



UNESCO



# Policy Brief on Sexual Offense Bill 2019





## **1. Introduction**

The Sexual Offences Bill, 2019, was passed by Parliament on the 3rd of May 2021 and submitted for presidential assent. On 3rd August 2021, the Bill was formally rejected by the President, who suggested that the bill is unnecessary as all the offences it provides for are already provided for elsewhere. The bill was intended 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 sex workers movement has struggled, since the tabling of this Bill in 2016 as the Sexual Offences Bill, 2015, to have aspects of the bill modified in order to lift the burden of criminalisation on the community of sex workers in Uganda. A major highlight was achieved when the Sexual Offences Bill, 2019 was first tabled in February of 2020 as this version of the Bill effectively decriminalised prostitution in Uganda by repealing sections 136, 137, 138 and 139 of the Penal Code Act, in effect removing the offences of prostitution, living on the earnings of prostitution and operating a brothel.

While the move to return the bill to parliament by the president is welcome, it is important to note that this does not necessarily mean that the bill will never become law.

### **Purpose of the policy brief.**

This brief provides a concise analysis of the sections in the bill as enacted that affect the rights of sex workers, and the implications of the section as currently worded. This brief is meant to inform advocacy efforts by the sex workers' movement because, although the bill has been rejected, it could potentially be brought back to Parliament for further debate and consideration, and it is important that the sex workers' movement is prepared to make input into the bill.

### **Necessity of the bill**

In the letter from the president addressed to the speaker of parliament, he indicated that the bill was unnecessary as it did not fill any gaps- the crimes it provides for are already created by another law, that is, the Penal Code Act. However, this bill is meant



to consolidate or bring together all the laws on sexual offenses, and is also an effort to make provision for sexual offenses that do not amount to rape or defilement but from which people, particularly women and gender minorities, specifically need to be protected. The bill provides for indecent and sexual assaults and sexual harassment and also expands protection for victims of sexual violence. It is a necessary addition to the law, although it contains some potentially dangerous provisions for the rights of sex workers.

## 2. A critique of problematic provisions in the Sexual Offenses Bill and their implications

### a) Clause 1: Interpretation

The only definition in the bill that is problematic is that of a sexual act, which is defined as “the penetration, however slight, of a person’s sexual organ by another person’s sexual organ”. This definition does not cover the current understanding of sex in all its forms- including oral sex, anal sex, the use of sex toys and masturbation. The Committee asked for this to be changed on the grounds that only penile-vaginal sex is sex, properly defined, and that all other conduct is “carnal knowledge against the order of nature”.

Implication: All forms of sex besides penile-vaginal sex will be illegal if this bill becomes law.

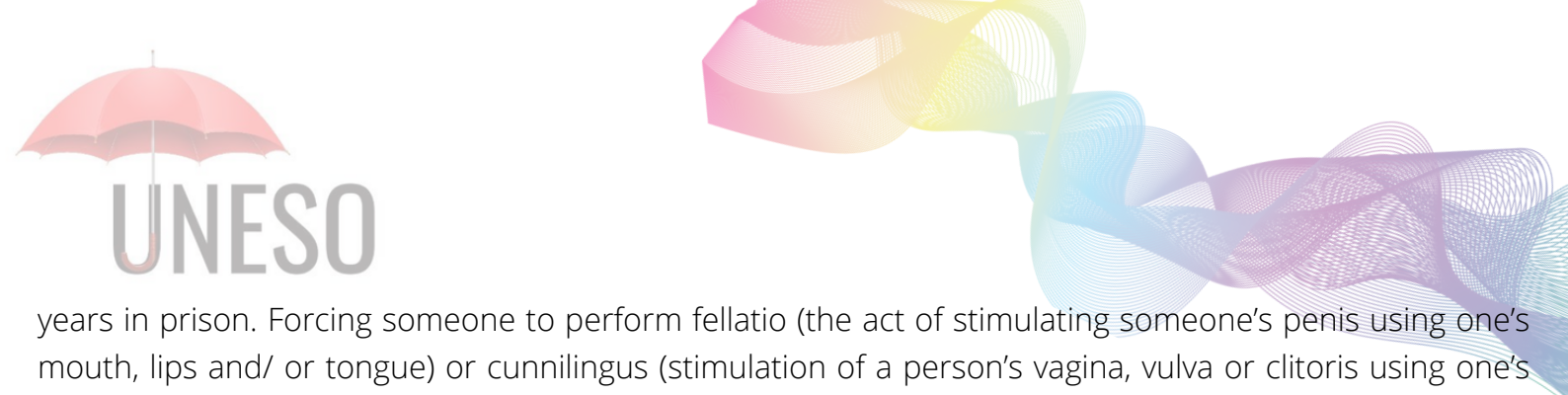
### b). **Clauses 2 and 3: Rape and aggravated rape**

