



**LEGAL ANALYSIS OF THE SEXUAL OFFENCES BILL 2015 AND ITS  
IMPLICATIONS ON LGBTI PERSONS, SEX WORKERS AND PERSONS  
LIVING WITH HIV/AIDS**

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## 1. Introduction

The Sexual Offences Bill, 2015 was 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, Monicah Amoding under the umbrella of the Uganda Women's Parliamentary Association (UWOPA).<sup>2</sup> According to its memorandum, the Bill intends to 'consolidate laws relating to sexual offences; combat sexual violence; provide for the punishment of the perpetrators of sexual offences; provide for procedural and evidential requirements during trial of sexual offences and for other related matters.' The Bill is divided into six parts providing for different aspects: Part I is the preliminarily section which provides interpretation of some of the terms used in the Bill; Part II provides for sexual offences in general covering offences from rape, unnatural offences, prostitution to incest; Part III provides for sexual offences against children including defilement, child to child sex and child pornography; Part IV provides for special powers of the court and jurisdiction which include powers to award compensation, holding proceedings in camera and the creation of a sexual offences database; and part VI provides for miscellaneous provisions which include provision for extra-territorial jurisdiction, regulations and saving of laws.

It is therefore a comprehensive bill that consolidates the different existing sexual offences and introduces new and innovative provisions that may be helpful in combating sexual offences. Some of the progressive new provisions are those that criminalise marital rape; make rape gender neutral; protect children from sexual exploitation and criminalise sexual harassment and assault. Many persons including women and LGBTI persons have agitated for these provisions for a long time, and this would be a huge achievement. Nevertheless, there are a few worrying provisions as far as LGBTI persons, sex workers and persons living with HIV/AIDS are concerned. These are provisions that seek to further criminalise consensual same sex relations and sex work. The bill, rather than following the current worldwide trend of decriminalising same sex relations, further criminalises consensual same sex conduct and widens its definition to prohibit a female person from permitting anyone to have carnal knowledge of her against the order of nature; it also maintains the criminalisation of sex work and expands it to cover soliciting for sexual services; and also makes HIV positive status an aggravating factor for rape. This analysis considers the bill from the perspective of an organisation working on the protection of LGBTI persons, sex workers and persons living with HIV/AIDS. It analyses each of those provisions of the Bill that affect LGBTI persons, sex workers and persons living with HIV/AIDS in light of international and domestic human rights standards, and makes recommendations.

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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.

<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).

## 2. Background

This bill is not the first attempt at enacting a Sexual Offences Act for Uganda. The first efforts were spearheaded by the government starting in 2000 with the Sexual Offences (Miscellaneous Amendments) Bill, 2000.<sup>3</sup> However, the process stopped there. In 2011, the Sexual Offences Bill, 2011 was gazetted<sup>4</sup> and later tabled before parliament in 2012 as the Sexual Offences Bill, 2012. It was a private members' bill spearheaded by UWOPA. After the Government had advised UWOPA not to pursue parallel efforts, UWOPA agreed to join efforts with the government.<sup>5</sup> However five years down the road, the process had not yielded any results and thus the tabling of the bill again by Hon. Amoding on behalf of UWOPA.<sup>6</sup>

The proponents of the bill justify it on the basis that there is an increase in sexual offences despite government efforts to combat them, and that the current laws do not address some aspects of sexual offences. UWOPA also argues that the existing laws do not provide adequate punishment for offenders and this needs to be revised. Also a comprehensive law would make it easy for the judiciary to implement. The bill also is necessary for the protection of children, which is an area not adequately catered for under the current law.<sup>7</sup>

When the bill was first presented in 2011, organisations working on LGBTI issues, sex worker issues, and issues of persons living with HIV/AIDS had this bill as one of those that they were closely watching.<sup>8</sup> This is because it had provisions that sought to further criminalise consensual same sex relations;<sup>9</sup> criminalise sex work;<sup>10</sup> and use someone's HIV positive status as an aggravating factor for the offence of rape.<sup>11</sup> These issues still remain in the current bill and therefore the same concerns still remain.

The bill was read for the first time and is currently before the Committee on Gender,

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<sup>3</sup> The Sexual Offences (Miscellaneous Amendments) Bill, 2000.

<sup>4</sup> The Sexual Offences Bill, 2011, No. 1 of 2011, Bills Supplement No.1, Bills Supplement to the Uganda Gazette No. 2 Volume CIV, 14<sup>th</sup> January 2011.

