different ethnic groups in working life. Provisions on the right of the Ombudsman to institute proceedings in disputes concerning improper treatment of a jobseeker or a worker are under section 17.*

[88] Act No. 443 of 30 May 1991, published in the Swedish *Official Bulletin* of 7 June 1991.

[89] Act No 134 of 7 April 1994, published in the Swedish *Official Bulletin* of 19 April 1994.

Section 5: The Government shall appoint an Ethnic Discrimination Board which shall consist of three members. The Board shall advise the Ombudsman on matters of principle concerning the application of the Act, and shall submit proposals to the Government for statutory amendments or other measures intended to counteract ethnic discrimination. The Board shall also adjudicate cases under section 7.

In India, a National AIDS Bill, contains previsions for the establishment of a Health Ombud alongside HIV Union and State level Commissions to promote compliance with the future law.

Burden of proof

The burden of proving that discrimination took place can present a significant hurdle in a case of alleged discrimination, whether indirect or direct. When fighting a discrimination case in which the complainant applies for a position and is rejected, information concerning the criteria for selection, the qualifications and assessment of the various candidates for the position usually lies exclusively with the employer. This is particularly true in cases of indirect discrimination when the actual criteria of selection for a position may have been established over many years. In many countries, the burden of proving discrimination lies with the complainant, and the employer is not obliged to produce evidence to show that the rejection can be explained on the basis of non-discriminatory reasons. In such circumstances, the employer may win the case simply by saying nothing and merely challenging the inferences drawn by the complainant. In practice, one of the most important procedural problems relating to allegations of discrimination in employment or occupation is that the burden of proof lies with the person who makes the complaint, which may represent an insurmountable obstacle. While at times the evidence can be collected without undue difficulty (in the case, for example, of advertisements for job vacancies where the discrimination is obvious because it is printed in the text), more often the discrimination involves an action or activity that is suspected rather than established, and therefore difficult to prove. This is also true when systematic discrimination is alleged, and the information and records that might constitute evidence are generally held by the person who is accused of discrimination.

These obstacles have led policy-makers to opt for shifting the burden of proof. Once the complainant makes out a prima facie (or plausible) case on certain facts, the responsibility for proving that the alleged act was *not* discriminatory shifts to the alleged perpetrator. This is typified by the European Union Council Directive No. 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.[90]

Given the usefulness of the European Union example, it is worthwhile quoting it at length, as an example of good practice that has worked in addressing sex discrimination, and one that might prove successful in the area of HIV/AIDS-based employment discrimination:

[..]Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory; Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought; Whereas it is all the more difficult to prove discrimination when it is indirect; Whereas it is therefore important to define indirect discrimination;

[90] *Official Journal of the European Communities*, 1998-01-20, No. L.14, pp. 6-8.

Article 4 – 1: Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Article 10 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, adopts similar wording in relation to alleged discrimination on the basis of disability, sexual orientation, etc.

The Tanzanian Employment and Labour Relations Bill of 2003, contains the following statement on the reversal of the burden of proof covering HIV/AIDS discrimination:

Section 6(7): In any civil legal proceedings-

(a) the employer shall prove the following if the employee makes out a prima facie case of discrimination on one or more of the following grounds listed in subsection (3)[including HIV/AIDS] (i) that the discrimination did not take place as alleged; (ii) that the discriminatory act or omission is not based on one or more of those grounds; or

(b) the employer shall prove a defence contemplated in subsection (6)[affirmative action or inherent requirements of the job] if the discrimination did not take place on a ground listed in subsection (3).

Remedies and sanctions

With regard to the effectiveness of sanctions, violations of the law should be punished with penalties that dissuade those who may consider repeating the discriminatory offence or wrongdoing and the victims of discrimination should be compensated for the wrong suffered. Damages may be awarded for economic loss, past and future (pecuniary damages) and for pain and suffering (non-pecuniary damages). Legislation which includes protective provisions, but which allows the employer to terminate the employment of a worker who has been the victim of discrimination simply through the payment of compensation, does not provide sufficient protection.

In addition, legislators and policy-makers should give careful consideration to the appropriateness, in the area of HIV/AIDS, of imposing penal sanctions. In short, preventive measures are necessary to address the social situations which often trigger discrimination. It should also be noted that the nature of discrimination is changing and is increasingly indirect, which makes it harder to address through the use of criminal penalties.

Most jurisdictions appear to agree that it is most effective to have available a wide range of possible sanctions to apply in discrimination cases, in particular those based on real or perceived HIV status.

Some examples from the sex discrimination in employment and occupation field can provide insights into the field of HIV/AIDS. In Finland, the offence of discriminatory advertising (sex discrimination in recruitment or during employment) incurs a penal sanction in the form of a fine. In Slovenia, it is a penal offence to violate the fundamental rights of workers (Penal Act No. 12/77-5/90, section 86). Section 60 of the same Act makes a violation of equality rights a penal offence where the discrimination in question has been expressly prohibited. In Israel, failure to comply with the Employment (Equal

Opportunities) Law of 1988[91] incurs penal liability, while the victim of the discrimination also has the right to seek civil remedies (which include punitive damages). Spanish law, under the Penal Code of 1991, imposes penal sanctions on those who commit any kind of severe discrimination in employment on the basis of sex. The Social Infringements and Sanctions Act of 1988,[92] classifies as a very severe infringement any measure adopted by an employer which implies sex discrimination.

