

## Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers

Updated with Recent Findings and Developments– August 2008

### BACKGROUND

In May 2003, Congress passed the United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act (Global AIDS Act).<sup>1</sup> The U.S. Global AIDS Act bars the use of federal funds to “promote, support, or advocate the legalization or practice of prostitution.”<sup>2</sup> The act also requires organizations receiving U.S. global HIV/AIDS funding to adopt a specific organization-wide policy opposing prostitution.<sup>3</sup> This organization-wide, anti-prostitution pledge requirement was offered by Congressman Christopher Smith (R-NJ) as an amendment to the 2003 Global AIDS Act during committee mark-up of the bill in the House of Representatives. Congress exempted the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization (WHO), International AIDS Vaccine Initiative, and any “United Nations agency” from this pledge requirement.<sup>4</sup>

The pledge requirement was first applied to foreign non-governmental organizations only<sup>5</sup> because the Department of Justice (DOJ) concluded that it would be unconstitutional to apply it to U.S.-based organizations, which enjoy the full protection of the First Amendment. DOJ later reversed itself, and in June 2005, the U.S. Agency for International Development issued a directive requiring that funding for AIDS programs be given **only** to those organizations – both U.S. and foreign – with policies explicitly opposing prostitution and sex trafficking.<sup>6</sup>

As a result of evidence-based advocacy by U.S. nongovernmental organizations exposing the public health impact of the “prostitution pledge,” legislators struck the pledge in original draft legislation to amend and reauthorize PEPFAR in early 2008. However, House leaders retained the requirement after closed door negotiations with the White House. The policy was included in the final reauthorization legislation passed by the full Congress and signed by President Bush in July 2008.

### WHAT DOES THE LAW SAY?

The pledge requirement states: “No funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>7</sup>

A separate requirement restricts the use of federal funds: “No funds . . . may be used to *promote or advocate the legalization or practice* of prostitution or sex trafficking.”<sup>8</sup>

### HOW IS THE LAW TRANSLATED INTO POLICY?

The Office of the Global AIDS Coordinator (OGAC), U.S. Agency for International Development (USAID), Department of Health and Human Services (HHS), and Centers for Disease Control (CDC) all require nongovernmental organizations (NGOs) receiving global AIDS funds to comply with the funding restrictions related to sex trafficking and prostitution.

An NGO applying or signing a contract or agreement for federal global HIV/AIDS funding must have a policy explicitly opposing prostitution and sex trafficking. This policy must apply to all the organization’s activities, even those funded through non-U.S. government sources. USAID and HHS have retained the right to investigate all the activities of funding recipients to ensure that they are sufficiently opposed to prostitution.<sup>9</sup> However, the agencies have never defined which activities are prohibited under the pledge.

### RECENT DEVELOPMENTS

Two separate lawsuits challenging the pledge were brought by U.S. organizations. In *DKT International v. USAID*, a federal district court held that the pledge requirement was unconstitutional. However, a three-judge panel of the U.S. Circuit Court for the District of Columbia reversed the ruling in February 2007.

In *Alliance for Open Society International. v. USAID*, a district court has held that the pledge requirement is unconstitutional because it compels independent NGOs to espouse the government's message and restricts their privately funded speech. In an initial ruling in May 2006, the district court ordered the government to stop enforcing the requirement against two plaintiff organizations. The government then appealed the case. While the case was pending on appeal, the government sought to forestall any further rulings against the pledge by issuing guidelines that purport to provide HIV prevention funding recipients with a chance to speak freely with private funds through separate affiliates.

These guidelines state that U.S.-based recipients can set up affiliates with private funding that do not have an anti-prostitution policy, provided there is "adequate separation" of the recipient and affiliate. This includes the onerous requirement of complete physical and financial separation, including "separate personnel, management, and governance." Moreover, USAID and HHS maintain the right to determine "on a case-by-case basis...whether sufficient physical and financial separation exists."<sup>10</sup> In other words, no recipient can be completely assured that its affiliation is separate enough, because no firm standard is set by the guidance. HHS has since developed these guidelines into a proposed regulation that is currently in the public comment process. In light of the newly issued guidelines, the appeals court returned the case to the district court.

