

# 4. Domestic protections against stigma and discrimination: Legal, policy and ethical standards

## 4.1 Introduction

In this chapter, an assessment is made of the domestic legal and policy environments in Botswana, Malawi and Zambia. The purpose is to understand to what extent healthcare users can expect to be treated equally and without discrimination in law and policy, and in terms of the ethical standards by which healthcare providers are bound.

## 4.2 Botswana

### Legal framework

Botswana's laws do not permit discrimination against healthcare users. Any discrimination would need to be strictly justifiable under the Constitution.<sup>81</sup>

#### Constitution

Section 15 of the Constitution provides for the prohibition against discrimination:

*"Protection from discrimination on the grounds of race, etc.*

*(1 Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*

*(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

*(3 In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or*

<sup>81</sup> 1966.

*mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."*

Section 3 of the Constitution provides for the enjoyment by every person of fundamental rights and freedoms:

*"Fundamental rights and freedoms of the individual*

*Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest".*

The Botswana Court of Appeal has held in addition that the protection under section 3 of the Constitution is enjoyed by members of the gay, lesbian and transgender community, affirming their recognition under the Constitution.<sup>82</sup>

### Public Health Act

The Public Health Act<sup>83</sup> does not provide for any general prohibition against discrimination in healthcare but does prohibit discrimination against healthcare providers by heads of health facilities on account of the healthcare provider's health status.<sup>84</sup> The definition of "public health" however details services aimed at ensuring "**every individual** in the community, a standard of living adequate for the maintenance of health."<sup>85</sup> It is noted that certain practices identified by research participants as being "discriminatory" (as described in Chapter 6) may also fall within the ambit of the Public Health Act. This includes the prohibition on conducting HIV tests on persons without their informed consent.<sup>86</sup>

### Health Professions Act

The Botswana Health Professions (Professional Conduct) Regulations<sup>87</sup> is subsidiary legislation passed in terms of the Botswana Health Professions Act.<sup>88</sup> The Regulations address a number of obligations on healthcare practitioners subject to the Act, which include a prohibition on divulging any information on a patient's ailments without the patient's express consent.<sup>89</sup> An exception is made where the healthcare practitioner is summoned to appear in court and ordered to disclose the information. Reporting patients to the police who present with medical ailments that may indicate the occurrence of prohibited same-sex sexual activity, sex work, or having undergone an abortion, for example, is therefore prohibited.

<sup>82</sup> *Attorney General v Rammoge and Others* (Court of Appeal Case CACGB-128-14), at paras 57-60.

<sup>83</sup> 11 of 2013.

<sup>84</sup> Section 148(1).

<sup>85</sup> Section 2 (emphasis added).

<sup>86</sup> Section 105(1)(a).

<sup>87</sup> Chapter 61:02.

<sup>88</sup> 2001: Chapter 61:02.

<sup>89</sup> See Regulation 21.

## Nurses and Midwives Act

The Nurses and Midwives (Disciplinary) Regulations, passed in terms of the Nurses and Midwives Act,<sup>90</sup> do not explicitly address the issue of discriminatory conduct but describe “disciplinary offences”<sup>91</sup> that include careless, incompetent and improper conduct, the provision of services inappropriate for a patient’s wellbeing, divulging confidential matters which are a duty to keep secret, failing to apply due care and attention, conducting oneself in a manner unbecoming of a nurse or midwife, and breaching the Code of Professional and Ethical Conduct for Nurses and Midwives.

## Policy framework

The policy framework in Botswana supports a non-discriminatory approach to healthcare in the broad sense and makes commitments to providing healthcare equitably. Particular provision is made for interventions targeted at HIV treatment and prevention services and sexual and reproductive health services for women. The policy framework does not, however, target interventions or make explicit the prohibition on healthcare workers and healthcare systems from discriminating against key populations in particular. Nor does it provide for mechanisms to report or monitor discriminatory conduct in healthcare service delivery.

## Public Service Charter

The Botswana Public Service Charter<sup>92</sup> requires the public service to be executed according to a number of values, including neutrality:

*“Neutrality encompasses ... fairness ... to the public, and equality of treatment. ... Equality demands fair and equal treatment of all persons without discrimination on the grounds of religion, gender, status, place of origin, tribe, colour or religious affiliation.”*

## National Health Policy

Botswana’s 2011 National Health Policy: Towards a Healthier Botswana (National Health Policy)<sup>93</sup> can be interpreted to include protections against discrimination on a superficial level. The Policy states its vision to be an “enabling environment whereby **all people living in Botswana** have the opportunity to achieve and maintain the highest level of health and well-being.”<sup>94</sup> In addition, the implementation of the National Health Policy is guided by the principles and values of respect for human dignity, rights, and confidentiality and the “equitable distribution of resources to guarantee accessibility to quality services, especially for the vulnerable, marginalised, and underserved, irrespective of political, ethnic or religious affiliations and place of domicile.”

While the National Health Policy makes repeated reference to the goal of equity, it makes no mention of the term “discrimination”, and does not include measures of equality or discrimination in monitoring and evaluation and in norms and standards enforcement plans.

<sup>90</sup> 1 of 1995: Chapter 61:03.

<sup>91</sup> See regulation 3(d), (g), (l), (m) and (v).

<sup>92</sup> Available at <http://www.gov.bw/Global/DPSM/public%20service%20CHARTER.pdf?epslanguage=en>.

<sup>93</sup> Republic of Botswana *National Health Policy: Towards a Healthier Botswana* (2011).

<sup>94</sup> As above, at para 31 (emphasis added).

“Stigma” is only mentioned in relation to access to rehabilitative services for persons with “alcohol-related problems”.

While persons with disabilities are acknowledged as suffering from social exclusion,<sup>95</sup> the only planned intervention relates to activities to ensure that health-facility buildings have special provision for the needs of healthcare users with (physical) disabilities.<sup>96</sup> No mention is made of sex workers, men who have sex with men, transgender persons, or LGBT health users in general. The policy’s statement on “Gender Equity” appears to address a gender binary approach to ensuring “gender sensitive and responsive issues including equal involvement of men and women in decision-making.”<sup>97</sup>

### HIV Policy

The 2012 Botswana National Policy on HIV and AIDS (HIV Policy) includes the policy objective:

*“To reduce HIV and AIDS related stigma and discrimination towards persons infected with or affected by HIV and AIDS and draw attention to the compelling public health rationale for overcoming stigmatisation and discrimination against them in society.”<sup>98</sup>*

In the Foreword, the Minister for Presidential Affairs and Public Administration states the HIV Policy “takes cognisance of the fact that due to age, gender, socio-economic status, sexual orientation or disability, some Batswana are more vulnerable” to HIV and AIDS.<sup>99</sup> In the policy itself, however, the definition of “vulnerability” makes no mention of LGBT persons nor are any particular interventions detailed in the Policy to address the particular needs of vulnerable populations.

