

*Law Commission Report 23*



MALAWI LAW COMMISSION

**REPORT OF THE LAW COMMISSION  
ON THE  
DEVELOPMENT OF THE GENDER  
EQUALITY ACT**

*February 2011*

ISBN: 978-99908-85-06-4

Printed by THE GOVERNMENT PRINTER, Lilongwe, Malawi

**The Malawi Gazette Supplement, dated 11th February, 2011, containing  
Report of the Law Commission (No. 13D)**

LAW COMMISSION REPORT NO. 23

CONSTITUTION OF MALAWI

REPORT OF THE LAW COMMISSION ON THE DEVELOPMENT OF  
THE GENDER EQUALITY ACT

The Report of the Law Commission on the Review of the Development of the Gender Equality Act is hereby published and shall be laid in Parliament pursuant to section 135 (*d*) of the Constitution.

Dated this twentythird day of February, 2011.

HONOURABLE DR. GEORGE THAPATULA CHAPONDA  
*Minister of Justice*

(FILE NO. LC/01/04)

REPORT OF THE LAW COMMISSION ON THE DEVELOPMENT OF  
THE GENDER EQUALITY ACT

TO: THE MINISTER OF JUSTICE, HONOURABLE DR. GEORGE THAPATULA CHAPONDA

This is the Third Report of the special Law Commission which was appointed under section 133 of the Constitution to review gender-related laws in Malawi. The Report is on the development of legislation on gender equality.

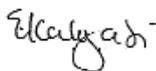
The Commission hereby submits the Report pursuant to section 135 (d) of the Constitution and commends the recommendations contained in this Report to the Government, Parliament and people of Malawi.

MEMBERS

MRS. ESNATH KALYATI

—*Chairperson*

Gender and Social Development Consultant,  
Relay Consultants and Associates and  
former Principal Secretary in the Ministry of  
Gender, Children and Community  
Development

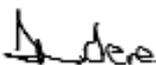


.....

MRS. DIANA JERE

—*Deputy Chairperson,*

Senior Lecturer, Kamuzu College of  
Nursing, University of Malawi and former  
Commissioner, Malawi Human Rights  
Commission



.....

MRS. GERTRUDE LYNN HIWA

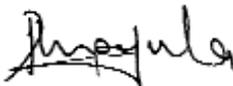
—*Law Commissioner*



.....

MR. PETER MSEFULA

—*Director of Gender Affairs, Ministry of  
Gender, Children and Community  
Development*



.....

DR. BLESSINGS CHINSINGA

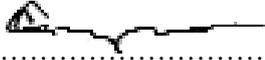
—*Political Economy Specialist, Associate  
Professor, Department of Public and  
Administrative Studies, Chancellor College,  
University of Malawi*



.....

Ms. GERTRUDE CHIPUNGU

—Programme Manager, Global AIDS  
Interfaith Alliance



.....

Mrs. ANNABEL MTALIMANJA

—Former Legislative Counsel and  
currently Administrator General,  
Ministry of Justice



.....

Ms. LINGALIRENI MIHOWA

—Former Programme Policy Manager,  
Oxfam–Malawi, Gender Specialist  
and currently Gender Advisor in the  
Office of the State Vice President



.....

REV. FR. DR. ROBERT T. MWAUNGULU

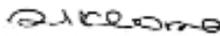
—Executive Director, Ecumenical  
Counselling Centre



.....

Mrs. INNOCENTIA OTTOBER

—Legal Practitioner, Member, Women  
Lawyers' Association and Malawi  
Law Society



.....

Dated: May, 2009

## TABLE OF CONTENTS

	PAGE
MEMBERS .. .. .	2
PROGRAMME OFFICERS .. .. .	5
ACKNOWLEDGEMENTS .. .. .	5
CHANGES IN THE COMPOSITION OF THE COMMISSION .. .. .	5
TERMS OF REFERENCE .. .. .	5
Work Methodology .. .. .	6
Structure of the Report .. .. .	7
Draft Legislation .. .. .	7
Use of Masculine or Feminine Gender .. .. .	8
Introduction .. .. .	8
Background .. .. .	8

**SPECIFIC FINDINGS AND RECOMMENDATIONS**

1.0 PRELIMINARY ISSUES .. .. .	14
1.1 SHORT TITLE .. .. .	14
1.2 LONG TITLE .. .. .	15
1.3 SCOPE OF APPLICATION .. .. .	16
2.0 IMPLEMENTATION AND ENFORCEMENT .. .. .	21
3.0 PROHIBITION OF HARMFUL PRACTICES .. .. .	25
4.0 PARTICIPATION OF WOMEN IN DECISION-MAKING IN POLITICS AND PUBLIC LIFE .. .. .	30
5.0 HEALTH .. .. .	54
6.0 EDUCATION AND TRAINING .. .. .	73
7.0 DIGNITY .. .. .	80
8.0 POVERTY ERADICATION AND ECONOMIC EMPOWERMENT .. .. .	94
9.0 INCIDENTAL PROVISIONS. . . . .	104
GENDER EQUALITY BILL, 20... .. .	109
PARLIAMENTARY AND PRESIDENTIAL ELECTIONS (AMENDMENT) BILL, 20... .. .	121
LOCAL GOVERNMENT ELECTIONS (AMENDMENT) BILL, 20... .. .	125
EMPLOYMENT (AMENDMENT) BILL, 20... .. .	129
PUBLIC SERVICE (AMENDMENT) BILL, 20... .. .	133

## TABLE

Table: The Majority of countries with the most women in parliament use political quotas .. .. .	34
----------------------------------------------------------------------------------------------------	----

### **Programme Officers**

The programme officers were Mrs. Fiona Atupele Mwale, LLB with Honours (Leeds), LLM (Warwick) and Mr. Chizaso Eric Nyirongo, LLB with Honours (Malawi), LLM (Oslo). Mr. Chikosa Silungwe, LLB with Honours (Malawi), LLM (Warwick); who originally served as a programme officer left on study leave in January, 2007 and therefore was not part of the programme to the end.

