



## ANALYSIS OF THE SEXUAL OFFENCES ACT, 2021 AND ITS IMPLICATIONS ON THE HUMAN RIGHTS OF CRIMINALISED MINORITIES

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### 1. Introduction

On Monday, 3<sup>rd</sup> May 2021, the Parliament of Uganda enacted the Sexual Offences Act, 2021, which is now awaiting presidential assent. The Bill for the Act was first presented as the Sexual Offences Bill, 2015, published in the Uganda Gazette on 11<sup>th</sup> December 2015.<sup>1</sup> It was tabled in Parliament on 14<sup>th</sup> April 2016 as a Private Member's Bill by National Female Youth MP, Monica Amoding under the umbrella of the

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<sup>1</sup> The Sexual Offences Bill, No. 35 of 2015, Bills Supplement No. 19, Bills Supplement to the Uganda Gazette, No. 73, Volume CVIII, 11 December 2015.

Uganda Women's Parliamentary Association (UWOPA).<sup>2</sup> In 2018, public consultations were undertaken and the bill fundamentally changed to reflect the various views gathered from the public consultations. The Bill was accordingly regazetted on 18<sup>th</sup> October 2019 as the Sexual Offences Bill, 2019, in accordance with the direction of the Deputy Speaker of Parliament. This was the fourth attempt at such a law, which was first proposed as the Sexual Offences (Miscellaneous Amendments) Bill, 2000, which was not enacted. The Sexual Offences Bill, 2011, was gazetted over 10 years later on 14<sup>th</sup> January 2021 as a Private Member's Bill, although it was not enacted then. This was followed by the tabling of the Sexual Offences Bill, 2015, which later metamorphosed into the Sexual Offences Bill, 2019 (hereinafter the Bill). It is the Sexual Offences Bill, 2019 that is now the Sexual Offences Act, 2021 (the Act).

According to its long title, it is 'An Act to revise the law on sexual offences for the effectual prevention of sexual violence; to provide for enhanced punishment for sexual offenders; to provide for the protection of victims during trial of sexual offences; to provide for extra territorial application of the law on sexual offences, consequentially repeal some provisions of the Penal Code Act, Cap. 120 and for other related matters.'

The Bill for the Act was considered by the Sectoral Committee on Legal and Parliamentary Affairs, which issued a detailed report in February 2021 recommending amendments to many provisions of the Act and introducing many new provisions.<sup>3</sup> This Committee Report was considered in plenary on Monday 3<sup>rd</sup> May 2021, and the Bill went through both the second and third readings and was enacted as an Act of Parliament. The Committee Report's recommendations were adopted with only a few and largely non substantive changes. The Act is thus largely an amalgam of the provisions of the Sexual Offences Bill, 2019, as modified by all the recommendations from the Legal and Parliamentary Affairs Committee. Although the official version of the Act is not yet out, HRAPF has based on the Sexual Offences Bill, 2019, the Sectoral committee report and an official video recording of what transpired in Parliament during the second and third readings to develop an unofficial version of the Act, upon which this analysis is based.

The Act does not specifically target LGBT persons, sex workers or persons living with HIV since its aim is to consolidate criminal provisions on sexual offences generally. However, many of its provisions directly affected these criminalised and marginalised groups. This Analysis focuses on the various sections of the Act in as far as they can be ascertained at this stage, in line with international and constitutional standards on human rights especially as regards criminalised and marginalised minorities - LGBT persons, sex workers and People Living with HIV.

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<sup>2</sup>New Sexual Offences Bill Tabled in Parliament' *Uganda Radio Network* 16 April 2016, Available at <http://ugandaradionetwork.com/story/new-sexual-offences-bill-tabled-in-parliament> (accessed 27 April 2016).

<sup>3</sup> See Parliament of Uganda 'Report of the sectoral committee on Legal and Parliamentary Affairs on the Sexual Offences Bill, 2019' February 2021 (on file with HRAPF).

