



Home Office

Country Information and Guidance

Malawi: Sexual orientation and gender identity

Version 2.0

March 2016

Preface

This document provides country of origin information (COI) and guidance to Home Office decision makers on handling particular types of protection and human rights claims. This includes whether claims are likely to justify the granting of asylum, humanitarian protection or discretionary leave and whether – in the event of a claim being refused – it is likely to be certifiable as ‘clearly unfounded’ under s94 of the Nationality, Immigration and Asylum Act 2002.

Decision makers must consider claims on an individual basis, taking into account the case specific facts and all relevant evidence, including: the guidance contained with this document; the available COI; any applicable caselaw; and the Home Office casework guidance in relation to relevant policies.

Country Information

The COI within this document has been compiled from a wide range of external information sources (usually) published in English. Consideration has been given to the relevance, reliability, accuracy, objectivity, currency, transparency and traceability of the information and wherever possible attempts have been made to corroborate the information used across independent sources, to ensure accuracy. All sources cited have been referenced in footnotes. It has been researched and presented with reference to the [Common EU \[European Union\] Guidelines for Processing Country of Origin Information \(COI\)](#), dated April 2008, and the [European Asylum Support Office’s research guidelines, Country of Origin Information report methodology](#), dated July 2012.

Feedback

Our goal is to continuously improve the guidance and information we provide. Therefore, if you would like to comment on this document, please [e-mail us](#).

Independent Advisory Group on Country Information

The Independent Advisory Group on Country Information (IAGCI) was set up in March 2009 by the Independent Chief Inspector of Borders and Immigration to make recommendations to him about the content of the Home Office’s COI material. The IAGCI welcomes feedback on the Home Office’s COI material. It is not the function of the IAGCI to endorse any Home Office material, procedures or policy.

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Guidance

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1. Introduction

1.1 Basis of Claim

- 1.1.1 Fear of persecution or serious harm by the state and/or non-state actors because of the person's actual or perceived sexual orientation and / or gender identity.

1.2 Other points to note

- 1.2.1 This instruction refers to lesbian, gay, bisexual and transgender (LGBT) persons collectively, although the experiences of members of each group may differ.
- 1.2.2 Decision makers should also refer to the Asylum Instructions on [Sexual Identity Issues in the Asylum Claim](#); [Gender Identity Issues in Asylum Claims](#); and [Gender Recognition in Asylum Claims](#).
- 1.2.3 Where a claim by a male applicant falls to be refused, it must be considered for certification under section 94 of the Nationality, Immigration and Asylum Act 2002 as Malawi is listed as a designated state in respect of men only.

2. Consideration of Issues

2.1 Is the person's account credible?

- 2.1.1 For information on assessing credibility, see sections 4 and 5 of the [Asylum Instruction on Assessing Credibility and Refugee Status](#).
- 2.1.2 Decision makers must also check if there has been a previous application for a UK visa or another form of leave. Asylum applications matched to visas should be investigated prior to the asylum interview (see the [Asylum Instruction on Visa Matches, Asylum Claims from UK Visa Applicants](#)).
- 2.1.3 Decision makers should also consider the need to conduct language analysis testing (see the [Asylum Instruction on Language Analysis](#)).

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2.2 Do LGBT persons from Malawi constitute a particular social group (PSG)?

- 2.2.1 LGBT persons in Malawi form a particular social group within the meaning of the 1951 UN Refugee Convention because they share a common characteristic that cannot be changed and have a distinct identity which is perceived as being different by the surrounding society.
- 2.2.2 In the Court of Justice of the European Communities judgement for the joined cases of C-199/12 to C-201/12, dated November 2013 ([2013] WLR(D) 427, [2013] EUECJ C-199/12), the Court held that ‘the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.’ (Ruling point 1).
- 2.2.3 Although LGBT persons in Malawi form a PSG, this does not mean that establishing such membership will be sufficient to make out a case to be recognised as a refugee. The question to be addressed in each case will be whether the particular person will face a real risk of persecution on account of their membership of such a group.
- 2.2.4 For further information on particular social groups, see [Asylum Instruction on Assessing Credibility and Refugee Status](#).

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- 2.2.5 Are LGBT persons at risk of mistreatment or harm amounting to persecution in Malawi?
- 2.2.6 Decision makers must establish whether or not the person, if returned to their country of origin, will live freely and openly as an LGBT person. This involves a wide spectrum of conduct which goes beyond merely attracting partners and maintaining relationships with them. If it is found that the person will in fact conceal aspects of his or her sexual orientation if returned, decision makers must consider why the person will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his or her own choosing and not because of a fear of persecution, then they may not have a well-founded fear of persecution. But if the reason why the person will resort to concealment is that they genuinely fear that otherwise they will be persecuted, it will be necessary to consider whether that fear is well founded (see [Sexual Identity Issues in the Asylum Claim](#)).

State treatment

- 2.2.7 Consensual same-sex sexual activity in Malawi is illegal and punishable with imprisonment for up to 14 years with hard labour for men and up to 5 years for women. Same-sex activity may also be prosecuted as “conduct likely to cause a breach of the peace.” On the 17 April 2015, the Marriage, Divorce and Family Relation Law came into force. It makes no provision for same-sex marriages. The new law also does not allow people who have undergone

gender reassignment surgery to marry a person, who before that sex changing surgery was of the same sex. The law is, otherwise, silent on matters relating to an individual's gender identity. ([Legal context](#)).

