

Prosecuting Sexual Violence against Women and Girls with Disabilities in Malawi

A preliminary analysis of the attrition of sexual offence
cases in the criminal justice system



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The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support – both technical and financial – to human rights and public-interest advocacy and litigation undertaken by domestic lawyers and human rights organisations in Southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers in each jurisdiction, who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, as appropriate – including providing legal research and drafting, training and mentoring, and monetary support.

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Acronyms and abbreviations

APAM	Association of Persons with Albinism in Malawi
APDM	Association of the Physically Disabled in Malawi
CHREAA	Centre for Human Rights Education, Assistance and Advice
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisations
DIWA	Disabled Women in Africa
DIWODE	Disabled Women in Development
DPI	Disabled People's International
DPO	Disabled People's Organisation
DWOOM	Disabled Women Orphans Organisation of Malawi
FEDOMA	Federation of Disability Organisations in Malawi
GEA	Gender Equality Act of 2013
MACODA	Malawi Council for Disability Affairs
MACOHA	Malawi Council of the Handicapped
MANAD	Malawi National Association of the Deaf
MHRC	Malawi Human Rights Commission
MoGCDSW	Ministry of Gender, Children, Disability and Social Welfare
MPS	Malawi Police Services
MUBU	Malawi Union of the Blind
NACCODI	National Advisory Coordinating Committee on Disability Issues
NGO	Non-Governmental Organisation
PODCAM	Parents of Disabled Children Association in Malawi
SRHR	Sexual and Reproductive Health and Rights
TAAM	The Albino Association of Malawi
VIHEMA	Visual Hearing Membership Association
VSU	Victim Support Unit
WOJAM	Women Judges in Malawi

Introduction and terminology

This report was prompted by Malawian civil society organisations' perception that there is a lack of will on the part of police and prosecution to investigate and prosecute cases related to sexual violence committed against women and girls living with disabilities.

When referring to “disability” in this document, the definitions in the Disability Act, No. 8 of 2012 are referred:

“disability’ means a long-term physical, mental, intellectual or sensory impairment, which, in interaction with various barriers, may hinder the full and effective participation in society of a person on an equal basis with other persons.”

The research conducted for this report indicates that persons with psychosocial or intellectual disabilities are sometimes treated differently from persons with other disabilities. In such cases, we refer to psychosocial and intellectual disability specifically.

Whilst it is acknowledged that women and girls with disabilities experience gender-based violence¹ in a myriad of ways including emotional, physical and sexual abuse, this document focuses specifically on the response of the criminal justice systems to reports of sexual violence committed against women and girls with disabilities. The Penal Code, Chapter 7:01 differentiates between indecent assault, rape and defilement, whilst the medical profession may describe sexual assault as being inclusive of rape, defilement and some acts of indecent assault. In this document we use the terms “sexual violence”,² “sexual offences” and “sexual assault” interchangeably to refer to the broad range of unlawful sexual acts committed against women and girls with disabilities.

We use the term “victim” when referring to a person who has experienced sexual violence. We refer to “victim” because this document relates to the criminal justice system and it is the term most often used by persons in the criminal justice system to refer to people who have experienced a crime. However, we acknowledge critiques that the term suggests that all persons who experienced sexual violence are helpless subjects of pity instead of autonomous individuals who may require support them and empowerment to overcome their experience of violence.

¹ The United Nations defines gender-based violence as follows: “Gender-based violence is considered to be any harmful act directed against individuals or groups of individuals on the basis of their gender. It may include sexual violence, domestic violence, trafficking, forced/early marriage and harmful traditional practices.” Office of the High Commissioner of Human Rights, ‘Sexual and gender-based violence in the context of transitional justice’, October 2014, available at http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf.

² The United Nations defines sexual violence as follows: “Sexual violence is a form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. Sexual violence takes multiple forms and includes rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity.” Office of the High Commissioner of Human Rights, ‘Sexual and gender-based violence in the context of transitional justice’, October 2014, available at http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf.

We note that the research makes reference to derogatory terminology used in Malawian legislation and judgments to refer to people with psychosocial and intellectual disabilities. The use of this terminology is made only for technical consistency to reflect the language of the law and is by no means endorsed by the authors of this research, who affirm the terminology as a violation of the inherent dignity of persons with psychosocial and intellectual disabilities.

Methodology

Research for this document was conducted between March and April 2017. The study used qualitative data collection methodologies which included desktop reviews and Key Informant Interviews with policymakers, duty bearers and other important stakeholders. The team used questionnaires focused on the experiences of women and girls with disabilities who have been unable to open a criminal case following a sexual assault or rape, and/or where their complaint has not been investigated, and/or where the prosecution has refused to prosecute the case.

In addition to the review of existing research findings in Malawi on the challenges faced by women and girls with disabilities, the purpose of the interviews was to gather information about the barriers encountered by women and girls with disabilities who have experienced sexual violence when they approach the criminal justice system, to discover how service providers and other stakeholders have responded to these barriers, and to compile their recommendations for addressing these obstacles in the future.

The research team held Key Informant Interviews with nine non-governmental organisations (NGOs) working on human rights and disability issues. The team held in-person interviews with representatives from all nine organisations and probed their experiences of the challenges faced in accessing justice for women and girls with disabilities, the reasons provided by the police and prosecution for their actions, and the organisations' views on why the police and prosecutors might be unwilling to take up matters. The interviews also delved into the organisations' experiences where cases were taken to court and any concerns they have around how the person with disability was attended to in court and the sentence imposed by the magistrate in cases of sexual offences committed against persons with disabilities.

In-person interviews were also conducted with three prosecutors and four investigators including those from the Victim Support Unit (VSU) where these types of cases are first reported. One interview with a police investigator was done through the phone. In-person interviews were also done with a Senior State Advocate and the Chief Legal Aid Advocate.

The findings from the desktop review and the Key Informant Interviews have led to the compilation of this discussion paper and the list of recommendations of areas which would be useful to address barriers to access to justice for persons with disabilities, particularly women and girls, who have experienced sexual violence.

All participants were given information about the study beforehand and gave their informed consent at the beginning of each interview.

	Civil Society Organisation	Person Interviewed
1	Federation for Disability Organisations in Malawi (FEDOMA)	Filomina Zidana, Project Coordinator Virginia Masumeta Nyalo, Finance Manager
2	Centre for Human Rights Education, Assistance and Advise (CHREAA)	Victor Mhango, Executive Director, Immaculate Maluza, Program Manager
3	Parents of Disabled Children in Malawi (PODCAM)	Miriam Namanja, Director Lyness Manduwa, Economic Empowerment Officer
4	Disabled Women in Africa (DIWA)	Rejoice Maseko, Project Manager
5	Association of Persons with Albinism in Malawi (APAM)	Project Manager
6	Malawi Union of the Blind (MUBU)	Latima Matenje, Programs Officer
7	Women Judges in Malawi (WOJAM)	High Court, Blantyre
8	One Stop Centre	Tandulanji Zimba, Director of Fountain of Life and volunteer at One Stop Centre
9	Victim	30 years, survivor of sexual violence who is blind

	Complaints Handling Institution	Position of Person Interviewed
1	Blantyre Police	Investigator/ Victim Support Unit Coordinator
2	Blantyre Police	Prosecutor
3	Blantyre Police	Investigator/ HIV Coordinator at VSU
4	Blantyre Police	Prosecutor
5	Regional Headquarters Southern Region Police	Investigations/ Community Policing
6	Ministry of Justice State and Constitutional Affairs, Advocate Chambers	Senior State Advocate
7	Legal Aid Bureau	Legal Aid Advocate
8	Lilongwe Police	Investigator
9	Lumbadzi Police	Investigator
10	Phalombe Police	Investigator
11	Malawi Human Rights Commission	Wycliffe Masoo, Director for Disability, Elderly Rights

The purpose of these interviews was to obtain an overview of some possible reasons for the attrition of cases. The respondents often gave anecdotal information reflecting on their recollection of cases. Sometimes these reflections led to generalisations which due to the lack of data from the courts and police stations cannot be verified accurately but do indicate areas in which further research and improvements are required.

