

Commentary

THE ANTI-PROSTITUTION POLICY IN THE US HIV/AIDS PROGRAM

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There is much to applaud in the legislation authorizing US foreign assistance for HIV/AIDS (the US Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act — hereafter the Leadership Act). President George W. Bush and Congress passed this landmark legislation in a laudable effort to address the catastrophic HIV/AIDS pandemic. The law has vastly increased US funding for HIV/AIDS programs and helped hundreds of thousands of people gain access to HIV treatment.

The prevention strategies in the Leadership Act have proven controversial. This Commentary reviews the health and human rights implications of one of the HIV prevention policies in the law — the “anti-prostitution policy” (APP) — which requires all recipients of US government HIV/AIDS funds to have a “policy explicitly opposing prostitution and sex trafficking.”¹

Legislative History and Requirements

Among the findings included in the Leadership Act is the following:

Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the

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United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.²

From this finding flowed a mandate that the US HIV/AIDS prevention strategy should include efforts to “eradicate prostitution.”³

To ensure that organizations receiving funds support the policy of eradicating prostitution, the law contains the following provisions:

No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.⁴

No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.⁵

The provisions apply only to nongovernmental organizations (NGOs). Foreign governments; the Global Fund to Fight AIDS, Tuberculosis, and Malaria (GFATM); the World Health Organization (WHO); the United Nations (UN) agencies; and the International AIDS Vaccine Initiative (IAVI) are exempt from the APP requirement, though they may receive funds under the Leadership Act.⁶

There is little in the legislative history to clarify the standard an organization needs to meet to comply with the APP requirement. The closest hint comes in a colloquy between Senators Patrick Leahy (Democrat from Vermont) and William Frist (Republican from Tennessee).⁷ Senator Leahy expressed a concern that “some or many organizations may refuse to condemn the behavior of the women who[se] trust they need in order to convince them to protect themselves against HIV.”

In response, Senator Frist asserted that “a statement [that the] organization is opposed to the practice of prostitution and sex trafficking because of the psychological and physical risks they pose for women” would suffice.

The US Department of Justice (DOJ) initially interpreted the APP requirement as applying only to foreign NGOs. In

September 2004, the DOJ issued a new interpretation that the APP requirement also applies to US organizations.⁸

The DOJ opinion prompted a change in policy and practice by the key implementing agencies. In June 2005, the US Agency for International Development (USAID) issued an implementing directive (AAPD 05-04) requiring organizations receiving US HIV/AIDS funds to certify that they have a policy “explicitly opposing” prostitution and sex trafficking.⁹

Importantly, the law, as interpreted by the DOJ and USAID, does not only preclude using US funds to advocate for the legalization of prostitution or sex trafficking. It also requires that the recipient organization have a policy opposing prostitution and sex trafficking that applies to the work of the entire organization, including work funded by private donors, multilateral institutions, or other governments.

Some additional clarification of the US standard for judging compliance with the APP requirement was provided in meetings with senior USAID officials and in a letter from the Director of USAID/Caucasus to the Open Society Institute. These communications advised that a violation of the APP would occur if an organization advocated for legalization of sex work, advocated for too great a reduction in penalties for sex work, or helped unionize sex workers, or if USAID determined that the totality of an organization’s statements showed support for legalizing sex work.¹⁰ However, apart from these informal communications, USAID has not provided any official guidance as to what criteria would apply in assessing compliance with the APP.

Senior USAID officials have insisted that the APP does not conflict with information, education, care, treatment, or micro-finance programs for sex workers. The Leadership Act supports health and economic development programs for sex workers. The sentence in the law forbidding the use of funds to advocate for legalization of sex work is followed immediately by this statement:

Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.¹¹

No specific programmatic strategy or content related to sex work is required or forbidden by the law or the implementing USAID directive.

