

 Malawi	
<p>National Law: <i>Penal Code, Chapter 7:01</i>¹</p> <ul style="list-style-type: none"> - S153: Unnatural Offences² - S154: Attempt to Commit Unnatural Offences³ - S156: Indecent Practice between Males⁴ - S137A: Indecent Practice between Females⁵ 	<p>Maximum Penalties:</p> <ul style="list-style-type: none"> - 14 years' imprisonment, with or without corporal punishment - 7 years' imprisonment, with or without corporal punishment - 5 years' imprisonment with or without corporal punishment - 5 years' imprisonment
<p><u>Treaty Ratification</u> AFRICAN CHARTER</p> <p>CAT CEDAW CRC ICCPR ICCPR OP ICESCR</p>	
<p>The law is applicable to both men and women (S153); men (S156); and women (S137A) respectively.</p>	
<p>Enforcement</p>	<ul style="list-style-type: none"> - 2014: The US Human Rights Country report notes that same-sex activity may also be prosecuted as 'conduct likely to cause a breach of the peace'.⁶ - 14 July 2014: The Malawi Government announced a moratorium on its anti-gay laws. In a statement to the UN Human Rights Committee in Geneva, Secretary for Justice and Attorney General, Janet Chikaya-Banda said that while no formal body had been created to review the possibility of decriminalising homosexuality in Malawi, there is political will to do so.⁷ After rejecting claims that there was a moratorium on prosecutions in 2012 (see below), the Malawi Government has now confirmed that police have been instructed not to arrest people for homosexuality. Reports suggest that no one in Malawi has been arrested since 2012.⁸ A number of examples before 2012 are presented in the 2012 UK Country of Origin Report.⁹ - 5 November 2013: The Malawi High Court announced its plan to review the constitutionality of the country's sodomy laws, having '<i>exercis[ed] its own jurisdiction under the constitution and the Courts Act</i>'. This review arises from confirmation cases involving 3 individuals who had been convicted in 2011 for sexual acts of a non-consensual nature. Those seeking to overturn the nation's anti-gay laws include the Malawi Law Society, the Centre for Development of the People (Cedep), 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

	<p>affected by HIV.¹⁰ The Attorney General's office and Pastor Nick Chakwera are arguing in favour of retaining the law.¹¹ The Attorney General raised a preliminary objection to the High Court's constitutional review based on procedural grounds, which has delayed consideration of the substantive issues. The Attorney General's objection is currently on appeal to the Court of Appeal. A hearing on the merits is stayed until the conclusion of the appeal.</p> <ul style="list-style-type: none"> - 18 May 2011: Steven Monjeza and Tiwonge Chimbalanga were prosecuted and sentenced to 14 years imprisonment with hard labour. They were later pardoned by the president following an intervention by UN Secretary General, Ban Ki-Moon.¹²
<p>Statements by Public Figures</p>	<ul style="list-style-type: none"> - September 2015: President Peter Mutharika has reportedly stated that Malawians will be able to decide through a referendum on whether legalise same-sex relationships.¹³ - June 2015: The UNAIDS and Lancet Commission report, <i>Defeating AIDS - advancing global health</i>, recommended that new paths be forged to uphold human rights and address criminalisation, stigma, and discrimination using practical approaches to change laws, policies, and public attitudes that violate human rights.¹⁴ The Commission was co-chaired by former President, Joyce Banda. - February 2015: Civil Society Organisations are pressing President Peter Mutharika, who was elected in May 2014, to declare his stand on LGBT rights.¹⁵ In September 2014, the Centre for Human Rights and Rehabilitation (CHRR) partnered with Centre for Development of People (Cedep) had issued an assessment of President Mutharika's performance, in the first 100 days of office, from a human rights perspective.¹⁶ The report raised concern about the administrations silence on sexual minority rights. - 2 May 2014: 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'.¹⁷ - 18 February 2014: Dr Salmin Omar Idruss, Secretary-General of the Muslim Association of Malawi, called for the death penalty to be introduced: <p style="margin-left: 40px;"><i>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.</i>¹⁸</p> - 7 November 2012: After criticism by church groups and the Law Society, Justice Minister Ralph Kasambara denied earlier reports saying that a moratorium had been put in place, preventing the arrest of anyone under the country's anti-gay laws.¹⁹

	<ul style="list-style-type: none"> - 21 May 2012: Kamuzu Chibambo, head of the Malawian opposition party, said decriminalising homosexuality would be a ‘grave mistake’ and urged parliament ‘to resist any intention directly or indirectly to legalize same-sex marriages.’²⁰ - 18 May 2012: On assuming office, then President Joyce Banda announced at her first State of the Union address, her intention to repeal laws criminalising homosexuality. However, due to strong domestic pressure President Banda reversed her position and explained that the people of Malawi apparently were not ready to repeal the country’s laws against homosexual activity.²¹ - While in the United States for a speech to the United Nations, Banda reportedly stated: <i>Anyone who has listened to the debate in Malawi realizes that Malawians are not ready to deal with that right now. I as a leader have no right to influence how people feel.... Where Malawi is and most African countries are, is maybe where America or the U.K. were about 100 years ago. The best thing the world can do is to allow each country to take its course, to allow each country to have that debate freely without the pressure of being pushed. We have seen countries where homosexuals have been killed. Why? Because, in my view, the country - the nation - wasn’t ready.</i>²² - There have been numerous and frequent homophobic outbursts in the last few years from politicians and religious groups. - 2009: The first time homosexuality was raised in public was when Secretary for Nutrition, HIV and AIDS, Dr Mary Shaba argued that Malawi should recognise the rights of its gay population as part of its fight against AIDS.²³
Persecution and Discrimination	<ul style="list-style-type: none"> - 2014: The US Human Rights Country Report documented that public discussion of LGBT rights increased during the year. In October the Center for Human Rights and Rehabilitation and the Center 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.²⁴ - 2013: There were few reported examples of persecution. One report did stress the problem of blackmail of sexual minorities.²⁵
Legislative	<ul style="list-style-type: none"> - April 2015: The Marriage, Divorce and Family Relations Act 2015 became law following the President’s assent.²⁶ While the new law makes important strides to prevent child marriage, it also includes provisions that discriminate against LGBTI