Background: Literature review

Sexual violence against women and girls with disabilities in Malawi

According to Malawi's Demographic and Health Survey 2015-16, of surveyed women between 15-49 years, 21 percent had experienced some form of sexual violence in their life; of these women, 4 percent had experienced sexual violence before the age of 18 (NSO, 2017: 282). These figures are not disaggregated to reflect the prevalence of sexual violence against women and girls with disabilities. There is a paucity of data on the nature and extent of sexual violence committed against women and girls with disabilities.

International studies show that women with disabilities are twice as likely to experience intimate partner violence and other forms of gender-based violence as women who do not have a disability (Ortoleva, 2012). Ortoleva notes that –

“women and girls with disabilities are at high risk of gender-based and other forms of violence based on social stereotypes and biases that attempt to dehumanise or infantilise them, exclude or isolate them, target them for sexual and other forms of violence, and put them at greater risk of institutionalised violence. Sexual and gender-based violence also has the consequence of contributing to the incidence of disability among women” (2012: 18).

Women and girls with disabilities face compounded challenges in accessing justice, particularly for sexual violence. Many communities harbour negative attitudes about disability, particularly psychosocial and intellectual disability.

“Of the range of disabilities, intellectual disabilities are often the most complex and least understood. The effects of the disability and related negative social attitudes and perceptions combine with the pernicious effects of sexism and misogyny, so that women with these kinds of disabilities are frequently and disproportionately subject to gender-based violence (GBV)” (Meer & Combrink, 2015).

According to Enoch Chilemba, in most Malawian societies, the birth of a child with disability is considered a tragedy: persons with disabilities are identified as ill and different from other persons and consequently their primary predicament becomes exclusion which translates into difficulty in accessing fundamental social, political and economic rights. “Being a person with a disability in Malawi entails exclusion from essential services; lack of the protection from your family and community; clear and present risk of exploitation and abuse; and ultimately a daily struggle for

survival” (Chilemba, 2014). Furthermore:

“Ignorance about sexuality issues constitute some of the factors that place people with disabilities at high risk of sexual abuse and consequently, HIV infection. The existence of myths such as that if people with HIV have sex with virgins, they can get cured of their infection has generally given rise to incidences of raping of children and adults, those with disabilities being more vulnerable. According to the Federation of Disability Organisations in Malawi (FEDOMA), there are also some claims and beliefs within the Malawian communities that if HIV+ people have sex with people with disabilities, they will be cured of their infection” (Munthali et al, 2004: 2).

In the course of the current study FEDOMA reiterated that PWD are used for witchcraft rituals based on the belief that a person would get rich if they raped a woman or girl with a disability.

Gender-based violence rates are high in Malawi generally. This vulnerability to violence is exacerbated by having a disability. Chilemba also noted that many women with disabilities experience high rates of spousal abandonment (2012: para 11.5).

“In adulthood, several [women] had experienced what they themselves defined as sexual abuse: Men came and wanted to ‘marry’ them. When the woman became pregnant, the man disappeared and left her alone. The interviewees ... sought both social and political action in this matter, especially a means to force men to take economic responsibility for their biological children” (Hoem Kvam & Hellum Braathen, 2009).

Studies employing focus group discussions with persons with disabilities found that girls identified certain violence which they face over and above what other schoolgirls face. They mentioned “threats and actual sexual abuse from specialist teachers, teachers and blind boys; promises to marry from blind adults in leadership positions in the organisation of the blind; extensive teasing such as leading them to the wrong classroom, hiding their white cane and their writing materials; not escorting them to the toilet; name calling ...; verbal abuse” (Suka, 2006: 3).

Most of the reports that the researchers in the present study have accessed only had a few lines on the issue of violence against persons with disabilities. There are no studies that have attempted to follow and document the criminal justice system practice in sexual violence cases in Malawi. The main observation is that the realities of sexual violence experienced by women and girls with disabilities have been overlooked and ignored across the board.

Lack of access to sexual and reproductive health services

For women and girls who have experienced sexual violence, access to the criminal justice system and to sexual and reproductive health services is equally important. Anecdotal information suggests that there is significant discrimination against women with disabilities in accessing sexual and reproductive health and general health services, including due to lack of mobility assistance and communication for those with hearing and visual impairment (Southern Africa Litigation Centre, 2016: 110-114).

“Whilst some women with intellectual disabilities are blocked from information about sexuality and [gender-based violence] by their caregivers, they exist in a social context that may also see them as sexually deviant or ‘hyper-sexed’, and that is extremely misogynistic and violent. As a result, such a woman may be more likely to be targeted for violence, less likely to be able to identify and react to such violence, less likely to report such violence, and less likely to be believed when she tries to report such violence” (Meer & Combrink, 2015: 21).

The Disability Act defines discrimination 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, economic, social, cultural, civil or other field.”

In the absence of specific efforts to facilitate inclusion and access, women and girls with disabilities are often excluded from prevention programmes, support services, and access to legal redress.

“Despite some helpful laws, policies and systems of practice in some countries, compared to their disabled male or non-disabled female peers, women with disabilities: are less educated; experience higher rates of unemployment; are more likely to be abused; are poorer; are more isolated; experience worse health outcomes; generally have lower social status” (Nyambura et al, 2015).

It has been noted that there are general provisions dealing with women in the broadest sense under the various policies and legislation.

The Gender Equality Act specifically provides that every person has the right to adequate sexual and reproductive health (section 19) and that every health officer has an obligation “to respect the sexual and reproductive health rights of every person without discrimination and respect the dignity and integrity of every person accessing sexual and reproductive health services” (section 20). The Act however makes no specific mention of disability. The Ministry of Health’s Guidelines for the Management of Sexual Assault and Rape in Malawi (2005) also does not make mention of the needs of persons with disabilities who are victims of sexual offences.

These provisions should, however, be read with the general prohibition on discrimination under the Constitution and section 6(2)(c) of the Disability Act which provides that:

“The Government shall 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.”

Inaccessible justice

A person’s ability to access justice can be affected by both social, legal and structural factors.

Ortoleva summarises some of the factors that contribute to the lack of access to justice for women and girls with disabilities who have been victims of sexual violence, including if:

- their abuser is also their caregiver and/or someone that the individual is reliant on for personal care or mobility;
- justice system institutions are physically inaccessible and do not provide reasonable accommodation;
- there is limited access to legal protection and representation;
- law enforcement officials and the legal community are ill-equipped to address the violence;
- their testimony is not viewed as credible by the justice system; and
- there is insufficient information available to them (2012: 18).

