

## DRUG LAW ENFORCEMENT DILEMMAS IN PRACTICING DISCRETION OF THE NEEDLE AND SYRINGE EXCHANGE PROGRAM (NSEP)

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**ABSTRACT:** *Needle and Syringe Exchange Program (NSEP) is one of the HIV/AIDS harm reduction intervention carried out specifically for the hard core drug addicts to come public for free clean syringe exchange without offense. NSEP in Malaysia is a collaborative effort by the National AIDS Taskforce, which involves agencies as the Ministry of Health (MOH), Royal Malaysian Police (RMP) and the Malaysian Aids Council (MAC). However the implementation is controversial and implicates public sensitivity as the program is seen encouraging an endless drug addiction. Moreover, although RMP enforces strict drug law in Malaysia, their commitment under National AIDS Taskforce requires them not to arrest NSEP clients during the anti-narcotic operation if they were found with a syringe and drug. This paper specifically highlights findings from a study done to explore i) the form of discretion given to the NSEP clients and ii) the challenges faced by the RMP while practicing discretion. Five officers from the Department of Crime Investigation and Narcotic, RMP have been purposefully selected as informants. Findings show RMP allows NSEP clients to freely exchange needles for a clean one within the outreach areas and will not arrest clients during anti-narcotic operation. The findings also bring to light the dilemma encountered by RMP for practicing discretion in NSEP. This research suggests a module of a multi sectoral approach for maintaining the NSEP establishment.*

**Keywords:** NSEP, HIV/AIDS, Drug abuse, Police discretion, Drug Law enforcement, Malaysia

### INTRODUCTION

NSEP is a remedial interventions which aimed to reduce the prevalence of HIV / AIDS among hard core drug users. The World Health Organization (WHO) has outlined NSEP as a practical harm reduction intervention that not only control the transmission of HIV among addicts but also indirectly to the general community [1,2]. The Harm reduction program has received a wide coverage in Asia Pacific especially in Bangladesh, China, India, Indonesia, Malaysia, Myanmar, Pakistan and Vietnam. All countries have reported highly accessibility towards this program even though the program still failed to fulfil many of drugs addicts need in preventing HIV spread and there are about 37 countries in Asia Pacific which implement NSEP [3], yet stated that prison is the best place to punish those involved in drug addiction.

NSEPs began as a pilot project in Malaysia since 2006 and received full support from the government, even though, according to Baba it received mixed reactions from the public when it was originally proposed [4]. NSEPs also been carried out in many other countries, including Australia, United States, Russia, Thailand and Indonesia. NSEPs is not a generally accepted effort and its implementation in many countries has been controversial as it encourages addiction and in contrary to the recovery and zero tolerance drug laws [5-8].

Malaysia is still combatting drug abuse and HIV/AIDS since 1997 until today and aim to be the drug free country in 2015. Malaysia is widely known as the country which put high effort to combat drug and enforce the serious punishment for drug abuse. However, the wide spread of HIV/AIDS is still worrying and challenging [3]. The enforcement of Akta Dadah Merbahaya 1985 is still could not fight the drug abuse in Malaysia, especially among the Intravenous Drug Users (IDU) [9]. The prevalence HIV/AIDS among the Intravenous Drug Users (IDU) is still at the worrying level. Until now there is still not even a state in Malaysia which is free from HIV/AIDS or drug abuse. Since 2013, HIV spreading number had increased cumulatively in 82,000 cases. In 1997, heroin is the most popular drug chosen among the IDU's followed

by morphine and cannabis. Injecting heroin is the best method chosen among the IDU's and they used to share needles between them. Even though Malaysia is implementing Harm Reduction program through NSEP intervention, Akta Dadah Merbahaya 1985 is technically prohibited owning own needle and syringe without medical prescription.

