

Uganda: Anti-Homosexuality Act 2014

On 24 February 2014, Ugandan President Yoweri Museveni signed his assent to the *Anti-Homosexuality Act 2014* (the **Act**), passed by the Ugandan Parliament on 20 December 2013. The Act has been amended and differs in some respects from the version of the bill first tabled in Parliament as a private member's bill in October 2009 by David Bahati MP.

Under pre-existing law, Uganda already criminalises consensual same-sex sexual activity between adults in private which attracts a maximum penalty of life imprisonment.¹

Yet the expanded forms of criminalisation under the Act go further in contravening Uganda's Constitution² as well as its binding international treaty obligations,³ which guarantee fundamental rights to dignity, equality, non-discrimination, privacy, life, freedom from arbitrary arrest and detention and freedom of expression and association.

In addition to violating a number of fundamental human rights, the criminalisation of homosexuality has been recognised by experts as seriously impeding public health outcomes, in particular the prevention and treatment of HIV and AIDS.⁴ Such laws hinder the effectiveness of strategies and measures designed to contain the HIV epidemic.

1. Purpose and Objectives of the Act

The purposes of the Act were reflected in a Memorandum to the bill as follows:

- Protect the traditional family by prohibiting (i) any form of sexual relations between persons of the same sex; and (ii) the promotion or recognition of

¹ *Penal Code Act 1950* (Cap 120) section 145 for the 'unnatural offence' of 'carnal knowledge of any person against the order of nature'. Section 146 provides a penalty of seven years for any attempt of the same and section 148 penalises 'indecent practices' of 'any act of gross indecency with another person' which also carries a maximum sentence of seven years.

² For example, these rights include but may not be limited to, the right to equality and freedom from discrimination (Article 21); protection of personal liberty (Article 23); respect for human dignity and protection from inhuman or degrading treatment (Article 24); right to privacy of person, home and other property (Article 27); protection of freedom of conscience, expression, movement, religion, assembly and association (Article 29); rights of persons with disabilities (Article 35); protection of rights of minorities to participate in decision-making processes (Article 36).

³ Uganda has ratified the International Covenant on Civil and Political Rights and the Optional Protocols; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention on the Rights of the Child; the African Charter on Human and People's Rights.

⁴ Global Commission on HIV and the Law, *Final Report of the Global Commission on HIV and the Law*, 9 July 2012, pp 45, 48; Commonwealth Secretariat, *A Commonwealth of the People: Time for Urgent Reform*, Report of the Eminent Persons Group to Commonwealth Heads of Government, London, 2011, p. 100 and p. 102, Recommendation 60.

sexual relations in public institutions and other places through or with the support of any Government entity in Uganda or any non-governmental organisation inside or outside the country.

- Strengthen the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexual family.
- To recognise the fact that same sex attraction is not an innate and immutable characteristic.
- Protect the cherished culture of the people of Uganda and the legal, religious, and traditional family values of the people against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.
- Protect the children and youth of Uganda who are made vulnerable to sexual abuse and deviation as a result of cultural changes, uncensored information technologies, parentless child developmental settings and increasing attempts by homosexuals to raise children in homosexual relationships through adoption, foster care or otherwise.

The objectives of the legislation were stated to be as follows:

- Provide for marriage in Uganda as that contracted only between a man and woman.
- Prohibit and penalise homosexual behaviour and related practices in Uganda as they constitute a threat to the traditional family.
- Prohibit the licensing of organisations which promote homosexuality.

2. Offences and Penalties

Sec.	Offence	Maximum Penalty
2	<p>Homosexuality</p> <p>The offence of homosexuality is committed by sexual acts including:</p> <ul style="list-style-type: none"> • penetration of anus or mouth of another person of the same sex with his penis or any other sexual contraption; • using any object or sexual contraption to penetrate or stimulate sexual organs of a person of the same sex. • ‘touching’ another person with the intention of committing the act of ‘homosexuality’. 	Life imprisonment
3	Aggravated Homosexuality	

	<p>'Aggravated homosexuality' is an offence in the following circumstances:</p> <ul style="list-style-type: none"> • Person against whom offence is committed is below 18 years of age. • Offender is a person living with HIV. • Offender is parent or guardian of person against whom the offence is committed. • Offender is a person in authority over the person against whom the offence is committed. • Victim of offence is a person with a disability. • Offender is a 'serial offender' (defined as 'a person who has previous convictions of the offence of homosexuality or related offences'). • Offender who administers intoxicating substances with the intent of overpowering a victim so as to enable homosexual acts against them. <p>A suspect charged with this offence is subject to mandatory medical testing to determine his or her HIV status.</p>	Life imprisonment
4	Attempt to commit homosexuality	
	Attempt to commit homosexuality.	7 years
	Attempt to commit aggravated homosexuality.	Life imprisonment
7	Aiding and abetting homosexuality	
	A person who assists, encourages or supports, counsels or acquires another person so as to engage in acts of homosexuality.	7 years
8	Conspiracy to engage in homosexuality	
	Conspiring with another person to induce someone of the same sex, by pretence or fraud, to engage in same-sex sexual activity.	7 years
9	Procuring homosexuality by threat	
	<p>Person who by threats, intimidation, false pretences or misrepresentation acquires or attempts to acquire any person to engage in same-sex sexual activity.</p> <p>Two witnesses are required otherwise corroborating material</p>	7 years

