

THEMATIC DISCUSSION PAPER:

Creating an Enabling Legal and Policy Environment for Increased Access to HIV & AIDS Services for Sex Workers

This paper is the product of discussions of the *Thematic Task Team on Creating an Enabling Legal and Policy Environment* in preparation for the 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, 12 – 15 October 2010 in Pattaya, Thailand (contact: linde@unfpa.org).

1. INTRODUCTION

“In countries without laws to protect sex workers, drug users, and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment, and fewer deaths. Not only is it unethical not to protect these groups: it makes no sense from a health perspective.”

- Ban Ki-moon, Secretary-General of the United Nations, Address to the International AIDS Conference, Mexico City, August 2008

States around the world have committed to the right of all people to the enjoyment of the highest attainable standard of health, including sexual and reproductive health, HIV prevention and access to treatment for HIV/AIDS¹. Human rights apply to all people, including female, male, and transgender people who sell sex and people living with HIV. Governments have a responsibility to promote, protect and fulfil these rights by putting in place relevant laws, policies and programmes. In reality, sex workers are one of the social groups least protected by law, most harassed by law enforcement agencies and most seriously discriminated against within their communities².

More recently, governments and the United Nations have more explicitly recognized the need to address the legal and policy barriers and stigma and discrimination faced by sex workers³ in order to respond to the HIV epidemic in the region. UNAIDS and its cosponsors have agreed on ten priority areas on which to focus their HIV and AIDS work, which include empowerment of sex workers and “removal of punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS”⁴. In May 2010, member states of the Economic and Social Commission for Asia and the Pacific unanimously agreed to put in place “measures to address stigma and discrimination, as well as policy and legal barriers to effective HIV responses, in particular with regard to key affected populations” (ESCAP Resolution 66/10). Key affected populations refer to male, female and transgender sex workers, men who have sex with men, and injecting drug users.

In many countries, laws, policies and practices against sex workers limit their right to basic social economic rights such as access to education, health care, housing, banking facilities, inheritance, property and legal services. They may also lack of citizenship or legal status, resulting from migration or unfavourable regulations, which can lead to exclusion of sex workers from health services, social programmes and communities.

In almost all countries some, or all, activities associated with commercial sex are illegal. As a result

¹ See, among others, the International Covenant on Economic, Social and Cultural Rights (1966), International Conference on Population and Development (ICPD) Programme of Action, 1994, and the Millennium Declaration (2000).

² UNDP (2004). *Law, Ethics and HIV/AIDS in South Asia. A Study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka*.

³ Sex workers are usually defined as “female, male and transgender adults who receive money or goods in exchange for sexual services”.

⁴ UNAIDS (2010). *UNAIDS Outcome Framework 2009 – 2011*.

of the criminalization of sex work, the locales where sex work takes place are surrounded by other forms of criminality such as criminal gangs, gambling, large scale corruption and extortion. This negatively impacts the health, safety, and human rights of sex workers.

Punitive laws, policies and practices around sex work do not reduce the demand or the number of people buying and selling sex but they do form barriers to sex workers accessing services and they change the shape (venue, methods) of the sex industry in ways that increase vulnerability. Criminalisation of brothels leads to the growth of more disguised or hidden sex work venues and less direct ways of selling sex, including through internet, telephone, massage parlours, streets, and parks. This has been shown to negatively impact HIV programmes and services for sex workers.

The forced participation of women in sex work has long been a legal concern. Now generally subsumed under the label of trafficking, this remains illegal everywhere and subject to domestic laws, for example against kidnapping and rape, and to specific international agreements. These agreements define human trafficking and limit it to “threat or use of force or other forms of coercion, abduction, or fraud, of deception, of abuse of power... or the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation.”⁵ However, contemporary laws that address trafficking are increasingly worded to include all, or most, female sex workers. This has resulted in substantial abuses of sex workers’ human rights and erosion of HIV prevention and care programmes. In Cambodia, for example, the introduction of a law against ‘trafficking and sexual exploitation’ led to the immediate collapse of the 100% Condom Use Programme which depended on selective enforcement of the law to leverage condom use and medical testing of brothel workers. While the programme had been credited with reducing HIV among female sex workers, the law led to significant decreases in the number of sex workers attending health services and accessing condoms⁶.

2. PRIORITY ISSUES

Three priority issues that need to be addressed to create an enabling environment for increased access to HIV and AIDS services for sex workers are described below.