Although the law does not require the denial of information or services to sex workers, there has been programmatic fallout from the APP:

- The Brazil National AIDS Commission rejected a \$40 million HIV/AIDS grant from USAID, with the Director of the Brazil HIV/AIDS program, Pedro Chequer, saying, "We can't control [the disease] with principles that are Manichean, theological, fundamentalist, and Shiite."¹²
- A Cambodian NGO stopped teaching English to sex workers in brothels, concerned that this might be construed as an effort to improve sex workers' ability to solicit English-speaking clients.¹³
- Funding for continuation of a popular game to educate sex workers was delayed for months while NGO and USAID staff defended the legitimacy of this approach to working with sex workers.¹⁴
- The BBC World Service Trust terminated an agreement with USAID for a program in Tanzania rather than sign the required APP certification.¹⁵

The APP has drawn protests from organizations providing HIV services. Thirteen leading public health and humanitarian organizations sent Randall Tobias, Coordinator of the US Global AIDS Program, a letter objecting to the extension of the requirement to US organizations.¹⁶ Representatives of the organizations met separately with Tobias and Kent Hill, USAID Assistant Administrator for Global Health, to express their concerns.

Analysis

Implications for Health Programs

The overwhelming majority of organizations have elected to comply with the APP, though a small number have ended their relationship with the US HIV/AIDS assistance program. Members of the US Congress have written letters to NGOs or USAID alleging violations of the APP or requesting investigations of alleged violations.¹⁷ To date, there have been no investigations or enforcement actions taken by USAID.

The most pervasive outcome of the APP has been uncertainty and caution among the NGOs receiving HIV/AIDS funds. The USAID implementing regulation (AAPD 05-04) provides virtually no guidance for what organizational policy would satisfy the requirement or what actions would amount to a violation. What constitutes an adequate policy statement? If an organization qualifies its policy through reference to either the root causes of sex work or empirical evidence regarding policies affecting sex work, will the statement fail some test? By what criteria will the government assess whether the policy, programs, writings, and speeches of partner organizations are adequately “opposed” to prostitution? At what point would mobilizing to protect the human rights of sex workers cross the line into “advocacy for legalization?” Would an article by an NGO officer concluding that criminalization of sex work is counter-productive constitute an abrogation of the law? Can an NGO have an anti-prostitution policy yet permit its employees to express alternative views? Does the reporting of research that does not uphold the government’s position constitute a violation? How will compliance with the APP be monitored and enforced? What rules govern any effort to impose sanctions? None of these questions are answered by AAPD 05-04.

Violating the APP?

A project in Latin America created a safe house for meetings, counseling, and services for sex workers and gay men. Establishing the safe house involved negotiation with the police to allay concerns by sex workers and gay men that contact with the service providers would make them easier targets for the police, whom they reported as engaging in beatings, sexual exploitation, and extortion, as well as arrest. Contact with sex workers was used also to provide health information to their customers. The project partially displaced a criminal justice approach with a public health approach, creating a safe space in which police and courts would not pursue criminal sanctions and health workers could provide services. The safe house and the advocacy of abstaining from criminal prosecution might be easily construed as violating the APP. Would the fear of running afoul of US law now dissuade both the organization and the donor from supporting an innovative, risk-taking approach to providing services to marginalized populations?

Source: Based on author’s personal experience with this project.

The resulting ambiguity creates the potential for misinterpretation, over-zealous enforcement, and over-reaction. In interviews conducted by the Global Health Council, NGOs describe a pattern of self-censorship, including avoiding discussing the APP in public, hesitating to join list-serves and public meetings on sex work, and, in one case, shutting down a website and magazine.¹⁸ The vagueness of USAID's implementing directive creates similar dilemmas for USAID officials in the field who need to justify any specific programmatic change in the absence of explicit guidance.

While creating a climate of uncertainty, the APP lacks a countervailing rationale as a public health intervention. The implicit reasoning underlying the APP is that it will deter NGOs from advocacy in which they might otherwise engage. As a result, governments will be less likely to legalize sex work. This will encourage progress in eradicating prostitution and reduce the incidence of HIV infection deriving from sex work. The US government has not provided any data or analysis that would support this tenuous reasoning or documented any benefits flowing from the imposition of the APP.

