A QUICK SCAN OF THE LAWS AND POLICIES AFFECTING THE HIV RESPONSE AMONG TRANSGENDER PERSONS IN UGANDA

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KEY DEFINITIONS

Discrimination: Treating a person or group of people differently or worse because of characteristics like their race, ethnicity, age or beliefs.

Gender: The characteristics and roles that society would link with either being male or female.

Hormone therapy: Treatment which will make a person look more like a typical man or a typical woman. It helps transgender persons to have the typical features of the gender they identify with, which is different from the gender they were born with.

Key Populations: Groups with a higher risk of contracting HIV than the rest of the population.

Post Exposure Prophylaxis (PEP): Emergency treatment which reduces the likelihood of HIV infection for a person who has been exposed to the blood or other body fluids of someone who could have potentially been infected with HIV.

Sex: The physical differences between males and females.

Sexual and reproductive health: Sexual and reproductive health means being well in all matters related to sexuality and the reproductive system.

Transgender persons: People whose gender identity is not in line with their biological sex.

Transition: The process which a transgender person undergoes in order to express the gender he or she identifies with.

LIST OF ABBREVIATIONS

AIDS	Acquired Immuno-Deficiency Syndrome
EOC	Equal Opportunities Commission
HIV	Human Immunodeficiency Virus
HTC	HIV Testing and Counselling
ICWEA	International Community of Women living with HIV/ AIDS Eastern Africa
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MARPI	Most at Risk Populations Initiative
NGO	Non-Governmental Organisation
NIRA	National Identification and Registration Authority
NSP	National HIV and AIDS Strategic Plan
PEP	Post-Exposure Prophylaxis
SRHR	Sexual and Reproductive Health and Rights
UGANET	Uganda Network on Law Ethics and HIV/AIDS
UNAIDS	Joint United Nations Programme on HIV
WHO	World Health Organization

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1 INTRODUCTION

In the fight against HIV/AIDS, countries around the world agree that it is important to focus on members of key population groups as the people who are in the best position to make decisions and take action.[1] Around 30% of all new HIV infections in Uganda occur among members of key populations and their sexual partners.[2]

One of the communities that is both 'most at risk' of getting HIV and 'left behind' in the fight against HIV are transgender persons. Globally, an estimated 19% of transgender women are living with HIV, and transgender women are 49 times more likely to get HIV than all adults of reproductive age.[3] Transgender persons face stigma at every turn. Transgender women in particular find themselves to be victims of many social problems that arise out of stigma and discrimination which have a negative impact on their health. These include: sexual abuse; being targeted and bullied; being denied employment; doing sex work under conditions where this is criminalised; and a lack of non-discriminatory access to healthcare services.[4]

Uganda is no exception to this situation. This is largely due to Uganda's legal and policy framework which does not formally recognise transgender people[5] and which criminalises same-sex sexual conduct. This places transgender persons, who are usually assumed to be homosexuals,[6] in a position where they are unapprehended criminals. Uganda also has few policies that specifically address the unique sexual and reproductive health needs of transgender persons.

This booklet identifies and analyses the laws and policies that affect the Sexual and Reproductive Health and Rights (SRHR) and access to HIV prevention and care services of transgender persons in Uganda. This is intended to inform advocacy for a more enabling environment.

The booklet is written in easy to understand language with illustrative examples It also identifies areas for advocacy for each of the laws. It is aimed at empowering transgender persons with knowledge about the legal framework which would enable them to take the lead in the fight against HIV and to advocate for their increased access to HIV prevention and care services. We hope that the transgender community finds the quick scan useful.

1 UNAIDS 'Reaffirming the leadership of people living with HIV in the AIDS response' 18 July 2016 available at http://www.unaids.org/en/resources/presscentre/featurestories/2016/july/20160717_living2016 (accessed 10 January 2017).

2 World Health Organization (WHO) *Policy brief: Consolidated guidelines on HIV Prevention, Treatment and Care for Key Populations* (2014) 2.

3 UNAIDS *The GAP Report* (2014) 216.

4 D Operario et al 'HIV in transgender communities: Syndemic dynamics and a need for multicomponent interventions' (2010) 55 *Journal on Acquired Immuno Deficiency Syndrome* S91-S93.

5 See Human Rights Awareness and Promotion Forum *A guide to the normative legal framework on the human rights of LGBTI persons in Uganda* (2015) 30.

6 In light of the impact of this on the HIV struggle, see generally M Peters ""They wrote gay on her file": Transgender Ugandans in HIV prevention and treatment' 18(1) *Culture, Health and Sexuality (*2016) 84-98.

2 HOW DOES UGANDAN LAW AFFECT THE SRHR AND ACCESS TO HIV PREVENTION AND CARE SERVICES OF TRANSGENDER PERSONS IN UGANDA?

2.1 What are the sources of law in Uganda?

The law of Uganda is found in both written and unwritten sources. The different sources are in terms of hierarchy.

The Constitution is the supreme law in Uganda. All other laws must be in line with it. The Constitution is followed in order of importance by the written laws, which are known as statutes or Acts of Parliament. Perhaps the most well-known and most relevant of these is the Penal Code Act. Statutes are followed by subsidiary legislation which are laws made under the authority of Parliament by other authorities like ministers. These include rules and guidelines. Policies are usually developed by ministries and other technical bodies stating the government's position on certain issues. These may not be enforceable in court but they give a strong indication of the direction in which the government intends to move.

Uganda also recognises common law and equity which refer to law developed by English courts over time. Finally Uganda respects customs and tradition provided they do not contravene the written law.

International law only becomes part of law if it is included in an Act of Parliament. However, international law principles require the state to respect obligations that they have signed on to in good faith, making treaties and agreements that Uganda has signed to have impact in the country even when they have not been enacted into an Act of Parliament.