## 2. Analysis of provisions directly affecting LGBTI persons, sex workers and persons living with HIV/AIDS

All the provisions in the Act affect criminalised and marginalised minorities, just like they affect other persons and groups of persons. There are however particular provisions that affect LGBT persons, sex workers and persons living with HIV directly. These provisions are discussed together with their implications, having regard to Uganda's current legal, social and human rights framework in relation to sexual minorities. It is important to note that the 1995 Constitution of Uganda is the supreme law in the country from which all laws and policies should flow.

### 2.1 Definition of a sexual act

Presumptive Section 1 of the Act (Clause 1 of the Bill) contains the definition section. The Committee report recommended, which recommendation was adopted, that a sexual act be defined as the penetration, however slight, of a person's sexual organ by another person's sexual organ, a departure from the 2019 version of the Bill wherein a sexual act was defined as:

- a) The penetration of a person's sexual organ, mouth or anus by a person's or an animal's sexual organ or object;
- b) contact or stimulation of a person's sexual organ with another person's or animal's sexual organ, or object; or
- c) insertion of a person's or animal's body part or any object into the sexual organ, anus or mouth of another person;

The original definition of a sexual act clearly took into account international standards on the definition of sexual acts, including the use of objects and oral sex, whereas the current definition limits a sexual act to only the traditional penile-vaginal penetrative sex. This definition is unnecessarily limited and is bound to deny protection of the law to victims of rape where the perpetrators' actions do not fit this pattern. This is inconsistent with Article 21(1)<sup>4</sup> that guarantees the equal protection of the law to all persons.

The justification for this change by the Committee was that the inclusion of references to objects and body parts such as the mouth and anus are already covered in the definition of unnatural offences. This is partly not accurate as elements of oral sex are completely ignored throughout the Act. This omission is bound to expose vulnerable persons to sexual assaults that fall outside the ambit of the seemingly acceptable penile-vaginal penetrative sex, who would then be protected only by provisions on sexual assault and unnatural offences, all of which carry a much lesser punishment than "traditional rape".

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<sup>4</sup> The Constitution of Uganda, 1995

In addition, this definition of a sexual act absolutely excludes men who have sex with men and women who have sex with women from protection against rape and sexual violence, which amounts to discrimination based on sex and sexual orientation.

## 2.2 Definition of rape

The Act defines rape in its presumed section 2 (originally clause 2 of the Bill) as performing a sexual act on a person without that other person's consent, or when that other person is incapable of consenting. This therefore effectively means that rape, as defined by the bill, is the penetration of a person's sexual organ by another person's sexual organ without the first person's consent, that is the penetration of one's vagina by another's penis without their consent, or, inversely (and somewhat less likely) the penetration of a person's penis by another person's penis or vagina without their consent, since sexual organs are also defined by the act to mean only a vagina and/or a penis. This section, therefore, despite its apparent neutrality, effectively seeks to define rape, in much the same way that section 123 of the Penal Code Act, Cap 120 defines it, as an offence that can only affect females, which is both discriminatory and factually misleading.

This definition is also restrictive and negates the possibility of forceful, unconsented penetration of the other body parts such as the mouth and anus by a sexual organ or object. The unconsented penetration of a sexual organ or other body parts by an object amounts to rape<sup>5</sup>. The only redress available for such a victim would be if the offender is charged with committing an unnatural offence or sexual assault, offences that carry a lesser punishment of 10 years than the offence committed which prescribes life imprisonment. This is inconsistent with the equal protection of all persons by the law.<sup>6</sup> In addition, this punishment does not tally with the actual offence committed, which is rape. This defeats the principle that the severity of the crime determines the severity of the punishment issued.<sup>7</sup>

In addition, the clause on rape does not consider factors such as the withdrawal of consent previously given at any stage, thus essentially denying victims of sexual violence redress if they consented to any part of the act of which they seek to complain. The removal of clause 36, which provided for the withdrawal of consent, should have been cured by clearly stipulating the same in the section defining the

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<sup>5</sup> Christopher W. Mullins 'We are going to rape you and taste Tutsi women': Rape During the 1994 Rwandan Genocide' *Center for the Study of Crime, Delinquency and Corrections* <https://www.researchgate.net/publication/228214122>...

