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#### **cc Edward Ssekandi Kiwanuka**

Speaker of the Parliament

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London, 9 December 2009

Dear Mr President,

#### **RE: The Anti-Homosexuality Bill 2009**

I write on behalf of The Equal Rights Trust (ERT) to express our serious concern about the Anti-Homosexuality Bill 2009 which was introduced before the Ugandan parliament on 14 October 2009. The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. ERT is the only international human rights organisation which is entirely focused on the right to equality as such.

As you must be aware, many stakeholders both inside and outside Uganda have expressed concern with the Anti-Homosexuality Bill. In view of this, in the present submission we will draw your attention to issues arising from this Bill only from the point of view of the rights to equality and non-discrimination, which are our focus of expertise, offering an objective independent opinion on whether the Bill is compatible with the Constitution of Uganda and international law in respect to these rights. On the basis of our analysis, we conclude that if adopted, the Bill would contravene both. If passed, the provisions of the Anti-Homosexuality Bill would legitimise, institutionalise, increase and perpetuate the profound discrimination and gross inequality reportedly suffered by lesbian, gay, bisexual and transgender (LGBT) people in Uganda today.

The Bill proposes to “fill the gaps in the provisions of other laws”, in particular section 145 of the Penal Code, which in effect makes same-sex conduct illegal through the criminalisation of “unnatural offences”. The Bill’s explicit purpose is to criminalise not only same-sex relationships but also the actions of those who promote the rights of LGBT people.

### **Summary of findings**

In this brief, The Equal Rights Trust presents substantive legal arguments which establish the conclusion that the Anti-Homosexuality Bill is contrary to:

- The Constitution of Uganda: In particular, the adoption of the Anti-Homosexuality Bill would violate, inter alia, Article 21 (equality and freedom from discrimination) of the Constitution.
- Uganda’s obligations under international human rights law. In particular, the adoption of the Anti-Homosexuality Bill would contravene Uganda’s obligations under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights.

On the basis of the legal analysis presented herein and in the anticipation of the egregious discrimination, stigmatisation and persecution that LGBT people and others will suffer if the Anti-Homosexuality Bill is adopted, we urge you, in the strongest possible terms, to:

- (i) Reject, in its entirety, the Anti-Homosexuality Bill; and**
- (ii) Take steps to review the constitutionality of section 145 of the Penal Code and remove this provision from Uganda’s legislation.**

We further request that you ensure that our opinion is circulated to Members of Parliament, in order that it may inform their discussions on the Bill.

### **1. The Constitution of Uganda**

Article 2 of the Constitution of Uganda states clearly that the Constitution is the supreme law of Uganda, that it is binding on all authorities and persons throughout the country and that any other law or any custom which is inconsistent with its provisions shall be void. A strong commitment to equality pervades the Constitution. The Preamble provides that the people of Uganda are committed to building a better future by establishing a socio-economic and political order through a popular and durable national

Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. Furthermore, a commitment to an equal and inclusive society is expressed through Article III (ii) which states:

“Every effort shall be made to **integrate all the peoples** of Uganda while at the same time recognising the existence of their ethnic, religious, ideological, political and cultural diversity.”  
*(Emphasis added)*<sup>1</sup>

Most notably the Constitution espouses a fundamental right to equality through Article 21.

### 1.1 The right to equality

Article 21 (1) states:

“All persons are equal before and under the law in all spheres of political, economic, social and cultural life and **in every other respect and shall enjoy equal protection of the law.**” *(Emphasis added)*<sup>2</sup>

The Anti-Homosexuality Bill creates several new offences within Ugandan criminal law. These include: (1) “The offence of homosexuality” which under Article 2 criminalises same-sex sexual conduct (including “touching with the intention to commit the act of homosexuality”) and carries a penalty of life imprisonment; (2) “Aggravated homosexuality” under Article 3 which imposes the death penalty on persons who are found guilty of committing “homosexuality” in a range of “aggravated” circumstances including “committing homosexuality” with persons under the age of 18, and “committing homosexuality” where the offender is living with HIV; and (3) “Same-sex marriage” which under Article 12 provides that people who contract a marriage with a person of the same sex are liable on conviction to life imprisonment.<sup>3</sup>

These offences along with many other contained in this Bill,<sup>4</sup> overtly and systematically discriminate against people on grounds of their sexual orientation. The adoption of this Bill would create arbitrary legal provisions within the criminal justice system which are inherently discriminatory and clearly contravene Article 21 of the Constitution of Uganda.

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<sup>1</sup> The Constitution of Uganda, available at: [http://www.ugandaonlinelawlibrary.com/files/constitution/constitution\\_1995.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf).

<sup>2</sup> The Constitution of Uganda, available at: [http://www.ugandaonlinelawlibrary.com/files/constitution/constitution\\_1995.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf).

<sup>3</sup> The Anti-Homosexuality Bill, In: Bills Supplement to the Uganda Gazette No. 47, Volume CII, 25 September 2009, Printed by UPCC, Entebbe, by Order of the Government, available at: <http://www.boxturtlebulletin.com/btb/wp-content/uploads/2009/10/Bill-No-18-Anti-Homosexuality-Bill-2009.pdf>.

<sup>4</sup> For example, Article 4 - “Attempt to commit homosexuality”; Article 8 - “Conspiracy to engage in homosexuality”; or Article 13 - “Promotion of homosexuality”.

