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# "WE GET TRAUMATISED IN DIFFERENT WAYS"

Key issues related to sexual  
orientation, gender identity  
and expression identified by  
a community consultation in  
Malawi





**Cover Photograph:** Nyasa Rainbow Alliance

#### **About the Nyasa Rainbow Alliance**

The Nyasa Rainbow Alliance is an LGBT-led organisation which was established in 2014 to protect and advance the interests of vulnerable groups and to address the challenges faced by the LGBT community including human rights violations, inaccessibility of health services, stigma and discrimination.

#### **About the Southern Africa Litigation Centre**

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support 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.

#### **Authorship and acknowledgement**

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# List of acronyms

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<b>ACHPR</b>	African Commission for Human and Peoples' Rights
<b>AIDS</b>	Acquired Immunodeficiency Syndrome
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CEDEP</b>	Centre for the Development of People
<b>CHRR</b>	Centre for Human Rights and Rehabilitation
<b>HIV</b>	Human Immunodeficiency Virus
<b>HRC</b>	United Nations Human Rights Council
<b>HRNAP</b>	Human Rights National Action Plan
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>LEA</b>	Legal Environment Assessment
<b>LGBT</b>	Lesbian, Gay, Bisexual and Transgender
<b>MHRRC</b>	Malawi Human Rights and Resource Centre
<b>MSM</b>	Men who have sex with men
<b>NAP</b>	National AIDS Policy
<b>NGO</b>	Non-governmental organisation
<b>SOGIE</b>	Sexual orientation and gender identity and expression
<b>STI</b>	Sexually transmitted infection
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>WHO</b>	World Health Organisation

UNDERSTANDING SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION:  
DEFINITIONS AND KEY CONCEPTS

Cisgender	Describes a person whose sense of personal identity and gender corresponds with the sex they were assigned at birth.
Gender	Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people. It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender is usually conceptualised as a binary (girl/woman and boy/man) yet there is considerable diversity in how individuals and groups understand, experience, and express it. <sup>1</sup>
Gender expression	The presentation of a person's gender through physical appearance and behaviour – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references. <sup>2</sup> A person's gender expression may or may not conform to that person's gender identity.
Gender identity	Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. <sup>3</sup>
Homophobia	The fear and hatred of or discomfort with lesbian, bisexual or gay people because of their actual or perceived sexual orientation, usually based on negative stereotypes of homosexuality.
Sex	Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is usually categorised as female or male but there is variation in the biological attributes that comprise sex and how those attributes are expressed. <sup>4</sup>
Sexual orientation	Each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. <sup>5</sup>
Transgender	An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc. <sup>6</sup>
Transgender man	A person who identifies as a man but was assigned a female sex at birth.
Transgender woman	A person who identifies as a woman but was assigned a male sex at birth.
Transphobia	The fear and hatred of or discomfort with transgender people because of their actual or perceived gender identity, usually based on negative stereotypes of gender diversity.

1. Canadian Institutes of Health Research: Definitions of Sex and Gender.  
2. Yogyakarta Principles plus 10 (2017).  
3. Preamble, Yogyakarta Principles (2007).  
4. Canadian Institutes of Health Research: Definitions of Sex and Gender.  
5. Preamble, Yogyakarta Principles (2007).  
6. Glossary on Gender Identity and Sexual Orientation.



# Introduction and background

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In February 2020, the Southern Africa Litigation Centre and Nyasa Rainbow Alliance held a consultation with individuals who identified as lesbian, gay, bisexual and transgender (LGBT) in Blantyre, Malawi. At this consultation, community members shared their lived experiences and identified numerous instances of discrimination and social exclusion related to their sexual orientation and/or gender identity and expression (SOGIE).

This research brief reviews the socio-legal framework of Malawi and contrasts the lived experiences that surfaced in the community consultation against Malawi's constitutional and international obligations. In doing so, it aims to provide a foundation for advocacy and litigation to challenge SOGIE-related discrimination and exclusion in Malawi. The research brief shows that whilst Malawi's constitutional and international obligations protect people from violence and discrimination, these protections are not implemented by the government of Malawi in relation to discrimination based on sexual orientation and/or gender identity and expression. The research brief argues that given the levels of discrimination and violence that LGBT Malawians experience due to their sexual orientation and gender identity, the Malawian government has failed to adequately protect them according to its constitutional and international obligations.

The research brief builds on the lived experiences of LGBT people that were shared during a community consultation. It reviews other research and literature to contextualise these lived experiences. The consultation took place on 25 February 2020 in Blantyre. Twenty-five people attended and shared their experiences. The consultation was facilitated by Nyasa Rainbow Alliance, in collaboration with the Southern Africa

Litigation Centre. It was in the format of a guided discussion, which centred around two key questions:

- What is important for you as an LGBT person in Malawi today?
- What are the most important issues affecting you as an LGBT person in Malawi today?

On the day of consultation, the participating LGBT community members discussed a range of topics. In order to respect the confidentiality of the meeting, and to protect community members from negative repercussions, the meeting was not recorded. Instead, with the consent of the meeting participants, the author of the research brief took detailed notes.

The research brief groups experiences into thematic groups and contextualises them against the socio-legal realities of Malawi. It further compares and contrasts these experiences against existing literature and research. In doing so, it aims to provide an analysis of the ways in which sexual orientation and gender identity and expression influence individual life chances and social inclusion. The research brief then analyses the lived experiences of LGBT Malawians against the obligations of the Malawian Constitution and international treaties, and the rights inherent to all citizens of Malawi.

## **SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION IN MALAWI**

Even though Malawi has a "long pre-colonial history" of same-sex sexual practices,<sup>7</sup> British colonial law installed a Penal Code that prohibited same-sex sexual activity between men.

In Malawi's colonial Penal Code, homosexual acts were criminalised through sections 153 and 156.<sup>8</sup>



Section 153 on unnatural offences reads:

*"Any person who: (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; shall be guilty of a felony and shall be liable to imprisonment for fourteen years."*

Section 156 on indecent practices between males reads:

*"Any male person who, whether in public or private, commits any act of gross indecency with another male person, ...shall be guilty of a felony and shall be liable to imprisonment for five years."*

Carnal knowledge against the order of nature is understood to mean anal intercourse, while gross indecency is usually understood to refer to any other same-sex sexual act.

After independence from colonial Britain, during the dictatorship of Hastings Banda, which lasted from 1966 to 1994, the colonial Penal Code provisions were upheld. Banda further criminalised gender non-conforming public appearances through the Decency in Dress Act No. 10 of 1973.<sup>9</sup> The Decency of Dress Act was amended in 1974 to also prohibit men from wearing bellbottom pants. The Decency of Dress Act was repealed in the early 1990s when Malawi began to democratise. At the same time, in 1973 an offence relating to men's hair was inserted into the Penal Code by Act No. 11 of 1973. This offence has since been repealed by the 2011 amendment of the Penal Code.<sup>10</sup>

In 1994, Hastings Banda lost the elections and a democratic government under Bakili Muluzi was

instituted. Although the onset of multiparty democracy and a new Constitution in 1995 brought wide-ranging changes founded on human rights principles, the Penal Code provisions that criminalised consensual same-sex sexual acts remained. The equality clause in the new Constitution did not explicitly include protection from discrimination based on sexual orientation and/or gender identity.<sup>11</sup>

Same-sex sexuality, and, to a certain extent, non-conforming gender identity, increasingly came into the public discourse from 2005 onwards. During a public consultation by the Malawi Law Commission in 2004 on amendments to the Constitution, the non-governmental organisation Malawi Human Rights and Resource Centre (MHRRC) suggested the inclusion of sexual orientation in the equality clause and argued that the criminalisation of same-sex sex in the Penal Code was discriminatory and should be abolished. This prompted widespread opposition by the media, religious leaders and politicians, and led to increased homophobic discourse in the public domain.<sup>12</sup>

Public homophobia in Malawi escalated in 2009 when the government arrested Tiwonge, a transgender woman, and Steven, a cisgender man, and convicted them of "carnal knowledge against the order of nature" and "gross indecency" between males.<sup>13</sup> The arrests came after the couple had celebrated a traditional engagement ceremony. Even though there was no evidence of the couple having engaged in anal sex, the Court inferred this from the fact that they lived together and sought to become engaged.

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7. Msibi, T. (2011) The lies we have been told, p. 67. Epprecht, M. (2004) Hungochani, pp. 114-115, 121-123.

8. The Republic of Malawi, Penal Code of 1930 (as amended) Cap 7:01; Laws of Malawi. Sections 153 and 156 existed in the original Penal Code. An amendment in 2010 resulted in the introduction of section 137A.


9. Currier, A. (2018) Politicizing Sex in Contemporary Africa, p. 5. Section 2(1)(b) of the Decency in Dress Act specifically prohibits women from wearing trousers, which constitutes the offence of indecency and is liable to a fine or imprisonment of 6 months. Section 180(g) of the Penal Code specifically stated that "Every male person who wears the hair of his head in such a fashion as, when he is standing upright, the main line of the bottom of the mass of hair (other than hair growing on his face or on the nape of his neck) lies below an imaginary line drawn horizontally around his head at the level of the mouth, shall be deemed an idle and disorderly person."