- 2.2.8 However, in 2012 (then) President Joyce Banda committed to repeal all laws that criminalized same-sex sexual relations, but she subsequently slowed efforts to repeal the laws (before leaving office in 2014). In November 2013 The High Court of Malawi decided to review the constitutionality of anti-LGBT laws and invited submissions in September 2014 but no judgement has been made. In July 2014, the Solicitor General and Justice Minister, Dr Janet Banda, told the UN Human Rights Committee that the police would not arrest people for same-sex sexual activity until the laws were reviewed but the review process has since stalled. However in September 2015 in response to a UN request to decriminalise same-sex relationships, Dr Banda stated that Malawi would not legalise same-sex relationships (Legal context, [Law reform](#)).
- 2.2.9 Despite statements made by the government that LGBT persons would not be prosecuted, two men were reportedly charged under the laws in May 2014. While a survey of a number of prisons conducted by an NGO in 2014 reported that there were 6 men serving sentences relating to same sex activity laws, and a total of 21 men who were in prison under these laws during 2011 and 2014 (it is not clear from the source material if these convictions were handed down before the statements on non-enforcement of the law made by the government).
- 2.2.10 However, in December 2015 two men were arrested on suspicion that they were engaging in homosexual acts in their house at Area 25 Township. They were released on bail and ordered to return to the Court to face sodomy charges. Subsequently, the two men were released from custody and all charges dropped. However, the moratorium on arrests and prosecution under the laws remains in place.
- 2.2.11 The government has also approved a HIV policy that includes programmes focussing on gay, bisexual, and other men who have sex with men (Treatment by, and attitude of, state authorities, [Law in practice](#)).
- 2.2.12 A LGBT person is unlikely to be prosecuted under existing laws because of their sexual orientation or gender identity.

Societal treatment

- 2.2.13 There is limited information from sources on the societal attitudes and treatment of LGBT persons. Sources indicate that there is societal stigma and discrimination, with incidents ranging from physical assault, harassment in the workplace and at home, loss of employment, and in accessing health care. LGBT persons were also subjected to homophobic rhetoric from some members of Christian and Muslim groups, while human rights defenders who advocated LGBT rights experienced ridicule and hate speech ([Societal attitudes and treatment](#)).

2.2.14 However, public discussion of LGBT rights increased in 2013 and 2014, and there has been an improvement in the balance of how media reports on LGBT issues. Some NGOs campaign for, support and document human rights violations against LGBT persons, including supporting a challenge against the laws through the Malawi High Court. Some key religious and traditional leaders publicly supported NGO advocacy programmes on LGBT rights (Societal attitudes and treatment).

2.2.15 While societal intolerance and discrimination occurs, there is no evidence of widespread harassment of and violence against persons known or perceived to be LGBT. A number of NGOs actively (and openly) support LGBT persons and there are signs of growing societal tolerance of their rights.

2.2.16 For further information on assessing risk, see [Asylum Instruction on Assessing Credibility and Refugee Status](#).

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2.3 Are those at risk able to seek effective protection?

2.3.1 Where the person's fear is of persecution or serious harm at the hands of the state, they would not be able to avail themselves of the protection of the authorities.

2.3.2 Where the person is at risk from a non-state actor, the state is unlikely to provide protection. See [Treatment by, and attitude of, state authorities](#))

2.3.3 For further guidance on assessing the availability or not of state protection, see [Asylum Instruction on Assessing Credibility and Refugee Status](#).

2.4 Are those at risk able to internally relocate?

2.4.1 Where the threat is from the state, a person cannot internally relocate to escape that risk.

2.4.2 Where the threat is from a non-state actor, while societal intolerance is likely to be prevalent throughout the country relocation may be relevant and reasonable. Decision makers will need to take into account the person's individual circumstances and determine if the threat is local and could be removed by relocation, with the onus on the person to demonstrate why they cannot relocate. (See [Treatment by, and attitude of, state authorities](#) and [Societal treatment and attitudes](#)).

2.4.3 Decision makers must also take account that the Supreme Court in the case of [HJ \(Iran\)](#) made the point that internal relocation is not the answer if it depends on the person concealing their sexual orientation in the proposed new location for fear of persecution.

2.4.4 For further guidance on considering internal relocation and the factors to be taken into account, see the [Asylum Instruction on Assessing Credibility and Refugee Status](#), and [Sexual Identity Issues in the Asylum Claim](#).

2.5 If refused, is the claim likely to be certifiable?

2.5.1 Where a claim falls to be refused, it is unlikely to be certifiable as ‘clearly unfounded’ under section 94 of the Nationality, Immigration and Asylum Act 2002.

2.5.2 For further information on certification, see the Appeal Instruction.

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3. Policy summary

3.1.1 Same-sex sexual relations are criminalised in Malawi, however the government has stated that it will not arrest and prosecute persons under this legislation. While there have been arrests and prosecutions in the past, these are few in number.

3.1.2 There is no evidence that there is widespread harassment of or violence against LGBT persons. While societal intolerance and discrimination occurs, such treatment does not generally amount to a real risk of persecution or serious harm. In some cases, the cumulative impact of anti-LGBT legislation and societal intolerance may amount to persecution. Each case needs to be considered on its individual merits, with the onus on the person to demonstrate that they are at real risk.

3.1.3 LGBT persons are not likely to be able obtain protection from the state.

3.1.4 Decision makers must give careful consideration to the relevance and reasonableness of internal relocation on a case-by-case basis taking full account of the individual circumstances of the particular person.