In Malawi, there are generally obstacles to accessing justice which are experienced more acutely by persons with disabilities:

“The courts are located mainly in urban and peri-urban areas or rural community centres. This means that for the majority of the people who live in remote rural areas, the nearest court might be as much as 40 kilometres away. In some cases, a person may have to walk for up to eight hours to reach the court nearest to his or her home. The effect of such distances is made worse by the fact that most rural areas do not have regular public transport. Where public transport exists, it is prohibitively expensive for most Malawians” (AfriMAP, 2006: 132-33).

Preliminary research findings

Women and girls with disabilities continue to be more vulnerable to gender-based violence including sexual violence. These women and girls experience stigma in society and in the criminal justice system.

The legal framework and capacity to consent

The legal and policy framework

Malawi has positive international obligations to respect, protect, fulfil and promote the rights of persons with disabilities. Malawi has both signed and ratified the UN Convention on the Rights of Persons with Disabilities (CRPD). Centrally important is the right to legal capacity and equal recognition as persons before the law, as affirmed in article 12 of the CRPD. Article 12(3) affirms that States are obliged to provide “support [persons with disabilities] may require in exercising their legal capacity”. The CRPD affirms that Malawi has the duty to ensure all persons are treated as “equal before and under the law and are entitled *without any discrimination to the equal protection and equal benefit of the law*” (article 5(1))(emphasis added).

The CRPD particularly recognises the vulnerability at the intersection of gender and disability in article 6 which requires States to “take measures to ensure the full and equal enjoyment” of all human rights in the CRPD by women and girls with disabilities. To assist this endeavour States must promote accessibility to public services (article 9; see also section 8 of the Disability Act), including police and prosecution efforts to hold offenders accountable. Because of persons with disabilities’ particular vulnerability in society, States must take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk” (article 11).

Malawi is furthermore a party to the African Charter on Human and Peoples’ Rights (African Charter) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women (Women’s Protocol). Under the African Charter, “every individual shall be entitled to the enjoyment of the rights and freedoms...without distinction of any kind” (article 2), and in particular “[e]very individual shall be equal before the law” and “entitled to equal protection of the law” (article 3) (emphasis added). Furthermore, article 7 ensures that “every individual shall have the right to have his cause heard” from the time of reporting through the adjudicatory stage while article 13 stipulates the right of “equal access to the public service[s] of the country,” including access to law officials of every stage of a criminal prosecution. The lack of investigation and/or prosecution of sexual violence claims on behalf of women and girls with disabilities is particularly egregious behaviour given article 18 of the Charter which states “[t]he State shall ensure...the protection of the rights of women and the child” and “the disabled shall also have the right to special measures of protection.” The right to “special protection of women with disabilities” is

affirmed in article 23 of the Women's Protocol and includes the obligation to "ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity" (article 23(2)).

There is a wide-ranging set of gender-related laws that theoretically protect women and girls with disabilities from discrimination and violence. The Constitution of Malawi is founded upon the underlying principle of the inherent worth and dignity of all persons and prohibits discrimination on the grounds of disability, amongst other grounds: "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...sex, ... disability ... or other status or condition" (section 20).

This constitutional prohibition of discrimination is further enhanced in various pieces of legislation – the 2013 Gender Equality Act both defines sex discrimination and also makes specific provisions to ensure access to sexual and reproductive health services; in theory this should include the right to treatment after sexual violence, including access to post-exposure HIV prophylaxis and emergency contraceptive on the basis of informed consent. The Prevention of Domestic Violence Act addresses the issue of intimate partner and domestic violence. Nevertheless, these legal protections do not adequately highlight, implicate or address the experiences of women and girls with disabilities particularly those who have experienced sexual violence.

The Disability Act also refines the issue of discrimination as it relates to persons with disabilities. The Act requires the development of standards and guidelines to make public services and facilities more accessible (section 8).

The Criminal Procedure and Evidence Code similarly encourages the development of measures to make it easier for victims to testify in sexual offence cases:

"71A Evidence of victims of sexual offences

1) Where a victim of a sexual offence is to give evidence in any proceedings under this Code, the court may, of its own motion, upon application made by a party to the proceedings, or a victim of a sexual offence, make one or more of the following orders -

a) That the court close while evidence is being given by the witness in the proceedings, including evidence given under cross-examination, and that no person remain in or enter a room or place in which the court is being held, or remain within the hearing of the court, without its permission;

b) That a screen, partition or one-way glass be placed to obscure the witness's view of a party to whom the evidence related, but not so as to obstruct the view of the witness by the magistrate or the judge and jury;

c) That the witness be accompanied by a relative or friend for the purpose of providing emotional support;

d) That the evidence of the witness be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television."

Section 145 of the Child Care, Protection and Justice Act No. 22 of 2010 also sets a good example for how courts can be more accessible to vulnerable persons and provides:

“The proceedings of a child justice court shall be informal and in particular, the presiding officer shall ensure that –

- a) Technical language is not used during the hearing;*
- a) No person puts on official uniform or professional robes or dress save only if it is strictly required to do so for the child to make an identification of for purposes of evidence as the court may authorise;*
- b) There are regular breaks with such necessary provisions for the child as the Minister may prescribe by regulations; and*
- c) Children with disabilities are accorded assistance to meet their special needs where necessary.”*

The Criminal Procedure and Evidence Code accommodates a witness who is unable to speak and makes provision for that person to give evidence using writing or signs (section 211).

Despite the various laws and policies that have been put in place to deal with matters of disability in Malawi, these have yet to result in equal access to justice for women with disabilities.

Sexual offences in the Penal Code

Section 132 of the Penal Code provides for the offence of rape:

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, shall be guilty of the felony termed rape.”

In terms of section 133, rape is punishable by life imprisonment.

Section 137 of the Penal Code provides for the offence of indecent assault on females:

“Any person who unlawfully and indecently assaults any woman or girl shall be guilty of a felony and shall be liable to imprisonment for 14 years...”

It shall be no defence to a charge for indecent assault on a girl under the age of 16 years to prove that she consented to the act of indecency...”

Section 138 provides for the offence of defilement of girls under the age of 16 years of age and stipulates that “any person who carnally knows any girl under the age of 16 years shall be guilty of a felony and shall be liable to imprisonment for life.”

Sections 132, 137 and 138 are not gender neutral. The difference between these sections are also interpreted very differently in different jurisdictions where similarly-worded provisions exist. The Botswana High Court in *Boitumelo v The State* 2005 (1) BLR 317 (HC) for example held that where a girl under the age of 16 years has not given consent to sexual intercourse, the charge

should be one of rape and not defilement. However, in Malawi police often automatically use section 138 when female children are involved.

Section 132 clearly applies to acts of sexual intercourse without consent or coerced consent. Coerced consent is if the consent has been obtained by means of threats or “intimidation of any kind”. In some countries this concept has been developed to acknowledge that certain power relations between two persons negate the possibility of consent. Consent has to be free and informed consent by someone who understands the consequences of the sexual act. If section 132 is to be applied in a non-discriminatory way, a person who has sex with a woman or girl with a mental disability who did not provide free and informed consent should be charged with rape and be liable to life imprisonment. In fact, this possibility can be argued to be acknowledged in section 139 of the Penal Code.

Section 139 of the Penal Code provides for the offence of defilement of “idiots or imbeciles”:

“Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.” (Emphasis added.)

There are numerous concerns with section 139 of the Penal Code:

It denies women and girls deemed an “idiot or imbecile” any capacity at all to consent to sexual intercourse or other sexual activity (Frohman & Ortoleva).

It fails to take account of the existence widely divergent psychosocial and intellectual disabilities and employs legal determinants of “idiot or imbecile” that are ambiguous, arbitrary and dehumanising.