The offences introduced by the Anti-Homosexuality Bill target a certain class of people - LGBT people and those who would defend their basic human rights – and seek to subject these people to arbitrary, unreasonable and unjustifiable discrimination within Ugandan criminal law. In doing so the Bill seeks to (i) systematically deny LGBT people their right to enjoy equal protection of the law; (ii) criminalise their ability to form private relationships; (iii) make it impossible for LGBT people to live their lives with dignity; and (iv) deny their inherent right to equality under Article 21. The Constitutional Court of Uganda has in previous decisions offered a clear interpretation of the purpose of Article 21 of the Constitution in relation to discrimination on grounds of sex:

“The concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender [...] There is urgent need for Parliament to enact the operational laws and scrap all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantial equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises.”<sup>5</sup>

Article 21(2) of the Constitution states:

“Without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.”<sup>6</sup>

Sexual orientation is not explicitly listed as a prohibited ground of discrimination within Article 21(2). Nonetheless a solid legal basis exists for the conclusion that Article 21(2) prohibits discrimination on the grounds of sexual orientation. Two justifications support this conclusion:

- i. Read as a whole, Article 21 protects all persons from discrimination;
  - ii. Sexual orientation is covered through a test for adding of new grounds to the enumerated grounds in Article 21(2)
- (i) Read as a whole Article 21 protects all persons from discrimination

The interpretation of the Constitutional Court case in *Uganda Association of Women Lawyers and Others v Attorney General* makes it clear that the grounds listed in Article 21(2) are illustrative and not exhaustive. The opinion of A. E. N Mpagi-Bahigeine Ja states that the concept of equality within Article 21 is founded on the idea that “it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics **such as** their race or gender.” The prevailing implication of this reasoning is that it is also wrong and unacceptable to discriminate on grounds which are analogous to race or sex. This reasoning taken together with the text of Article 21(1) which sets out that the right to equality protection

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<sup>5</sup> *Uganda Association of Women Lawyers and Others v Attorney General* (Constitutional Petition No. 2 of 2003) [2004] UGCC 1, judgment of A. E. N Mpagi-Bahigeine Ja, 10 March 2004.

<sup>6</sup> The Constitution of Uganda, available at: [http://www.ugandaonlinelawlibrary.com/files/constitution/constitution\\_1995.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf).

the law applies to **all persons** creates a strong presumption that under Article 21(2) discrimination on the grounds of sexual orientation is unconstitutional.

(ii) Sexual orientation is covered through a test for adding new grounds to the enumerated grounds in Article 21(2)

Most jurisdictions have adopted a variant of one of two broad approaches when setting the personal scope of the prohibition of discrimination. The first is termed a closed-list approach. It narrowly construes the right to equality to apply to a limited range of protected grounds, or classes, and respective personal characteristics, such as race, sex or disability<sup>7</sup> on the basis that these characteristics have historically resulted in discrimination and victimisation against individuals who have them. Through specifying that the right to equality applies only to certain characteristics, a closed list approach guarantees that the scope of protection from discrimination is not overly broad. It also ensures that the right to equality is not misused by preventing legitimate distinctions from being made or by allowing spurious claims of discrimination.

While the closed list approach permits greater legal certainty, it is often too restrictive and non-flexible in its application. The impossibility to seek protection from discrimination based on a new or emerging ground undermines the object and purpose of the constitutional guarantees of equality and of national equality legislation. Consequently, many legitimate claims of discrimination would fall because they cannot be argued within an explicitly prohibited ground.

A second approach - the open list approach - also explicitly lists grounds of discrimination such as race, sex or political opinion which have historically resulted in discrimination against individuals with certain group characteristics. In addition to these, the open list approach includes the expression “other status”, which enables new grounds of discrimination to be prohibited by law. This approach recognises that the grounds on which serious discrimination manifests itself often evolve or are born anew from social events and that individuals are often victims of discrimination on grounds which do not necessarily have a link to historical oppression, victimisation or marginalisation. It therefore allows courts and other judicial bodies to expand the list of prohibited grounds of discrimination to analogous cases in which individuals can experience similar unjust discrimination.

International human rights instruments elaborated in the framework of the United Nations in the wake of the 1948 Universal Declaration on Human rights follow the open list approach, established first by Article 2 of that Declaration.<sup>8</sup> Making use of the open list – the “other status” provision, international human

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<sup>7</sup> The United Kingdom and the European Union follow this approach. In the European Union in particular, the limitation to only six grounds of discrimination on which binding directives establishing minimum standards can be adopted – sex, race (including ethnic origin), religion or belief, sexual orientation, disability and age – is based on Article 13 of the Treaty of the European Union. However, all 27 EU Member states in their national legislation prohibit discrimination of various further grounds.

<sup>8</sup> Article 2 of the Universal Declaration on Human Rights reads: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, **without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.** Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” (*Emphasis added.*)

rights treaty bodies, including the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have determined that discrimination on grounds of sexual orientation is covered by the provisions of the respective Covenants under their oversight (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) because it is analogous to the explicitly proscribed grounds of discrimination.<sup>9</sup> Yet many legal systems avoid the open list approach as it allows an overly broad and flexible interpretation of the right to equality in which potentially any distinction regardless of its triviality could invoke a claim of discrimination and a violation of the right to equality.

The Declaration of Principles on Equality (2008)<sup>10</sup> which can be described as the current international understanding of the principles on equality as well as a moral and professional consensus on equality<sup>11</sup>, was agreed upon by a group of experts from all regions of the world, whose work was facilitated by The Equal Rights Trust. In response to the sets of difficulties arising from both the open-list and closed-list approaches to grounds of discrimination, the Declaration of Principles on Equality has developed a compromise solution that retains the flexibility and inclusiveness of the open list approach but encases it within a strict legal test. This ensures that the protection against discrimination is not extended to spurious or illegitimate claims of discrimination. Principle 5 of the Declaration of Principles on Equality states:

“Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”<sup>12</sup>

Therefore, applying the test set out in this document of good practice<sup>13</sup>, in order for sexual orientation to constitute a prohibited ground of discrimination, it must be shown that either:

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<sup>9</sup> This test – the analogy with the explicitly listed characteristics -- is also adopted in Article 1 (xxii)(b) of the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000.

<sup>10</sup> Declaration of Principles on Equality, published by The Equal Rights Trust, London 2008.

<sup>11</sup> See, for example, *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001, para. 93.

<sup>12</sup> Declaration of Principles on Equality, Principle 5, p. 6.

<sup>13</sup> The approach to this issue in the Declaration of Principles on Equality is based on the same three-step test provided in the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000, Article 1. Experts from diverse jurisdictions agreed that the South African approach represents the best practice on this issue.