3.1.5 Where a claim falls to be refused, it is unlikely to be certifiable as ‘clearly unfounded’

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4. Legal context

4.1.1 [Same sex sexual relations for men and women are illegal under Section 137A, 153, 154 and 156 of the Penal Code and are punishable by up to 5 years for women and up to 14 years for men in prison.](#)¹

4.1.2 According to a Report by the Law Library of Congress, Criminal Laws in Homosexuality in Africans:

‘Malawi criminalizes homosexuality. Anyone who “has carnal knowledge of any person against the order of nature ... or permits a male person to have carnal knowledge of him or her against the order of nature” commits an “unnatural offence,” a felony, on conviction, punishable by a fourteen-year prison term. Attempting to commit an “unnatural offence,” also a felony, is punishable on conviction by a seven-year prison term. In addition, Malawi criminalizes what it calls “indecent practices.” Anyone who “commits an act of gross indecency with another” in public or in private or “procures” or “attempts to procure” another to commit such act with him/herself or with another person commits a felony and is, on conviction, punishable by a five-year prison term. “Indecent practices between females” provides that any female person who, whether in public or private, commits “any act of gross indecency with another female” shall be guilty of an offence and liable to a prison term of five years. The term “gross indecency” is not defined.’²

4.1.3 The United States Department of State (USSD) stated in its Country Report into Human Rights Practices, 2014, Malawi published 26 June 2015:

‘Consensual same-sex sexual activity is illegal and punishable by up to 14 years in prison, including forced hard labour. The Penal Code outlaws “unnatural offences” and “indecent practices between males.” In September 2013 the High Court invited friend-of-the-court submissions on the constitutionality of laws against these acts. It received arguments both for and against the laws’ constitutionality, with most of the arguments being in

¹ ILGA State Sponsored Homophobia, May 2015

http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf Date Accessed 1 October 2015

² ILGA State Sponsored Homophobia, May 2015

http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf Date Accessed 1 October 2015

The Law Library of Congress, Criminal Laws in Homosexuality in Africans, February 2014

<http://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> Date Accessed 1 October 2015

opposition. The Attorney General filed a motion with the Supreme Court objecting to the process on the basis that the Chief Justice must certify constitutional questions and obtained an order in February 2014 suspending the proceedings. As of November 2014 the motion had yet to be decided.’ (To date, there has been no decision).

‘Same-sex activity may also be prosecuted as “conduct likely to cause a breach of the peace.” A 2011 amendment to the Penal Code established penalties for consensual same-sex sexual activity between women, setting a maximum prison term of five years.’³

- 4.1.4 In a report by the International, Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), published in May 2015, it was noted that:

‘In Malawi, the Marriage, Divorce and Family Relations Act was signed into law by the President in April 2015. The Act provides that a marriage is between spouses of the opposite sex and imposes a criminal penalty of a fine or five years imprisonment if a marriage is celebrated knowing that it does not comply with the Act. The law-makers, in the memorandum to the Bill, explained that they had considered the possibility of transgender persons trying to marry and have deliberately excluded this possibility by defining sex as a person’s birth sex.’⁴

- 4.1.5 Malawi passed the Marriage, Divorce and Family Relations Bill in 2015 and according to Human Rights Watch (HRW), in their Report, Malawi-New Marriage Laws Can Change Lives:-

‘By defining sex as “the sex of a person at birth,” the Marriage Act denies equal rights to form a family to some transgender people. The same provision denies the right to marriage to some intersex people – those born with both male and female sex characteristics – whose sex is often assigned arbitrarily at birth. In addition, though Malawi’s constitution does not expressly preclude marriage for same-sex couples, the Marriage Act limits marriage to “persons of the opposite sex,” ignoring the reality of same-sex relationships.’

‘The law also reinforces the prohibition of “unnatural offences” under Malawi’s Penal Code – a provision used to criminalize consensual same-sex relations between adults – by listing a conviction for such an offence as acceptable evidence of irretrievable marriage breakdown.’⁵

³ United States Department of State, Country Report into Human Rights Practices, Malawi 2014, Section 6, Published 26 June 2015 <http://www.state.gov/documents/organization/236590.pdf> Date Accessed 28 September 2015

⁴ ILGA State Sponsored Homophobia, May 2015, page 102 http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf Date Accessed 17 December 2015

⁵ Human Rights Watch – Malawi: New Marriage Laws Can Change Lives – April 2015 <https://www.hrw.org/news/2015/04/17/malawi-new-marriage-law-can-change-lives> Date Accessed 28 September 2015

4.1.6 Pink News reported on 17 April 2015 about the new Marriage Laws that:

‘It also defines a person’s sex as “determined at birth”, hence sex, for the purpose of marriage, will continue to be regarded as one’s sex at birth. The law states: “Such a determination of sex at birth avoids any potential problems caused by transsexuals or persons who have undergone sex-changing surgery later in life from marrying a person, who, prior to that sex-changing surgery was of the same sex as them.” The law also mentions gay sex as being comparable to rape and sexual harassment.’⁶

4.1.7 Pink News reported on 10 March 2015 that:

‘Malawi will not change its laws against homosexuality, said the Malawi Health Minister. Jean Kalilani made the remarks as the Malawi Government applied for a grant of around £257.000 from the Global Fund to Fight AIDS, Tuberculosis and Malaria. Malawi wants to use the money for HIV prevention among the country’s gay population. However, Ms Kalilani stressed that the decision did not amount to a legal change in status for gay people. “There will be no change in laws on homosexuality”, said Ms Kalilani, reports the Nyasa Times. “It is still a crime to anyone engaging in the practice.” Campaigners say that Malawi’s anti-gay laws hamper the country’s HIV prevention efforts. Gift Trapence, from the Centre for the Development of People (CEDEP), said: “It is difficult to offer HIV and AIDS services to homosexuals when there are sodomy laws on the other hand.’⁷

4.1.8 The International Gay and Lesbian Human Rights Commission published a press release on 17 April 2015 and stated that:

‘The [Marriage, Divorce and Family Relations Law](#) creates new forms of legal discrimination against lesbian, gay, bisexual, transgender and intersex individuals. While the law raises the minimum marriage age to 18, it also promotes a policy of exclusion against LGBTI Malawians that would likely translate into discrimination in education, housing, jobs and elsewhere....