10. Johnston, T. (2015) In the picture. A situational analysis of LGBTI health and rights in Southern Africa.

11. Johnston, T. (2015) In the picture. A situational analysis of LGBTI health and rights in Southern Africa.

12. Currier, A. (2018), pp.51-63.

13. R v Soko and Another (359 of 2009) [2010] MWHC 2 (19 May 2010).



What seemed to offend the Court most was the engagement ceremony itself, which it defined as an act of gross indecency against accepted moral values.<sup>14</sup> This triggered verbal attacks and a wave of homophobia in the media and other areas. For example, music and poems expressed homophobic sentiments against LGBT people.<sup>15</sup> The trial of Tiwonge and Steven attracted international attention and their identities were exposed on national media. As a result, some donor countries made the payment of development aid conditional on the recognition of the rights of LGBT persons. This further exacerbated the politicised nature of homophobia and tied it to questions of national sovereignty.<sup>16</sup> After pressure at national and international level, then-President Bingu wa Mutharika pardoned and released the two persons in 2010.<sup>17</sup> After the pardon, Tiwonge sought refuge in South Africa.<sup>18</sup>

At the same time, the Penal Code was amended to also criminalise sex between women. In December 2010, Malawi's Parliament amended the Penal Code to include section 137A on "Indecent practices between females". The section reads:

*"Any female person who, whether in public or private, commits any act of gross indecency with another female person, ... shall be guilty of an offence and shall be liable to imprisonment for five years."*<sup>19</sup>

When the amended law was passed, the then Minister of Justice and Constitutional Affairs argued that the amendment was 'gender sensitive' because it was meant to eliminate discrimination between men and women in the criminalisation of consensual same-sex

sexual acts.<sup>20</sup> The amendment followed a similar trend in other countries, including Botswana, Zambia and Tanzania.

In 2012, the new president, Joyce Banda, publicly supported the decriminalisation of same-sex sexual acts and declared a moratorium on prosecutions for consensual same-sex sexual activity.<sup>21</sup> The Justice Minister argued that the sections of the Penal Code that criminalise same-sex sexual activity might be unconstitutional, and that therefore, the law should not be implemented until the constitutionality of the sections had been established,<sup>22</sup> a statement he subsequently denied.<sup>23</sup> This was met with fierce opposition from religious leaders and the public.

In 2013, the Malawi High Court called on organisations to apply for admission as amicus curiae in a judicial review of the sentences imposed for the sodomy offence. In July 2014, the Solicitor-General and Secretary of Justice Janet Chikaya-Banda affirmed to the United Nations Human Rights Committee that these laws would not be enforced pending the High Court review of their constitutionality.<sup>24</sup> The judge's decision to proceed in constituting a panel of judges to hear the case, without requesting certification of the case as a constitutional matter, was taken on appeal.<sup>25</sup> The appeal has not yet been heard.

In 2015, a new Justice Minister confirmed that a moratorium on arrests for consensual same-sex sexual acts was in place.<sup>26</sup> In 2016, three members of the clergy approached the High Court for an order that the government's moratorium on arrests should

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14. In ordering the maximum sentence, the Court noted: "I cannot imagine more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the mind of a whole nation with a chinkhoswe (engagement) ceremony. For that, I shall pass a scaring sentence so that the 'public must also be protected from others who may be tempted to emulate their [horrendous] example'".

15. Personal communication, Nyasa Rainbow Alliance, 24 February 2020.

16. Mawerenga, J.H. (2018) The homosexuality debate in Malawi.

17. Bearak, B. (2010) New York Times.

18. Gevisser, M. (2014) The Guardian.

19. Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi.

20. Mwakasungula, U. (2013) in Waites, M. & Lennox, C., Human Rights, Sexual Orientation and Gender Identity in the Commonwealth, p. 362.

21. Human Rights Watch (2015); BBC News (2012).

22. Human Rights Watch (2012).

23. LA Times (2012).

24. Human Rights Watch (2015).

25. Republic v Chawisi and Others (Confirmation Case Nos. 22, 411 and 662 of 2011), High Court, Mwaungulu J, 19 February 2016.

26. Isaac, T. (2015) Jurist.

be declared unlawful.<sup>27</sup> Two non-governmental organisations, Centre for the Development of People (CEDEP) and Centre for Human Rights and Rehabilitation (CHRR) joined the case as amici curiae. The issue before the Court was whether it was within the legal mandate of the executive branch of government to suspend the operation of a criminal law. The Mzuzu High Court granted an injunction on 11 May 2016 and referred the case for constitutional certification to the Chief Justice. In July 2016, the Chief Justice declined to certify the case because there was an appeal pending against the judgment.<sup>28</sup> That appeal has yet to be heard. Later that same year, two men were arrested under the anti-sodomy provisions.<sup>29</sup>

In January 2016, a member of Parliament, Kenneth Msonda, commented on social media and radio that gays and lesbians should be killed.<sup>30</sup> Shortly thereafter, Gift Trapence and Timothy Mtambo commenced a private prosecution, charging Msonda under section 124(1)(b) of the Penal Code with inciting persons to contravene the law. The Director of Public Prosecutions took over the prosecution and immediately withdrew the charge against Msonda. Trapence and Mtambo then proceeded to take her decision on review.<sup>31</sup> Msonda sought to have the case certified as a constitutional matter, arguing that his right to freedom of expression was infringed. A full bench of the High Court determined that the Director of Public Prosecutions' powers were executive and only reviewable in rare instances.<sup>32</sup>

Also in 2016, Parliament passed the Marriages, Divorce and Family Relations Act No. 4 of 2015. This new law was widely applauded as a significant step in the fight

against child marriages because it set the minimum age for marriage at 18. However, the law also defined the gender of a person as the sex assigned to them at birth.<sup>33</sup> Section 64(b) of the Act cites crimes under section 153 of the Penal Code, on unnatural offences, as grounds for divorce:

*"In deciding whether or not a marriage has irretrievably broken down, the court may accept any one or more of the following facts as evidence that the marriage has irretrievably broken down ...  
(b) the respondent has been convicted of the offence of rape or an offence under section 153 of the Penal Code."*

The Other Foundation summarises the political situation in Malawi as follows:

*"The political situation has been contradictory. At times, governments have seemed willing to scrap discriminatory legislation, but fear of a backlash, or of appearing to give in to foreign pressure, has made them hesitate or backtrack. On the other hand, the resulting controversies and debates have raised public awareness of the issues and sensitised key stakeholders on the need for all citizens to enjoy equal rights."*

Same-sex relationships are deemed immoral by cultural norms and religious ideologies in Malawi, and overall Malawians are not tolerant of non-heterosexual sexualities. Afrobarometer-Malawi data shows that 94% of Malawians said that they would dislike having a homosexual neighbour.<sup>35</sup> In another recent survey among Malawians, almost nine out of ten respondents (89%) said they would not accept a gay man in their family, and nearly three quarters said gay men should not be accepted in Malawian cultures or take part in Malawian traditions.<sup>36</sup> When asked if communities should be encouraged to protect gay men, more than two thirds of Malawians said they should not.

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27. The State v Minister of Justice and Constitutional Affairs and Others Ex-Parte Kammasamba and Others (17 of 2016) [2016] MWHC 503 (11 May 2016).  
 28. State and Others v Kammasamba and Others (Ruling) (Miscellaneous Civil Cause No. 17 of 2016) [2016] MWHC 607 (27 July 2016).  
 29. Sangala, T. (2015) Malawi Times.  
 30. Sangala, T. (2016) Malawi Times.  
 31. S v Director of Public Prosecutions (Ruling) (Miscellaneous Civil Cause No. 16 of 2016) [2016] MWHC 658 (25 April 2016).  
 32. S & Another Ex Parte: Trapence & Another (Constitutional Cause No. 1 of 2017) [2018] MWHC 799 (20 June 2018).  
 33. The Act specifies that "'sex' in relation to the gender of a person means the sex of the person at birth."  
 34. The Other Foundation (2019) Under Wraps: A survey of public attitudes to homosexuality and gender non-conformity in Malawi, p. 19.  
 35. Tsaka, M. and Chunga, J. (2020) Afrobarometer Round 8 Survey in Malawi.  
 36. The Other Foundation (2019).





Around the same number said the protection of gay men's rights should not be included in the Constitution.<sup>37</sup>

Widely made homophobic statements by the media, religious groups, NGOs, and the government contribute to high levels of fear among Malawians who identify as LGBT.<sup>38</sup> There is a lack of knowledge and sensitivity about sexual orientation and gender identity, which exposes LGBT people to stigma, discrimination, violence, rape, and blackmail from members of the police, the judiciary, and other government officials in Malawi.<sup>39</sup> Since the arrests of Steven and Tiwonge in 2009, politicised homophobia has saturated national politics. In this environment, Malawian HIV, human rights, and feminist organisations were hesitant to show solidarity with organisations defending LGBT rights because it could compel “a toll on individual activists and on organisations”.<sup>40</sup>

### THE LIVED EXPERIENCES OF LGBT PERSONS IN MALAWI

A recent representative survey shows that 3.5% of Malawian adult men and women, of all population groups, both in rural and urban areas, and across age groups, self-identify as LGBT or intersex.<sup>41</sup> That is approximately 186,000 Malawians. LGBT persons living in Malawi experience prejudice, discrimination, rejection, stigma and violence based on their sexual orientation and/or gender identity. These experiences, of course, are not uniform: their frequency, severity and impact depend on a range of other factors and are linked to other marginalisations such as gender, class or rurality. SOGIE-related marginalisation interacts with, and reinforces, other marginalisations.

In this section of the research brief, these lived experiences are presented and contextualised against research findings from other studies that have been conducted in Malawi. The section draws on findings from a recent study called the ‘Are we

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37. The Other Foundation (2019).  
38. Singini, G. (2016) Malawi Times.  
39. Johnston, T. (2015).  
40. Currier, A. (2014).  
41. The Other Foundation (2019).



doing alright?' study, as well as other documented research evidence.<sup>42</sup> Together, the findings show the wide range of the ways in which SOGIE-related stigma and discrimination play out, and the various ways in which it negatively impacts people's opportunities, life chances and life trajectories.