- (a) Discrimination on the grounds of sexual orientation causes or perpetuates systematic disadvantage in Uganda; or
- (b) Discrimination on the grounds of sexual orientation undermines human dignity in Uganda; or
- (c) Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.

We now turn to examine whether the adoption the Anti-Homosexuality Bill, which would legitimise and perpetuate discrimination on grounds of sexual orientation, would be compatible with this modern understanding of the prohibited grounds of discrimination.

(a) Discrimination on the grounds of sexual orientation causes or perpetuates systematic disadvantage in Uganda

The Anti-Homosexuality Bill criminalises activities on the grounds of sexual orientation. It not only criminalises acts of people who engage in same-sex conduct but also criminalises acts of people who promote the rights of LGBT persons and those who fail to report “the offense of homosexuality”. The effect of the Bill is that on the grounds that a gay, lesbian or bisexual person engages, attempts to engage, or “conspires to engage” in private same-sex conduct, they will be committing a crime. Furthermore, anyone who aids, abets, counsels, or promotes the freedom of people to engage private same-sex conduct also commits a crime.

The Bill therefore reaffirms the existing disadvantage and introduces new forms of disadvantage on the grounds of sexual orientation (for both LGBT people and human rights defenders<sup>14</sup>). It perpetuates the existing discrimination, victimisation and disadvantage experienced by LGBT people as a result of the application of the criminal code by making a broad range of activities aimed at promoting tolerance toward and inclusion of LGBT people a criminal offence. The Bill also promotes the systematic disadvantage of LGBT people and those associated with the LGBT movement both inside and outside Uganda.

Criminalising (including the death penalty) same-sex activity is an obvious form of systematic disadvantage against LGBT people. In a statement to the UN Human Rights Council in December 2008, sixty-six UN member states confirmed the systematic disadvantage that laws such as the Anti-Homosexuality Bill can have. The statement reads:

“We are also disturbed that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses [...]

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<sup>14</sup> Thus, the Bill also is in grave contradiction to the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Res. 53/144, 8 March 1999, A/RES/53/144.

We urge States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.”<sup>15</sup>

South Africa has acknowledged the disadvantaging and negative impact that sodomy laws have had on gay men. In the leading judgment of the Constitutional Court which declared these laws unconstitutional, Justice Ackerman stated:

“I turn now to consider the impact which the common law offence of sodomy has on gay men in the light of the approach developed by this Court [...] (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.”<sup>16</sup>

The Canadian Supreme Court also recalled in the case of *Vriend v Alberta*<sup>17</sup> that its previous jurisprudence declared that sexual orientation was analogous to other grounds contained in section 15(1)<sup>18</sup> of the Canadian Charter of Rights and Freedoms because of the disadvantage LGBT people suffered.

“In *Egan*, it was held, on the basis of “historical social, political and economic disadvantage suffered by homosexuals” and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1).”<sup>19</sup>

The South African and Canadian jurisprudence illustrates that constitutional guarantees to substantive equality require that laws which systematically criminalise the activities of LGBT people inherently disadvantage them and infringe their right to equality.<sup>20</sup> The Anti-Homosexuality Bill seeks to victimise,

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<sup>15</sup> Statement on Human Rights, Sexual Orientation and Gender Identity presented in the sidelines of the United Nations General Assembly, 18 December 2008. Available at: <http://www.droitslgbt2008.fr/documents/?mode=download&id=2>.

<sup>16</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CCT 11/98, 1998.

<sup>17</sup> [1998] 1 S.C.R. 493.

<sup>18</sup> Section 15(1) of the Canadian Charter of Rights and Freedoms states “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

<sup>19</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, per Cory J. para 90.

<sup>20</sup> Principle 11 (b) of the Declaration of Principles on Equality requires states to: “(b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality.” Similarly Principle 2(b) of the Yogyakarta Principles provides the duty of states to repeal laws which prohibit consensual sexual activity among people of the same sex in order to give effect to the right to equality: “States shall...Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and

criminalise and stigmatise all those associated with the LGBT movement in Uganda. All offences within the Bill disadvantage LGBT people in a way which seeks to severely impair their ability to lead a normal life. The negative consequences of this Bill would leave LGBT people at such a disadvantage in comparison to everyone else that they would be unable to participate in any way in Ugandan economic, social, political, cultural or civil life.

(b) Discrimination on the grounds of sexual orientation undermines human dignity

The second test on which another ground of discrimination ought to be added to the list of protected grounds is whether it undermines human dignity. The jurisprudence of the Canadian Supreme Court in the case of *Vriend v. Alberta*, has declared that recognising the human dignity of people with a different sexual orientation is critical to ensuring their right to equality under section 15 (1) of the Canadian Charter of Rights and Freedoms:

“It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour **or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened.** That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. **It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.**”<sup>21</sup> (*Emphasis added*)

Upholding human dignity has also been put forward by the Constitutional Court of South Africa as a fundamental basis to strike down sodomy laws. In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CCT 11/98, 1998, the Court found that the sodomy laws violated the right to equality contained in section 9 of the Constitution of South Africa. Confirming that the discriminatory impact which the sodomy law had on gay men was unfair, Justice Ackerman considered three elements to be material. First the discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. Second, the nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform to the moral or religious views of a section of society. Third, the discrimination which the sodomy laws constituted has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.<sup>22</sup>

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ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.” (See The Yogyakarta principles: The Application of International Human Rights Law in Relation to Sexual Orientation and gender Identity, 2006, <http://www.yogyakartaprinciples.org>).

<sup>21</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 69.

<sup>22</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, CCT 11/98, 1998.