<sup>5</sup> UWOPA 'UWOPA to support government on the Sexual Offences Bill Amendments' available at <http://www.uwopa.or.ug/news/uwopa-support-government-sexual-offences-bill-amendments> (accessed 2 May 2016).

<sup>6</sup> UWOPA 'UWOPA moves motion to table sexual offences Bill 2015' Available at <http://www.uwopa.or.ug/news/uwopa-moves-motion-table-sexual-offences-bill-2015> (accessed 2 May 2016).

<sup>7</sup> Above. Also in relation to the Sexual Offences Bill 2012, see generally, UWOPA 'Policy Brief on the Sexual Offences Bill (SOB) 2012: Fast tracking legal Reforms on SOB' available at <http://www.uwopa.or.ug/publication/uwopa-policy-brief-sexual-offences-bill-2012> (accessed 2 May 2016).

<sup>8</sup> See for example A Jjuuko 'The incremental Approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) Institute of Commonwealth Studies, School of Advanced Study, London, UK, 381-408, 390.

<sup>9</sup> Sexual Offences Bill, 2011, clauses 19 and 20.

<sup>10</sup> Above, clauses 15, 16 and 17.

<sup>11</sup> Above, clauses 4(1)(a).

Labour and Social Development for Public Hearings where it was referred after the first reading. It was however not presented with the required certificate of financial implications. The certificate was reportedly requested by its mover in December 2015 but it had not yet been received by the time of developing this analysis.<sup>12</sup>

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

All the provisions in the bill affect sexual minorities, just like they affect other groups of persons. There are however particular provisions that affect them 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. Uganda is also party to various international human rights instruments that are binding.

#### **3.1 Overly broad and vague definition of a sexual act**

A sexual act is defined to among others include: *'direct or indirect contact with the anus, breasts, penis, buttocks, thighs or vagina of one person and any other part of the body of another person.'* This definition is so broad and vague and thus subject to multiple interpretations and misinterpretations. It simply focuses on the contact without even attaching sexual intent. The reference 'indirect' contact makes it more confusing since it is not clear what amount to indirect contact. This would virtually imply that all sorts of contacts between persons regardless of motive would be regarded as sexual acts once the anus, breasts, penis, buttocks, thighs or vagina of a person are used on any other body part of another person. The only exceptions are those where the contact is by a hand or 'any other unharmed object' for medical purposes or for reasonably necessary body searches by law enforcement agencies. Many legitimate activities that usually involve body contact like football, dancing or sharing seats in public transport would qualify as sexual acts. Accidental contacts will also be covered.

The definition thus does not take into consideration the intention of the body contact except in the given exceptions. This means that accidental body contact, direct or indirect, can be interpreted to mean a sexual act, constituting an ingredient of the various sexual offences.

Sexual minorities, sex workers and persons living with HIV/AIDS are all likely to suffer the brunt of such a broad definition. LGBTI persons have been habitually victimised because of the institutionalised homophobia in Uganda. Homosexual advances have been used to justify homophobic crimes and in fact, the now nullified Anti-Homosexuality Act 2014 had a provision that exonerated any person who

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<sup>12</sup> n 2 above.

committed an offence in the process of 'defending' themselves against homosexual advances and activities.<sup>13</sup> It is therefore highly probable that this definition can be used against LGBTI persons to accuse them of various sexual offences even when in fact, such contact was not meant to be sexual. This definition will be fodder for false and targeted accusations against LGBTI persons.

Sex workers are in the business of soliciting sex in exchange for monetary or material gain. Several actions done by a sex worker, even when not to solicit sex, can be interpreted as though they were sexual. This definition gives room for such unfettered interpretations and leaves sex workers vulnerable to criminal sanctions. Any body contact made by them, however innocent, could be easily interpreted to mean a sexual act.

Persons living with HIV/AIDS continue to be stigmatised and discriminated against. It is widely believed that these persons intentionally transmit HIV/AIDS and as a matter of fact, this is criminalised.<sup>14</sup> Therefore the definition of sexual act provided by the bill could easily be used to further victimize persons living with HIV/AIDS, by leveling false accusations against them.

### ***Recommendation***

The definition of a sexual act should be amended to include the intention of the person making such contact. Intention shall be determined with due regard to the manner in which it is made, and the circumstances under which it is made.