‘The law denies equal rights to form a family to transgender, intersex and other individuals whose identity does not align with that assigned at birth, and ignores the reality of any co-living arrangement not in the form of opposite-sex couples—including non-romantic relationships.’⁸

⁶ Pink News, Malawi’s new anti-LGBT law comes into effect, 17 April 2015, <http://www.pinknews.co.uk/2015/04/17/malawi-anti-lgbt-law-signed-in/>, accessed on 17 December 2015

⁷ Pink News, Malawi will not change its laws against homosexuality, the country’s Health Minister has said. 10 March 2015, <http://www.pinknews.co.uk/2015/03/10/malawi-health-minister-no-plans-to-drop-anti-gay-laws/>, accessed on 17 December 2015

⁸ International Gay and Lesbian Human Rights Commission, Serious Concerns Raised Over Discriminatory Malawi Law Targeting LGBTI People, 17 April 2015, <https://www.outrightinternational.org/content/serious-concerns-raised-over-discriminatory-malawi-law-targeting-lgbti-people>, accessed on 17 December 2015

4.1.9 The law forbids discrimination based on race; colour; sex; language; religion; political or other opinion; national, ethnic, or social origin; disability; property; birth; or other status. The law does not specifically mention sexual orientation. The capacity of government institutions to enforce the law was limited.

4.1.10 There is no information on laws relating to gender identity, although as noted in Paragraph 4.1.5, sex is defined as “sex of a person at birth”. Furthermore, Amnesty International noted in its June 2013 report that gender identity is denied before the law:

‘A stark example of the double oppression that some transgender and intersex people suffer is that of Tiwonge Chimbalanga, a Malawian transgender woman, and her husband, Steven Monjeza, who were prosecuted under Malawi’s indecency laws after committing to each other in a traditional marriage ceremony in 2009. Because Tiwonge’s gender identity is not recognized in Malawian law, she was charged with an offence that applies to men, thereby denying in the strongest possible way her right to determine her gender identity.’⁹

A submission for the Malawi Shadow Report on the International Covenant on Civil and Political Rights, published in July 2014, noted that: ‘Under the Immigration Act, Section 4(1) any prostitute or homosexual, or any person, male or female, who lives or has lived on or knowingly receives or has received any part of the earnings of prostitution or homosexuality, or has procured men or women for immoral purposes is deemed a prohibited immigrant.’¹⁰

4.1.11 Erasing 76 Crimes stated that: ‘Opponents of the anti-gay laws include Malawi’s Centre for the Development of People (CEDEP), the Malawi Law Society, the Centre for Human Rights and Rehabilitation (CHRR), the University of Malawi’s Faculty of Law, and the Malawi Network of Religious Leaders living with or affected by HIV.’¹¹

4.2 Law Reform

4.2.1 The US State Department report for 2012 stated:

⁹ Amnesty International, Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa, 25 June 2013, AFR 01/001/2013, available at: <http://www.refworld.org/docid/51d2a0144.html>, accessed on 17 December 2015

¹⁰ Malawi Shadow Report on the International Covenant on Civil and Political Rights, submitted by Centre for Development of People, Communication Workers Union of Malawi, International Gay and Lesbian Human Rights Commission, Media Institute of Southern Africa and the Youth Empowerment and Civic Education, July 2014, <https://www.outrightinternational.org/sites/default/files/Malawi0714ForUpload.pdf>, accessed on 17 December 2015

¹¹ Erasing 76 Crimes, [It’s official: No more Malawi arrests under anti-gay laws](#), 14 July 2014, accessed on 6 January 2016

'On 18 May [2012], in her first state of the union address, [then] President Banda committed to work to repeal the "indecent and unnatural acts laws." On 5 November, Minister of Justice Ralph Kasambara stated publicly that the government would suspend enforcement of laws criminalizing consensual same-sex sexual conduct pending a decision on whether to repeal them. However, subsequently Banda slowed efforts to repeal the laws. On 26 September, on the margins of the UN General Assembly, she stated that the country was not ready to repeal laws criminalizing homosexuality.'¹²

4.2.2 The Human Dignity Trust noted in a report updated on 25 October 2015 that:

'Malawi's National Report, which was submitted as part of the Universal Periodic Review (UPR) process, made no mention of decriminalisation or the rights of LGBT persons.'¹³

4.2.3 The USSD noted in its report covering 2014 that:

'In September 2013 the High Court invited friend-of-the-court submissions on the constitutionality of laws against these acts. It received arguments both for and against the laws' constitutionality, with most of the arguments being in opposition. The Attorney General filed a motion with the Supreme Court objecting to the process on the basis that the Chief Justice must certify constitutional questions and obtained an order in February suspending the proceedings. As of November 2014 the motion had yet to be decided.'¹⁴ (To date, there has been no decision).

4.2.4 The CHRR noted in its Annual Report covering 2014 that:

'In September 2014, the High Court of Malawi, on its own motion, invited submissions from institutions and individuals to address it on the constitutionality of Section 153 of the Penal Code vis-a-vis Section 20 of the Malawi Constitution which prohibits discrimination. CHRR and other organisations joined the case as friends of the Court praying that the Court declare the laws that criminalize homosexuality unconstitutional. By the end of 2014, the Court had not delivered its judgements on this matter.'¹⁵

4.2.5 Amnesty observed in February 2015 that 'Justice Banda... reported that a process for the Malawi Law Commission to review the penal laws criminalizing

¹² US State Department, [Country Reports on Human Rights Practices for 2012, Malawi](#), section 6, 19 April 2013, accessed on 8 October 2015

¹³ Human Dignity Trust, Criminalisation of homosexuality: Malawi, 25 October 2015, http://www.humandignitytrust.org/uploaded/Map/Country_Reports/Malawi.pdf, accessed on 17 December 2015

¹⁴ United States Department of State, Country Report into Human Rights Practices, Malawi 2014, Section 6, Published 26 June 2015 <http://www.state.gov/documents/organization/236590.pdf> Date Accessed 28 September 2015

¹⁵ Centre for Human Rights and Rehabilitation, [Annual Human Rights Report 2014](#), covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

same-sex acts had stalled largely due to financial constraints. Specifically, the Law Commission had been asked to give an opinion on the constitutionality of Articles 137A, 153 and 156 of the Penal Code, criminalizing homosexuality.¹⁶