Nevertheless, the HIV Policy does provide that:

*“Every person in Botswana shall not be discriminated against in terms of access to health services.”<sup>100</sup>*

The HIV Policy acknowledges the protection against discrimination in the Botswana Constitution and the effect of discrimination “especially in relation to an individual’s HIV status” on the effectiveness of the national response to HIV.<sup>101</sup> While making several targeted interventions in relation to discrimination in employment, education, and legal and financial services,<sup>102</sup> the HIV Policy does not direct particular attention to key populations or vulnerable populations, embracing a notion of discrimination largely understood as based on HIV-status.

<sup>95</sup> As above, at para 2.6.6.

<sup>96</sup> As above, at para 4.5.3.3 (d).

<sup>97</sup> As above, at para 3.3.

<sup>98</sup> Republic of Botswana *Botswana National Policy on HIV and AIDS* (Revised edition, 2012), at para 2.1.3.

<sup>99</sup> As above, 3.

<sup>100</sup> As above, at para 7.1.5.

<sup>101</sup> As above, at para 7.1.

<sup>102</sup> See, for example, HIV Policy, as above, at paras 7.1.1-7.1.6.

## HIV Strategic Framework

The Second Botswana National Strategic Framework for HIV and AIDS 2010-2016 (HIV Strategic Framework)<sup>103</sup> states:

*“Stigma and associated discrimination are socially embedded phenomena that impact negatively on the national response as they collude to constrain the coverage and effectiveness of HIV and AIDS interventions and increase the vulnerabilities of particular groups in society.”<sup>104</sup>*

The HIV Strategic Framework makes repeated reference to increased access to health services,<sup>105</sup> and to improving ethical and legal frameworks for “universal access” to HIV services.<sup>106</sup> The Framework provides further that even where supportive laws and policies exist, “non-existent or weak enforcement of these laws may facilitate the perpetuation of stigma and discrimination and limit the general success of the response to HIV.”<sup>107</sup>

While acknowledging the need for more research and the gaps in targeting the “unique profile and specialised needs” of specific groups,<sup>108</sup> the Strategic Framework does not mention key populations, LGBT persons or persons with disabilities. The Guiding Principles of the national response to HIV in the HIV Strategic Framework are stated to include human rights: “promoting dignity, non-discrimination ... of all people and ensuring equal access to health and social support services regardless of race, creed, religious or political affiliation, sexual orientation or socio-economic status.”<sup>109</sup> The inclusion of Guiding Principles based on “gender sensitivity” are framed exclusively in relation to the view that the HIV epidemic has become “feminised”.<sup>110</sup>

## HIV Treatment Guidelines

The 2012 Botswana National HIV and AIDS Treatment Guidelines<sup>111</sup> provide clinical guidelines on HIV prevention, testing, treatment initiation and management. The concepts of stigma and discrimination are referred to briefly in relation to counselling women living with HIV to avoid breastfeeding<sup>112</sup> and in relation to a caregiver’s disclosure of a child’s HIV status to the child.<sup>113</sup> The Guidelines do not provide resources for clinicians in relation to key populations or persons with disabilities but for the brief statement that the safe implementation of pre-exposure prophylaxis for men who have sex with men and commercial sex workers remains to be established.<sup>114</sup> The Botswana TB/HIV Policy Guidelines<sup>115</sup> make no mention of issues relating to stigma and discrimination.

<sup>103</sup> Republic of Botswana *The Second Botswana National Strategic Framework for HIV and AIDS 2010-2016* (2009).

<sup>104</sup> As above, at para 1.2.4.

<sup>105</sup> As above, at para 2.4.1 (1).

<sup>106</sup> As above, at para 2.4.1 (6).

<sup>107</sup> As above, at para 3.2.1.

<sup>108</sup> As above, at para 1.3.5.

<sup>109</sup> As above, at para 2.3.

<sup>110</sup> As above, at para 2.3.

<sup>111</sup> Government of Botswana: Ministry of Health *2012 Botswana National HIV & AIDS Treatment Guidelines* (2012).

<sup>112</sup> As above, at 75.

<sup>113</sup> As above, at 78.

<sup>114</sup> As above, at 20.

<sup>115</sup> Republic of Botswana: Ministry of Health *Botswana TB/HIV Policy Guidelines* (2011).

## Disability Policy

The National Policy on Care for People with Disabilities<sup>116</sup> states as a first principle of the Policy, the “recognition and protection of the human rights of every individual.”<sup>117</sup> There is no explicit mention of discrimination or rights to equitable access. However, certain obligations are placed on the State to ensure that persons with disabilities can access healthcare services among others.<sup>118</sup> A respondent from the Office of People with Disability in the Office of the President – interviewed for this research – criticised Botswana’s policy approach towards persons with disabilities, as focussing on a medical model of “caring” and “treatment” of persons with disabilities, premised on assumptions of them being abnormal objects of pity and charity. The respondent expressed a need for this new Office to embrace a social model of disability, more conducive to respect for persons with disabilities as equal members of society.

## Ethical standards

Professional ethical standards to which healthcare workers are subject are not specific on concepts of discrimination or stigma. However, a range of conduct described under these frameworks would be easily accommodated under practices described by focus-group participants in Chapter 6 as discriminatory.

## Health Professionals

Health professionals are required to register with the Botswana Health Professions Council (BHPC) and to pledge to practise their professions according to the ethical standards articulated in the BCHP Code of Ethical and Professional Conduct (Code of Conduct). The Code of Conduct for health professionals is not captured in subsidiary legislation, like in the Nurses and Midwives Regulations.

The Code of Conduct makes direct mention of “discrimination” only in relation to the treatment of colleagues and not in relation to obligations towards patients. However certain provisions relating to the duties and ethical obligations of healthcare professionals to patients find direct application. The Code of Conduct articulates certain “Core Values” to include:

*“Justice: to treat all persons and groups impartially and fairly, and to make access to quality care equitable for all.”<sup>119</sup>*

In addition, a number of the Code’s ethical obligations describe duties that would be violated in the types of practices described by participants in this research as discriminatory. Most prominently, these include the ethical obligations to:

*“3 Regard every patient with respect, taking care to safeguard the patient’s dignity.*

*9. Ensure that one’s own personal beliefs and opinions do not prejudice the type and quality of care given to the patient.*

*23. Refrain from any abuse of the privileged relationship that exists*

<sup>116</sup> Republic of Botswana *National Policy on Care for People with Disabilities* (1996).

<sup>117</sup> As above, at para 4.2.

<sup>118</sup> See, as above, at paras 4.3.1, 4.3.1.3.

<sup>119</sup> Botswana Health Professions Council *Code of Ethical Professional Conduct* (2012).