Defilement of a woman/girl considered an “idiot or imbecile” carries a lesser maximum sentence when compared with defilement of girls under the age of 16 (section 139 and 138 respectively).

If one acknowledges that a person could be charged with rape by understanding the absence of consent, based on the range of individualised factors that would have influenced consent, voluntariness and whether the person was informed, then section 139 may be redundant. It is possible that a woman with a psychosocial or intellectual disability can consent to sex if she is over the age of consent and able to give free and informed consent, and that where she does not give free and informed consent, the person who had sex with her should be charged with rape (Doyle, 2010). This could offer a less discriminatory solution than the current situation where all women with psychosocial or intellectual disabilities are assumed unable to consent and where sexual violence perpetrated against them results in 14 years imprisonment in contrast to the life imprisonment stipulated for rape.

Importantly, in interviews with respondents it often appeared that where any woman or girl with a

disability experienced sexual violence, the response was often to use section 139 and not 132 even where the disability in no way affected the woman's ability to consent.

Section 155 of the Criminal Procedure and Evidence Code provides that alternative verdicts to charges of rape could be a conviction under sections 137 or 138 but not section 139. Again this illustrates that section 139 of the Penal Code is based on the assumption that women with disabilities can never consent to sexual acts. This assumption fails to understand the degrees of mental and intellectual disabilities that exist and the extent to which that influences a person's capacity to provide informed consent.

In the reasoning of *Republic v Peter Jasi*, Confirmation Case No. 1026 of 1994 and *Republic v Andreyia William*, Confirmation Case No. 565 of 1994), "there can be no defence of consent available on a charge of defilement of an imbecile or an idiot for the policy of the offence is to protect mentally deranged girls or women."

In *M'bwana v Republic* 8 MLR 159, Chatsika, J observed that the "broad ingredients" of the offence of defilement of an "idiot or an imbecile" are: That there must be defilement, and that the complainant must be proved to have been an "idiot or an imbecile".

However, the judge also proceeded to illustrate that "evidence of idiocy or imbecility must be positive and that mere history or reputation of mental unsoundness was not sufficient." This seems to suggest that a medical professional or at least someone "else" must make a relevant pronouncement on the *imbecility* of the victim and perhaps needed to have made such a diagnosis in the past. However the High Court in *Kanyinji v Republic* [2008] MWHC 213 held that "positive proof of idiocy or imbecility" do not require medical evidence only and that "if there are persons who can positively testify as to the idiocy or imbecility of the victim" such as a relative, that would be sufficient. What is concerning about these judgments is the discriminatory and arbitrary manner in which the courts view persons with psychosocial and intellectual disabilities.

Section 139 is uncertain and archaic, based upon the view of women as incapable and powerless, and in the context of women and girls with disability the law also views them as asexual. The law effectively objectifies women and girls with psychosocial and intellectual disabilities – stripping them of all human desires and abilities to desire. Whilst at the same time infantilising and positing them as powerless and in need of protections – perhaps even from their own selves.

There are obvious and competing objectives in need of reconciliation when issues of mental capacity and consent are considered: the need to respect the "informed" choices and personal liberty of all persons and the need to ensure that persons with disabilities are adequately protected against abuse. In its present formulation, this raises the question as to whether targeted legislative provisions for this group of victims are necessary and/or appropriate.

Key Informant Interviews indicated that section 139 is rarely and inconsistently applied to cases of sexual violence committed against women and girls with psychosocial and intellectual disabilities. Not all officers or Disabled Peoples' Organisations (DPOs) were even necessarily aware of the provision, in the case of some (for example the officer of WOJAM) there is a preference to rely upon alternative provisions for prosecution – perhaps those that are easier to prove or carry heavier penalties than section 139. The State Advocate agreed with WOJAM by indicating that "State

Advocate Chambers handles cases on appeal and confirmation and usually cases under section 139 are charged under defilement or other sections.” The fact that sexual intercourse with a woman or girl considered to be an “idiot or imbecile” strictly amounts to defilement also presents problems. Though deliberately aimed at protecting women and girls with mental disabilities, it also negates their ability to fully exercise their autonomy in deciding who to maintain sexual relations with. Unfortunately, section 139 of the Penal Code makes no effort to recognise that delicate balance.

The Connecticut Supreme Court’s decision in *Kortner v Martise* 312 Conn. 1, 13, 91 A.3d 412 (2014) offers an interesting illustration of this. The court indicated that the mere fact that a person is under “conservatorship” doesn’t make her legally incapable of consenting to sex. The trial court recognised through the evidence demonstrated that the woman with a mental disability “lived in her own apartment, spent unsupervised time there, and was able to make decisions about her household chores and carry on interpersonal relationships”. The court recognised that having a standard law against sexual intercourse with people with psychosocial and intellectual disabilities would adversely affect their civil liberties. Thus, the court concluded that the final determination of whether the purported victim had the ability to consent “to sexual conduct is a factual question” that the court must decide.

The police and their role in the attrition of cases of sexual violence

Key Informant Interviews with NGOs indicated a general perception that the highest point of attrition of cases is at the investigations level by the police. The police have generally taken a light attitude towards handling cases of persons with mental disabilities. PODCAM has previously registered cases with the police but there has been little movement. According to PODCAM “there is largely a negative attitude towards people with disabilities and a perception that they do not engage in sexual activity and therefore cannot suffer any form of sexual violence or assault.” The NGOs state that police would cite unreliable witnesses, that the culprit cannot be traced, or lack of resources as reasons for not pursuing the case.

According to the Key Informant Interview with the One Stop Centre, in some instances, the investigations commence on a good note but are never seen to their logical conclusion. Sometimes files go conspicuously missing, leading to stalling of the case.

There have been instances where the accused have lodged a case with the police for defamation once they are identified by the victim. In such cases, FEDOMA reported that the police would usually side with the accused and the parents of reporting victims would be warned by the police for defamation.

It was noted that police allow parents and families to withdraw cases or settle at family level. The Malawi Police Service indicated that it is often difficult for them to intervene when such assertions emerge because affected families remain tight-lipped and are unwilling to cooperate with police investigations. This has largely to do with community stigma and stereotypes against people with disabilities in general.

Discussion with PODCAM indicated that homeless women and girls with psychosocial and intellectual disabilities are often sexually abused and bear several children but there is no action or effort to trace the perpetrators on the part of the police. MUBU had a similar experience and noted two cases where teachers had raped blind students but where no legal action had been taken against the perpetrator.

Perceived complexity of cases

CHREAA suggests that there is a tendency not to want to deal with the perceived complexities of a disability, and hence police investigators are reluctant to respond to incidences of sexual violence committed against women and girls with disabilities with the diligence such cases deserve. Another KII remarked that “police feel it’s a complex issue and they would not manage to get the right information and evidence to secure a conviction”. The complexity was also linked to the perception that additional evidence would have to be obtained to corroborate such cases and accordingly “police have the attitude that the cases are too involving in an environment where there are limited resources”.

Difficulties in application of section 139 of the Penal Code

Problems with regard to the applicability of the provision are largely due to the fact that “imbeciles and idiots” has been defined very broadly. Though medical assessments can sometimes be done, the tendency is to apply the provision broadly and based on testimony of close relatives with regards to the mental condition of the victim.

Competence to testify

The DPOs believe that the police and other members of the criminal justice system hold stereotypical views about the mental competency of women and girls with disabilities regarding their capacity to understand and report sexual violence regardless of the nature and extent of their disability and these views often compromise the administration of justice.