4.2.6 Nyasa Times, in their article, Malawi Tells UN No To Homosexuality – 25 September 2015, stated that:

‘The Malawi Government has vehemently rejected a push by the UN Human Rights Council to legalize same sex relationships in Malawi. Secretary for Justice and Solicitor General, Jane Chikaya Banda, confirmed the government's stance on the matter. Banda said that “legalising same sex would be against the Constitution of the Republic of Malawi and values of Malawians.” The U.S and its European allies are pushing Third World countries to legalise same sex marriages and respect rights of the minority groups who include Gays and Lesbians. However, this is the first time the government has told the UN off on same sex marriages. The UN Secretary General Ban Ki Moon came to Malawi to secure the release of a gay couple after they were arrested during the Bingu wa Mutharuka regime.’¹⁷

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5. Treatment by, and attitude of, state authorities

5.1 Law in Practice

5.1.1 The Human Rights Campaign stated in July 2014 that:

‘In November 2013, the Malawi High Court decided to review the constitutionality of the nation's ban on homosexual intercourse. The question of decriminalization of homosexuality in Malawi has been debated since former President Joyce Banda took office in 2012. She called for repealing the Penal Code but later told international reporters that the country might not be prepared for such a change. The suspension of the anti-LGBT law has been opposed by some religious figures arguing that homosexuality is alien to the Malawian culture.’¹⁸

5.1.2 The USSD Human Rights Report for 2014 observed that:-

‘In July 2014, Solicitor General Janet Banda told the UN Human Rights Commission that the government would not enforce... [the anti-gay] laws. In

¹⁶ Amnesty International, World Report 2014/15 – Malawi, February 2015, <https://www.amnesty.org/en/countries/africa/malawi/report-malawi/>, accessed on 7 October 2015

¹⁷ Nyasa Times, Malawi Tells UN No to Homosexuality, 25 September 2015 <http://allafrica.com/stories/201509251178.html> Date Accessed 28 September 2015

¹⁸ Human Rights Campaign - Malawi Suspends Anti-LGBT Law – 18 July 2014 <http://www.hrc.org/blog/entry/malawi-suspends-anti-lgbt-law> Date Accessed 28 September 2015

May 2014, however, two men were charged pursuant to the anti-sodomy laws after one disclosed their relationship to police. As of November 2014 the men were freed on bail, but charges remained pending. Two other cases of men charged with sodomy were reported in the press. Each case involved activity between an adult and a minor that could be charged under other criminal statutes.¹⁹

5.1.3 On 16 December 2015, the Nyasa Times reported that:

‘Malawi Police at Kanengo station in the capital Lilongwe on Monday 7 December 2015, arrested two men on suspicion that they were engaging in homosexual acts in their house at Area 25 Township. They were released on bail and ordered to return to Court to face sodomy charges. Subsequently, the two men were released from custody and all charges dropped. However, the moratorium on arrests and prosecution under the anti-gay laws remains in place’.²⁰

5.1.4 The CHRR noted in its Annual Report covering 2014 that:

‘A prison survey conducted by CHRR and CEDEP in July 2014 revealed that there were 6 adults across the country currently serving jail sentences for committing same sex offences. However, three men convicted under Section 153 (a) of the Penal Code in 2011 by a lower Court and sentenced to long prison terms ranging from 10 to 14 years imprisonment with hard labour appealed their conviction and sentences.’²¹

5.1.5 The same source noted that

‘Human Rights Watch study found that even unenforced anti-gay laws have nefarious consequences, including blackmail, restricted access to health services, and a lack of access to justice. The [UN] HRC [Human Rights Council] urged Malawi to prosecute the perpetrators of violence against LGBTI persons, compensate the victims, and ensure that public officials refrained from using language that might encourage such violence. By December 2014, the Government had not yet criminalized hate speech against LGBTI persons.’

5.1.6 The International Gay and Lesbian Human Rights Commission stated in July 2014 that:

‘During the dialogue [with the UN HRC], the Malawian Government referred to the criminalization of same-sex adult sexual acts but claimed that these

¹⁹ United States Department of State, Country Report into Human Rights Practices, Malawi 2014, Section 6, Published 26 June 2015 <http://www.state.gov/documents/organization/236590.pdf> Date Accessed 28 September 2015

²⁰ Nyasa Times, Malawi: UK Against Discrimination of Gays in Malawi – no Homophobia, 16 December 2015, <http://allafrica.com/stories/201512170196.html>, accessed on 17 December 2015

²¹ Centre for Human Rights and Rehabilitation, *Annual Human Rights Report 2014*, covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

criminal provisions are not being applied. This is the same as research findings from CEDEP, whose researchers visited 23 prisons throughout the country and found that from 2011 to 2014, 21 men had served time for adult same-sex sexual acts and at least 6 of the cases involved consensual sex between adults.²²

5.1.7 Human Rights Watch noted in its September 2014 submission to the UPR on Malawi that:

‘During the 2010 UPR, Malawi rejected the recommendation to decriminalize same-sex conduct saying that the wishes of the people of Malawi in this regard should be respected. To (our) commendation to end incitement to discrimination and homophobia on the basis of sexual orientation, Malawi stated that there was no homophobia or incitement against gay people.’²³

5.1.8 The USSD also noted that:

‘The Malawi Human Rights Commission (MHRC), an independent government-chartered institution, declined to address human rights problems facing LGBT persons in 2014 and was criticized by other human rights groups for failing to join a Court challenge to the so-called anti-sodomy laws.’²⁴

5.1.9 The CHRR noted in its Annual Report covering 2014 that:

‘In July 2014, the Human Rights Committee expressed concern over the MHRC reluctance to engage on lesbian, gay, bisexual and transgender and intersex issues. It requested the MHRC to fully comply with its mandate and engage on all human rights issues including those related to the rights of LGBT persons. By December 2014, the Commission had not made any statement regarding sexual minority rights.’²⁵

