

**Submission to the National Council Standing Committee on  
Constitutional and Legal Affairs on Clause 5(2) of the  
Labour Bill, 2004**

Made by: AIDS Law Unit, Legal Assistance Centre on behalf of:

Big Issue  
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Sister Namibia  
Social Marketing Association  
The Rainbow Project  
Voluntary Services Overseas (VSO)

## CLAUSE 5 – PROHIBITION OF DISCRIMINATION IN EMPLOYMENT

**PROPOSAL:** That Clause 5(2) be amended by the insertion of subclause (f) to read as follows:

“(f) *HIV status*”

### **MOTIVATION:**

*The Bill in its current form does not specify HIV status as a prohibited ground of discrimination in employment.*

The only possible reference to discrimination on this basis may be found in section 5(2)(e) of the Bill which refers to “*physical or mental disability*”. In our opinion *HIV does not constitute a disability* as people living with HIV are often asymptomatic and able to carry on a productive life for many years. With the introduction on anti-retroviral treatment this period will increase.

Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights constitute an essential component in preventing the transmission of HIV and reducing the impact of HIV/AIDS. This is particularly true in the context of HIV/AIDS in the workplace. The protection and promotion of human rights are necessary both to the protection of the inherent dignity of persons affected by HIV/AIDS and to the achievement of public health goals of reducing vulnerability to HIV infection, lessening the adverse impact of HIV/AIDS on those affected and empowering individuals and communities to respond to HIV/AIDS.

There is an undeniable link between human rights and health. In general, human rights and public health share the common objective to promote and protect the rights and well being of all individuals. From the human rights perspective, this can best be accomplished by promoting and protecting the rights and dignity of everyone, with

special emphasis on those who are discriminated against or whose rights are otherwise interfered with. Similarly, public health objectives can best be accomplished by promoting health for all, with special emphasis on those who are vulnerable to threats to their physical, mental or social well being. Thus, health and human rights complement and mutually reinforce each other in any context. They also complement and mutually reinforce each other in the context of HIV/AIDS.<sup>1</sup>

One aspect of the interdependence of human rights and health is demonstrated by examining the impact of stigma and discrimination on the epidemic. People will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality and other negative consequences. Therefore, it is evident that lack of protection of individual rights to dignity, equality and freedom from discrimination negatively impacts on the epidemic. This interdependence is also illustrated by the fact that social inequalities in the form of, for example, gender inequalities, increase vulnerability to HIV.

A broadly based, inclusive response, involving people living with HIV/AIDS in all its aspects, is a main feature of successful HIV/AIDS programmes. Another essential component of a comprehensive response is the facilitation and creation of a supportive legal and ethical environment, which is protective of human rights. This requires measures to ensure that government, communities, employers and individuals respect human rights and human dignity and act in a spirit of tolerance, compassion and solidarity.

In the context of the HIV/AIDS epidemic, the promotion and protection of human rights is necessary to achieve the health goals of:

- Reducing vulnerability to HIV infection;
- Encouraging people to find out about their status;
- Lessening the adverse impact of HIV/AIDS on those affected; and
- Empowering individuals and communities to respond to HIV/AIDS.

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<sup>1</sup> "HIV/AIDS and Human Rights: International Guidelines" United Nations, 1998

## **National policy framework:**

The Namibian national policy framework contains various provisions on the need to outlaw discrimination on the basis of HIV/AIDS.

**The National Policy on HIV/AIDS entitled “*Positive Responses and Choices: Policies and Guidelines for HIV/AIDS Prevention and Control*”**, adopted by Cabinet in June 1992, outlaws discrimination and the implementation of coercive control measures<sup>2</sup>.