2.1 Legal and policy frameworks impacting sex workers and HIV

Decriminalization of sex work is essential to improve the health of sex workers, as recommended by the United Nations Special Rapporteur on the Right to Health, Anand Grover⁷. Sex work has historically been criminalized in two major ways: 1) through the criminalization of the selling of sexual services, and 2) through the criminalization of practices around sex work (such as keeping a brothel, soliciting, living off proceeds of sex work, providing information that facilitates sex work, or buying sex). In both cases, sex workers are usually treated as criminals. Whilst removing criminal laws is essential, it is not sufficient to address all the legal and policy issues that lead to sex workers being arrested, abused and mistreated by law enforcement.

⁵ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations (2000) Convention against Transnational Organized Crime. (Also known as the Palermo Protocol).

⁶ Overs, Cheryl. *Caught Between the Tiger and the Crocodile: The Campaign to Suppress Human Trafficking and Sexual Exploitation in Cambodia*. APNSW. <http://www.aids2031.org/pdfs/caught%20between%20the%20tiger%20and%20the%20crocodile.pdf> and Human Rights Watch (2010). *Off the Streets*. <http://www.hrw.org/en/reports/2010/07/20/streets-0>.

⁷ Grover A. (2010). *Report of the Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health* (2010), Human Rights Council.

Legal environments differ per country and even within countries. Sex workers are affected by numerous laws and policies aimed at preventing or regulating sex work. This may include:

1. Criminal or punitive laws that make all or some activities related to sex work illegal, such as anti-trafficking and anti-prostitution laws;
2. Regulations, civil and administrative regulations, decrees, executive orders, and local ordinances and policies (including loitering, public offenses, indecency);
3. Laws or traditional practices around the 'protection' of morality, culture, and religion. For example, male and transgender sex workers are often targeted through laws against 'sodomy', 'unnatural sex' or for cross-dressing and women are criminalised for adultery;
4. Public health laws.

Laws against activities associated with commercial sex and other laws used to control sex workers and sex businesses increase vulnerability to HIV by fuelling stigma and discrimination, limiting access to health services and condoms and generally limiting sex workers' self-esteem and ability to make informed choices. They keep the sex industry 'hidden' or operating in disguise. Condoms are avoided or prohibited by management lest they be used as evidence of prostitution offenses having been committed.

Criminalisation of sex work undermines HIV prevention, care and treatment efforts. Fear, stigma and discrimination on the part of service providers - resulting from the criminalized status of sex work - reduce both the quantity and the quality of services that sex workers receive. In addition, in some countries in the region it is a legal offence for an HIV positive person to have sex without informing the partner of her/his status. This may prevent sex workers from receiving correct information and access to proper HIV and STI testing, counselling, and treatment.

Criminalization of sex work and related practices forms a potent barrier to the mechanisms that protect other workers such as occupational health and safety standards and labour rights. Poor working conditions for sex workers increase their HIV risk and vulnerability. Lack of access to water, rest, security, safety equipment, and sick leave means that many sex workers are exposed to violence and other threats to their health where they work. Most sex worker groups demand a legal framework that recognizes sex work as an occupation that can be regulated in ways that protect workers and customers. The new ILO labour standard on HIV/AIDS, adopted in June 2010 by governments, employers and workers from around the world, includes sex workers in all areas of non-discrimination and access to health services and occupational safety⁸.

2.2 Practices (law enforcement, policy implementation) impacting sex workers and HIV

There is a disconnect between actual laws and policies that are in place in a country, and what law enforcement and health officials believe they are required to do legally and from a public health perspective. The enforcement of these laws and other enforcement including arbitrary persecution significantly impacts the lives of female, male, and transgender sex workers and the effect of HIV programmes. In many countries, discriminatory enforcement and stigmatizing practices drive sex work underground, hindering efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes.

Reports from sex worker organisations in different countries show that where sex workers are

⁸ ILO (June 2010). *Recommendation concerning HIV and AIDS and the World of Work*.

regularly targeted for arrest and prosecution, sex workers are less likely to access health services, and condom use and HIV testing tend to be lower. In numerous countries in the region the possession of condoms is assumed by police to be evidence of prostitution related activities. In some countries, health service providers and outreach workers are harassed or jailed when reaching out to sex workers. STI and HIV testing is sometimes mandatory for sex workers and confidentiality is not assured. This has led to discrimination, loss of livelihood and even violence⁹.

A particular concern for many sex workers is the effect of stigma and discrimination on their children, as children are sometimes simply taken away from their parents or prohibited from schools as a result of their mothers' status.

