

# Universal Periodic Review of Malawi

36<sup>th</sup> Session

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JOINT STAKEHOLDER SUBMISSION

## Community Health Rights Advocacy (CHeRA)

<https://www.facebook.com/Community-Health-Rights-Advocacy-911280249012184/>



CHeRA is a male sex worker community led not for profit organisation founded by MSW based in Lilongwe Malawi in 2017. CHeRA works with MSW and MSM to raise awareness, capacity building of male sex workers in health rights advocacy, economic empowerment, income source diversification and financial independence and management, rapid response interventions for MSW facing prosecution and documentation of human rights abuses against MSW.

## African Sex Workers Alliance (ASWA)

<https://aswaalliance.org/>



The African Sex Workers Alliance (ASWA) is the Pan African alliance of sex worker-led organisations formed in 2009 with membership from 33 countries. The organisation's mission is to amplify the voices of sex workers as well as advocate for the health and human rights of the diverse community of sex workers working and living in Africa.

## Sexual Rights Initiative

[www.sexualrightsinitiative.com](http://www.sexualrightsinitiative.com)



The Sexual Rights Initiative (SRI) is a coalition of national and regional organizations based in Canada, Poland, India, Argentina, and South Africa with an office in Geneva that has been advocating for the advancement of human rights in relation to gender and sexuality in the UN human rights system since 2006.

### Key Words

Sex workers' rights, criminalisation of adult sex work, police violence and corruption, violence and discrimination against sex workers, sexual orientation and gender identity and expression, access to sexual and reproductive health services, HIV and AIDS.

## Executive Summary

1. This report has been prepared by CHeRA and ASWA with technical support from the Sexual Rights Initiative. The report draws heavily on the experience of CHeRA in working primarily with male sex workers and men who have sex with men and research undertaken by ASWA in Malawi as part of a 2019 study on violence against sex workers in Africa<sup>1</sup> (referred to throughout this report as the ASWA Study).
2. The legal, policy, social and economic conditions for sex workers in Malawi remain challenging and without improvement in the years since the last UPR. Many of the specific challenges raised by sex worker advocates during Malawi's last UPR remain the same. Despite highlighting these in the last review, Malawi did not receive any recommendations that directly addressed sex workers rights violations.
3. The criminalisation of some aspects of sex work and the widespread lack of clarity about the legal status of sex work leads to high levels of violence and discrimination against sex workers by state and non-state actors, an almost complete impunity (less than 10% of reported cases are even prosecuted) for perpetrators of this violence and discrimination and lack of support, redress and justice for survivors of violence. Male sex workers are additionally targeted by state and non-state actors based on the legal status of same sex conduct which is criminalised in Malawi.
4. Sex workers also face significant barriers in accessing health care services - including sexual and reproductive health services and information. Sex workers are subjected to psychological and physical acts of violence by healthcare workers and others employed at healthcare facilities. There have been documented cases of healthcare workers reporting gay men and trans\* sex workers to the police. The experiences of discrimination and violence, and fear thereof, leads to sex workers not having access to information and services and has a detrimental impact on their health.
5. Female sex workers and men who have sex with men are listed as key populations that require specific programs and responses. Both groups show a higher prevalence rate than the general population in Malawi. UNAIDS reports the HIV prevalence rate among sex workers to be 55% (2018), although the Malawian National HIV Prevention Strategy (2015 - 2020) quotes the HIV prevalence among female sex workers to be 71%. There is no specific data available on the HIV prevalence among male sex workers, as the HIV prevalence rate among these individuals is reflected under the MSM population. Sex workers are at increased exposure to HIV transmission as a result of the high levels of sexual violence they are exposed to, lack of information about HIV prevention and lack of access to HIV prevention methods among other factors. In addition, sex

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<sup>1</sup> African Sex Worker Alliance (2019). *"Every sex worker has got a story to tell about violence"*: Violence against sex workers in Africa. Nairobi.

- workers who are on HIV treatment may default on treatment because of frequent arrests and detention during which time they are unable to take their treatment.
6. The ongoing harassment, violence and precarious working conditions of sex workers also have a negative impact on their mental health and wellbeing with high rates of depression and post traumatic stress disorder being reported.
  7. This report puts forward a number of recommendations on decriminalising all aspects on adult sex work and the amendment of other laws used to harass and exploit sex workers; improving the health outcomes of sex workers by strengthening health systems and health service delivery; improving access to information and training for sex workers, and rights based training for health care workers, police and other state actors in the criminal justice system.