## Education

During the community consultation, many participants spoke about being bullied at and being excluded from education institutions:

*"My schoolmates found out that I had Facebook friends who identified as gay. They said I must be gay too. As a result, they bullied me at school. They would bang on my desk at school and shout 'Gay! Gay! Gay'. Nobody intervened. When I was 17, I reported it to the headmaster, and said that they were doing it because they thought I was gay. The headmaster blamed me for the bullying and suspended me from school. I had to find and enrol in a different school. As a result, my schoolwork was interrupted and my grades suffered."*

This person's experience resonated with other participants. One young transwoman shared the following story:

*"I was also bullied at school. On my way to school, fellow students forced me to pay them to pass them to go to school. At school, other students often interrupted me when I was speaking in class. The teachers did not do anything to stop them. I reported it to the school authorities, but they blamed me for it. I left school without finishing my grade, and I have not been back in over a year."*

In these instances, the bullying victims were not supported or protected by their teachers or the administration of the school. Instead, they experienced secondary victimisation by being forced to leave their educational institution, or by being threatened with expulsion. This sends two important messages. It signals tacit agreement about their actions to the perpetrators of the bullying, by not holding them accountable for their actions. To the LGBT victims of bullying, it signals that sexual orientation and/or gender identity and expression-related discrimination and bullying falls

outside of the scope of protection and support offered to all learners at educational institutions.

Often, learners who were bullied because of their sexual orientation or gender identity and expression received no support from their families. Instead, they were further blamed for the victimisation that they experience. A nurse who identifies as a gay man remembered his time at school and nursing college:

*"My family told me that my sexual orientation would bring misfortune over the family and that the bible condemns me. The mission school I went to threatened to expel me because I am gay. At nursing school, my lecturers discouraged me from being friends with a woman who was rumoured to be lesbian, and other students gossiped about our sexual orientations. To make sure that I don't do anything illegal, my lecturer asked the building manager of my dorm to surveil me, to keep him updated about everything that I do."*

The consequences of bullying in school are serious for LGBT learners. As the example of the young transwoman shows, in the worst-case learners leave school prematurely, and do not have the opportunity to finish their schooling or degree.

## Workplace discrimination

The 'Are we doing alright?' study found that financial precarity among LGBT Malawians is high: only 16% of LGBT Malawians who participated in the study were formally employed. That is, they held a salaried position with a work contract. Two thirds of those surveyed (65%), were unemployed and had no income. Not surprisingly, the study found that 79% of LGBT Malawians did not have sufficient financial means to cover their daily needs.

At the community consultation, LGBT Malawians who were employed shared stories of discrimination and bullying at the workplace. Similar to when SOGIE-discrimination and bullying happen in educational institutions, at workplaces LGBT persons often also

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42. The "Are we doing alright?" study was conducted by researchers from the University of Cape Town in South Africa, in collaboration with the Malawi College of Medicine and CEDEP. The study interviewed 197 Malawians who identified as lesbian, gay, bisexual or transgender about their mental health and wellbeing, access to healthcare and experiences of violence. The full research findings are published as: Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019). 'Are we doing alright?' Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Malawi.

experienced secondary victimisation, when their line managers place the blame for the victimisation on themselves, rather than holding the perpetrators accountable:

*A lesbian woman shared a story of workplace bullying because of her assumed sexual orientation. Her colleagues suspected that she identified as lesbian and told her she was not allowed to speak to female colleagues. She was bullied and called names. When she reported this to her line manager, her line manager explained that she was to blame, and told her to dress differently*

Previous research has documented the impact of discrimination at the workplace. In a report by CEDEP and CHRR, a gay man told the story of why he quit his job in the banking sector:

*"I was already aware of the rumours that went round in town that I had a boyfriend. But the rumours came true when I broke up with my boyfriend. I must admit that things did not go well with my ex-partner when the relationship ended that he opted to disclose our secret affair to my fellow workmates in the bank. The rumours went on for some months before I finally decided to quit as I could not handle the workmates' attitudes and the rumours around my workplace. I stayed home for close to 9 months before I got another job."<sup>43</sup>*

## Family rejection

The findings from the 'Are we doing alright?' study show that only one in three (35%) LGBT persons in Malawi can go to their family for support.<sup>44</sup> Only two in five (41%) had told their family about their sexual orientation or gender identity.

Almost all participants in the community consultation spoke about strained relationships with their families because of their sexual orientation or gender identity. Family members disapproved of people's sexual orientation or gender identity, and families hold considerable power, especially over young LGBT people. Several participants had been thrown out of their family homes and cut off from family support when a family member found out about their sexual

orientation or gender identity.

One woman at the consultation, who identified as lesbian, had been chased from her home three times because of her sexual orientation. Her daughter lives with her parents, and she feels that she needs to 'fit in', so that her mother does not bad-mouth her to her daughter. Her family also has economic influence over her and controls her access to education. She needs to hide her sexual orientation and pretend to be heterosexual, so that she can complete her education, and continue having a relationship with her daughter.

Another young person told the following story:

*"I told my family I want to get married to a man. They said they needed to pray because they cannot accept me. They said: 'Your decisions are devilish, they are not accepted in this home.' Then they looked for my boyfriend, the man I want to marry. They threatened me that they would stop me from going to school if I continue with the relationship.*

*I chose to remain in school. I now keep my gender identity and my relationship secret. I pretend to be 'normal' at home, and I dress as a man. But I still see my boyfriend. He is married and has children.*

*Last year, my family took me to a prophetess so that she could pray over me. The prophetess told me: 'You are gay and you will die in two years if you don't repent.' Now I live in fear. I am scared that I will die next year, because I am still seeing my boyfriend. But to my family, I still pretend to be 'normal'. Family is important. My brother lives in South Africa and had invited me to stay with him. I am financially dependent on him. But after he found out about my boyfriend, he cancelled the invitation. He was worried that I might get married in South Africa: 'He will get married to a man in South Africa, so he must stay in Malawi.' Because of all of this, I have decided that I must not live as a transwoman anymore."*

Whilst these narratives may be seen as inter-familial conflicts, they affect individuals' ability to exercise their constitutional rights. Msosa argues that:

43. Quote cited in: CEDEP and CHRR (2015). Human Rights Violation Report, p. 42

44. Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

*"expulsion from the family home shows that the family has an informal capacity to take away important rights that the family, as an institution, is delegated to uphold. For example, being evicted from the parents' home stripped him of constitutional rights such as housing, privacy and dignity."*<sup>45</sup>

The narratives of the participants of the community consultation show that family rejection impacts the lives of young LGBT people in many ways. Losing their family home because of their sexual orientation or gender identity means young people lose their housing, their financial security, their access to education (when education was sponsored by a parent or another family member) and their social support network, which significantly curtails their future opportunities.

## Healthcare

The lived realities of LGBT persons in the community consultation showed that access to healthcare is a key concern. Several community members recounted stories of SOGIE-related discrimination in healthcare facilities or by healthcare providers, or even denial of healthcare. For example, a young transwoman recounted her experience going to hospital to get care:

*She remembered the nurses calling her names and shouting at her, and turning her away, denying her healthcare. She said she was only assisted once she went to the Johns Hopkins Clinic, which is a specialised clinic for MSM.*

Other research from Malawi shows us that her experience is not unique. In a recent evaluation in 2017, consultations with health workers, district health management teams, and LGBT respondents highlighted the significant levels of discrimination faced by LGBT people when seeking health services.<sup>46</sup> Project stakeholders supported the view that homosexuality and sexual 'deviance' are viewed as an external, western, imposition on

Malawian culture and norms. Another study found that some healthcare providers report sexual and gender minority people under section 153 of the Penal Code, despite the fact that there is no legal obligation to do so.<sup>47</sup> This makes seeking healthcare a dangerous gamble for many LGBT Malawians. An anecdote that was related to a researcher shows that this directly limits healthcare access:

*"In an anecdote relayed [...] by an LGBT rights activist in 2012, a young gay man was unable to obtain treatment for an anal STI after medical personnel congregated to gawk at his condition; he feared that a nurse had surmised that his anal STI stemmed from him having sex with a male partner and called the police to arrest him for having same-sex sex. He fled the clinic without receiving treatment."*<sup>48</sup>

The 'Are we doing alright?' study, which interviewed 197 Malawians who identify as lesbian, gay, bisexual or transgender, confirms that LGBT people living in Malawi, including men who have sex with men, experience discrimination when accessing healthcare services. One third of the study participants (34%) had been denied healthcare because of their sexual orientation and/or gender identity and expression.<sup>49</sup> Almost half of LGBT study participants (47%) had been treated disrespectfully in healthcare facilities because of their sexual orientation and/or gender identity or expression, and two in five had been insulted or been called names (41%). Interviews by another researcher describe examples of the kind of humiliation that LGBT people experience when seeking healthcare and revealing their sexual orientation and/or gender identity, ranging from being put on display for other healthcare workers to see, to being mocked and made a spectacle.<sup>50</sup>

As a result, LGBT Malawians try to conceal their sexual orientation and/or gender identity in order to avoid discriminatory treatment. Studies show that less than 10% of Malawian MSM had revealed

