

# UNAIDS Reference Group on HIV and Human Rights

## Recommendations regarding the “UNAIDS Guidance Note on HIV and Sex Work (April 2007)”

The UNAIDS Guidance Note on HIV and Sex Work (April 2007) has proved to be highly contentious. The contents and approach to the document are disputed on their merits and their tone by sex workers, activists and public health workers worldwide.

The UNAIDS Reference Group on HIV and Human Rights (Reference Group) is an independent, advisory body, established in 2002 to advise UNAIDS on all matters relating to HIV and human rights. Its members act in their individual capacity. The views of the Reference Group, including those expressed in this paper, do not necessarily reflect the views or positions of the UNAIDS Secretariat or the Co-sponsors of UNAIDS.

The Reference Group is grateful for the opportunity to comment on the Guidance Note and to make suggestions towards a revised document that will appropriately address sex work in the context of evidence-informed, rights-based approaches to HIV prevention, treatment, care and support. In these recommendations, the Reference Group seeks to summarize concerns with the process involved in the past and present development of the Guidance, explain some of the major problems in the Guidance and suggest changes to make it acceptable and effective.

Furthermore, though UNAIDS has indicated that this is an “internal” Guidance Note, that is, guiding the UNAIDS programme response on sex work, the Reference Group feels that the document fails to guide the concerned UN agencies appropriately *and* sends a confusing and inappropriate message to those external to the UNAIDS programme on acceptable responses to HIV in the context of sex work.

Our comments build on, and are supportive of, the input provided in September 2007 by the Global Working Group on HIV and Sex Work Policy,<sup>1</sup> the Guidance Note from the “Women Won’t Wait” campaign, and the Commentary on the Guidance Note by the Canadian HIV/AIDS Legal Network.<sup>2</sup>

In these documents, sex workers from around the world and human rights and gender activists have expressed many concerns, including:

- the fact that the Guidance Note ignores the centrality of human rights, including the violence

<sup>1</sup> The Global Working Group on HIV and Sex Work Policy. Inputs to the UNAIDS Guidance Note on HIV and Sex Work – April 2007. September 2007.

<sup>2</sup> Canadian HIV/AIDS Legal Network. A Human Rights-based Commentary on UNAIDS Guidance Note: HIV and Sex Work (April 2007). Toronto: Legal Network, 2007 (available at <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=780>).

perpetrated against sex workers, often by police or other state-sponsored forms which go unpunished;

- the negative impact of authoritarian, punishment-based HIV prevention and mandatory HIV testing programmes for sex workers which have occurred in the context of criminalization of sex work, “raid and rescue” approaches, and the (often nominal) introduction of a 100% Condom Use Programme;
- the fact that the Guidance Note does not emphasize enough the urgency to address HIV in sex work settings through effective and large-scale HIV prevention and treatment programmes, particularly in settings in which epidemiological data shows that unprotected sex between sex workers and clients is one of the major drivers of the HIV epidemic;
- the fact that the Guidance Note is not sufficiently informed by evidence and encourages measures that have not been proven to work, while not devoting enough attention to practical measures that work and should be implemented broadly to ensure universal access among sex workers to comprehensive HIV prevention and treatment programmes, including sustained access to condoms and lubricant; voluntary diagnosis and treatment of sexually transmitted infections; HIV information; and peer education;
- the fact that the Guidance Note seems to back away from a focus on groundbreaking programmes of, by and for sex worker organizations, while previous UNAIDS publications rightly showcased as best practices many programmes that demonstrated the effectiveness of sex worker empowerment and peer-based programme management for HIV prevention and treatment;
- the conflation and confounding of “trafficking” and “sex work” in the Guidance Note; and
- the ethical and human right violations sometimes perpetrated against sex workers in relation to trials of products and drugs for HIV prevention, treatment, care and support.

Our comments were further informed by a presentation to the Reference Group by Reference Group member Meena Seshu at the eighth meeting of the Reference Group, 4 December 2007.

We largely support the need for a Guidance Note on HIV and Sex Work, though we hope that any Guidance Note will serve as both internal and external guidance. Additionally, we largely support the three pillars approach taken in the UNAIDS document and agree with the content of certain sections of the document. However, as discussed in detail below, there are some important issues that require significant revision.

## General Concerns

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We are concerned about the overall approach of the document, the process of developing the document and the inclusion (or lack thereof) of crucial inputs, and the language used to convey specific political agendas that are contentious, immaterial to the strategies necessary to respond to HIV and in some respects likely to impede that response.