“Women with disabilities face a number of obstacles in the legal justice system, including the systematic failure of the court system to acknowledge them as competent witnesses. This exclusion is particularly problematic in cases involving sexual assault or other forms of gender based violence, in which the complaining witness may provide key evidence necessary for a conviction” (Ortoleva, 2012: 73).

Victims become affected not only by the crime itself but often by the additional challenges they face throughout the pre-trial and trial process. Delicate matters come into play. For instance, issues of confidentiality with regards the medical records of a victim who is suspected of suffering from a psychosocial or intellectual disability may raise human rights concerns.

In some instances, the testimony of the victim is considered less credible on the basis of the victim’s psychosocial or intellectual disability. This is more pronounced during the police investigation phase and points to reasons, amongst others, why cases of sexual violence against women or girls with psychosocial and intellectual disability rarely proceed beyond the community and police investigation phase. Thus the testimony of a victim with psychosocial or intellectual disability regarding her version of events of the sexual assault or rape is sometimes considered incompetent or not credible. Hence, there is a tendency to rely on corroboration to support the victim’s version

of events. Failure to provide corroboration often jeopardises the prosecution's case.

The Criminal Procedure and Evidence Code provides in section 210 that:

“all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by immature or extreme old age, disease, whether of mind or body, or any cause of the same kind”.

FEDOMA also indicated that this is a trend in cases involving people with intellectual challenges where their testimonies are not considered credible. This was also noted in other KIIs with one respondent commenting that “police largely assume a very stern interrogative approach towards a victim with a psychosocial disability or often lose trust in the victim's version of events if the victim fails to recall certain events.” Because of this many parents would prefer not to open cases involving their children to protect them from ridicule and discrimination. They however indicated that these challenges usually come out during investigations by the police.

Lack of training/capacity to handle persons with disabilities

The respondents indicated that they had not received any prior training or orientation in order to ensure reasonable accommodation and accessibility when dealing with a victim who has a disability. They particularly cited communication barriers with regards to victims with visual and/or hearing impairments. Often, they rely upon the relatives to ensure communication. Hence, this has implications on evidence. Nonetheless, the respondents indicated that they do try as much as possible to ensure that investigations and prosecutions are done diligently. Such efforts to ensure access to justice for such victims with disabilities are therefore more “individual based” as opposed to being institutionalised. Thus, it depends largely on the determination of an investigator and/or prosecutor to assist in such cases. Hence, respondents insisted that it would not be right to conclude that the police or the prosecutors take such cases “lightly” due to the fact that a victim has a disability. Instead, it is largely due to the lack of capacity in the police to respond effectively. The respondents highlighted that the problems continue even up to the court processes in which the magistrates and other systems of the court are unable to adapt to the needs of a victim who may have a disability. According to FEDOMA, “the problem with the police is beyond professional capacity and includes poor attitudes towards the women and girls with psychosocial and intellectual disabilities and not taking their cases seriously. If no one complains, the police would not be proactive to take up the issue as a case.”

Violence is often perpetrated by a family member

Women and girls with disabilities are at increased risk of violence in their homes, neighbourhoods and communities. When violence is perpetrated against a woman or girl with a disability by a member of her family or someone entrusted with supporting her, access to justice is often denied. According to FEDOMA, “families are concerned about who will provide for the child and the family if the perpetrator is the breadwinner.” Traditional mediation methods administered by traditional or religious leadership are often the preferred recourse to justice for the family and/or the community. These alternatives to criminal justice often exclude the victim and thereby further deny her access to redress.

According to the Malawi Union of the Blind incidences of sexual violence including rape/defilement that occurs within the home environment are rarely reported. Often relatives feel “embarrassed” to bring up the matter publicly due to the victim’s disability and the public attention that it may attract. The sexual assault often becomes known when the victim becomes pregnant. However during this time, most of the evidence regarding the sexual assault would have eroded.

In addition to this and coupled with lack of family support, victims of such assault are less likely to be willing to testify in court. In order to illustrate how prevalent and yet unreported incidences of sexual violence committed against women or girls with disabilities are in the community, the respondent proceeded to illustrate that he could recall many instances in which girls with disabilities would disappear from school or the public eye, and then be spotted at home pregnant or nursing a baby. Thus, it became apparent that the girls were being sexually assaulted, often by a proximate relative. Hence, family members would conceal the matter for fear of bringing “shame to the family.” According to FEDOMA, “lack of support in such cases makes the parents close up and not reveal the ordeals they are going through.”

Informal justice and alternative dispute resolution in sexual violence cases

It was found that families would negotiate damages and find alternative routes to justice that reinforce the lack of agency and autonomy on the part of the woman or girl. According to PODCAM, since the formal justice system is often far from many people and expensive, incidences of sexual violence are sometimes reported through informal mechanisms such as traditional and religious authorities. Once it is noted that the victim has a disability, there is a tendency for the traditional authority to adopt a reconciliatory approach as opposed to referring the matter to the police.

This finding was corroborated by FEDOMA who pointed out that the traditional authorities are perpetuating the practice of abuse and discrimination. Traditional authorities ask perpetrators to pay compensation in such cases. Traditional authorities would sometimes be aggressive in handling such cases involving people with disabilities as they would ask that the women with severe disability give evidence even in situations where they have no capacity to do so. According to FEDOMA, “some chiefs indicate that when women or girls with psychosocial disabilities have been defiled and impregnated, the family should embrace the situation that someone found their child attractive to give them a child.”

Accessibility of the justice system

The majority of criminal justice services in Malawi are neither accessible nor are they disability friendly. The Malawi Police Service interviewees said that there are limited criminal justice providers that are equipped to communicate with women and girls with disabilities. There are only a few trained officers and they are desk officers based at police headquarters in Lilongwe – far removed from the victims. There are also often problems with the design of court and police station facilities which affect the ability of people with physical disabilities to access the service.

Discussions with the DPOs indicated that the courts have no interpreters for persons with disabilities and some magistrates would like the victims to speak for themselves. One KII indicated that “courts are not sympathetic and the process rigid. They would still want to use the normal methods of getting evidence in instances where the victim cannot speak or express themselves.” Nonetheless, the respondent was able to illustrate that the justice system is largely not adaptable to the unique needs of people with disabilities in general. There are numerous barriers and problems of accessibility.

This is corroborated by the findings of the Human Rights Commission’s Public Inquiry on Disability in 2013 which found that the failure to provide training to the Malawi Police Service, Judiciary and Prison Service officials about the needs of persons with disabilities have led to their exclusion and denied them access to justice. The Inquiry also found that persons with hearing impairments and the deaf-blind, in particular, have problems accessing justice either as offenders, complainants or witnesses since some court officials in Malawi do not allow the use of sign language interpreters. This is due to unavailability of staff trained in sign language at the court. Persons with intellectual disabilities, in particular, are often regarded to be of “unsound mind” such that prejudice overrides rational consideration of situations by law enforcers and interpreters; hence denying those with intellectual disabilities access to justice.

Lack of expert assessment

One official interviewed noted a concern around the lack of expert assessment of the mental state of a victim of sexual assault. Problematically, this official seemed to suggest that all women with disabilities require expert assessment, thus again indicating a general prejudice about the legal capacity of persons with disabilities.

It was noted that the tendency of the court is often to rely upon the testimony of eye-witnesses and family members regarding the nature of the psychosocial or intellectual disability of the victim.