### **Progress and gaps in the implementation of recommendations from 2nd cycle of the UPR**

8. Despite Malawi not receiving any recommendations focusing specifically on sex work, a number of recommendations accepted by Malawi are relevant and important to review from a sex worker rights perspective:

8.1. Recommendations relating to sexual orientation, gender identity and expression

Take effective measures to protect lesbian, gay, bisexual and intersex persons from violence and prosecute the perpetrators of violent attacks. (Austria)

The criminalisation of same sex conduct has a direct impact on the levels of violence against persons based on their sexual orientation and gender identity and expression and their ability to access justice and services. The 2012 moratorium placed on the arrest and prosecution of consensual same sex acts was successfully challenged by conservative religious leaders with the result that the moratorium was suspended in 2016. The suspension of the moratorium represents a significant barrier to the implementation of the prevention component of this UPR recommendation.

Instead of police fulfilling their role in the opening of cases, providing information to survivors and investigating cases of violence against LGBTI persons, LGBT survivors or those perceived to be LGBT, instead report being harassed, beaten and insulted by police when seeking to report cases of violence.

In November 2016, the Malawian Office on the Solicitor General requested the Malawian Human Rights Commission to hold a public inquiry into “the controversial issue of LGBTI in Malawi”. This was immediately challenged by human rights NGOs who drew attention to the risk of using public opinion to inform the policy and legal framework on a human rights issue which also has been the subject of numerous treaty body and universal periodic review recommendations to Malawi.

8.2. Recommendations relating to gender based violence and violence against women and girls

Ensure strict compliance of laws relating to gender-based violence. (Ghana)

Intensify specifically its efforts to combat widespread violence against women and girls, including through gender-sensitive legislation, stronger enforcement of existing laws as well as by increasing public awareness and promoting gender equality. (Iceland)

Continue working on the implementation of actions which ensure effective access of women victims of gender violence to justice, reparation and social reintegration. (Uruguay)

The application of the laws and policies relating to gender based violence and / or violence against women do not adequately address the intersectional nature of violence and discrimination and instead reinforce narrow patriarchal, heteronormative ideas and gender norms. On the one hand this translates into services and programs that only cater to heterosexual women who comply with gender norms and expectations (i.e. narrowly defining which women qualify) and at the same time exclude marital rape and justify other forms of violence as punishment for breaching norms (i.e. narrowly defining what counts as gender based violence). Instead of addressing violence from an intersectional basis which would put poor women, migrant women, female sex workers, women with disabilities, lesbian bisexual and trans women at the centre of prevention and response programs and initiatives they are instead seen as not women enough to qualify for accessing these programs and services. The ASWA study found that there is a widespread perception that its not possible to rape a female sex worker, in other words she is seen as an individual without sexual autonomy and having no right to withhold consent. Malawi has not adequately addressed the underlying patriarchal and heteronormative beliefs and other interlocking systems of oppression that give rise to gender based violence and undermine individuals' rights to bodily autonomy.

### 8.3. Recommendations relating to health, HIV and AIDS.

Guarantee that people of the lesbian, gay, bisexual, transgender and intersex communities have effective access to health services, including treatment for HIV/AIDS. (Honduras)

Step up efforts to reduce the HIV/AIDS rate in the country.

The National AIDS Prevention Strategy (2016 - 2020) includes a number of positive actions to be taken in increasing the HIV prevention and response outcomes for key populations. Included in the document is an acknowledgement of the impact of criminalisation on health seeking behaviours and health outcomes for key populations. However, two of the key populations are very narrowly defined to include men who have sex with men (and not LGBTI persons) and female sex workers (excluding male sex worker and possibly trans\* women sex workers). There is also almost no data available for male sex workers (as a distinct group from men who have sex with men) or lesbian and bisexual women who are often seen as low risk groups for HIV / AIDS infection. The HIV Prevention Strategy acknowledges that even for the key populations MSM and female sex workers, there has been an underinvestment in information, services and products and this together with stigma, discrimination and legal barriers, continues to drive the prevalence rate among these groups up.

## **Developments, protection gaps and rights violations affecting sex workers since the last UPR of Malawi**

### **Legal and policy framework**

9. The Constitution of the Republic of Malawi, the Public Health Act and the Sexual and Reproductive Health Policy and Guidelines among laws and policies, all enshrine the rights to equality and to accessing health services without discrimination.
10. While there has never been a law that specifically criminalises the sale of sex services, certain aspects of sex work have been criminalised.
11. Section 146 of the Penal Act makes it illegal to live off the earnings of a sex worker. In the past, this was understood by lower order courts to include sex worker's own earnings as well as those of other sex workers. It has been used to bring charges against sex workers. In 2016 the High Court clarified that the intent behind Section 146 was to protect sex workers from those who exploit them, and does not criminalise sex work
12. Previously, Section 184(c) of the Penal Code provided that a person found in a place in circumstances which lead to the conclusion that such person is there for an illegal purpose, was deemed a rogue and vagabond. The "Rogue and Vagabond" clause was frequently used to harass sex workers. However, in January 2017, the Rogue and Vagabond law was struck down following strategic litigation by CHERA and SALC on behalf of a street vendor.
13. This lack of clarity in the law may also contribute to police abuse. As one respondent said in the ASWA Study:  
*"Laws are contradictory, not clear, so police officers are in between, they don't know which is which. They are just under the impression that they must stop sex work from happening."*<sup>2</sup>