*between the health professional and the patient.*<sup>120</sup>

Notable duties to patients described by the Code of Conduct include:

*"1.7. Care for the patient in need of care, irrespective of status, religion, race, tribe, nationality, political affiliation, gender, sexual orientation or occupation."*

In addition to these core values, ethical obligations and duties, several other provisions are more particular to the types and variations of conduct described as "discriminatory" in healthcare settings. Applicable ethical obligations include the obligation to provide patient-centred care in the patient's best interests; to assess the patient comprehensively; to inform and counsel the patient on their health condition; to be sympathetic, courteous and honest with patients; to alleviate pain, anxiety and distress; and to respect and protect confidential information."

Relevant duties owed to patients include respecting the patient's privacy and dignity at all times; allowing the patient to access his records; seeking and obtaining informed consent following providing adequate information and a full discussion of the patient's options; and refraining from indecent sexual acts, violence or threatening behaviour towards patients.

### **Nurse's Pledge of Service**

In addition to the Nurses and Midwives (Disciplinary) Regulations above, nurses and midwives registered under the Nursing and Midwifery Council of Botswana undertake a pledge of service. This pledge includes a promise to care for the sick:

*"without regard to race, creed, colour, politics and social status, sparing no effort to conserve life, alleviate suffering and to promote health."*

The pledge further states an undertaking to respect healthcare users' dignity and to hold in confidence "all personal information entrusted to me".

## **4.3 Malawi**

### **Legal framework**

Like Botswana, discrimination is prohibited in broad terms under constitutional law. In addition, particular provisions exist for the protection of persons with disabilities.

#### **Constitution**

The Malawi Constitution was adopted in 1994 and strongly embodies the value of equality. Section 4 provides:

*"This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the **equal protection** of this Constitution, and laws made under it."*<sup>121</sup>

<sup>120</sup>As above.

<sup>121</sup>Emphasis added.

In addition, section 20 provides for a human right to equality and freedom from discrimination and recognises a notion of substantive equality:

*“(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.*

*“(2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.”*

Further to this, the inherent dignity and worth of all persons,<sup>122</sup> and the equal status of all persons before the law<sup>123</sup> are recognised as “fundamental” constitutional principles. The right to equality and recognition before the law is a non-derogable right under the Constitution.<sup>124</sup> The Constitution provides that the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.<sup>125</sup>

The “inviolable” right to dignity of “all persons” is protected under section 19 of the Constitution, which includes the right not to be subjected to medical or scientific experimentation without consent.<sup>126</sup> Furthermore, individuals are obliged under the Constitution to respect other individuals and to refrain from discrimination:

*“Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognized communities and the international community and these duties shall include the **duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance**; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights of others, collective security, morality and the common interest.”*<sup>127</sup>

The right to confidentiality over one’s health status is arguably guaranteed under section 21 of the Constitution, which provides for the right of every person to personal privacy.

The right to development under section 30 of the Constitution extends to “all persons”, making special provision for women and persons with disabilities, and requiring that the State takes all necessary measures to realise the right including ensuring equality of opportunity for all in access to health services.<sup>128</sup>

<sup>122</sup> Section 12(1)(d).

<sup>123</sup> Section 12(1)(e).

<sup>124</sup> Section 45(2)(g).

<sup>125</sup> Section 12(1).

<sup>126</sup> See section 19(5).

<sup>127</sup> Section 12(2) (emphasis added).

<sup>128</sup> Section 30 provides that:

“(1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.

(2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include,

Women are afforded special protection under section 24 of the Constitution which includes that they “have the right to full and equal protection by the law”.<sup>129</sup> The State is obliged to take action to eliminate customs and practices that discriminate against women.<sup>130</sup> Children are also entitled to equal treatment before the law, regardless of the circumstances of their birth. The child’s best interests and the welfare of children shall be the primary consideration in all decisions affecting them.<sup>131</sup>

In the enjoyment of one’s rights, the Constitution entrenches the right to access to justice and effective legal remedies, affirming the obligation of the State to ensure that all persons can access accountability and redress when their rights are violated. Section 40 provides that:

*“(1) Every person shall have a right to recognition as a person before the law.*

*“(2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.*

*“(3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.”*

Finally, while merely of directory and interpretive value,<sup>132</sup> “principles of national policy” under the Malawi Constitution provide specifically for the State to achieve adequate healthcare and to enhance the protection of rural life and the dignity of persons with disabilities.<sup>133</sup>

## Gender Equality Act

Malawi’s Gender Equality Act guarantees “every person” the right to “adequate sexual and reproductive health” – which includes access to sexual and reproductive health services, family planning, and protection from sexually transmitted infections without discrimination.<sup>134</sup> The Act stresses the obligation on healthcare providers to secure the informed consent of persons accessing sexual and reproductive health and family-planning services.

amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

(3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.

(4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.”

<sup>129</sup> Section 24(1).

<sup>130</sup> Section 24(2).

<sup>131</sup> Section 23(1).

<sup>132</sup> See section 14.

<sup>133</sup> Section 13 provides in relevant part:

“The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—

(c) Health

To provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.

(e) Rural Life

To enhance the quality of life in rural communities and to recognize rural standards of living as a key indicator of the success of Government policies.

(g) Persons with Disabilities

To enhance the dignity and quality of life of persons with disabilities by providing—

(i) adequate and suitable access to public places;

(ii) fair opportunities in employment; and

(iii) the fullest possible participation in all spheres of Malawian society.”

<sup>134</sup> Sections 19 – 20.

## Disability Act

Malawi's Disability Act 8 of 2012 provides for progressive protections against discrimination, which it defines as:

*"a distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, of any human rights or fundamental freedoms, in the political, social, cultural, civil or other field".<sup>135</sup>*

Persons with disabilities are afforded a right to healthcare services, to which government is obliged to:

*"provide persons with disabilities the same range, quality and standard of free or affordable health care services as provided to other persons, including sexual and reproductive health services and population based public health programmes".<sup>136</sup>*

Several provisions under the Disability Act prohibit discrimination particular to the context of healthcare<sup>137</sup> and create obligations to ensure accessibility<sup>138</sup> and to provide for reasonable accommodation<sup>139</sup> of the needs of persons with disabilities. The Act provides for civil remedies in the case of a violation of certain provisions in the Act through the court process.<sup>140</sup> The Minister of Gender, Children, Disability and Social Welfare is also empowered to impose administrative provisions on a person or institution that contravenes the Act.<sup>141</sup>

## Nurses and Midwives Act

Under the Nurses and Midwives (Scope of Nursing Practice) Regulations,<sup>142</sup> promulgated under the Nurses and Midwives Act,<sup>143</sup> registered nurses and midwives are obliged to respect the rights of healthcare users<sup>144</sup> to practice nursing in a non-discriminatory and non-judgmental manner,<sup>145</sup> and to "maintain confidential information relating to clients or patients unless, in the particular circumstances, breach of confidentiality is required".<sup>146</sup> Furthermore, under the Nurses and Midwives (Professional Practice Standards) Regulations,<sup>147</sup> registered nurses and midwives are required to demonstrate "courteous behaviour, based on culture, tradition and respect" to healthcare users.

<sup>135</sup> Section 2.

