

Challenges filed to U.S. Anti-AIDS Law Anti-prostitution Pledge Requirement *

Two separate lawsuits were filed recently in U.S. federal courts challenging a provision of U.S. law requiring that nongovernmental organizations have a policy “explicitly opposing prostitution” as a condition of receiving funding under the United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (U.S. Global AIDS Act).¹ US-based plaintiffs in both cases argue that the “anti-prostitution pledge” requirement in the Act violates U.S. Constitutional guarantees of free speech and due process, and undermines proven, effective efforts to fight HIV/AIDS among sex workers.

The first case, filed in August 2005, was brought by DKT International (DKT), one of the largest providers of HIV/AIDS services worldwide.² In June 2005, DKT was awarded \$60,000 in USAID funds for HIV/AIDS prevention work in Vietnam. DKT has no policy on prostitution, and believes that remaining neutral on this issue is in the best interest of its HIV/AIDS prevention work. In July, USAID informed DKT that it would be ineligible for USAID funding unless it certified that it had an anti-prostitution policy. When DKT refused to adopt or certify such a policy, USAID canceled the \$60,000 grant. DKT receives about 16 percent of its budget from USAID, and its ineligibility for U.S. anti-AIDS funds threatens to curtail its lifesaving anti-AIDS work.

In September 2005, the Alliance for Open Society International (AOSI) and its affiliate, the Open Society Institute (OSI) brought a second challenge to the “anti-prostitution pledge” requirement. AOSI is currently in the middle of operating a project to fight HIV/AIDS in Central Asia, funded primarily by a \$16.5 million USAID grant. OSI

¹ *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 22 U.S.C. Sec. 7631(f) (2003); see also USAID, Acquisition & Assistance Policy Directive, AAPD 05-04, 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, at 5-6, online: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf ; Department of Health and Human Services, Centers for Disease Control and Prevention, Expansion and Support of HIV/AIDS/STI/TB Information, Education, and Communication and Behavioral Change Communication Activities in Ethiopia, at Section IV.5, online: <http://www.cdc.gov/od/pgo/funding/05075.htm> (United States agency guidelines implementing the Global AIDS Act).

The Act specifically exempts certain multilateral organizations receiving anti-AIDS funds (including the Global Fund to Fight AIDS, Tuberculosis and Malaria and United Nations agency) from the pledge requirement. *Consolidated Appropriations Act 2004*, Pub. L. 108-199, Sec. 595(3) (2004). In May 2005, the US government proposed a new policy extending this requirement to grantees of exempt organizations, which would have gutted the exemption. Although the government subsequently backed down on this new policy, subsequent comments by Randall Tobias, US Global AIDS Coordinator, leave open the possibility that it might be applied to grantees of exempt institutions in the future. D Brown. US backs off stipulation on AIDS funds: plan had called for overseas groups to publicly denounce sex trafficking. *Washington Post*, 18 May 2005.

² DKT operates family planning and HIV prevention programs in eleven countries in Africa, Asia, and Latin America. It receives funding from USAID, as well as from private donors, foundations and other governments, to support its HIV/AIDS work. See Complaint and Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction, *DKT International, Inc. v USAID and Andrew Natsios*, filed in U.S. District Court for the District of Columbia, August 11, 2005. Documents filed with the court available online at <http://www.genderhealth.org/loyaltyoathsuit.php>.

receives no USAID funds, but provides funding, technical assistance, and administrative support to the project.

In August 2005, AOSI was notified that it would receive additional funding for its Central Asia project only if certified compliance with the anti-prostitution pledge requirement. In recognition of the fact that USAID would have eliminated funding for its anti-AIDS program, and to avoid the harm that clients would suffer in the likely event that the program would thus be forced to shut down, AOSI crafted and signed a pledge. AOSI then sued USAID to secure its First Amendment and statutory rights to engage in a range of privately financed activities to fight HIV/AIDS. OSI joined the lawsuit to ensure that USAID would not seek to penalize them or OSI for any of OSI's privately financed activities.³

Affidavits filed in both cases from a range of public health experts with expertise in designing and evaluating programs to prevent and respond to HIV/AIDS testify to the evidence supporting programs that approach sex workers in a respectful and nonjudgmental manner. Such approaches are vital to earning sex workers' trust and engaging them in HIV prevention efforts, including integrating peer-based outreach and education. Forcing grantees to oppose prostitution is likely to destroy these programs, exacerbate existing stigma and perpetuate discrimination against sex workers, driving them further underground and away from existing health and social services.

