



## Written Memorandum on Sexual Offences Bill

Chapter Four Uganda is an independent non-profit organisation working to protect civil liberties and promote human rights for all. Chapter Four has reviewed the Sexual Offences Bill, 2019 that was presented on the floor of Parliament for the first reading and prepared this memorandum. We believe the memorandum will contribute to improving this Bill and ensuring that Parliament passes a law that is Human Rights compliant and protects the rights of all persons.

### Key Issues in the Bill

#### Clause 1: Interpretation

“sexual act” is defined in sub clauses (a) to (c) to mean penetration, contact or stimulation, as well as insertion of a person’s sexual organ, mouth or anus by a person’s or an animal’s sexual organ or object.

##### *Recommendation:*

We recommend that this be amended to read as follows:

“sexual act” means any contact however slight of any object or organ by a person on another person’s sexual organ, mouth or anus.

##### *Justification*

The existing definition excludes the use of another body part that is not a sexual organ like fingers. It is also unclear on the use of the object, and the above definition will provide clarity on all the uses.

#### Clause 2: Rape

Clause 2(b) provides that a person who performs a sexual act with another person incapable of consenting to the sexual act.

##### *Recommendation*

We recommend that the words “where that person is” be inserted at the beginning of clause 2(b) for clarity.

### **Clause 3: Aggravated Rape**

Clause 3(a) provides that where the sexual offender is infected with HIV or suffering from AIDS, it shall be deemed to be aggravated and the person so convicted is liable to suffer death.

#### *Recommendation*

- a. Amend clause 3 by replacing the death sentence with life imprisonment
- b. Remove HIV/AIDS status as a ground for aggravation.

#### *Justification*

The inclusion of HIV status as an aggravating factor is rooted in stigma against HIV positive persons. The provision is also redundant because the HIV Act ably deals with intentional spreading of HIV/AIDS. Targeting persons suffering HIV/AIDS persons is discriminatory and against the constitution which provides for equality before the law for all persons.

The provision of a mandatory death sentence is unconstitutional as was decided by the Supreme Court in the case of Attorney General v Susan Kigula and 417 others<sup>1</sup>.

### **Clause 4: Administering substance with intent to commit a sexual act**

Whereas clause 4 is important, it provides only for a maximum sentence and does not give a judge discretion to give a lesser punishment depending on the circumstances of the case. This is important because it enables judicial officers to administer lesser or more sentences depending on circumstances of the case as a means of attaining a just outcome and is in line with Article 28 of the Constitution.

#### *Recommendation*

Replace the word “for” appearing immediately before the words “seven years” with the words “not exceeding” so that it reads “... is liable to on conviction to imprisonment not exceeding seven years”

### **Clause 5: Sexual assault**

This provision provides for sexual assault as including unlawful touching, exposure of sexual organs, among others.

#### *Recommendation*

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<sup>1</sup> <https://ulii.org/ug/judgment/supreme-court-uganda/2009/6>

We recommend that the paragraph succeeding clause 1(e) of the provision be amended to read as follows:

“...with intent *to cause that other person alarm or distress* commits an offence and is liable on conviction, to imprisonment for a term of *not more than* one year or a fine of twenty-four currency points or both.

#### *Justification*

The phrase “insult the modesty of that other person” is vague and takes the listed actions outside of the realm of violence to that of morality. The failure to frame such actions as violence goes against the spirit of the law, which is named in the explanatory memorandum as enacting a specific law on sexual offences for the effectual prevention of sexual violence.

The punishment prescribed ought to be a maximum sentence, so that the courts are given leeway to assess each case and give a commensurate sentence. This will enable a more rigorous application of the law and facilitate its implementation.

#### **Clause 10: Sexual exploitation**

This clause provides for a mandatory sentence.

#### *Recommendation*

The sentence should be changed to read “ a period not exceeding 10 years as opposed to 10 years”.

#### **Clause 11: Unnatural Offences**

Clause 11(a) prohibits sexual acts with another person contrary to the order of nature.

#### *Recommendation*

We recommend that Clause 11(a) be excluded from the Bill.

