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Memorandum of Support from Human Rights Watch for Bill: S1379/A2736

HUMAN
RIGHTS
WATCH

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(AN ACT to amend the civil practice law and rules, the criminal procedure law and the executive law, in relation to the use in evidence of the fact of possession of a condom.)

Human Rights Watch submits this memorandum in support of S1379/A2736, which would change the current law by explicitly prohibiting the introduction of condoms as evidence of prostitution and prostitution-related offenses in certain criminal and civil proceedings. Amendment of the existing law is essential to promoting both public health and human rights.

Between October 2011 and July 2012, Human Rights Watch conducted research in New York City on the prevalence and consequences of police seizure of condoms as evidence of prostitution-related offenses, and the introduction of condoms as evidence of prostitution-related offenses in criminal proceedings. In July 2012, Human Rights Watch released a 112-page report documenting the use of condoms as evidence of prostitution in New York and three other major US cities.¹ Human Rights Watch's research involved over 125 interviews with sex workers, outreach workers, sex worker advocates, public defenders, and law enforcement officials in New York City. The report also documented the experience of LGBT youth in relation to police confiscation of condoms as evidence of prostitution.

Our research found that police in New York City stop, search, and arrest people involved, or believed to be involved, in the sex trade using possession of condoms as evidence of intent to engage in prostitution-related offenses. Though few prostitution or loitering cases proceed to trial, prosecutors in New York have introduced condoms as evidence of prostitution-related offenses in criminal court.

Human Rights Watch found that sex workers, LGBT populations, and members of their communities are aware of this practice and fear carrying condoms, either for use with clients or with other sexual partners, as a result. Mona M., a peer outreach worker, sits in a

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¹ Human Rights Watch, "Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities," July 2012, <http://www.hrw.org/reports/2012/07/19/sex-workers-risk-o>

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neighborhood restaurant at a regular time so that she can provide condoms to women who are afraid to carry them when they are working. She told Human Rights Watch,

The majority have fear, they don't carry condoms.... I'm an outreach worker. They know Mona will be in the cafe. They will only come when they have a client, get one condom, then leave with the client. For me it's a risk to have the condoms in my purse. But I've worked as an outreach worker, and I feel obligated to carry condoms because if someone comes up and asks me, and I don't have one, what are they going to do?²

While some women told Human Rights Watch that they continued to carry and use condoms despite the possible consequences, others said that fear of arrest overwhelms their need to protect themselves from HIV and they therefore engage in unprotected sex while working. As Anastasia L., a transgender woman from Mexico who did sex work in Queens until 2007, said

If I took a lot of condoms, they would arrest me. If I took few or only one, I would run out and not be able to protect myself. How many times have I had unprotected sex because I was afraid of carrying condoms? Many times.³

For the same reasons that permitting condoms to be used as evidence for prostitution undermines human rights including the right to health, permitting condoms found at a location where people have been coerced into the sex trade to be used by prosecutors as evidence to support charges of trafficking or promoting prostitution is in practice counterproductive, and risks more harm to victims of trafficking. Although the intent to secure a successful prosecution of traffickers is commendable, and consistent with government obligations to combat trafficking, using condoms as evidence in trafficking cases provides a perverse incentive to traffickers to prohibit victims from carrying or using condoms or to restrict victims' access to condoms, including by refusing to make them available at locations where they are being exploited. In San Francisco, our research found that trafficking enforcement efforts that were likely to involve confiscation of condoms found at a location for use as evidence in prosecution, made business owners reluctant to keep condoms on the premises; and those who continued to accept condoms concealed them in ways that made them useless or dangerous. For example, one outreach worker in San Francisco reported seeing unwrapped condoms stored in an empty bleach container at a massage parlor, making them both unsanitary and likely to

² Human Rights Watch interview with Mona M., New York City, February 9, 2012. Mona M. is a pseudonym. Pseudonyms are used for all current and former sex workers and others requesting anonymity in order to protect their privacy, confidentiality, and safety.

³ Human Rights Watch interview with Anastasia L., New York City, March 22, 2012.

have deteriorated.⁴ Legislation to prohibit prosecutors from using possession of condoms as evidence to support prostitution-related charges, including trafficking, could give trafficking victims some ability to negotiate for their own sexual safety.

New York City is the epicenter of the AIDS epidemic in the United States, with more than 110,000 people living with HIV and an AIDS case rate that is nearly three times the national average.⁵ A recent study in New York City among people who exchange sex for money or other goods (a category broader than those who self-identify as sex workers) found that 14 percent of the men and 10 percent of the women were HIV-positive.⁶ This is dramatically higher than the 1.4 percent HIV prevalence in New York City generally and the 0.6 percent prevalence in the United States overall.

New York State and City have devoted enormous resources to curbing the HIV epidemic, targeting prevention efforts to many of these vulnerable populations. A cornerstone of these prevention efforts is promoting universal access to condoms. New York City currently distributes nearly 40 million free condoms annually.

Permitting condoms to be used as evidence of prostitution-related offenses undermines these efforts and discourages vulnerable populations from carrying condoms, and condoms are essential for HIV prevention. Law enforcement officials can, and should, partner with public health officials to ensure that enforcement of the criminal law does not undermine the health and safety of all.

Under international human rights law, governments are obligated to promote public health and ensure access to information and services for preventing the spread of HIV and sexually transmitted diseases without discrimination. Governments should not take actions that interfere with one's ability to protect their health.⁷ To do so is not only inconsistent with human rights law but it is bad public policy.

New York State has distributed millions of condoms to its citizens in an admirable campaign to protect the public health. Law enforcement practices that deter people from using these condoms, particularly members of groups at high risk for sexually transmitted infections, undermine the intent of this ongoing effort, waste tax dollars, and invite increased rates of HIV and other infections.

⁴ Human Rights Watch, "Sex Workers at Risk," 2012.

⁵ New York City Department of Health and Mental Hygiene, New York City HIV/AIDS Annual Surveillance Statistics, 2012, <http://www.nyc.gov/html/doh/html/data/hivtables.shtml> (accessed April 16, 2013); Centers for Disease Control and Prevention, Diagnoses of HIV Infection in the United States and Dependent Areas, 2011, *HIV Surveillance Report*, vol. 23, 2011, <http://www.cdc.gov/hiv/surveillance/resources/reports/2011report/index.htm> (accessed April 16, 2013).

⁶ Samuel M. Jenness et al., "Patterns of Exchange Sex and HIV Infection in High-Risk Heterosexual Men and Women," *Journal of Urban Health*, vol. 88, no. 2 (2011), pp. 329-341.

⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI) 21 UN GAOR (no.16), UN Doc A/6316 (1966), 99 UNTS 3, art.11, entered into force January 3, 1976, signed by the US on October 5, 1977; UN Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, paras. 12, 18, 19, 30, 50, 54.

In sum, the New York State legislature should expand and strengthen the promotion of condom use among its most vulnerable residents—trafficking victims, sex workers, and LGBT youth—as well as among the general public by enacting S1379/ A2736 in the 2013 legislative session.



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