<sup>6</sup> n 4 above Article 21 (1)

<sup>7</sup> Mirko Bagaric, 'The Punishment Should Fit the Crime - Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing' (2014)2 *San Diego Law Review*, Vol. 51 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2661913](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661913)

See Article 28 (8) 'No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.'

offence of rape to protect victims of sexual abuse. The removal of the right to withdraw consent during a sexual act effectively subjects the person seeking to withdraw consent to acts in which they no longer wish to participate, thus violating their dignity and their right to freedom from cruel and inhumane treatment.<sup>8</sup>

Finally, it is noteworthy that, unlike the 2016 version of the bill, the Act does not recognise marital rape as a possibility or indeed as an offence from which people ought to be protected. The bill is discriminatory as it does not provide victims of rape who are married to their perpetrators with equal protection of the law. Considering the heightened vulnerability of women and marginalised persons within the domestic setting, the prevalence of domestic violence in Uganda<sup>9</sup> and the intricacies involved in escaping from an abusive spouse, marital rape ought to be treated and punished with the same (if not heightened) sense of seriousness as other rape cases.

### 2.3 HIV positive status as an aggravating factor for rape

The Act provides in its presumptive section 3 (originally clause 3 of the Bill) for the offence of aggravated rape, with one of the aggravating factors being the HIV status of the perpetrator. The clause provides for the death penalty in cases where the court is satisfied that there were aggravating factors in the commission of rape. In determining the existence of such circumstances, the Act requires the court to take into account whether or not the offender is infected with HIV or suffering from AIDS. The creation of different punishments for people living with HIV/AIDS is discriminatory and against public policy. It entrenches the stigma and discrimination that PLWHIV already face<sup>10</sup>. In most cases where the presence of HIV/AIDS is an aggravating factor, lack of knowledge of one's HIV status can be used as a defence, and this discourages people from testing and accessing treatment in a bid to escape criminal liability, which exacerbates the HIV/AIDS scourge.

This clause also provides for the mandatory testing of perpetrators of rape to ascertain their "health status, including HIV status", a thinly veiled attempt to single out and victimise only the HIV-positive persons that come into conflict with the law in such circumstances. The forced HIV testing of persons charged with rape is an affront to their bodily integrity and subjects the persons living with HIV to cruel and

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<sup>8</sup> n 4, Article 24

<sup>9</sup> According to the Uganda Demographic and Health Survey of 2011, 6 out of 10 women and 4 out of 10 men between the ages of 15 and 49 have experienced physical, emotional or sexual violence at the hands of a spouse. Uganda Bureau of Statistics 'Uganda Demographic and Health Survey 2011' (2012)

<sup>10</sup> HRAPF 'Submissions To The Legal And Parliamentary Affairs Committee Of Parliament On Clauses 3 And 11 Of The Sexual Offences Bill, 2019' 12 June 2020 and Chapter Four Written Memorandum on the sexual offences Bill'

inhumane treatment<sup>11</sup>. While the international standard requires that a person can only be subjected to medical checks only with their free consent<sup>12</sup>. The provision does not make room for consent but rather makes it mandatory for every person charged to be subjected to medical examination, consent is rendered irrelevant.

In addition, this clause also provides that where the perpetrator of the offence of rape is a relative of the victim, the offence shall be aggravated and the perpetrator shall be liable to suffer death, a clause that is problematic in so far as it is vague and does not clearly define what amounts to a relative for purposes of the section, an omission that is particularly significant in light of the penalty proposed for the offence.

#### **2.4 The differential punishments for sexual assault, indecent assault and indecent exposure when there are other persons are present**

Presumptive section 5 replaced clause 5 on sexual assault while presumptive sections 6 and 7 are new provisions recommended by the Committee.

