

## 1. Background

In recent decades, China has made tremendous progress in the research and prevention of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS), as well as in the treatment, care and support of people living with the disease. Notably, China is one of the only middle-income countries in which domestic funds account for the major proportion of the funding of their HIV/AIDS programme.<sup>1</sup> Medical institutions nationwide conducted an estimated 130 million HIV antibody tests in 2014, or an increase of 70 million tests from 2010. Around 103,501 new cases were diagnosed and the number of people receiving antiretroviral therapy increased from 295,358 in 2014 to 389,852 in February 2016.<sup>23</sup>

China's great progress in HIV testing is enabling people to become aware of their HIV status and access appropriate antiretroviral treatment. Testing, however, can also lead to unwarranted discrimination against people living with HIV/AIDS and be counterproductive in the protection of public health. In this briefing note, we suggest the Government of China further extends its leadership in the fight against HIV/AIDS by abolishing mandatory HIV testing as a precondition for employment in the public service.

## 2. Mandatory HIV testing as precondition for employment: Why is it not a good idea?

Testing and finding out one's HIV status is the first step for individuals to access HIV-related care and prevention services. For this reason, leading organizations in the field of HIV/AIDS recommend voluntary HIV testing and counselling for all those who may have been exposed to the disease.<sup>4</sup> Over the last 25 years, many countries have moved away from mandatory HIV testing as a precondition for employment because a growing body of evidence has demonstrated that it does not prevent the spread of HIV/AIDS. Mandatory testing may even contribute to its spread, as it discourages treatment and care by increasing ignorance, stigma and discrimination.



Mandatory HIV screening may still be required for *exposure prone procedures* (see Box 1), but mandatory testing for access to employment in general is strongly discouraged (see Box 2) for the following reasons:

### Public health perspective

- There is no evidence that mandatory HIV testing during recruitment can prevent the spread of the disease or help people living with HIV/AIDS get access to healthcare and other HIV-related services.
- Evidence shows that mandatory testing would force job applicants living with HIV/AIDS or who have the potential to be diagnosed as HIV positive to hide their status and avoid treatment largely because of the related stigma.
- Mandatory HIV testing creates a false sense of security because usually it takes around three months (the "window period") after infection to accumulate enough antibodies for the disease to be detected. Also, an HIV-negative test result during recruitment does not preclude the possibility of contracting the disease afterwards.

### Human rights perspective

- Mandatory testing for employment, usually accompanied by a lack of adherence to confidentiality or counselling, is a direct violation of an individual's rights to dignity, privacy, work and freedom from discrimination.

<sup>1</sup> China AIDS policy implementation: reversing the HIV and AIDS epidemic by 2015, available at: [ije.oxfordjournals.org/content/39/suppl\\_2/ii1.full](http://ije.oxfordjournals.org/content/39/suppl_2/ii1.full)

<sup>2</sup> National Health and Family Planning Commission of China: 2015 China AIDS Response Progress Report, 2015.

<sup>3</sup> National Center for AIDS/STD Control and Prevention, China CDC: "Update on the AIDS/STD epidemic in China and main response in

control and prevention in February, 2016", in *Chinese Journal of AIDS & STD*, (2016, Vol. 4, No. 1), p223.

<sup>4</sup> ILO: Mandatory HIV Testing for Employment of Migrant Workers in Eight Countries of Southeast Asia: from Discrimination to Social Dialogue, 2009.

## Economic perspective

- People living with HIV can and do live with the disease for many years without experiencing symptoms or posing any threat of transmission to their peers. Mandatory testing and screening would lead to the loss of qualified members of the labour force and an increase in unemployment.

### Box 1. HIV testing of healthcare workers

#### United Kingdom<sup>5</sup>

All new healthcare workers (HCWs) who are employed or starting training in a clinical care setting are offered an HIV antibody test. Those who apply for a post or training involving exposure prone procedures (EPPs) and decline testing for HIV, hepatitis A and hepatitis B should not be cleared for EPP work.

