



POLICY BRIEF ON SEXUAL OFFENCES BILL (SOB) 2015 FAST TRACKING LEGAL REFORMS ON SOB

Executive Summary

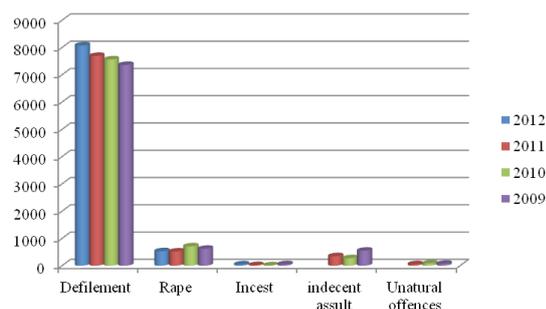
The purpose of this policy brief is to highlight the need for amendment of the existing legal framework on sexual offences through the enactment of the sexual offences bill or the fast tracking of amendments to legislation on sexual offences. The development of this policy brief involved desk review of literature on sexual offences as well as field interviews with police officers, judicial officers and state prosecutors.

The research established that in spite of the elaborate provisions on the law prohibiting the sexual offences, the number of sex related offences has continued to increase with rape and defilement featuring most prominently. Factors identified as responsible for causing the prevalence of sexual offences in Uganda include weak legislative provisions, lack of awareness and institutional implementation challenges among others.

Proposals for amendments of the law tackle the following; improved procedures for victim handling and support, updating and enhancing the existing penalties, broadening the definitions of the offences to cover more victim categories, redefinition of offences to make them gender neutral and creation of new offences to cater for developing social trends among others.

It is anticipated that the enactment of the foregoing proposals will go a long way to: ensure constitutionality and promote access to Justice for victims of sexual offences in Uganda; Increase reporting of sexual offences and ensure successful prosecution of offenders. It is further anticipated that these proposals shall bring Uganda's legal regime on sexual offences in conformity with international standards and human rights best practice.

Trends of sexual offences in Uganda 2009-2012



Annual police crimes reports 2009, 2010, 2011 and 2012

Statement of the problem

Sexual offences take different forms including rape, aggravated rape, attempt to commit rape, administering substance for purpose of committing a sexual act, sexual Assault, sexual harassment, sexual offences relating to position of authority and persons in position of trust, sexual act with a person incapable of giving consent, detention with sexual intent, person living on earnings of prostitution, prohibition of prostitution, exploitation of prostitution, unnatural offences, attempt to commit unnatural offences and indecent practices and acts among others. Sexual offences that may be specifically committed against children include; defilement, aggravated defilement, failure to disclose offence of defilement for economic gain, child to child sex, householder permitting defilement or rape before a child, supply of sexual content and material to a child, incest of a child prostitution and child pornography. In spite of the elaborate provisions on the law prohibiting the above sexual acts, the number of sex related offences has continued to increase across the country over the years as illustrated in the diagram above.

The trends show an average of 37 cases of defilement reported every month. This demonstrates a large number of victims of defilement, in spite of the existing laws across the country over the years as illustrated in the diagram above. The table below demonstrates a steady increase in the sexual offence cases reported annually within the past four years. Defilement and rape continue to feature most prominently. This study similarly investigated the trends of defilement recorded at the Central Police Station in Kamuli between 2011 and 2013 the years and established the following statistics;

Table: Cases of Defilement report in Kamuli 2011-2013

YEAR	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
2011	46	44	29	23	39	35	34	32	32	39	25	22
2012	34	52	37	32	29	50	52	40	35	38	38	29
2013	45	30	30	27	34	43	57	42	31	51	--	--

The trends show an average of 37 cases of defilement reported every month. This demonstrates a large number of victims of defilement, in spite of the existing laws.

Factors identified as causing the prevalence of sexual offences in Uganda

Among the factors identified are the following;

1. Weak legislation: The law relating to sexual offences is outdated and falls short of the Constitutional standards of Uganda. Earlier efforts towards reform culminated in the Penal Code Amendment Act of 2007 which reforms focused on sexual offences pertaining to Children. A new section 129 that broadened the scope of defilement to cater for boys and girls alike. It also provides for the offence of aggravated defilement, child to child sex¹ and redefined a Sexual Act.² The amendment also provided for the payment of compensation to victims of defilement in addition to any sentence imposed on the offender. Whereas these were much needed reforms a lot of gaps remain in the law including the weak fines and penalties, undefined harmful traditional practices, and an unfriendly atmosphere for victims among others.