The Zimbabwe HIV/AIDS Regulations of 1998 send a strong message about compliance. Yet the broad coverage of violations of *any* obligation under the regulations, which include, for example, the obligation on an employer to provide every employee with a copy of the regulations themselves, may result in tough, disproportionate sanctions on small enterprises that have few resources to devote to photocopying or purchases from the Government Printer:

> *Section 11: Offence and penalty*
>
> *Any person who contravenes any provision of these regulations shall be guilty of an offence and liable to a fine not exceeding 5,000 dollars or to imprisonment for a period not exceeding 6 months or to both a fine and such imprisonment.*

The Costa Rican Regulations of 1999 require that there be punishment of the guilty party, but leave the nature of the penalty up to the procedural custom in each sector:

> *Section 26: The Ministry of Labour and Social Security shall apply administrative sanctions, observing the established due process, to employers who are found guilty of discriminatory acts. In the case of public institutions, the decision/award must be communicated to the hierarchical superior of the civil servant in question, for the application of the corresponding disciplinary sanction. The Ministry of Labour and Social Security shall verify the implementation of the corresponding penalty…*
>
> *Section 32: Every establishment, private or public, referred to in the Principal Act, No. 7771, or in these Regulations, must include in their internal disciplinary rules and agreements penalties that correspond to the violation, whether by act or omission, of the Act or these Regulations, with the aim of assisting in their implementation. Copies of the internal rules/agreements shall be transmitted to the National Coordination Council for HIV/AIDS.*

Regarding the effectiveness of fines in times of high, even hyper-inflation, legislators have been trying to ensure that the penalty remains dissuasive. This can be achieved by referring to the amount of the fine as a "unit" or a "level" which is further delineated or defined in monetary terms in regulations that may be amended more readily than a statute. The Zimbabwe Labour Relations Act, as amended in 2002, for example, punishes persons who obstruct labour officers in carrying out their duties:

> *Section 126(5): …shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding 6 months or to both such fine and such imprisonment.*

A number of countries have gone further by legislating for what is referred to as contract compliance. This element to promoting equality is normally found in laws providing for affirmative action. It places the requirement on employers to either be in possession of a certificate that they are respecting the equality policy and/or to lose

[91] Act No. 5748-1988, published in *Labour Laws: State of Israel*, Ministry of Labour and Social Affairs, Jerusalem, 200-01-80, pp. 215-221.

[92] Act No. 8 of 4 July 1988, published in the *Official State Bulletin*, 1988-04-15, No. 91, pp. 11427-11434.

government contacts or loans if they are found to be in breach of it. The South African Employment Equity Act provides a good example of this:

> *Section 53: State contracts*
>
> *(1) Every employer that makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything--*
>
> *a. must (i) if it is a designated employer, comply with Chapters II and III of this Act; or (ii) if it is not a designated employer, comply with Chapter II of this Act; and*
>
> *b. attach to that offer either (i) a certificate in terms of subsection (2) which is conclusive evidence that the employer complies with the relevant Chapters of this Act; or (ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which, when verified by the Director-General, is conclusive evidence of compliance.*
>
> *(2) An employer referred to in subsection (1) may request a certificate from the Minister confirming its compliance …*
>
> *(3) A certificate issued in terms of subsection (2) is valid for 12 months from the date of issue or until the next date on which the employer is obliged to submit a report… whichever period is the longer.*
>
> *(4) A failure to comply with the relevant provisions of this Act is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreement.*

Chapter XI - Final remarks

The above discussion and examples are aimed at ensuring better coverage of HIV/AIDS prevention and protection in labour legislation. Where appropriate, the ILO Code and Conventions have been highlighted. Like most legislation that addresses sensitive issues, any reform of labour legislation can rarely be technically perfect, as it must be built on the basis of social and political compromises and negotiations. Legislation should, in the first instance, seek to be a reliable and workable framework for efficient and fair governance of the labour market, and for sound labour relations. In practice, this means that issues that may be arguable from a technical point of view may not actually be problematic for the users. The ILO believes that the final say on soundness, fairness and workability of a piece of legislation - covering any issue - should belong to the users themselves, not to legal analysts. This is why the ILO strongly encourages that the adoption and implementation of legal instruments be the result of extensive consultation and social dialogue between all the relevant stakeholders. Experience shows that this leads to the adoption of provisions addressing HIV/AIDS that are workable. In the fight against its spread, and the stigma and discrimination that arise in the world of work, sound legislative provisions, such as the examples given in this paper, can make an important contribution.

Annex 1
ILO tools for Labour Law reform

- NATLEX/ILOLEX databases
- *Labour Legislation Guidelines*, Geneva, 2003 (CD ROM and available via website http://www.ilo.org/public/ifpdial/llg/index)
- *Comparative study on contents of civil service laws*, IFP/DIALOGUE Working Paper No. 5, Geneva, 2001
- *Termination of Employment Digest*, ILO, Geneva, 2000
- General Surveys of the ILO supervisory bodies
- Website portal "International Observatory on Labour Law"