5.1.10 The same source stated that:-

‘.....A major highlight of the year 2014 was the Government’s adoption of the HIV policy that includes programmes targeting gay, bisexual and other men who have sex with men (MSM). Specifically, government sought US\$400,000 from the Global Fund to be used to fund programmes for this group. It is

²² International Gay and Lesbian Human Rights Commission - UN Human Rights Committee Identifies Human Rights Violations Against Persons Based on Sexual Orientation in Malawi – 10 July 2014 <http://iglhrc.org/content/un-human-rights-committee-identifies-human-rights-violations-against-persons-based-sexual> Date Accessed 28 September 2015

²³ Human Rights Watch, Malawi: Universal Periodic Review, September 2014, <http://www.refworld.org/docid/553a29c34.html>, accessed on 17 December 2015

²⁴ United States Department of State, [Country Report into Human Rights Practices, Malawi 2014](#), Section 6, Published 26 June 2015, accessed 28 September 2015

²⁵ Centre for Human Rights and Rehabilitation, [Annual Human Rights Report 2014](#), covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

however unclear how the Government would effectively implement these programmes in a context where same sex relations remain criminalised.²⁶

5.1.11 The International Gay and Lesbian Human Rights Commission stated that:

‘During the dialogue [with the UNHRC], the Malawian Government referred to the criminalization of same-sex adult sexual acts but claimed that these criminal provisions are not being applied. This is the same as research findings from CEDEP, whose researchers visited 23 prisons throughout the country and found that from 2011 to 2014, 21 men had served time for adult same-sex sexual acts and at least 6 of the cases involved consensual sex between adults.’²⁷

5.1.12 Erasing 76 Crimes in their Article – Gay Malawian Appeals for Justice – Now He’s in Hiding – January 2016, has reported that:

‘A gay Malawian man, Eric Sambisa, who heads the Southern Region Rainbow Alliance, a secret grouping of mostly gay men, has stated that he is gay and is tired of being treated as a second-class citizen by the homophobic Malawian Government and homophobic Malawian society. The Nyasa Times of Malawi also reported the story, saying that Sambisa was briefly detained by police after the Times of Malawi story was published and has since gone into hiding.’²⁸

5.2 Access to Healthcare

5.2.1 The same source stated that:-

‘The LGBTI persons were left out from public health support initiatives including from HIV information, support and services. Such information is necessary to enable LGBTI persons to make informed decisions and consequently reduce their vulnerability to HIV. However, a major highlight of the year 2014 was the Government’s adoption of the HIV policy that includes programmes targeting gay, bisexual and other men who have sex with men (MSM). Specifically, government sought US\$400,000 from the Global Fund to be used to fund programmes for this group. It is however unclear how the Government would effectively implement these programmes in a context where same sex relations remain criminalised.’²⁹

²⁶ Centre for Human Rights and Rehabilitation, [Annual Human Rights Report 2014](#), covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

²⁷ International Gay and Lesbian Human Rights Commission - UN Human Rights Committee Identifies Human Rights Violations Against Persons Based on Sexual Orientation in Malawi – 10 July 2014 <http://iglhrc.org/content/un-human-rights-committee-identifies-human-rights-violations-against-persons-based-sexual> Date Accessed 28 September 2015

²⁸ Erasing 76 Crimes in their Article – Gay Malawian Appeals for Justice –Now He’s In Hiding – 2 January 2016 <http://76crimes.com/2016/01/02/gay-malawian-appeals-for-justice-now-hes-in-hiding/> Date Accessed 16 January 2016

²⁹ Centre for Human Rights and Rehabilitation, [Annual Human Rights Report 2014](#), covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

5.2.2 The UN Human Rights Council noted in a report dated 23 February 2015 that:

‘HR Committee was concerned that LGBTI persons did not enjoy effective access to health services. It stated that Malawi should guarantee effective access to health services, including HIV/AIDS treatment, for LGBTI persons.’³⁰

5.2.3 The same UN Human Rights Council report added that:

‘UNCT stated that the criminalization of consensual same sex relations, societal stigma and discrimination had a detrimental impact on the enjoyment of the right to health. LGBTI persons were often not included in public health and support initiatives, such as education programmes or the provision of disease and infection prevention and care, and were denied access to necessary information, support and services to make informed decisions and to reduce their vulnerability to HIV.’³¹

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6. Societal treatment and attitudes

6.1.1 The Nyasa Times stated in their article, No to Gay Rights in Malawi [2015], that:

‘The Malawi President Peter Mutharika has been urged by the Church of Central Africa Presbyterian (CCAP) Livingstonia Synod Moderator Douglas Chipofya to be bold like Kenyan’s President Uhuru Kenyatta, who flatly rejected Barack Obama’s calls for gay rights, during Obama’s visit to the country. The CCAP Livingstonia Synod spiritual father termed homosexuality as ‘pure evil’ and ‘animal-like behaviour’. Chipofya was asked to offer an opening prayer at the annual Ngoni event, but took advantage of his time on the microphone to appeal against same-sex marriages. He asked the President, who was in attendance, to firmly stand against “alien cultural influences”.’

‘Culture is good, but we should not allow some people to take advantage of our cultural celebrations to bring alien practices,” said Chipofya. He continued that “...homosexuality is pure evil. I appeal to you, the State president, to do

³⁰ UN Human Rights Council, Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 : Malawi , 23 February 2015, para 60, A/HRC/WG.6/22/MWI/2, available at:

<http://www.refworld.org/docid/5538e3194.html> accessed on 17 December 2015

³¹ UN Human Rights Council, Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 : Malawi , 23 February 2015, para 61, A/HRC/WG.6/22/MWI/2, available at:

<http://www.refworld.org/docid/5538e3194.html> accessed on 17 December 2015

as your Kenyan counterpart did to Obama. As a church and Malawians, we ask you to say no to this evil.'