In addition to jeopardizing public health and rights-based programming for health, the "pledge requirement" violates the First Amendment by forcing private organizations to adopt the government's point of view and by restricting what they can say and do with their private funding. While participating organizations are required to adopt the pledge, the government has refused to provide any guidance regarding just what it means to "oppose prostitution," casting a shadow of uncertainty over entire HIV/AIDS prevention programs. Organizations are left to wonder whether USAID will deem them out of compliance when they talk with allies, hold a conference, or issue a publication related to sex work.

In filing these lawsuits, DKT, AOSI, and OSI join a chorus of voices that have objected to a requirement that substitutes morality for evidence-based HIV prevention practices. SANGRAM (Sampada Grameen Mahila Sanstha), an NGO based in Sangli, India, has been recognized by Indian and international organizations as an example of best practices for its HIV/AIDS prevention work with women in prostitution.⁴ In October 2005, SANGRAM stopped taking USAID money for their anti-AIDS work by mutual agreement, as they understood the pledge requirement would violate both the spirit of working respectfully with at risk-persons, and civil society organizations right of free

³ Alliance for Open Society International, Inc. and Open Society Institute v USAID and Andrew Natsios, Complaint filed in U.S. District Court for the Southern District of New York, September 23, 2005, available online at <http://www.brennancenter.org/programs/downloads/complaint-osi.pdf>.

⁴ The Indian National AIDS Control Organization, as well as UNAIDS and UNESCO, all have recognized SANGRAM for their HIV/AIDS work with women in prostitution. External evaluations conducted by AVERT, a USAID grantee, have recommended that the SANGRAM project with women in prostitution be made into a demonstration and training center.

expression.⁵ In May 2005, Brazil rejected US \$40 million in US anti-HIV/AIDS grants because they made funding conditional on recipient organizations adopting a pledge opposing sex work.⁶ In February 2005, thirteen U.S.-based NGOs criticized USAID's policy, saying that it "greatly undermines" AIDS prevention efforts.⁷

Even if DKT, AOSI and OSI prevail in their respective lawsuits, a victory is unlikely to cure impediments to HIV/AIDS work posed by the U.S. Global AIDS Act. First, courts could limit their decisions to U.S.-based organizations, leaving foreign NGOs subject to the pledge.⁸ Nor do the lawsuits challenge the Act's provision barring the use of funds to "promote or advocate the legalization or practice of prostitution."⁹ There is evidence that this latter restriction is already chilling work in the field. In Cambodia, for example, NGOs discontinued plans to provide English language training classes for people working in the commercial sex sector for fear such programs would be interpreted as "promoting prostitution."¹⁰

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⁵ Facsimile communication from David Kennedy, spokesman, U.S. Embassy, New Delhi, to Meena Saraswathi Seshu, general secretary, SANGRAM, 6 October, 2005; email communication from Meena Saraswathi Seshu to Rebecca Schleifer, 7 October, 2005.

⁶ MM Phillips, M Moffett. Brazil refuses US AIDS funds, rejects conditions. *Wall Street Journal*, 2 May 2005:A3.

⁷ Letter to Randall Tobias, U.S. Global AIDS Coordinator, regarding application of U.S. Global AIDS Act restrictions on working with sex workers to U.S.-based NGOs (February 25, 2005).

⁸ Compelling foreign organizations to adopt policies consistent with the government's viewpoint raises important constitutional concerns that courts could choose to address. See *DKT Memorial Fund Ltd. v Agency for Intern. Dev't*, 887 F.2d 275 (D.C. Cir. 1989) (Ginsberg, J., dissenting).

⁹ U.S. Global AIDS Act, 22 U.S.C. Sec. 7631(e).

¹⁰ Interview by Alice Miller, Columbia Law School, with Elaine Pearson, Anti-Slavery International, Bangkok, Thailand. July 2004.