The need for a non-discriminatory and supportive environment is stressed in the policy. In particular the policy emphasises the need for non-discrimination on the basis of HIV status in access to care and treatment, *employment, employment benefits, educational and training institutions, accommodation, immigration and travel.*<sup>3</sup> In terms of paragraph 4.5.6 of this policy “*Determination of an individual’s status should not be a prerequisite of entry into work, continuation of work, promotion prospects or training opportunities. As an employer, the Government of Namibia shall not require such tests and will encourage all other sectors to do likewise.*” With reference to employee benefits, the policy provides that “*Pension rights and other occupationally related benefits should not be harmed by the disclosure of one’s HIV status.*”<sup>4</sup>

The need to outlaw discrimination on the basis of HIV/AIDS has also been emphasised in the *Namibian HIV/AIDS Charter of Rights*, which has been adopted by Cabinet as a national policy. The Charter has a specific chapter on HIV/AIDS and Employment, which is largely modelled on the guidelines for the implementation of the National Code on HIV/AIDS and Employment. It provides specifically that “*Discrimination on the basis of HIV status in access to and continued employment, conditions of employment and employment benefits is contrary to the provisions of the Labour Act*”.

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<sup>2</sup> See in particular para 4.5.9: "The implementation of non-discriminatory measures will complement education, information and counselling programmes, and will do most to enlist the support and co-operation of those who are HIV-infected or most at risk of HIV infection for responsible behaviour. They are in effect central to any successful prevention programme."

<sup>3</sup> paras 4.5, 4.8

<sup>4</sup> para 4.5.8

The need to outlaw discrimination on the basis of HIV status has also been emphasised in the **National Strategic Plan on HIV/AIDS (Medium Term Plan III) for the period 2004-2009**, launched by His Excellency, the President of the Republic of Namibia in March 2004. This Plan states that *“The adverse impacts of stigma and discrimination are being increasingly recognised as key barriers to combating the epidemic. Commitment to reducing stigma and discrimination is therefore a central guideline and principle in all strategies contained in MTP III”*.(at page 10)

Component 1 of this strategic plan addresses the need for the creation of an enabling environment. The plan envisages that *“policy development and law reform will facilitate the establishment of a legal and social environment which encourages openness about HIV/AIDS and in which PLWHAs receive fair and equitable treatment. To create an enabling environment that effectively addresses stigma and discrimination, existing laws and policies must be reviewed and reformed where necessary.”* (page 33)

The Minister of Labour has promulgated guidelines in terms of the Labour Act, No 6 of 1992, for the implementation of the **National Code on HIV/AIDS and Employment**, which are to be followed and adhered to by all employers and employees for the purpose of the application of the relevant provisions of the Labour Act in respect of HIV/AIDS in employment.<sup>5</sup> This National Code on HIV/AIDS and Employment was formulated after consultation between government, employer organisations and employee organisations and is premised on “the fundamental principles of human rights embodied in the Constitution of the Republic of Namibia”.<sup>6</sup>

In terms of paragraph 4.1 of the guidelines, the Code on HIV/AIDS and Employment applies, subject to the provisions of the Labour Act, *“to all employees and prospective employees, all workplaces and contracts of employment and all human resources practices forming part of policy component of any organisation.”*

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<sup>5</sup> Government Notice 78 of 1998 published in Government Gazette No 1835 of 3 April 1998

<sup>6</sup> op cit para 3.2

The guidelines outlaw discrimination on the basis of HIV status in the context of employment and provide, inter alia, that *"there should be neither direct nor indirect pre-employment tests for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV."*<sup>7</sup> They provide, in addition that there should be no compulsory HIV testing for training or promotion and further that HIV infected employees should work under normal conditions so long as they are fit do so and if they can no longer do so, they should be offered alternative employment "without prejudice to their benefits".<sup>8</sup>

The guidelines also provide that *"government, employers and employee representatives should ensure that occupational benefits are non discriminatory and sustainable and provide support to all employees including those with HIV infection."*<sup>9</sup>

The guidelines afford protection from victimisation on the basis of HIV status by providing that *"persons affected by or believed to be affected by HIV or AIDS should be protected from stigmatisation and discrimination by co-workers, employers or clients"* and *"where employers and employees agree that there has been adequate information and education provisions for safe work, then disciplinary procedures should apply to persons who refuse to work with an employee with HIV/AIDS."*<sup>10</sup>

**These guidelines are however only guidelines, and do not have the force of law. This was confirmed by the Labour Court in the case of Haindongo Nanditume v Minister of Defence.**

The issue of discrimination on the basis of HIV status has also been considered by our Labour Court. On 10 May 2000 the Labour Court handed down judgment in the case of Haindongo Nanditume v Minister of Defence.