45. Msosa (2017). Human Rights and Same-sex Intimacies in Malawi, p. 163.

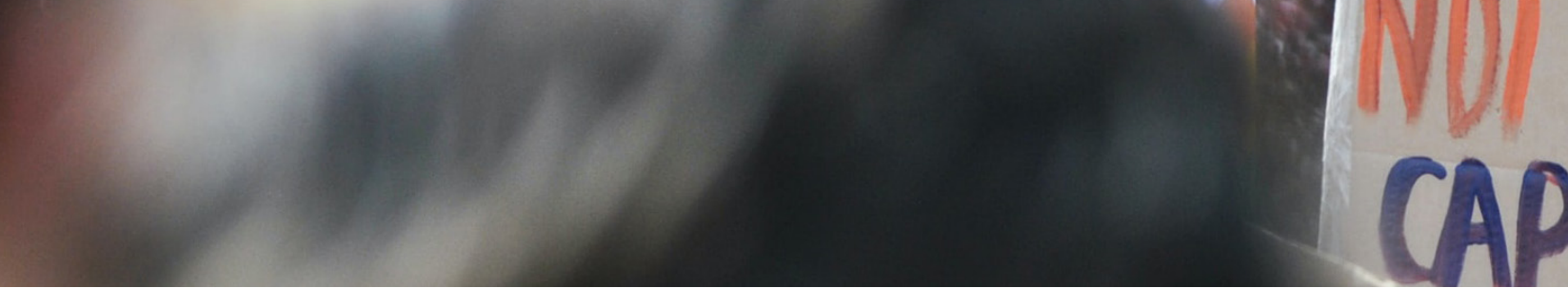
46. Arts and Global Health Centre Africa (AGHCA) (2017). Baseline Report of the Umunthu Programme implemented by the Arts and Global Health Centre Africa (AGHCA).

47. Müller, A., Daskilewicz, K., Langen, B., Odumusu, O. (2017). These are the topics cannot run away from.

48. Currier, A. (2018). p. 217. See also Southern Africa Litigation Centre (2016). Accountability and redress for discrimination in healthcare in Botswana, Malawi and Zambia, p. 98; and Bandawe, C. and Mambulasa, M. (2012). CEDEP Needs Assessment for Effective Implementation of Human Rights, HIV and Other Health Related Interventions among MSM and WSW in Malawi, p.11: "28% [of participants] admitted they felt afraid of seeking healthcare services because of their sexual orientation. All of them feared being harassed by the healthcare provider or arrested by the police."

49. Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

50. Currier, A. (2018). pp. 216-219.



their sexual orientation to healthcare providers, and that almost one in five MSM were hesitant to seek healthcare because they feared SOGIE-related discrimination.<sup>51</sup>

## Harassment and violence

A recent report by Human Rights Watch documents and details that LGBT people experience violence in public spaces, and that such violence is usually not reported to authorities.<sup>52</sup> The 'Are we doing alright?' study provides a statistical analysis of LGBT Malawians' experiences of violence and shows that violence against LGBT Malawians is widespread: 66% of LGBT people in Malawi had been verbally harassed or insulted because of their sexual orientation or gender identity.<sup>53</sup> 41% had been physically assaulted, and 42% had experienced sexual violence. People who identified as transgender or gender non-conforming were at higher risk: 78% of transgender people had been verbally harassed, 49% had been physically assaulted, and 46% had experienced sexual violence. Another recent study with transgender Malawians also showed that three quarters (73%) said they had been verbally harassed in the previous year.<sup>54</sup>

The 'Are we doing alright?' study compared the levels of sexual violence experienced by LGBT study participants to levels of sexual violence experienced by women in the general population, based on two recent studies.<sup>55</sup> In summary, LGBT people living in Malawi, including men who have sex with men, experienced higher levels of violence than have been reported for the general Malawian population.

The level of sexual violence experienced among lesbian participants in the study was almost double that of women in the general population (37% versus 20% respectively). The levels of sexual violence experienced by gender non-conforming people were more than triple that of women in the general population (75% versus 20%). The levels of sexual violence experienced by transgender women were 2.5 times as much as experienced by women in the general population (50% versus 20%).<sup>56</sup>

During the community consultation, many LGBT Malawians shared stories that personalised these statistics. A transman relayed a story of being threatened by people on the street:

*"I was told by men on the street: 'You should not be going out with this girl, we want her. If you keep doing it, you will disappear. Because you are part of a species that we hunt.'"*

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51. Baral, S. et al. (2009). HIV prevalence, risks for HIV infection and human rights among men who have sex with men in Malawi, Namibia and Botswana, 4-5.

52. Human Rights Watch (2018). "Let Posterity Judge": Violence and Discrimination against LGBT People in Malawi.

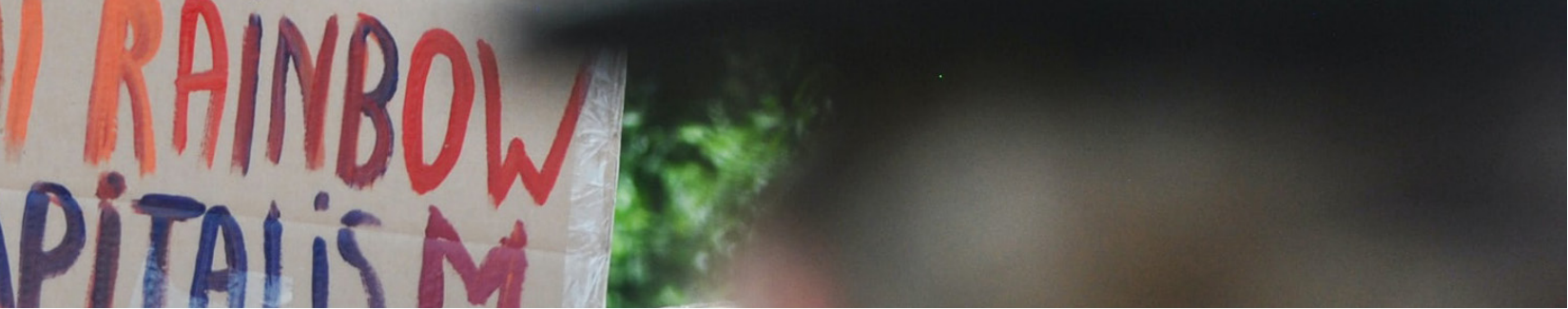
53. Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

54. Umar, E., Jumbe, V., Bandawe, C. (2018). Baseline study: Improving the Lives of Transgender People in Malawi Project.

55. The latest Malawi Demographic and Health Survey, published in 2017, found that one in five women in the general population (20%) had experienced sexual violence (National Statistical Office (NSO) [Malawi] and ICF, 2017). Another study from 2005 found a similar number, with 18% of women saying that they had experienced sexual violence (Pelser et al., 2005).

56. Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).





LGBT people frequently experience violence in public but do not receive help from bystanders. Other research shows that often, such violence is motivated by sexual orientation or gender identity-related prejudice, and is not only tolerated, but applauded by the public.<sup>57</sup> Furthermore, a report by CEDEP and CHRR also notes that:

*"Political, religious and traditional leaders not only condone these human rights abuses, but many fuel these abuses through public statements that describe same-sex intimacy as 'abnormal', 'unMalawian' and 'ungodly'."*<sup>58</sup>

Research also shows that LGBT Malawians often do not report experiences of violence.<sup>59</sup> In the 'Are we doing alright?' study, only 18% of LGBT Malawians who had experienced violence said they had reported it to the police. Previous research has shown that many victims of SOGIE-based violence do not report violence for fear of arrest, exposure of their sexual orientation or gender identity or because of lack of trust in the authorities. Others are reluctant to go to the police because they have previously encountered police officers who were reluctant to believe in the existence of a homophobic motive for a crime or incident.<sup>60</sup>

*"I was beaten up because I was speaking to another woman at a bar. I was seriously injured. I lost some teeth and I had to be hospitalised. I reported the attackers to the police and took them to court. We get traumatised in different ways, but the courts don't help us, they always side with the majority."*

Further, the police or other authorities are not safe institutions for LGBT Malawians, as they are also used to investigate and prosecute alleged cases of homosexuality that are reported by community members.

*"During the community consultation, a young gay man recounted a time when he was called 'satanic' and a 'demon' at a local bar. Instead of intervening, the owner of the bar called the police on him."*

The 'Are we doing alright?' study showed that a significant amount of LGBT Malawians are survivors of violence, and that many had experienced violence recently. This is very likely to have an impact on people's well-being, as well as on their physical health. The World Health Organisation reports that the health consequences of physical and sexual violence are significant and diverse: they include physical injuries, unwanted pregnancy, sexually transmitted infections, including HIV, higher rates of mental health concerns, including depression and post-traumatic stress disorder, and higher likelihood of attempting suicide.<sup>61</sup> Indeed, the 'Are we doing alright?' study showed that more than one quarter of LGBT Malawians who had experienced violence showed signs of post-traumatic stress disorder.<sup>62</sup>

### **The health impact of violence, discrimination and exclusion**

The homophobia and transphobia that LGBT Malawians have described during the community consultation negatively impacts their social relationships, their opportunities for the future, their socio-economic stability and their health and well-being.