In August 2008, a district court found that "the Guidelines require more separation than is reasonably necessary to satisfy the government's legitimate interest," and that "the Policy Requirement and the Guidelines...impermissibly compel speech."<sup>11</sup> The court also granted the plaintiff's motion to add to the lawsuit members of the Global Health Council and InterAction – two coalitions of U.S.-based international health and development organizations. Moreover, the court granted a preliminary injunction that prevents the U.S. government from enforcing the prostitution pledge policy on the plaintiffs or their member organizations. The injunction does not apply to foreign-based NGOs.

### WHAT ARE THE IMPLICATIONS OF THESE POLICIES?

These policies and restrictions have numerous adverse implications for effective HIV prevention, and the promotion of both human rights and public health. In 2006, the Center for Health and Gender Equity conducted field research in three Asian countries affected by the changes in U.S. policy.\* The findings below were collected by CHANGE and by other organizations working on or researching HIV prevention among sex workers.

#### Undermining public health best practices

First and most importantly, these policies run contrary to best practices in public health and undermine efforts to stem the spread of HIV.

We're working with these sex workers, we're telling them that if they use condoms, men will be saved from HIV....You're asking them to help you fight HIV. And in the same breath you are telling them that they are terrible people and that you're against them. It just doesn't make sense."<sup>12</sup>

*Meena Seshu, director of Sangram, an HIV prevention organization in India that refused to sign the pledge*

Female, male and transgender sex workers, some of whom have been trafficked, are among the most marginalized persons in any society. The organizations with the most effective anti-AIDS and anti-trafficking strategies build their efforts on a sophisticated understanding of the social and personal dynamics faced by marginalized populations. These strategies are founded on the ability to generate trust and credibility among the populations in question.

\* CHANGE Consultant Veronica Magar used qualitative research methods to examine the degree to which policy changes affected program content and coverage, specifically in Cambodia, Thailand, and Vietnam. She conducted structured interviews of representatives of the U.S. government, cooperative agencies, subcontractors, United Nations, consultants, and NGOs. All interviews were conducted in confidence, and names of interviewees are withheld by mutual agreement.



CHANGE's research found that program managers overwhelmingly identify reaching sex workers as the biggest challenge to their work. Programs targeted at brothels require drawn-out, time-intensive relationship-building efforts with the venue owners and the sex workers themselves. Reaching indirect sex workers on the streets or in karaoke bars, massage parlors, or beer gardens represents even greater challenges since sex workers do not disclose their vocation to those they do not know.

Some of the most effective strategies to reach out to and establish trust among sex workers include drop in centers and empowerment programs.

**Drop in Centers (DICs)** bring sex workers in for services while providing a safe space for gathering. Benefiting from participatory approaches, sex workers themselves select activities of interest, such as language classes, beauty courses, computer access, and livelihood training.

**Empowerment** programs encourage and train sex workers to become peer educators on themes like HIV transmission, sex worker rights, and condom negotiation techniques. Empowerment programs also can include setting up collectives that help ensure that all the sex workers in a certain area are insisting on condom use.

Under U.S. policy, however, organizations successfully using these strategies have found signing the pledge problematic. These approaches are successful precisely because they are non-judgmental about sex workers and their activities. Organizations that work closely with sex workers fear that signing the pledge would sabotage the trust beneficiaries have in them, critically undercutting the success of these programs.