The Indian judiciary recently moved to strike down section 377 of the Indian Penal Code, which criminalised homosexuality, and declared it unconstitutional.<sup>23</sup> In the *Naz Foundation* decision, the Delhi High Court held that the discrimination perpetuated by section 377 severely affects the rights and interests of homosexuals and deeply impairs their dignity. It found that the inevitable conclusion was that the discrimination caused to the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India<sup>24</sup>. The High Court found that section 377 also violated Article 15 (right to non-discrimination) of the Constitution and concluded “that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15”.<sup>25</sup>

The centrality of human dignity to the reasoning of the Canadian, South African and Indian courts in striking down laws and policies which discriminated against people on grounds of their sexual orientations has three important implications for the Anti-Homosexuality Bill in Uganda. First, the Bill perpetuates an ideology that LGBT people are unnatural, immoral and a threat to Ugandan society. This fundamentally violates the dignity of all LGBT people in Uganda and encourages a system in which the stigmatisation and humiliation of LGBT people is acceptable, if not obligatory. Second, by imposing a life sentence penalty for engaging in private activities the Bill denigrates LGBT people as the lowest “class” of Ugandan society and sends a blanket message that these people should be treated with the lowest possible regard, worth, concern and respect. Third, treating a person as a criminal because of a characteristic which is innate to them not only violates the human dignity of the individual -- it violates the dignity of all Ugandans by betraying their wish to build their society upon the democratic principles of equality, unity, tolerance and understanding as expressed in Article III of the Constitution. At its most fundamental level the purpose of the Bill seeks to undermine the human dignity of LGBT people throughout Uganda. Therefore, Article 21(2) should, under the test set out in Principle 5 of the Declaration of Principles on Equality, provide protection from discrimination on the grounds of sexual orientation.

(c) Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds

The third basis upon which other grounds of discrimination must be prohibited is when the discrimination on that ground seriously affects the equal enjoyment of a person’s right in a manner comparable to the discrimination on the explicitly prohibited grounds. The Anti-Homosexuality Bill seriously restricts several rights and freedoms including, *inter alia*, the rights to equality, privacy, freedom of expression, association and assembly.

In determining whether the discrimination on grounds of sexual orientation would be comparable to discrimination on the grounds enumerated in Article 21(2), several factors have been identified as

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<sup>23</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001. It should be noted that Section 377 is a variant of the Colonial laws introduced in the second half of the 19<sup>th</sup> Century across the British Empire, and for this reason it bears a semblance to section 145 of the Ugandan Penal Code.

<sup>24</sup> Article 14 of the Constitution of India states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

<sup>25</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001, para. 104.

material by courts in other jurisdictions. The South African Constitutional Court in the landmark decision of *Harksen v. Lane*,<sup>26</sup> opined that there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. The Canadian Supreme Court has stated that what prohibited grounds of discrimination have in common “is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”<sup>27</sup> Based on this jurisprudence, the Delhi High Court in the *Naz Foundation* case cited above<sup>28</sup> held that sexual orientation was analogous to sex and was therefore covered under Article 15 of the Indian Constitution.

To assess the degree of similarity of sexual orientation to the listed protected characteristics, one should ask the question: would the same treatment that the Anti-homosexuality Bill would extend to people of a different sexual orientation be acceptable if it were extended to people on the grounds of their race or gender? In the context of Uganda, it would seem highly unlikely that the *de jure* discrimination and criminalisation would be tolerated on grounds of race or sex. This would be the equivalent of outlawing being a female; or being of a certain ethnic or racial origin. This would also be analogous to imprisoning anyone who does anything to express – even in private – their sexual nature or their ethnic identity. Similar to race and sex, sexual orientation is a fact of nature and a permanent or long-lasting characteristic of the human person. It is defined as follows:

“Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>29</sup>

As noted above, the Ugandan Constitutional Court has strongly emphasised that the “concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender.”<sup>30</sup> It would be intolerant to this concept if a law sought to categorise a whole class of the people of Uganda as criminals because of their race or sex. The Constitutional Court of South Africa has considered this point:

“Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay

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<sup>26</sup> *Harksen v. Lane*, [1998] (1) SA 300 (CC).

<sup>27</sup> *Corbiere v. Canada*, [1999] 2 S.C.R. 203, para 13.

<sup>28</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001.

<sup>29</sup> See The Yogyakarta principles: The Application of International Human Rights Law in Relation to Sexual Orientation and gender Identity, 2006, <http://www.yogyakartaprinciples.org>.

<sup>30</sup> *Uganda Association of Women Lawyers and Others v Attorney General* (Constitutional Petition No. 2 of 2003) [2004] UGCC 1, judgment of A. E. N Mpagi-Bahigeine Ja, 10 March 2004.

men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.”<sup>31</sup>

It is clear therefore that under all three tests set out in the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000 and the Declaration of Principles on Equality 2008 discrimination on grounds of sexual orientation – which would inevitably be caused by the Anti-Homosexuality Bill if adopted – runs counter to the Ugandan Constitution itself. It plainly causes and perpetuates systematic disadvantage, undermines human dignity and adversely affects the enjoyment of rights in a manner similar to that which would have been caused if the Bill was concerned with one of the characteristics protected by Article 21(2). While only one of these tests need to be satisfied to require a ground of discrimination to be prohibited, the fact that the discrimination caused by the Anti-Homosexuality Bill satisfies all three tests is a clear indication that sexual orientation should be read into Article 21(2).

## 1.2 The exceptions and limitations permissible by the Constitution of Uganda

It is necessary to further consider whether the *de jure* discrimination which the Anti-Homosexuality Bill seeks to enact is compatible with any of the limitations of fundamental rights permitted by the Constitution of Uganda.

Derogating from the fundamental right to equality contained in Article 21 is only justifiable in two circumstances. First, Article 21(4) permits Parliament to enact laws that are aimed at:

- “(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or
- (b) making such provision as is required or authorised to be made under this Constitution; or
- (c) providing for any matter acceptable and demonstrably justified in a free and democratic society.”

The purpose of Article 21(4)(a) seems to be to provide a mechanism to allow parliament to take positive measures to counter systematic disadvantage and discrimination without these measures violating Article 21 themselves. **The Anti-Homosexual Bill clearly does not fall within this category of legislative measures.** Indeed, rather than seeking to redress the disadvantage and discrimination suffered by LGBT people, the Bill further perpetuates their status of outcasts. Moreover, it seeks to punish those who do attempt to combat the discrimination and oppression experienced by LGBT people in Uganda.