2.2 What does Ugandan law say about transgender persons and how does it affect their SRHR and access to HIV prevention and treatment?

Domestic law is largely silent about transgender persons. This silence makes transgender persons to lack recognition in law as a specific category of persons that is entitled to rights and protection. It also makes it easy to confuse transgender persons with homosexuals and thus transfer the stigma that homosexuality carries in Uganda to transgender persons too. However, this silence can be exploited to advance and advocate for the SRHR of transgender persons and more access to HIV services by transgender persons as what is not prohibited is allowed. Below is an analysis of the key laws and how they affect transgender persons:

a) The Constitution

The Constitution is the supreme law of Uganda.[7] It provides that all persons are equal and

7 Article 2.

should not be discriminated against.[8] It has a list of grounds upon which people should not be discriminated against and these include sex. Gender is not specifically included. However, this does not mean lack of protection since the list is for illustrative purposes only and does not affect the generality of protection provided.

All the other rights in the Constitution including the right to: freedom from torture, inhuman and degrading treatment; liberty; privacy and the right to freedom of association all apply to all persons, including transgender persons. The High Court has in three cases involving LGBTI persons emphasised this.[9] The Constitutional Court has also declared a provision that had the effect of stopping the Equal Opportunities Commission from investigating cases of discrimination concerning transgender people to be unconstitutional.[10]

The only provision in the Constitution that limits the rights of LGBTI persons is the one that prohibits marriages of persons of the same sex. Since most[11] transgender persons in Uganda do not legally change their sex, if a transgender woman got married to a cis man (a man who was born a man), that marriage would not be allowed because they are all presumed to belong to the same sex.

The Constitution does not specifically protect the right to health. However, the right to access health services is recognised in Objective XIV of the National Objectives and Directive Principles of State Policy. In 2005, the Constitution was changed to provide that the country shall be governed on the basis of these objectives and principles.[12] This change in the Constitution placed the responsibility on the State to ensure the realisation of the right to access health services.[13] Also Article 45 of the Constitution includes all other rights which may not be specifically recognised in the Constitution.

Therefore, since all persons are equal before and under the law, and can enjoy all other rights except for the right to marriage for persons of the same sex, transgender persons should not be denied enjoyment of their SRHR and access to HIV prevention and treatment services.

Areas for advocacy

The Constitution is the supreme law of Uganda. However, it can be amended by a bill of Parliament which is meant to amend the Constitution and passed by a two thirds majority

8 Article 21.

9 This was in the cases of: *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 which involved the police forcefully entering a house of a transgender activist and fondling and denying toilet facilities to a transgender person; *Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rollingstone Newspaper* Miscellaneous Cause No. 163 of 2010 which concerned publication of pictures of LGBTI persons in a magazine and calling upon them to be 'hanged' and *Kasha Nabagesera & 3 Others v. The Attorney General and Hon. Rev. Fr Simon Lokodo*, High Court Miscellaneous Cause No. 33 of 2012 where a minister stopped an LGBTI skills training workshop and although the court found the action to be a legitimate limitation to the right to freedom of assembly and association, it declared that the rights existed for everyone.

10 *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009.

11 Article 31(2a).

12 Section 8A of the Constitution, see CEHURD *Advocating for the right to reproductive healthcare in Uganda: The import of Constitutional Petition No. 16 of 2011* (2011) 20.

13 The Republic of Uganda Ministry of Health *The Second National Health Policy: Promoting Peoples' Health to Enhance Socio-Economic Development* (2010) 1.

of all members of Parliament. Advocacy can help to bring to the fore issues that require constitutional amendment and inclusion of gender identity as one of the protected grounds against discrimination should be raised, as should inclusion of the right to health expressly within the Bill of Rights and removing the prohibition against same sex marriages.

The other avenue is to go to the Constitutional Court to seek the court's interpretation of the different provisions of the Constitution affecting transgender persons.

b) Laws made by Parliament (statutes)

Statutes are second to the Constitution in terms of hierarchy. The ones most directly affecting transgender persons are:

i) The Registration of Persons Act 2015

This is the law that deals with the registration and identification of persons in Uganda. It governs the registration of births and deaths, registration of all persons and issuance of identification documents like National Identification cards and birth certificates.

This Act affects transgender persons and their access to HIV services in the following ways:

Non-recognition of a third gender or transgender persons

The general framework of the Act only recognises the male and female genders as the gender markers available. There is thus no provision for a third gender for those who do not align to the male or female sexes. Also, there is no mention of transgender persons in the law at all. This makes transgender persons invisible within the framework of the law that recognises persons. Invisibility in the law leads to invisibility in practice and thus exclusion of transgender persons and absence of specialised services for them.

Change of name provisions and how they are applied

The law provides for the change of name of an adult.[14] The section does not put any conditions on changing names. As long as one is 18 years and above, they can have their names changed. This has been done for many transgender persons, who change their names to match their preferred gender. This is very progressive and avoids situations of a person using documents that do not match their gender/appearance.

However, HRAPF has handled one case, where an application by a transgender woman to change her name was rejected because she had male features. While it is a single incident, it shows that something like that could continue happening. There is therefore need to do advocacy within the authorities that change names to ensure that the law is implemented as it is.

14 Section 36.

This administrative hurdle, although not following the law, has the impact of leaving transgender persons with names that do not match their gender identity. This leaves them at the risk of being called frauds, criminals, and being held liable for falsifying information under sections 52 and 76 of this law. For fear of arrests, ridicule, suspicion and stigma created by this, transgender persons think twice before approaching health facilities to access health services, and health providers also refuse to provide health services to them for fear that they are dealing with criminals. This hinders their access to HIV prevention and treatment services and their enjoyment of SRHR.