<sup>136</sup> Section 6(2)(c).

<sup>137</sup> See section 7.

<sup>138</sup> See sections 8 and 9.

<sup>139</sup> "Reasonable accommodation" is defined in section 2 of the Act as: "means necessary and appropriate modifications and adjustments that ensure that persons with disabilities enjoy or exercise all human rights and fundamental freedoms on (an) equal basis with other persons, without imposing disproportionate or undue burdens on the other persons".

<sup>140</sup> Section 31.

<sup>141</sup> Section 32.

<sup>142</sup> GN 12/2002.

<sup>143</sup> Promulgated in terms of section 85 of the Nurses and Midwives Act 16 of 1995.

<sup>144</sup> Regulation 8(d).

<sup>145</sup> Regulation 8(f).

<sup>146</sup> Regulation 8(l).

<sup>147</sup> G/N 13/2002, promulgated in terms of section 85 of the Nurses and Midwives Act.

## Policy framework

The policy framework in Malawi strongly supports an approach to healthcare founded in “equity” and non-discrimination.

### Health Sector Strategic Plan

In the Malawi Health Sector Strategic Plan 2011-2016: Moving Towards Equity and Quality, the notion of universal and equitable access to healthcare services is emphasised. The Ministry of Health is stated as being “committed to ensuring that services in the [Essential Health Package] are available with universal coverage for all Malawians.”<sup>148</sup> The notion of “universal coverage” is explained with explicit reference to socio-economic disparity, geographical coverage, and to persons with disabilities.<sup>149</sup> “Equity” is repeatedly emphasised in Malawi’s health policy framework.<sup>150</sup>

### National HIV Policy

While the HIV and AIDS Policy: Sustaining the National Response (National HIV Policy) fails to explicitly recognise LGBT persons and persons with disabilities as key populations or vulnerable populations, it recognises stigma and discrimination as a “key challenge” as well as the:

*“marginalisation of [people living with HIV], key populations such as sex workers, injecting drug users and people in close settings and other vulnerable groups; limited access to quality HIV and AIDS and health services, and other human rights violations”.*<sup>151</sup>

The National HIV Policy objectives include reducing vulnerability to HIV infection among various population groups and offering enhanced support to vulnerable populations, making particular mention of persons with disabilities.<sup>152</sup> Universal access, uptake, and retention of quality HIV-related services and the protection, participation and empowerment of people living with HIV and vulnerable populations are detailed as priority areas in the Policy.<sup>153</sup>

### HIV and AIDS Strategic Plan

The Malawi National HIV and AIDS Strategic Plan 2011-2016, despite making repeated mention of the failures to include certain vulnerable populations (such as men who have sex with men) in targeted interventions, fails to include LGBT persons in its understanding of “vulnerable persons”.<sup>154</sup>

### Health Sector Plan

The 2011-2016 Malawi Health Sector Strategic Plan (the Health Sector Plan) states its purpose

<sup>148</sup> Government of Malawi: Ministry of Health *Malawi Health Sector Strategic Plan 2011-2016: Moving Towards Equity and Quality* (2012), 34.

<sup>149</sup> As above.

<sup>150</sup> See, for example, the Vision in: Government of Malawi *National Sexual and Reproductive Health and Rights Plan* (2009).

<sup>151</sup> Republic of Malawi *National HIV and AIDS Policy: Sustaining the National Response* 2nd edition (2013), 9.

<sup>152</sup> See: 2.4 (ii), (iii) and (v). The Malawi Health Sector Strategic Plan 2011-2016: Moving Towards Equity and Quality, note 142 above, at 50, identifies in the Essential Health Package, the following as vulnerable persons: “poor people, women, children, orphans, people with disabilities and the elderly, people living in hard to serve areas, and displaced persons.”

<sup>153</sup> See paras 3.2.1 and 3.5.

<sup>154</sup> See subtheme 2.

to be “moving towards equity and quality”. The Health Sector Plan preserves and extends the Essential Health Package (EHP), which includes free-of-charge services and treatment for diseases and conditions that affect the majority of the population, especially the poor.<sup>155</sup> The EHP includes services for malaria, tuberculosis, sexually transmitted infections (STIs), and HIV/AIDS, amongst others. The Plan interprets the Constitution to guarantee that all Malawians will be provided with free health care and other social services at the highest quality within the resources available, and guarantees equality to all people in accessing health services.<sup>156</sup> The Health Sector Plan elaborates its vision to include:

*“All the people of Malawi shall have access to health services without distinction by ethnicity, gender, disability, religion, political belief, economic and social condition or geographical location. The rights of health care users and their families, providers and support staff shall be respected and protected.”<sup>157</sup>*

It states further that the “ethical requirement of confidentiality, safety and efficacy in both the provision of healthcare and healthcare research shall be adhered to”.<sup>158</sup> Accountability is a guiding principle of the Plan envisioning that:

*“[a]ll stakeholders shall discharge their respective mandates in a manner that takes full responsibility for the decisions made in the course of providing health care. All health workers at all levels and all DPs shall be accountable to the people of Malawi.*

*Community participation shall be encouraged in the planning, management and delivery of health services.”<sup>159</sup>*

In order to ensure “client satisfaction”, the Plan includes the goal to establish and support health centre committees and to set up customer complaints desks to address client concerns.

### **National Sexual and Reproductive Health and Rights Plan**

The 2009 National Sexual and Reproductive Health and Rights Plan speaks to the free choice of individuals and couples to be empowered to determine their reproductive choices without coercion.<sup>160</sup> The goals to reduce stigma and discrimination and to empower rights-holders is elaborated in the Plan.<sup>161</sup>

### **National HIV and AIDS Strategic Plan**

The Malawi National HIV and AIDS Strategic Plan acknowledges a number of failures in programming for the needs of key populations and vulnerable populations, including the failure to target services to meet the needs of men who have sex with men and persons with

<sup>155</sup> Health Sector Plan, notes 18 and 142 above.

<sup>156</sup> As above, 33.

<sup>157</sup> As above, 48. See also the Guiding Principles in: Government of Malawi *National Sexual and Reproductive Health and Rights Plan* (2009), at para 2.5.

<sup>158</sup> Notes 142, 48-49 above.

<sup>159</sup> As above, 48.

<sup>160</sup> National Sexual and Reproductive Health and Rights Plan, note 151 above. See, for example, para 3.1.2.4.

<sup>161</sup> Malawi National HIV and AIDS Strategic Plan 2011-2016, note 29 above. See, for example, the Guiding Principles, Theme 5, and Strategy 5.1.

disabilities.<sup>162</sup> While identifying stigma and discrimination as a strategic concern, the Plan does not include any processes for accountability or redress for patients in its implementation framework on stigma and discrimination.<sup>163</sup>

### **National HIV and AIDS Monitoring and Evaluation Plan**

The Malawi National HIV and AIDS Monitoring and Evaluation Framework 2015-2020 requires a biannual Quality of Health Related HIV Services Survey to be conducted by the Ministry of Health. It is unclear whether this survey must include the measurement of stigma and discrimination experienced by healthcare users.

