

HIV and sex work: the ten commandments of Pattaya¹

*The Hon. Michael Kirby AC CMG**

Level 7, 195 Macquarie Street, Sydney, NSW 2000, Australia. Email: mail@michaelkirby.com.au

Equal justice under law

To some, it may seem strange that I, a former judge, am speaking on this occasion. Are not judges the enemies of sex-workers? Are they not the enforcers of punitive law? Are they not part of the problem in ensuring the dignity, equality and capacity for self-protection that is a vital element in the strategy to reduce the spread of the human immuno-deficiency virus (HIV) amongst sex workers – the virus that causes the acquired immuno-deficiency syndrome (AIDS)?

Not necessarily. Of course, judges must obey and give effect to the law. The law on sex work is usually made by legislatures. Often, it is designed to reflect public understandings of religious and moral instruction. Where the law is clear, judges have little or no leeway. They must give effect to the rules that are democratically made.

For years, I have been involved in activities addressed to the reduction of HIV. That itself may seem odd. How did it come about?

It arose because I too have known the restrictions, stigma and shame that can be caused by laws addressed to adult, private, consensual sexual conduct. I refer to the prevalent laws against homosexual conduct. Those laws affected me in sunny Australia, as I was growing up. In practice, they were only ever partly effective. But they were effective enough to cause a lot of trouble in my life. For a time, they also impeded some of the Australian efforts to contain the spread of HIV.

In most parts of the world, the law does not single out gays and criminalise them. But in the countries which were at one time part of the British Empire, anti-sodomy offences were invariably enacted. Although these laws generally had no links with the pre-existing culture of the colonies, they were enforced by the colonial rulers. When I was growing up, they were spasmodically enforced in Australia. When I discovered my own sexuality, I realised that, in the path to its fulfilment and a full life, stood an over-reaching law that intruded into my private and intimate sexual life, my happiness and identity.

So this is something I shared in common with sex workers and their clients. Like them, gays had always been around. They

often found ways to avoid the law. But, in this respect, the law was not a friend. It was not protecting them and their right to be left in peace to be themselves. It was oppressing them. And it was doing so in a respect, important for their human fulfilment.

In most countries of the world, such laws against gays have long since been repealed. Napoleon, at the height of his imperial powers, appointed codifiers to re-express the ancient laws of France. Those codifiers abolished such laws, regarding them as an anachronism. So it was that laws against gays were not part of the heritage of the French colonialism. In the result, they did not become part of the Spanish, Portuguese, The Netherlands, German or Scandinavian colonial traditions. They did not find their way into the laws of Russia, China or Japan. In fact, they were largely confined to the countries of the British Empire and to Arab lands. Indonesia, the most populous Islamic country in the world, has not had such laws operating nationally because of the long period of Netherlands rule.

So, the law is often a product of historical circumstances. History can be changed. Laws can be reformed. In the face of the perils of HIV, law reform is a special challenge for our own time. The transmission of HIV often involves sex. That makes the law on gays and on sex workers a matter for special attention. This is what brings us together in this conference.

Because of my own personal experience, I stand with you in addressing the over-reach of the law and the need for widespread legal and attitudinal change. But how is this change to be secured? In my opinion, it will only be achieved by attending to the ten commandments which I will now proclaim. Those commandments should go from here to every corner of the world. They should be taken up by us and by the United Nations. Great movements have to start with a single step. That step begins here in Pattaya.

The ten commandments of Pattaya

1. Empowering sex workers

The first commandment is to listen to the voices of those who are most affected. This includes empowering and listening to the

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*Member of the UNDP Global Commission on HIV and the Law (2010–); member of the Eminent Persons Group on the future of the Commonwealth of Nations (2010–); member of the UNAIDS Reference Group on HIV and Human Rights (2003–). One-time member of the WHO Global Commission on AIDS (1988–92) and President of the International Commission of Jurists (1995–98). Former Justice of the High Court of Australia (1996–2009).

voices of sex workers, their clients, supporters, doctors, families and friends. In the context of the global epidemic of HIV, advances are not produced by imposing rules from the top down. Good results require attention to the voices of those who are on the front line.