Absence of a procedure for change of sex for adults

The law requires that when a birth is being registered, the sex of the child should be registered.[15] It then provides that if a child was born intersex and they undergo an operation, they can register their change in sex.[16]

This provision only applies to children and the law is silent on adults and provides no procedure on how they can have their sex change registered. Usually, the principle is that where the law does not prohibit something, then it is allowed. This implies that change of sex for adults is not prohibited. However, there is no process for registering such a change.

However, in practice, the Ministry of Internal Affairs has administrative processes through which a change of sex can be recorded on the documents. HRAPF has handled a case where a transgender woman underwent surgery and changed her sex, applied to have her passport changed to reflect female, and this was allowed upon proof that a sex change had been done. However, most transgender persons in Uganda, perhaps due to the expenses involved, do not undergo operations to change their sex, and as such may not have the administrative procedure available to them.

The implications of the failure of the law to expressly provide a procedure for change of sex for adults is that transgender persons end up appearing, having names and behaving in ways that do not match the sex indicated on their different documents. This causes them to be regarded as frauds, and creates a lot of stigma, which leads to them failing to access health services and to hide away leading to risky sexual behaviours that expose them further to HIV.

Areas for advocacy

There is need to advocate for an amendment of the law to provide for: recognition of a third gender of persons who have not undergone sex change operations; acknowledging the existence of transgender persons; the procedure for change of sex for adults; training of more health service providers and officials in the Ministry of Internal Affairs and the Uganda Registration Services Bureau on transgender issues; enacting policies that address the complex issues of being transgender; and establishing more health facilities that provide specialised and non-discriminatory services for transgender persons to avoid stigmatisation.

15 Section 32(2)(a).

16 Section 38.

Also, the Ministry of Internal Affairs, the National Identification and Registration Authority (NITA) can be targeted to administratively provide for a third gender and to put in place guidelines on how registration of sex changes among adults can be done.

ii) The Penal Code Act, Cap 120

The Penal Code Act is Uganda's principal criminal law and creates most of the offences recognised in Uganda. It contains a number of provisions which have a serious impact on the SRHR as well as access to HIV prevention and care services of transgender persons in Uganda and they include the following:

Provisions criminalising same sex relations

The Penal Code Act criminalises the act of 'having carnal knowledge against the order of nature',[17] which is understood to refer to same-sex sexual activities. A transgender person who is in a sexual relationship with a person of the opposite gender but the same sex will be affected by this provision. Since the process of registering sex changes usually requires a surgical change, the gender markers in the documents will still indicate the persons' biological sex and this will qualify the relationship as a same sex relationship. The effect of this seeming criminalisation of sexual conduct of transgender persons contributes to their stigmatisation and isolation from essential healthcare services.[18] This provision drives transgender persons underground for fear that if they approach healthcare service providers, they will be arrested.

The criminalisation of same-sex conduct also places healthcare workers in a difficult position as they may feel conflicted or concerned that they may be breaking a law by offering services to transgender persons. In Uganda, the High Court has held that the holding of a leadership workshop aimed at empowering LGBTI persons amounted to 'the incitement to commit a crime' and 'conspiracy'.[19] On the basis of this judgment, healthcare workers may feel that they are encouraging and supporting transgender persons to commit the offence of 'having carnal knowledge against the order of nature' by providing them with sexual and reproductive healthcare services. This discourages service provision, even from those that would otherwise be willing.

Such a provision also makes it somehow acceptable for transgender persons to be discriminated against and have their rights violated like being denied access to HIV prevention and care services. This is because the High Court held in the Lokodo case that although LGBT people have rights, enjoyment of these rights can be limited by section 145. This means that even when they face violations, they can hardly access justice because such violations are considered justified, and they would fear arrest.

There is need to amend the law and remove section 145 and to also engage service providers in advocacy on handling issues of transgender persons, and the importance of doing so in

17 Section 145.

18 See generally Peters, n6 above.

19 *Nabagesera and 3 Others v Attorney General and Another* Miscellaneous Cause 33 of 2012. Incitement to commit a crime and conspiracy are criminalised under sections 21, 390 and 391 of the Penal Code Act.

fighting against HIV/AIDS.

Provisions criminalising sex work

The Penal Code Act criminalise different aspects of sex work in Uganda.[20] This criminalisation is troubling for transgender persons since many transgender persons, especially transgender women, engage in sex work due to the limited options they have as regards employment. Like the criminalisation of same-sex conduct, criminalisation of sex work also discourages transgender sex workers from seeking healthcare services and also discourages healthcare service providers from providing such services. The double stigma of being a transgender sex worker also discourages them from being open about their sexual behaviour with friendly healthcare providers, which hampers access to proper prevention and treatment packages. The criminalisation also reduces their bargaining power when carrying out sex work and they end up getting sexually abused or fail to engage in protected intercourse which increases their vulnerability to new and multiple HIV infections. The law needs to be amended and sex work decriminalised.

Provisions criminalising Idle and disorderly conduct

The Penal Code Act creates the offences of 'being an idle and disorderly person' and 'being a rogue and vagabond', respectively.[21] These are broad and vague provisions which criminalise a very wide range of actions such as 'being found wandering' in a public place at such a time and under such circumstances which would 'lead to the conclusion that such person is there for an illegal and disorderly purpose'. These provisions disproportionately affect 'undesirable' minorities in Uganda. Transgender persons are arrested under these provisions where police officers suspect that they engage in 'unnatural offences' or are fraudsters and impersonators, on the basis of their appearance or location, but do not have the necessary evidence to arrest them and investigate a case under section 145 of the Penal Code Act.[22]

The World Health Organization has suggested that laws which are used to unfairly target key populations should be reviewed. This is because such laws have the effect of further marginalising and isolating them from healthcare services. Being arrested under the idle and disorderly laws makes a person feel humiliated and insecure and make transgender persons struggle to act as empowered agents who can fight for the realisation of their own sexual and reproductive health rights.