2. Lack of awareness: This poses a challenge at many levels as discussed here below;

a. Failure to appreciate defilement as a crime: Whereas efforts have been made in some areas to inform the public about defilement, some members of the public do not relate to defilement as a criminal matter as they do for theft murder and assault. As such they do not give it the urgency it deserves. They instead delay the criminal process by first engaging in discussions in order to obtain family consensus

on how to handle a matter of defilement before reporting to the police, in the process, the delay occasioned may result in a loss of crucial evidence.

b. Out of court settlements: In other instances the parents of the victim of defilement prefer marrying the victim off to the perpetrator to reporting the matter to police. Matters of defilement are commonly reported only where the victim is pregnant and the perpetrator is unable to marry the victim. According to a resident attorney from Kamuli³ "In our rural settings, defilement means pregnancy, without pregnancy, there is no defilement." In many of the defilement cases reported efforts have been made to negotiate a compromise, it is only where this has failed that the reporting is done. "Many of these cases are reported after the parties fail to agree on how much money should be paid or if a partial sum was exchanged and the perpetrator fails to pay up the balance. In some cases, the defiler and victim have been "married" for over five years and then the parent reports that the perpetrator defiled his daughter!"⁴ Many of the cases reported are for purposes of extortion. Justice is not an issue. Many of the parents of the victims allude to the fact that they only report because the perpetrator has failed to give them the money they want. Witnesses can also be compromised through bribes.

c. Engaging the wrong forum: Some families try to settle the matter at the Local Council level. The Local Council court has no criminal jurisdiction to handle matters of defilement. Some of the Local Council officials have been known to use their authority to extort money from the perpetrators of defilement.

¹ This is an offence to be dealt with as required by Part V of the Children Act. Those above 12 are to be dealt with as prescribed by part X of the Act.

² This was broadened to include "Penetration of the vagina, mouth or anus, however slight of any person by a sexual organ; the unlawful use of any object or organ by a person on another person's sexual organ."

³ Interview with Anthony Wamibu RSA Kamuli

⁴ Interview with RSA Kamuli

3. Institutional challenges : Some of the institutional challenges identified as allowing for the prevalence of sexual offences include;

a. Distance from health centres: The study established that in some remote areas the victims of sexual offences do not have access to the designated health professionals and may therefore fail to report and document evidence in the time frame required. For instance in Kamuli, it was established that the areas of Kibuye, Kyamatende, Kiige and Kasolwe do not have health centres and the necessary staff to fill in the PF3. As such, the cases of sexual offences are reported late.⁵

b. Corruption: A number of medical personnel require a fee of UGX 20, 000 to fill the PF3. It was established that very few medical personnel are willing to fill the form free of charge. Among the reasons given for this additional cost is the fact that the Medical officers claim they will use the money for transport when it is time for them to give evidence in court, claiming that they are usually not facilitated for this role.⁶ This additional prevents many victims from accessing justice as they cannot afford to get the medical examination required for proof of a sexual offence.

c. Limited Funding and capacity to handle cases: This challenge is faced in the various offices handling matters of sexual offences as follows; for some police stations it is in the form of lack of facilitation to follow up reported cases, while for the Prosecutors it is limited funds for dealing with witnesses.

The study established that a State Attorney's budget for witnesses is UGX 200,000 a month. This sum cannot support efforts by the prosecutor to properly investigate a matter. It is also the case that very few of the cases reported are tried. In spite of the big numbers of those arrested monthly, a judicial officer may only be able to hear these cases once a month. This results in case backlog and has been pointed out by some as responsible for the rise in cases. In an interview with the RSA of Kamuli district, he observed that; 'The rise in sexual offences can be attributed to the absence of justice. '

Another salient issue is that the Investigating officers in police are not sufficiently trained and equipped to carry out proper investigations. In a case reported in Kamuli, an investing officer handling a matter of defilement wrote "threatening violence" on the charge sheet. Furthermore, some of the medical personnel engaged to fill the PF3 are not well trained and may be easily compromised to tamper with the evidence which works to the detriment of the victim.