Nor does the Bill fall within the envisaged remit of Article 21(4)(b). Subsection (b) provides that Parliament may derogate from its obligations under Article 21(1) and (2) if it does so in making provisions which are “required or authorised” by the Constitution. Given the Constitution’s strong commitment to equality and integration of all people in Uganda, it is unclear how the introduction of this Bill could be either required or authorised by the Constitution.

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<sup>31</sup> National Coalition for Gay and Lesbian Equality v Minister of Justice, CCT 11/98, 1998, page 30.

It is easy to see that the Anti-homosexuality Bill does not meet the conditions for derogation provided under Article 21(4)(c). Imposing life imprisonment and the death penalty for private, non-violent sexual conduct between two consenting adults is not acceptable or justifiable in a free and democratic society. Indeed, in at least one respect, the Bill undermines one of the key components of a free and democratic society: Article 13 of the Bill (promotion of homosexuality) seeks to impose severe restrictions on freedom of speech, a right protected elsewhere in the Constitution.

The second provision permitting derogation from Article 21 is provided by Article 43 of the Constitution, which permits the restriction of any of the fundamental rights contained in the Constitution where it is necessary to preserve the public interest. With reference to Article 43, the Bill's memorandum puts forward only one public interest argument to justify a violation of LGBT people's fundamental right to equality: that homosexual behaviour constitutes a "threat to the traditional family". The memorandum to the Bill states that its objectives include:

- prohibiting and penalising homosexual behaviour and related practices in Uganda **as they constitute a threat to the traditional family**;
- prohibiting the ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act;
- prohibiting the licensing of organisations which promote homosexuality. (*Emphasis added.*)

The public interest claim in this case is unjustifiable for three reasons. First, the charge that homosexual conduct constitutes a threat to the traditional family lacks any factual basis or evidence; it appears to be based on deeply rooted stereotypical and prejudicial attitudes about LGBT people. The experience in countries which permit same sex relationships and conduct contradicts this assertion and no evidence exists to suggest that homosexual conduct is a threat to the traditional family. Second, the notion of the *traditional* family is itself subjective. As Sylvia Tamale points out, matrimonial relations among various African communities have differed a great deal.<sup>32</sup> Third, "public interest" for the purposes of Article 43 does not permit any limitation of the enjoyment of the rights and freedoms prescribed that are beyond what is acceptable and demonstrably justifiable in a free and democratic society.<sup>33</sup> Respect for the fundamental rights of each person is itself an essential aspect of the public interest in a democratic society. Therefore, the protection of the "traditional family" at the expense of such fundamental rights is itself an assault on the public interest. For this reason, the latter point would remain valid even if it were a proven empirical fact that not imprisoning homosexuals in a given society has the effect of undermining the "traditional family" – even though no such fact has been established by research in any society.

On the basis of the legal reasoning presented above ERT is of the opinion that the Anti-Homosexuality Act 2009, if adopted, would be unconstitutional, as:

- It would be a direct violation of Article 21 of the Constitution of Uganda;

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<sup>32</sup> See Tamale, S. "A Human Rights Impact Assessment of the Anti-Homosexuality Bill", speech made at Makerere University, 18 November 2009. (Copy available from The Equal Rights Trust.)

<sup>33</sup> Article 43 (2).

- The discrimination that it would legitimise would be unreasonable and unjustifiable under Article 21(4) and Article 43 of the Constitution.

In view of the foregoing, it must be observed that the currently operative Section 145 of the Uganda Penal Code is similarly unconstitutional.

### 1.3. Discrimination in the enjoyment of the right to privacy

The offences created by Article 2 (offence of homosexuality), Article 13 (promotion of homosexuality) and Article 14 (failure to disclose the offence) of the Anti-Homosexuality Bill would, if adopted, violate the right to privacy contained in Article 27(2) of the Constitution of Uganda, which provides:

“No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property.”<sup>34</sup>

Criminalising private activities between consenting adults inherently infringes the human right to privacy set out in Article 27 of the Constitution. The criminalisation of such conduct has been criticised as a flagrant denial of the right to privacy by other African courts.<sup>35</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998), Case CCT 11/98 the South African Constitutional Court held that the Sodomy laws in place in South Africa violated the constitutional right to privacy. Justice Ackerman stated:

“Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy [...] The offence [sodomy] which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.”<sup>36</sup>

At paragraph 36 of the Court’s judgment Justice Ackerman emphasised the wider social harm caused by criminalising such private conduct:

“It is at the same time a severe limitation of the gay man’s rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise

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<sup>34</sup> The Constitution of Uganda, available at: [http://www.ugandaonlinelawlibrary.com/files/constitution/constitution\\_1995.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf)

<sup>35</sup> Other legal systems have also struck down sodomy laws on the basis that they violate the human right to privacy, for example, the United States in the case of *Lawrence v. Texas*, 539 U.S. 558 (2003) and the European Court of Human Rights in the case of *Dudgeon v. United Kingdom*, (Appl. No. 7525/76), judgment of 22 October 1981.

<sup>36</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Case CCT 11/98, 1998, para 32.

to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.”<sup>37</sup>

Furthermore, in 2008 the High Court of Uganda in the case of *Victor Juliet Mukasa and Yvonne Oyo v. Attorney General* accepted that a search conducted without a warrant at the house of Ms Mukasa, President of the Sexual Minorities in Uganda, violated her right to privacy. In so doing, the court declared that Ugandan constitutional rights apply to gay, lesbian, bisexual and transgender people.<sup>38</sup> Consequently, if this Bill was adopted it would overturn the interpretation of the High Court. It would also afford arbitrary and draconian powers to police and law enforcement officials – the inevitable outcome of which would be the fundamental impairment of LGBT people to enjoy private lives. As such it would inherently deny a significant proportion of Ugandan citizens their constitutional right to privacy.

