



SOUTHERN AFRICA
LITIGATION CENTRE

AFRICAN CIVIL SOCIETY CONDEMN MALAWI CRIMINALIZING CONSENSUAL SEXUAL RELATIONS BETWEEN ADULT WOMEN

We, African civil society organizations, condemn the recent actions of the Malawian Parliament and President Bingu wa Mutharika amending the Penal Code to expand criminal penalties to adult women who engage in consensual same sex relations. This amendment is in direct violation of Malawi's legal obligations, undermines an effective response to HIV and is un-African.

The amendment clearly violates fundamental rights enshrined in Malawi's Constitution. Specifically, section 20(1) of the Constitution protects against discrimination "in any form". Furthermore, the Constitution guarantees that every person has the right to dignity, under article 19(1); freedom of association, under article 32; freedom of expression, under article 35; and the right to personal privacy, under article 21.

The protection of these rights is further provided for under Malawi's obligations under regional law. The African Charter on Human and Peoples' Rights (ACHPR), ratified by Malawi, guarantees non-discrimination, dignity and freedom from cruel, inhuman and degrading treatment, liberty, expression, and association under articles 2, 5, 6, 9(2), and 10(1) respectively. With particular application to women, the Protocol to the ACHPR on the Rights of Women in Africa, ratified by Malawi in 2005, acknowledges the importance of protecting African women's rights to dignity, to the free development of her personality and security of person under articles 3 and 4.

These rights are reinforced under Malawi's obligations under the International Covenant on Civil and Political Rights (ICCPR), which Malawi has also ratified, protecting the right to non-discrimination; equality; liberty; privacy; and dignity. The Human Rights Committee, tasked with interpreting the nature and extent of the rights enshrined in the ICCPR, held that laws criminalizing consensual relationships between same-sex adults violated the rights to privacy and non-discrimination under the ICCPR.

In addition to violating Malawi's fundamental legal obligations, this amendment will undermine Malawi's efforts to address HIV among people engaging in same sex relations—a group the Malawian government has recognized as vulnerable to discrimination and critical to its efforts to effectively respond to the HIV epidemic. The National HIV/AIDS Policy states: "Government and partners shall put in place mechanisms to ensure that HIV/AIDS/STI prevention, treatment, care and support and impact mitigation services can be accessed by all without discrimination, including [persons engaged in same sex sexual relations]." The 2009 Malawi National HIV and AIDS Action Framework (NSF) end of term review stated: "Although the NSF singled out the youth as a vulnerable group to HIV infection, there are other HIV/AIDS high-risk target groups that require special attention. These include commercial sex workers, women and men in armed forces, truck drivers, men who have sex with fellow men, women who have sex with fellow women, intravenous drug users." This is reinforced by leading medical institutions as well as UNAIDS, UNDP and the World Health Organisation who recommend engaging persons having same-sex relations as a critical component of an effective response to HIV.

The amendment to the Penal Code contravenes the most basic rights guaranteed under Malawi's Constitution. Furthermore, criminalizing people engaging in same sex relations will create legal obstacles hindering the ability of governmental and non-governmental agencies to provide critical HIV services to this high risk group and increase the fear among the group of accessing the needed services. Finally, the amendment contravenes the basic

values we hold as Africans—to treat all with ubuntu. Therefore, we call on the Malawian Government to repeal this amendment.

Endorsed by:

1. Swaziland Positive Living (SWAPOL), Swaziland
2. AIDS and Rights Alliance for Southern Africa (ARASA), Namibia
3. Centre for Human Rights and Rehabilitation, Malawi
4. Centre for the Development of People, Malawi
5. National Women's Lobby Group (NAWOLG, Malawi
6. NSIDO, Malawi
7. Association for Secular Humanism, Malawi
8. Southern African Litigation Centre, South Africa
9. Gay Kenya, Kenya
10. Women working with Women (3W), Kenya
11. SCARJoV, Luanda – Angola
12. National Empowerment Network of PLHAs in Kenya, Nairobi, Kenya
13. PEMA Kenya, P.O Box 41562, G.P.O MOMBASA, Kenya
14. SISAL Madagascar, Antananarivo, Madagascar
15. Global Research and Advocacy Group (GRAG), SENEGAL
16. Botswana Network on Ethics, Law and HIV/AIDS, Botswana
17. SECTION27, INCORPORATING THE AIDS LAW PROJECT, Johannesburg, South Africa
18. Président de Protection Enfants Sida (P.E.S), REPUBLIQUE DEMOCRATIQUE DU CONGO
19. Alternatives- Cameroun, Cameroon
20. Positive Vibes, Namibia
21. Stay Alive Support Group, Mombasa, Kenya
22. Persons Marginalized and Aggrieved Kenya (PEMA Kenya), Kenya
23. AIDS Law Unit of the Legal Assistance Centre, Namibia
24. Artists For Recognition and Acceptance (AFRA-Kenya), Nairobi, Kenya
25. Youth Outreach on Rights and Development (YORD), Namibia
26. Ravane+ (Network Of People Living With HIV/Aids in the Indian Ocean Region), République de Maurice
27. The Civil Society Coalition on Human Rights and Constitutional Law-Uganda
28. Human Rights Awareness and Promotion Forum-Uganda
29. NYAWEK coalition of LGBTI, Western Kenya
30. Out-Right Namibia (ORN), Namibia
31. COLLECTIF URGENCE TOXIDA, Mauritius
32. Gay and Lesbian Activists Alliance of Washington, Washington, USA
33. EMPOWER INDIA - Professional Civil Society Organisation, INDIA
34. **Positive Lives India (PLI+), India**
35. Tupilak (Nordic Rainbow Cultural Workers), Sweden
36. ILGCN (International Lesbian & Gay Culture Network) Information Secretariat-Stockholm, Sweden
37. International secretary of the Nordic Rainbow Humanists, Sweden
38. Kåre Moen, Institute of Health and Society, University of Oslo
39. International Commission of Jurists, Switzerland
40. KAIPPG International, USA
41. ActALIVE Arts Coalition, USA
42. Caribbean Vulnerable Communities Coalition, Kingston, Jamaica