### **HIV Treatment Guidelines**

Guidelines for HIV treatment do not provide for distinctions between patients and require no obligatory testing for high-risk patients, while emphasising the rights of patients to refuse treatment.<sup>164</sup>

### **Charter on Patients' and Health Service Providers' Rights and Responsibilities**

In addition to these policies and plans, the Malawi Government has developed a Charter on Patients' and Health Service Providers' Rights and Responsibilities (the Charter). The language of the Charter is inclusive, referring to the rights of "every individual" and "every patient". The Charter states explicitly that:

*'Every patient has the right to be cared for by a competent health worker regardless of age, gender, ethnicity, religion, economic status and without any form of discrimination.'*<sup>165</sup>

Further to a number of provisions articulating patients' health rights, the Charter provides for the right of every patient to be "treated with kindness, consideration and dignity without regard to age, gender, ethnicity, religion, economic status and without any form of discrimination." A right to complain about health services is entrenched in broad terms in the Charter:

*"Everyone has the right to complain about health care services and to have such complaints investigated and to receive a full response on such investigation."*

<sup>162</sup> National Sexual and Reproductive Health and Rights Plan, notes 143 and 28 above.

<sup>163</sup> See, as above, 211.

<sup>164</sup> See, for example, Ministry of Health *Clinical Management of HIV in Children and Adults: Malawi Integrated Guidelines for Providing HIV Services in: Antenatal Care, Maternity Care, Under 5 Clinics, Family Planning Clinics, HIV Exposed Child / Pre-ART Clinic, ART Clinics* (2014).

<sup>165</sup> Republic of Malawi *Charter on Patients' and Health Service Providers' Rights and Responsibilities*, 1.

## Ethical standards

Medical practitioners in Malawi are explicitly prohibited from discriminating against healthcare users.

### Medical Practitioners and Dentists Code of Ethics

A Code of Ethics (the Code) for medical practitioners, dentists, paramedics and allied health professionals has been developed by the Medical Council of Malawi as required under the Medical Practitioners and Dentists Act.<sup>166</sup> The Code specifically requires practitioners not to discriminate against patients,<sup>167</sup> that they “respect all aspects of human life”,<sup>168</sup> and respect patients’ confidentiality,<sup>169</sup> and ensure that in “as far as possible” informed consent is obtained from patients before any procedure.<sup>170</sup> The only stated exclusion from the obligation to respect patient confidentiality is if so required in a court of law. However, the protection of patients from breaches on confidentiality is undermined by a subsequent provision in the Code which provides for types of actions that may constitute professional misconduct and result in disciplinary action:

*“A practitioner shall not disclose to a third party information, which he obtained in confidence from a patient in the course of the professional relationship between the patient and the practitioner. Provided that in the following circumstances, the confidential information may be disclosed to a third party:*

- 1. Where there is a valid consent from the patient or his legal adviser or guardian, provided that information may be given to a relative or appropriate person if in the circumstances of the case in question it is reasonably undesirable on medical grounds to seek the patient’s consent;*
- 2. Where the information may be required by law;*
- 3. Where public interest persuades a practitioner that his duty to the community overrides that to his patients; and*
- 4. In the interests of research and medical education, information may be divulged, but at all times the patient’s name shall not be revealed.*

*A practitioner shall always be prepared to justify his action whenever he disclosed confidential information.”*

<sup>166</sup> Chapter 36:01 of the Laws of Malawi.

<sup>167</sup> Medical Council of Malawi *Code of Ethics and Professional Conduct* 2 ed, at section 1, para 1.5. The Code states that every practitioner shall: “Not discriminate against any person on the basis of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth status, or any other status”.

<sup>168</sup> As above, at section 1, para 1(1)2.

<sup>169</sup> As above, at section 1, para 1(4).

<sup>170</sup> As above, at section 5, para 5.6.

## 4.4 Zambia

### Legal framework

Zambia's Constitution protects against discrimination, which should include protection in the context of healthcare. Zambian legislation further prohibits certain forms of professional misconduct by healthcare workers.

#### Constitution

Zambia's Constitution was enacted in 1996, subject to significant amendments in 2016. Human dignity, equity, social justice, equality and non-discrimination are founding values of the Constitution.<sup>171</sup> The guiding values and principles of the public service include the "effective, impartial, fair and equitable provision of public services".<sup>172</sup>

Article 11 of the Constitution<sup>173</sup> guarantees "every person in Zambia" the enjoyment of rights and freedoms whatever their race, place of origin, political opinion, colour, creed, sex or marital status. Article 23 provides for protection against discrimination by any law or person. "Discrimination is defined as–

*"affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."*<sup>174</sup>

The Constitution does not provide for a justiciable right to health. However, Article 112 specifies non-binding Directive Principles of State Policy that include that–

*"(d) the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities*

*(f) the State shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable".*<sup>175</sup>

#### Nurses and Midwives Act

For nurses and midwives, the Nurses and Midwives Rules, promulgated under the Nurses and Midwives Act, specify professional misconduct under rule 29 as "any act or omission contrary to the generally recognised responsibility of such persons towards patients or contrary to professional ethics."

<sup>171</sup> Article 8 of the Constitution of Zambia (Amendment) Act 2 of 2016.

<sup>172</sup> As above, at Article 173(1)(c).

<sup>173</sup> Constitution of Zambia Act 18 of 1996.

<sup>174</sup> As above, at Article 23(3).

<sup>175</sup> As above, at Article 112. Article 111 of the 1996 Constitution states that the Directive Principles are not justiciable or enforceable, by themselves, in a court of law.

Rule 29(2) includes the following behaviour as amounting to professional misconduct

*(a) immorality or other improper conduct or association with patients;*

*(c) wilful or deliberate betrayal of a professional confidence;*

*(d) abandonment of a patient in danger;*

*(h) dishonesty, negligence or incompetence in the performance of duties;*

*(i) refusal without lawful excuse or proper excuse to obey a lawful order given in the course of duty by a person in authority;*

*(j) unkindness to or ill-treatment of patients or, except in self defence or the interest of a patient, the use of excessive force or violence in the performance of duties."*

## Gender Equity and Equality Act

Zambia's 2015 Gender Equity and Equality Act<sup>176</sup> prohibits discrimination against "any sex"<sup>177</sup> and prohibits both public and private persons and bodies from "abusive, violent or degrading treatment" against "any person".<sup>178</sup>

Women's rights to "adequate sexual and reproductive health" are guaranteed as inclusive of protection from sexually-transmitted infections, and access to sexual and reproductive health and family planning services.<sup>179</sup> The Minister of Health is obliged to take appropriate measures to ensure that women are able to access healthcare services on an equal basis with men and to enjoy "appropriate services" in connection with pregnancy and postnatal care.<sup>180</sup> The obligation on healthcare providers to obtain informed consent from persons accessing sexual and reproductive healthcare services is strongly emphasised in the Act.<sup>181</sup> Special measures are mandated under the Act to ensure that women in rural and peri-urban areas are able to access adequate healthcare facilities.<sup>182</sup>

It is noted that the Act contemplates a complaints procedure with the Gender Equity and Equality Commission.<sup>183</sup> At the time of writing, the Commission was not yet in operation.