### **Violence, harassment and extortion by police, clients and community**

14. Despite the changes in law, in particular the striking down of Section 184(c), police continue to misuse other laws prohibiting "idle and disorderly behaviour" to harass, arrest and extort monetary bribes or other sexual services from sex workers.
15. Similarly, despite the 2016 clarification of the intention of Section 146, police continue to invade brothels and arrest sex workers or extort money from them.
16. The lack of information about the legal status of sex work in Malawi, together with stigma and discrimination associated with sex work, state sanctioned violence and impunity for acts of violence against sex workers all create conditions that increase the vulnerability of sex workers to violence from clients, including clients refusing to pay for sexual services which they have received.
17. There have also been cases of collective / group violence against sex workers. CHERA has assisted more than 6 male sex workers over the past two years who were subjected to public violence by multiple perpetrators.
18. In almost all cases of sexual violence, the perpetrators do not use condoms and this increases the risk of HIV and STI infection and pregnancy for female sex workers.

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<sup>2</sup> African Sex Worker Alliance (2019). "Every sex worker has got a story to tell about violence": Violence against sex workers in Africa. Nairobi. p45

19. Sex workers are also subjected to other forms of structural, institutional and interpersonal discrimination and violence in almost every sphere of their lives. For instance, respondents in the ASWA Study reported the different manifestations of discrimination and violence they experienced as sex workers in Malawi:

*“You are not regarded as a whole person if you are a sex worker. When you are a sex worker, and you go to church, they change topics. The pastor will call you to go to the front and they will pray for you.”<sup>3</sup>*

*“Female sex workers are regarded as carriers of diseases. They are also regarded as a thief, you are always suspected when something is stolen. They think you are doing it for pleasure, they don’t understand that it is an occupation. They think that you can just have sex for free.”<sup>4</sup>*

20. As mentioned elsewhere other social markers and factors compound discrimination and violence faced by sex workers, these include sexual orientation and gender identity and expression, legal status in the country, HIV status among other factors. For instance, respondents in the ASWA Study reported that sex workers with albinism were highly vulnerable to being raped and murdered, due to cultural beliefs that sex with an albino could cure STIs, or that the bones of an albino had healing powers.

### **Underreporting and secondary victimisation**

21. Not surprisingly, given the stigma, discrimination and justified fears of secondary victimisation by police, sex workers are reluctant to report cases of violence by state and non-state actors. *“Some of us if we’ve been beaten up, if we’ve been abused, if we’ve been violated in any way, we just stay silent, we don’t even tell our friends. Like not even reporting to the police. We just stay quiet. We don’t want anyone to know”<sup>5</sup>* Respondent in the ASWA Study.
22. Even when sex workers do attempt to report these cases they are often turned away, or subjected to ridicule and verbal and physical assault, or are themselves arrested. The result of this is that there is little accurate data on the levels and patterns of violence experienced by sex workers.

### **Lack of investigation and prosecution by police and law enforcement**

23. The underreporting together with the failure of police to open cases reported to them is compounded by poor-quality investigation and low levels of prosecution. CHERA estimates that less than 10% of cases of violence are prosecuted.

### **Barriers to healthcare and increased HIV and STI exposure and unwanted pregnancies**

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<sup>3</sup> African Sex Worker Alliance (2019). *“Every sex worker has got a story to tell about violence”*: Violence against sex workers in Africa. Nairobi. p47