Before testing, HCWs should be reminded of their professional responsibilities in relation to HIV and possible ways in which they may have been exposed, including:

- if a man, having unprotected sex with another man;
- having unprotected sex in a country where HIV transmission through sex between women and men is common, or having unprotected sex with someone exposed in such a country;
- sharing injecting equipment while using drugs;
- having significant occupational exposure to HIV-infected material;
- engaging in invasive medical, surgical, dental or midwifery procedures in places with inadequate infection-control precautions, or where HIV is prevalent; and
- having unprotected sex with anyone who has been exposed to HIV as outlined above.

Practising HCWs who perform EPPs must seek medical advice on the need to be tested and, if HIV positive, follow appropriate clinical and health advice.

#### Canada<sup>6</sup>

In early 2004, it was revealed that a surgeon at a Montreal hospital was living with HIV, having operated on over 2,600 patients. Although no cases of infection were found among them, it provoked calls for mandatory HIV testing of HCWs.

The Québec Medical Association also adopted a policy requiring regular testing of doctors and, if found to be HIV positive, disclosure to their employers.

However, given the very limited circumstances of HIV transmission from HCWs to patients, the Canadian HIV/AIDS Legal Network and *Coalition d'organismes communautaires québécois de lutte contre le sida (COCQ-sida)* reminded health authorities that mandatory testing of HCWs is not justified. Instead, HCWs should monitor their HIV status regularly and, if HIV positive, seek advice confidentially about whether they need to limit their professional practice. Practice restrictions may be justified for "high-risk" EPPs. However, it is important to ensure HCWs living with HIV are protected from discrimination and information about their HIV status is not unduly disclosed.

### Box 2. Workplace HIV/AIDS policies

#### Ghana

According to the Ghanaian Civil Service: Workplace HIV and STIs [Sexually Transmitted Infections] Policy, no civil servants or job applicants are required to undergo HIV testing. Management may provide voluntary counseling and testing to staff who request a test as part of a workplace healthcare service, in the event of an occupational accident with a risk of exposure to blood or other bodily fluids, for the purposes of compensation following such an accident, with informed consent and pre- and post-test counseling, and with strict confidentiality procedures.

In respect of confidentiality, staff are not required to disclose their HIV status. If a member of staff voluntarily discloses their HIV status to their employer, it should not be disclosed to others without their written consent. Nonetheless, the acceptance and support of staff who voluntarily disclose their HIV status in the workplace should be promoted by encouraging participation in education, prevention and awareness programmes; encouraging the development of support groups for employees living with HIV/AIDS; and ensuring those who are open about their HIV/AIDS status are not stigmatised.

As regards education and prevention, staff should be adequately educated about HIV/AIDS and its impact on the

<sup>5</sup> Public Health England: The management of HIV infected healthcare workers who perform exposure prone procedures, 2014

<sup>6</sup> Canadian HIV/AIDS Legal Network: HIV Testing in Canada, 2007.

world of work, civil servants should be encouraged to know their blood groups and ministries, departments and agencies should focus on peer education to disseminate information in the workplace.

### **South Africa**

The South African Development Community (SADC) Employment and Labour Sector established the Code on HIV/AIDS and Employment to assist workplaces in addressing issues surrounding HIV/AIDS. Some of the main policy components are as follows:

- Education, awareness and prevention programmes should be developed jointly by employers and employees and be accessible to all in the workplace.
- There should be no direct or indirect pre-employment, training or workplace testing for HIV.
- HIV status should not be a factor in job status, promotion or transfer.
- No employee should be dismissed merely on the basis of HIV status.
- Occupational benefits should be non-discriminatory and sustainable, providing support to all employees, including those living with HIV.
- Precautionary measures should be taken to reduce the risk of transmission, including information and training on hazards and safety procedures for safe work.
- People affected or believed to be affected by HIV/AIDS should be protected from stigmatisation and discrimination by coworkers, employers and clients.

### **3. Principles of HIV testing in employment**

In a series of documents,<sup>7</sup> the International Labour Organization (ILO), Joint United Nations Programme on HIV/AIDS (UNAIDS), World Health Organization (WHO), and International Organization for Migration (IOM) have acknowledged the following principles regarding workplace HIV testing:

- HIV testing should be voluntary, encouraged and supported.
- HIV screening for the purpose of employment decisions is not allowed.
- Workers should enjoy the protection of their privacy, including confidentiality relating to HIV/AIDS.