On the basis of the legal reasoning presented above ERT is of the opinion that the Anti-Homosexuality Act 2009, if adopted, would violate Article 27 of the Constitution of Uganda, in respect to LGBT people, as well as all those who would promote LGBT rights, and by extension, all human rights defenders.

In addition to the substantive violation of Article 27, the Bill would also violate the accessory aspect of Article 21 of the Constitution. The constitutional right to non-discrimination and equality contained in Article 21 has two aspects: (i) a substantive and free-standing right to equality which is not necessarily associated with or dependent on the existence or exercise of any other right set forth by law: “all persons” are equal “in all spheres of political, economic, social and cultural life and in every other respect”; (ii) an accessory right not to be discriminated against in relation to the enjoyment of other rights set forth by law, and in particular other rights set forth in the Constitution itself.

The Anti-homosexuality Bill will violate the right of LGBT people and of those who promote LGBT rights to non-discrimination in the enjoyment and exercise of the right to privacy. This means that they will not only have their right to privacy as such substantively infringed, but the infringement will be discriminatory, because the right to privacy enjoyed by persons with heterosexual orientations and/or persons who express opinions and acts in ways hostile or abusive to homosexuals will not be similarly infringed. The latter categories of persons will enjoy their privacy and not pay impossible penalties for being who they are or for holding their opinions or expressing their beliefs.

In conclusion, the Anti-homosexuality Bill, if adopted, will also violate the Article 21 right to non-discrimination in relation to the right to privacy as provided in Article 27 of the Constitution of Uganda.

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<sup>37</sup> Ibid, para. 36.

<sup>38</sup> See The Danish Institute for Human Rights and World Outgames, “Copenhagen Catalogue of Good Practices – International Conference on LGBT Human Rights” 2009, available at: <http://viewer.zmags.com/showmag.php?mid=wgdqgt&pageid=1>.

## 2. International law

If made law, the provisions within the proposed Anti-Homosexuality Bill would contravene Uganda's international human rights obligations. This section of the submission sets the legal foundations of this position.

### 2.1. The right to non-discrimination in international human rights law

Article 1 of the Universal Declaration of Human Rights unequivocally states that "All human beings are born free and equal in dignity and rights." The Anti-Homosexuality Bill undermines this fundamental principle of international law by creating a system of *de jure* discrimination on the grounds of sexual orientation. Uganda is a party to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Covenants contain strong provisions relating to the rights to equality and non-discrimination.

Article 2(1) (non-discrimination) and Article 26 (equal protection of the law) of the ICCPR require that states provide protection from discriminatory laws, policies and practices across an "open list" of grounds: both Articles state that discrimination is prohibited on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. While sexual orientation is not explicitly mentioned in Article 2(1) or Article 26, the UN Human Rights Committee, the treaty body which has authority to interpret the ICCPR, has stated in its communications that discrimination on grounds of sexual orientation is prohibited under the ICCPR.<sup>39</sup> On several occasions the Human Rights Committee has also expressed concern about the criminalisation of homosexuality and discrimination on the grounds of sexual orientation in its concluding observations.<sup>40</sup>

The right to non-discrimination is also contained within Article 2(2) of the ICESCR. As with the non-discrimination protections within the ICCPR, Article 2(2) of ICESCR does not explicitly prohibit discrimination on the grounds of sexual orientation. However, the UN Committee on Economic, Social and Cultural Rights has through its general comments<sup>41</sup> and its concluding observations<sup>42</sup> expressed concern

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<sup>39</sup> See for example, Communication No. 488/1992: Australia, CCPR/C/50/D/488/1992, *Nicholas Toonen v. Australia*, April 4, 1994; see also Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, *Edward Young v. Australia*, September 18, 2003; *X v. Colombia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005, 14 May 2007, para. 7.2.

<sup>40</sup> See, for example, Concluding observations: Greece, CCPR/CO/83/GRC, March 31, 2005, para. 19; Concluding observations: Kenya, CCPR/CO/83/KEN, March 28, 2005, para. 27; Concluding observations: Poland, CCPR/CO/82/POL, December 2, 2004, para. 18; Concluding Observations: Egypt, CCPR/CO/76/EGY, November 28, 2002, para. 19; Concluding Observations: Lesotho, CCPR/C/79/Add.106, April 8, 1999, para. 13; Concluding Observations: Zimbabwe, CCPR/C/79/Add.89, April 6, 1998, para. 24; Concluding Observations: Sudan, C/79/Add.85, July 29, 1997, para. 8.

<sup>41</sup> See, for example, General Comment No. 18: The Right to Work (art. 6), E/C.12/GC/18, February 6, 2006, para. 12; General Comment No. 15: The Right to Water (arts. 11 and 12), E/C.12/2002/11, January 20, 2002, para. 13; General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, August 11, 2000: "Special Topics of Broad Application", para. 18.

over discrimination on grounds of sexual orientation. More significantly, the Committee has recently provided an authoritative interpretation of the Article 2(2) in General Comment No. 20<sup>43</sup> where it has explicitly stated that discrimination on the grounds of sexual orientation is prohibited by the “other status” clause of Article 2(2). The General Comment sets out:

“Sexual orientation and gender identity” “Other status” as recognized in Article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.”<sup>44</sup>

As a party to the ICCPR and CESCR Uganda has an obligation to protect the human rights of all people, including LGBT people, in a non discriminatory manner and to address any legal measures which seek to criminalise or discriminate people on the basis of their sexual orientation. Moreover, as a party to both covenants Uganda is not only bound by international law to their provisions, but it is also obliged to implement law and policy in order to give effect to these provisions. In practice, this means that Uganda should be taking steps to end the discrimination, marginalisation and oppression of people because of their sexual orientation.