SANGRAM is a leading NGO in India engaged in HIV prevention work with sex workers and has received acclaim and support from international institutions like UNAIDS and the Ford Foundation. SANGRAM has been very creative and extensive in its programming, and has trained and mobilized sex workers as educators of their male clients. Of note are SANGRAM's successes in assisting sex workers to enforce safe sex practices

in brothels and in distributing 350,000 free condoms each month. SANGRAM was poised to expand their efforts when they learned of the prostitution pledge requirement. After consulting with their beneficiaries, they chose to forego further funding, give back the remainder of their existing grant, and not sign the pledge.<sup>13</sup>

Because drop-in-centers offer control, knowledge, and some degree of comfort to sex workers, they have been a particular target under U.S. policy. CHANGE's research found a widespread perception that, as one person said, "drop-in-centers represent the biggest problem now, since they are misinterpreted as encouraging sex work."<sup>14</sup>

This perception has had serious impact on the success of HIV prevention activities among sex workers. In Bangladesh, sex worker outreach organization Durjoy Nari Shangho lost money when the international NGO that funded them signed the prostitution pledge. Their drop-in-center program had been recognized as a UNAIDS "best practice," but has now been cut from twenty centers to just four.

Hazera Bagum, director of the organization, has described the impact this has had:

*Most street sex workers are homeless. They have nowhere to go to sleep, to bathe, or to use the toilet. Durjoy's drop in centers acted like a home for them. They came in and rested, educated themselves and talked to each other about effective HIV prevention.... The monthly condom distribution rate used to be very high, but since the closings, there is less access, so sex workers are not using as many condoms. They distribute fewer every month.<sup>15</sup>*

### Creating tension between programmatic success and funding

As demonstrated above, some of the most effective HIV prevention interventions for sex workers are precisely those that the U.S. government has called into question with the anti-prostitution pledge policy. While the policy explicitly allows service provision – including condom promotion – for sex



workers, it assumes that effective service delivery can be isolated from the larger programmatic context. In other words, the policy is based on the premise that condom promotion can be equally successful regardless of the implementing organization's attitude and activities around prostitution.

In fact, CHANGE's research found that program managers struggle with maintaining compliance with the policy directive while also ensuring that they deliver on promised outcomes to improve condom use among clients of sex workers. For example, increasing condom use among commercial sex workers requires direct engagement, training, building of trust, demonstrations of correct use, training on negotiating protection with clients, and collective action among commercial sex workers, all of which could potentially be considered under the policy as "promoting prostitution." As one informant in the CHANGE-supported survey reported, "we're dodging bullets... trying to protect the integrity of our programs while maintaining the policy..."<sup>16</sup>

Evidence strongly suggests that this tension has diluted the effectiveness of HIV prevention

According to one informant, a contractor in another geographic region had planned to work with sex workers on their rights against police perpetrated violence. The U.S. government representative was hesitant to fund this work until another staff member consulted with the chief legal advisor in Washington, D.C. The chief legal advisor confirmed that working on violence against sex workers is allowable since it is not related to legalization, but is an issue of violence against women. Unfortunately, as informants have noted, such messages as this do not seem to be reaching missions and U.S. government partner agencies worldwide.<sup>18</sup>

programs targeting the sex work sector. For example, large U.S. government contractors generally partner with smaller local organizations to reach target populations like sex workers. But since the pledge was imposed, these agencies are

*"The oath paralyzes people, makes those working in the field unsure of what they can or can't do."<sup>19</sup>*

*- Rekha Masilamani, Pathfinder International*

restricted from partnering with organizations that represent sex workers because most will not sign the pledge. As one senior manager of a top agency indicated, "The pledge restricts us from people we need to access...The policy limits agencies from using the strongest available partners."<sup>17</sup>

### **Causing a chilling effect on organizations which results in self-censorship, curtailing effective HIV prevention programs**

Part of the problem is with the wording of the policy, which says that no HIV/AIDS funds can be used to promote the practice of prostitution. Through its field research, CHANGE found that this wording is very confusing for implementing NGOs. Of the 19 informants representing agencies that agreed to sign a prostitution policy, 17 reported that the policy presented by the U.S. government was ambiguous and caused confusion.