### The Process of Consultation

While UNFPA and the UNAIDS Secretariat included representation of sex workers at the Global Technical Consultation on HIV and Sex Work held in Rio de Janeiro, Brazil in July 2006,<sup>3</sup> there has been a lack of meaningful consultation with sex workers in the subsequent stages of development of the Guidance Note. We urge UNFPA and the UNAIDS Secretariat to involve sex workers and consult with the organizations that represent them as the Guidance is revised and finalized over the next months; and to share the agencies' plans about the process that will be followed before finalization of the Guidance with the Reference Group and other interested parties, including sex worker organizations. In particular, we would like to know what steps will be taken between revision and finalization of the document; what efforts will be made to consult and involve the Reference Group, sex workers, and civil society more generally in the process of finalizing the Guidance; whether there is potential for the Reference Group to continue providing input into the document as it will be further developed; what the timeline for finalizing the Guidance is; and finally, how the guidance will be disseminated once finalized? We strongly believe that the guidance will be most effective if it is designed, developed, implemented and evaluated with the cooperation of sex workers themselves and representatives of sex workers. The process of finalization of the Guidance therefore needs to allow for this input.

### The Content of the Guidance Note

#### Prevention, Treatment and Care

The Guidance must focus on HIV prevention, treatment, care and support. The current draft does not do this enough. At a minimum, we suggest that Pillar 2 of the current draft, which focuses on reducing risk to HIV infection, become Pillar 1. The current Pillars 1 and 3 can then follow.

Given that the Guidance Note specifically addresses HIV and sex work, it is critical that greater attention be devoted to: (1) increasing sex workers' access to HIV testing and counselling while respecting their human rights; (2) the implications of provider-initiated testing and counselling for sex workers, and (3) greater access to treatment, care and support for sex workers living with HIV. It will also be critical to assert the need for HIV-positive sex workers to have *equal and sustainable* access to HIV treatment.

#### Addressing the Diversity of Sex Workers

The Guidance should explicitly state that sex workers include people who are female, male and transgender, and identify sex workers as female, male and transgender as relevant throughout the

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<sup>3</sup> UNFPA, UNAIDS, Government of Brazil (2006). Report of the Global Technical Consultation on HIV and Sex Work, Rio de Janeiro, 12-14 July.

Guidance. This would recognize that female, male and transgender sex workers sometimes have different issues and needs in relation to HIV prevention, treatment, care and support.

### **The Need for a Human Rights-Based Approach**

The Guidance should emphasize a human rights-based approach and explicitly be anchored in rights-based principles and programming and a commitment to ending human rights abuses against sex workers that occur in the context of the national responses to HIV.

As currently drafted, the Guidance fails to anchor the three pillars in human rights principles, and the pillars make little explicit reference to human rights approaches, human rights violations, or actions needed to protect, promote and respect the human rights of sex workers. The points below elucidate what actions are appropriate in HIV-related programming that fully takes sex work into account.

*Sex workers face many barriers to accessing the support and services they need to maintain healthy lives, free of violence, discrimination and HIV.* Basic human rights principles are core elements of effective strategies to address the intersection of discrimination and violence and HIV among sex workers – especially in situations where the HIV epidemic is concentrated in sex worker communities. These activities can only take place with the cooperation of sex workers themselves in all their diversity.<sup>4</sup> A rights-based response requires that there is no consequential denial of rights because sex work is the “work” in question.

Rights-based programming principles stress the universality, inalienability, interdependence and indivisibility of rights. Commonly, rights-based approaches are understood to be based on human rights principles of: non-discrimination, participation, inclusion, empowerment, transparency, accountability, obligation and interconnectivity (i.e. assuring the conditions for enjoyment of rights). Furthermore, according to human rights principles, for programming to be meaningful, it must be available, accessible, acceptable, and of high quality. Each of these points can help guide approaches to HIV programming, including in the context of sex work.