Sex work is typically a harmful and dangerous venture. Depending on the context in which it is practiced, sex work is associated with drug use, disease, violence, discrimination, debt, and exploitation.¹⁹ It does not, however, follow that criminalization is the correct strategy for reducing sex work and its risks. Criminalization has been ineffective as a means for eradicating prostitution, leading to "violence; police harassment; increased HIV and STI [sexually transmitted infections] risk; reduced access to services; psychological disease; drug use; poor self-esteem; loss of family and friends; work-related mortality; and restrictions of employment, housing, and parenting."²⁰

Effective strategies for reducing the harms from sex work include education, empowerment, prevention, care, reducing and managing exposure to risk, and safeguarding the human rights of sex workers.²¹ The APP stands outside of any of these frameworks for harm reduction. It requires rhetorical compliance from NGOs while failing to advance any evidence-based approach to improving health or reducing harm.

Sex workers and sex worker organizations are key players in effective prevention programs; statements and actions that may discourage sex workers' participation in HIV prevention must be avoided.²² The APP does not support and may contravene efforts to overcome stigmatization and actively involve sex workers in prevention. Stigmatizing people perceived as engaging in high-risk behavior has been a major contributor to the spread of HIV/AIDS.²³ It has suppressed education; driven people away from services; and led to violence, disruption of relationships, and discrimination. Sex workers are a very difficult population to reach—precisely because they have been so widely stigmatized. Yet, health organizations issuing policy statements may be perceived by sex workers as judging—and therefore stigmatizing—sex work. The duty of health organizations is to prevent, mitigate, and treat risks to health, which usually requires adopting a non-judgmental posture with regard to clients' behavior.

Implications for Human Rights

Rights of Sex Workers. The International Guidelines on HIV/AIDS and Human Rights promulgated by UNAIDS and the Office of the UN High Commissioner for Human Rights state that:

Criminal law prohibiting sexual acts (including adultery, sodomy, fornication, and commercial sexual encounters) between consenting adults in private should be reviewed, with the aim of repeal. . . . With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work.²⁴

The APP advocates a position incompatible with the International Guidelines. Sex workers have the right to information, education, and HIV services on a non-discriminatory basis.²⁵ Yet, the APP reinforces a criminal justice approach to sex work that serves to simply drive sex work underground and discourage attempts to access health information and services.

Moreover, the APP does not address the underlying issues of vulnerability. Recourse to sex work often has its genesis in poverty, gender inequalities, sexual exploitation, and cultural beliefs.²⁶ While imposing the APP on all NGOs receiving HIV funds, the Leadership Act does not provide concomitant support to help nonprofits redress the vulnerability leading to sex work. The policies of health and humanitarian organizations should focus on reducing vulnerability instead of deploring its outcome.

There are United Nations conventions and agreements supporting measures that can reduce vulnerability, such as the Convention on Eliminating Discrimination Against Women and the Convention on the Rights of the Child. These two conventions have not been ratified by the US, and US support for the Beijing Platform of Action and the Cairo Programme of Action—international political documents that address these issues—has waned in recent years. Focusing on root causes and vulnerability is the surest path to reducing recourse to sex work.

Sex Work and Poverty in Zambia

To the extent that sex work and its attendant harms flow from poverty, the APP is irrelevant. A project in Zambia found that mothers and grandmothers obliquely encouraged girls to seek sex partners when there was no food in the house. Young adolescent girls also traded sex for school supplies, as they lacked the tiny amounts of money needed for pencils, notebooks, and uniforms. NGO statements opposing sex work will not rectify this situation. What matters is reducing the underlying conditions of poverty, discrimination, and powerlessness. The policies of health and humanitarian organizations—and of the United States—should focus on addressing these root causes.²⁷

Rights of Health Organizations and Health Workers. The APP requirement that NGOs oppose prostitution and sex trafficking creates practical dilemmas. NGOs must oppose prostitution, but, unlike trafficking, there is no internationally accepted legal definition of prostitution. The legal and *de facto* regime governing sex work varies widely by country, ranging from the highly tolerant to harshly puni-

tive. The APP may put NGOs in the position of opposing existing law and risking the ire of national authorities. The APP conflates sex work and sex trafficking. Trafficking, one of multiple paths to sex work, is a crime that involves “. . . the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”²⁸ The key elements in trafficking are coercion and duplicity. One may reasonably endorse a criminal justice approach to trafficking without agreeing that it is the right approach to sex work.