Presumptive section 5 creates the offence of sexual assault, which is defined as intentionally and without consent touching or coming into direct or indirect contact with the sexual organ, breasts, buttocks or thighs of any person using any part of their body, any part of another person's body or any object, including any part of the body of an animal.

Presumptive section 6 provides for Indecent assault, which is defined to mean uttering any word, making any sound or gesture or exhibiting any object to another person with the intent to insult the modesty of that other person.

Presumptive section 7 creates the offence of indecent exposure which is defined to mean intruding on the privacy of a person by exposing or displaying that person's sexual organs, breasts, thighs or buttocks, or exposing one's own sexual organ, breasts, thighs or buttocks to another person.

These provisions are welcome in the sense that they cover forms of sexual abuse that may not necessarily extend to rape. However, for each of these offences, there is a separate punishment for the offence itself, and then a higher one for committing the offence in the presence of the victim's spouse, child or other relative. This implies that the offences are not so grave when committed in private as when witnessed, thus potentially emphasising the prevailing culture of further blaming victims of sexual violence where the offence is not witnessed. In addition, it tends to deny the agency of the victim of the offence by insinuating that the offence is worse when it offends a person other than the victim. There is no need to draw this distinction as it has negative connotations, particularly for women and children.

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<sup>11</sup> N 8 above

<sup>12</sup> International Covenant on Civil and Political Rights Article 7

In addition, the definition of indecent exposure as it refers to the exposure of one's own organs is insufficient to cover persons whose privacy may be infringed on by the unauthorised publication/ distribution of photos of their sexual organs, breasts, thighs or buttocks in a recent trend of "revenge pornography", wherein former lovers of persons release pictures depicting their nude forms as a form of punishment for ending their relationships or other slights suffered. It is necessary to make it clear that a person whose privacy is thus infringed on shall not be prosecuted, and shall be entitled to compensation from the perpetrator.

## 2.5 Indecent Communications

Presumptive section 8 of the Act (originally clause 6 of the Bill) prohibits indecent communications without making provision for consent. It provides that 'A person who by whatever means transmits, transfers, sends, forwards, directs material of a sexual nature to another person commits an offence ...' Material of sexual nature is defined to include sexually suggestive conversations, texts, pictures, videos, objects, or written materials.

The failure of this section to consider elements of consent or the nature of the relationship between the two parties implies that any sharing of materials, even between married persons or persons already in a sexual relationship, is also prohibited. This is undue interference with persons' freedom of expression and subjects persons to undue interference with their correspondence, thus interfering with the right to privacy.<sup>13</sup> It remains to be seen how this will be enforced without the requirement of the authorities actually invading the privacy of the individual.

Due to the stigma attached to same-sex conduct in Uganda, if such communications are between consenting adults of the same-sex, that would attract more condemnation, persecution and arrest than it would for persons of the opposite sex who are in a relationship or who have consented to the materials being sent, thus effectively criminalising more than just sexual acts between persons of the same sex, but also close relationships between persons of the same sex. The law ought to have made provision for consent in this case and only criminalised non-consensual and unwanted communications. This section ought to have been drafted in line with the definitions of offensive communication and cyber harassment in the Computer Misuse Act, which emphasise the element of consent.

## 2.6 Detention with sexual intent

Presumptive section 10 of the Act (originally clause 8 of the Bill) defines the offence of detaining a person with the intention of performing a sexual act on them, and provides for a penalty of imprisonment for up to 7 years.

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<sup>13</sup> n 4 Article 27 (2)

However, under Presumptive section 10(3), the consent of a person in detention to a sexual act shall not be a defence to a charge under subsection (1). This does not take into account the concept of a person detained or otherwise restrained with sexual intent with their consent or at their request. This should be rectified to ensure that persons who consent to such a practice are also catered for and their partners not unnecessarily victimised. In effect, this violates a person's right to bodily integrity, extends to how they use their body for pleasure, however obtained.