Further to being a violation of the general right to equality before the law and non-discrimination as provided by common Article 2(2) and by Article 26 ICCPR, the Anti-Homosexuality Bill would also constitute a breach of the subsidiary aspect of Article 26 when applied in conjunction with other human rights. Article 26 of the ICCPR states:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The UN Human Rights Committee in General Comment No. 18 has interpreted the meaning of this provision in the following way:

“Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on

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<sup>42</sup> See, for example, Concluding Observations, Trinidad and Tobago, E/C.12/1/Add.80, June 5, 2002, para. 14; Concluding Observations: (Hong Kong) China, E/C.12/1/Add.58, May 21, 2001, para 15 (c); Concluding Observations: Kyrgyzstan, E/C.12/1/Add.49, September 1, 2000, para. 17.

<sup>43</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2))”, E/C.12/GC/20, 10 June 2009.

<sup>44</sup> Ibid, para. 32.

States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant.”<sup>45</sup>

Effectively, Article 26 requires that all legal rights must be applied in a non-discriminatory manner. While this includes Uganda’s obligations under the ICCPR it also extends to the obligations to which Uganda is bound by other human rights treaties and the legal rights that exist within Ugandan law. This basic principle of international human rights law is patently breached by provisions of the Anti-Homosexuality Bill. Adopting and implementing the Bill will prevent the equal enjoyment by LGBT people and those associated with the LGBT community of a number of recognised legal rights. Within the rights guaranteed under the international bill of rights (the ICCPR and the ICESCR) the provisions of the Anti-Homosexuality Bill would make the equal application of many human rights impossible. This would include very high risks at violation of the rights listed below, although the list is not complete:

#### The right to non-discrimination in relation to the right to life

Under international human rights and criminal law it is generally understood that the application of the death penalty must be narrowly construed and limited to only the most serious crimes. On this point the UN Commission on Human Rights (the Commission) has urged all states which still maintain the death penalty:

“To ensure that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults.”<sup>46</sup>

Article 3 of the Anti-Homosexuality Bill creates an offence of aggravated homosexuality punishable with the death penalty. The conditions which must be met if a charge for the “offence of aggravated homosexuality” is brought include: (i) the offender is a person living with HIV (Article 3(1)(b)); and (ii) the offender is a serial offender (Article 3 (1)(f)). Each of these conditions remains far below the degree of gravity set out by the Commission’s resolution on the question of the death penalty. This offence, for example, includes the possibility that two consenting adults who engage in any form of homosexuality under Article 2 (including mere touching with intent) could be executed for the crime of “aggravated homosexuality”. **Permitting such a broad application of the death penalty under Article 3 of the Bill goes far beyond the permissible application of the death penalty under international law.**

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<sup>45</sup> UN Human Rights Committee, General Comment No. 18: Non-discrimination.: 10/11/89. CCPR General Comment No. 18. (General Comments), para. 12.

<sup>46</sup> Commission on Human Rights Resolution, E/CN.4/RES/2002/77, April 25, 2002: The question of the death penalty, para. 4(c).

### The right to non-discrimination in relation to the right to be free from degrading treatment

The application and implementation of the Bill would result in a criminal justice system which would treat every person who engaged in same-sex conduct in a degrading way. Article 7 of ICCPR provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>47</sup>

The “offence of homosexuality” and “aggravated homosexuality” distinguishes the sexual conduct of LGBT and heterosexual people and marks the former out for severely detrimental treatment. The punishment meted out to same-sex couples is unreasonable, unjustifiable and is of such severity that it clearly infringes the non-discriminative application of the right to be free from degrading treatment required by Article 26 in conjunction with Article 7 of the ICCPR.

The same analysis applies to section 145 of the Penal Code, which criminalises homosexuality, albeit with less specificity than the proposed Bill. The extant provision discriminates against homosexuals and violates their right to equality and privacy, contravening both the Constitution and Uganda’s international obligations. To comply with its obligation under ICCPR, the Parliament should repeal section 145 of the Penal Code.

### The right to non-discrimination in relation to the right to privacy

As has been set out above the Bill violates the right to privacy of LGBT people and those associated with LGBT people. In addition to this, the draft law, if passed, would discriminatively apply the right to privacy. The Bill infringes on the private life of people who engage in same sex conduct in a manner which does not apply to heterosexual people. Therefore, while heterosexual people are free to engage in sexual conduct without the inquiry or scrutiny of the state, the Anti-homosexuality Bill seeks to make the sexual conduct of same- sex couples or people who engage in same-sex activity the subject of criminal inquiry, investigation and punishment. This violates Article 26 in conjunction with Article 17 of the ICCPR by arbitrarily distinguishing between the private activities of LGBT people and heterosexual people. Article 17 states:

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation; (2) Everyone has the right to the protection of the law against such interference or attacks.”<sup>48</sup>

In addition, the draft law imposes an obligation to disclose the commission of any offence under the Bill within 24 hours (Article 14). The implication of Article 14 is that if a mother has one gay son and one heterosexual son who she knew where both engaged in sexual relationships she would be forced by the

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<sup>47</sup> ICCPR, Article 7.

<sup>48</sup> ICCPR, Article 17.

conditions under Article 14 to report her gay son to the authorities but not her heterosexual son. The effect that this invasion of privacy would have on the private life of the mother is twofold. First, it forces the mother to discriminate against the gay son who will face criminal punishment as a result – this in turn will violate the private relationship between mother and son. Second, it treats a mother who has an LGBT child differently from a mother who only has heterosexual children – but imposes different responsibilities on each. Therefore, the Bill requires that the state discriminatively apply the human right to privacy in a way which is inconsistent with the requirements of Article 26.

#### The right to non-discrimination in relation to the rights to freedom of expression and association

Article 13 criminalises the “promotion of homosexuality.” This offence includes a broad range of activities such as the production, procuring, marketing, broadcasting or disseminating of materials for the purposes of “promoting homosexuality”. It also makes offering premises or fixed or movable assets for the purposes of “promoting homosexuality” as well as using electronic devices for this purpose an offence. This broad-ranging discriminatory restriction of a particular type of expression or association would violate Articles 19 and 22 of the ICCPR respectively. Article 19 provides:

“(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”<sup>49</sup>

According to Article 22 of the ICCPR,

“(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”<sup>50</sup>

In any case the Anti-homosexuality Bill deliberately targets people who engage in “pro-homosexuality” expression or association and makes them liable for a criminal offence. The draft law has a clear and

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<sup>49</sup> ICCPR, Article 19.