Provisions criminalising Personation

Section 381 of the Penal Code Act creates the offence of personation which means that a person falsely represents himself or herself as another actual person (living or dead) with the

20 In sections 136 to 139.

21 Sections 167 and 168.

22 Human Rights Awareness and Promotion Forum *The Narcotic Drugs and Psychotropic Substances (Control) Act, 2015 and the Legal Regulation of Drug Use in Uganda: Analysing the tension between criminal law, public health and human rights* (2016) 51-52.

intent of defrauding another. Ideally, this provision should not be used against transgender persons as they are not actually personating anyone living or dead.

Explanation

The offence of personation is where someone pretends to be another person. The person they pretend to be must be a real person, whether that person is dead or not. For example, if someone pretended to be Juliana Kanyomozi and started collecting money from people who believe that indeed it is Juliana Kanyomozi, then that person would have committed the offence of personation. However, if a person is born male and they are called Ssekaana Hannington, and they become transgender and change their name to Nakaana Hannah, they would not have committed an offence, because there is no specific person called Nakaana Hannah who they are pretending to be. Therefore, being transgender does not amount to personation.

However, in practice transgender persons are nevertheless prosecuted under this provision in some cases.[23] In the same way as the other criminalising laws, this provision has the effect of further alienating them from much needed medical services and care.

Areas for advocacy

There is need to challenge the Penal Code provisions in courts of law and to engage in advocacy to have them amended by Parliament as those criminalising same sex relations and those on idle and disorderly conduct fall short of Constitutional requirements. Advocacy is also necessary to ensure that law enforcers understand the meaning of the offence of personation such that they do not use it against transgender persons.

iii) The HIV Prevention and Control Act, 2014

The purpose of the Act is to provide for the 'protection, counselling, testing and care of persons living with and affected by HIV and AIDS' in order to prevent HIV and AIDS. The Act has a number of aspects which affect transgender persons' access to SRHR and access to HIV services. These are:

Positive provisions

The Act has a number of positive provisions which make it easier for transgender persons to access HIV prevention and care. These include provision of counselling before and after someone is tested for HIV[24] and prohibition of discrimination on the basis of HIV status in the workplace, schools, healthcare settings etc,[25] requirement of the State to provide 'universal HIV treatment to all persons on a non-discriminatory basis', [26] to make available free of charge Post Exposure Prophylaxis (PEP) to persons who had been exposed to HIV,[27] to

23 HRAPF has recorded one such a case which reached the court: *Uganda v Boaz Kalyeija*, Criminal Case no 18 of 2015. See Human Rights Awareness and Promotion Forum *A guide to the normative legal framework on the human rights of LGBTI persons in Uganda* (2015) 28.

24 Sections 3(1), 5 & 6.

25 Sections 32(1) & 33.

26 Section 24(1)(b).

27 Section 32(3)(b).

promote the awareness of rights of persons living with HIV and to ensure their participation in government programmes.[28] These provisions are positive steps which address the stigma that people living with HIV face and it is important for all key population groups to know about these provisions and to insist on their enforcement where possible.

The Act requires of the state to 'give priority to most at risk populations' which it defines as 'fishing communities, prisons, migrant populations or other areas as may be determined by the Minister from time to time'.[29] It seems that the Act had intentionally listed for priority most at risk population groups that are not controversial in Uganda, and left it to the minister to define the others. No mention is made of transgender persons or other contentious key population groups. Even without specific mention, these provisions can still be used in support of advocating for the prioritisation of transgender persons as a key population, since they have been identified by the UNAIDS and even the Government of Uganda as such.[30]

Problematic provisions

There are other problematic provisions that could negatively impact access to HIV prevention and care services. These include forced HIV testing for persons charged with sexual offences,[31] criminalisation of actual and attempted transmission of HIV,[32] and disclosure of patient information.[33] Forced HIV tests for persons charged with sexual offences will be used to target sexual minorities, including transgender persons, which will lead to their further marginalisation and stigmatisation; criminalisation of transmission of HIV will discourage testing as prior knowledge of one's HIV status would be evidence that they are guilty as they knew that they could transmit HIV; criminalisation of attempted transmission is very broad as an attempt is not defined and can be used to 'witch-hunt' groups of persons that are considered unwanted like transgender persons; and disclosure of results, especially without consent, will discourage testing as it will create uneasiness within stigmatised populations like transgender persons. All these hinder access of transgender persons to HIV prevention and care and the enjoyment of their SRHR.

Areas for Advocacy

A case was filed in Uganda's Constitutional Court challenging the constitutionality of these provisions, and it needs to be supported to ensure that the law is amended and the provisions removed.[34] There is also need for advocacy to ensure that the progressive provisions are implemented.

28 Section 24(1)(e) & (f).

29 Section 24(1)(k) & 24(2).

30 UNAIDS *UNAIDS Terminology Guidelines* (2015) 8; Republic of Uganda Ministry of Health *Addendum to the National Antiretroviral Treatment Guidelines* (2013) 18.

31 Section 12.

32 Sections 41 & 43.

33 Section 18.

34 Constitutional Petition No. 24 of 2016 instituted on 14 July 2016 by UGANET, ICWEA and Prof. Ben Twinomugisha, with the support of over 60 civil society organisations.

iv) The Non-governmental Organisation Act, 2016

A new Non-Governmental Organisations Act came into force in March 2016 to regulate NGOs in Uganda and their operations. The Act contains two provisions that pose a threat to the future existence and work of organisations which provide services to transgender persons. These are:

Provisions placing 'special obligations' on organisations and providing for refusal to register organisations whose objectives contravene the law

These prohibit organisations from engaging in activities that are prejudicial to the 'security and laws of Uganda', and to the 'interests of Uganda and to dignity of Ugandans'.[35] The NGO Bureau is also empowered to refuse to register an organisation whose objectives are regarded as being in contravention of the laws of Uganda.[36] The provision of services to a group that is considered to engage in criminal conduct by supposedly committing 'unnatural offences' can be interpreted as being contrary to the laws of Uganda and the interests of Ugandans. This means that the NGO Act could have the effect of stopping the operation of organisations which provide sexual and reproductive health services and HIV prevention and care to transgender persons as well as organisations which advocate for the rights of this group and empowers its members to stand up for their rights.