More fundamentally, the effect of the APP is to compel and forbid speech. Neutrality does not suffice. NGOs must articulate a specific public policy position approved by the US government to receive HIV/AIDS funds, even if that expression is supported wholly by non-federal funds. The US Supreme Court has affirmed the right of the US government to direct and constrain how private organizations use government funds.²⁹ However, restricting what an organization may say and not say with its other, non-federal funds is unprecedented and constitutionally suspect.

The US government argues that it has the right to choose partners who adhere to its views. However, this line of reasoning is inimical to good public policy. It is in the public interest—and the US government’s—to safeguard the right of US *and* foreign NGOs to debate even contentious and emotion-laden issues. Better and more informed policy emerges from the marketplace of ideas, rather than from attempts to stifle debate. The US government has a hypothesis: criminalization helps eradicate sex work and its ills. Using funds not provided by the US government, private organizations should be able to test the hypothesis by collecting evidence, presenting the findings, and proposing relevant policy conclusions. Public health professionals have the right, indeed the obligation, to advocate for the legal and health strategies they believe most advance public health. This should not disqualify them from being a partner of the US government. The effect of the US law is to deter organizations from accurately reporting experiences that contradict the US government’s position. Also, NGOs

working with the US government should have the right to refrain from expressing a viewpoint.

The APP creates a harrowing precedent. Public health has always been fraught with controversy. Topics such as family planning, sexually transmitted infections, HIV/AIDS, sexual violence, maternal health, abortion, and sex education have been the subject of intense, emotional debate. The position taken by the US government regarding HIV prevention is without logical limit. If the US government can constrain the privately funded expression of opinion on the legal status of sex work by its private sector partners, the principle must apply to all other issues, domestic and foreign. Given the vast reach of US government contracts and grants, this is an assertion of virtually unlimited power to regulate speech.

Legal Challenge

In August 2005, DKT International filed suit against the US government challenging the constitutionality of the APP. This was followed by a suit filed by the Alliance for Open Society International/Open Society Institute (AOSI/OSI) and Pathfinder International. While the lawsuits vary somewhat, both made two essential arguments. First, the government lacks the constitutional authority to regulate the privately funded speech of NGOs receiving federal funds. While the government may dictate the use of its monies, it may not control the use of an organization's private resources. Second, the suits argued that the APP is unconstitutionally vague. The conditions under which an NGO may be out of compliance are very poorly defined in both the law and the implementing regulation. The plaintiffs contended that the government is not permitted to place private organizations in legal jeopardy on the basis of requirements subject to a wide array of reasonable interpretations. The ultimate outcome of these cases may have far-reaching consequences for the ability of all NGOs receiving federal funds to speak freely about public policy.

On May 9, 2005, Judge Victor Marrero of the US District Court for the Southern District of New York ruled that the APP violated the First Amendment rights of AOSI/OSI and Pathfinder. This was quickly followed by a May 18, 2005, ruling by Judge Emmet Sullivan of the US District Court for

the District of Columbia, who found both the APP provision in the Leadership Act and the USAID AAPD unconstitutional on First Amendment grounds. On July 24, 2006, the US government filed an appeal in the DKT International case.

Conclusion

Underlying the APP are understandable but badly misguided impulses. Unsafe sex work has, in some settings, been an important factor in the spread of HIV. Reducing unsafe sex work is therefore one means of impeding the spread of the disease. Sex work is frequently dangerous. Most religious and ethical traditions frame sexuality within a sacred context and call upon physical intimacy to be an act of grace and love. The transmuting of sexuality into a service bought and sold is ineffably sad and often tragic. Why not, then, require recipients of government funds to declare their opposition to prostitution?

The short answer is that the APP is an empty rhetorical exercise that can do no good, is likely to do harm, and violates free speech. The burden of proof rests with the US government to show the efficacy of its policy before forcing it on private organizations. But there is no evidence showing that the APP is advancing better health or reducing the dangers associated with sex work. To the extent the APP is having any effect, it is deleterious. The APP has alienated some US government partners, created uncertainty for others, and provided an incentive to avoid innovative programming. It forces NGOs to issue statements that may further stigmatize sex workers, without addressing or attempting to remedy the vulnerability leading to sex work.