#### *Justification*

Clause 11(a) is vague, broad, and is another attempt to legislate in a manner that promotes discrimination against Ugandans who identify as Lesbian, Gay, Bisexual, Transgender, Intersex or Queer (LGBTI/Q). This provision as it exists in the Penal Code has been construed as criminalising consensual adult behaviour between LGBTI/Q persons, and re-enacting this provision will further entrench homophobia and transphobia in the society. This would be contrary to recognised human rights standards and amount to cruel, inhuman and degrading treatment of LGBT+ Ugandans.

#### **Clause 18: Supply of sexual content and material to a child**

This provision prohibits the distribution of material of a sexual nature to children, except if given as part of sex education as part of the curriculum of an approved institution of learning.

#### *Recommendation*

We recommend that the exception be widened to allow parents and guardians to give permission for sex education for their children.

#### *Justification*

This provision is likely to prevent comprehensive sex education for children outside of schools that may be given by medical personnel, parents and caretakers, among others.

### **Clause 26: Evidence of character and previous sexual history**

This provision prohibits the cross examination of a victim of a sexual offence except with leave of court.

#### *Recommendation*

We recommend that the provision read as follows:

“In prosecution for an offence under this Act where the question of consent is in issue, it shall not be permissible to adduce any evidence or to put questions in the cross examination of the victim as to the general immoral character or previous sexual experience of such victim with any person for proving such consent.”

#### *Justification*

The exception provided leaving it to the court’s discretion is unnecessary. A victim’s previous sexual experiences are irrelevant to determine consent in a particular case that’s before the court.

### **Clause 33: Disclosure of sexual offences record**

This provision requires a person who has been convicted of a sexual offence to disclose this conviction when applying for employment which places him/her in a position of authority or care of children or any other vulnerable person.

#### *Recommendation*

We recommend that the word “not” be inserted after “does” to give Clause 33(2) its intended meaning.

We also recommend that the following provision be inserted:

3) An employer who wishes to recruit an employee part of whose duties relate to being in a position of authority or care of children or any other vulnerable person shall use

all means necessary to verify the information provided by such prospective employees as to whether they have been convicted of an offence under this Act.

*Justification*

This will ensure that prospective employees divulge the information required by this clause.

**Clause 34: False sexual allegations**

This provision criminalises a person who makes false or misleading allegations regarding sexual offences.

*Recommendation:*

We recommend that this provision be excluded.

*Justification:*

This provision is unnecessary as the crime of perjury is covered under sections 94 - 97 of the Penal Code Act. This provision is also contrary to the spirit of Clause 27 that allows for uncorroborated evidence of a victim of sexual assault.

Further, it is a statistical fact that shame and self-blame prevent many victims of sexual assault from reporting within a time convenient to verify physical signs of sexual assault. Many women that eventually report are not believed. Across the world, the criminal justice system meant to provide justice has made it notoriously difficult for victims to get justice. The provision is also discriminatory towards women. It is a statistical fact that the majority of victims of sexual assault are women and therefore the effect of such a rule would be to legislate the assumption that women are inherently dishonest. Since there's no scientific proof that shows that women and girls will, as a general rule, make false accusations of sexual assault, and no similar provisions exist for other offences, this provision ought to be removed from the law.

**Clause 39: Harassment Order**

This provision allows for a person who has a well-founded fear of harassment to apply to court for an order on such terms and conditions as the court may prescribe.

*Recommendation*

We recommend that the provision be amended as follows:

*Application for a Protection Order:*

Any person may apply to court for a protection order against an accused person or any other person where he/she has a well-founded fear that he/she may be subjected to harassment, intimidation, or unwanted contact by such person on such terms and conditions as the court may prescribe.

*Justification*

The clause is misleading as it appears to be applying for an order to harass the victim. In addition, the clause restricts such orders to persons who are already on trial and may not be helpful if the perpetrator has not yet been charged as investigations are still ongoing.

### **Provisions to add**

We recommend that the following provisions be included in the law:

- Image based violence / non-consensual distribution of intimate images

### **Publication, etc., of an intimate image without consent**

- 1) Any person who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, commits an offence and is liable on conviction, to imprisonment for not more than 5 years.
- 2) For the purpose of this section, an intimate image means a visual or audio recording of a person made by any means including a photographic, film or video recording:
  - a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
  - b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
  - c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

For any further queries on any of the above, please contact us on:

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