The bill defines rape as performing a sexual act on a person (penetration of one’s vagina with another’s penis) without that other person’s consent, or with a person incapable of giving consent. Aggravated rape occurs when the victim has a disability or suffers a disability as a consequence of the rape, the perpetrator is related to the victim (although the section does not define the degree of relation), the victim is of advanced age (above the age of 75), the victim has or develops a mental disability as a result of the rape, etc. The HIV positive status of the victim is also an aggravating factor in cases of rape.

The punishment for rape is life imprisonment, while a person convicted of aggravated rape could suffer death.

### **Implications:**

1) The forceful penetration of one’s anus using a penis or object would be classified only as unnatural offences (Clause 13), as would the forceful penetration of one’s vagina with an object, with a punishment of up to 10



years in prison. Forcing someone to perform fellatio (the act of stimulating someone's penis using one's mouth, lips and/ or tongue) or cunnilingus (stimulation of a person's vagina, vulva or clitoris using one's tongue or mouth) without their consent would likely be classified as sexual assault (Clause 5), punishable with 3 years in prison, 7 if the act is witnessed by another.

ii) This bill also does not recognise marital rape as an offence from which people, particularly women, should be protected. This is a grave error in light of the worrying statistics on domestic violence in Uganda.

iii). The bill does not provide for the right to withdraw consent after the sexual act has begun, so it might not be considered rape if one continues a sexual act against the express wishes of another person.

iv) The use of one's HIV positive status as an aggravating factor in rape is also worrying as it is inherently discriminatory against people living with HIV and is likely to deter people from seeking testing, treatment and care services that could prolong life because it enhances the stigma that PLWHIV face already.

### c. **Clauses 5, 6 and 7: Sexual assaults, indecent assaults and indecent exposure**

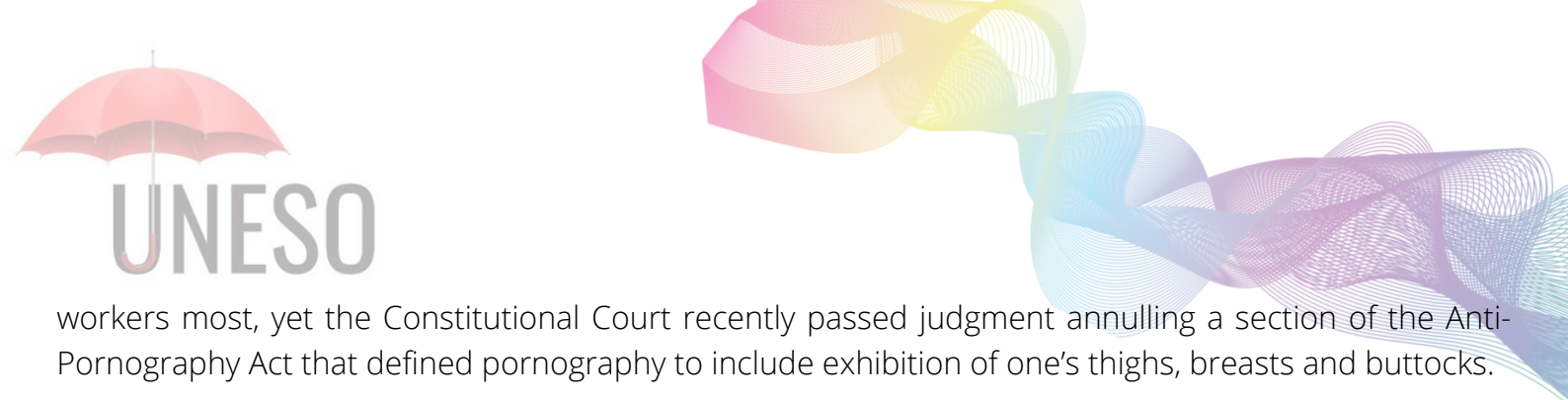
- Sexual assault is defined to mean intentionally and without consent touching or coming into "direct or indirect contact" with a person's thighs, breasts, buttocks or sexual organs with any part of their body, the body of another person or any part of the body of an animal or object. This definition is too wide and does not provide for the intention behind such contact, and is likely to victimise people who may do so innocently.