The prohibitionist ideology had challenged Malaysia to focus on the treatment, recovery and drug policies. Whereas the harm reduction movements at the international level contradicts with the objective, principles and the mission of the prohibitionists [8-13]. The prohibitionist holds the strong philosophy that drug abuse could only be reduced through punishment and legal enforcement. The harm reduction has a different paradigm as they focus on reducing harm rather than punishment and prioritizing the human right of the Intravenous Drug Users (IDU) [14]. In addition, the harm reduction supporters feel that by enforcing punitive techniques will only worsen the issue of drug abuse [10].

Prohibitionist policies have coincided with moral model or model of criminal justice for holding the notion that drug abuse is one of the moral standpoint and should be classified as a form of crimes [10]. Prohibitionist assesses IDU as a deviant and they should be punished in order to prevent them from continuing to abuse drugs. Even the sentence could also be instrumental in planning drug rehabilitation program in many countries that holds that ideology. Ideology based recovery sentence remained the dominant global paradigm [15]. Drug laws and strict recovery policy in the war on drugs and restraint, absolute (total abstinence) is still held strongly by many countries, including major powers like the United States and Britain. Therefore, prohibitionist certainly refutes the principles, policies and practices that harm reduction, particularly through Needle Syringe Exchange Programs (NSEP).

The analysis of the literature review found out several problems due to the conflict of NSEPs implement of law had much discussed in terms of the limitations of the police jurisdiction. The researchers who focused on the challenges

of implementation and acceptance of NSEP among the police [16-20]. Researchers tend to focus on how the operation of the police to fight against drugs indirectly have affected significantly to the decline in participation in NSEP [16, 17]. While few did not only discuss about police operations and their impact on NSEPs but also highlighted that the behaviour and attitude of the police towards IDUs are very significant as the police form a negative interaction towards IDUs [18]. Others have a similar discussion about the finding [18-20]. Challenges in police involvement in NSEP in Malaysia are contradicting with NSEPs philosophy which focuses on zero tolerance with the National Drug Policy [21, 22]. This conflict in turn affects the commitment of the police as the enforcers of the Dangerous Drugs Act. When the police could carry out operations in the NSEPs outreach area, addicts are afraid and refuse to exchange the needle with the NSEPs workers [16-18]. Up to now, despite the NEP was carried out a few decades ago, but the IDU who use NEP still had bad experiences when dealing with the police [23]. Police operations number is considered to reduce in the outreach area, whereas the police have the responsibility to ensure the enforcement of laws related to drug abuse is carried out. Police were asked to cooperate and practice discretion of not to carry out operations in the NSEP outreach area. Police were also advised do not arrest NSEPs clients and do not send the clients into the rehabilitation centre. This is because the NSEP holds the philosophy to stop the dependence on drugs as those experienced by drug addicts in rehabilitation centres is less practical. Drug addicts should learn to reduce the risk of drug addiction by adopting safe addiction. In the last two years, police arrested the drug addicts and the drug addicts were sent to the rehabilitation centre for recovery. This situation is considered irrelevant. Therefore the cooperation given by the police in providing discretion by not arresting NSEPs clients is much appreciated. Even the discretion of the police is actually one indicator of improving the achievement and goals of NSEP. However, the question arises on how far police can give discretion to the implementation of NSEP? How about the need to exercise police discretion towards NSEP's clients? The question that arises is the need for justification in this study as it aims to identify the police attitude towards NSEP. This article will discuss further why exercising discretion, to the NSEP's client is a challenge for the police.

#### **Objectives:**

1. Identify the forms of discretion conferred by the Royal Malaysia Police towards the NSEP's client
2. Identify challenges in practicing the discretion among the Royal Malaysia Police towards the NSEP clients.

#### **MATERIAL AND METHODS**

This study uses a qualitative research approach which is an exploratory case study. The study chooses agency as the unit of analysis. A total of five (5) police officers who have been nominated by the Criminal Investigation Department and Narcotics (CID), has been selected as the key informants. The important criterion set for the informants is they must be the representative of the police unit in the National AIDS Task Force for NSEPs.