In this conference, during the presentation by Dame Carol Kidu (PNG), the sole woman member of the Parliament of Papua New Guinea, in a dramatic moment, the participants from that country cried out one by one: 'Who will speak for us?'. In the face of restrictive rules of morality, who will speak for the sex workers? Who will speak for their safety and power to control their own bodies? Who will speak for the repeal of ineffective laws? Who will speak for a true public morality that respects the conduct of these workers and their need to be empowered, so as to avoid transmission of the virus to them and their families and clients?

From the beginning of the global response to HIV, the agencies of the United Nations, have reached out to engage with the communities most affected. Great leadership was given here by the inaugural director of the Global Programme on AIDS (GPA) of the World Health Organization (WHO), Dr Jonathan Mann. He always insisted upon participation of speakers for the vulnerable and those at greatest risk. He always involved homosexuals and people living with HIV and AIDS. So have his successors at UNAIDS, Peter Piot and Michel Sidibé. We must continue to draw strength from their instruction and example. Progress is made not by speaking *at* people, but by talking *with* them. And listening and learning from them. Who will speak for the voiceless? We must all do so.

2. Law as friend not foe

The second commandment is that we must maximise the capacity of law to be of help in dealing with HIV; and minimise the obstructive and damaging effects of the law.

Law can be of support in the struggle of HIV and AIDS. Anti-discrimination laws, and giving full effect to constitutional protections of equality, privacy and citizenship can reduce the operative barriers of law to spreading the messages about safer conduct and self-protection. Law can remove the sources of stigma. Law can encourage a new, supportive public morality. It can do this through wise legislative action and informed judicial opinions, such as the recent decision of the Delhi High Court in India in *Naz Foundation v Union of India*.² The corrosive effect of stigma upon the outreach of public health campaigns was recounted to this conference by a male sex worker from India. Likewise, other participants have explained the damaging consequences of naming sex workers in the media, and thereby casting shame and stigma upon them and their families and children.

Law does not have to be part of the problem. It can be part of the solution.

3. Law is not enough

The third commandment is that we must all appreciate that reforming the letter of the law is not itself enough to change social attitudes.

Dr Cheryl Overs (Australia) explained to the conference the way policy and societal conduct can impede the safer conduct messages, although they may have no foundation in the letter of law. Harassing sex workers because they do not have the 'right papers' is one of many oppressive strategies that impact on the global struggle against HIV. Several participants described oppressive police conduct, extending even to instances of rape and other unconsensual sexual liberties imposed on arrested sex workers before they are freed. One lesson of the conference is the importance of educating police and public officials everywhere in the realities of HIV. And how it is in the interests of everyone in society that sex workers should be in empowered to insist upon the use of condoms, especially for every insertive sexual act.

4. Dialogue amongst sex workers

The fourth commandment is that sex workers must themselves engage as part of a 'team effort' to respond to the spread of HIV. Dame Carol Kidu cautioned that they should avoid attacking each other or other vulnerable groups. To raise their voices in society, they must make common ground with supporters and with other vulnerable communities, including men who have sex with men (MSM) and injecting drug users (IDUs).

Sex workers must also engage, individually and through their representative associations, with police and other public officials. They must explain that one consequence of utilising the presence of condoms as evidence that an accused person is engaged in prohibited sex work will be the temptation not to have condoms on the person. This will lead on to unacceptable risks of unprotected sexual conduct. This, in turn, can only escalate the spread of HIV to the great danger not only of sex workers and their families but also their clients, the clients' sexual partners and other groups in society.