## **3.2 Broad and inclusive definition of rape**

Clause 2(1) of the bill repeals and replaces the definition of rape as found in section 123 of the Penal Code Act, 1950. The archaic and unclear expression 'unlawful carnal knowledge' is replaced with a much clearer and more expansive definition. The definition extends beyond the traditional and limited view that an act would only constitute rape if forceful penile-vaginal penetration has taken place. Under the new Bill, it is provided that the insertion of any body part of the perpetrator, an animal or any object into the vagina, penis or anus of another person constitutes rape. Forced contact between any body part of the perpetrator and the anus, breasts, penis, buttocks, thighs or vagina of another person is also included in the definition of rape and so is cunnilingus, fellatio or any other form of genital stimulation. This broadened protection allows for severe sentences to be passed for a wide range of harmful sexual offences, which may fall short of the traditional definition of rape. This broader definition is helpful for especially LGBTI persons as they suffer rape that cannot be comfortably defined to fit within the ambits of the traditional penile-vaginal definition.

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<sup>13</sup> Anti-Homosexuality Act 2014 sec 5(1).

<sup>14</sup> The HIV/AIDS Prevention and Control Act 2014, secs 43-44.

In terms of the Penal Code Act, only women or girls can be victims of rape. The Bill, on the other hand, provides that the offence of rape is committed where 'any person' suffers a forced sexual act. This gender-neutral definition of rape avails the deterrent protection of a more severe minimum sentence to men, boys and intersex persons. It also recognises that sexual offences committed against male victims are equally severe, destructive and punishable.

This gender neutrality is very essential as it covers crimes committed against men and transgender women. These crimes (where they have been prosecuted at all) have hitherto been prosecuted under the offence of having carnal knowledge against the order of nature, which creates the uncomfortable implicit assumption that there is no difference between consensual same sex sexual intercourse and non-consensual same sex intercourse. The offence of carnal knowledge against the order of nature has proved hard to prosecute since it is a victimless offence. Therefore the two most recent convictions that have been registered under this offence, were largely because the sex was not consensual.<sup>15</sup> Having a rape provision that covers such scenarios lessens the grounds for the justification of keeping the offence of carnal knowledge against the order of nature on Uganda's law books, as cases of non-consensual same sex intercourse against men and transgender women can be strictly treated as rape cases and prosecuted under the general rape provision.

The only issue with the provision on rape is that though section 123 of the Penal Code Act which provides that a person who obtains consent of a married woman by personating her husband commits rape is proposed to be amended to be gender neutral, the amendment also sticks to only married persons. While this gender-neutral approach is welcome, it is suggested that this provision should be amended to simply discount consent obtained through personation. As it stands, the Bill presupposes that spouses are the only regular sexual partners who could be personated to the detriment of the victim. This specific protection would not be available to sexually active Ugandans who have consented only because they have been deliberately misled about the identity of their partner. The provision discriminates on the basis of marital status. Even though marital status is not a listed prohibited ground in Article 21(2) of the Constitution, discrimination on this basis prevents an unmarried person from enjoying equal protection of the law as required in Article 21(1).

### ***Recommendations***

1. This definition of rape under the Bill should be maintained and passed as it is.
2. Clause 2(1) should be made applicable to all cases of personation of any person's regular sexual partner.

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<sup>15</sup> These were in the cases of *Uganda v Shabhazi Muhammed* Crim. Case No 474/2013 and *Uganda v Christopher Mubiru Kisingiri* Crim. Case No 0005/2014.

### 3.3 Differential treatment of marital rape from other forms of rape

Clause 2(3) of the Bill creates the offence of ‘marital sexual assault’. While the acknowledgement that spouses can and often do commit acts of sexual assault against each other is a big step forward for Uganda, clause 2(3) of the Sexual Offences Bill falls short of the human rights standards set by regional and international law.

The International Covenant on Civil and Political Rights (ICCPR) provides that all people are entitled to equal protection of the law. This provision is echoed in articles 2 and 3 of the African Charter on Human and Peoples’ Rights (ACHPR) and article 21 of the Constitution of Uganda. Article 3(4) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) provides that States Parties shall adopt appropriate measures to ensure the protection of every woman’s right to respect of her dignity and protection from all forms of violence, particularly sexual and verbal violence. In terms of this treaty, Uganda is obligated to enact and enforce laws which prohibit violence against women including unwanted or forced sex taking place in private.<sup>16</sup> Uganda is also obligated to punish the perpetrators of violence against women.

