



Malawi – Researched and compiled by the Refugee Documentation Centre of Ireland on 29 November 2016

Any information on the mistreatment of lesbians in Malawi. Legal status of lesbians in Malawi

A 2011 press release from the International Commission Of Jurists states:

“The International Commission of Jurists (ICJ) expresses grave disappointment at Malawi’s recent enactment of a law criminalizing sexual relations between women. Such a law is an affront to human dignity and seriously undermines Malawi’s human rights commitments under international law. The ICJ urges that the Parliament undertake an immediate review with an eye to repealing all laws that currently criminalize sexual activity on the basis of the sex of the partners. In December 2010, the Parliament passed a bill amending the Penal Code of Malawi. In late January 2011, President Bingu Wa Mutharika assented to the bill, thus completing its enactment into law. The new Section 137A, captioned ‘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.” (International Commission Of Jurists (8 February 2011) *Sex Between Women Now a Crime in Malawi: New Law Violates Human Rights Obligations of Malawi*)

A submission by the Southern Africa Litigation Centre to the Committee on the Elimination of all Forms of Discrimination against Women, in a paragraph headed “Criminalisation of same sex acts between women”, states:

“In 2011, President Bingu Wa Mutharika approved an amendment to the Penal Code which provides a punishment of up to five years imprisonment for same sex acts between women. SALC is concerned that, as a result of this criminalisation, women seen to be engaging in same sex acts will be subjected to intersectional discrimination. SALC is particularly concerned that this amendment will limit access to services, including health care services, for lesbian women and/or those perceived to be lesbian. Due to the discrimination women already experience, the additional discrimination based on sexual orientation is likely to affect them to a greater degree than men in a similar position.” (Southern Africa Litigation Centre (SALC) 30 September 2015) *Update Submission to the Committee on the Elimination of all Forms of Discrimination against Women Regarding the Government of Malawi’s 7th Periodic Report*)

In “Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change” (chapter titled “The LGBT situation in Malawi: an activist perspective”) human rights activist Undule Mwakasungula states:

“On the subject of discrimination, a bone of contention over the years has been the exclusion from criminalisation of ‘indecent practices’ between females. This debate was, however, rested in 2010 when Parliament passed a new law criminalising consensual same-sex activity between women. The new law, Section 137A, captioned ‘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’. Reasons for introducing this new law were made clear. The then Justice and Constitutional Affairs Minister, Dr George Chabonda, did not mince words when defending this new law. Addressing a press conference soon after the law was passed, Chabonda described the new law as ‘gender sensitive’, saying government wanted to include women ‘to ensure that homosexuality is criminalised without discrimination’” (Mwakasungula, Undule (2013). *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*. Institute of Commonwealth Studies, School of Advanced Study, University of London, pp. 359-379)

A statement released by the US-based NGO OutRight Action International states:

“The International Gay and Lesbian Human Rights Commission (IGLHRC) today raised serious concerns about discriminatory provisions in a law signed by Malawi’s President Mutharika that is expected to go into effect today. 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—a positive move to combat child marriage—it also promotes a policy of exclusion against LGBTI Malawians that would likely translate into discrimination in education, housing, jobs and elsewhere.” (OutRight Action International (17 April 2015) *Serious Concerns Raised Over Discriminatory Malawi Law Targeting LGBTI People*)

A report from Human Rights Watch states:

“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 offenses’ under Malawi’s Penal Code – a provision used to criminalize consensual same-sex relations between adults – by listing a conviction for such an offense as acceptable evidence of irretrievable marriage breakdown.” (Human Rights Watch (17 April 2015) *Malawi: New Marriage Law Can Change Lives*)

An article from Malawian newspaper the Nyasa Times states:

“Malawi government has vehemently rejected a push by the UN human rights council to legalise same sex relationships and abolish death penalty in Malawi. Secretary for Justice and Solicitor General Jane Chikaya Banda confirmed the government’s stance on the matter. Banda said legalising same

sex would be against the Constitution of the Republic of Malawi and values of Malawians.” (Nyasa Times (25 September 2015) *Malawi Tells UN No to Homosexuality*)

A Voice of America news report states:

“The Office of the U.N. High Commissioner for Human Rights said it is concerned by developments in Malawi that could stoke anti-gay sentiment, including incitement to murder. It expressed fears the decision by Malawi’s chief prosecutor to drop charges against an individual accused of inflammatory statements against gays and lesbians could have serious consequences. Earlier this month, the spokesman of one of the country’s main political parties publicly, and on several occasions, described gay and lesbian people as ‘worse than dogs’ and called for them to be killed.” (Voice of America (22 January 2016) *Incitement to Anti-Gay Killings in Malawi Concerns UN*)

The 2016 Freedom House report for Malawi, in a section titled “Civil Liberties” (sub-section F “Rule of Law”), states:

“Consensual sexual activity between same-sex couples remains illegal and punishable by up to 14 years in prison. However, the application of the law has been suspended pending a High Court decision on its constitutionality, and in December 2015 the government dropped charges against two men who had been charged under its provisions. A new marriage law that took effect in April 2015 defined marriage as between a man and a women, ruling out the possibility of same-sex marriages.” (Freedom House (18 August 2016) *Freedom in the World 2016 – Malawi*)

The 2015 US Department of State country report for Malawi, in a section titled “Acts of Violence, Discrimination, and Other Abuses Based on Sexual Orientation and Gender Identity”, states:

“LGBTI persons are denied by law and practice basic civil, political, social, and economic rights. Consensual same-sex sexual activity is illegal and punishable by up to 14 years in prison, including hard labor. The penal code outlaws ‘unnatural offenses’ and ‘indecent practices between males.’ In July 2014, however, Solicitor General Janet Banda told the UN Human Rights Commission that the government would not enforce these laws. On December 19, Minister of Justice Samuel Tembenu reaffirmed the moratorium on the enforcement of laws criminalizing consensual same-sex sexual activity. “(US Department of State (13 April 2016) *2015 Country Reports on Human Rights Practices*, p.21)

This section of the report also states:

“Same-sex sexual 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 for conviction of five years.” (ibid, p.22)

A Voice of America news report states:

“A high court in Malawi has ordered the annulment of a government moratorium issued in 2012 that suspended a law criminalizing homosexual acts. The government had suspended enforcement of the anti-gay laws pending parliamentary review after rights campaigners said the laws were unconstitutional. The court’s order to enforce the anti-gay laws comes two months after government authorities ordered police to respect the moratorium by unconditionally pardoning two suspected gays who were arrested in December last year in the capital, Lilongwe.” (Voice of America (12 February 2016) *Malawi Court Annuls Government Suspension of Anti-Gay Laws*)

An article from the Washington Post states:

“Local opinion leaders and some civil society groups objected to the release of Kulemekka and Gonani, and reject the moratorium. That includes the Malawi Human Rights Commission, which argued that the executive branch does not have the power to suspend laws. Legal experts in Malawi agree, saying the moratorium was unconstitutional. The Young Pastors Coalition of Malawi – which opposed Kulemekka and Gonani’s release and called for their re-arrest – sought and was granted an injunction by the High Court in Mzuzu against the moratorium. The High Court ordered Malawians engaging in same-sex acts be arrested and prosecuted until such a time when the law is repealed by Parliament.” (Washington Post (1 March 2016) *This one graph shows the biggest threat to LGBT rights in Malawi*)

This response was prepared after researching publicly accessible information currently available to the Research and Information Unit within time constraints. This response is not and does not purport to be conclusive as to the merit of any particular claim to refugee status or asylum. Please read in full all documents referred to.

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