Likewise, closing brothels will not generally eliminate the existence of paid sex work. Such work has been present in virtually all societies, ancient and modern, for millennia. If sex workers are driven from brothels, where they may be empowered and supported in safer sex practices, the result will often be their transfer to work on the streets, in riskier and often dangerous environments and with less prospect of self and client protection.

5. Limiting over-reach of trafficking law

There can be no contest about the unacceptable character of international human trafficking for sex or other work. In many lands, particularly in developing countries, documented evidence demonstrates many cases where young people (mostly

²[2009] 4 *Law Reports of the Commonwealth* 838 (Shah CJ and Muralidhar J).

girls) are sold into a modern form of slavery and forced against their will to engage in sex work. The trans-national features of such activity have resulted in a series of international treaties designed to suppress such wrongs³ and the enactment of local laws designed to give effect to such international treaties and to suppress forms of sexual servitude akin to slavery.⁴

Sex workers, at this conference and elsewhere, did not contest the operation of such conventions, as such, and the local laws that give them effect. Indeed, their insistence upon their own adult rights to self-determination, work safety and protection are entirely consistent with the provision of such rights to those who are involuntarily, or at an immature age, forced into work in the sex or other industries or into debt bondage or activities akin to slavery.

Still, there are groups in the world today who seek to press such international and local laws beyond their legitimate and proper reach. For some governments and people, the very notion of voluntary sex work is intolerable. They assert that it is a contradiction in terms. In part, this attitude derives from conceptions of sexual morality grounded in religious understandings. Many religions deny the entitlement, even of an adult individual, acting in private, to have sexual contact outside the bonds of heterosexual marriage. Today, this attitude to the expression of human sexuality is no longer universally supported. Diverse opinions exist, including amongst adherents to all the world's religious traditions. The same prohibition on adult consensual sex work formerly (and still in 80 countries) prohibited homosexual activities because, by definition, this occurred outside hetero-normative married sexual relations.

Some feminist advocates denounce any attempts to decriminalise (still more to legalise) the consenting adult activities of commercial sex workers. They insist on adoption of the so-called 'Swedish model' to criminalise the clients of sex workers on the footing that, necessarily, they denigrate the human dignity of women. Such attitudes too are not universal. Moreover, based on the centuries of human experience, they appear futile, disproportionate and inconsistent with individual control over adult, private, intimate conduct.

Amongst some sex workers, attempts are sometimes made to avoid this debate by defining 'sex work' as restricted to *legal* activities falling outside international and national laws. Still, as Meena Saraswathi Sesu (General Secretary of Sangram in India) has pointed out, international agencies and some national governments with large influence, frequently attempt to utilise the treaties and laws on trafficking to suppress *every* form of

adult, voluntary, consenting sex work. To the extent that this is done or attempted, it constitutes an over-reach in the operation of international treaty and local law.⁵ As a matter of law, public policy, HIV containment and respect for individual human rights, it is essential to insist on confining these treaty and local laws against human trafficking to their proper sphere.

That sphere rests upon protection against unconsensual and under-age involvement in the sex industry. It does not, as such, demand total suppression or elimination of that industry, contrary to the informed choices exercised by adult sex workers, their clients and others. The over-reach of such laws is not only oppressive and itself contrary to fundamental human rights. It is doomed to fail. It is likely to damage the legitimate but specific operation of anti-trafficking measures. Those who want to turn anti-trafficking laws and treaties into a moral or religious crusade must be bluntly told that this is not sustained by the language of the treaties, international and national law, universal human rights and, most importantly, the strategies essential to contain the HIV epidemic.

6. Re-visiting international law

Sometimes the vagueness and ambiguity of law can be a cause of difficulties for those who are subject to it. That is because of the different religions, cultures and traditions that exist in the world. Ambiguity is even more common in international than in national law. To secure agreement over the language of a treaty, it is often necessary to resort to vague and ambiguous language. Whilst this sometimes secures a step forward in the achievement of understandings of universal human rights, it can also lead to the use of international law for unintended purposes. Or to pressing treaties into use for particular agendas.