- Indecent assault is defined as uttering words, making gestures or sounds or exhibiting objects to a person with the intent of insulting that person's modesty, and the offences is punishable by up to a year in prison.

- Indecent exposure is defined to mean intruding on the privacy of a person by exposing or displaying that person's sexual organs, breasts, thighs or buttocks, or exposing one's own sexual organ, breasts, thighs or buttocks to another person. This one covers revenge porn, which is a welcome addition. It is however necessary to clearly stipulate that the victim in such a case shall not be prosecuted for the revenge porn.

Implications:

- I. The definition of indecent exposure to include "exposing one's breasts, thighs, buttocks or sexual organs" is likely to result in criminalisation of certain forms of dress, particularly for women, which would affect sex



workers most, yet the Constitutional Court recently passed judgment annulling a section of the Anti-Pornography Act that defined pornography to include exhibition of one's thighs, breasts and buttocks.

ii. For each of these offences, there is a separate punishment for the offence itself, and then a higher one for committing the offence in the presence of the victim's spouse, child or other relative. This implies that the offences are not so grave when committed in private as when witnessed, thus potentially emphasizing the prevailing culture of further blaming victims of sexual violence where the offence is not witnessed. In addition, it tends to deny the agency of the victim of the offence by insinuating that the offence is worse when it offends a person other than the victim.

The provisions are however generally welcome in the sense that they cover forms of sexual abuse that may not necessarily extend to rape.

#### **d. Clause 11: Detention with sexual intent**

This clause defines the offence of detaining a person with the intention of performing a sexual act on them, but does not take into account people who may choose to be detained or restricted of their own free will for their sexual pleasure.

Implication: Because it does not define detention clearly, it will also affect sex workers as merely stopping a potential client and holding them in place for five minutes while trying to convince them to become a client may, in the strictest sense, be defined as "detention with sexual intent", to replace the offence of soliciting under the Penal Code Act.

#### **e. Clause 13: Unnatural offences**

This clause defines having carnal knowledge against the order of nature to include the use of sex toys on one's own or on another's sexual organs, anal sex and sex between persons of the same gender, which definition essentially also seeks to outlaw masturbation on top of consensual same-sex sexual contact and consensual anal sex.