<sup>7</sup> These documents include: ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111); ILO HIV and AIDS Recommendation, 2010 (No. 200); ILO Code of Practice on HIV/AIDS and the World of Work; WHO Global Health Sector Strategy on HIV/AIDS

- There should be counselling both before and after results are given.

### **Box 3. Fundamental principles**

#### ***ILO HIV and AIDS Recommendation, 2010 (No. 200)***

In relation to HIV testing, privacy and confidentiality, Recommendation No. 200 provides the following:

- Testing must be genuinely voluntary and free of any coercion and testing programmes must respect international guidelines on confidentiality, counselling and consent.
- HIV testing or other forms of screening for HIV should not be required of workers, including migrant workers, jobseekers and job applicants.
- The results of HIV testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement.
- Workers, including migrant workers, jobseekers and job applicants, should not be required by countries of origin, of transit or of destination to disclose HIV-related information about themselves or others. Access to such information should be governed by rules of confidentiality consistent with the ILO code of practice on the protection of workers' personal data, 1997, and other relevant international data protection standards.
- Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status.
- Members should have in place easily accessible dispute resolution procedures which ensure redress for workers if their rights set out above are violated.

#### ***United Nations General Assembly Political Declaration on HIV and AIDS<sup>8</sup>***

In June 2016, the United Nations General Assembly reaffirmed its commitment to promote laws, policies and practices to end HIV-related stigma and discrimination. Its undertakings included the following:

- Commit to strengthen measures at the international, regional, national, and local and community levels to prevent crimes and violence against, and victimization of, people living with, at risk of, and affected by HIV and

2011-2015; WHO/UNAIDS Statement on HIV Testing and Counseling, 2012; UNAIDS/IOM Statement on HIV-related Travel Restrictions, 2004.

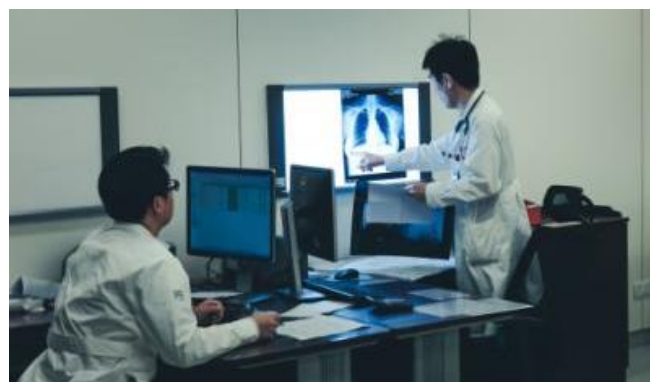
<sup>8</sup> United Nations General Assembly: Political Declaration on HIV and AIDS: On the Fast-Track to Accelerate the Fight against HIV and to End the AIDS Epidemic by 2030.

foster social development and inclusiveness, integrate such measures into overall law enforcement efforts and comprehensive HIV policies and programmes as key to reaching the global AIDS Fast-Track targets and the Sustainable Development Goals.

- Review and reform, as needed, legislation that may create barriers or reinforce stigma and discrimination, such as, age of consent laws, laws related to HIV non-disclosure, exposure and transmission, policy provisions and guidelines that restrict access to services among adolescents, travel restrictions and mandatory testing, including of pregnant women, who should still be encouraged to take the HIV test, to remove adverse effects on the successful, effective and equitable delivery of HIV prevention, treatment care, and support programmes to people living with HIV.
- Underscore the need to mitigate the impact of the epidemic on workers, and their families, and their dependants, workplaces and economies, including by taking into account all relevant conventions of the International Labour Organization, as well as the guidance provided by the relevant International Labour Organization recommendations, including the recommendation on HIV and AIDS and the World of Work, 2010 (No. 200), and call upon employers, trade and labour unions, employees and volunteers to take measures to eliminate stigma and discrimination, protect, promote and respect human rights and facilitate access to HIV prevention, treatment, care and support.

#### 4. Laws, policies and practices of mandatory HIV testing during recruitment in China

China ratified the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), in 2006. It has notified the ILO that it prohibits discrimination in employment and occupation on the grounds of certain aspects of health status (notably in relation to hepatitis B). The Government, trade unions and employers voted in favour of Recommendation No. 200. Current laws, rules and regulations in China do not yet fully reflect these international labour standards.