The APP insists that NGOs declare a belief in criminalizing sex work — a view disavowed by the major international organizations in the field and not supported by the preponderance of evidence.

The APP is fundamentally at odds with a commitment to the values of free speech and open debate. Sound public health policy should derive from evidence and experience, not a governmental rendering of permissible opinion. For that reason, two US federal judges found the APP to be unconstitutional when applied to US organizations. Its application to foreign organizations not subject to constitutional

protections is, however, equally objectionable. It is unconscionable for the US government to continue to foist on developing-country NGOs an unsound policy that it cannot legally impose on US organizations.

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References

1. United States Leadership against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 22 USC 7601 (23) (2003) [hereafter, The HIV Leadership Act].
2. Ibid.
3. Ibid.
4. Ibid.: 7631 e.
5. Ibid.:7631 f.
6. PL 108-99 (2004) amending Section 301(f) of the HIV Leadership Act
7. 149 Congressional Record Daily Edition S6457 (Washington, DC: US Congress, May 15, 2003).
8. Letter from Daniel Levin, Acting Assistant Attorney General to Alex M. Azar II, General Counsel, US Department of Health and Human Services (Washington, DC: September 20, 2004).
9. USAID Acquisition and Assistance Policy Directive 05-04 (Washington, DC: USAID, June 9, 2005).
10. Civil Action No. 05-cv-8209, *Alliance for Open Society International, Inc and Open Society Institute v. United States Agency for International Development and Andrew S. Natsios*, Memorandum of Law, pp. 24–25.
11. The HIV Leadership Act (see note 1): 7631 e.
12. M. Phillips and M. Moffett, “Brazil refuses US AIDS Funds, Rejects Conditions,” *Wall Street Journal* (May 2, 2005): p. A3.
13. CHANGE *Policy Brief: Implications of US Policy Restrictions for Programs Aimed at Commercial Sex Workers and Victims of Trafficking Worldwide* (Maryland: CHANGE, November 2005): p. 3.
14. Global Health Council, *Policy Brief: Anti-Prostitution Policy Requirement* (Washington, DC: 2006): p. 2.
15. P. Gill, “BBC backs off from Bush in Africa,” *The Guardian* (January 23, 2006).
16. Letter to Randall Tobias dated February 25, 2005.
17. See, for example, a letter from Representative Mark Souder (Republican from Indiana) to USAID Administrator Andrew Natsios dated December 7, 2005; and letter from Senator Tom Coburn (Republican from Oklahoma) to President George W. Bush dated May 19, 2005.
18. Global Health Council, *Policy Brief: Anti-Prostitution Policy Requirement* (see note 14).
19. M. L. Rekart, “Sex-Work Harm Reduction,” *The Lancet* 366 (2005): pp. 2123–34.

20. Ibid.: p. 2124.
21. Ibid.
22. UNAIDS Best Practice Collection, *Sex Work and HIV/AIDS* (Geneva: UNAIDS, June 2002).
23. J. M. Mann, and D. J. M. Tarantola, "From Vulnerability to Human Rights," in J. M. Mann and D. J. M. Tranatola (eds), *AIDS in the World II* (New York: Oxford University Press, 1996): pp. 463–76.
24. Office of the High Commissioner for Human Rights and UNAIDS, *HIV/AIDS and Human Rights: International Guidelines* (Geneva and New York: United Nations, 1998): p. 18.
25. Mann and Tarantola (see note 23).
26. UNAIDS (see note 22): p. 7.
27. M. S. Shah, S. D. Kambou, and B. Monahan, *Embracing Participation in Development* (Atlanta: CARE, 1999): pp. 1.45 and 3.70.
28. United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/RES/55/25 (2000), Article 3, para (a).
29. *DKT International v. United States Agency for International Development and Andrew S. Natsios* (August 11, 2005), Memorandum of Law, p. 11.