Previous research has established that criminalising laws and experiences of homophobia and transphobia create barriers to access to healthcare and make men who have sex with men more vulnerable to HIV and other sexually transmitted infections. For example, one study showed that

57. Msosa, A. (2017).  
58. CEDEP and CHRR (2015), p. 24.  
59. Human Rights Watch (2018).  
60. CEDEP and CHRR (2015).  
61. Krug, E.G. et al. (2002) The world report on violence and health.  
62. Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019), p. 46

social stigma and criminalisation meant that men who have sex with men were afraid of disclosing their sexual orientation to others and were afraid of being arrested when seeking healthcare.<sup>63</sup> The same study found that healthcare providers were reluctant to provide HIV services to MSM because they were concerned about negative political or legal implications if they did<sup>64</sup> — even though providing healthcare to LGBT people is not criminalised in Malawi. The study concluded that criminalising laws, as well as social homophobia and transphobia increased MSM's vulnerability to HIV, and at the same time reduced their access to HIV prevention and care. This was confirmed by a Legal Environment Assessment done by the Department of Nutrition and HIV and AIDS, the Ministry of Justice and the United Nations Development Programme, which assessed the impact of the current law and policy environment on vulnerability to HIV and access to HIV services in Malawi:

*[...] there were a number of punitive or coercive provisions in law, [...] which are now recognised as creating barriers to the response to HIV and AIDS. For instance, laws that criminalise sex between men [...] block access to services for key populations.”<sup>65</sup>*

For the first time, the 'Are we doing alright?' study investigated the impact of criminalising laws and experiences of homophobia and transphobia on the mental health and well-being of LGBT Malawians. The study found that the levels of mental health problems, suicidal behaviour and substance use among LGBT Malawians was higher than among Malawi's general population. For example, 48% of LGBT Malawians showed signs of depression, whilst the World Health Organisation estimates the prevalence of depressive disorders among the general population in Malawi to be 4%.<sup>66</sup> 15% of LGBT Malawians had tried to end their own life by suicide. This is more than suicide among

school-going adolescents in Malawi, even though adolescents are usually at highest risk for suicide.<sup>67</sup>

The 'Are we doing alright?' study explains that stigma, prejudice, discrimination and structural stigma (social stigma that is institutionalised or made into law, such as laws that criminalise consensual same-sex behaviour) lead to stressful social environments for LGBT people.<sup>68</sup> It points out that same-sex sexuality and gender diversity are not in themselves mental illnesses, but that hostile and stressful social environments lead to an increase in mental health problems among LGBT people.<sup>69</sup> The report documents that the high levels of mental ill-health among LGBT Malawians, the high levels of violence and the discriminatory experiences in access to healthcare that LGBT Malawians experience are due to stigma, prejudice and discrimination based on sexual orientation and gender identity. The report concludes that the Malawian Penal Code, which criminalises consensual same-sex sexuality, contributes to these disparities in mental health status, to high levels of violence and to the barriers to access to healthcare.<sup>70</sup>

## LEGAL FRAMEWORK: THE RIGHTS OF LGBT PERSONS IN MALAWI

The discrimination, violence and social exclusion that LGBT Malawians experience seem surprising given the strong constitutional and international non-discrimination obligations of Malawi's legal framework. This section reviews these constitutional and international obligations and contrasts them with the lived experiences of LGBT Malawians.

63. Wirtz, A.L. et al. (2014) A qualitative assessment of health seeking practices among and provision practices for men who have sex with men in Malawi.

64. Wirtz, A.L. et al. (2014).

65. Malawi Department of Nutrition and HIV and AIDS (DNHA), Ministry of Justice, United Nations Development Programme (UNDP) (2012) Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, p. 9.

66. World Health Organization (2017).

67. McKinnon, B. et al. (2016). Adolescent suicidal behaviours in 32 low-and middle-income countries, p. 340.

68. Meyer, I. (2003). Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: conceptual issues and research evidence. Hendricks, M.L. and Testa, R.J. (2012). A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the minority stress model. Hatzenbuehler, M.L. et al. (2014). Structural stigma and all-cause mortality in sexual minority populations.

69. Hendricks, M.L. and Testa, R.J. (2012).

70. The report draws on work about structural stigma - social stigma that is institutionalised or made into law, such as laws that criminalise consensual same-sex behavior – to analyse the disparities in mental health and wellbeing between LGBT Malawians and Malawians who identify as heterosexual and/or cisgender. For further information, see Müller, A. et al. (2019).

Malawi has a constitutionally entrenched Bill of Rights, with a comprehensive catalogue of economic, social, cultural, civil and political rights. The Bill of Rights is directly enforceable by the courts. Since 1994, Malawi has been guided by Human Rights National Action Plans (HRNAPs) that guide interventions to promote human rights. These documents emphasise that a human rights-based approach is essential to achieving human rights for all in Malawi.<sup>71</sup> Under section 211(2) of the Constitution, international human rights treaties that Malawi has ratified and domesticated, such as the International Covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR) are binding on the Republic.<sup>72</sup> For this reason, this section of the research brief analyses the lived experiences of LGBT Malawians that have been presented in the previous section in the context of both national and international law. The section begins by analysing the relevant provisions of the Constitution of Malawi, and then moves on to analyse the obligations under international treaties.

## The Constitution of the Republic of Malawi

Malawi's Constitution includes strong provisions on equality and human dignity. According to section 12(1) (d):

*"The inherent dignity and worth of each human being requires that the State and all persons shall recognise and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote."*

The Constitution also guarantees all Malawians equal protection before the law and bans discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, or other status. It is important to remember that all constitutional provisions apply to LGBT persons in Malawi. The specific provisions discussed

below are only highlighted because of their relevance to the lived experiences of LGBT people that have been documented in the previous section.

## International human rights law

Malawi has ratified a number of major international and regional treaties relating to the promotion and protection of human rights and the rule of law. These covenants are legally binding on Malawi once domesticated.

Several of the international and regional human rights treaties that have been ratified include human rights protections based on sexual orientation or gender identity. The following international treaties will be considered in the analysis:

- The International Covenant on Civil and Political Rights (ICCPR), ratified in 1993, and its Optional Protocol to the International Covenant on Civil and Political Rights, ratified in 1996.
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified in 1993, as well as its General Comments, which operationalise some of the rights laid out in the Covenant.
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified in 1987.
- The African Charter on Human and Peoples' Rights (ACHPR), ratified in 1989, including Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their Real or Imputed Sexual Orientation or Gender Identity.

Malawi is a dualist country, which means that courts must interpret the Constitution, statutes and all other laws in a manner that, as far as possible, avoids conflict with international law.<sup>73</sup> As stated by Nyirenda J, Malawi has chosen to be bound by the international treaties it ratified – "In other words, Malawi has consciously and

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71. The Republic of Malawi (not dated), Human Rights National Action Plan: Priorities for Action 2016-2020, p. 17.

72. Constitution of Malawi, section 211.

73. *Gondwe v Attorney General* [1996] MLR 492 (HC), 496.

decidedly undertaken the obligations dictated by these Conventions. It is therefore our solemn duty to comply with the provisions of the Conventions."<sup>74</sup>

All of these international treaties prohibit any form of discrimination. CEDAW, ICESCR, and ICCPR, have been interpreted by the United Nations Human Rights Council as including protections based on sexual orientation and gender identity.<sup>75</sup>

### The Yogyakarta Principles

In 2006, a panel of international human rights experts published the Yogyakarta Principles, a guidance document that addresses a broad range of international human rights standards and their application to sexual orientation and gender identity.<sup>76</sup> In 2017, after review of the 2006 Principles, the panel published additional principles, to reflect developments in international human rights law and practice.

These new Principles are called The Yogyakarta Principles plus 10.<sup>77</sup> The new document also contains additional State obligations related to torture, asylum, privacy, health and the protection of human rights defenders.<sup>78</sup>

The Yogyakarta Principles and the Yogyakarta Principles plus 10 reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations, gender identities and gender expressions.<sup>79</sup> They are instructive in defining legal and human rights principles for legislating and implementing the rights of LGBT people. Throughout the following section, the principles that are relevant to the constitutional and international obligations are reviewed, summarised and discussed against the current legal framework in Malawi. These principles provide further interpretative guidance for the current legal framework in Malawi.

### Equality and non-discrimination

Malawi's constitutional and international human rights obligations should protect people, regardless of their sexual orientation or gender identity, from discriminatory treatment.

#### Constitution of Malawi

Section 20(1) of the Constitution guarantees Malawians –

*"equal and effective protection against discrimination based on the grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition." <sup>80</sup>*

Section 20 should be read with section 41(1) of the Constitution, which provides that every person shall have the right to recognition as a person before the law, and also with section 12(1)(e) which states that all persons have equal status before the law.

At numerous points in time, it has been pointed out that even though the equality clause does not specifically list 'sexual orientation' or 'gender identity' as grounds for protection, the interpretation of the clause, in light of its intention and Malawi's obligations under international human rights treaties, should be understood to include these grounds.

A leading Malawian scholar has argued that 'other status' under section 20(1) was deliberately left in to indicate that it is not an exhaustive list of grounds on which persons are entitled to protection:<sup>81</sup>

*"Section 20(1) of the Constitution does not lay down an exhaustive list of prohibited grounds of discrimination. For example, age, sexual orientation and citizenship are not mentioned. Nevertheless, by including the words 'other status' at the end of the list of the prohibited grounds, this section leaves room for extending the grounds on which discrimination may be prohibited." <sup>82</sup>*

74. In Re: Adoption of Children Act (Cap 26:01) In Re: David Banda (Adoption Cause No. 2 of 2006) [2008] MWHC 243 (27 May 2008).