## 2.7 Unnatural offences

Presumptive Section 13 of the Act (originally clause 11 of the Bill) criminalises 'carnal knowledge against the order of nature' and defines it thus:

*1) A person who-*  
*(a) performs a sexual act with another person contrary to the order of nature;*  
*or*  
*(b) engages in a sexual act with an animal;*  
*commits an offence and is liable on conviction, to imprisonment for ten years.]*

*(2) For purposes of this section-*  
*(a) a person shall be taken to have performed a sexual act with another person contrary to the order of nature if that person-*  
*(i) penetrates another person's anus with his or her sexual organ;*  
*(ii) allows another person to penetrate his or her anus with that other person's sexual organ;*  
*(iii) penetrates or allows another person to penetrate his or her or that other person's sexual organ or anus with an object or*  
*(iv) performs a sexual act with a person of the same gender or does any of the acts prohibited in sub paragraphs (i), (ii) and (iii) with a person of the same gender.*  
*(b) a person shall be taken to have engaged in a sexual act with an animal if that person penetrates an animal's sexual organ or anus with his or her sexual organ.*  
*(3) A person who attempts to commit the offence of unnatural offence commits a felony and is liable, on conviction, to imprisonment for five years.*

This provision seeks to replace section 145 of the Penal which criminalises having carnal knowledge against the order of nature.

On a positive note, the provision reduces the punishment for unnatural offences from life imprisonment to ten years imprisonment. Although this does not eliminate the criminalisation, it makes the offence less serious - unlike before when law enforcement officials regarded it as a very serious offence akin to rape or defilement or murder because it carried the maximum penalty of life imprisonment. This may help to reduce some of the stigma attached to such offences. It also removes the ambiguity as to what is exactly criminalised since the conduct to be criminalised is



clearly defined. This may help in reducing the number of arrests of LGBT persons practices such as simply for walking while holding hands, or cohabiting. The definition also makes the provision to at least theoretically apply to all as the acts described do clearly apply to same-sex sexual practices and sexual practices between persons of opposite sex that are not limited to penile vaginal penetration, such as anal sex and the use of sex toys.

However, on a negative note, the purported non-discriminatory nature of the act is largely theoretical as the discussions in Parliament show that the targets of the provision are homosexuals. The language on anal sex also makes anal examinations an acceptable way of conducting investigations, despite the fact that they clearly amount to inhuman and degrading treatment and carry no actual evidentiary value. We expect to see an increment in such examinations. So despite the pretensions around equality and non-discrimination, the provision targets a particular group of minorities for persecution, and therefore violates article 21 of Uganda's Constitution, which provides for the right to equality and freedom from discrimination. Even though the provisions of the Article do not expressly mention sexual orientation, the same is included on the basis of sex which the Human Rights Committee in the case of *Toonen v. Australia*, observed "the Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."<sup>14</sup>. Therefore, in passing a law targeting persons based on their sexual orientation, the same is inconsistent with Article 21 (2) of the Constitution.

Secondly, by extending the criminalisation to cover anal sex specifically, oral sex and the use of sex toys, the state is clearly unduly interfering in private sexual affairs of all persons by dictating the acceptable sex practices for citizens. This violates the right to privacy, which is protected under article 27 of the Constitution of the Republic of Uganda.

The provision also maintains the conflation between same-sex relations and bestiality, which compares same-sex conduct between consenting adults to sex with animals, which are incapable of consent.