Haindongo Nanditume, an ex-PLAN combatant was refused entry into the Namibian Defence Force solely on the basis of his HIV status.

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<sup>7</sup> para 6.2.1

<sup>8</sup> paras 6.5, 6.6.3

<sup>9</sup> para 6.7.1

<sup>10</sup> para 6.9

In its judgment the court found that an employer such as the NDF is not permitted to exclude people from employment on the basis of their HIV status, as being HIV positive does not necessarily mean that one is not fit for employment. The court found further that an HIV test alone will not achieve the purpose of assessing fitness for employment and that pre-employment testing for HIV can thus only be undertaken as part of a broader assessment of physical fitness.

### **Regional and International Policy and Legal Frameworks:**

At a regional level, SADC has adopted the **Code on HIV / AIDS and Employment in the Southern African Development Community (SADC)**.

Clause 9(1) of the Code provides that: *“Persons affected by or believed to be affected by HIV or AIDS should be protected from stigmatisation and discrimination by co-workers, employers or clients”*. Clause 2 of the Code states that *“The regional nature and implications of the epidemic and the desire to harmonise national standards in dealing with HIV / AIDS motivate this regional code. This code aims to ensure that SADC member states develop tripartite national codes on AIDS and Employment that shall be reflected in law”* (emphasis added).

At an international level, in June 2001, 189 head of states, including Namibia, adopted the **UN Declaration of Commitment on HIV/AIDS** and committed themselves to *“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 greater risk of HIV/AIDS, in consultation with representatives of employers and workers, taking into account of established international guidelines on HIV/AIDS and the workplace”*.

In addition, the International Labour Organisation has published an **ILO Code of Practice on HIV/AIDS and the world of work**. The ILO Code of Practice contains 10 key principles that should guide legislators when elaborating a law to fight HIV/AIDS in the world of work:

- Recognition of HIV/AIDS as a workplace issue
- *Non-discrimination based on the real or perceived HIV status*
- Gender equality
- Healthy work environment
- Social dialogue
- No HIV testing for purposes of exclusion of employment
- Confidentiality of HIV-related data
- Continuation of employment relationship and adaptation of work
- Prevention
- Care and support

To ensure its effective implementation the **law must be unambiguous** and provide for clear grievance procedures as well as strong yet realistic sanctions. It must also be coherent with the policies and standards adopted at the national and international levels and accompanied by enforcement mechanisms.

**Several countries in the region have recently amended their labour law to expressly prohibit discrimination on the basis of HIV status. A case in point is Zimbabwe.** In 2002, the Zimbabwean Labour Relation Act was amended. **It now explicitly prohibits an employer from discriminating against any employee or prospective employee on the ground of “HIV status”.** Any person who violates this provision is guilty of an offence and liable to a fine and/or to imprisonment for a period not exceeding one year. Victims can obtain damages from the employer and reintegration in their employment.

People living with HIV/AIDS in Namibia still suffer widespread rights abuses at the hands of employers and employees are often denied access to employment or continued employment solely on the basis of their HIV status.

We accordingly respectfully submit that *HIV status should be included in clause 5 of the proposed Bill as a prohibited ground of discrimination in employment* as this will ensure that discrimination on the basis of HIV/AIDS in employment is clearly prohibited by law in line with the existing Namibian policy framework on HIV/AIDS



and will bring Namibian law in line with the SADC Code on HIV/AIDS and Employment and the ILO Code of Practice. Amending the law accordingly will also represent a move by Namibia towards meeting its obligations in terms of the UNGASS Declaration of Commitment on HIV/AIDS.