This confusion centers primarily around what exactly "promoting prostitution" includes. While U.S. government attorneys and auditors in Washington might understand precisely what activities this phrase encompasses, implementing agencies on the ground are often subgrantees at the end of a long game of telephone – and the resulting explanations are unclear and contradictory. Misunderstandings are common even among U.S. government employees, who frequently assume the policy prohibits more activities than intended. As a result, implementing agencies perceive that their funding is always at risk of being cut off due to noncompliance with the policy, even when they strongly feel their activities do not promote prostitution.



The climate created is one of fear and silence, paralyzing organizations that sign the pledge.

CHANGE found that 19 of 31 people interviewed in the field reported that they censored themselves or their organizations as a result of the pledge. Almost all contracting agencies reported that they have cleared their websites of references to sex workers or their rights.

Half also reported that they are avoiding media coverage in local and international news for fear of facing accusations of promoting sex work.<sup>20</sup>

The most severe form of self-censorship occurs when organizations decide to abandon programming for sex workers altogether. As one respondent reported, “the U.S. government’s indecisiveness makes us feel hesitant to bid on USAID funds for sex work programs.”<sup>21</sup> Many agencies have shifted away from prevention work to a care, treatment and support focus.

CHANGE has learned that this climate has affected other major donors to HIV prevention programs as well. A colleague in India reported that their sex worker rights organization was told not to use the donor’s money to travel to another city where a sex workers’ rights rally was about to take place.<sup>22</sup>

### **Exacerbating stigma and isolation for already marginalized persons and groups**

The cumulative impact of the policy is that sex work has become a political and social hot potato, despite the urgent need for innovative programming and collaboration in this sector. The pledge signers are either reluctant to talk about sex worker rights and empowerment or shy away from sex worker programming altogether. Those who refuse to sign are isolated from other organizations and the major donor agencies. Governments get the clear message that brothel raids and more stringent anti-prostitution laws please the U.S. government.<sup>23</sup>

For many sex workers in these countries, when drop-in-centers close and the brothels are raided there is nowhere left to go. As Hazera Bagum put it, “Closing the centers is like losing their homes,

their meeting places, losing their health clinic, school, losing everything. They are forced to run from person to person, from organization to organization, trying to communicate these problems – ‘What can I do? Where can I go? Where can I eat, sleep, take a bath, use the toilet?’ This is the painful situation we are in now that all of the centers have been closed.”<sup>25</sup>

“...for twenty years, our sex worker networks worked well together, working with non-sex worker groups on all kinds of issues. But with the U.S. funding restrictions and the pledge, it has broken down – people are now afraid to work with sex workers and sex worker rights organizations.”<sup>24</sup>

- Arpha Nota, Empower Foundation, Thailand

It is critical to address the dangers associated with prostitution and trafficking in persons. However, current U.S. policies do little to advance this goal, and instead exacerbate stigma and discrimination against already marginalized groups. Any anti-prostitution declaration by organizations working in the sex sector has the potential to judge and alienate the very people these organizations seek to assist, making it difficult or impossible to provide services or assistance to those at risk. Public statements against prostitution can also fuel public scorn against female, male, and transgender sex workers, further driving them underground and away from lifesaving services. It was for these and other reasons that Brazil rejected \$40 million in U.S. global AIDS money in 2005, noting that such restrictions undermined the very programs responsible for Brazil’s success in reducing the spread of HIV.<sup>26</sup>

