

Transgender Rights in Malawi

Rights under the Constitution of Malawi

Chapter IV of the Constitution deals with human rights. Section 20 guarantees the right to equality and protection from discrimination on a number of grounds. Gender identity and sexual orientation are, however, not among the listed grounds. However, the section refers to “sex” and “other status or condition”. The United Nation’s Human Rights Committee has stated that the phrase “other status” should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 15
Right to life	Section 16
Personal liberty	Section 18
Human dignity	Section 19(1)
Protection from torture, cruel, inhuman or degrading treatment	Section 19(3)
Right to equality	Section 20
Right to privacy	Section 21
Family and marriage	Section 22
Freedom of expression	Section 35
Rights of arrested or detained persons	Section 42
Right to administrative justice	Section 43
Right to education	Section 25
Freedom of association	Section 32
Freedom of assembly	Section 38

Section 22 of the Constitution deals with the family and marriage, but it does not state explicitly that a marriage is between heterosexual persons. However, the **Marriage, Divorce and Family Relations Act of 2015**, has been condemned by human rights groups for increasing discrimination towards LGBT people. The Act prevents a transgender person from marrying someone who has the same sex as the transgender person’s birth sex. So, this means it would be unlawful for a man to marry a woman if her birth sex was male, or for a woman to marry a man if his birth sex was female.

Changing your Gender Marker

Malawi does not have a law that allows a transgender person to change the gender marker in their identity document. However, there are provisions in the **National Registration Act 13 of 2010** that could possibly be used by transgender persons to change the sex description in their identity document:

- **Section 20(1)** provides that where a change in particulars of a registered person materially affect his registration, the district registrar shall record the change and notify the Director of the circumstances and recommend that the person be issued with a new identity card. In terms of **section 20(2)**, if the director is satisfied that the change materially affects the registration, he will cancel the identity document and issue a new one.
- **Section 21(1)** provides that every registered person may, whenever he is satisfied that his appearance has changed so as to make it likely that his identity may be questioned, apply to the district registrar for the issue of a new card with a more recent photograph.

If an application in terms of sections 20(1) or 21(1) is rejected, a transgender person can rely on **section 43 of the Constitution**, which gives every person the right to procedurally fair administrative action and the right to written reasons.

Your Rights in the Workplace

- **Section 5 of the Employment Act 6 of 2000**, prohibits discrimination against an employee/prospective employee on basis of “sex” or “other status” in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment relationship.
- **Section 5(3)** states that any person who contravenes the section is guilty of an offence and is liable to a fine or imprisonment for two years.
- **Section 6(1)** provides for equal remuneration for employees without distinction and discrimination of any kind – in particular on the basis of sex or “other status”.
- **Section 57(3)** states that it is not a valid reason to dismiss an employee or impose disciplinary action on the basis of the employee’s sex or “other status”.
- In terms of **section 63**, the remedies for unfair dismissal include an order for reinstatement, re-engagement or compensation.

It has been reported that employees are discriminated against in the work environment in various ways – including through pre-employment HIV testing or they are dismissed on the basis of their HIV status. In *Banda v Lekha*, the Malawi Industrial Relations Court held that discrimination based on HIV status is a violation of section 20(1) of the Constitution.²⁰ The Constitution was later amended to include “any other status or condition”.

²⁰ IRC 277 of 2004, [2005] MWIRC 44.

Section 7 of the Gender Equality Act of 2012 provides that the government must take active steps to eliminate sexual harassment in the workplace, by ensuring that employers have appropriate policies to deal with sexual harassment:

- **Section 7(2)** provides that a person who has suffered sexual harassment need not exhaust internal sexual harassment procedures before prosecution of the offence can be commenced or civil proceedings instituted.
- **Section 6** defines sexual harassment as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.”
- **Section 6(2)** states that a person who sexually harasses another commits an offence, and is liable to a fine or imprisonment for five years.

Criminalisation and Harassment

Transgender people are often unlawfully persecuted under Malawi’s tough criminal laws, which make it illegal to engage in consensual same-sex sexual activity. The **Penal Code** contains the following provisions:

- **Section 153** criminalises anyone who has “carnal knowledge” of any person “against the order of nature”. It carries a 14-year jail term.
- **Section 154** criminalises the attempting to commit an “unnatural offence”, which is punishable by up to seven years in prison.
- **Section 156** criminalises “indecent practices” between two men. It carries a five-year prison term for acts of gross indecency.
- **Section 137A** criminalises “indecent practices between females”. It is now illegal for any female to commit acts of “gross indecency” with another female, which is punishable by a prison term of five years.

Transgender persons are also harassed by officials who use vagrancy provisions in the **Penal Code**:

- **Section 180(d)** states that “every person who without lawful excuse, publicly does any indecent act” is deemed an idle and disorderly person.
- **Section 180(e)** states that “every person who in any public place solicits for immoral purposes” is deemed an idle and disorderly person.
- **Section 184(1)(c)** states that: “every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose” shall be deemed to be a rogue and vagabond, and shall be guilty of a misdemeanour and liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for eighteen months.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

The **Prevention of Domestic Violence Act 5 of 2006**, defines domestic violence as “any criminal offence arising out of physical, sexual, emotional or psychological, social, economic or financial abuse committed by a person against another person in a domestic relationship”.²¹ The Act provides for applicants to apply for a protection order against the perpetrator.

Access to Sexual and Reproductive Health

There is no access to gender reassignment surgery in Malawi. Transgender people face discrimination from health workers and many choose to avoid using healthcare facilities.

The **Gender Equality Act of 2012**, in **section 19(1)**, states that “every person has a right to adequate sexual and reproductive health” – which includes the right to:

- a) Access sexual and reproductive health services;
 - b) Access family-planning services;
 - d) Be protected from sexually transmitted infections;
 - e) Self-protection from sexually transmitted infections;
 - f) Choose the number of children and when to bear those children;
 - g) Control fertility; and
 - h) Choose an appropriate method of contraception.
- **Section 20(1)(a)** provides that every health officer “shall respect the sexual and reproductive health rights of every person without discrimination”.
 - **Section 20(1)(b)** states that every health officer “shall respect the dignity and integrity of every person accessing sexual and reproductive health services”.
 - **Section 20(1)(c)** states that every health officer “shall provide family planning services to any person demanding the services irrespective of marital status or whether the person is accompanied by a spouse.”
 - **Section 20(2)** states that any person who contravenes this section commits an offence and is liable to a fine or imprisonment for three years.

The **Malawi National HIV and AIDS Strategic Plan 2011-2016** targets prevention at MSM and sex worker populations. However, it does not address WSW, lesbian women transgender or intersex individuals. Malawi’s **HIV Prevention Strategy 2015-2020** targets key populations – including MSM and sex workers.

²¹ Section 1.