It is HRAPF's position that sexual acts between consenting adults should not be criminalised. The criminalisation of these acts contravenes established international and regional human rights standards, as well as the Constitution of the Republic of Uganda in that it unfairly limits the fundamental rights of people who are lesbian, gay, bisexual, transgender, and intersex (LGBTI) and denies them equal protection under the law owing to the harsh differential treatment they receive based on their

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<sup>14</sup> Communication 488/1992, *Toonen v. Australia*, Human Rights Committee U.N. Doc CCPR/C/50/D/488/1992 (1994). <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (accessed on 25th January 2021).

sexual orientation and the criminalisation of the same.<sup>15</sup>

While there is no express provision in the Ugandan Constitution protecting LGBTI rights, there are basic protections that are embedded in the Constitution and in other laws of Uganda, which protect the rights of all persons. All rights in the Bill of Rights apply to LGBTI persons the same way they apply to all persons in Uganda.<sup>16</sup> Uganda has furthermore ratified different international and regional human rights instruments, which provide for protection of all rights of persons without discrimination. In particular, the principle of equality is espoused in Article 1 of the Universal Declaration of Human Rights (UDHR), Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 2 of the African Charter on Human and Peoples' Rights (ACHPR). Other rights of LGBTI persons which are protected under both international and domestic law include the right to liberty; the right to freedom from inhuman and degrading treatment or punishment; the right to life; the right to privacy and the right to dignity.

Criminalisation of same-sex conduct has the effect of driving LGBTI persons to the margins of society, denying them access to opportunities and services and rendering them susceptible to abuse and discrimination from the majority groups in society. Furthermore, the process of arresting, charging and prosecuting suspected transgressors of the same-sex conduct provisions in Uganda frequently violates the basic rights of the person. Usually the arrests are not premised on a reasonable suspicion as to the commission of an offence; rather, they are due to the external appearance of the person, a tip off by a third party, an attempt at mob justice by the community, or by entrapment by the police.<sup>17</sup> The criminal law related to same-sex conduct is utilised in ways that diverge from simple enforcement of the provisions and is instead used to harass, intimidate and dehumanise LGBTI persons. The legal process does not normally proceed beyond charges and arraignment and therefore the accused persons are made to undergo a humiliating experience that is in reality malicious prosecution since the chances of sustaining the charges are almost non-existent. The rights typically violated in the process include the right to liberty, right to equality and non-discrimination, the right to life, right to privacy, and the right to a fair trial.<sup>18</sup>

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<sup>15</sup> HRAPF 'Human rights abuses and violations against Lesbian, Gay, Bisexual and Transgender (LGBT) persons in detention and imprisonment in Uganda: A case study of Kampala' (2019)

<sup>16</sup> Human Rights Awareness and Promotion Forum (HRAPF) 'A guide to the normative legal framework on the rights of LGBTI persons' October 2015, 11-36. Available at <http://hrapf.org/publications/laws/>. Accessed 2 May 2016.

<sup>17</sup> See Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL) & Human Rights Awareness and Promotion Forum (HRAPF) 'Protecting morals by dehumanising suspected LGBTI persons, a critique of the enforcement of laws criminalising same sex conduct in Uganda' March 2013, 35-56.

<sup>18</sup> Above, 58-67.

## 2.8 Expanded criminalisation of sex work

Presumptive section 14, 15 and 16 of the Act criminalise operating a brothel, engaging in prostitution and engaging in a sexual act with a prostitute respectively. These are new provisions recommended by the committee that reintroduce and redefine provisions of the Penal Code criminalising sex work. Presumptive section 16 criminalises the buying of sex from sex workers. The Bill had proposed that the provisions on sex work in the Penal Code be repealed. This is thus a big departure from that position.

The interpretation section of the Act defines a prostitute as a person who:

- (a) holds himself or herself out as available for a sexual act or sexual gratification for monetary or other gain; or*
- (b) engages in a sexual act or sexual gratification for monetary or other gain.*

The new Act continues to use the derogatory term 'prostitute,' with its negative connotations.