#### ***Employment Promotion Law<sup>9</sup>***

China's Employment Promotion Law does not include a clear definition of workplace discrimination. The Law appears to apply to "employment units" but not to the public service. Article 30 of the Law prohibits discrimination against job applicants on the basis of health status, but makes job applicants subject to medical examination as a means of containing the spread of infectious diseases.

#### ***Mandatory health examinations (including HIV testing) for civil servants, teachers and police officers***

The Ministry of Human Resources and Social Security (MoHRSS) and National Health and Family Planning Commission have issued the national health standards for the recruitment of civil servants.<sup>10</sup> Candidates are required to undergo medical examinations, including HIV testing, and those with HIV-positive results are disqualified from the candidacy.

#### ***Mandatory health examinations (including HIV testing) for foreign workers***

China lifted restrictions on tourists living with HIV from visiting the country in 2010, but will not issue residence permits to this group of foreigners. An HIV test is required when applying for a work or study visa for more than six months. In order to get a working visa in China, a foreign citizen is required to receive a medical examination, including HIV testing. Although there is no formal restriction of work on foreigners living with or receiving treatment for HIV, the chances of obtaining a working visa are effectively jeopardized if the test result is HIV positive.

The ILO Committee of Experts on the Application of Conventions and Recommendations has requested the

<sup>9</sup> Employment Promotion Law of the People's Republic of China of 2007, available at: [www.gov.cn/flfg/2007-08/31/content\\_732597.htm](http://www.gov.cn/flfg/2007-08/31/content_732597.htm)

<sup>10</sup> MoHRSS: National Health Standards for the Recruitment of Civil Servants, available at: [www.mohrss.gov.cn/gkml/xxgk/201407/t20140717\\_136044.htm](http://www.mohrss.gov.cn/gkml/xxgk/201407/t20140717_136044.htm)

Government to specifically “provide information on the practical application of the Notice on Further Regulating the Medical Examination for Enrolment and Employment to Safeguard the HBsAg Carriers’ Rights to Education and Employment, including any cases of violations detected by or reported to the competent authorities”.<sup>11</sup> It also asked the Government “to provide information on any other measures taken to address discrimination based on disability, HIV and AIDS, hepatitis B and other infectious diseases.”

## 5. Discrimination against job applicants living with HIV: Legal cases

### Landmark decision: *Hoffmann v. South African Airways*

In 2000, Jacques Hoffmann, a job applicant to South African Airways (SAA), filed a lawsuit in the Witwatersrand High Court, South Africa, against SAA, a subsidiary of the state-owned Transnet Corporation. Mr Hoffmann had been deemed qualified and fit for the position. However, he had been refused employment as an airline cabin attendant after compulsory medical examinations found him to be living with HIV. Mr Hoffman appealed to the Constitutional Court of South Africa and ultimately won the lawsuit.

After hearing extensive medical and scientific testimony, the Constitutional Court concluded that Mr Hoffmann, who was receiving antiretroviral treatment, was medically fit to work. The Court noted that HIV status alone did not render Mr Hoffman unfit to work as a cabin attendant. It stated:

[15] ... where an HIV positive individual is asymptomatic and immunocompetent, he or she will in the absence of any other impediment be able both:

- to meet the performance requirements of the job; and
- to receive appropriate vaccination as required for the job.

...

[17] On medical grounds alone, exclusion of an HIV positive individual from employment solely on the basis of HIV positivity cannot be justified.

...

[35] ... Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to

be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgements. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.

The Court also noted that, with effective treatment, “individuals [living with HIV] are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified” (para. 12).<sup>12</sup>

The Court held that, while legitimate commercial requirements are important, they cannot serve to disguise stereotyping and prejudice. It also held that people living with HIV, as one of the most disadvantaged groups in society, deserve special protection under the law. The Supreme Court ordered SAA to make an offer of employment immediately to the plaintiff and pay his legal costs.