## Persons with Disabilities Act

The Persons with Disabilities Act 6 of 2012 prohibits discrimination<sup>184</sup> which is defined as–

*"any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of imparting or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, and includes all forms of discrimination,*

<sup>176</sup> 22 of 2015.

<sup>177</sup> Section 15.

<sup>178</sup> Section 16.

<sup>179</sup> Section 21.

<sup>180</sup> Section 32.

<sup>181</sup> Section 32(3).

<sup>182</sup> Section 26(2).

<sup>183</sup> See sections 41-46.

<sup>184</sup> Section 6(1).

*such as the denial of reasonable accommodation.*<sup>185</sup>

The law creates an obligation on all persons to uphold the rights of persons with disabilities and to safeguard the dignity of persons with disabilities.<sup>186</sup> It prohibits the use of derogatory names for persons with disabilities.<sup>187</sup>

“Appropriate measures” must be taken by the relevant Minister to ensure that persons with disabilities can access health services that are gender sensitive, including sexual and reproductive healthcare services and services of the same range, quality, and standard of free or affordable healthcare, as enjoyed by others.<sup>188</sup> The Act stresses the right to informed consent for persons with disabilities in healthcare and explicitly requires measures to be taken to prevent the discriminatory denial of healthcare and services on the basis of disability.<sup>189</sup>

## Policy framework

The policy framework in Zambia states a commitment by government to provide healthcare without discrimination while providing for particular protections in the context of HIV.

### National Health Policy

Zambia’s National Health Policy 2013 speaks to ensuring access to healthcare for all people of Zambia, regardless of their geographical location, gender, age, race, social and economic, and cultural or political status. The 2010 National Community Health Worker Strategy adopts a vision of “equity of access” to health services<sup>190</sup> and seeks to address rural/urban disparities in healthcare provision.

### HIV Policy and Strategic Framework

The National HIV/AIDS/STI/TB Policy of 2005 includes the aims to address stigma and discrimination and to protect human rights.<sup>191</sup> The National AIDS Strategic Framework 2011-2015 (NASF) prioritises strategies for an enabling policy and legal framework to address HIV as including a priority to ensure that human rights are adequately addressed to reduce stigma and discrimination. While it notes the inadequate focus on key populations, the NASF proposes no specific interventions for key populations. The revised NASF 2014-2016 prioritises strategies that include enhancing the implementation of human rights and equal access to services; facilitating community-based advocacy on stigma and discrimination; advocating legal reform to ensure that all Zambian citizens are equally able to access HIV health and social services; and improving access to legal services for key populations.

### HIV Treatment Guidelines

The Zambia Consolidated Guidelines for Treatment Prevention of HIV Infection<sup>192</sup> state that individuals must give informed consent for HIV testing and counselling, and should be

<sup>185</sup> Section 2.

<sup>186</sup> Section 5.

<sup>187</sup> Section 6(3).

<sup>188</sup> Section 27(a).

<sup>189</sup> Section 27(f).

<sup>190</sup> Republic of Zambia: Ministry of Health *National Community Health Worker Strategy in Zambia* (2010), 14.

<sup>191</sup> Republic of Zambia: Ministry of Health *National HIV/AIDS/STI/TB Policy* (2005). See the Main Objective, at 4.1; and Broad objectives, at 4.2 (h) and 5.8.

<sup>192</sup> December 2013.

informed of the right to refuse testing; mandatory or coerced testing is never appropriate.<sup>193</sup> The confidentiality of HIV testing and counselling services is further emphasised. Post-exposure prophylaxis (PEP)<sup>194</sup> is recommended under the Guidelines following a determination of the need for PEP based on the risk of transmission and the risks and benefits of taking or not undertaking the intervention.<sup>195</sup>

## Ethical standards

Ethical standards in Zambia governing the conduct of health professionals prohibit discrimination between healthcare users and recognise the right to complain.

### Patients' Rights and Responsibilities Charter

The Health Professions Council of Zambia (HPCZ) has developed a Patients' Rights and Responsibilities Charter, posters of which are displayed in many healthcare facilities. The Charter states that all patients have the right to treatment without discrimination, to informed consent, to privacy and confidential treatment, and to access their medical records, among others. The Charter also states that patients have the "freedom to provide suggestions or grievances". The right to complain is further affirmed under the "responsibilities" component of the Charter, which states that patients have a responsibility to "report anything that appears unsafe".

### Health Professions Code of Ethics

The HPCZ has a Professional Code of Ethics and Discipline: Fitness to Practice.<sup>196</sup> The Code applies to all health practitioners registered under the Health Professions Act, thus excluding application to nurses and midwives. The Code of Ethics makes clear mention of the obligation on practitioners not to discriminate between patients:

*"Treatment, care and welfare of the patient or client should take into account the patient's/client's needs, preference and confidentiality. Patients/clients should not be discriminated on grounds of age, gender, marital status, education, medical condition, national or ethnic origin, physical or mental disability, political affiliation, tribe, race, religion or social status."*<sup>197</sup>

The obligation to ensure a patient's informed consent is emphasised as is the obligation to give appropriate advice and information to the patient.<sup>198</sup> The Code considers breaches of trust between practitioner and patient to be professional misconduct<sup>199</sup> which includes the improper disclosure of information obtained in confidence from the patient, exerting improper influence on a patient, and entering into an emotional or sexual relationship with a

<sup>193</sup> Republic of Zambia: Ministry of Health *Zambia Consolidated Guidelines for Treatment Prevention of HIV Infection* (2013), 9.

<sup>194</sup> PEP is short-term ART that reduces the likelihood of HIV infection after potential exposure to HIV.

<sup>195</sup> Zambia Consolidated Guidelines for Treatment Prevention of HIV Infection, notes 173, 44 above. At 45, the Guidelines indicate "substantial risk for HIV exposure" as including genital exposure to sexual fluids where the source is known to be HIV-infected. Penetrative sexual abuse is considered a "high risk" category.

<sup>196</sup> The Code was last reviewed in 1995. Guidelines for healthcare practitioners' professional misconduct are not stipulated in the Health Professions Act or Health Professions (General) Regulations. Section 61 of the Health Professions Act, does, however, determine contraventions of the Act and breaches of the Code of Ethics as professional misconduct.

<sup>197</sup> Health Professions Council of Zambia *Professional Code of Ethics and Discipline: Fitness to Practice*, at para 5.1.