Other factors responsible for the alarming rates of sexual offences in the country include;

1. Redundancy/idleness and unemployment:

The current national unemployment rate in Uganda is 36.45%;⁷ while the unemployment rate among youth stands at 62%. This means there is a huge number of people idle and in some cases restless. The increasing number of an idle population creates spaces for exposure to pornography and sexual content. The Anti-Pornography Bill is purportedly a reaction to an "increase in pornographic materials in the Ugandan mass media and nude dancing in the entertainment world." Its provisions would aim to "equip the country with a better law to tackle the insidious social problem of pornography."⁸

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⁵ Interview with O/C CFPU Kamuli

⁶ The study established that the Ministry of Health issued a circular prohibiting the demand by medical personnel for money to fill the PF3.

⁷ <http://www.tradingeconomics.com/uganda/unemployment-rate>

⁸ <http://www.thinkafricapress.com/uganda/ugandas-antipornography-bill-if-woman-wears-miniskirt-we-will-arrest-her>

2. Alcohol and drug substance abuse: alcohol has been shown to play a dis-inhibiting role in certain types of sexual assault;⁹ alcohol has a psychopharmacological effect of reducing inhibitions, clouding judgements and impairing the ability to interpret cues.¹⁰ Research suggests that connections between violence, drinking and drunkenness are socially learnt rather than universal. In 2013 Uganda was ranked 8th globally on alcohol consumption.¹¹ In 2005 the World Health Organisation ranked Uganda as the leading consumer of alcohol in the world – per capita alcohol consumption in Uganda was 19.5 litres.¹² The use of alcohol with anxiety-enhancing drugs such as cannabis, tobacco, khat, heroin and other medically prescribed drugs has also been said to be in the increase.¹³ 2013 saw increased reporting on drugs and substance abuse in Uganda.¹⁴

3. Poverty: In 2009/10 it was noted that the annual poverty rate had reduced from 31% (8.5 million people) in 2005/6 to 24.5% (7.5 million people) in 2009/10.¹⁵ Poverty is linked to

both the perpetration of sexual violence and the risk of being a victim of it. It has been argued that “because of extreme poverty, many girls are tempted by the promise of a little money to buy food or clothing. The most at risk are girls in the upper primary classes (P/5–P/7). Some are well into their teens by the time they reach primary sixth or seventh because their academic progress was delayed due to lack of school fees.”¹⁶

In order to ensure that the legal regime on sexual offences is up to date and relevant to address the trends of sexual offences in Uganda, the Parliament has undertaken various amendments to existing laws including the Penal Code Act¹⁷ and Magistrate Courts Act and other related laws. Other reforms include the enactment of the Prevention of Trafficking in Persons Act,¹⁸ the Domestic Violence Act¹⁹ and the Female Genital Mutilation Act. Other ongoing initiatives include the draft anti pornography Bill as well as the proposed Sexual Offences (Miscellaneous Amendments) Bill 2000.

Existing Legislations

i. 1995 Constitution:

Under Chapter IV – Bill of Rights provides for protection and promotion of different rights. Article 79(i) mandates Parliament to enact laws on any matter for the peace, order, development and good governance of Uganda. Parliament is obligated to enact progressive legislation on sex related offenses.

ii. Penal Code Act:

Chapter XIV of the Penal Code Act provides for offenses against morality which include rape, defilement, leaving off the earnings of prostitution, indecent assaults, unnatural offenses, incest, among others. In 2007 the penal code act amended to repeal²⁰ and amend²¹ some provisions under the penal code Act. The penal code Act remains largely post

colonial and does not address some current and emerging sex related offenses and trends.

iii. Prevention of Trafficking in Persons Act:

this Act prohibits trafficking in persons and also lays emphasis on sex related offenses such as sex tourism, sexual exploitation and pornography which contravene this legislation. Sex related offenses prohibited under this Act are limited to offenses within the chain of trafficking in persons.

iv. Domestic Violence Act:

this Act provides for the protection of victims of domestic violence. The Act prohibits different kinds of violence including sexual abuse which includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of another person.

9 Miczek KA et al. Alcohol, drugs of abuse, aggression and violence. In: Reiss AJ, Roth JA, eds. Understanding and preventing violence. Vol. 3. Social influences. Washington, DC, National Academy Press, 1993, pp. 377–570.

10 Abby A, Ross LT, McDuffie D. Alcohol's role in sexual assault. In: Watson RR, ed. Drug and alcohol reviews. Vol. 5. Addictive behaviors in women. Totowa, NJ, Humana Press, 1995.