Finally, the expansion of these restrictions to U.S.-based groups contradicts the fundamental right to freedom of speech guaranteed in the U.S. Constitution.<sup>27</sup> Requiring domestic organizations with mixed funding to adopt positions consistent with U.S. government policy compels speech, which is an unconstitutional condition on government funding in violation of the First Amendment.<sup>28</sup> While the U.S. government can



legally require its funds be used to further government-approved messages,<sup>29</sup> it has not previously compelled U.S. organizations with multiple funding sources to speak explicitly on an issue in compliance with a specific U.S. objective. The courts have long held that the government does not have power to compel a U.S. grantee to pledge allegiance to the government's viewpoint in order to participate in a government program.<sup>30</sup> Compelling foreign organizations to adopt policies consistent with the government's viewpoint raises important constitutional concerns and undermines the democratic principles for which the United States stands.<sup>31</sup>

### RECOMMENDATIONS TO CONGRESS

- Pass legislation to remove the prostitution pledge requirement from the Global AIDS Act of 2003, as preserved in the 2008 reauthorization law.
- If the pledge remains intact, limit its impact by passing legislation to ensure that groups working on behalf of sex worker health and rights are not excluded from HIV prevention funding.
- Assert Congress' oversight role by monitoring implementation of the pledge and investigating the impact of the pledge on public health and human rights. Congress should consult with and engage civil society in these monitoring efforts.

### RECOMMENDATIONS TO THE ADMINISTRATION

- Request that the Department of Justice revisit its interpretation of the application of the restrictions in the Global AIDS Act of 2003 to domestic grantees, especially in light of multiple court rulings that the restrictions violate First Amendment rights. The Administration should ensure instead that all policies are consistent with human rights and public health norms and constitutional guarantees of freedom of speech.
- If the pledge remains U.S. law, issue clear guidance that public health best practices such

as empowerment programs and drop-in centers are not excluded from U.S. funding, and are in fact *encouraged* as effective means to reduce HIV transmission.

- To ensure transparency in policymaking, consistency with U.S. and international human rights law, and the promotion of best practices in public health, routinely consult with a broad range of experts in the HIV/AIDS field before any agency or office issues program directives interpreting global U.S. HIV/AIDS laws.
- Promote the inclusion of sex worker groups in the design, implementation and evaluation of national HIV prevention programs to ensure such programs fully and effectively address the prevention needs of sex workers and their clients, partners, and children.
- Ensure that all scientific and program evidence is regularly reviewed by experienced researchers and program managers, and is shared with U.S. missions and embassies overseas.

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<sup>1</sup>*United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. §§ 7601-7682 (2003) [hereinafter, Global AIDS Act].

<sup>2</sup>See Global AIDS Act, 22 U.S.C. § 7631(e) (barring use of funds to "promote or advocate the legalization or practice of prostitution or sex trafficking"); TVPRA, 22 U.S.C. § 7110(g) (1) (barring use of funds to "promote, support, or advocate the legalization or practice of prostitution").

<sup>3</sup>See *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. § 7631(f) (2003) [hereinafter, Global AIDS Act]; *Trafficking Victims Protection Reauthorization Act of 2003*, 22 U.S.C. § 7110(g) (2) (2003) [hereinafter, TVPRA].

<sup>4</sup>See Consolidated Appropriations Act of 2004 [PL108-199](#) (2004), which amends section 301(f) of the AIDS Authorization by exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any "United Nations agency" from that



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section. The Statement of Managers states that the conferees "intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO)."

<sup>5</sup>See, e.g., Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Svcs., *Rapid Expansion of HIV/AIDS Activities by National Ivorian Nongovernmental Organizations and Associations Serving Highly Vulnerable Populations in Cote d'Ivoire Under the President's Emergency Plan for AIDS Relief*, Funding Opportunity No. 04199, Jul. 2004, at 9 (stating, "[A]ny foreign recipient must have a policy explicitly opposing, in its activities outside the United States, prostitution and sex trafficking..."). See also Bureau of Administration, U.S. Dep't of State, *Anti-Trafficking in Persons*, Funding Opportunity No. DOS-GTIP, Mar. 2005, at 11-12 (stating, "U.S. law... prohibits such funds from being used to implement any program that targets victims of severe forms of trafficking in persons involving sex trafficking by an organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. It is the responsibility of the primary grantee to ensure these criteria are met by its sub-grantees").