<sup>198</sup> As above, 4, at para 5.1(c)

<sup>199</sup> As above, 5, at para 5.2(b).

patient.<sup>200</sup> Quite distinctly, the Code of Ethics also deals with the obligation on practitioners not to refuse to treat a patient merely for presenting with a stigmatising condition:

*"A health practitioner should not refuse to treat or attend to a patient/client if the condition is within the health practitioner's competence, solely on the grounds that the patient/client is or may be having a stigmatising medical condition."*<sup>201</sup>

### **Guidelines for Good Practice in the Health Care Profession**

The HPCZ has developed a number of Guidelines for Good Practice in the Health Care Profession. The Guidelines on informed consent<sup>202</sup> state that healthcare users have a right to information about their condition and treatment options<sup>203</sup> and about healthcare services, to be presented in a way that they understand.<sup>204</sup>

The Guidelines on patient confidentiality<sup>205</sup> state the understanding of a healthcare professional's duty of confidentiality as meaning they "may not disclose any health care information revealed by a patient or discovered by a practitioner in connection with the treatment of a patient".<sup>206</sup> This is stated to include all information "disclosed to a physician during the course of the patient-physician relationship".<sup>207</sup>

Exceptions to the obligation of confidentiality are framed in a somewhat contradictory manner:

On the one hand, the only permissible exceptions are noted to be where the healthcare user consents to disclosure, or if the healthcare professional is required to disclose information by law. The concept of a "breach of confidentiality" is further described as any disclosure to a third party of the healthcare user's information without consent or a court order.

However, the Guidelines state that healthcare users' personal information may be disclosed without consent if the benefits of a disclosure to the public or another person outweigh the public and private interests in keeping the information confidential.<sup>208</sup> The example of HIV-status disclosure to a healthcare user's spouse or partner is noted.

### **[Nurses and Midwives] Professional Code of Conduct**

In addition to the Nurses and Midwives Rules described above, the General Nursing Council of Zambia has developed a Professional Code of Conduct, 2013. Among other things, the Code of Conduct requires that all nurses and midwives

*"[r]ecognise and respect the uniqueness and dignity of each client and respond to their need for care, irrespective of their ethnic origin, political affiliation, religious beliefs, gender, traditional beliefs, values and practices, personal attributes and the nature of their health problem or any other factors."*

<sup>200</sup> As above, 6, at para 5.2(b).

<sup>201</sup> As above, 11, at para 5.6 (i).

<sup>202</sup> Health Professions Council of Zambia *Guidelines for Good Practice in the Health Care Profession: Obtaining Patients' Informed Consent: Ethical Considerations*, March 2016.

<sup>203</sup> As above, at para 3.1.1.

<sup>204</sup> As above at para 6.1.

<sup>205</sup> Health Professions Council of Zambia *Guidelines for Good Practice in the Health Care Profession: Maintaining Patient Confidentiality*, March 2016.

<sup>206</sup> As above at para 1.0.

<sup>207</sup> As above.

<sup>208</sup> As above at para 9.

Nurses and midwives are further required to protect “all confidential information concerning clients obtained in the course of [their] professional practice”. A nurse or midwife may only disclose confidential information with the consent of the healthcare user, by order of court, by order of the General Nursing Council of Zambia, or if the disclosure can be justified “in the wide public interest.”

## 4.5 A brief overview of the criminal laws relating to sex workers and LGBT persons

### Sex workers

Sex workers<sup>209</sup> are women, men and transgendered persons who receive money or goods in exchange for sexual services and who consciously define those activities as income-generating, even if they do not consider sex work as their occupation.

Most former British colonies have similar laws relating to sex work. The legal framework in these countries, including Botswana, Malawi, and Zambia, can be described as one of partial criminalisation. Partial criminalisation refers to a situation where only the activities related to sex work are criminalised and not the actual act of selling sex. Activities related to sex work which are criminalised include living off the earnings of prostitution,<sup>210</sup> procurement,<sup>211</sup> brothel-keeping<sup>212</sup> and persistently soliciting.<sup>213</sup> Notably, the offences relating to sex work are mostly aimed at criminalising the activities of those who exploit sex workers for personal gain.

These provisions are, however, seldom enforced because proof of the commission of the offences is difficult to obtain and because police resources are required for enforcement. Instead, sex workers themselves, instead of the people who exploit them, are targeted by the police usually through the arbitrary arrest of sex workers on “rogue and vagabond” provisions.<sup>214</sup> Police often make use of specific crackdowns or sweeping exercises, where women are arrested to show that the police are “doing something”. Increasingly, however, courts have held that the arbitrary arrest and abuse by police of sex workers violate their human rights.<sup>215</sup>

<sup>209</sup> This Report refers to “sex work” and “sex workers” out of respect for the dignity of people involved in sex work. The term “prostitution” is also referred to where appropriate, since this is the legal term used in many countries. The term “prostitution” is often stigmatised within society. Instead this document prefers to use the term “sex work” when referring to commercial sexual activities taking place between consenting adults.

<sup>210</sup> Malawi: section 145-6 of Penal Code; Botswana: section 155-6 of Penal Code; Zambia: section 146-7 of Penal Code.

<sup>211</sup> Malawi: section 140-3 of Penal Code; Botswana: section 149 of Penal Code; Zambia: section 140-4 of Penal Code.

<sup>212</sup> Malawi: section 147 of Penal Code; Botswana: section 157-8 of Penal Code; Zambia: section 149 of Penal Code.

<sup>213</sup> Botswana: section 155 of Penal Code; Zambia: section 146 of Penal Code.

<sup>214</sup> Botswana, Malawi and Zambia have provisions in their Penal Codes which deem as rogues and vagabonds a “suspected person or reputed thief” who has no visible means of subsistence and cannot give good account of himself, and any person found in a public place at such time and under such circumstances to lead to the conclusion that the person is there for an illegal or disorderly purpose. The rogue and vagabond offences, which have their origin in the English Vagrancy Act of 1824, are vague and overly broad and tend to be used as catch-all offences where there is no proof of the commission of an actual offence.

<sup>215</sup> The Malawi High Court in *SM and 12 others v R*, Malawi High Court 1049/2007. Justice Nyirenda dealt with an example where women were picked up at trading centre at 3 am and charged and convicted of being rogues and vagabonds, contrary to section 184(1)(c). The Court held: “But surely the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society.” ... In the present case the ladies were found occupying rest houses and nothing more to it. There was virtually nothing more to their circumstances on the facts. Perhaps they were hoping for some stray and weak-minded

Thus, although the act of selling sex is not criminalised, sex work still takes place in a largely criminalised environment. These laws stigmatise sex workers and make it difficult for them to access services. It is in this context that calls are made for decriminalisation.