In the matter of human sexuality, there is plenty of evidence, including in international practice, to demonstrate the over-reach of the law. Putting it bluntly, law has quite frequently been invoked to suppress adult, private, consenting sexual activity in the fields of:

- Commercial sex work;
- Homosexual adult activity;
- Trans-sexual identity;
- Access to erotic materials.

The truth is that some religions, and some others in society, are extremely uncomfortable with the realities and variety of human sexual expression. Proportionality in the role of the law

³Convention to Suppress the Slave Trade and Slavery (1926 Slavery Convention) (1927) 212 UNTS 17; the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices akin to Slavery* (the 1956 Supplementary Convention) (1958) 226 UNTS 3; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations *Convention Against Trans-national Organised Crime* (Palerio Protocol, 2000), Arts.3(a), (b), (c), 5.1. The *Palerio Protocol* was adopted in 2000 at Palerio, Italy. It entered into force on 25 December 2003. By October 2009, it had been signed by 117 countries and there were 133 parties. The United Nations Office on Drugs & Crime (UNODC) is responsible for implementing the Protocol. Signature commits ratifying states to prevent and combat trafficking in persons and that expression is defined by reference to forms of 'coercion' and 'sexual exploitation'. It renders 'the consent of a victim of trafficking in persons to the intended exploitation ... irrelevant where any of the [forbidden] means ... have been used'. But it is not, in terms, an international prohibition against all forms of sex work (prostitution).

⁴See e.g. *Criminal Code Amendment (Slavery and Sexual Servitude) Act* 1999 (Aust); *Crimes Act* 1961 (NZ), s98(1).

⁵See e.g. *The Queen v Wei Tang* (2008) 237 *Commonwealth Law Reports* 1 at 28–29 [66]–[70]. See also Sandhya Rao and Catu Sluggett, *Who Stole the Tarts? Sex Work and Human Rights*, Center for Advocacy on Stigma and Marginalisation (CASAM), September 1, 2009.

and regulation by society, has increasingly emphasised the legitimacy of demanding limitations on the excessive intrusions of the state upon such matters. As Pierre Trudeau, one-time Prime Minister of Canada, put it: 'The state has no place in the bedrooms of the nation'.

Where the bedrooms are those of adults who consent together in their expressive sexual conduct, there was great truth in Trudeau's advice.

In international law, the *International Covenant on Civil and Political Rights* (ICCPR)⁶ provides many restrictions on involuntary slavery, servitude or unlawful imprisonment.⁷ Nevertheless, it insists that 'everyone shall have the right to recognition everywhere as a person before the law'.⁸ And that requirement, self-evidently, extends to sex workers.

This provision has to be reconciled with measures in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).⁹ By that Convention, it is provided in Art.6 that:

'States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'.

This provision does not address similar activities involving men or children. Nor does it define 'traffic', 'exploitation' or 'prostitution'. The last word, prostitution, in particular, is burdened with many negative connotations dating back to biblical times.

There is a risk that provisions such as Art.6 of CEDAW and the definition of 'trafficking' in the *Polermo Protocol on Human Trafficking* will be utilised to promote national legal measures contrary to the informed consenting choices of adults, acting in private. It is such over-reaching measures that organisations representing sex workers seek to prevent. Once international treaties are adopted, it is often difficult to recapture the consensus necessary to produce amendments deemed necessary to limit their unexpected over-reach. Nevertheless, in international practice, steps can be taken to restrict the excessive operation of international treaties, viewed according to their letter.

Thus, the UNDP Global Commission on HIV and the Law now has before it consideration of the interpretation and application of the TRIPS Agreement as relevant to the patenting of pharmaceutical drugs necessary to an effective HIV response. Likewise, UNODC and other agencies involved in the implementation of Art.6 of CEDAW and the *Polermo Protocol* need to coordinate their policies. Such policies should be rendered consistent with the global strategies to respond effectively to the HIV epidemic, as policies are promoted by UNAIDS, UNDP, UNFPA and other agencies. This can and should be done.

