

## HUMAN RIGHTS WATCH

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## Memorandum of Support from Human Rights Watch for Bill: S.323/A.1008

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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.)

February 27, 2012

Human Rights Watch submits this memorandum in support of S.323/A.1008, 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.

In 2011-2012, Human Rights Watch has been conducting research in New York City on the existence and effects of a practice of police seizure of condoms as evidence of prostitution-related offenses, and introduction of condoms as evidence of prostitution-related offenses at certain proceedings. Based on dozens of interviews with sex workers, outreach workers, sex worker advocates, and public defenders in New York, it is our conclusion that condoms in the possession of alleged sex workers are frequently the subject of police stops and searches, and often are confiscated or destroyed by police. Police routinely catalogue the condoms as evidence of a prostitution-related offense, as evidenced by the attached complaint forms utilized by arresting officers in Brooklyn. Prosecutors in Manhattan have also attempted to introduce the seized condoms as evidence of a prostitution-related offense. Human Rights Watch has found that in Manhattan, Brooklyn, and Queens, sex workers 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. The fear generated by this practice leads some sex workers to carry fewer condoms, and sometimes to engage in sex work without the protection of condoms.

In the age of HIV, discouraging the use of condoms, particularly among high-risk and vulnerable groups, can have disastrous public health consequences. A 2011 study found a 14.1 percent HIV prevalence rate among males in New York City who had exchanged sex for money or other needs and a 10.8 percent HIV prevalence rate among women who

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1 Human Rights Watch interview with Kate Mogulescu, staff attorney, The Legal Aid Society, New York, November 2, 2011.

had done the same.<sup>2</sup> Indeed, the New York City Department of Health and Mental Hygiene (NYC DOHMH) has publicly noted that it is “actively involved in activities to change structures, policies and regulations that are barriers to optimal HIV prevention, care and treatment including...[s]upport for legislation to ban the use of condoms as evidence of prostitution....”<sup>3</sup> The NYC DOHMH collected 63 surveys in 2010 with persons located in places known for street-based sex work. The intention of the survey was to “inform the NYC DOHMH work with the NYPD on highlighting the public health impact of law enforcement practices. Efforts to engage the NYC police department, through our respective intergovernmental affairs liaison offices, are underway.”<sup>4</sup>

Moreover, the association of condoms with criminal activity increases police harassment not only of sex workers but of men who have sex with men, HIV/AIDS outreach workers and others who regularly fear harassment or arrest by the police.<sup>5</sup> Transgendered women in particular experience a high rate of false targeting as sex workers by the police, a practice so widespread in New York City that it was the subject of a 2005 campaign by Amnesty International.<sup>6</sup> Transgendered women whom Human Rights Watch interviewed routinely said that they have had condoms confiscated by the police. According to these groups who are frequently targeted by the police, the seizure and use of condom possession as evidence deters them from carrying condoms.

Permitting condoms to be used as evidence of prostitution in a criminal proceeding discourages sex workers from carrying condoms, and condoms are essential for HIV prevention. This simple truth has also been documented by Human Rights Watch in countries throughout the world,<sup>7</sup> and by sex workers in the United States.<sup>8</sup> The World Health Organization has found that sex workers are one of the groups most likely to respond positively to efforts to increase condom use, and that such efforts should be strengthened and laws that discourage condom use should be reformed.<sup>9</sup>

Police 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. Condoms are proven and effective tools in the fight against HIV/AIDS and other sexually transmitted diseases.

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<sup>2</sup> 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), p. 329-341.

<sup>3</sup> Bureau of HIV/AIDS Prevention and Control, New York City Department of Health and Mental Hygiene, “New York City Department of Health and Mental Hygiene Enhanced Comprehensive HIV Prevention Plan (PS 10-10181),” March 15, 2011.

<sup>4</sup> *Ibid.*

<sup>5</sup> Human Rights Watch, *Hated to Death: Homophobia, Violence and Jamaica’s HIV/AIDS Epidemic*, November 2004, <http://www.hrw.org/en/node/11894/section/1>; Human Rights Watch, *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*, July 2002, <http://www.hrw.org/en/reports/2002/07/01/epidemic-abuse>.

<sup>6</sup> Amnesty International, “Stonewalled: Still Demanding Respect,” <http://www.amnestyusa.org/lgbt-human-rights/stonewalled/page.do?id=1106628> (accessed May 27, 2010.)

<sup>7</sup> Human Rights Watch, *Unprotected: Sex, Condoms and the Human Right to Health*, May 2004, <http://www.hrw.org/reports/2004/philippines0504/>; Human Rights Watch, *Still Making Their Own Rules: Ongoing Impunity for Police Beatings, Rape and Torture in Papua New Guinea*, October 2006, <http://www.hrw.org/en/reports/2006/10/29/still-making-their-own-rules>.

<sup>8</sup> See, e.g., United Justice Center, *Memorandum in Support of So1289/Ao8356*, May 2010.

<sup>9</sup> World Health Organization, *Sex work and HIV/AIDS, Technical Update*, Geneva 2002, p. 2.

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 may not take actions that interfere with one's ability to protect their health.<sup>10</sup> 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. Legislation that deters people from using these condoms, particularly members of groups at high risk for sexually transmitted disease, undermines the intent of this ongoing effort, wastes tax dollars, and invites increased rates of HIV and other infections.

In sum, the New York State legislature should expand and strengthen the promotion of condom use among sex workers as well as among the general public by passing S.323/A.1008.



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<sup>10</sup> 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.