In clause 2(1) of the Bill, non-consensual sexual acts are referred to as rape and convicted perpetrators are liable to life imprisonment. In clause 2(3), non-consensual sexual acts committed against a person’s spouse are referred to as ‘marital sexual assault’ and a person convicted of this offence is liable to imprisonment for a period of not less than one year. It is both inconsistent and unfair to make a person convicted of rape liable to life imprisonment, while a person convicted of rape perpetrated against that person’s spouse is liable to up to one year’s imprisonment. The clause is discriminatory as it does not provide victims of rape who are married to their perpetrators with equal protection of the law.

Sex workers, LGBTI persons, and persons living with HIV are all at risk of suffering marital rape due to their respective vulnerabilities. Criminalising marital rape therefore provides protection for these groups. Considering the heightened vulnerability of women and marginalised persons within the domestic setting, the prevalence of domestic violence in Uganda<sup>17</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.

#### ***Recommendation***

The provision should be amended to provide the same punishment to all categories of rape regardless of the marital relationship between the offender and the victim.

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<sup>16</sup> Art 4(2)(a) of the Maputo Protocol.

<sup>17</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) 239. Available at <https://dhsprogram.com/pubs/pdf/FR264/FR264.pdf> (accessed 27 April 2016).

### 3.4 Using HIV Positive status as an aggravating factor for rape

The offence of aggravated rape is created under clause 3 of the Bill. The clause provides for the death penalty in cases where a court is satisfied that there were aggravating factors in the commission of rape. In determining the existence of such circumstances, the bill implores the court to take into account whether or not the offender is infected with HIV or suffering from AIDS<sup>18</sup>, or whether the offender is infected with a sexually transmitted disease.<sup>19</sup> The creation of different punishments for people living with HIV/AIDS is discriminatory and against public policy. It entrenches the stigma and discrimination that these people already face. 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. This discourages people from testing and accessing treatment in a bid to escape criminal liability. This exacerbates the HIV/AIDS scourge.

#### **Recommendation**

This provision should be amended to remove the HIV status of an offender from the list of aggravating factors which a court should consider in determining whether or not there were aggravating circumstances in the commission of the offence of rape.

### 3.5 The overly broad and vague offence of sexual assault

This is created under clause 6 (1) which provides that:

*'Any person who engages another person in a sexual manner against their will forcefully or otherwise by direct or indirect contact with the anus, breasts, penis, buttocks, thighs or vagina of that person; or exposure or display of his or her genital organs to another person; or with the intention to insult the modesty of that other person utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by that person or intrudes upon the privacy of such person commits a misdemeanor...'*

This provision, just like the definition of a sexual act is overly broad and vague and thus prone to abuse. This is because in some instances the intention may not be sexual.

#### **Recommendation**

The provision should be amended to clearly define the circumstances that constitute the requisite intent.

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<sup>18</sup> Sexual Offences Bill, 2015, clause 3(2)(a).

<sup>19</sup> Sexual Offences Bill 2015, clause 3(2)(b).

### **3.6 Protection of persons in custody from improper sexual activity**

Clause 11 prohibits officials and employees of correctional facilities from engaging in sexual contact, sexual intercourse, sexual harassment, sexual assault or performance of any other sexual act with a person in their custody. It also prohibits them from employing, authorising or inducing any person to engage in the above prohibited acts. Going by the definitions of sexual contact, sexual harassment, sexual assault and sexual act provided in the bill, this provision is welcome for the protection of the rights of sexual minorities. Many times, sexual minorities, especially LGBTI persons are subjected to inhuman and degrading practices when in custody. They are subjected to humiliating searches as officers try to use their genitals to ascertain their actual sex or gender and are subjected to tests such as the anal exams. They are also subjected to sexual harassment by their fellow suspects/prisoners, which is in most cases constructively sanctioned by the officials in charge.

Although the definition of a sexual act provides exceptions in instances of medical procedures and lawful searches, the bill provides that such procedures and searches should not be carried out abusively and should not humiliate the suspects or arrestees. This provision gives sexual minorities prosecutorial grounds against the injustices they often face when held in custody.

#### ***Recommendation***

The provision is progressive and protective of LGBTI persons, sex workers and persons living with HIV and should therefore be maintained.

### **3.7 Continued criminalisation of sex work**

Just like the Penal Code Act, the bill seeks to prohibit prostitution under clause 12. Clause 1 defines a prostitute to mean '*a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain*'. Prostitution can be construed accordingly. This definition does not differ from the definition in the Penal Code Act and therefore this offence remains the same.

The offence of prostitution in Uganda remains one of the most redundant provisions, the enforcement of which 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.