Hostile court environment

PODCAM cited incidences in which police investigators or court magistrates would aggressively question the victim with a psychosocial or intellectual disability with the expectation of getting coherent answers. Rarely would such investigators or magistrates rely upon experts in mental assessments or psychiatry or support persons to question the victim or at least provide a conducive environment in which the victim can calmly respond to the questions as opposed to an interrogation room or an open court. PODCAM cited a scenario in which a male child with

an intellectual disability was raped. The child was able to explain to his family what had occurred. However, when the child went before the court, the environment was so insensitive and unfriendly that the child was unable to say what had occurred. The magistrate merely asked questions as he would ordinarily ask any other victim. Similarly, the respondents cited a case that had occurred in Soche East (Blantyre) in which a female child with an intellectual disability narrated an ordeal to her parents regarding a sexual assault. When the parents reported the matter to the police, the police proceeded to interrogate her but the female child refused to respond. Since the police deemed her to be “uncooperative” the police insisted that they could not verify her story.

The courts tend to treat uncorroborated evidence with great caution, even when the victim does not have a psychosocial or intellectual disability. Whilst there is no legal requirement for evidence to be treated as such, the practice in terms of common law has been to require some corroboration of a victim’s testimony in sexual offence cases relating to the fact that the act was committed and the person who committed it. This is generally problematic since incidences of sexual violence often occur in isolated and secluded environments. In addition, a sexual assault victim with a psychosocial or intellectual disability will not always react within “societal expectations” such as reporting the crime immediately. The Social Welfare Department in Chiradzulu cited a case in which a young male was assaulted by an adult male who allegedly fondled his genitals with pepper and burnt his abdomen with a hot iron object. The victim who is known to suffer from a psychosocial disability crept back to his house and lay down for hours in his room without reporting the incident. His mother observed the injuries later in the night when she heard her son slightly moaning. Though the matter is in court in Mbulumbuzi and currently awaiting judgment, the evidentiary aspect has been burdensome as the victim’s version of events lacks corroboration and the credibility of his story has been put into question. The mother to the victim has complained of her son being required to testify in an open court in an intimidating atmosphere. The young man would become withdrawn and fail to respond to certain questions. These types of incidents indicate the urgent need for the criminal justice system to incorporate the use of intermediaries and support persons in court processes involving vulnerable witnesses.

FEDOMA commented that “in courts, like with police, there are no expertise to handle such cases. The cases are not given any special consideration depending on the specific needs.”

Discrepancies between higher and lower courts

CHREAA noted that the High Court seems to be more up-to-date in trying to meet international human rights standards on handling cases but the situation is different at the magistrate level. The magistrates do not make extra effort to create a conducive and open environment for persons with disabilities to engage in a rigid and adversarial justice system. CHREAA also complained that such cases are held in open court where members of the community would sometimes ridicule the victim or the family.

A respondent from the High Court indicated that judicial officers (especially those who graduated some time ago) may not be conversant with emerging jurisprudence on disability rights.

Structural barriers to justice

WOJAM indicated that though there is anecdotal evidence to suggest that incidences of sexual abuse against women and girls with disabilities are on the rise, many of such cases do not reach the High Court. This could be indicative of structural barriers that emanate from the community through to the police. However, the respondent indicated that the court system is not without blame. It has largely failed to make the justice system adequately accessible to people with disabilities. Sometimes the court process can also be long and tedious. Thus for victims with disabilities who require support, it becomes increasingly frustrating for the victim to attend the trial and sustain the momentum.

Sentencing disparities

Though the issue of consent is irrelevant to the question of guilt of the accused person under section 139 of the Penal Code, Malawian courts have nonetheless decided that consent would be relevant with regards to sentencing: “Be that as it may consent may be taken into account when considering sentence.” See *Republic v Goliati and Jonasi* 1971-72 ALR (Mal) 251. Hence, consent may be used as a mitigating factor to justify the lessening of a sentence. This type of reasoning again illustrates the lack of understanding of when section 139 should come into play and embodies conflicting understandings of capacity to consent.

The research team managed to collect so few cases that we could not really compare the sentences. However, WOJAM expressed concern regarding the disparities in the maximum sentence with regards to sections 138 and 139 of the Penal Code. The respondent said the current law seems to create a perception that women/girls with psychosocial and intellectual disabilities have less consideration under the law.

Since section 139 of the Penal Code still refers to women and girls with psychosocial and intellectual disabilities as “idiots” and “imbeciles”, which are derogatory terms, there is a strong possibility that a lesser sentence is largely due to an “inferior status” that is accorded to girls or women with psychosocial and intellectual disabilities.

Challenges and lessons learned

Data are not disaggregated to highlight the incidence of disability

There is currently no systematic and recurring collection of national information on crime victimisation of persons with disabilities. There exists no base rate data on victims with disabilities for the crimes for which victim data are typically gathered. Data collection was a challenge across the complaints-handling bodies that were approached – all officers relied upon their recall of cases that they were personally aware of or had heard of as opposed to being able to access files from their registry. The stated reason for this was that the issue of the disability would not be recorded, the matter would simply be registered as one of sexual violence or other complaint, thereby rendering the intersection of disability and violence invisible in the system.

At the Malawi Human Rights Commission, despite having a dedicated Directorate that handles matters of disability, the registry is centralised and the cases are registered and investigated. At the Legal Aid Bureau, the team was informed that the people who work in the registry are rotated and so it would rely upon the recall of particular officers to find a file that has a related issue of disability since it would not be recorded as such.

The Gender Equality Act provides for the Minister to make regulations on the collection of data including causes of discrimination on account of gender and sexual harassment for the purposes of policy reform and programming (section 22(2)(d)). This might be one opportunity for disaggregated data on the violence faced by persons with disabilities.

Similarly, the information collected in the Malawi Demographic and Health Survey should record where a respondent has a disability so that more information becomes available on the prevalence of violence against persons with disabilities and their access to services.

Finally, section 26(2)(b) of the Disability Act provides:

“The Government shall promote regular and appropriate data collection on the living conditions of persons with disabilities in order to determine the amount of resources required to deal with those conditions.”

Cases not registered or registered differently across institutions

It proved nearly impossible to trace one complaint across the various institutions – e.g. from the complainant or the DPO to the police and through to the courts. Matters that had been reported to the DPOs might not have been registered at the police as a complaint. Or where registered, the file might have been lost or closed but not recorded as such. At the court, usually the Magistrate’s Court, the case might have been decided but the registration can easily be different from that used by the DPO or the police.

The paper-based record keeping has extreme consequences. The court rulings are handwritten, often illegible and do not bear precedent so often the other magistrates will not be aware of decisions made on a similar matter but in a separate court room unless they talk about it. Files are often lost or destroyed, the filing systems change and are inconsistent across institutions. Record keeping is a major hindrance. The experiences of women and girls is essentially erased by the non-capturing of their disability in the recording of the complaints. The entire criminal justice system requires digitisation.

Key legislation and policies are weak and/or not implemented

As has been indicated, laws and policies exist which would, if implemented, improve access to justice for persons with disabilities. Unfortunately, there has been insufficient measures to ensure that those tasked with implementing the various pieces of legislation are aware of its contents and supervised to ensure implementation.

“Although the Disability Act has been passed (which in itself is a significant milestone considering that it took almost eight years before it was actually enacted into law by Parliament), [persons with disabilities] in Malawi continue to face multiple challenges. At a general level, it seems the Government of Malawi’s commitment to properly and comprehensively respond to the needs of [persons with disabilities] is not ‘deep’ and consistent. Indeed, issues of disability tend to be benignly invisible in major Government policy documents” (Chilemba, 2014).