Data collection was carried out using in-depth interviews. Each respondent was interviewed by an average of two to three series. The scope of the interview was formed through

the analysis of previous research findings on harm reduction, NSEPs, agency networking and the duty of police as law enforcers [1, 2, 24, 25].

The study applied the methods of data analysis used for guiding data analysis processes [26-28]. Inductive analysis methods require researchers to seek and identify several subthemes and form the main themes. A comparison is made to compare the similarities and differences between the themes. With similar data segments are then classified under the same group. The differences for each data segment has also studied and classified. Analysis forms the theme of the interview data in this study were made inductively.

#### **FINDINGS**

This section will discuss how far discretion has been practiced by the Royal Malaysia Police and what are the challenges faced by them in practicing discretion towards the NSEPs clients.

#### ***Forms of discretion conferred by the police to the client NSEPs***

Policeman basically performs his duty in a discretionary nature as it involves the action of either set of evaluation or selection. Each policy, especially at the micro level involves the duty to investigate, questioning, arresting, warned that talks to any appeal, chose the charge, close the case or prosecute [24]. Discretion may take place when capturing clients, suing, during trial and during the sentencing. Discretion is used by police officers when the power available to them gives them freedom to choose on how to act and not to act against any law enforcement. The police are controlled by the policies and guidelines within the services in giving discretion. Discretion is not given arbitrarily.

*There is no particular standard in giving discretion. It doesn't involve any Standard Operation Procedure (SOP). Discretion is practiced by the police according to his own experience, and his own knowledge when he wanted to prevent something in a discretionary way.*

The results of the analysis found that police were asked to practice discretion towards the NSEP's client as follows:

- i) Provide an opportunity for clients come out to make the needle exchange in the NSEP outreach area.
- ii) Take no action or not to arrest NSEP's clients who are involved in the program if the clients were found in the drug operation outside the NSEP outreach area.

#### **Discretion for the client to get out of the needle exchange in the NSEP outreach areas**

Police and NSEPs implementing agencies took the deal so that no drug operation is carried out within 50 meters of the location of needle exchange programs. The consideration should be given to the program to increase the rate of IDU to go out and get the clean needles. Police found that IDUs are afraid to join NSEP as they feel insecure about the possibility of getting caught.

*In NSEPs our discretion always takes place when we were actually asked to provide opportunities for ongoing programs in the region within some*

*distance which we are required not to not take action as there are clients involve in the NSEP program.*

*We were asked to practice discretion as the program does not supply drugs to their clients. Within a radius of 50 meters, we did not bother. If outside radius, we will take action.*

### **Discretionary to Take No Action or Arrest NSEP's Client**

Respondent explained that police discretion is needed for not taking action on NSEP's clients, especially when the clients are within a radius of 50 meters in the NSEP's outreach area. Not only that, the police was also expected to give discretion by not arresting clients even outside the NSEPs outreach.

*Addicts can be considered automatically as NSEP's client, but if there are operations with the police we hope they will show the ID card... we are asked not to take action on clients within a radius of 50 meters. We are also asked not to take action to NSEPs clients who have a very small quantity of drugs. The police have discretion, but it does not mean that we did not carry out our duty...*

Both forms of discretion as specified by respondents are also included in Standard Operating Procedures and the Criminal Investigation Department and Narcotics Royal Malaysia Police. These standards are developed collaboratively between the police and NSEPs implementing agencies and the Ministry of Health. The study found that the police have the discretion to exercise towards the NSEPs clients, but police are still subject to the priority to comply with the law. What can be obtained from the analysis of the study is the police also face the challenge of putting into practice the use of discretion for this program.

### **Challenges faced by Royal Malaysia Police in practicing discretion towards the NSEP's client**

Results showed that Royal Malaysia Police had faced difficulties to practice discretion towards the NSEPs client because:

- i) It is illegal for the police for practicing discretion by not catching NSEPs clients who are found of having drug or injecting equipment.
- ii) Abuse of discretion towards the NSEPs client happened as some important identification information about the client is not provided by the NSEP stakeholder.
- iii) Police still have to respond to public complaints about NSEPs client.