	evidence will be necessary.	
10	Detention with intent to commit homosexuality	
	Detaining another person with the intention of committing acts of homosexuality with him or her or with any other person.	7 years
11	Brothels	
	Person who keeps a house, room, set of rooms or place of any kind for the purposes of homosexuality.	7 years
	Owner or occupier of premises, or person managing or assisting in the management or control of premises, who induces or knowingly allows any person to use or be on the premises for same-sex sexual activity, whether a particular person or generally	5 years
12	Same sex marriage	
	Person who purports to marry a person of the same sex commits the offence of homosexuality	Life imprisonment
	Persons or institutions conducting a marriage ceremony between persons of the same sex	7 years (individuals) Cancellation of licence (institutions)
13	Promotion of homosexuality	
	<p>The promotion of homosexuality is an offence where committed by a person who:</p> <ul style="list-style-type: none"> • Participates in producing, acquiring, marketing, broadcasting, disseminating or publishing pornographic materials for purposes of promoting homosexuality. • Funds or sponsors homosexuality or other related activities. • Offers premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality. • Uses electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality. • Acts as an accomplice or attempts to promote or in 	<p>5 years and/or fine (individuals)</p> <p>Deregistration of corporate body, business, association or an NGO, and Director, proprietor or promoter liable to imprisonment for 7 years</p>

	any way abets homosexuality and related practices.	
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Other Operative Provisions

The Act also provides for the following:

SEC.	PROVISION
5	<p>Protection, assistance and payment of compensation to victims of homosexuality</p> <ul style="list-style-type: none"> • A victim of homosexuality is not to be penalised for any crime committed as a direct result of his or her involvement in homosexuality. • A victim of homosexuality shall be assisted to enable his or her views and concerns to be presented and considered at the appropriate stages of the criminal proceedings. • Where a person is convicted of homosexuality or aggravated homosexuality, the court may order the offender to pay compensation for any physical, sexual, psychological harm caused to the victim.
14	<p>Extradition</p> <p>Persons charged under the Act are subject to extradition laws.</p>

3. Implications of the Act

The Act significantly expands the range of same-sex activities punishable by imprisonment which are now subject to maximum terms of seven years to life. The kinds of activities proscribed by the Act go beyond sexual acts and many other facets of life are now impinged on. One of the main concerns about the Act is the breadth and ambiguity of its provisions. Moreover, the Act embraces, in some cases, not only to homosexuals but their associates regardless of their sexuality.

Homosexuality

The offence of homosexuality is not limited to penetrative sexual acts, but encompasses any form of 'touching' another person with the *intent* to commit homosexuality. Touching is defined to include touching 'with any part of the body', 'with anything else' and 'through anything'. Moreover, 'homosexuality' is defined as same gender or same sex 'sexual acts', which acts are defined broadly and non-exhaustively as, among other things, 'physical sexual activity that does not necessarily culminate in intercourse'. According to this series of definitions, therefore, the offence of homosexuality may conceivably capture any sexual act at all, and could include kissing or something as harmless as two persons of the same sex cuddling with clothes on or holding hands.

This 'touching with intent' provision makes further inroads towards radically criminalising sexual orientation *per se* rather than simply targeting mere acts. It increases the likelihood of false allegations against both homosexuals and heterosexuals and the subjective nature of determining the intention behind a particular touch could lead to even more arbitrary arrests and detention. This novel provision is one most open to abuse.

Aggravated Homosexuality

Disabled people who engage in homosexual acts are automatically deemed 'victims' regardless of whether they have consented and their same sex partners will be liable to have committed the more serious act of 'aggravated homosexuality'.

Likewise, a person living with HIV who engages in homosexual acts is also deemed to have committed the offence of 'aggravated homosexuality' regardless of consent being given, the HIV status of the 'victim', or whether the offender knows his or her own HIV status. Anyone charged under the section on aggravated homosexuality is subject to mandatory HIV testing.

Victims

The one-sided benefits of anonymity, immunity from prosecution and compensation conferred on 'victims' of homosexuality heightens the incentive for people to come forward and present themselves as victims or make false claims, regardless of the consensual nature of any homosexual activity. This violates the right of the accused to a fair trial and due process.

Aiding and abetting

Any individuals who provide support to the LGBT community could be found to be 'aiding and abetting, counselling or procuring' another to engage in acts of homosexuality. This could include activities such as providing safe-sex advice or sexuality counselling; allowing same-sex couples to share sleeping arrangements; operating a gay-friendly venue; or organising a meeting of LGBT people. The rights to freedom of opinion and expression, association and assembly are breached by this provision.