Areas for advocacy

There is need to advocate for amendment of the law to remove these provisions, or a court challenge to the provisions. There is also need for advocacy and engagement with the NGO Bureau, the Ministry of Health and the Uganda AIDS Commission to ensure that the provisions are not used to target key populations like transgender persons.

v) Equal Opportunities Commission Act, 2007

As part of the fight against the spread of HIV/AIDS, the World Health Organization encourages countries to implement laws that prohibit discrimination against key population groups.[37] Uganda has enacted the Equal Opportunities Commission Act, 2007 (EOC Act), which aims at eliminating discrimination and inequalities against any group of persons on grounds such as sex, age, tribe or health status and to take affirmative action in favour of such groups. In carrying out this mandate, the EOC has power to investigate complaints of plans, policies or actions which seemingly amount to discrimination and to examine laws and policies which are likely to have the effect of preventing equal opportunities,[38] to investigate complaints brought before it concerning discrimination and marginalisation,[39] and to monitor state entities to ensure that they all conform to non-discrimination principles and equal opportunities.

35 Section 44(d) and (f).

36 Section 30(1)(a).

37 WHO, n2 above at 10.

38 Section 14(2).

39 Section 15.

While initially sexual minorities like transgender persons could not access the commission by reason of section 15(6)(d) which prohibited handling of issues that were considered immoral and socially unacceptable, the Constitutional Court held that that provision was unconstitutional in the case of *Jjuuko Adrian v Attorney General* [40] and that all persons should have access to the Commission. With this new-found access, transgender persons should engage in advocacy to ensure that this law is implemented to their advantage, to reduce the inequalities they face in the health sector.

Areas for Advocacy

There is need for transgender persons and organisations working on these issues to use the Equal Opportunities Commission to enforce the rights of LGBTI persons.

c) Subsidiary legislation, common law and equity

There are no specific rules or regulations made under the authority of parliament, or common law or equity rules that affect transgender persons in Uganda.

d) Customary law

Customary law is derived from the customs and practices of the communities in Uganda. Such customs however should not be contrary to the law. Most customs in Uganda recognise difference and there are local names that could be said to be closer to persons who are transgender, for example 'kyakulassajja' or 'kyakulakkazi' in Luganda which refer to a woman who does what is typically done by men and a man who does what is tyically done by women respectively.[41] These people are not typically punished or excluded and are regarded as normal members of the community. This is a more progressive approach that can actually facilitate the realisation of the SRHR of transgender persons and their access to HIV care and services. Again, where customary practices are discriminatory, or contrary to the Constitution and/or the law, they can be found to be unconstitutional.

2.3 Which policies affect the SRHR as well access to HIV prevention and care of transgender persons?

A number of policies affect the SRHR of transgender persons as well as their access to HIV prevention and care and these are:

i) The Second National Health Policy: Promoting Peoples' Health to Enhance Socio-Economic Development (2010).42

The National Health Policy has as its goal 'a good standard of health for all people in Uganda in

40 Constitutional Petition No. 1 of 2009.

41 S Tamale 'Homosexuality is not un-African' *Al-Jazeera America* 26 April 2015 available at http://america.aljazeera.com/opinions/2014/4/homosexuality-africamuseveniugandanigeriaethiopia.html (accessed 27 January 2017); see generally S Nannyonga-Tamusuza 'Female-men, male-women, and others: constructing and negotiating gender among the Baganda of Uganda' 3(2) Journal of Eastern African Studies (2009) 367-380.

42 N13 above.

order to promote healthy and productive lives'. The policy has the objectives of strengthening the organisation and management of health systems and improving the quality of access to health services. The policy states that Uganda intends on 'reducing health inequities through action on the social determinants of health' in order to reach the government's targets on combatting AIDS.[43] One of the major 'determinants of health' that the policy recognises is 'social behaviours'.[44] It is often social behaviours that lead to the forming of key population groups.

The policy however does not go further to explain the formation and marginalisation of groups, such as transgender persons, due to these 'social behaviours' and does not make recommendations on how this exclusion from the healthcare system can be addressed. The particular difficulties of women and People With Disabilities (PWD) in accessing health facilities are, however, recognised in the policy. The policy encourages further research in order to base interventions on identified gaps and evidence in respect of vulnerable groups.[45] The policy makes no mention of transgender persons and does not indicate that they are a vulnerable group in need of specified health interventions.

Areas for advocacy

Transgender persons can advocate for a more inclusive policy that covers their needs and concerns.

ii) The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights (2012).

This policy provides direction to actors involved in planning, promoting and providing services in respect of sexual and reproductive rights. The standards and guidelines reflect the objectives and priorities of the National HIV/AIDS Strategic Plan and the Health Sector Investment Plan. Even though transgender persons are not specifically named or targeted for these services, the fact that a policy is in place which serves to generally increase access to SRHR and HIV prevention and care is a step in the right direction. However, considering that transgender persons are a key population group with particular needs in respect of their sexual and reproductive health, a policy focusing on this group in particular would be needed to address the spread of the HIV epidemic within this group.

A positive aspect of the policy is that it recognises that sexual and reproductive health as well as HIV/AIDS prevention can best be achieved if these services are offered in an integrated manner.[46] What this would mean in a practical sense is that someone who visits a health centre for a pregnancy test would also be offered an HIV test; or if someone visits a health centre to get anti-retroviral treatment (ART) the healthcare provider would also determine if the sexual and reproductive health needs of the patient are met.