<sup>50</sup> ICCPR, Article 22.

straightforward discriminatory intent in this regard. Through seeking to curb expression which “promotes homosexuality”, the Bill would impose a separate and narrow sphere of permissible expression in Uganda. Similarly, Article 13 establishes unreasonable differentiation between those who can receive funds or rent premises and those who can’t. Article 13 creates different, less favourable treatment of those promoting homosexuality that does not apply to those promoting heterosexuality in respect to their rights to freedom of expression and association. In this way a broad range of individuals (including individuals working in civil society, governmental, and international organisations) will be directly and egregiously discriminated against in the exercise of their rights to freedom of expression and association.

#### The right to non-discrimination in relation to the right to work

Article 6 (1) of the ICESCR states:

“The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”<sup>51</sup>

If a person’s employment is in any way related to human rights activism, advocacy, education and training, research, capacity building, or to a practically limitless range of other activities having a bearing in any way to universal human rights, under the Anti-homosexuality Bill this person will have to live in a permanent risk of losing their job or having their employment rights violated in other ways. In addition to this, under Article 26 of the ICCPR the equal enjoyment of employment rights on a non-discriminatory manner will be infringed.

#### The right to non-discrimination in relation to the right to health

By criminalizing the “funding and sponsoring of homosexuality and related activities” under Article 13, the Anti-homosexuality Bill strikes a major blow to Uganda’s public health policies and to its efforts to overcome the HIV infection and deal with AIDS. Article 12 (1) of the ICESCR states:

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>52</sup>

The adoption of the Bill would make the fulfilment of this right extremely difficult. If, for example, under the *Most At Risk Populations’ Initiative (MARPI)* introduced by the Ugandan Ministry of Health in 2008, which targets specific populations in a comprehensive manner to curb the HIV/AIDS epidemic, health practitioners as well as those that have funded this initiative will automatically be liable to imprisonment for seven years, as their service users include LGBT persons. Furthermore, if the draft law is passed it will inevitably make LGBT people reluctant to seek health checks and healthcare services in an open and safe manner. As a result, LGBT people will be denied equal access to the highest attainable standards of health as the legal framework would make it impossible for them to be guaranteed accessible, acceptable, and

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<sup>51</sup> ICESCR, Article 6(1).

<sup>52</sup> ICESCR, Article 12(1).

quality healthcare in accordance with the requirements of the ICESCR.<sup>53</sup> They would be forced to either (i) hide their sexual orientation from healthcare professionals; or (ii) adopt a “don’t ask don’t tell” relationship with healthcare practitioners. This contravenes Article 26 of the ICCPR through imposes indirect burdens on access to healthcare for LGBT people in comparison to heterosexual people. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has previously emphasised this point:

“International human rights law proscribes discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds [...] sexual orientation.”<sup>54</sup>

The Bill would also have serious negative consequences for healthcare practitioners’ ability to use key indicators to identify the health status of their patients.

**In view of the foregoing, permitting the Anti-Homosexuality Bill to become law would be contrary to Uganda’s legally binding international obligations. It would grossly violate the international commitments it made when it ratified the ICCPR and the ICESCR. In particular, it will lead to violations of the right to non-discrimination both as a free-standing right to equality in all spheres of life and as a right to exercise all human rights on an equal basis with others.**

## **2.2. Regional human rights law obligations**

The right to equality and non-discrimination is guaranteed by Articles 2, 3 and 28 of the African Charter on Human and People’s Rights. Uganda became party to the Charter on 10 May 1986. Article 2 of the Charter provides:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”

Consequently, African regional human rights law imposes further obligations on Uganda to protect the rights of every individual. Uganda cannot negate this obligation by claiming that that sexual orientation does not fall within the scope of the Charter because in a similar manner to the ICCPR and the ICESCR the explicitly proscribed grounds are illustrative and the Charter recognises the rights and freedoms of everyone “without distinction of any kind”.

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<sup>53</sup> UN Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4. para. 12.

<sup>54</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49, February 16, 2004, para. 32.

## Conclusion

The Equal Rights Trust recommends that the Ugandan parliament reject the Anti-homosexuality Bill in order to ensure Uganda's adherence to its own Constitution and international and regional law. As the preceding analysis makes clear, passage of the Bill would be both unconstitutional and put Uganda in breach of its obligations under binding international and regional treaties.

From the point of view of the right to non-discrimination and equality, the Bill is unconstitutional: it is in direct contravention of Articles 21 of the Ugandan Constitution and the discrimination which it espouses cannot be justified on the basis of the limitations of rights permitted by the Constitution. Furthermore, by passing the Bill, Uganda would violate its international legal obligations as a party to the ICCPR and CESCR.

Uganda's constitution contains strong guarantees of equality and non-discrimination, but these rights are ineffective if they are selectively denied. Any step which entrenches discrimination against one group undermines the strength of the right to equality itself. Furthermore, at a time where many countries are liberalising their laws with respect to the criminalisation of homosexuality, to move in the opposite direction would be a disgrace.

Dear Mr President, I extend the expertise of The Equal Rights Trust if you require any assistance in strengthening the rights to non-discrimination and equality in Uganda.

Yours sincerely



Dr Dimitrina Petrova,  
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The Equal Rights Trust

- cc. Prime Minister Apollo Nsibambi  
Speaker of the Parliament Edward Ssekandi Kiwanuka  
Minister of Gender, Labour, and Social Affairs Honorable Opio Gabriel  
Chair of the Uganda Human Rights Commission Med Kaggwa  
Directorate for Ethics and Integrity  
Chair of the Uganda Diplomatic Human Rights Working Groups Mathisen Gørild  
Ambassador to the Republic of Uganda Embassy of the United States of America Jerry P. Lanier  
Ambassador to the US Perezi K. Kamunanwire  
Permanent Representative of the Republic of Uganda to the United Nations Dr. Ruhakana Rugunda