One of the most effective responses to injustices and the health risks that flow from them is self organising by sex workers. However, this is complicated in many countries by regulations that limit formal register as an association or NGO to people of 'good character' or through other barriers to NGO registration.

Influential people in local communities and the larger society, such as religious leaders, media, teachers, law enforcement officers and parliamentarians, play an important role in setting local norms regarding the ways in which prostitution should be viewed and how sex workers are treated. They can be obstacles to effective HIV and sex work programming, but if included in the right ways, they can be effective levers of change in a community. Their meaningful engagement will help address the ways in which laws and regulations are practised and tackle stigma and discrimination related to sex work and HIV.

2.3 Access to justice for sex workers

Sex workers face many forms of abuse by police officers criminals and sometimes their own communities and families as a result of lack access to the justice system. This lack of legal protection makes them vulnerable to violence, extortion and other forms of abuse. Enforcement of laws against sex workers usually takes place without formal charges, legal counsel or access to a court. When there are charges it is often with offenses such as 'public indecency', 'disturbance', or 'loitering' rather than through prostitution laws. Few legal support groups and lawyers are resourced to advocate for the rights of sex workers.

3. ACTIONS

Immediate actions:

- Conduct a thorough mapping of the legal and policy environment (including the relevant laws, policies, practices, and access to justice by sex workers).
- End mandatory testing and forced rehabilitation or treatment of sex workers.
- Raise awareness on the negative impact of anti-trafficking laws and laws aiming to criminalize the purchase of sex on human rights of sex workers in order to immediately stop further development and implementation of such laws.
- Support organizational development and capacity building of sex worker organizations and networks in order for sex workers to raise awareness and advocate for their rights, prevention of abuse, and access justice. This includes strengthening legal literacy and awareness of

⁹ APNSW (2010). *Caused By The Refraction*. Film available on <http://sexworkerspresent.blip.tv/file/3977331/>

human rights among sex workers.

- Support sex worker led responses to prevent and counter human trafficking and commercial sexual abuse of children.
- Introduce health and safety standards for sex work, according to the new ILO labour standards (Recommendation Concerning HIV and AIDS and the World of Work).
- Educate (human rights training, HIV training) and involve local government, police and other law enforcement officers to reduce the negative practices against sex workers.
- Provide incentive for multi-disciplinary engagement of stakeholders who may not usually already be engaged in the response (such as law enforcement officers, community leaders, religious leaders, teachers, lawyers). Motivate stakeholders to use their influence to support laws that more effectively manage the sex industry in terms of human rights, workers rights, and public health.
- Engage and support legal advisors, lawyers and judges to advocate and fight for the rights of sex workers.
- Set up mechanisms for sex workers to file court cases if arrested, fined, or forced to pay bribes by the police and law enforcement. Sex workers should be able to access mechanisms for legal recourse in case of discrimination, extortion, violence, or harassment.

Long term actions:

- Decriminalize sex work by removing laws and policies that prevent sex workers accessing safe places to live and work and reduce their access to health services, justice and labour rights (including local ordinances, state level regulations, and others). This includes laws against buying and selling sex and operating sex businesses. Replace those laws with regulations, laws and policies similar to those that govern other businesses and activities.
- Formally recognize sex work as an occupation to enable sex workers to obtain benefits derived by workers, including the ability to claim state benefits, form labour unions and access banking, insurance and pension schemes.
- Remove laws that criminalize consensual sexual activity among adults.
- Protect sexual diversity in domestic human rights and anti-discrimination legislation.
- Ensure that HIV National Strategic Plans (NSPs) and other programming guidance addresses the needs and rights of all sex workers, including female, male and transgender sex workers.

4. ADDITIONAL ISSUES (that were discussed but not further prioritized in this paper)

- There is a need for more strategic information in relation to sex work and HIV.
- Inter-sectoral alignment of law and policy - the extent to which laws, policies and enforcement practices are aligned with health and social objectives – is often weak. For example, a health department in a country may pursue harm reduction policies, while an interior ministry may have a zero tolerance policy toward sex work, and the women's ministry supports (forcible) rehabilitation of sex workers.
- Better coordination and harmonized efforts within and between different UN and community organizations is needed.

5. MORE INFORMATION

Relevant reading, in addition to documents already cited in the footnotes of this paper:

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- NGO Delegation Annual Report to the UNAIDS Programming Coordination Board (June 2010), *Stigma and Discrimination: Hindering Effective HIV Responses*. http://unaidspcbngo.org/wp-content/uploads/2010/05/2010_NGO_Report_Final_website.pdf
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