43 As above at 10.

44 As above.

45 As above at 20.

46 As above at 64.

Areas for advocacy

Transgender persons can advocate for a more inclusive policy that covers their needs and concerns.

iii) National HIV and AIDS Strategic Plan 2015/2016 – 2019/2020 (2015)47 and the National HIV and AIDS Priority Action Plan 2015/2016 – 2017/2018

The purpose of the National HIV and AIDS Strategic Plan (NSP) is to guide the implementation of the national response to HIV and 'to align key HIV and AIDS interventions to the key drivers of the epidemic'.[48] The National HIV and AIDS Priority Action Plan is part and parcel of the NSP and details and prioritises activities for the first three years of its implementation. The NSP recognises that HIV prevalence is particularly high in key populations, which are mentioned to include sex workers, Men who have Sex with Men and boda boda drivers.[49] The plan acknowledges that HIV infection is fueled by socio-economic and structural factors such as gender norms and gender-based violence.[50] The NSP also acknowledges the harmful effects of the HIV Prevention and Control Act on the HIV response in that some of its provisions create a barrier to access HIV treatment and care and enforces HIV-related discrimination and stigma.

The NSP targets both existing and emerging key populations in HIV prevention interventions, which is commendable.[51] However, the NSP fails to make specific mention of transgender persons as a key population group. The NSP contains the encouraging strategic action of scaling up comprehensive interventions targeting Most At Risk Populations (MARPs).[52] The Plan has the strategic objectives of implementing a comprehensive package of social support and protection interventions for people living with HIV/AIDS and other vulnerable groups and key populations as well as eliminating stigma and discrimination of these groups and mainstreaming their needs into other development programs.[53] These objectives and action points can be used in advocating for targeted interventions for transgender persons.

Areas for advocacy

Engaging the Ministry of Health to ensure that transgender persons are also expressly covered in the NSP.

47 Uganda AIDS Commission *An AIDS Free Uganda: My responsibility! National HIV and AIDS Strategic Plan 2015/2016 – 2019/2020* (2015).

48 As above at 1.

49 As above at 5.

50 As above at 9.

51 As above at 21.

52 As above at 22.

53 As above at 29.

iv) Uganda HIV Testing and Counselling Policy, 3rd edition (2010)[54]

The goal of the HIV Testing and Counselling (HCT) Policy is to help to reduce HIV transmission by enabling people to know their HIV status and to improve their quality of life by linking them to prevention, care, treatment and support services.[55] The elements of the policy are service delivery, health systems and 'ethico-legal' issues which refers to questions of human rights, stigma and special groups.[56] The policy is aimed at ensuring that HCT follows a human rights-based approach and is aimed at reducing stigma and discrimination during HCT service delivery.[57] HCT is informed by a number of 'policy statements' among which is that all persons shall have the right to access quality HCT services.

The policy provides that HCT services are to be designed to address the needs of 'special groups'.[58] Even though this is not expressly stated, transgender persons can be considered to be included under these 'special groups' in that Most At Risk Populations (MARPs) in general are mentioned. Overall, the HCT policy complies with international standards and is set to assist marginalized groups like transgender persons in accessing HIV testing and treatment, as well as reducing HIV-related stigma.[59]

Areas for advocacy

There is need to advocate for HCT guidelines which address the needs of each MARP or key populations in greater detail. It is also necessary to ensure and demand for the implementation of this policy.

v) The National Policy Guidelines for Post Exposure Prophylaxis for HIV, Hepatitis B and Hepatitis C (2007)[60]

HIV Post Exposure Prophylaxis (PEP) is emergency treatment which reduces the likelihood of HIV infection for a person who has been exposed to the blood or other body fluids of someone who could have potentially been infected with HIV.[61] The National Policy Guidelines on PEP has the goal of preventing infection with HIV and Hepatitis B and C after such exposure.[62] These guidelines are helpful in serving the general population and allowing access to PEP to the target audience of the policy, which includes healthcare workers, barbershop attendants, victims of sexual offence and police officers.[63] The policy does not recognise key populations as groups which would be in dire need of PEP and therefore does not suggest particular programming and considerations to serve these groups.

54 The Republic of Uganda Ministry of Health *Uganda HIV Testing and Counselling Policy 3rd edition (*2010).

55 As above at 7.

56 As above at 8.

57 As above.

58 As above at 10.

59 UNAIDS *90-90-90 An ambitious treatment target to help end the HIV epidemic (*2015) 16.

60 The Republic of Uganda Ministry of Health *The National Policy Guidelines for Post Exposure Prophylaxis for HIV, Hepatitis B and Hepatitis C* (2007).

61 As above at vii.

62 As above at 4.

63 As above at 4-5.

Areas for advocacy

There is need to advocate for inclusion of transgender persons in this policy as they require PEP services due to their vulnerability.

vi) Policy on HIV treatment

Uganda has integrated its guidelines on ART[64] with policies on child feeding and prevention of mother-to-child HIV transmission in a single document.[65] This policy offers guidance to health workers on providing comprehensive treatment to HIV patients. In 2013, an addendum was added to this document in order to scale up Uganda's response to the HIV epidemic.[66] The addendum created a new requirement of initiating ART to MARPS, which is explicitly stated to include transgender persons in the discussion on providing ART to adolescents.[67]

In commemoration of World AIDS Day in 2016, President Museveni launched a new set of test and treat guidelines which would ensure that those who test positive for HIV would start treatment immediately and that all individuals who are HIV positive will be eligible for treatment.[68] This move is a positive step toward ensuring that transgender persons are also included in the provision of HIV testing and treatment.