### **Discretion is Unlawful**

Discretion practiced by the police is subjective. Respondent said the police can withdraw the application for discretion towards NSEPs client. The police are controlled by a set of guidelines in providing discretionary services. These guidelines can be amended from time to time in line with changes in the public interest [24]. According to respondent, police have agreed that discretion can be

given to drug addicts while the drug addicts are exchanging the needle, however, giving discretion for the drug addicts while they are in possession of drug paraphernalia and even injecting some amount of drug is still counted as illegal.

*... We can accept discretion, so we do not disturb the perimeter where NSEP is carried out, it is ok... but if it leads to drug possession, in fact we cannot have discretion over there. The NSEP stakeholder asks why there is no privilege given to the NSEP's client. They have needle so they are going to have to take drugs. Which means when they get the free needle, they would not want to shoot (inject) water in the syringe. They must buy drugs. Haa...there comes the problem...*

It is certain that the needle is legal (halal) for belonging and to be used. However, it can be judged as illegal (haram) when the one who owns it describe the needle with drugs. The needle is legal (halal), but the drug is illegal (haram). This understanding can be inferred by analysing how respondents assess the challenge to give discretion to the NSEP's clients...

*If drugs are found with someone, it becomes an offense. People should not query about discretion. That means giving discretion by allowing them to have even a little quantity of drug and not allowing police to arrest them is actually wrong according to the law. We leave no discretion in accordance with law. That's not exactly discretion. Even though drug addict is there within a radius of 50 meters, but if they commit crimes, police have to take action against them.*

Although NSEP aim for interventions to reduce HIV infection among IDUs, the police is still found to give priority for the public interest and comply with the law. The clash between the objectives of NSEP with the policies of the police to comply with the law has been a great challenge for the police to give discretion to this program.

### **Abuse of discretion by the NSEP's client because important identifying information about them are not provided by the NSEP's stakeholder to the police**

The concept of discretion is also a bit confusing, especially for an agency or individual who does not understand it. In this article, the concept of discretion tends to seem vague, especially regarding the discretion for not arresting the NSEP's client during the drug operation. In addition, the tendency of the police to give discretion was also found to have a strong connection with NSEPs stakeholder transparency in providing details about their clients. The study found that failure in this regard had led to technical problem arising from lack of transparency in an identification card (ID) specifically to the NSEPs client. The situation of Identification cards (ID Cards) owned by the NSEPs client does not contain important information about who they are. The police assume misuse of discretion may occur when

anyone can say that they are the NSEPs client and ask for discretion so they would not be arrested.

Analysis of the interview had revealed that the police who exercise discretion would retain only if the IDU can prove that they are NSEPs clients. Discretion will be practiced by freeing IDU when they have been confirmed as NSEPs client. However, problems arise when NSEPs client ID card raise doubts and difficulties with the police for verification purposes. In the Identification Card, the only detail which appears is the client's card identification number with no other details such as the name or image. Respondents also informed that the number of NSEPs drop-in centres (Drop in Centre-DIC) is also displayed, but the police still faces difficulty getting confirmation about the client as Drop in Centre staff could not be reached. In fact, in most cases the DIC could not confirm the arrested IDU as their clients

*When he did not show his ID card, although he said he was in NSEPs, we cannot accept. We think he's lying. We need to take action according to the law, arrest, and urine check. If positive we post hospital for examination and when confirmed he is a drug addict, we will send them to the rehabilitation centres.*

*The problems faced by the NGOs (NSEPs stakeholder) with the police is the transparency of the ID and the NGO's keep everything about the client as confidential. We do not really agree to the confidentiality of the IDU. It is quite troublesome, especially in terms of the legitimacy of the ID. Is the one who carries ID cards is the real holder? ID must be transparent. No need to be so secretive. Save more time for review... we want to avoid them from abusing the program.*

Moreover, although the police have been shown the IDU's ID cards, IDU who were arrested during the operation will be brought to the police station to undergo a urine test. NSEPs clients tend to be released on a discretionary basis, but when there is no confirmation of information by Drop in Centre (DIC) and IDUs only refer to their identity card numbers, they also had to go through the procedure of detention as non-IDU clients NSEPs. Doubts on ID and in authentication of information have actually made it harder for the police to give the discretion.