### **Trafficking and Sex Work**

The Guidance must distinguish between “trafficking” and “sex work”. Increasing evidence and global norms confirm the clear distinction between trafficking and sex work and lay out the distinctive and specific characteristics of trafficking. The definition of “trafficking” refers to “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat of use of force or other forms of coercion, of abduction, or fraud, of deception, of the 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 purpose of exploitation.”<sup>5</sup>

Though many sex workers have been deceived or lured by payments into sex work and thus might be

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<sup>4</sup> See the articles in: *Research for Sex Work 2*, August 1999. Available at <http://www.nswp.org/pdf/R4SW-02.PDF>

<sup>5</sup> See, e.g., Palermo protocol at <http://untreaty.un.org/English/TreatyEvent2003/Texts/treaty2E.pdf>; Inter-Parliamentary Union, UNAIDS, UNDP (2007) Taking Action Against HIV – Handbook for Parliamentarians, at 191 (box 54). Available via <http://www.ipu.org/english/handbks.htm#aids07> or at [http://data.unaids.org/pub/Manual/2007/20071128\\_ipu\\_handbook\\_en.pdf](http://data.unaids.org/pub/Manual/2007/20071128_ipu_handbook_en.pdf).

said to be “trafficked”, there is a large number, if not the majority, who have not entered sex work on these bases nor on any other basis involving active coercion or deceit. Though poverty and inequality are deplorable reasons for people to enter sex work and indicate inadequate “free choice”, it cannot be said that people suffering from such conditions have been trafficked. They like all people should benefit from human rights support, including those that would empower them with social and economic choices. They should not however be treated as “victims” in need of “saving”.

The Guidance Note fails to clarify this distinction and, rather, blurs the lines between trafficking and sex work. Furthermore, the document currently outlines an approach that appears to regard all sex workers as “victims” and does not acknowledge that people who are involved in sex work that does not involve victimization are independent actors making decisions (however constrained) about their labour and economic rights.

The blurring of trafficking and sex work and/or treating all sex workers as “victims” can lead to support for coercive efforts to control or reduce sex work which rarely produce beneficial and lasting outcomes and have even been associated with abuse of sex workers and their families. Mandatory medical treatment or procedures, forced rehabilitation, or programmes implemented by police or based upon detention of sex workers are all examples of coercive programming. All such strategies either represent, or are prone to, human rights abuses and corruption.

In particular, sex workers should not be subjected to the violence and related human rights violations that all-too-frequently accompany “raid and rescue operations,” whether these are directed by state agents or non-state actors.

The Reference Group believes that the Guidance Note should make a strong affirmation of the human right to the liberty and security of person (as well as privacy) that is the basis of an individual’s agency over her/his body and sexuality, *as well as* the basis for an individual not to be trafficked or held in slave-like conditions.

### **The Focus on Reduction of Demand for Sex Work**

The Guidance sees reduction of demand for sex work to be a crucial structural element of addressing the danger of HIV in the lives of sex workers. However, no evidence is provided for this, and the document does not elaborate on how this could be achieved. In any case, elimination of demand is a strategy as unlikely to succeed as the elimination of sexual activity more generally. In responding to HIV it is always necessary to have a back-up strategy to (often ideological) programmes to ‘just say no’. In the matter of sex work, hypocrisy and denial are often serious impediments to effective programmes.

### **Alternative Livelihood Programmes**

Under two of its pillars, the Guidance encourages a focus on providing alternative and “decent” work for people in sex work. As discussed in more detail in the comments provided by the Canadian HIV/AIDS Legal Network,<sup>6</sup> there are several problems with how these programmes are presented in the Guidance. In particular, such programmes should always include meaningful participation of sex workers in their

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<sup>6</sup> Supra, note 4.

design and implementation and have strong elements against any elements of coercion.

### **Criminalization of Sex Work**

It is increasingly evident that criminalization of various forms of work and/or activity seriously hampers HIV efforts.<sup>7</sup> In this light, the Guidance should encourage governments to repeal laws that criminalize sex work and, in particular, laws that discourage the use of condoms by treating them as “evidence” of a crime or infraction. At a minimum, the Guidance should state, as the International Guidelines on HIV and Human Rights do, that “criminal law should not impede provision of HIV prevention and care services to sex workers and their clients”.<sup>8</sup> The Guidance should call on governments to do a legal audit of laws *and* their enforcement to assess their impact on access and improve them either through law reform and/or through working with police, the judiciary and prisons to find pragmatic ways to improve the actual lives and experience of sex workers in the context of HIV.<sup>9</sup>

### **Participation of Sex Workers in Programming Efforts**

Optimal results in HIV programming are seen where there is meaningful and voluntary participation of sex workers in programming, and the Guidance needs to stress more heavily the importance of participation of sex workers in programming efforts.

This is a human rights concern, and clarifies that policy and programming should be based on evidence that is gathered from ethical research, observant of human rights, in which sex workers or their representatives themselves play a meaningful role. Such participation will not only ensure what is effective for sex workers, but can also help to reduce stigma, discrimination, violence and the application of coercive programming.