Areas for advocacy

Leaders in the transgender community should ensure that in practice, transgender persons are not excluded from accessing treatment immediately after diagnosis and that they benefit from the inclusive policies.

vii) Medical and Dental Practitioners: Code of Professional Ethics (2013) (Derived from the Medical and Dental Practitioners Act of 1998).

The Code of Professional Ethics exists to promote and maintain the highest standard of ethical behavior of medical practitioners. The Code requires of medical practitioners to respect the constitutional rights of their patients.[69] Of particular importance to transgender persons, is the requirement that medical practitioners refrain from discriminating against patients on the basis of gender, race, religion, disability, HIV status or any other vulnerability.[70] This provision ought to encourage transgender persons to approach healthcare centres. However, there is also a provision which may discourage transgender persons from accessing healthcare services. This provision requires of practitioners to observe patient confidentiality and privacy

64 Republic of Uganda Ministry of Health *National Antiretroviral Treatment Guidelines for Adults, Children and Adolescents* (2009).

65 Republic of Uganda Ministry of Health *The Integrated National Guidelines on Antiretroviral Therapy, Prevention of Mother to Child Transmission of HIV and Infant & Young Child Feeding* (2011).

66 N30 above.

67 As above at 18.

68 H Lutaaya 'Uganda rolls out free HIV testing and treatment for all' *The Sunrise* 1 December 2016 available at http://www.sunrise.ug/news/201612/uganda-rolls-out-free-hivaids-testing-and-treatment-for-all.html (accessed 27 January 2017).

69 Section 4.

70 Section 5.

and to refrain from disclosing information of the patient without the patient's consent except where such disclosure would 'protect the public or advance greater good of the community'. A medical practitioner may consider it necessary to report the fact of her patient's transgender status to the police since transgender persons are viewed as 'suspected homosexuals' in Uganda. The medical practitioner may view such an action as necessary in order to 'protect the public'. Transgender persons are not guaranteed that they will be treated with patient confidentiality and it is understandable that it would be difficult to seek healthcare for as long as the gender identity of transgender persons is not recognised and same-sex sexual conduct remains illegal.

Areas for advocacy

There is therefore need for engagement of medical practitioners to ensure that this provision is not interpreted and implemented out of context.

3 WHAT DOES INTERNATIONAL LAW SAY ABOUT TRANSGENDER PERSONS AND HOW DOES IT AFFECT THEIR SRHR AND ACCESS TO HIV PREVENTION AND CARE?

International human rights law makes it clear that all human beings are equal and have the same rights. The Universal Declaration of Human Rights provides that 'all human beings are born free and equal in dignity and rights'[71], that all are equal before the law[72] and that everyone is entitled to all the rights and freedoms guaranteed in the declaration.[73] These same rights are repeated in the International Covenant on Civil and Political Rights[74], the International Covenant on Economic, Social and Cultural Rights[75], the Convention on the Elimination of all forms of Discrimination Against Women[76] and the African Charter on Human and Peoples' Rights.[77]

Although none of these instruments mentions transgender persons, the provisions on non-discrimination have been interpreted to include non-discrimination on the grounds of either sexual orientation or gender identity. This means that under international law, transgender persons are equal to all other persons, they are not criminalised and should enjoy their rights like other persons. They can therefore access all healthcare services without discrimination.

Sexual and Reproductive Health and Righst are part of the right to health.[78] The right to health is protected in the Universal Declaration of Human Rights,[79] the African Charter on Human and Peoples' Rights[80] and the International Covenant on Social, Economic and Cultural Rights which recognises 'the highest attainable standard of physical and mental health'.[81] In as far as transgender women are concerned, the Convention on the Elimination of All forms of Discrimination Against Women protects women's right to health[82] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa protect the 'health and reproductive rights' of women.[83] Therefore under international law, the SRHR of transgender persons are protected in the rights to health and they are entitled to their enjoyment.

71 Article 1.

72 Article 7.

73 Article 2.

74 Article 26.

75 Article 2(2).

76 Article 1.

77 Article 2.

78 Principle 17 of the Yogakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

79 Article 25.1.

80 Article 12.

81 Article 12.

82 Article 12.

83 Article 14.

4 ILLUSTRATIONS OF THE EFFECTS OF LAWS AND POLICIES AFFECTING THE SRHR AND ACCESS TO HIV PREVENTION AND TREATMENT OF TRANSGENDER PERSONS

This section illustrates the impact of the current legal and policy framework and how it affects the SRHR and access to HIV prevention and treatment of transgender persons using practical examples:

Example 1

Sam is a 28-year old transgender man. Sam identifies as male, even though he has undergone very little of the hormone therapy and surgeries which he would like to have. Sam is attracted to women but he does occasionally sleep with men. One new year's eve, Sam is raped and severely beaten by a male acquaintance. While extremely traumatised by the experience and concerned that he may have contracted HIV or another STI in the process, Sam simply does not have the courage to go to the police or a medical centre in the days after the incident. Two months after the incident, Sam's home pregnancy test indicates that he is pregnant. Sam had hoped to have a family of his own in future, but he never imagined himself to bear children. He felt embarrassed by being pregnant. So many fears and uncertainties kept running through his mind: 'What if I have contracted HIV and pass it along to this child? How will pregnancy affect my transition? How will my hormone therapy affect the child's development? How can I possibly reconcile myself with being a mother? How do I get rid of this pregnancy? ....' Sam wished that he could simply go to a clinic and ask for an abortion, but he knew that abortions are against the law and, on top of that, that he would have to dress in women's clothes and adapt his mannerisms to avoid being ridiculed by the healthcare workers. He decides that he has no option but to terminate the pregnancy himself by using a sharp object or taking a herbal medicine...

Discussion

This example illustrates the vulnerability that transgender persons face to gender-based violence, along with little access to family planning; HIV counselling and testing; Post Exposure Prophylaxis; emergency contraceptives and abortion services. It also illustrates that transgender persons have a unique set of sexual and reproductive health needs and that carefully planned and targeted interventions would be necessary in order to address the HIV epidemic within this key population group.