Attempts to divert international treaty law into a total suppression of commercial sex work (prostitution) would not only amount to a distortion of the language and true purpose of such treaties. It would constitute a particularly damaging development for the effectiveness of the global HIV response.

7. Speaking frankly with religion

As this conference has shown, people, including sex workers and their friends, feel sensitive and protective of their own religious traditions. The world's religions contribute in many ways to understandings of public morality as such understandings exist in most countries. Religions commonly have, at their core, variations of the 'golden rule'. This requires respect and love for one another. That consideration also underpins the advance in understanding of the diversity of universal human rights.

Sometimes, in practical terms, religions claim the 'high moral ground'. They oppose legal and other reforms, even when these are designed to support the HIV response. Those engaged in the HIV response must open a dialogue with religious leaders. The right to life and to access to essential health care is normally an avenue that can be deployed to promote religious tolerance and acceptance of diverse views in society, including over sexual matters. In the golden rule and in saving and caring for human lives, much common ground can be found to help promote effective HIV strategies.

In Australia, despite the formal positions of the Roman Catholic Church on sexual morality, great practical leadership has been provided by particular religious orders in supporting the treatment of people living with HIV; in outreach to CSWs [commercial sex workers]; and in establishing and maintaining programmes for the protection of IDUs. The seventh commandment requires an outreach to, and dialogue with, religion.

8. Utilising courts and parliaments

Whilst most of the important measures relevant to proscribed sexual conduct will derive from elected legislatures, courts and judges also have important parts to play in upholding sensible laws and invalidating laws and policies that exceed their proper bounds and restrict effective AIDS strategies.

Thus, in India, the *Naz Foundation Case*¹⁰ limited the operation of the anti-homosexual provisions of s377 of the *Indian Penal Code* 1860 so that it would apply only to minors. In Bangladesh, the Supreme Court, in the absence of any prohibitory legislation, held that its duty was to protect the rights of sex workers, as citizens, to maintain their livelihood and their right to work without being unreasonably harassed by the local administration.¹¹

A few days before this meeting convened in Pattaya, a Canadian judge of the Superior Court in Ontario held that

⁶Entered into force 23 March 1976, Art.6; 999 UNTS 171.

⁷ICCPR, Arts.8, 11.

⁸ICCPR, Art.16.

⁹Entered into force 3 September 1981.

¹⁰[2009] 4 *Law Reports of the Commonwealth* 838.

¹¹*BSEHR v Bangladesh* (2001) 53 *Dhaka Law Reports* 1 (Karim J).

three provisions of the *Criminal Code of Canada*, penalising aspects of prostitution, were contrary to the requirements of the *Canadian Charter of Rights and Freedoms* and therefore invalid.¹² Even those who criticised that decision usually acknowledged that 'parliament must ensure prostitutes are protected from harm'.¹³ In Pakistan, the Supreme Court has defended the right to equal treatment of trans-gender citizens.

Sometimes, where local politics or institutional religious pressures make it difficult or impossible for legislators to agree on enactments deemed necessary for an effective HIV response, courts may be able to afford wise decisions. The main importance of the *Naz Foundation Case* in India may well lie in the 41 countries of the 54 member organisation of the Commonwealth of Nations which still criminalise consenting adult private homosexual acts. Because of the commonality of the constitutional protections invoked in *Naz* by the Delhi High Court, its reasoning may well be applicable in many other lands where legislative steps to repeal such laws have so far failed to achieve success. We should be alert to these possibilities.