The offence of prostitution in Uganda remains one of the most redundant provisions whose enforcement continues to fail. Law enforcement agencies like police, courts of law, and prosecutors have failed to convict people on the charges of prostitution. This is because it is hard to gather enough evidence to prove all the ingredients in that offence and also meet the high standard of proof required for criminal cases. The Police have ended up arresting sex workers and charging them with vagrancy offences like being idle and disorderly or being rogue and vagabond. These arrests are mostly carried out to solicit bribes from the sex workers and harass them. Few of them get to trial. The provision is therefore unnecessary since it is unenforceable. Its continued presence on the law books merely distorts the justice system by encouraging arbitrary arrests, extortion, blackmail and bribery.<sup>19</sup>

This is in addition to the other spill-over effects associated with the criminalisation of sex work, most notable of which is the worsening of the HIV/AIDS scourge. The UNAIDS in its Gap Report identified sex workers as some of the Most At Risk populations and yet they are also some of the Left behind populations in as far as access to health care services is concerned. Continued criminalization of sex work discourages sex workers' access to the necessary HIV/AIDS information as they stay in hiding. Criminalization also discourages service providers from providing the necessary HIV/AIDS services for fear of contravening the law. This has worsened the HIV situation. Despite the continued criminalization, the provision is not used in court, sex work has not reduced and it is against public health policy. It is therefore safe to say that the continued criminalization of sex work is doing more harm than good.

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<sup>19</sup> HRAPF report

Additionally, by criminalising “engaging in a sexual act with a prostitute”, this bill seeks to criminalise having a sexual relationship of any nature with a person defined as a prostitute, thus targeting both clients and intimate partners of sex workers who engage in sexual relationships with sex workers without any monetary or material exchanges merely because their intimate partner has been convicted of an offence. In this clause, the bill goes beyond just criminalising sex workers to criminalising their clients too. Therefore under this bill, the person paying for the services of a sex worker would also be criminally liable. While this position can be appreciated from a gender equality perspective, it is bad from the human rights and health perspectives. As already noted, criminalisation of sex work in itself has its pitfalls. Criminalisation of even the clients will drive the sex workers further underground, reduce their bargaining power for safe sex practices, and increase insecurity thus worsening their access to HIV services. The provision might also potentially be abused by law enforcement officers to arbitrarily arrest people and extort and blackmail them.

### **2.9 Definition of aggravated defilement**

Section 19 of the bill creates the offence of aggravated defilement, defined to include defilement where the offence is committed by a person who is HIV positive, which raises the same human rights and public health concerns as noted on the inclusion of HIV positive status as an aggravating factor in rape cases.

### **2.10 The sexual offenders register**

Presumptive Sections 33 -39 of the Act (originally clauses 28 -33 of the Bill) provide for the sexual offenders register and for details that have to be entered as well as regulating conduct of a person entered on the register.

Whereas this is important for really harmful offences such as child sexual exploitation, rape and defilement, it is an unfair encumbrances on people who are LGBT or sex workers. Having persons convicted of these offences and requiring them to be put on the sex offenders register with the attendant obligation such reporting to local authorities every time one moves to a new district is discriminatory to these categories of people, as not every one who engages in similar conduct will in reality be subjected to the same treatment, but they also put such persons at risk of persecution and harm when their identities are known, merely for engaging in an act that is purely consensual and has no real victims.

### **2.11 Deletion of the provision on consent**

The deletion of the provision of consent in part 6 of the bill creates ambiguity about the aspect of withdrawal of consent, as well as consent to some sexual acts and not others. For instance, without the possibility of withdrawal of consent, it is perfectly possible for a person to consent to a sexual act and then seek to withdraw the consent in the event that the act expected of them is not what they expected, and yet withdrawal of consent at this point would not protect them as a continuation of the

act would not be considered rape. This provision ought to be reinstated either at this point or in the clause defining rape to clarify the right of persons to withdraw consent at any point.

### **3. Conclusion**

The Sexual Offences Act 2021, as adopted by Parliament on 3<sup>rd</sup> May 2021 represents a regression in the movement for the protection and promotion of sexual and reproductive health rights for sexual and gender minorities and sex workers as well as for people living with HIV. Whereas some of the provisions in the Bill provide much-needed protections, the spirit of the law in certain provisions is one of intolerance, a factor that should not exist in a free and democratic society. The provisions are an affront to basic human rights and are inconsistent with the provisions of the constitution.