11 <http://www.monitor.co.ug/News/National/Uganda-tops-Africa-inalcohol-consumption>

12 Uganda Youth Development Link: State of Alcohol Abuse in Uganda, 2008 pg 1

13 n 4 above 2

14 [http://www.newvision.co.ug/news/644119-campaign-to-freeuganda-](http://www.newvision.co.ug/news/644119-campaign-to-freeuganda-of-drug-and-substance-abuse.html)

[of-drug-and-substance-abuse.html](http://www.newvision.co.ug/news/644119-campaign-to-freeuganda-of-drug-and-substance-abuse.html)

15 Ministry of Finance Planning and Economic Development: Reducing Vulnerability, equalizing opportunities and transforming livelihoods, 2012

16 www.theguardian.com

17 2007

18 2009

19 2006

21 Amendment of section 286 and 319 of the principal Act

v. Prohibition of Female Genital Mutilation Act:

this law seeks to protect girls and women from violence through the practice of Female Genital Mutilation/cutting.

vi. Evidence Act:

provides for evidential procedural requirements in the court of law. This Act remains largely colonial having been enacted in 1909. There is need to review some of the evidential requirements in this Act to ensure that the evidential requirements address the peculiar evidential needs of sex related offences.

vii. Venereal Diseases Act:

this Act provides for the examination and treatment of persons infected with venereal diseases (includes but not limited to syphilis, gonorrhoea and includes sexually transmitted diseases but not HIV/AIDS) and for other such related matters. This Act prohibits unlawful or negligent transmission of venereal diseases.

Why do we need a new law on sexual offences?

Whereas the Penal Code Amendment took on board some of the key issues proposed by the study, a number of crucial proposals remain to be enacted including; the redefinition of the offence of rape, provisions for Marital Sexual Assault, redefinition of defilement for persons with a mental disability, and lowering the standard of proof in sexual offences involving children among others elaborated upon below;

The proposed amendments seek to redefine rape to make it broader and thereby capture more instances of violence against women and men that are currently not taken care of in existing legislation for example the draft amendments propose to redefine a sexual act to include penetration of the vagina, mouth or anus. It is also proposed that rape should not be limited to an act of immorality but should constitute an act of violence against the person. The proposals also take into account instances of a female person who aids a male person in perpetrating the rape of another female as having committed rape herself under the general rule of principal offenders which covers not only a person who actually does

the act which constitutes the offence, but also those who help that person in engaging in that unlawful behavior.²² The bill proposes that rape is defined as forceful performance of a sexual act by one person on another person.

At present, sexual intercourse without a woman's consent can only be unlawful if it is done outside marriage. The law exempts a husband from the offence of raping his wife as consent is presumed from the fact of marriage.²³ The only exception to this rule is in instances where 20 Section 129 and 288 of the Penal Code Act a decree nisi has been pronounced in divorce proceedings.²⁴ The proposal includes a provision for marital sexual assault.

Other proposals include an introduction of aggravating circumstances in instances of rape; these include transmission of incurable disease, instances where the victim is a person of advanced age, the amount of force used, and the extent of harm inflicted on the victim. It is proposed that the offender should face a graver penalty of life imprisonment where these aggravated circumstances are occasioned on the victim.

²² Ibid at page 3

²³ Ibid at page 27

²⁴ Reg. vs. R (1992) 1AC.612 recognised rape within marriage

The proposal also seeks to strengthen the provisions on abduction for purposes of sexual intercourse or marriage. The current law provides for elopement²⁵, it is stipulated that any person who elopes with a married woman or man or entices or causes a married woman or man to elope with him, commits an offence. The penalty is presently set at a maximum of six months imprisonment and six hundred shillings for the person who agrees to elope and twelve months and two hundred shillings for the person who entices another to elope. The proposal provides a stiffer penalty for this offence²⁶ in light of the possible health risks involved.

The proposal also covers the cultural practice of abduction for marriage. Abduction literally means²⁷ to illegally take away using force, deception or kidnap. Under the law, abduction is an offence.²⁸ In some communities in Uganda, the process of acquiring a wife begins with abduction of the girl by a future husband. Under such circumstances, the acts of rape and defilement that ensue are not regarded as sexual offences²⁹

The proposal also tackles issues of defilement of persons who lack the mental capacity to consent to sexual acts. This is termed as defilement of idiots and imbeciles within the Penal Code Act.³⁰ The shortcomings of this provision include the derogatory definitions of the offence, the lack of gender neutrality of the provisions, the lack of a definition for an "idiot" or "imbecile" and the inadequate penalty for those who defile such persons. The issue of sexual rights of people with disability is also considered. The proposed amendment is for the words "idiot and "imbecile" to be replaced with the words "a person with a mental disability" and is to include both males and females incapable of giving free consent due to their mental illness or defect.