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.<sup>20</sup> Continued criminalisation of sex work discourages sex workers' access to the necessary HIV/AIDS information as they stay in hiding. Criminalisation 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 criminalisation of sex work is doing more harm than good.

#### ***Recommendation***

This provision should be repealed in its totality.

### **3.8 Introduction of the offence of soliciting**

This is a new offence that did not exist in the Penal Code Act. It is created under clause 13 and it provides that:

*“A person who solicits another in a vehicle, on a street or public place for the purpose of obtaining their sexual services as a prostitute commits 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 for the offence of soliciting. 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.

#### ***Recommendation***

The provision should be repealed in its entirety.

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<sup>20</sup> UNAIDS 'The GAP Report' (2014) 186, 189 and 193, available at [http://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Gap\\_report\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf) (accessed 1 May 2016).

### **3.9 Introduction of the offence of sexual exploitation of prostitution**

This provision is what essentially replaced the offence of living on the earnings of prostitution that is in the Penal Code Act.<sup>21</sup> According to the latter provision, anyone that survived on the proceeds of prostitution, with knowledge that such proceeds were from prostitution, was held criminally liable for committing an offence. This offence was never really implemented but its implementation would have adverse effects as it would affect the livelihoods of many people. It is therefore a welcome step to see that the bill seeks to repeal it.

The provision in the new bill criminalises the causing or inciting of a person to become a prostitute in expectation of a gain and controlling of the activities of another person in relation to their prostitution activities in expectation of gain. It majorly criminalises pimps. Criminalisation of 'pimping' feeds into the general criminalisation of sex work whose perils have been discussed above. Where such activities qualify to be trafficking, Uganda has an anti-trafficking law that can adequately address the issues.<sup>22</sup>

#### ***Recommendation***

The provision should be repealed in its entirety, as any form of criminalisation of sex work is self-defeating. Also, the issue of trafficking is adequately addressed in another law.

### **3.10 Continued criminalisation of Brothels**

The offence of brothels is under clause 15 of the bill. It is not different from the offence of brothels in the Penal Code Act.<sup>23</sup> The clause criminalises the owning of houses or rooms for purposes of prostitution. This also feeds into the concept of criminalising sex work, which has been discussed above.

#### ***Recommendation***

This provision should be repealed in its entirety as it is related to the criminalisation of sex work.

### **3.11 Criminalisation of consensual same-sex relations and widening the offence to expressly cover women**

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<sup>21</sup> The Penal Code Act Cap 120, section 136.

<sup>22</sup> Prevention of Trafficking in Persons Act, 2009.

<sup>23</sup> n20 above, sec 137.

Clauses 16 and 17 of the Bill are almost a repetition of section 145 and 146 of the Penal Code Act, which makes it an offence to 'have carnal knowledge against the order of nature' and 'Attempts to have carnal knowledge against the order of nature' respectively. However, there is a proposed extension of the Penal Code offence of 'permitting a male person to have carnal knowledge of him/her against the order of nature'<sup>24</sup> to now expressly include women as it is proposed to read as 'permitting a male or female person to have carnal knowledge of him/her against the order of nature.'<sup>25</sup>

The phrase 'carnal knowledge against the order of nature' has not yet been defined by courts, but is used to prosecute persons considered to be engaged in same sex conduct as the *Shabhaz Muhammed and the Mubiru cases* above showed.<sup>26</sup> Clauses 16 and 17 thus criminalise same-sex sexual conduct. It is HRAPF's position that sexual acts between consenting adults should not be criminalised. 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).

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>27</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

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<sup>24</sup> The Penal Code, Section 145(c).

<sup>25</sup> Sexual Offences Bill, 2015, Clause 16(c).

<sup>26</sup> n15 above.

<sup>27</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.

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>28</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>29</sup>

### ***Recommendation***

The provisions should be repealed in its entirety.

## **4. Conclusion**

While it is a welcome effort to have a codified law on sexual offences, care should be taken not to re-criminalise the offences that are already redundant and abusive. The Penal Code Act on which this bill is premised is a colonial law, the relevance of whose provisions has been overtaken by the rapid developments in the human rights field and evidence of their unenforceability. Since efforts to amend the Penal Code Act are long overdue, parliament should use the opportunity of this new bill to repeal all provisions that criminalise consensual same sex relations, sex work and that promote stigma against persons living with HIV.

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<sup>28</sup> See Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) & 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>29</sup> Above, 58-67.