<sup>4</sup> Ibid p49

<sup>5</sup> Ibid p52

24. Although the National HIV Prevention Strategy (2015 - 2020) specifically introduces measures aimed at increasing access to HIV and other SRHR services for female sex workers and men who have sex with men, these have been slow to take effect.
25. Health services are not accessible across the country and there have also been instances reported of sex workers being verbally and physically abused by health care workers and other staff at healthcare facilities (such as security guards, administrators etc). Sex workers - particularly male and trans\* sex workers - have been reported by healthcare workers to police when they have gone to access services or products.
26. Healthcare workers also routinely breach sex workers right to privacy and confidentiality by disclosing information about sex workers health and HIV status to other patients, clinic staff and community members, without sex workers consent.
27. Stigma surrounding HIV status is compounded by anti-sex work sentiment and in the case of male or trans\* sex workers, by heteronormative prejudice. This has a direct impact on sex workers right to AFAQ services and their right to health.
28. Despite provision of pre-exposure prophylaxis (PrEP) being included within the National AIDS prevention strategy (although without any specific targets set) sex worker advocacy groups report very low access to PrEP, in only four districts and through a Medicines Sans Frontiers project in the Southern region of Malawi. The future of this rollout is uncertain beyond December 2019.
29. Prevention of Mother to Child HIV Transmission (PMTCT) programmes continue to ignore the needs and rights of unmarried women and female sex workers. The PMTCT programme requires pregnant women to attend their first antenatal clinic visit with their spouse. Mother to child transmission among sex workers and unmarried women is therefore higher than among married women who are able to access PMTCT services.

### **Impact on mental health and wellbeing**

30. Research conducted in 2018, found that the prevalence of post traumatic stress disorder and major depression among sex workers was 8%. In addition, just under half of all female sex workers reported experiencing mild depression<sup>6</sup>.
31. It is important to note, that sex work itself is neither inherently violent nor the cause of mental health problems but rather that the criminalised conditions, stigma and discrimination, lack of access to justice, rights based services and redress all contribute to the mental health and wellbeing problems experienced by sex workers.
32. Some sex workers interviewed in the ASWA Study reported self-policing and self-censorship as ways of mitigating the risk of violence and discrimination. One gay male sex worker respondent said that he dressed conservatively whenever he appeared in public, and only dressed in a sexy

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<sup>6</sup> MacLean, S. A., Lancaster, K. E., Lungu, T., Mmodzi, P., Hosseinipour, M. C., Pence, B. W., ... Miller, W. C. (2018). Prevalence and Correlates of Probable Depression and Post-Traumatic Stress Disorder Among Female Sex Workers in Lilongwe, Malawi. *International Journal of Mental Health and Addiction*, 16(1), 150–163. <https://doi.org/10.1007/s11469-017-9829-9>

way in places where it was safe to do so<sup>7</sup>. Self-policing and -censorship undermine individuals right to freedom of expression among other rights.

## **Recommendations**

33. Decriminalise all aspects of voluntary sex work, including 'Living on the proceeds of sex work' and place a moratorium on the use of this and any other laws or bylaws that are used to harass, detain or extort money or sex from sex workers.
34. Repeal laws that criminalise consensual same sex conduct and immediately reinstate the moratorium on the arrest and detention of persons for no reason other than their real or perceived sexual orientation and gender identity and expression and/ or suspected or actual consensual same sex conduct.
35. Review and update training curriculum for police, law enforcement and other criminal justice personnel to include current legal and policy framework on sex work and ensure that the curriculum is rights based and in line with international norms and standards. Integrate this content into basic training for new officials and also as part of in service training for officials who have been working in the field for some time.
36. Put in place effective mechanisms, such as training for health care workers on human rights as well as feedback mechanisms, to ensure that the delivery of public health services is done in a rights based, confidential, respectful and non-judgmental manner.
37. The Ministry of Health should revisit the delivery mode of the Prevention of Mother to Child Transmission of HIV (PMTCT) programme, to remove any access barriers that prevent sex workers and unmarried women from accessing PMTCT services.
38. The Ministry of Health should collaborate with the police to have referral health facilities that are close to police stations where all arrested individuals, including sex workers, can easily access antiretroviral therapy while in police custody.
39. The Ministry of Justice and the Ministry of Gender and Social Welfare, with the Malawi Human Rights Commission (MHRC) should embark on awareness programmes to empower all marginalized groups, including sex workers, to know their rights, including sexual and reproductive rights, and know how to take action when their rights have been violated.
40. The Ministry of Justice and the Ministry of Gender and Social Welfare, with the Malawi Human Rights Commission (MHRC), should embark on awareness programmes for the general population so that everyone is aware of the rights of sex workers and respects them.

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<sup>7</sup> ASWA Study on Violence Against Sex Workers in Africa p55



41. The Ministry of Justice and the Ministry of Gender and Social Welfare, with the Malawi Human Rights Commission (MHRC), should embark on a training programme for the police, judicial staff, prison staff and health personnel on gender, sexuality, sexual and reproductive rights, including the rights of sex workers.
  
42. The Government should put in place and strengthen monitoring and feedback mechanisms so that the police personnel and health service providers who violate sex workers' rights with impunity are identified and punished accordingly once they are found guilty.