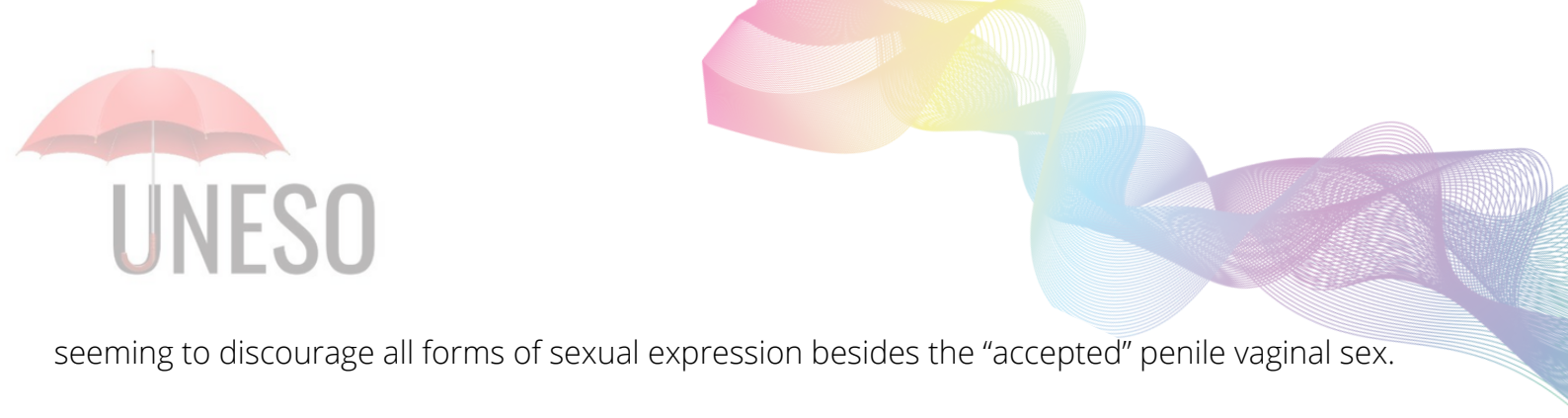
#### **Implications:**

i. This definition (and the criminalisation of) unnatural offences amounts to an unwanted interference of the state in the private sexual affairs of all persons by dictating the acceptable sex practices for citizens.

ii. 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.

iii. This particular section will also further inhibit conversations about healthy sex practices as it also bans masturbation and potentially oral sex, thus





seeming to discourage all forms of sexual expression besides the “accepted” penile vaginal sex.

**f. Clause 14, 15 and 16: Criminalisation of sex work**

These clauses criminalise operating a brothel, engaging in prostitution and engaging in a sexual act with a prostitute. The interpretation section of this bill defines a prostitute as a person who engages in sex for monetary or other gain, or a person who holds themselves out as available for sexual gratification or sex for material gain, which could quite easily cover self-confessed sex workers, even when they have never been arrested for or convicted of the offence of prostitution.

**Implications**

i. These clauses not only criminalise engaging in sex work and operating brothels but also the clients (and other intimate partners) of sex workers who engage in sexual acts with them. Clause 16 is so ill-defined that any sexual contact with a sex worker, whether it is transactional or not, is potentially criminalised.

ii. Criminalisation of sex work has continued to expose sex workers to myriad violations of their rights as it exposes them to arbitrary arrests for petty offences, and the criminalisation also affects the fight against HIV/AIDS as it forces sex workers underground and away from prevention, treatment and care services, as well as increasing their vulnerability to physical and sexual violence.

**g. Clauses 18 and 19: Defilement and aggravated defilement**

These clauses of the bill criminalise engaging in sexual acts with children, with the aggravating factors being the HIV positive status of the offender, situations where the offender is related to or in a position of authority or trust over the victim and where the victim is an infant (below 14 years of age), among others. The penalty for defilement is 18 years in prison (compared to life imprisonment for rape) and death for aggravated defilement (same as for aggravated rape).

**Implications**

i. The definition of sexual act means that children who are subjected to anal or oral sex or sex using objects will not be protected from sexual violence, as this would only be classified as carnal knowledge against the order of nature (10 years in prison) or sexual assault or in the presence of a child (7 years in prison).

ii. Using HIV as an aggravating factor also raises the same human rights concerns as in the offence of aggravated rape, that is, criminalising a health condition, which will only result in further driving people away from prevention, testing, treatment and care services and thus exacerbate the HIV scourge.