#### **The police still need to Act against Public Complaints about NSEPs Client**

NSEP in Malaysia had Transit Centre (Drop-In Centre) in residential area which is visited by clients freely. The presence of clients at the reach out centre in the nearby residential area is realized by the residents. The analysis also found that police had received complaints from the public about the presence of the clients frequently to the residential areas or public health clinic. Respondent said that it is a priority for law enforcement agencies such as Royal Malaysia Police to respond to complaints from the public in crimes related matter involving drug addicts, including programs such as NSEP.

*Residents who live nearby the outreach area had made complaints. When they complain, they mentioned about the drug addict... they did not know either they are methadone clients or NSEP's client. To whom do they complain? The complaint is directed to the police. So, could the police ignore the complaint? The police must take action because it is the jurisdiction of the police. When the police act, arrest or expel clients, NGOs and NSEPs stakeholder will say that the police did not cooperate and do not give discretion.*

This situation led to a dilemma among the police either they have to fulfil the objective of NSEP or maintaining public security and attending public complaints.

In addition, it is very important to the police to conform to the objective of the service by responding and attending to any complaints from the public. All respondents interviewed also highlighted the importance of preserving the integrity of the police in society. Respondent is concerned about the police image even indirectly involved in the program. It is expected that the public would not easily accept if the police always give discretion and do not make regular patrols in the NSEPs outreach area while complaints have been made by them. The basis of this concern can be identified in the interview with the respondent as follows

*... Sometimes if the public had made much noise, then the police will take actions. The police had to take action, if not the police will be accused for not working. Police can follow the instructions not to disturb the program, but the problem is the public perception. So far, the people considered addicts as the living carcass. So this concept (run NSEPs and giving discretion) makes NSEP difficult to be accepted by the public. Community make noise when they encounter the addicts are around their residential area. Police also cannot say that they did not want to disturb the NSEPs outreach area.*

Practically giving discretion has admittedly existed in the task of police, but researcher argue discretion attempt to damage public confidence in the police [24]. The image of the police as the authorities in maintaining public order certainly questioned by people. Ironically, if the purpose of discretion itself is not fully understood by community members (for the purpose of this article is to NSEPs discretion and drug addicts who participate in the program). These findings are consistent with studies that found the police pay attention to society's expectations of police image and their engagement in NSEP [18-20].

#### **DISCUSSION, IMPLICATION AND SUGGESTION**

NSEPs through harm reduction interventions is designed to increase IDU access to sterile injecting equipment and safe charging. This approach is to change existing perceptions about the drug problem from the perspective of crime and justice to a public health perspective. However, as a country that supports zero tolerance towards drug, NSEPs implementation under the strategy of harm reduction in Malaysia so far is still controversial. The study has

highlighted the challenge of implementing NSEPs formed of compliance with the law. NSEPs progress has been challenged by the difficulty of giving discretion to the particular client and the program in general. The study's findings support previous studies conducted although this article is discussing in detail the challenges the police have to face in exercising discretion in the implementation of NSEPs, review showed the importance of ensuring that police practices are in line with the law and discretion is given to the ownership of clean needles by the drug users [16-20, 29].

Support from the Dangerous Drugs Act enforcement agencies such as the police is essential in maximizing the effectiveness of NSEP. However, the police tend to be less committed to the program because of their employment are fully subject to the act and ethical police service. The Dangerous Drugs Act has been shaping the agency to evaluate the drug abuse issue as a matter of law and security. So anything involving drug addicts will also drag laws and public safety issues. The results of this study showed that inter-agency coordination in NSEPs with the Royal Malaysia Police as law enforcement agencies are substandard, particularly the practice of giving discretion to the NSEP's client.