Decriminalisation<sup>216</sup> refers to an approach where no specific laws criminalise consensual adult sex work and related activities. In a decriminalised situation, child prostitution, trafficking and coerced prostitution would still be criminalised:

*“Decriminalising sex work does not mean encouraging it, but it would rather pave way for policies that protect those who have been forced into the trade ... They will be able to report men who forcibly put them at risk of contracting the virus, and in turn men who seek their services will no longer abuse them as might be the situation now.” (Festus Mogae, former President of Botswana)<sup>217</sup>*

Guideline 4 of the UNAIDS International Guidelines on HIV/AIDS and Human Rights, 2006, promotes the decriminalisation of voluntary adult prostitution:

*“[W]ith regard to adult sex work that involves no victimisation, criminal law should be reviewed with the aim of decriminalising, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients.”*

It should be noted that even if the current laws are not changed, the existing offences relating to sex work do not criminalise the status of a person. Thus it is incorrect to refer to sex workers as being criminals. **Sex workers retain all the rights of other citizens including accessing healthcare services without discrimination.**

In Malawi, Botswana and Zambia, there is often a mistaken perception that the offence of living off the earnings of sex work has the effect of criminalising sex workers and their dependents. But this is not the case. The offence is specifically aimed at criminalising those persons who exploit sex workers, not sex workers themselves.

**It is not a crime to be a sex worker in Botswana, Malawi or Zambia. Even if a person attends a health facility for a sexually transmitted infection acquired as a result of sex work, a healthcare worker is obliged to attend to that person without discrimination and judgment.**

men to come around and spend the night with them. But what offence would that be on their part? As a matter of fact this was invasion of privacy on the part of the police officers. I am afraid the convictions here at were all misconceived.”

<sup>216</sup> An example of a decriminalised approach to consensual adult sex work is New Zealand.

<sup>217</sup> R Moyo “In Conservative Botswana, a Push to Legalise Prostitution” *The Mail and Guardian* (8 November 2011), available at: <http://mg.co.za/article/2011-11-08-in-conservative-botswana-a-push-to-legalise-prostitution>.

## LGBT persons

The terms lesbian, gay, bisexual and transgender refer broadly to the sexual orientation and/or gender identity of persons:

- Sexual orientation refers to a person's enduring pattern of emotional, romantic, and/or sexual attractions.
- Gender identity refers to a person's deeply felt internal and individual experience of their own gender. In most societies, there is a basic division between gender attributes assigned to males and females. In all societies, however, some individuals do not identify with some (or all) of the aspects of gender that are assigned to their biological sex. A person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. A person whose gender identity does not correspond with his or her biological sex at birth is referred to as a transgender person.

**A person's sexual orientation or gender identity is not an element of any crime in Botswana, Malawi or Zambia.** Statements such as "homosexuality is a crime" are inaccurate. However, criminal laws exist which prohibit consensual sexual acts between adult persons of the same sex. Such acts are difficult to prove and few cases go to court. However, the existence of these offences leads to arbitrary arrests and discrimination.

Botswana, Malawi and Zambia's offences originate from English law, as it existed in the 1800s, and refer to offences of carnal knowledge against the order of nature (anal sex)<sup>218</sup> and gross indecency.<sup>219</sup> Initially these offences applied to same-sex sexual acts between men only but Botswana, Malawi and Zambia have revised their laws to also criminalise consensual sexual acts between women<sup>220</sup> and to increase the penalties that may be imposed for these types of offences. These offences criminalise same-sex sexual acts only, not a person's sexual orientation or gender identity. The offences do not distinguish between consensual sexual acts and non-consensual acts.

Although LGBT persons are not criminalised in themselves and should not be discriminated against at health facilities, two instances arise where LGBT persons attend health facilities in the context of existing offences against same-sex sexual acts:

- When police bring men who had been arrested on suspicion of committing same-sex sexual acts to a health facility, in order to obtain medical evidence of anal penetration.
- When LGBT persons attend health facilities to attend to an illness or infection arising from same-sex sexual acts.

In both these instances, a healthcare worker remains ethically obliged to follow medical guidelines properly – including the requirement that healthcare users' medical information are dealt with confidentially and that informed consent is obtained for medical procedures.

<sup>218</sup> Botswana: section 164 of Penal Code (7 years' imprisonment); Malawi: section 153 of Penal Code (14 years' imprisonment); Zambia: section 155 of Penal Code (15 years' to life imprisonment).

<sup>219</sup> Botswana: section 167 of Penal Code; Malawi: section 156 of Penal Code (5 years' imprisonment); Zambia: section 158 of Penal Code (7-14 years' imprisonment).

<sup>220</sup> Botswana: section 167 of Penal Code; Malawi: section 137A of Penal Code (5 years' imprisonment); Zambia: section 158 of Penal Code (7-14 years' imprisonment).

### Botswana Court of Appeal judgment on the rights of LGBT persons

On 16 March 2016, in the case of *Rammoge and 19 Others v Attorney General*, the Botswana Court of Appeal held that the refusal to register the organisation Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) was not only unlawful but a violation of the right of LGBT activists to freely assemble and associate. The Court of Appeal emphasised that “all persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests”, and that fundamental rights applied to “every member of every class of society”. Significantly, the Court of Appeal recognised that members of the gay, lesbian and transgender community, while a minority, “form part of the rich diversity of any nation” and are fully entitled to the constitutional protection of their dignity.

The Botswana Court of Appeal’s judgment signifies the first time an apex court in Africa has provided an authoritative interpretation of the effect of criminal laws affecting lesbian and gay individuals, and clarified the common misconception that “homosexuality” itself is a crime. Referring to the offence of “carnal knowledge against the order of nature”, the Court observed that while the offence has the practical effect of limiting sexual activity, “it is not, and never has been, a crime in Botswana to be gay”. The Court emphasised that such criminal provisions do not extend to criminalising LGBT persons themselves and it is contrary to the principles of criminal law to criminalise a person’s status as opposed to their actions.

## 4.6 Conclusion

The constitutions of all three countries protect against discrimination. While in none of the countries is there a clear and explicit constitutional prohibition against discrimination in healthcare, and while none make explicit the prohibition against discrimination on the basis of health or HIV-status, occupation or sexual orientation, these protections should be understood as accommodated in the generous language afforded in the relevant constitutional protections.

The policy environments in all three countries protect against stigma and discrimination in the emphases on equitable and quality healthcare. It is noted, however, that few of the policies and plans analysed provide for particular strategies to ensure that discrimination does not occur in healthcare or to provide mechanisms for accountability and redress when it occurs.

The regulatory and ethical standards that govern the conduct of healthcare workers differ in the level to which they make explicit that discriminating between healthcare users is prohibited. However, it is clear from the nature of the conduct deemed unethical in all these frameworks that discriminatory practices are incorporated as forms of unprofessional conduct or misconduct by healthcare workers.

- Legally healthcare users in all three countries enjoy the right not to be discriminated against in terms of accessing healthcare.
- Policy frameworks in all three countries embody commitments by the Botswana, Malawi and Zambian governments to deliver healthcare services without discrimination.
- Healthcare workers are ethically and legally bound not to discriminate against healthcare users unfairly in delivering healthcare services, and to treat healthcare users with due respect for their inherent human dignity.