Another issue that is key within the proposed amendments to the sexual offences law is the proposal to modify the trial procedure and evidential requirements to make them victim friendly. It is proposed that: the procedure for trying sexual offences is simplified, the high evidential standard is lowered and the trials relating to sexual offences held in camera.

This will guarantee the protection and willingness of victims and witnesses to cooperate with the police and prosecutors in sexual offenses. Also tackled is the proposal to eliminate the requirement for corroboration in sexual offences. Corroboration is evidence which confirms the accuracy of other evidence in a material particular. In criminal cases, it must confirm or tend to confirm the guilt of the accused. As a general rule, evidence given against a defendant does not need to be corroborated.

A defendant can generally be convicted on the uncorroborated evidence of a single credible witness, provided that the judge is satisfied, beyond reasonable doubt, of the defendant's guilt. Corroboration rules were formulated in the interests of the accused, with the aim of avoiding wrongful convictions in three types of cases, namely,

(i) the evidence of accomplices; (ii) the evidence of the complainant in sexual offences; and (iii) the evidence of children.³¹ It has been argued that the corroboration rules work particularly to the disadvantage of victims of sexual offences. In a criminal proceeding, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's knowledge, skill, experience, training or education that will assist the court

25 Section 121A (1) and (2) Penal Code

26 Presently the imprisonment term is

27 ULRC Sexual offences report at page 59.

28 Section 120 of the Penal Code

29 Sexual offences study report at page 59.

30 Section 124 of the PCA

31 Proposed abolition of the corroboration rules for sexual offences. Press release by the Hong Kong Special Administrative Regional Government. <http://www.info.gov.hk/gia/general/199903/20/0320114.htm> as at 27th January 2012

to understand the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.

An expert for purposes of this section includes a clinical officer, a medical officer, a nurse or qualified medical personnel under the Medical and Dental Practitioners Act or a counselor, psychiatrist, psychologist, social worker and any other person with experience in treating or handling sexual assault victims who possess specialized knowledge about common victim behaviors and victim responses to trauma. Other proposals tackled under the proposals include; the compensation of victims to sexual assault and rehabilitation of offenders, lowering the standard of proof to a balance of probability, and eliminating the admission of evidence of prior sexual experience for victims. It is anticipated that the enactment of these provisions would go a long way in ensuring constitutionality and promoting access to Justice especially for victims of sexual assault in Uganda. This would further culminate in improved procedures for victim handling and support, increased reporting of sexual offences and successful prosecution of offenders. The enactment of these proposals would also have Uganda's legal regime in conformity with international standards and human rights best practice.

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Recommendations

Call for Action

The increase in the number of sexual offences demands a strong response from Parliament. The Ministry therefore calls upon all stakeholders to take a more proactive position to combat the increased cases of sexual offences. In particular the Ministry of Gender Labour and Social Development call upon: -

1. Parliament – to hasten amendments relating to sexual offences. The present legal framework is not responsive to the current trends of sexual offences.
2. Parliament should ensure that the procedural law pertaining to sexual offences represents both legal and medical approaches to the offence especially in the area of victim handling.
3. Parliament should ensure the modification of the trial procedure and evidential requirements pertaining to sexual offences to make them victim friendly.
4. Parliament should take into consideration developments in technology and their impact on sexual offences and develop laws to address the same.
5. Parliament should streamline policies and practice in the area of sexual offences and HIV/AIDS.
6. Police – to strengthen investigative processes and procedures for sexual offences. Develop standard operating procedures on how to investigate and handle sexual offences.
7. Ministry of Education and Sports – curriculum on sexuality education – strengthen dissemination of information on sexuality education.
8. Sensitization and awareness – an awareness campaign to inform the public on what to do when faced with sexual offences or their victims.
9. Early warning systems for women and girls – on how to detect possible sexual offenders and how to protect themselves.
10. Victims of sexual offences should have access to a crisis care centre. The police should work closely with crisis centers in the aftercare of a victim.

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