Example 2

Alex is a 22-year old transgender woman who hails from Iganga. Alex lives by herself in Kampala after she had been chased from her village and shunned by her family. Alex has struggled to make ends meet without any support system. She has looked for jobs in small shops and at restaurants, but no-one wants to hire her. One restaurant manager laughed at her request and said that a 'funny person' like her would chase their clients away. Alex had no choice but to turn to sex work. Every day of her life is a struggle. Alex has been arrested on

the streets more times than she can even count. There are many times that she does not even know why she had been arrested. The police officers would say it is because she is a sex worker or because she was being idle and disorderly. She never insists that her clients wear condoms because she is afraid that she will lose business, or worse, that her clients will become violent. She is HIV positive and feels sickly of late. Alex realises that if she does not get treatment it might mean death. She dreads going to a clinic. Apart from expecting the doctors to mistreat her because of her appearance, she is afraid that she might get arrested from hospital. She has heard rumours that there is a new law which makes it a crime to have sex without a condom. The doctors might also assume that she is a sex worker or a homosexual and call the police. Alex feels completely trapped and has no idea how she can get the treatment that she needs…

Discussion

This example illustrates the psychological trauma which transgender persons experience through rejection and ridicule from society, police and their own families. It shows how transgender persons would often be left with no options but to turn to sex work in order to sustain themselves and how this makes them even more vulnerable to HIV. The example also shows how stigma and the criminalisation of sex work, same-sex sexual conduct as well as some of the provisions of the HIV Prevention and Control Act alienates transgender persons from the healthcare system and prevents them from getting the sexual and reproductive healthcare and HIV prevention and care services that they need.

CONCLUSION

There are a number of laws which have provisions that limit access to sexual and reproductive health services and HIV prevention and care services of transgender persons in Uganda. The greatest obstacles are the absence of legal recognition of transgender persons and the criminalisation of same sex sexual conduct. Transgender persons are impacted by the lack of laws, policies and programs which properly address their unique sexual and reproductive health needs. MARPI-Mulago, the only programme which exists to specifically address these needs, is not equipped to serve transgender persons across the country as it is an under-funded non-governmental initiative. Leaders in the transgender community are encouraged to advocate for the decriminalisation of same-sex sexual conduct and sex work, and to advocate for policies and programming which address the sexual and reproductive health as well as the HIV prevention and care needs of transgender persons in particular.

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ABOUT HRAPF

Background:

Human Rights Awareness and Promotion Forum (HRAPF) is an independent, nonpartisan, Non-Governmental human rights organisation that is duly registered under the laws of Uganda. HRAPF was founded in 2008. HRAPF prides itself in promoting access to justice, raising awareness on human rights among the most marginalised groups in Uganda and advocating for an enabling legal and policy framework for the promotion of rights of marginalised groups.

HRAPF's Vision:

A society where the human rights of all persons including marginalised groups are valued and respected.

HRAPF's Mission:

To promote respect and observance of human rights of marginalised groups through legal and legislative advocacy, research and documentation, legal and human rights awareness, capacity building and partnerships.

HRAPF's Slogan:

'Taking Human Rights to all'

HRAPF's Objectives:

To sensitise Ugandans on the international and national human rights regime in order to promote a culture of respect for human rights of marginalised groups.

To undertake research and document human rights abuses suffered by marginalised groups for appropriate remedial action.

To influence legal and policy developments in Uganda to ensure compliance with human rights principles.

To offer legal assistance to marginalised groups in order to enhance access to justice.

To share information and best practices on the rights of marginalised groups in order to strengthen the human rights movement in Uganda.

To network and collaborate with key strategic partners, government, communities and individuals at a national, regional and international level.

To build a strong and vibrant human rights organisation.

HRAPF's Values:

Non-discrimination

Equal opportunity

Justice

Practical Approach

Team work

HRAPF'S PROGRAMMES

Under the strategic plan 2013-2017, HRAPF has three broad programmes:

ACCESS TO JUSTICE PROGRAMME

This programme aims at promoting sustainable access to justice for marginalised groups in Uganda. The programme mainly focuses on criminal justice, family justice and sexual and gender based violence. It targets sexual minorities, women and children living with HIV/AIDS, indigent men and women and the elderly with land problems.

LEGISLATIVE ADVOCACY AND NETWORKING PROGRAMME

The objective of this programme is to work with likeminded organisations and institutions to advocate and influence the adoption of polices and legislation that promotes equality and non-discrimination in order to prevent discrimination of marginalised groups.

ORGANISATIONAL DEVELOPMENT AND CAPACITY BUILDING PROGRAMME

The objective of this programme is to create the appropriate institutional structures and organisational framework for the efficient and effective implementation of the Programme activities and realisation of the Programme Goal.

HRAPF'S GOVERNANCE AND LEADERSHIP STRUCTURE

HRAPF's governance and leadership structure is composed of four organs: The General Assembly, the Trustees, the Board of Directors and the Secretariat.

The General Assembly

This is the supreme policy-making body of the organisation. It is made up of all members. Currently HRAPF has 53 members. Membership is open to all persons interested in promotion, protection and creation of awareness of human rights to the most marginalised Ugandans.

The Trustees

The Trustees are the custodians of the organisation's Memorandum and Articles of Association.

The Board of Directors

The BOD is responsible for guiding the Secretariat to perform day-to-day running of the organisation. The BOD is composed of seven members: the Chairperson, the Vice Chairperson, the Secretary General, the Treasurer, two other members, and the Executive Director as ex-officio. The BOD meets once every quarter.

The Secretariat

This is the implementing body of the Organisation. It is headed by the Executive Director and is currently made up of 33 staff members. HRAPF regularly hosts interns and volunteers.

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