

Comment on the Code of Good Practice: Key Aspects of HIV/AIDS and Employment

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1 INTRODUCTION¹

The Code is a very useful and comprehensive document. However, in its attempt to be comprehensive, its considerable length may serve to make its use rather daunting for some organisations, institutions or companies. In addition, the language used is very 'legalistic', thus possibly preventing companies from using it optimally. This also makes its use particularly difficult for people who do not have English as their mother tongue.

The introductory section of the document is simply stated and positive in that it reflects HIV/AIDS as a disease with socio-economic and human-rights implications and highlights the existence of stigma related to HIV/AIDS.

One of the dilemmas confronting those developing a policy on HIV/AIDS is the extent to which one includes this type of introductory information – which again, if too lengthy will discourage potential readers from becoming familiar with the policy. In developing an introduction to an HIV/AIDS workplace policy it often seems that one is stating the obvious. One of the things the authors found most difficult in developing their policy was to know *what* to include and exclude, particularly in the light of the brief given to them by management to produce a document no longer than five pages.

2 GOALS/OBJECTIVES OF THE CODE

The goals of the Code focus on eliminating unfair discrimination, promoting a non-discriminatory workplace environment, promoting effective

¹ In this paper the authors draw on their practical experience in drafting an HIV/AIDS workplace policy for the University of the Western Cape to reflect on the Code of Good Practice: Key Aspects of HIV/AIDS and Employment (the Code) in terms of its ability to assist in defining and refining HIV/AIDS policies. The authors are not legal 'experts' and therefore attempt a 'practical' rather than legal analysis of the Code.

management of HIV in the workplace, balancing the rights and responsibilities of employers and employees and 'giving effect to the regional obligations of the Republic' as a member of SADC.² The objectives focus more specifically on setting out clear guidelines for employees to prevent discrimination against those infected by HIV in the workplace and also on how to manage HIV in the workplace. In addition, it also seeks to promote co-operation between various key stakeholders both within the organisation as well as at local, regional and national levels.

The university is a peculiar type of workplace in the sense that it has obligations to both staff and students. This goes beyond the normal employee/employer relationship envisaged in the code. In addition, a university also bears the responsibility for other tasks related to HIV/AIDS, such as providing a role model for best practices in education and research and supporting community outreach. Whilst the document is useful, it does not specifically cover the type of responsibility and role an academic institution might incorporate into its workplace HIV/AIDS policy and programme. Although one could argue that the Code does not necessarily claim to do this, it is a point to highlight for other organisations that might not fit the 'classic' workplace description.

This also begs the question to what extent a 'normal' workplace extends itself beyond its narrow responsibility of looking after those in the workplace alone and whether or not it sees itself as having the responsibility also to develop community outreach programmes, given the nature of the epidemic. In addition, we need to ask what obligation employers have to provide financial or other support to NGO and AIDS service organisations that might be either assisting their own educational programmes and/or supporting their workforce through home-based care programmes and local networks.

We felt that not much mention is made in the Code of 'fighting' the epidemic on a broader scale – or in a sense, beyond what one might call the 'factory gates'. Although there is talk about 'regional obligations' and 'fostering co-operation'³, this is not elaborated upon in any detail by specific guidelines. The question we would like to pose is: "What is the role of a company/employer in contributing to the development of the broader community's ability to both prevent HIV and care for those who have AIDS?" This question has not been addressed by the Code.

3 POLICY PRINCIPLES

The principles in the Code cover issues related to equality and non-discrimination, creation of a supportive environment, protection of human rights and dignity of those living with HIV/AIDS, the development of workplace policies and programmes that take into account the disproportionate impact on women and consultation, inclusivity and full participation of all stakeholders.⁴

² Item 1.6.

³ Items 1.6 & 2.3 (ii).

⁴ Items 3.1–3.5.

The principles, however, fail to mention prevention and education, treatment and care of those infected by HIV/AIDS within the workplace and the aspect of social responsibility (or community outreach). Although prevention is mentioned in the objectives⁵, it does not form part of either the broader goals of the policy or the policy principles. The issue is again vaguely picked up in item 13.1.2(ii)(a), but is very non-specific and does not elaborate much on what it means further than outlining “ongoing sustained prevention of the spread of HIV among employees and their communities”.

One of the key prevention methods is to provide condoms to employees. The policy, however, does not suggest that employers should actually provide condoms, but rather that they should “promote condom distribution and use”.⁶ We feel that companies should be strongly encouraged to provide condoms to their employees, particularly as they can access them free of charge from the Department of Health.

4 LEGAL FRAMEWORK

We will not comment on the legal framework as this is not our area of expertise. However, we would like to comment on the items relating to employees who might have been exposed to HIV as a result of occupational exposure. Under item 5.3.7 the Code says that “an employee who is infected with HIV as a result of an occupational exposure to infected blood or bodily fluids may apply for benefits in terms of section 22(1) of the Compensation for Occupational Injuries and Diseases Act, No 130 of 1993”. Surely an employee who is infected with HIV as a result of occupational exposure should be informed that she/he has the *right* to apply rather than that she/he ‘may’ apply? We feel that the policy should advocate that employers assume a much more active role in supporting their employees in cases of occupational injury. This point needs to be addressed again under item 9.1 and item 9.2, advocating that a stronger and more direct role be assumed by employers in terms of COIDA procedures.