Brothels

Places where any acts of homosexuality take place are now defined as 'brothels', feasibly capturing landlord-tenant relationships and family members sheltering LGBT people in the process.

Same Sex Marriage

Despite the fact that marriage is only permitted between a man and a woman under the Constitution,⁵ the Act penalises with life imprisonment, anyone who simply 'purports' to marry another person of the same sex.

Promoting homosexuality

Promotion of homosexuality is a wide ranging offence which will have a chilling effect on the freedoms of expression, opinion, assembly and association. It will impact adversely on programmes such as safe-sex education, counselling, HIV prevention

⁵ Article 31(3) of the Constitution of the Republic of Uganda 1995 provides: "Marriage shall be entered into with the free consent of the man and woman intending to marry".

and sexual health activities. Effectively, civil society groups, donors, activists, media organisations and academics who are sympathetic to LGBT people and express this openly will be at risk of being criminalised. No exceptions or defences are provided for.

4. Reactions

Office of the High Commissioner for Human Rights

The UN High Commissioner for Human Rights, Navi Pillay, denounced the Act stating:

Disapproval of homosexuality by some can never justify violating the fundamental human rights of others ... This law will institutionalise discrimination and is likely to encourage harassment and violence against individuals on the basis of their sexual orientation. It is formulated so broadly that it may lead to abuse of power and accusations against anyone, not just LGBT [lesbian, gay, bisexual and trans] people.

Pillay foreshadowed the worst abuses likely to result from the operation of the Act and urged greater vigilance in protecting vulnerable LGBT people in the current environment:

- Noting with ‘*deep concern that the law could also threaten the critically important work of human rights defenders in the country*’, Pillay urged the Government to ‘*take immediate steps to ensure that [human rights defenders] are not prosecuted for their advocacy*’.
- ‘*With the HIV infection rate rising in Uganda, the law will have a negative impact on efforts to prevent transmission and provide treatment for people living with HIV, as well as undermine the Government’s commitment to non-discriminatory access to healthcare.*’
- ‘*Police and judicial authorities must investigate any violence and attacks against LGBT individuals and hold perpetrators to account*’, Pillay said, stressing that States have a legal duty to protect all individuals from human rights violations, regardless of their sexual orientation or gender identity.
- ‘*Media organisations should also refrain from fuelling hatred or attacks on the basis of sexual orientation.*’

The full statement by the High Commissioner can be viewed at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14275&>

UNAIDS

The Joint UN Programme on HIV and AIDS (**UNAIDS**) notes that 1.5 million people are living with HIV in Uganda with 140,000 new infection rates in 2012. Globally, gay men are around 13 times more likely to become infected with HIV than the general population, emphasising the urgent need to ensure safe access to HIV prevention and treatment services for all people everywhere.

UNAIDS Executive Director Michel Sidibé observed:

Uganda was the first country in Africa to break the conspiracy of silence on AIDS – and to give voice to the most marginalized – but now I am scared that this bill will take Uganda backwards, relinquishing its leadership role in the AIDS response, I strongly urge the Ugandan authorities to ... ensure the human rights and dignity of all people in Uganda.

The bill also has public health implications; studies show that when gay people face discrimination including abuse, incarceration and prosecution - they are less likely to seek HIV testing, prevention and treatment services.

More on the response of UNAIDS to the Act can be viewed at:

<http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2014/february/20140218psuganda/>

Desmond Tutu

Former Archbishop Desmond Tutu condemned the assent of the Act by President Museveni in the following terms:

The history of people is littered with attempts to legislate against love or marriage across class, caste and race. But there is no scientific basis or genetic rationale for love. There is only the grace of God. There is no scientific justification for prejudice and discrimination, ever. And nor is there any moral justification. Nazi Germany and apartheid South Africa, among others, attest to these facts.

More on the comments by Archbishop Tutu can be found at:

<http://www.theguardian.com/world/2014/feb/23/desmond-tutu-condemns-uganda-proposed-anti-gay-law>

5. The Legal Challenge

On 11 March 2014, a group of ten petitioners jointly filed a petition in the Constitutional Court of Uganda at Kampala challenging the Act. The petitioners in *Oloka-Onyango et al v Attorney General of Uganda* represent a wide cross section of society and include a legal academic, a politician, a journalist, local LGBT activists (including one gay man, a lesbian and a trans person) and two LGBT/human rights organisations.

The petitioners argue that the Act in various parts violates the principle of legality and rights to privacy, equality and non-discrimination, dignity and freedom from cruel, inhuman and degrading treatment, freedom of expression, thought, assembly and association, presumption of innocence and the right to civic participation.

It appears that the law does not officially come into effect until it has been published in the official *Uganda Gazette*. The petition seeks orders to halt the operation of the Act as well as its publication in the Gazette.

The petition also seeks further orders prohibiting any person from writing, publishing or mounting a campaign against homosexuals as well as injunctions against any persons, organisations or companies restraining them from publishing in print or electronic media any articles or letters against homosexuals which 'may bring such persons into public ridicule, odium and hatred'.