Recommendations

There is a need to be keenly aware of intersectionality and overlapping vulnerabilities that women and girls with disabilities face. There are already high levels of violence, particularly violence against women. This preliminary overview has resulted in the following recommendations for urgent action to address the justice gap presented herein.

Advocate for law reform

Section 139 of the Penal Code requires review informed by progressive principles of human rights. This includes, amongst others, complete removal of derogatory terms such as “idiots” and “imbeciles” in reference to those with psychosocial and intellectual disabilities. Though the intention behind the framing of the provision was to protect women/girls with mental disabilities, it negates equally essential components of the rights of women/girls with disabilities and the research indicates that the provision is seldom applied.

There is a need for reformed legal analysis of section 139 of the Penal Code in a way that focuses on the accused’s abuse of a relationship of power or trust, the accused’s coercive behaviours, and the victim’s voluntariness (Benedet & Grant, 2007) and not simply use the mental state of the “victim” in a way that excludes other experiences and autonomy of women and girls with disabilities. It is also of crucial importance that any suggested provisions intended to give recognition to sexual autonomy do not operate to deny vulnerable people adequate legal protection from exploitation.

Looking to regional penal codes, South Africa’s “Sexual Offences against Persons who are Mentally Disabled” (sections 23-26 of the South African Criminal Law [Sexual Offences and Related Matters] Amendment Act of 2007) provides a notable example of including coercion as a criminal element so as to preserve the autonomy of persons with disabilities who choose to maintain sexual partner(s). Section 23(2)(e) recognises “threat, force, coercion, deception, abuse of power or authority for the purposes of...a sexual act” with a person with a disability is guilty of the offense of sexually exploiting a mentally disabled person. Sexual grooming through coercion is also prohibited per section 24(2)(d). Section 23(3)(a)-(b) recognises the inherent position of power that care-givers, parents, guardians, and teachers of persons with disabilities have, and makes explicit that use of such power to sexually assault or exploit a person with a disability in their care is illegal. Importantly, South Africa’s law is gender neutral, thus also conceiving that boys or adult men with disabilities may too be victims of sexual offences.

Conduct in-depth attrition research

This preliminary study has reinforced the knowledge that there are serious problems with discretion at many key points in the criminal justice process but particularly at the entry point – the police. This occurs against the backdrop of a culture of dehumanising women and girls with psychosocial and intellectual disabilities and painting them as asexual, free from sexual desires and desirability, or less deserving of access to justice. Police act at their discretion when they register a complaint or not. They are also directed by the family and will acquiesce when the family of the victim refuses to register or pursue a complaint – despite the criminal conduct at stake. Often the preference for resolution at family / community level is premised on the absence of State-funded or independent support systems. Because people with disabilities are often so reliant on family and the community for support systems and resources, criminal prosecution of abuse is perceived by police and traditional authorities to not be in the best interests of the person with disability.

It is necessary to engage in in-depth research that critically explores the entire progression and drop-out through the system beginning from when a case is reported to the police and following the matter all the way through the system to conviction or otherwise. In so doing, a study could develop a richer understanding of the prevalent practices within the criminal justice system which in turn could inform more nuanced and targeted interventions to improve access to justice for women and girls with disabilities.

Vitaly important, it must be acknowledged that the present research did not engage the direct experiences and preferences of people with disabilities. Further research must be inclusive of the view, will and preferences, and experiences of people with disabilities directly in order to ensure comprehensive understandings and solutions.

Regulations and/or practice directions

As the lack of justice for sexual violence committed against persons with disabilities runs from the initial police investigation through prosecution, training is necessary to increase equal protection under the law for persons with disabilities. Regionally, South Africa has comprehensive directives for police officers generally and investigating officers specifically. The directives include such standard-operating procedures as ensuring station commissioners compile and keep up-to-date information about hospitals capable of collecting rape-kits and giving post-sexual assault treatment and of civil society organisations providing psychosocial support to victims. First-contact officers (those who initially receive a complaint of sexual assault) should immediately request that the victim “accompany him or her to an appropriate area...out of sight and hearing of persons in the community service centre” and they should “reassure ... the victim that he or she is safe and will be protected.” Moreover, “[a]ny member receiving a report that a sexual offence has allegedly been committed against any person, must always view the report in a very serious light” and “no victim may be turned away.” By including basic directives of listening intently and ensuring current information on victim services, including health services, will already advance the justice cause of anyone seeking to report a sexual assault.

If there is a victim with a disability who may have communication problems, there are further

directives that prevent immediate dismissal of claims. For example “the [officer] must be patient with the victim to allow him or her to explain what happened during the alleged commission of the offence... A member may never be judgmental while interacting with the victim irrespective of the circumstances surrounding the offence.” The Directive goes on to command that “[i]f the victim is unable to make a coherent statement, a skeleton docket must be opened, a statement must be obtained from any person that may be accompanying the victim and the victim must be allowed time before a statement is obtained from him or her.” Coupling such directives with possible training on how to deal with persons with disabilities is imperative to dispel institutional and cultural misunderstandings of persons with disabilities and the seriousness with which their cases should be handled.

Furthermore, law enforcement officers should be trained to inform victims of the importance of undergoing a medical examination as soon as reasonably possible. This is both for the sake of the case, as evidence is best collected within 72 hours of an offence, and for the victim as services such as post-exposure HIV prophylaxis, emergency contraceptive, and other treatment such as wound care may be urgently needed. Additionally, healthcare facilities may be better equipped to deal with victims of trauma with disabilities. This is where the right to health services as seen in the African Charter and the CRDP converge with evidence collection for a criminal case. Training is needed to stress the important aspects of both. Collection of medical evidence can be critical to corroborate the victim’s testimony and if conclusive can even remove the need for the victim to testify, thus reducing secondary trauma. It is noted that this study did not collect information relating to health service provision relevant to sexual violence, which issue is important for further research.

When a case has been taken seriously by the receiving and investigating officers and moves on to possible prosecution, but fails due to a lack of will to prosecute, there is still a failure in the criminal justice system. To overcome this, prosecutors should be trained in several areas. Firstly, they should learn how to work patiently and diligently with victims and witnesses who have disabilities. Secondly, they should develop skills of questioning individuals that have disabilities and sexual assault survivors as both groups require a sensitivity and understanding quite apart from other criminal investigation victims and witnesses. They should aim to develop professional skills that are effective in an adversary setting while maintaining respect for the persons with disabilities.

There could be some need to engage the Chief Justice to champion the development of practice directions or regulations that guide the lower courts on protection measures that can be taken to protect the victim during the court proceedings. Particularly among magistrates, as they will hear the majority of sexual assault cases. Mandatory training on how to manage court proceedings involving sexual assault, particularly of victims with disabilities, is necessary to overcome intimidation of victims and witnesses. Training should encourage magistrates to intervene without request from parties to allow evidence to be given in camera or in chambers. These interventions should take into consideration the degree of disabilities as well as the common experiences of violence and the context. This could be done either through ongoing training of magistrates, or through mandatory training at the Mpemba Staff Development Institute (MSDI).