<p>News</p>	<p>persons. Although Malawi’s constitution does not expressly preclude marriage for same-sex couples, the Marriage Act limits marriage to ‘persons of the opposite sex.’ The new law also reinforces the prohibition of ‘unnatural offenses’ under Malawi’s Penal Code by listing a conviction for such an offence as acceptable evidence of irretrievable marriage breakdown.²⁷</p> <ul style="list-style-type: none"> - February 2015: According to the 2nd Cycle UPR stakeholder report, the relevant provisions of the Penal Code that criminalise consensual sexual conduct between adults have been referred to the Law Commission for review, but that the Law Commission was yet to take any significant action towards repealing those provisions.²⁸ Malawi’s National Report, which was submitted as part of the UPR process, made no mention of decriminalisation or the rights of LGBT persons.²⁹ - August 2014: The ICCPR Human Rights Committee raised concerns about the independence of the Malawi Human Rights Commission and the rights of LGBTI persons. In particular, it was concerned about the reluctance of the Commission to engage in issues related to the rights of LGBTI persons.³⁰ The Committee also raised concern that consensual same-sex sexual activity among consenting adults was still criminalized. There were also reports of cases of violence against LGBTI persons and that, owing to the stigma, these persons do not enjoy effective access to health services. The Committee recommended that the Commission fully comply with its mandate and engage in all human rights issues, including those related to the rights of LGBTI persons, and that Malawi review its legislation to explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination and repeal the provisions that criminalize homosexuality and other consensual sexual activities among adults. - February 2013: The National Assembly passed the Gender Equality Act. This legislation focused on discrimination against women and did not address other forms of discrimination.³¹ - 2011: Malawi rejected recommendations to decriminalise homosexuality and all other laws, which lead to discrimination on the grounds of sexual orientation.³² - January 2011: Malawi Amended S137 of the Penal Code (gross indecency law) to extend its potential reach to criminalise lesbian women. - A constitutional challenge is currently underway in the courts (see above).
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¹ : http://www.malawilii.org/files/mw/legislation/consolidated-act/7:01/penal_code_pdf_14611.pdf.

This version does not yet include the 2011 amendment.

² *Penal Code, Chapter 7:01, s.153: ‘Any person who - (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him*

or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.'

³ Penal Code, Chapter 7:01, s.154: 'Any person who attempts to commit any of the offences specified in the last preceding section shall be guilty of a felony and shall be liable to imprisonment for seven years, with or without corporal punishment.'

⁴ Penal Code, Chapter 7:01, s.156: 'Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.'

⁵ 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.

⁶ US State Department, [Bureau of Democracy, Human Rights and Labor](#), *Country Reports on Human Rights Practices for 2014: Malawi 2014*,

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accessed on 5 September 2015

⁷ Stewart, C., 'It's official: No more Malawi arrests under anti-gay laws', *Erasing 76 Crimes*, 14 July 2014,

<<http://76crimes.com/2014/07/14/its-official-no-more-malawi-arrests-under-anti-gay-laws/>> accessed on 19 July 2014

⁸ Stewart, C., 'UN joins legal challenge to Malawi's anti-gay law', *Erasing 76 Crimes*, 21 January 2014,

<<http://76crimes.com/2014/01/21/un-joins-legal-challenge-to-malawis-anti-gay-law/>> accessed on 19 July 2014

⁹ UK Border Agency, *MALAWI: COUNTRY OF ORIGIN INFORMATION (COI) REPORT*, 31 October 2012,

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310462/Malawi_COI_report_2012.pdf> accessed on 19 July 2014

¹⁰ Stewart, C., '3 in Malawi prisons await ruling on sodomy law', *Erasing 76 Crimes*, 16 June 2014,

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<<http://76crimes.com/2013/11/06/malawi-high-court-weighs-overturning-anti-gay-law/>> accessed on 19 July 2014

¹¹ Ibid 10.

¹² Tenthani, R., 'Malawi court starts hearing landmark homosexual case', *Maravi Post*, 20 January 2014,

<<http://www.maravipost.com/scope/law-and-order/5265-malawi-court-starts-hearing-landmark-homosexual-case.html>> accessed on 19 July 2014

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¹⁴ UNAIDS and Lancet Commission, *Defeating AID - advancing global health*, 25 June 2015

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¹⁵ Malawi News Network, *CSOs Want Peter to Declare Stand on Homosexuality*, 13 February 2015,

<<http://www.malawinewsnetwork.com/csos-want-peter-declare-stand-homosexuality/>> accessed on 3 August 2015

¹⁶ CHRR and CEDEP, Mutharika's 100 Days in Office: A Road of Hope and Apprehension to the Future', *Malawi Voice*, 8 September 2014, <<http://malawivoice.com/2014/09/08/mutharikas-100-days-in-office-a-road-of-hope-and-apprehension-to-the-future/>> accessed on 23 September 2015

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