Police discretion is important for NSEPs to promote needle exchange among IDU fearlessly from being arrested. Police discretion is required not to arrest the client even if the operation is carried out near the NSEP outreach NSEPs. NSEPs implementing agencies, particularly the State Health Department and the Malaysian AIDS Council expects the cooperation from the police not to interfere with the needle exchange program. NSEP's stakeholder certainly do not want the police operation which can cause uncomfortable feeling and scared the clients as the client would not come out to the outreach area to make a needle and syringe changes.. The reluctance of clients will certainly affect participation in the program and thus difficulties for the stakeholder to approach the IDU. However, this discretion cannot be blended easily either by NSEPs nor the police. Exercising discretion become difficult for the police because of three main factors, namely i) discretionary illegal, ii) the identity card (ID card) for verifying NSEP's client become difficult because it only contains important identifying information that could eventually lead to the possibility of misusing the card to obtain immunity from being arrested. And iii) the police still have to respond to public complaints about NSEPs clients and this make any discretion not to disturb the IDU cannot be carried out..

Discussing the findings of the study had developed further by highlighting the social factors that play an important role in practicing discretion. Data analysis showed that there is a clash of interest among the NSEPs stake holder, the police and the public. In detail, discretion is difficult to be given because 1) the expectation of discretionary implementing agencies that the police should not conduct regular patrols and operations against clients NSEPs is considered as an opportunity for the NSEP's client, 2) the conformity towards the police role in drugs operations is compatible with the law enforcement procedures and 3) the tendency of the public to question the integrity of the police in giving discretion to the NSEP's client is because they perceive that drug addiction is a social problem and it is harmful to public safety. This illustrates that it is not an easy thing to just stick to the concept of purely discretionary in legal procedures especially

when there are no changes made to the act. Studies suggest that harm reduction approaches and public health policies should be integrated in the implementation of a zero-tolerance strategy. More effective multisectoral cooperation is expected to give significant impacts of this integration. However, this will require a long time because integration would require changes to social policy and it is proposed to take into account the following steps to ensure a greater commitment from the police department:

- a) Establishing a framework for integrating existing drug policy by giving more attention to harm reduction.
- b) Ensure effective method of assessing the results of a harm reduction interventions. This includes developing a system for data collection of client's information which is reachable and accessible by the police.
- c) Promote and improve cooperation between sectors as a means of joint approaches (integration) in reduction the demand of drugs and harm reduction from drugs.
- d) Establish a common understanding between the agencies which concerned about harm reduction module
- e) Establish integrated training strategy (integration) of the police agencies and other stakeholders.

Furthermore, the National AIDS Task Force for NSEPs in Malaysia does not involve any legal commitment. Hence, further research focuses on the establishment of legal practitioner in NSEPs is proposed. Future research specifically addressing the verification on NSEP from the perspective of law in Malaysia is important as an early attempt to integrate roles between agencies bound by legal rulings. In addition, future study should also aim to understand the best method of integrating the harm reduction approach into the drug law in Malaysia. If the legal position can be identified, a follow-up on how to apply the harm reduction mechanism module for drug policy in the Zero Tolerance country like Malaysia can be developed.

## CONCLUSION

The implementation of NSEP had trigger conflict when the needle is legal 'halal' become illegal 'haram' for the purpose of ownership in drug addiction. The clash of value needs to be recognized and not taken for granted by the NSEP's stakeholder. Although changes in public health policy and drug rehabilitation is designed by NSEP to improve access for IDU for safe drug consumption, but its implementation is difficult without the cooperation of the police as the law enforcers. A collaboration between police, public health agencies and drug treatment and rehabilitation agencies have enormous potential to breed a new intervention methods and strategy which aim to reduce risky behaviours, HIV / AIDS and crime related to drug abuse. Each agency is capable of forming multi-sectoral networks with the aim of identifying common ground between agencies. However, initial efforts in coordinating the idea of NSEPs into law existing drugs must first be considered.

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