

## ANTI-PROSTITUTION POLICY REQUIREMENT

Nearly two decades of research have demonstrated the benefit of public health programs to prevent the spread of HIV/AIDS among high risk groups. Those that help sex workers protect their health and human rights are among the prevention strategies designated “best practices” by UNAIDS and the World Health Organization (WHO). These efforts have shown success in containing an epidemic that has already claimed 23 million lives. Markedly scaling up such programs can reduce by half the estimated *60 million new infections* that are otherwise expected to occur within the decade.<sup>1</sup>

In the face of this challenge, the U.S. government now requires that all non-governmental organizations (NGOs) receiving HIV/AIDS funding comply with an “anti-prostitution policy” (APP). The requirements of the APP, its impact on NGO programs, the free speech controversy generated by the APP, and the favorable court ruling on two lawsuits filed in protest of the clause, are reviewed in this policy brief.

### Background on Anti-Prostitution Policy

In 2003, the U.S. government adopted the Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the Act), whose primary purpose is to strengthen the role of the U.S. and the effectiveness of its response to these three global diseases. Having identified prostitution and sex trafficking as key factors in the spread of HIV/AIDS, Congress designated the eradication of prostitution as a central strategy to curb the epidemic. To this end, the Act contains two related clauses: one prohibiting funding to any organization that advocates for the legalization of prostitution and the second requiring all organizations that receive federal funding for HIV/AIDS activities to adopt an organization-wide policy explicitly opposing prostitution and sex trafficking (the APP). These clauses apply whether or not organizations work with sex workers.

Although it was initially understood that the APP applied only to foreign NGOs, in September 2004 the Department of Justice advised the Department of Health and Human Services that the APP also could be applied to U.S. NGOs. Foreign governments, U.N. agencies and the International AIDS Vaccine Initiative (IAVI) are eligible for funding under the Act but are exempt from the APP.

The U.S. Agency for International Development (USAID) issued a directive in 2005, stating that, as a condition for receiving AIDS funding, all U.S. and foreign NGOs must comply with the APP by adopting an explicit policy opposing prostitution. The required policy applies to “all activities of an organization, including those funded by private sources, foundations, governments other than the U.S., and multilateral sources.”<sup>2</sup> USAID reserves the right to terminate funding of any organization judged to be in violation of the policy.

### Impact of the APP on HIV Programs

While most organizations have complied with the APP requirement, many report having done so reluctantly. Although the Act clearly declares support for prevention, care and treatment programs for sex workers, Global Health Council members note that the APP has interfered with their ability to carry out tested and effective interventions and has hampered efforts to reach this important population with information and services.

Council members and other NGOs describe a “chilling effect” and pattern of self-censorship related to the vagueness of the clause and uncertainty about what would constitute a breach.

The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program.

– U.S. District Court Judge Victor Marrero

Based on these fears, U.S. organizations and their grantees have modified or curtailed programs for sex workers:

- ▶ A Cambodian NGO stopped teaching English to sex workers in brothels, concerned that this could be misconstrued as an effort to improve their ability to solicit English-speaking customers.
- ▶ Another NGO closed down a website and stopped publication of a popular magazine providing health information to sex workers.

More generally, Global Health Council members expressed discomfort talking about the APP for attribution and were hesitant to engage in public discussions of the issue, whether on list-serves, in meetings or through research and publications dealing with sex work.

NGO concerns have been exacerbated by letters to USAID from members of Congress demanding investigations for alleged violations of the APP. Funds for some HIV prevention projects have been cut, delayed or redirected without explanation, and in the absence of investigation or finding of fault on the part of the NGO.

Some in-country partners of U.S. organizations have declined U.S. funding. The Brazil National AIDS Commission rejected a \$40 million grant from the U.S. rather than require NGOs to comply with the APP. The impact has dramatically affected small NGOs in Brazil, including those that do not work with sex workers. The \$80,000 operating budget of one organization was reduced by 70 percent, forcing cutbacks in its highly successful youth education HIV prevention program. The British Broadcasting Company Charitable Trust (BBC Trust) also refused to comply with the APP and no longer accepts U.S. government funding for HIV/AIDS programs.

### NGOs Challenge Constitutionality of APP

Two lawsuits have been filed challenging the constitutionality of the APP. A suit filed by DKT International argues that the policy requirement constitutes “compelled speech,” which violates the First Amendment by forcing all organizations funded by the U.S. government for HIV/AIDS activities to adopt a government-sanctioned position.<sup>3</sup> This, DKT argues, bans NGOs from using non-government sources of money to speak freely or withhold opinion about contested social issues and constitutes an unprecedented and illegal extension of power. According to the complaint, well-established law asserts that the U.S. government may determine and restrict a grantee’s use of government funds, but not its funds from non-federal sources.

A lawsuit filed by The Alliance for Open Society International, (AOSI), Open Society Institute (OSI), and Pathfinder International<sup>4</sup> adopted the same position. In addition, the OSI suit argued that the APP is unconstitutionally vague, violating both the First and Fifth Amendments. The requirement fails to define “opposition to prostitution” and provides no guidance as to what actions are permissible or impermissible.