9. Vigilance against new oppressions

Throughout this conference, attention has been drawn to risky new actions that may, however well intentioned, serve only to oppress adult sex workers and their clients. Amongst the laws mentioned in debates have been:

- The introduction of mandatory testing regimes, without proper guarantees of follow-up and access to essential therapies and without consenting participation of those who are tested;
- The introduction and enforcement of new criminal and regulatory laws against those who indirectly benefit from sex work, such as landlords or related businesses; and
- The revived efforts in some countries to suppress erotic material. The internet itself an illustration of the seemingly irrepressible desire of human beings to have access to such material as an attribute of their adult sexual expression. Whilst particular forms and contents of such erotica may warrant special attention and regulation, the access of adults to adult images appears a fairly universal, and generally harmless desire. What goes on in peoples' heads is ordinarily their own business. For that reason, attempts by the state to intrude into and control adult fantasies will normally fail. Attempts to suppress consenting adult private sexual conduct are rarely effective, certainly according to the letter of the law. And this fact gives rise to potential corruption, oppression and impediments to an effective response to HIV.

10. Universal rights for sex workers

This brings me to the last commandment. Universal human rights extend to all people. Sex workers are not exempted or excluded. They enjoy all the rights guaranteed to human beings

by international law. Those rights include 'the right to work' which is defined¹⁴ to include 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. See also *Universal Declaration of Human Rights*, Art.23.1.

Likewise, workers are guaranteed by international treaty law the 'enjoyment of just and favourable conditions of work'. These include 'safe and healthy working conditions'.¹⁵ It is the duty of the law in every nation to support the achievement of these global attributes belonging to every human being everywhere. And this includes sex workers.¹⁶

Protecting true global values

Whilst this conference was proceeding in Pattaya, half way across in the world in Chile, a group of underground miners, trapped for many weeks, were being rescued from what, in earlier times, would have been an agonising death of being buried alive. Millions of people around the world were united in a sense of human unity with the trapped men and with the effort of Chile, supported by friendly countries, to rescue them and to uphold their basic rights to live, work and find happiness.

There would be many in this world who would be critical of the men for accepting their often dirty and sometimes dangerous work. Yet that was their choice. On rescue, one of them explained that he had voluntarily undertaken the work to secure higher wages and to support his loved ones. He planned to return to it. It was the only work he knew. Many would question his choice. But the choice belonged to him. His motivation was by no means unusual.

Around the rescue of these men, the world found, for a few days and hours, common aspirations, hopes and dreams. There must likewise be a common cause in the global response to HIV and to the assertion of the right of all, with no exceptions, to respect for their universal human rights.

When we leave Pattaya to return to our homes and families, and are far away, we will remember the international experts who came together to examine the issues of HIV and sex work. We will recall the learned papers, the powerpoint presentations, the brave statements and the scientific analysis.

But above all, we will remember the energy of the sex workers in their 'concert with attitude'. Their insistence on their own dignity and rights. And the importance of upholding that insistence so as to provide them with respect and also to help contain the HIV epidemic amongst them, their families and clients.

To the cries from this conference 'who will speak for the voiceless?', the answer comes back. We will. We will convey their message from Pattaya. We will insist on human rights for all, including for sex workers. Nothing else is acceptable as a matter of a true public morality. Nothing else is sensible from the standpoint of responding to the urgent, ongoing global challenge of HIV and AIDS.

¹²*Bedford v Canada (Attorney-General)* [2010] OJ No. 4057 (Susan Himel J). The decision is under appeal and has attracted a mixed reaction. *Globe & Mail* 30 September 2010, pA18 ('The Weighing of Complex Harms'). See also *Globe & Mail*, 2 October 2010, f9 ('Forget Legalisation – Just Turn a Blind Eye').

¹³*Pacific Newspaper Group*, Editorial Page, 1 October 2010, pA14.

¹⁴*International Covenant on Economic, Social and Cultural Rights*, ICESCR, Art.6.1; 993 UNTS 14531.

¹⁵ICESCR, Arts.7 and 7(b).

¹⁶Emily Maguire, 'Body Politic – Scarlet Alliance (Australian Sex Workers Association)', *The Monthly* (Australia), September 2010, p36.