In countries where sex work remains illegal, and repeal of such laws cannot be expected in the short term, strategies of involvement of representatives or advocates for sex workers need to be explored through national HIV commissions, departments of health and relevant civil society organizations.

### **Access to Services**

The Guidance Note should call for a comprehensive assessment by national HIV programmers, with the participation of civil society and sex workers, of the barriers to access to HIV prevention, treatment, care and support. Suggestions on how to do such an assessment and overcome such obstacles should form a large part of the Guidance, located in the context of UNAIDS efforts to get countries to “know their epidemics and response” and to achieve Universal Access.

Given the pervasive reality of rape and sexual violence at the hands of clients, pimps and law

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<sup>7</sup> For more details, see: Inter-Parliamentary Union, UNAIDS, UNDP (2007) Taking Action Against HIV – Handbook for Parliamentarians, at 190.

<sup>8</sup> Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS. International Guidelines on HIV/AIDS and Human Rights – 2006 Consolidated Version, paragraph 21(c).

<sup>9</sup> Inter-Parliamentary Union, UNAIDS, UNDP (2007) Taking Action Against HIV – Handbook for Parliamentarians, at 193-194.

enforcement personnel, the Guidance should call for the immediate, substantial scale-up in education about, and availability of, post-exposure prophylaxis, as well as emergency contraception and other emergency counseling and support services for sex workers. In addition, it should call for national governments, international agencies, donors and local implementing partners to expand and intensify targeted outreach not only to female, but also to male and transgender sex workers.

## Specific Changes to the Guidance

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In line with the recommended changes to the overall approach, structure and wording of the document noted above, the Reference Group also recommends specific changes to existing language in the document, in order to strengthen it and make it more relevant to the realities of sex workers' experiences. These suggested changes are noted using the current structure and order of the document.

1. The document begins with a discussion of trafficking, thus suggesting that the context of trafficking (i.e. force, deception, and coercion) is the appropriate framework for understanding the challenges of HIV for sex workers. It also, by way of introduction, identifies a specific focus as being the provision of life choices and occupational alternatives to sex work. The introduction and first section entitled "Entry into Sex Work" need to be re-written to distinguish clearly between trafficking and sex work, as described above, and thus set a framework for the entire document.
2. While the Guidance Note insists that sex workers have the "right" to get out of sex work, it fails to mention that many assert a right, and wish, to remain in sex work because it involves the exercise of their agency over their bodies, and human rights, such as privacy and economic rights. Under Pillar 1, the section entitled "Promote Access to Decent Work and Alternative Employment" should be deleted and could be replaced with the following:

"Expand economic and social opportunities for sex workers"

There is strong evidence that sex workers with better economic and social status are less vulnerable to HIV. Thus it is important to ensure that sex workers can participate in and benefit from programmes that expand economic and social opportunities and development strategies that provide sustainable supplementary incomes for individuals and households. Such strategies need to address inequalities such as lack of secure housing; lack of access to education, banking services and credit; and control of family assets. The stigma and discrimination which reduces male, female and transgender sex workers' potential for economic independence and social inclusion must also be addressed.

Collective organizing and community mobilization are key to ensuring that sex workers benefit from development policies and programmes. Increasing sex workers' access to banking services and encouraging community-run credit cooperatives are two ways by which this can be addressed.

3. Pillar 2, dealing with reducing risk to HIV infection describes a recommendation of "strategic partnerships" to provide technical support to governments when developing policies to reduce the risks associated with HIV and sex work. However, attention must be given to the fact that a person whose occupation renders them as either a criminal or an outcast may have difficulty taking advantage of HIV prevention, treatment, care and support programmes or sitting at the same table with those who normally would be incarcerating them. With this in mind, we suggest the following be added under Examples of Action in Pillar 1:

- Implement policies and programmes to educate and train officials in law enforcement, health, judicial and other government sectors, and civil society organizations to foster appropriate attitudes and behaviour;
- Ensure officials that violate the rights of sex workers are subject to effective sanctions;

4. Under “Responsibilities of States,” the following should be added:

States have the responsibility to protect the rights of all people, including sex workers, even where sex work is criminalized. Though States may criminalize sex work, the people who are sex workers still have the rights to nondiscrimination, due process, employment, education, freedom from violence, and health, including access to comprehensive HIV prevention, treatment, care and support services.

5. Pillar 1, “Reducing Vulnerabilities and Addressing Structural Issues”, should include a section on the elimination of violence against sex workers. Ending violence against women and girls, as well as all forms of gender-based violence, must be foundational to any rights-based programming in general and to HIV.