'Human rights campaigners have been pressing for the government to decriminalize homosexuality, saying there should be no discrimination on the basis of sexual orientation. During his visit to Kenya, US President Obama voiced strong support for gay rights in Africa – but Kenya's President, Uhuru Kenyatta branded it a "non-issue". The US President said that treating people differently eroded freedom and then "bad things happen" – but Kenyatta told President Obama that while the US and Kenya agree on a lot, there are some things that cultures or societies "just don't accept."³²

6.1.2 The Human Dignity Report updated on 25 October 2015 noted some homophobic statements by public figures. For example, on 2 May 2014, the report noted: 'Leader of the Malawi Congress Party Dr Lazarus Chakwera made a link between homosexuality and child abuse, claiming that homosexuality is a form of 'child exploitation'.

6.1.3 Furthermore, on 18 February 2014, 'Dr Salmin Omar Idruss, Secretary-General of the Muslim Association of Malawi, called for the death penalty to be introduced: "Even animals like goats don't do this, what more with human beings like us who were blessed with wisdom by the Almighty God? The offenders need to be handed the death penalty as a way of making sure that the issue is curbed."³³

6.1.4 However in regard to the comments of Dr Idruss, the Nyasa Times reported:

'Malawi's Justice and Constitutional Affairs Minister, Fahad Assani, has trashed calls by the Muslims Association of Malawi (MAM) to toughen the punishment for homosexual acts to include death penalty.

'MAM general secretary Shiek Salmim Omar Idruss said those convicted of homosexual acts should face a death penalty and not 14 years jail as the law states now.

'Idruss argued that capital punishment was the only way to rid society of homosexuality. 'However, Assani said pushing such a law there will be an international outcry, which could see some countries suspend aid to the country. Speaking in a telephone interview with Nyasa Times, Assani said Malawi is a democratic country and cannot promote homophobia and impose death penalty on gays.'³⁴

³² No to Gay Rights in Malawi: CCAP Spiritual Father tells Mutharika to be Bold Like Kenya's Uhuru – 9 August 2015 <http://www.nyasatimes.com/2015/08/09/no-to-gay-rights-in-malawi-ccap-spiritual-father-tells-mutharika-to-be-bold-like-kenyas-uhuru/> Date Accessed: 2 September 2015

³³ Human Dignity Trust, Criminalisation of homosexuality: Malawi, 25 October 2015, http://www.humandignitytrust.org/uploaded/Map/Country_Reports/Malawi.pdf, accessed on 17 December 2015

³⁴ Nyasa Times, [Malawi govt rejects anti-gay law advanced by Muslims](#), 19 February 2014, accessed

6.1.5 The USSD Report for 2013 observed:

'Public discussion of LGBT rights increased during the year. For example, on 7 September [2013], a local NGO that campaigns for LGBT rights showed a documentary film on anti-LGBT efforts in Uganda. After the film a discussion on LGBT matters followed between 40 LGBT persons and an estimated 80 clergy members.

'The Weekend Nation newspaper continued to publish a weekly column entitled "Sexual Minority Forum." On 22 and 23 June, the Centre for Human Rights and Rehabilitation and the Centre for Development of People held a workshop for lesbians and bisexual women where they talked about the discrimination they face.'³⁵

6.1.6 The USSD Report for 2014 noted that:

'Public discussion of LGBT rights increased during 2014. In October 2014 the Centre for Human Rights and Rehabilitation and the Centre for Development of People released a Report documenting 76 instances in 2013 of discrimination and human rights violations in the country based on sexual orientation and gender identity. Documented abuses included mob violence and police harassment directed toward gay or allegedly gay men. For example, the Centre reported that in July 2013 a gay man named Vincent was beaten by a mob and subsequently arrested and assaulted by police.

'The Weekend Nation Newspaper continued to publish a weekly column entitled "Sexual Minority Forum" written by the leaders of two human rights non-governmental organisations (NGOs) to shed light on conditions affecting LGBT persons and their rights.'³⁶

6.1.7 The UN Human Rights Council noted in May 2015 report that: 'HR Committee was concerned that consensual same-sex sexual activity among consenting adults was still criminalized and about reports of violence against LGBTI persons....It also stated that Malawi should prosecute the perpetrators of violence against LGBTI persons; compensate the victims; and ensure that public officials refrained from using language that might encourage such violence.'³⁷

on 6 January 2016

³⁵ United States Department of State, [Country Reports on Human Rights Practices, Malawi 2013](#) Section 6, published February 2014, accessed 28 September 2015

³⁶ United States Department of State, Country Reports on Human Rights Practices, Malawi 2014, Section 6, Published 26 June 2015 <http://www.state.gov/documents/organization/236590.pdf> Date Accessed 28 September 2015

³⁷ UN Human Rights Council, Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 : Malawi , 10

6.1.8 The Centre for Human Rights and Rehabilitation (CHRR) noted in its Annual Report covering 2014 that:

‘... [while] consensual homosexuality remained criminalized but the government did not enforce these laws during the year. Notwithstanding the “moratorium on arrest of people engaged in homosexual activity”, in September 2014, CHRR and [Centre for the Development of People] CEDEP published a ground breaking study which showed that up to 76 cases of human rights violations based on sexual orientation and gender identity were recorded, ranging from physical assault, harassment at their work places and homes, forced evictions to loss of employment. In February 2014, campaigners for same sex relations were shocked when press reports indicated that the Muslim Association of Malawi had called for the death penalty for gays. Human Rights Defenders for LGBTI rights were also a constant subject of ridicule and hate speech. Often political leaders did not show leadership by condemning hate speech.’³⁸