## **h. Clause 24: Child prostitution**

This clause is positive in as far as it seeks to protect children from sexual exploitation in the sex work business. However, sub-clause (a) provides clearly that a person who knowingly permits a child to remain in any premises for the purposes of prostitution also commits an offence.

Implication: This clause is likely to victimise sex workers who may not be lodge owners if it is found that there is a juvenile sex worker on the premises, even when the sex workers themselves are not the owners or controllers of the brothel- as the clause does not restrict liability to the owners of the premises, but to all adults within the premises who do not report/allow such a thing to happen.

## **i. Clauses 34 – 39: The sex offenders register**

Part 5 of the bill provides for the creation of a sex offenders register, on which a person who has been convicted of a sexual offence is to be registered within 10 days from the date of the conviction, whether or not there is an appeal pending. Clause 37 provides that the registration on the sexual offenders register shall last for the entire natural life of the offender, which does not take into account the rehabilitative value of the criminal justice system. In addition, there is a requirement in clause 39 that a person on the sexual offenders register notify local authorities whenever they are moving into a new area or visiting an area where they do not reside that they are on that register, and to notify potential employers of the same whenever they seek employment in positions of care over children and other “vulnerable” persons- no matter what the offence was for which they were entered on the register (clause 38).

## **Implications**

i. This register is inherently discriminatory as there is no corresponding register for people convicted of other offences like robbery, theft, murder, etc., thus singling out people convicted of offences under this act for negative treatment. It is particularly harmful to sex workers and LGBT persons, whose entry on the register would ordinarily be for offences that were entirely victimless as the acts complained of would be consensual anyway.

ii. This clause also does not allow space for rehabilitation in any case, so even sexual offenders who have been proven to be rehabilitated appear to have no right to be forgotten and are required to continue to declare themselves sexual offenders until the moment of their death



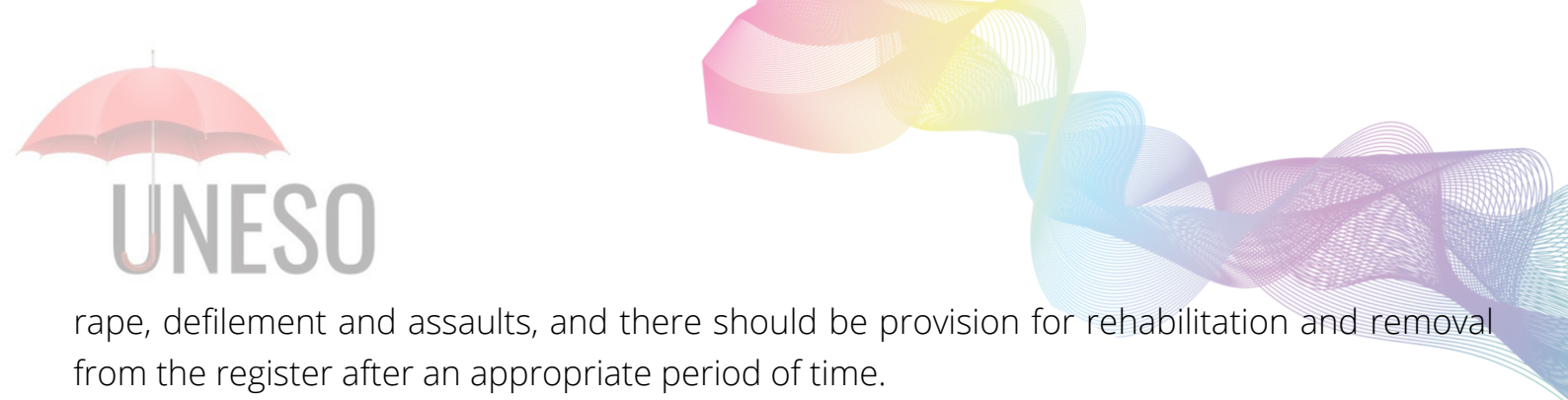
### 3. Recommendations

To the Parliament

In order to bring this bill into conformity with internationally accepted human rights standard, UNESCO and partners recommend that:

- i. A sexual act be redefined to include all contemporary sexual practices in order to avoid the absurdity that the current definition has caused to the definition of rape, defilement and other sexual offences
- ii. That marital rape/ sexual assault be recognised as an offence, and victims provided protections therefrom in the law
- iii. That a specific provision be included that defines consent fully and provides for the right to withdraw consent even after initial acceptance.
- iv. That the HIV positive status of perpetrators not be used as an aggravating factor in sexual offences as it aggravates stigma around HIV and discourages testing and treatment
- v. The definition of sexual assault should be modified to clearly provide for the intention of the perpetrator in order to ensure that such contact when accidental or for lawful purpose is not also criminalised
- vi. Indecent exposure should be better defined in order to remove the definition that seeks to police dressing especially for women, which has been declared unconstitutional.
- vii. The provision of separate punishments for indecent assault, sexual assaults and indecent exposure in the event that the offence is witnessed should be removed as it amounts to a denial of agency of the real victims by providing for “other victims” (those who merely witness)
- viii. The offence of detention with sexual intent should be clarified by clearly defining what amounts to detention
- ix. Consensual same sex sexual relations should be decriminalised in keeping with current trends in human rights protection for all persons across the world
- x. The definition of anal sex, oral sex, masturbation and the use of objects during sex as carnal knowledge against the order of nature should be deleted as it amounts to an unlawful interference by the state into the private sexual lives of citizens, thus violating their dignity and privacy
- xi. Sex work should be decriminalised and sex workers afforded the same protection of the law as all other labourers
- xii. The criminalisation of intimate partners of sex workers merely for engaging in a sexual act with sex workers should be deleted as it extends not only to clients of sex workers but also to their lovers and other sexual partners, thus amounting to discrimination against sex workers
- xiii. The definition of child prostitution should clearly limit liability for allowing a child to remain on premises for purposes of prostitution only to the adults that own or control the premises, as at the moment it is ambiguous enough to also cover other residents/ visitors
- xiv. The sexual offenders register is discriminatory and should be removed from the law
- xv. In the alternative (and without prejudice to the previous recommendation), entry onto the register should only be after the appeal process has been exhausted, for specific offences wherein there are real victims, such as





rape, defilement and assaults, and there should be provision for rehabilitation and removal from the register after an appropriate period of time.

xvi). Subject the bill to a more rigorous public consultation process as the bill concerns matters that directly affect a huge majority of the population.

### **To the Uganda Law Reform Commission**

i). Issue an advisory opinion to the Parliament to guide them on the human rights implications of this bill, and ensure that the opinion covers sufficiently the legal and human rights concerns raised above.

### **To Sex Workers CSOs**

i). Ensure that you raise awareness among members of the sex workers community about the implications of the Bill

ii). Built a critical mass of support for advocacy against the bill by engaging mainstream human rights organisations (particularly women's rights organisations) on the other general implications of the bill

iii) Build mass awareness of the bill and its negative implications through the different social and traditional media channels.

iv) Engage legislators and leaders at different levels of government on the negative implications of the bill in order to build support for proposed changes in the event that the bill is returned to parliament

v). Share information on the negative implications of this bill with development partners and the diplomatic community in order to inform and support their advocacy efforts towards reform of this bill

## **4. Conclusion**

This Bill has several very positive clauses that could protect children, women and other vulnerable groups from sexual violence and abuse, and is a welcome addition to the law. However, the sections defined above unfairly victimise sex workers and LGBT people and further increase their vulnerability, and this ought to be revised before the bill is signed into law in order to offer the equal protection of the law that sex workers in all their diversities are entitled to under the Constitution of the Republic of Uganda.