75. See the report on "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (2011) para 15.

76. Yogyakarta Principles (2007).

77. Yogyakarta Principles Plus 10. (2017).

78. Human Rights Watch (2017).

79. The Yogyakarta Principles Plus 10 (2017).

80. Constitution of Malawi, section 20(1).

81. Chirwa, D. (2011). Human Rights Under the Malawi Constitution.

82. Chirwa, D. (2011).



Malawian case law supports the view that 'other status' in section 20(1) is open to other statuses that are not explicitly mentioned in the Constitution. In the case of *Banda v Lekha*, a woman complained that her employer had unfairly dismissed her when she disclosed that she was living with HIV.<sup>83</sup> The Industrial Court ruled that she was indeed unfairly dismissed on prohibited grounds of discrimination, and that the employer had violated her right to equality and fair labour practices under the Constitution. Importantly, the Court found that the anti-discrimination provisions extend to HIV status.<sup>84</sup>

### **African Charter on Human and Peoples' Rights**

Article 2 of the African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination on the basis of distinctions such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any other status.

Article 3 of the African Charter provides that every individual shall be equal before the law and shall be entitled to equal protection of the law.

The African Commission has interpreted article 3 of the African Charter to mean that no person or class of persons shall be denied the same protection of the laws, which is enjoyed, by other persons or class of persons in like circumstances in their lives, liberty, property, and in the pursuit of happiness.<sup>85</sup>

The African Commission has further held in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe*<sup>86</sup> that the aim of article 3 "is to ensure equality of treatment for individuals irrespective

of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation".<sup>87</sup>

Significantly, the African Commission, recognising that every individual is entitled to equal protection of the law under article 3 of the Charter, passed a resolution addressing States' failure to respond to violence perpetrated against persons based on their actual or perceived sexual orientation or gender identity.<sup>88</sup> The resolution called on "State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities."

### **International Covenant on Civil and Political Rights**

Malawi ratified the International Covenant on Civil and Political Rights (ICCPR) in 1993. It ratified the Optional Protocol to the International Covenant on Civil and Political Rights in 1996.

The International Covenant on Civil and Political Rights affirms the equality of all people in two significant provisions. Article 2(1) states:

*"Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*<sup>89</sup>

The International Covenant on Civil and Political Rights affirms the equality of all people in two significant provisions. Article 2(1) states:

83. *Banda v Lekha* (277 of 2004) [2005] MWIRC 44 (01 June 2005).

84. Section 6(1) of the HIV and AIDS (Prevention and Management) Act, 2017. The Act specifically prohibits discrimination based on a person's HIV status or perceived HIV status at the workplace (section 28(1)) and at any education institution (section 35(1)(c)). The HIV and AIDS (Prevention and Management) Act defines discrimination as follows: "'discrimination' includes any distinction, exclusion or restriction made on the basis of the actual or perceived HIV status of a person which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by that person or another individual associated with that person on a basis of equality with the other members of the community, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

85. *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm. No. 294/04 (3 April 2009) at para 99 [quoting *Brown v Board of Education of Topeka* 347 US 483 (1954)].

86. *Id.*

87. *Id.* (our emphasis)

88. Resolution 275, African Commission on Human and Peoples' Rights, 2014.

89. ICCPR, article 2.1

*"Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*<sup>89</sup>

Article 26 affirms that:

*"[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*<sup>90</sup>

In 1994, the UN Human Rights Committee that monitors compliance with the ICCPR, established that: "The reference to 'sex' in articles 2, para. 1, and 26 is to be taken as including sexual orientation."<sup>91</sup>

The UN Human Rights Committee also found that laws that criminalise consensual sex between adults of the same sex or gender, such as sections 137A, 153 and 156 of the Malawian Penal Code, are discriminatory and violate the right to privacy.<sup>92</sup>

### **International Covenant on Economic, Social and Cultural Rights**

Whilst the Covenant makes no mention of sexual orientation or gender identity, the CESCR Committee defines a number of "other statuses" that can lead to discrimination. For example, paragraph 32 of General Comment 20 on non-discrimination in economic, social and cultural rights includes sexual orientation as one such "other status": "States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights."<sup>93</sup>

### **Convention on the Elimination of all forms of Discrimination against Women**

In 2015, during the review of Malawi by the Committee on the Elimination of all forms of Discrimination against Women (CEDAW), the Committee raised concerns about the lack of recognition of the rights of bisexual, lesbian and transgender women and intersex persons.

They asked Malawi to review section 20 of the Constitution to include sexual orientation as a prohibited ground of discrimination.

### **YP 30: The right to State protection**

Yogyakarta Principle 30 articulates the obligation of States to apply their constitutional protections to all people, regardless of sexual orientation and gender identity:

*"Everyone, regardless of sexual orientation, gender identity or gender expression, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group."*<sup>94</sup>

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90. ICCPR, article 26.

91. Toonen v Australia, Human Rights Committee, 50th Session, Case No. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7.

92. Toonen v Australia, Human Rights Committee, Case No. 488/1992.

93. Committee on Economic, Social and Cultural Rights, General Comment No. 20, section 32.

94. Yogyakarta Principles Plus 10 (2017). Principle 30.

Under this principle, States are obliged to:

*"Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors;  
Take appropriate and effective measures to eradicate all forms of violence, discrimination and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression or sex characteristics, whether by public or private actors..."*<sup>95</sup>

## Human dignity

Section 19(1) of the Constitution of Malawi asserts that "the dignity of all persons shall be inviolable".

Article 5 of the ACHPR states that: "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status."<sup>96</sup>

Jurisprudence from other Southern African countries might help in the interpretation of this right in the Malawian context. The High Court of Botswana has, on three occasions, emphasised that LGBT persons are as entitled to the right to dignity as everyone else.<sup>97</sup> In *Attorney General v Rammoge & Others*, the High Court clarified that:

*"Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in other progressive States, to the constitutional protection of their dignity."*<sup>98</sup>

The Gender Equality Act entitles all employees, job applicants and other persons who have dealings with the workplace to be treated with dignity.<sup>99</sup>

## Freedom from cruel, inhuman and degrading treatment

Section 19(3) of Malawi's Constitution states: "No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment."

This is similar to article 7 of the ICCPR and article 5 of the Universal Declaration of Human Rights (UDHR) which both provide that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 5 of the African Charter also emphasises that "all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." The African Commission has emphasised that this section has to be interpreted broadly to include the widest possible array of physical and psychological abuse.<sup>100</sup>

The Human Rights Committee, tasked with monitoring compliance with the ICCPR, has asserted that the purpose of the right to be free from inhuman and degrading treatment is to protect the mental and physical integrity and dignity of the individual.<sup>101</sup>

The Gender Equality Act defines sexual harassment as engaging in "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."<sup>102</sup> The Act criminalises sexual harassment with a penalty of a fine or 5 years' imprisonment.<sup>103</sup>

95. Yogyakarta Principles Plus 10 (2017), Principle 30, p. 8.

96. ACHPR, article 5.

97. See *Attorney General v Rammoge & Others* 2016 All Bots 165 (CA), *ND v Attorney General of Botswana & Another* (2017, MAHGB-000449-15) and *LM v Attorney General* 2019 All Bots 46 (HC).

98. *Attorney General v Rammoge & Others* 2016 All Bots 165 (CA), cited with approval in *LM v Attorney General* 2019 All Bots 46 (HC) para. 148.

99. Section 7(1)(c) of the Gender Equality Act, 2012.

100. *Doebbler v Sudan* (2003) AHRLR (ACHPR 2003).

101. See UN Human Rights Comm., General Comment No. 20, at para 1.

102. Section 6(1) of the Gender Equality Act, 2012.

The experiences of LGBT Malawians that have been described during the community consultation show many examples of cruel, inhuman or degrading treatment or punishment, which LGBT Malawians have suffered because of their sexual orientation or gender identity.

## Privacy

In section 21, the Constitution of Malawi guarantees that:

*"Every person shall have the right to personal privacy which shall include the right not to be subjected to -*

- 1. Searches of his or her person, home or property;*
- 2. The seizure of private possessions; or*
- 3. Interference with private communication, including mail and all forms of telecommunications."*<sup>104</sup>

Article 17 of the ICCPR, which protects the right to privacy, reads:

*"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.  
Everyone has the right to the protection of the law against such interference or attacks."*<sup>105</sup>

In the community consultation, LGBT Malawians described instances when their sexual orientation or gender identity was disclosed against their will in healthcare facilities, in educational institutions, at workplaces, and among family members. In all of those cases, the non-consensual disclosure of a person's sexual orientation or gender identity led to discrimination, violence, or a denial of healthcare or education. Thus, for LGBT Malawians, the right to privacy about their sexual orientation and gender identity is crucially important in order to avoid harm.

In recent judgments, other courts in Southern Africa have emphasised the importance of the right to privacy in relation to legislation that criminalises consensual sexual activity between adults and have argued that consensual sexual intimacy is protected by the right to

privacy. For example, the High Court of Botswana ruled that:

*The [Penal Code provisions that criminalise same-sex sexual acts] impair the applicant's right to express his sexuality in private, with his preferred adult partner. The applicant has a right to a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that it is consensual."*<sup>106</sup>

The Constitutional Court of South Africa established that:

*Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from outside the community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."*<sup>107</sup>

Drawing on such case law from other Southern African countries shows that the right to privacy of LGBT Malawians is incompatible with the criminalisation of consensual same-sex sexuality. Thus, sections 137A, 153 and 156 of the Penal Code violate the right to privacy of Malawians who practice same-sex sexuality, including LGBT Malawians and Malawians who identify as men who have sex with men.