6.1.9 The same source stated that:

‘Furthermore, societal stigma and discrimination had a detrimental impact on the enjoyment of the right to health. The LGBTI persons were left out from public health support initiatives including from HIV information, support and services. Such information is necessary to enable LGBTI persons to make informed decisions and consequently reduce their vulnerability to HIV.’³⁹

The same report under a Section titled positive developments stated that:

‘During the year [2014], there were some notable improvements in the reporting of LGBTI issues by the mainstream media. For example, both the Nation and the Daily Times newspaper featured stories about Malawians in same sex relationships. Some key religious and traditional leaders publicly supported CHRR and CEDEP advocacy programmes on LGBTI issues. The changes albeit minimal suggest an improved understanding of the rights of the LGBTI persons that may be attributed to awareness raising programmes implemented by CHRR and CEDEP. Nevertheless, the Malawi Human Rights Commission (MHRC), a constitutional body blessed with a broad mandate to

February 2015, A/HRC/WG.6/22/MWI/3, para 45, available at:

<http://www.refworld.org/docid/5538e3c04.html>, accessed on 17 December 2015

³⁸ Centre for Human Rights and Rehabilitation, Annual Human Rights Report 2014, covering events between 1 January and 31 December 2014, undated, p55-56, <http://chrrmw.org/downloads/CHRR%202014%20Human%20Rights%20Report.pdf>, accessed on 7 October 2015

³⁹ Centre for Human Rights and Rehabilitation, [Annual Human Rights Report 2014](#), covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

protect and promote human rights in the country remained silent on LGBTI issues.⁴⁰

6.1.10 The UN Human Rights Committee noted in its Concluding Observations in a report dated 19 August 2014 that:

‘The Committee is concerned that the Malawi Human Rights Commission does not function fully independently and is not yet adequately funded. The reluctance of the Commission to engage on issues related to the rights of LGBTI persons is also a source of concern for the Committee.’⁴¹

6.1.11 The International Gay and Lesbian Human Rights Commission continued that:

“It is, of course, good to know that our government recognizes that the criminalization of consensual adult same-sex sexual acts is a human rights concern,” said Gift Trapence, Executive Director of CEDEP, who was present during the dialogue. “But the information offered to the Committee is manifestly wrong. Adults engaging in same-sex sexual conduct are being arrested and imprisoned, and several are in prison even as the government denies their existence.”⁴²

‘In its presentation to the Human Rights Committee, the Malawian Government also indicated that criminal provisions regarding consensual adult same-sex sexual acts have been referred to the Law Commission for consultations, but that such consultations have been delayed because of financial concerns. “The Law Commission certainly has a mandate to review our laws, but this is by no means the only route towards better compliance with the country’s human rights obligations,” said Trapence. “A law could be declared unconstitutional by the Courts, prompting a change, or Members of Parliament can introduce Private Members Bills. Both of these options could potentially provide a faster solution the suffering of so many.”⁴³

‘IGLHRC, CEDEP and 3 other civil society groups submitted shadow reports that document deficiencies regarding Malawi’s legal and policy framework to protect civil and political rights, including the continued explicit criminalization of consensual sexual acts between adults of the same sex. “The Committee

⁴⁰ Centre for Human Rights and Rehabilitation, [Annual Human Rights Report 2014](#), covering events between 1 January and 31 December 2014, undated, p56, , accessed on 7 October 2015

⁴¹ Human Rights Committee, Concluding observations on the initial periodic report of Malawi, 19 August 2014, para 6, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMW%2fCO%2f1%2fAdd.1&Lang=en, accessed on 17 December 2015

⁴² International Gay and Lesbian Human Rights Commission - UN Human Rights Committee Identifies Human Rights Violations Against Persons Based on Sexual Orientation in Malawi – 10 July 2014 <http://iglhrc.org/content/un-human-rights-committee-identifies-human-rights-violations-against-persons-based-sexual> Date Accessed 28 September 2015

⁴³ International Gay and Lesbian Human Rights Commission - UN Human Rights Committee Identifies Human Rights Violations Against Persons Based on Sexual Orientation in Malawi – 10 July 2014 <http://iglhrc.org/content/un-human-rights-committee-identifies-human-rights-violations-against-persons-based-sexual> Date Accessed 28 September 2015

raised the criminalization of consensual adult same-sex sexual acts as a serious concern,” said Marianne Møllmann, Director of Programs of IGLHRC. “The Committee understands that, when people are criminalized because of their real or perceived sexual orientation, this affects their ability to get jobs, go to school, or access potentially life-saving health treatment.”⁴⁴

6.1.12 According to the The Marabi Post, in their article, ‘Caught Doing It – Two Malawians Girls Dismissed From School Over Lesbianism Act’–

‘Two girls have been dismissed from Michiru Secondary School in Blantyre for allegedly being found in a lesbianism act. The Malawi Penal Code, under Section 137A provides that any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, shall be guilty of an offence and shall be liable to imprisonment for five years.’⁴⁵

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⁴⁴International Gay and Lesbian Human Rights Commission - UN Human Rights Committee Identifies Human Rights Violations Against Persons Based on Sexual Orientation in Malawi – 10 July 2014 <http://iglhrc.org/content/un-human-rights-committee-identifies-human-rights-violations-against-persons-based-sexual> Date Accessed 28 September 2015

⁴⁵The Marabi Post – Caught Doing It – Two Malawians Girls Dismissed From School Over Lesbianism Act – 26 March 2014 <http://www.maravipost.com/life-and-style/people/5690-caught-doing-it-two-malawian-girls-dismissed-from-school-over-lesbianism-acts.html> Date Accessed 28 September 2015

Version Control and Contacts

Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors then email [the Country Policy and Information Team](#).

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email [the Guidance, Rules and Forms Team](#).

Clearance

Below is information on when this version of the guidance was cleared:

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- approved on: 2 February 2016

Changes from last version of this guidance

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