### Specific occupations

**United States:** In *Doe v. District Court of Columbia*, the District Court examined the issue of whether a fire fighter’s HIV-positive status would make him incapable of performing his work. The Court relied on expert medical and scientific testimony in finding that there was no measurable risk of him transmitting HIV to other fire fighters or to the public during the course of his duties. The Court observed that, “in reaching this conclusion, the Court joins other courts that have refused to regard the theoretical or remote possibility of transmission of HIV as a basis for excluding HIV-infected persons from employment or educational opportunities.”<sup>13</sup>

**India:** In *RR v. Superintendent of Police & others* (Unreported [2005] Karnataka Administrative Tribunal), RR, was tested for HIV as a requirement for entry into the police force. On being found to be living with HIV, his job application was rejected. RR approached the Karnataka Administrative Tribunal, challenging the constitutionality of a circular issued by the Director General and Inspector General of police mandating that applicants testing HIV positive would not be inducted into the Karnataka Police.

<sup>11</sup> HBsAg is the surface antigen of the hepatitis B virus, which indicates current hepatitis B infection.

<sup>12</sup> The case can be viewed at

<<http://www.saflii.org/za/cases/ZACC/2000/17.html>> and the Government Gazette of the Republic of South Africa, available at:

[http://www.ilo.ch/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_125635.pdf](http://www.ilo.ch/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125635.pdf)

<sup>13</sup> ILO: HIV and AIDS and Labour Rights: A Handbook for Judges and Legal Professionals, (Geneva, 2015).

The Tribunal declared that a person who was fit, otherwise qualified and posed no substantial risk to others cannot be denied employment in a public sector entity. It also found that the policy circular that denied employment on the sole ground of an HIV-positive diagnosis was a violation of Articles 14 and 16 of the Constitution of India, relating to equality before the law and equality of opportunity in matters of public employment respectively. It directed that RR be given employment as a police constable from the date he qualified for the post and that his service benefits should also be assessed from that date.<sup>14</sup>

**Japan:** The Tokyo District Court issued a decision in favour of a plaintiff who had been required to undergo HIV testing and was expelled from the Tokyo police force when the test revealed his HIV-positive status. As part of the relief granted, the Court instructed the employer to cease the practice of requiring HIV testing for employment in the police force.<sup>15</sup>

#### **Rejection of public health arguments for mandatory HIV testing**

**Russia:** The European Court of Human Rights has cited both ILO Convention No. 111 and Recommendation No. 200, in addition to other human rights instruments, in *Kiyutin v. Russia*. In this 2011 ruling, the Court rejected public health justifications for requiring HIV testing for the purpose of obtaining a residency permit. Specifically, the Court rejected Russia's public health argument, noting that the mere presence of a person living with HIV in the country did not constitute a threat to public health and the selective imposition of HIV-related travel restrictions only on foreigners seeking residence was unjustified. The Court found that the complainant had been discriminated against on the basis of his health status in violation of Articles 8.1 and 14 of the European Convention on Human Rights.<sup>16</sup>

**Botswana:** In *Diau v. Botswana Building Society*, the Botswana Industrial Court held that a worker cannot be dismissed for refusing to undergo HIV testing. The employment of the complainant was terminated by the Botswana Building Society after she refused to take an HIV test. She sought reinstatement and compensation for unfair dismissal and humiliation. The Court concluded that the complainant had been dismissed because she had refused to undergo a compulsory HIV test, holding that she was entitled to disobey the instruction as it was "irrational and unreasonable

to the extent that such a test could not be said to be related to the inherent requirements of the job".<sup>17</sup>

## **6. Recommendations on the elimination of mandatory HIV testing**

Critical steps are required to break up the institutional barriers at both national and local levels in China, in particular the following:

- Revise relevant medical standards for recruitment in the public service that contain discriminative clauses, especially mandatory HIV testing;
- Establish social dialogue for tripartite partners (the MoHRSS, the All-China Federation of Trade Unions and the China Enterprise Confederation), as well as other relevant government ministries, to disseminate awareness of HIV/AIDS as a workplace issue and compare China's experience with international practices;
- Review the application of Article 30 of the Employment Promotion Law in both the public and private sectors; and
- Develop specific laws banning direct and indirect discrimination in employment and occupation.

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This briefing was prepared by the ILO Country Office for China and Mongolia in partnership with the WHO Representative Office and UNAIDS China Office.



<sup>14</sup> National Human Rights Commission of India, available at: <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf>

<sup>15</sup> ILO: HIV and AIDS and Labour Rights: A Handbook for Judges and Legal Professionals, (Geneva, 2015).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.