## Right to education

Section 25 of the Constitution of Malawi states that: "All persons are entitled to education."<sup>108</sup>

It mirrors article 17(1) of the African Charter on Human and Peoples' Rights. The right to education is re-iterated in article 11(1) of the African Charter on the Rights and Welfare of the Child, which Malawi acceded to in 1999.<sup>109</sup> The African Charter on the Rights and Welfare of the Child goes on to state that education should be directed to, amongst other things, "fostering respect for human rights and fundamental freedoms" and "the preparation of the

103. Section 6(2) of the Gender Equality Act, 2012.

104. Constitution of Malawi, section 21.

105. ICCPR, article 17.

106. LM v Attorney General 2019 All Bots 46 (HC) at para. 127.

107. National Coalition for Gay and Lesbian Equality & Another v Minister of Justice and Others 1999(1) SA 6 (CC).

108. Constitution of Malawi, section 25.

109. Article 17 of the African Charter on the Rights and Welfare of the Child is similar to article 13 of the International Covenant on Economic, Social and Cultural Rights.





child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups”.<sup>110</sup>

Malawi's current Education Act, passed in 2012, provides that the Minister of Education has a duty under section 4(1) to promote education for all people in Malawi irrespective of race, ethnicity, gender, religion, disability and any other discriminatory characteristics. The stated national goals of the education system in Malawi include to “develop

in the student, an appreciation of one's culture and respect of other people's culture” and to “promote equality of educational opportunity for all Malawians by identifying and removing barriers to achievement”.<sup>111</sup> Further, the national curriculum is to “promote respect for human rights” and “promote unity in diversity through a flexible framework which allows for the accommodation of cultural differences and needs”.<sup>112</sup> The Education Act accordingly requires that the government's policies accord with the values of diversity and ensuring equal access to education.

The first objective listed as a priority area for the Human Rights National Action Plan 2016-2020 is to “expand equitable access to education to enable all to benefit”.

Section 14(1) of the Gender Equality Act provides that “every person has the right to access education and training including vocational guidance at all levels”. The Act further states that the government must ensure that all primary and secondary schools include in their curricula principles of gender equality and human rights.<sup>113</sup>


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110. African Charter on the Rights and Welfare of the Child, article 11(2)(b) and (d).

111. Education Act of 2012, section 5(2)(d) and (i).

112. Education Act of 2012, section 76(2)(h) and (j).

113. Section 18(1)(a) and (b), Gender Equality Act, 2012.



As the LGBT Malawians at the community consultation have described, discrimination and bullying based on their sexual orientation and gender identity and expression limit their ability to partake in, and receive, education. Thus, the right to education of LGBT Malawians is violated if they are discriminated against or bullied in educational institutions because of their sexual orientation or gender identity.

### Right to development

Section 30 of the Constitution of Malawi guarantees the right to development. It states that:

*"All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development." 114*

It further elaborates that:

*"The State shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure." 115*

The Constitution of Malawi places special responsibility on the State to ensure that every person can take advantage of the right to development, and that every person has equality of opportunity:

*"The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities." 116*

In the community consultation, LGBT Malawians raised numerous examples of discrimination because of their sexual orientation and gender identity. In all cases, such discrimination had negative consequences for their educational development (being bullied and expelled from school), for their development in the workplace (being bullied at work), in healthcare facilities (being insulted and denied healthcare services), and for their access to food and shelter (being thrown out of family homes). All these areas are crucial areas for development and equality of opportunity. Because of discrimination based on their sexual orientation and gender identity, LGBT people do not have equal access to opportunities for development.

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114. Constitution of Malawi, section 30(1).

115. Constitution of Malawi, section 30(2).

116. Constitution of Malawi, section 30(3).



## Freedom of expression and access to information

Section 35 of the Constitution of Malawi guarantees that:

*"Every person shall have the right to freedom of expression."<sup>117</sup>*

Freedom of expression is also a priority area in the Human Rights National Action Plan 2016-2020. Objective 2 of the priority area is to amend laws that impinge on freedom of expression.

Article 19(2) of the ICCPR affirms that:

*"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice."<sup>118</sup>*

The Human Rights Committee (HRC) in General Comment 34 elaborates on the content of this right.<sup>119</sup> The HRC notes that freedom of opinion and expression are indispensable conditions for the full development of the person and are essential for any society. The right constitutes the foundation stone for every free and democratic society and is "a necessary condition for the realisation of the principles of transparency and accountability

that are, in turn, essential for the promotion and protection of human rights".<sup>120</sup> Freedom of expression is integral to the enjoyment of the right to freedom of association and extends to expression that may be regarded as "deeply offensive".<sup>121</sup>

Article 9(2) of the African Charter provides that "every individual shall have the right to express and disseminate his opinions within the law".

The African Commission on Human and Peoples' Rights, in the case of *Constitutional Rights Project and Others v Nigeria*, held that "freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of the public affairs of his country. Under the African Charter, this right comprises the right to receive information and express opinions".<sup>123</sup>

The African Commission's Declaration of Principles on Freedom of Expression in Africa (2002) emphasises that freedom of expression is a fundamental and inalienable human right and an indispensable component of democracy:

*"Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination. No one shall be subject to arbitrary interference with his or her freedom of expression... Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity."<sup>124</sup>*

117. Constitution of Malawi, section 35.

118. ICCPR article 19.

119. General Comment 34, Human Rights Committee.

120. Id at para 3.

121. Id at para 11.

122. *Constitutional Rights Project and Others v Nigeria* 2000 AHRLR 227 (ACHPR).

123. Id at para 26.

124. African Commission "Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa" (2002).

Freedom of expression includes the freedom to express one's sexual orientation and/or gender identity. States violate this right when they allow public officials or others to exercise violence against or harass people whose gender expression does not conform to social gender norms.<sup>125</sup> Thus, the violence and discrimination that LGBT Malawians have described at the community consultation and that is described in other research constitute violations of LGBT Malawians' freedom of expression.

## Freedom of association

Section 32 of the Malawi Constitution provides for the protection of freedom of assembly and association: "Every person shall have the right to freedom of association, which shall include the freedom to form associations."

Article 10 of the ACHPR provides that every individual shall have the right to free association provided that they abide by the law. Article 11 of the ACHPR provides that "every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, safety, health, ethics and rights and freedoms of others."

The African Commission, in its Guidelines on Freedom of Association and Assembly in Africa, called on States not to limit the right to expression, association and assembly on the basis of sexual orientation or gender identity.<sup>126</sup>

The Botswana Court of Appeal in 2016 noted that "All persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests."<sup>127</sup>

## Health

Section 13(c) of the Constitution states that the State is to provide adequate healthcare, commensurate with the health needs of Malawian society and international standards of healthcare.<sup>128</sup>

The right to health is explicitly mentioned in section 19(1) of the Gender Equality Act of 2012:

*"Every person has the right to adequate sexual and reproductive health which includes the right to –*

- a. Access sexual and reproductive health services;*
- b. Access family planning services;*
- c. Be protected from sexually transmitted infection;*
- d. Self-protection from sexually transmitted infection;*
- e. Choose the number of children and when to bear those children;*
- f. Control fertility; and*
- g. Choose an appropriate method of contraception."*

Section 20(1) of the Gender Equality Act further provides that a health officer shall –

*"Respect the sexual and reproductive health rights of every person without discrimination;  
Respect the dignity and integrity of every person accessing sexual and reproductive health services."*

The HIV and AIDS (Prevention and Management) Act No. 12 of 2017 deals not only with a person living with HIV, but also someone "vulnerable to contracting HIV" and entitles such persons to:<sup>129</sup>

- a. "Dignity of his person, physical integrity, life and health;*
- b. Practice a profession of choice;*
- c. Compensation associated with the restriction of his rights; and*
- d. Free medication, at a State medical institution, necessary for anti-retroviral therapy or treatment of an HIV-related disease listed in the Second Schedule."*

The Nurses and Midwives (Scope of Nursing Practice) Regulations obliges nurses to respect the rights of

125. HRW and IGLHRC (2003). More than a name: State-sponsored homophobia and its consequences in Southern Africa.

126. Guidelines on Freedom of Association and Assembly in Africa, para 28 and 80.

127. Attorney General v Rammoge & Others 2016 All Bots 165 (CA) at para 78.

128. CEDEP and CHRR (2015).

129. Section 7(1)(a)-(d) HIV and AIDS (Prevention and Management) Act, 2017



healthcare users and practice nursing in a non-discriminatory and confidential manner.<sup>130</sup>

The Charter on Patients' and Health Service Providers' Rights and Responsibilities provides that every patient has the right to be cared for without discrimination and everyone has the right to complain about health services and to have the complaint investigated.

The Human Rights National Action Plan 2016-2020 lists the right to health as a priority issue. Recognising the barriers to access to healthcare that LGBT persons in Malawi experience, the Plan specifically names LGBTI persons under the Priority Issue 'Sexual and Reproductive Health': Ensure effective access to health services for the LGBTI communities.<sup>131</sup>

Additionally, the Human Rights National Action Plan lists the following objectives, which are relevant in the context of SOGIE:

- Human Rights National Action Plan 2016-2020 Objective 1: Ensure accessibility of high-quality Essential Health Package (EHP) services. The ICESCR General Comment 14 clarifies that accessibility includes people's ability to access healthcare without discrimination. The lived experiences of LGBT Malawians show that SOGIE-related discrimination is a major barrier to accessing healthcare for LGBT people in Malawi. Thus, ensuring accessibility under Objective 1 of the Human Rights National Action Plan will need to recognise SOGIE-related discrimination and take appropriate steps to address it.
- Human Rights National Action Plan Objective 5: Strengthen accountability mechanisms including through legal framework on the right to health. Given that many LGBT people in Malawi experience discrimination and denial of healthcare because of their sexual orientation and/or gender identity, such health accountability mechanisms need to take SOGIE-related discrimination into account.