In both suits, the U.S. government argues that the APP is constitutional, claiming that organizations are free to say and do as they please, just not with its money. The government contends that it has a right to choose its partners and that extending these restrictions to privately-funded activities is a legitimate interpretation of the Spending Clause of the Constitution: “Congress’s decision as to who it will choose to subsidize falls as clearly within Congress’s constitutional powers as Congress’s decision as to what it will choose to subsidize.”<sup>5</sup> The government also states that its anti-prostitution message would be “confused” if grantees do not sufficiently oppose prostitution in private speech.<sup>6</sup>

On May 9, 2006, the U.S. District Court for the Southern District of New York ruled in favor of the plaintiffs (AOSI/OSI and Pathfinder), finding that the requirement is “offensive to the First Amendment.”<sup>7</sup> According to the court, the requirement unconstitutionally compels speech, is overreaching, and is not tailored to the government’s interest in preventing HIV spread and prostitution.<sup>8</sup> Judge Victor Marrero wrote, “The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program.”<sup>9</sup>

The court noted that the government’s argument to protect the “the sanctity of its message,”<sup>10</sup> while “commendably creative,”<sup>11</sup> does not justify a restriction on private funds. Such a restriction is not self-limiting and “could presumably be manipulated to allow for almost any viewpoint based restriction – simply through the crafting of a sufficiently broad government message.”<sup>12</sup> The court did not rule on the OSI vagueness argument.

On May 18, 2006, Judge Emmet Sullivan in the U.S. District Court for the District of Columbia ruled in favor of DKT on similar grounds.<sup>13</sup> Citing “view-point based restrictions on speech” as unconstitutional,<sup>14</sup> the court prohibited USAID from enforcing the anti-prostitution policy against DKT.

Nearly 40 NGOs have joined in *amicus curiae* briefs or submitted individual depositions supporting the two lawsuits.

## Administrative Burden of the APP

The APP has led to significant administrative burdens for NGOs, including staff time and resources to develop and implement the policy, and appreciable expenditures in justifying programs to congressional critics and conferring with legal counsel. One U.S.-based organization saw a USAID Request for Proposals abruptly withdrawn after letters from U.S. legislators condemned their innovative program to educate sex workers about risky behavior. The grant was reinstated, but only after months of staff time was spent defending the legitimacy of its educational approach. In the case of AOSI, USAID funds promised for a drug demand reduction program, were delayed resulting in staff layoffs and the closing of youth outreach centers in Central Asia.

USAID missions have inconsistently monitored and enforced compliance with the policy. One USAID mission required an NGO to develop costly training for local partners and subcontractors in how to comply with the policy. In another country, where HIV/AIDS funds were part of an integrated health program, disentangling the work to which the APP does and does not apply imposed paperwork and other administrative burdens.

<sup>1</sup> Stover, J. et al, The Global Impact of Scaling-Up HIV/AIDS Prevention Programs in Low- and Middle-Income Countries, *Science Express*, Feb 2, 2006.

<sup>2</sup> USAID Acquisition and Assistance Policy Directive (AAPD 05-04).

<sup>3</sup> DKT Int'l, Inc. v. United States Agency for Int'l Dev. (USAID), No. 05-01604, Plaintiff's Memorandum in Support of Preliminary Injunction at \*2 (D.D.C. 2005).

<sup>4</sup> Alliance for Open Society Int'l, Inc. (OSI) v. United States Agency for Int'l Dev. (USAID), 05 Civ. 8209, slip op. (S.D.N.Y. May 9, 2006).

<sup>5</sup> DKT Int'l, Inc. v. United States Agency for Int'l Dev. (USAID), No. 05-01604, Defendant's Reply in Support of Motion to Dismiss Civil Action at \*11 (D.D.C. 2005).

<sup>6</sup> *Id.* at \*18.

<sup>7</sup> OSI v. USAID at 105.

<sup>8</sup> *Id.* At 94-95.

<sup>9</sup> *Id.* at 106.

<sup>10</sup> OSI, 05 Civ. 8209, slip op., at 105.

<sup>11</sup> *Id.* at 103.

<sup>12</sup> *Id.* At 104, fn 46.

<sup>13</sup> DKT Int'l, Inc. v. United States Agency for Int'l Dev. (USAID), 05 Civ. 1604 (EGS), slip op., (D.D.C. May 18, 2006).

<sup>14</sup> *Id.* at 27.

## GLOBAL HEALTH COUNCIL POSITION AND RECOMMENDATIONS

The Global Health Council applauds the leadership of the President and Congress in the fight against HIV/AIDS and the significant increase in funding that has been provided. Sex work is typically dangerous and harmful. However, the APP does nothing to improve and can only impede the success of prevention programming for sex workers and their clients.

- ▶ The global AIDS crisis demands the wise and efficient use of human and financial resources. Instead, the administrative demands of complying with the APP divert those resources from effective use.
- ▶ Experienced partners have been alienated by the APP while others engage in pro forma compliance with a policy for which there is little to no support in the professional community.
- ▶ Sex workers and organizations representing them play a vital role in HIV prevention programs. By requiring NGOs to issue statements that condemn sex work, the APP threatens to further stigmatize sex workers. It exacerbates the difficulty of helping sex workers protect their health, undermines efforts to

encourage healthier and more life-affirming means of employment, and ignores the social and economic vulnerability that drives people into sex work.

Good public health programming depends on the ability of those working on the front-lines of AIDS programming to openly present and debate the evidence. The apprehension created by the APP has curtailed the flow of information and stifled debate. The clause further inhibits organizations from collecting or disclosing evidence that would contradict the APP.

In the case of AOSI/OSI, DKT and Pathfinder, a federal court found the application of the APP to be unconstitutional. Given the vast reach of U.S. government contracts and grants, the APP threatens the independence of private, non-governmental organizations and their ability to speak out on public policy.

For the above reasons, the Global Health Council urges Congress to act quickly to delete the APP requirement from the Leadership Act, and to immediately remove any restrictions that the APP currently imposes on the work of U.S.-based and international NGOs.



## THE GLOBAL HEALTH COUNCIL

is the world's largest membership alliance dedicated to saving lives by improving health throughout the world. The Council serves and represents thousands of public health professionals from more than 100 countries on six continents.

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