5 THE ISSUE OF CONFIDENTIALITY

Whilst recognising and supporting the need for privacy and confidentiality, we feel that the issue of confidentiality is discussed in the Code as an *absolute* right.⁷ What happens, however, when an employee discloses her/his HIV-positive status and also discloses that she/he is not using condoms? What is the responsibility of the health worker, counsellor or any other person in the workplace to whom such information has been disclosed? The Code does not take into account the rights of the partners of those infected by HIV and also does not take into account Codes of Practice of the Health Professional Council. We feel that some reference to the above Codes ought to be included in the Code of Good Practice so that

5 Item 2.2 (iii) – ‘introducing measures to prevent the spread of HIV’.

6 Item 15.2.2 (iv).

7 Item 7.2.2.

health professionals who are faced with such dilemmas in the workplace can be guided by what is acceptable or reasonable in the context of HIV/AIDS.

We struggled with this particular issue in drawing up our policy at UWC, and included 'unless legally indicated' to clauses in which confidentiality was assured in order to cover this issue. However, clearer guidelines about this in the Code would have assisted us in this instance.

6 ENCOURAGEMENT OF HIV TESTING

There is much emphasis placed upon protection of the rights of employees against being tested in a discriminatory way. Perhaps equal emphasis should be placed on the workplace providing information on the advantages of undergoing voluntary HIV testing and counselling (in order to protect oneself from re-infection as well as protecting partners against infection). This is mentioned in item 15.2.2(ii), but is not emphasised enough. In addition the Code does not specify *who* should pay for voluntary testing and counselling.

7 EMPLOYEE BENEFITS

One of the things we struggled with at UWC was employee benefits related to HIV. Whilst many medical schemes cover the cost of antiretroviral treatment, one perhaps needs to question how realistic it is to ask a company to "ensure that this scheme does not unfairly discriminate, directly or indirectly, against any person on the basis of his or her HIV status."⁸ Our understanding is that, in terms of section 67(1) and (9) of the Medical Schemes Act,⁹ the Minister of Health, in January 2000, issued regulations prescribing the minimum benefits that medical schemes ought to provide for HIV/AIDS, namely, that they are required to treat opportunistic infections associated with HIV and to provide for hospitalisation. Perhaps it would be more realistic to ask companies to ensure that the scheme that they support does indeed offer such minimum benefits and that, as an addition to this, they investigate *which* company offers the most 'supportive' benefits to those living with HIV/AIDS. Based on this analysis they could then consider the implications of a change of schemes if an alternative scheme is found to be more supportive.

8 WORKPLACE HIV/AIDS PROGRAMMES

We found that this item was sound and acknowledges that each programme needs to be guided by the needs and capacity of the specific workplace.¹⁰ This is an important issue to highlight, since there is little point in developing a perfect workplace HIV/AIDS policy if it is not matched by the allocation of appropriate resources (both in terms of

⁸ Item 10.4.

⁹ Act 131 of 1998.

¹⁰ Item 15.2.2.

finances and human resources). The Code then recommends a series of steps/initiatives that every workplace *should attempt* to address in cooperation with 'sectoral, local, provincial and national initiatives'. It is important that workplaces are encouraged to link with other initiatives in the field. However, perhaps more emphasis needs to be placed on the crucial role of local AIDS service organisations, non-governmental organisations and community-based organisations.

9 GENERAL COMMENTS

Whilst the Code is really designed to reflect broad issues that need to be considered when developing a policy, we feel that it is imperative that those who have been given the responsibility of developing a policy be aware of the details and of outlining *who* will provide a particular service or benefit, and what the *standard* of that service will be (e.g. who pays for and provides condoms in the workplace? What treatment will be covered by the company? Who pays for voluntary testing and counselling?). Assigning responsibility to specific posts or departments within a company or an institution, and being specific about the standards that ought to be expected, are critical if a workplace policy is going to be implemented effectively. Hopefully these will be spelt out in more detail in the promised Technical Assistance Guidelines on Managing HIV/AIDS in the workplace.¹¹

This also raises questions about the extent of a company's responsibility. To what extent does a company have an obligation to negotiate with a drug company to get access to medicine (e.g. to prevent mother-to-child HIV transmission, to treat opportunistic infections and post-exposure prophylaxis for occupational injuries or rape) or to provide treatment that is not covered by medical schemes or by the State?

Another issue not sufficiently emphasised within the Code was that of gender-based discrimination and violence, although it is alluded to in the principles that take note of the disproportionate impact of the epidemic on women. This issue has been included in the ILO's *Draft code of practice on HIV/AIDS and the world of work*, a code of practice that was developed at an international level, and subsequent to the Code of Good Practice.

We believe that the particular risks that women face in relation to HIV/AIDS and the commitment an institution or a company should make to eradicate any form of gender-based discrimination and/or violence within the workplace ought to be considered a significant issue which every workplace HIV/AIDS policy ought to address.

10 CONCLUSION

This is a sound Code of Good Practice and a much-needed and welcome document. Our main criticism relates to the extent to which companies should engage with and take responsibility for the HIV epidemic. The

¹¹ Referred to in item 1.2 of the Code.

Code takes a limited view of workplace responsibility and should perhaps re-examine the boundaries it has drawn relating to this responsibility. Ideally, one would like to see employers playing a greater role in prevention, addressing gender-based violence and discrimination more proactively, taking greater community responsibility and taking greater responsibility for providing treatment for those living with HIV/AIDS. This should take place within the framework of what an individual company can *realistically* provide (given its size and level of resources).

Sources

International Labour Organisation *Draft code of practice on HIV/AIDS and the world of work* (Geneva 2001)