The Malawi National AIDS Commission has long recognised the need for non-discriminatory healthcare for LGBT Malawians. As early as 2003, Malawi's first National AIDS Policy (NAP) recognised that "people who engage in same-sex sexual relations" were especially vulnerable to contracting HIV.<sup>132</sup> The NAP explains that the reasons for this vulnerability were rooted in discrimination and inequality based on sexual orientation and gender identity:

*"People who engage in same-sex sexual relations are often underprivileged socially, culturally, economically or legally, may be less able to fully access education, healthcare, social services and means of HIV prevention; to enforce HIV prevention options; and to access needed treatment, care and support. They are thus more vulnerable to the risks of HIV infection and suffer disproportionately from the economic and social consequences of HIV/AIDS ... (they are also) socially and culturally vulnerable to prevailing attitudes."*<sup>133</sup>

A government assessment of the legal, regulatory and policy environment for HIV and AIDS in Malawi published in 2012, recognised that MSM faced stigma and discrimination from healthcare workers and noted that this was, at least in part, due to the laws that criminalise same-sex sexuality.<sup>134</sup> The report recommended the repeal of laws criminalising consensual sex between adults of the same sex:

*"Laws criminalising consensual sex between adults of the same sex must be reviewed with a view to repeal. Current processes underway in the Law Commission to review the laws criminalising unnatural sexual offences within the Penal Code should be supported by the LEA, and participatory national debate on the issue should be encouraged to explore the context, cultural and religious values and human rights issues around same-sex relationships. Efforts should be taken to ensure that men who have sex with men are supported to access appropriate and non-discriminatory healthcare services in the interim and that law enforcement officials do not violate their rights or create barriers to their organisations."*<sup>135</sup>

The ICESCR, in its article 12.1, affirms: "The right of everyone to the highest attainable standard of physical and mental health."

130. Regulation 8 of the Regulations, Government Notice 12 of 2002.

131. Human Rights National Action Plan 2016-2020, Objective 1.8.

132. National AIDS Commission (2003) National HIV/AIDS Policy.

133. National HIV/AIDS Policy, pp. 15-19.

134. Malawi Government (2012) Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, p. 35.

135. Malawi Government (2012) p. 139.

General Comment 14 defines that access to healthcare, consists of four main dimensions: availability, accessibility, acceptability and quality of care.<sup>136</sup> Paragraph 12.b of General Comment 14, which operationalises the right to health, states that non-discrimination is a key dimension of accessibility to healthcare; and paragraph 18 explicitly says that States may not discriminate based on sexual orientation in the enjoyment of this right:<sup>137</sup>

*"By virtue of article 2.2 and article 3 [equality provisions in the treaty], the Covenant proscribes any discrimination in access to healthcare and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation [emphasis added], and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.<sup>138</sup> With respect to the right to health, equality of access to healthcare and health services has to be emphasised. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and healthcare facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of healthcare and health services, especially with respect to the core obligations of the right to health."<sup>139</sup>*

The Committee emphasised that the right to health includes "access to health-related education and information, including on sexual health."<sup>140</sup>

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# Recommendations

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The lived experiences of LGBT Malawians that are collected in this report are testament to widespread discrimination and violence based on sexual orientation, gender identity and gender expression. The failure of the Malawian State to protect LGBT Malawians from such discrimination, and to take effective measures to enable LGBT persons to live a life free from abuse, discrimination and violence, violates its constitutional principles as well as its obligations as a State party to regional and international human rights treaties, including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>141</sup>

A number of existing reports have made similar observations, and have formulated comprehensive recommendations to Malawian politicians, holders of public office, and to law and human rights institutions.<sup>142</sup> In particular, the report Violence and discrimination based on real or perceived sexual orientation and gender identity in Malawi, published by CEDEP and CHRR in 2015, should be read for its recommendations, which remain relevant in the contemporary context. This research brief draws on these existing recommendations to formulate the following recommendations. These are meant to support the government of Malawi to comply with the Constitution and Malawi's international obligations.

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136. Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. No. E/ C.12/2000/4 (2000). 4Müller, A. (2017). Scrambling for access: availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa. BMC International Health and Human Rights, 17(1), p.16.

137. General Comment 14, at 18.

138. General Comment 14, at 19.

139. General Comment 14, at 11.

140. CEDEP and CHRR (2015).

141. CEDEP and CHRR (2015).

142. Malawi Government (2012), p. 12.

## Decriminalise consensual same-sex sexual acts

This is a well-established recommendation, which has also been recommended by government agencies. The 2012 Legal Environment Assessment by the Malawi Department of Nutrition and HIV and AIDS and the Ministry of Justice recommended that: "Laws criminalising consensual sex between adults of the same sex must be reviewed with a view to repeal."<sup>143</sup>

In order to ensure that all Malawians, including Malawians who identify as LGBT, men who have sex with men and women who have sex with women can access the full legal protection under the Constitution of Malawi and Malawi's international human rights obligations, sections 137A, 153 and 156 of the Penal Code should be repealed. This process should be combined with broader reform of sexual offences. Currently, sections 137A, 153 and 156 are ambiguous and lack clarity on the acts which are prohibited, which means that they ought to be repealed. However, without also ensuring that the offence of rape is gender-neutral, there will be a lacunae in the law relating to non-consensual acts, for example where a man rapes another man.<sup>144</sup> Currently, section 153 criminalises both consensual and non-consensual same-sex acts. Further recommendations related to the decriminalisation of consensual same-sex sexual acts include:

- Pending the repeal of sections 137A, 153 and 156 and the reform of section 132 of the Penal Code, interpret sections 137A, 153 and 156 to only apply to non-consensual acts.
- Issue a directive to prosecutors and police on the need to only apply sections 137A, 153 and 156 in non-consensual cases.
- Ensure training for the judiciary, law enforcement officers and healthcare providers in relation to their human rights obligations regardless of persons' sexual orientation, gender identity, gender expression and sex characteristics.

- Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics.

## Interpret section 20(1) of the Constitution of Malawi to include protection from discrimination based on sexual orientation and gender identity

In order to comply with constitutional and international human rights obligations, section 20 of the Constitution of Malawi should be interpreted to include protection from discrimination based on sexual orientation and gender identity, under the provision for protection based on 'other status'.

## Improve mechanisms for accountability and redress for rights violations

The community consultation and other studies confirm the lack of trust in and access to complaints mechanisms.<sup>145</sup> Complaints processes ought to allow for complaints at facility level (at an educational institution, workplace and healthcare service); complaints to the district head, complaints to the ombudsperson nationally or the hospital ombudsperson specifically; complaints to a police Victim Support Unit; complaints to the Malawi Human Rights Commission; and complaints to the Nurses and Midwives Council of Malawi and the Medical Council of Malawi. All these existing complaints mechanisms ought to be sensitised to the stigma and discrimination faced by LGBT persons, and ought to ensure that they ensure confidentiality and anonymity of complainants.

For complaints mechanisms to meet the needs of LGBT persons, the mechanisms should guarantee confidentiality and immunity from prosecution for persons reporting rights violations.<sup>146</sup> Since complaints

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143. Section 132 of the Penal Code states: "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."

144. Southern Africa Litigation Centre (2016).

145. Southern Africa Litigation Centre (2016), p. 102.

146. Southern Africa Litigation Centre (2016), p. 102.

mechanisms are not widely used, a concerted effort must be made to ensure that they are accessible and that the public are aware of where and how to access them.<sup>147</sup> Public health laws need to include protections for complaints against secondary victimisation and service denial and to put in place clear procedures for handling complaints in the context.<sup>148</sup>

## **Recommendations to specific stakeholders**

### ***To the Malawi Human Rights Commission***

- Include SOGIE as ground for discrimination in analyses of human rights violations.
- Use the powers conferred on it by the Gender Equality Act of 2012 to carry out investigations on complaints of gender issues, to investigate complaints from LGBT persons.<sup>149</sup>
- Ensure that human rights education (envisioned in the National Human Rights Action Plan 2016-2020) includes information aimed at LGBT people, and that SOGIE is included as ground for non-discrimination and human rights abuses in mainstream human rights education.
- Work with NGOs who protect the rights of LGBT people to develop "specialised civic education [...] to assist in providing appropriate orientation and human rights training to local officials, CBOs and traditional leaders",<sup>150</sup> as envisioned in the HRNAP 2016-2020 and in the Gender Equality Act.<sup>151</sup>
- Initiate public education about the human rights of all persons in Malawi, regardless of their sexual orientation, gender identity and gender expression.

### ***To the Malawi Law Commission***

- Review sections 137A, 153 and 156 of the Penal Code with a view to repeal them and to ensure that the Penal Code complies with the Constitution of Malawi.
- Initiate public education about the constitutional and international human rights obligations of Malawi, and their application to persons who identify as lesbian, gay, bisexual and transgender.

### ***To non-governmental organisations working for the rights of LGBT persons***

- Educate LGBT constituents about their constitutional rights and protections.
- Educate LGBT constituents about human rights accountability mechanisms and create awareness of how and where to report rights violations.
- Provide legal advice and support for LGBT people who have experienced rights violations.
- Advocate at and work with the Malawi Human Rights Commission and Malawi Law Commission to achieve the recommendations of decriminalisation and constitutional protection from discrimination.

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147. Southern Africa Litigation Centre (2016), p. 102.

148. Southern Africa Litigation Centre (2016), p. 134.

149. Section 9(1) and (2)(b) of the Gender Equality Act, 2012.

150. HRNAP 2016-2020, p. 21.

151. Section 21 of the Gender Equality Act, 2012.



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