Thus, it is incumbent on courts to consider measures to ensure that persons with disabilities are

reasonably accommodated. The Disability Act defines “reasonable accommodation” to mean:

“Necessary and appropriate modifications and adjustments that ensure that persons with disabilities enjoy or exercise all human rights and fundamental freedoms on equal basis with other persons, without imposing disproportionate or undue burden on the other persons.”

Centralise oversight of disability training

The institutional setup and service delivery of the justice system requires capacity building to accommodate the unique needs of victims with disabilities, especially sexual violence. Under the Disability Act of 2012, a National Advisory and Coordinating Committee on Disability Issues (NACCDI) was created to enable a uniform promulgation and implementation of national disability rights policy. As of the writing of this report, the NACCDI has yet to be operationalised. However, as disability training, policy implementation, and oversight of such is required in all facets of society, it is necessary that there exists a body that audits and assesses the effectiveness of policies and their implementation. As the NACCDI was created to ensure uniformity in disability rights advancement and protections, this would be the ideal vehicle to exercise oversight responsibilities, whether this is done by the NACCDI themselves or through a neutral third-party.

Civic education and community mobilisation

Communities also need to be sensitised and empowered to report incidences of sexual violence and dispel stigma. There is a need for specific interventions on sexual violence carried out using DPOs to particularly target traditional and religious authorities and parents of children with disabilities. The Disability Act specifically encourages government to recognise and support the role of civil society in promoting and protection the rights of persons with disabilities (section 3).

Alternative support systems for women and children with disabilities

Families and communities have inadequate alternatives and resources to provide support for community living for persons with disabilities in Malawi. In the absence of appropriate support for community-based care and living, families have resorted to chaining people with disabilities in their care, locking them up or allowing them to wander freely without protection. The mental hospital only takes select cases and even then they are limited in the facilities and treatment that they have to offer. It was noted that the lack of alternative support systems for persons with severe disabilities is particularly concerning in cases where the care-givers and relatives are the perpetrators of abuse. The obligation on States to support community-based care and services for people with disabilities is central to the CRPD. FEDOMA strongly urged the government to strengthen outreach programmes to provide support to poor families who might not have the necessary skills or resources to adequately support persons with disabilities under their care.

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Appendix 1: Questionnaires

Interview guide – Investigators and prosecutor

1. What particular sorts of illnesses, conditions or disabilities do you think the term 'people with disabilities' refer to?
2. Do you have any data on the number of women and girls with disabilities who have accessed services and programmes to prevent and address violence in the past year? (VSUs, one stop centres, etc.)
3. What are the means to report violence against women and girls with disabilities in different settings, including medical centres and institutions? To what extent are these known and accessible?
4. How many cases have you handled where one (or more) of the parties had a disability?
5. Was there anything special/noteworthy/different about these cases?
6. Do you have statistics on crimes against persons with disabilities?
7. Have you ever investigated/charged/prosecuted a case under section 139 of the Penal Code? ¹
8. How many cases involving sexual assault against a woman or girl with disabilities have been reported at your duty station/office?
9. Who reported the case?
10. If the complainant was not the victim what was their relationship to the victim?
11. What was the relationship between the victim and the suspect?

12. How many cases involving sexual assault of girls or women with disabilities have you personally handled (if any)?
13. Explain how the case was brought to the attention of your office? (if more than one case please give a brief description for each case – with file/case name and parties)
14. What were the disabilities that the victim was afflicted with?
15. Were there cases where the woman or girl had psychosocial or intellectual disabilities?
16. Was the disability a part of the case or just something you observed? (did the victim mention being violated because of her disability or implicate her disability in any other way)
17. Did the disability affect the manner, procedure or approach in which you handled the case whether during the preliminary interviews with the victim or during the prosecution? Explain
18. Were any special measures taken towards the woman or girl with disabilities? Explain.
19. Was the victim assisted in accessing legal aid? Explain.
20. How many of these reported sexual assault cases have resulted in
a. Withdrawal
b. Charge
c. Prosecution
d. Conviction
21. In those cases that you encountered were witness statements taken?
22. What process is followed when a sexual offence case is withdrawn?
23. How often are sexual offence cases withdrawn?
24. What is the most common reason for a sexual offence case to be withdrawn?

25. When a case is withdrawn, when is this most likely to take place?
26. When you decide not to pursue a case like this what might be the reasons for that decision?
27. Do you communicate the decision with the complainant/victim?
28. What prompted you or your office to investigate/prosecute a case?
29. What prompted you or your office NOT to investigate/prosecute a case?
30. Are there any unique/peculiar difficulties in investigating/prosecuting cases of sexual violence in which the victim is a woman or girl with disabilities?
31. What is your assessment of how police investigators/prosecutors/court officials deal with cases of sexual violence against girls or women with disabilities? (probe on any disadvantages)
32. What is your assessment of how the community, the police and/or the courts generally deal with cases involving sexual violence against women or girls with disabilities? Probe on any concerns or complaints on the procedure, approach, court environment and outcome of the case
33. What can we do to ensure that women and girls with disabilities have enhanced access to justice in sexual violence and other GBV cases?
34. Is there any person or organisation you think might be able to help with additional information on such cases or similar cases?
35. Is there any additional information you can share on this topic?

Interview guide – NGO/CBO

1. What is the mandate of your organisation?
2. How big is your organisation? (number of employees, number of offices)
3. What type of work does your organisation do with/for persons with disabilities?
4. What particular sorts of illnesses, conditions or disabilities do you think the term 'people with disabilities' refer to?
5. Have studies/research been conducted on the prevalence, nature, causes and impact of violence against women and girls with disabilities in different settings (family/home, work-place, medical institutions, schools, etc.?). What forms of disability and violence do they cover?
6. Do you have statistics on crimes against persons with disabilities?
7. Do you have any data on the number of women and girls with disabilities who have accessed services and programmes to prevent and address violence in the past year? (VSUs, one stop centres, etc.)
8. What are the means to report violence against women and girls with disabilities in different settings, including medical centres and institutions? To what extent are these known and accessible?
9. Do you know of any case in which a woman or a girl with disabilities was sexually assaulted?
10. If yes, how were you made aware of this case?
11. What was your role in this case?
12. Was the victim assisted in accessing legal aid? Explain.
13. Explain the circumstances/details of the case.
14. What was the relationship between the victim and the suspect?

15. Was the matter reported to any law enforcement agency?
16. Did you follow up on the action taken after the matter was reported?
17. If yes, how did the law enforcement agency respond to the matter? (probe on whether investigations occurred; whether the investigations were thorough; whether they were concluded or reasons for non-conclusion; whether the matter proceeded to court or reasons for any failure to proceed to court)
18. Did you maintain contact with the complainant/victim?
19. Where a matter was brought to the attention of the police do you know if it was investigated? Prosecuted? Withdrawn?
20. Have you had a complainant/victim ask you to withdraw their case concerning sexual violence? a. if yes, please describe the reasons that were given for the withdrawal b. at what stage of the criminal justice system did this request/withdrawal take place?
21. In your experience how do law enforcement agencies (primarily the police) generally deal with complaints of crime raised by persons with disabilities?
22. In your experience what challenges do persons with disabilities face in accessing justice?
23. Do you think that the disability of a victim affects the diligence and professionalism in which the police respond to such complaints? (Probe on the disadvantages)
24. Are women and girls with disabilities particularly disadvantaged when they seek assistance from the police? (Probe on reasons for such disadvantage)
25. Are you aware of section 139 of the Penal Code? ²
26. Have you ever heard of a case where a charge/investigation/prosecution/conviction was sought under section 139 of the Penal Code?