<sup>6</sup>Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking." (June 9, 2005) [http://www.usaid.gov/business/business\\_opportunities/cib/pdf/aapd05\\_04.pdf](http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf)

<sup>7</sup>Global AIDS Act, 22 U.S.C. § 7631(f). In reauthorizing PEPFAR with the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Congress left this section intact.

<sup>8</sup>Global AIDS Act, 22 U.S.C. § 7631(e).

<sup>9</sup>See USAID, *Acquisition & Assistance Policy Directive*. July 23, 2007.

<sup>10</sup>Ibid.

<sup>11</sup>See Alliance for Open Society International v. USAID, No. 05-8209 (S.D.N.Y. August 8, 2008)

<sup>12</sup>Meena Seshu, "Pledges and Punishment: Interview with Meena Seshu." By Esther Kaplan, AlterNet. Posted March 15, 2006. [www.alternet.org/story/33284](http://www.alternet.org/story/33284).

<sup>13</sup>Ibid.

<sup>14</sup>Interview with senior international NGO official by Veronica Magar, May 2006.

<sup>15</sup>*Taking the Pledge*. Shot and edited by Erin Siegal. Network of Sex Work Projects. 2006.

<sup>16</sup>Interview with senior international NGO official by Veronica Magar, May 2006.

<sup>17</sup>Interview with senior international NGO official by Veronica Magar. May 23, 2006

<sup>18</sup>Interview with USAID official by Veronica Magar, May 20, 2006.

<sup>19</sup>"Sex Workers on the Front Line – of Prevention." By Sheetal Doshi. Center for Public Integrity. Posted November 30, 2006. [www.publicintegrity.org/aids/report.aspx?aid=803](http://www.publicintegrity.org/aids/report.aspx?aid=803)

<sup>20</sup>Interviews with NGO leaders by Veronica Magar, May 2006.

<sup>21</sup>Interview with senior international NGO official by Veronica Magar, May 22, 2006

<sup>22</sup>Meeting with NGO leaders at CHANGE office, November 9, 2007.

<sup>23</sup>The Trafficking Victims Protection Reauthorization Act establishes criteria to rank each government's level of

commitment to eliminating trafficking, including efforts to prosecute acts of trafficking and protect victims of trafficking. Governments that are ranked in the lowest tier are subject to sanctions. Some governments have used brothel raids and anti-prostitution legislation to show their commitment to stop trafficking, even in cases where brothels have no link to trafficking. Interview with senior international NGO official with Veronica Magar, May 2006.

<sup>24</sup>*Taking the Pledge*. See n17.

<sup>25</sup>Ibid. footnote 25.

<sup>26</sup>See Michael M. Phillips and Matt Moffett, *Brazil Refuses 29 U.S. Aids Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3.

<sup>27</sup>See U.S. CONST. Amend. I.

<sup>28</sup>See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>29</sup>See also *Regan v. Taxation w. Representation of Washington*, 461 U.S. 540 (1983) (holding permissible speech restrictions on a government subsidy because other, non-federal contributions could be used to fund prohibited speech).

<sup>30</sup>See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (holding that the Government may make a value judgment, implement that judgment by the allocation of public funds, and "leave the grantee unfettered in its other activities" funded by other sources).

<sup>31</sup>See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a requirement that children pledge allegiance to the U.S. flag in order to attend public school). See also *Speiser v. Randall*, 357 U.S. 513 (1958) (holding unconstitutional a requirement that receipt of a tax exemption was contingent on the filing of a loyalty oath to the U.S. Government); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977),

*citing* *Barnette* (holding that forcing an individual to be "an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control").

<sup>33</sup>See *DKT Memorial Fund Ltd. v. Agency for Intern. Dev't*, 887 F.2d 275 (D.C. Cir. 1989) (Ginsberg, J., dissenting).