### **Acknowledgements**

Initial funding for this Programme was jointly provided by the Governments of the Kingdoms of Norway and Sweden by the Norwegian Agency for Development (NORAD) and the Swedish International Development Agency (sida) respectively. The funding was administered by NORAD through the Royal Norwegian Embassy in Malawi.

Subsequent funding for this Programme was provided by the European Union and was administered by the Delegation of the European Commission. The Global Fund Round 5 funded the final part of the Programme and the funds were administered by the National AIDS Commission (NAC).

### **Changes in the composition of the Commission**

During the course of the work of the Commission, Commissioners Dr. Andrew Agabu and Mrs. Flossie Chidyaonga left the country to pursue career opportunities abroad. While these Commissioners did not resign from the Commission they left very early in the Programme and as such do not appear in the list of Commissioners.

Within the Secretariat of the Law Commission, Justice Elton Singini, sc, who was the Law Commissioner until June, 2006, left the Law Commission at the end of a distinguished ten-year tenure at the Commission to resume his duties with the Judiciary. He was succeeded by Mr. Anthony D. Kamanga, sc, who was appointed Law Commissioner in June, 2006. Mr. Kamanga was subsequently appointed Solicitor General and Secretary for Justice in July, 2007. Both Justice Singini, sc and Mr. Kamanga, sc contributed to the findings and recommendations and to the strategic direction of the work of this Commission during their respective terms. In June, 2008, Mrs. Gertrude Lynn Hiwa, former Chief Legislative Counsel and a Commissioner from the Ministry of Justice on this special Law Commission, was appointed Law Commissioner.

### **Terms of Reference**

The following were the Terms of Reference of the Commission—

- (a) to examine the Constitution in relation to gender equality;
- (b) to examine relevant laws of Malawi to establish the extent to which they incorporate gender equality;

- (c) to examine national policy instruments such as—
  - (i) the National Gender Policy;
  - (ii) the National Gender Programme;
  - (iii) the Malawi Poverty Reduction Strategy Paper (the “MPRSP”);
  - (iv) the Malawi Growth and Development Strategy (the “MGDS”);  
and
  - (v) the National HIV and AIDS Policy,

in light of their contribution to the attainment of gender equality in Malawi;

- (d) to examine international instruments such as—
  - (i) the Universal Declaration of Human Rights;
  - (ii) the Convention on the Political Rights of Women;
  - (iii) the International Covenant on Civil and Political Rights;
  - (iv) the International Covenant on Economic, Social and Cultural Rights;
  - (v) the Convention on the Elimination of All Forms of Discrimination against Women (the “CEDAW”);
  - (vi) the Southern Africa Development Community Declaration on Gender and Development;
  - (vii) the Southern Africa Development Community Protocol on Gender and Development; and
  - (viii) the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the “AU Women’s Protocol”),

for guidance on international standards relating to gender equality;

- (e) to consult stakeholders on matters that ought to be included in the development of legislation on gender equality;
- (f) to develop legislation on gender equality;
- (g) to consult stakeholders in order to solicit views on the findings and recommendations of the Commission; and
- (h) to make recommendations on any other matters relating to gender equality.

### **Work Methodology**

The Commission developed the following methodology in the development of legislation on gender equality—

- (a) inviting submissions from members of the general public through notices in newspapers;

- 
- (b) considering a Discussion Paper, which prioritized areas of focus and guided the work of the special Law Commission;
  - (c) holding meetings during which the Commission examined the relevant laws on gender equality in light of the Constitution, municipal law, the national policy framework, international law and policy and comparable foreign law;
  - (d) holding special consultative meetings with: the Reproductive Health Unit and the Malawi Human Rights Commission on safe abortion and maternal mortality; the Ministry of Gender, Children and Community Development and the Office of the President and Cabinet on the participation of women in the public sphere;
  - (e) organizing a National Consultation Workshop in Lilongwe on 13 September, 2007 where it presented its tentative recommendations. The participants at the workshop were drawn from the public service, academia, faith organizations, traditional leadership especially Chiefs, private sector, civil society and the general public. Feedback from this workshop indicated the need for further consultation;
  - (f) holding three Regional Consultative Workshops in Lilongwe on 8 December, 2008, Blantyre on 12 December, 2008 and Mzuzu on 13 December, 2008. Once again, workshop participants were drawn from the public service, academia, faith organizations, traditional leadership especially Chiefs, private sector and the general public;
  - (g) consulting the Principal Secretary in the Ministry of Gender, Children and Community Development on the strategic direction of the Report; and
  - (h) reconvening to consider the feedback from the various consultative fora. All submissions, comments and criticisms that have been made were considered and debated and have influenced the findings of the Commission.

### **Structure of the Report**

The narrative part of this Report contains specific findings and recommendations made by the Commission; and all recommendations for enactment made by the Commission are indicated in bold.

### **Draft Legislation**

Draft legislation for the enactment of the recommendations of the Commission is attached as part of this Report. The proposed new law shall be called the **Gender Equality Act**.

The Commission has made recommendations in relation to participation of women in politics and improved work conditions for pregnant women, including paternity leave and equality in conditions of service for men and women and has developed draft Amendment Bills in relation to the Parliamentary and Presidential Elections Act,<sup>1</sup> the Local Government Elections Act<sup>2</sup>, the Employment Act<sup>3</sup> and the Public Service Act<sup>4</sup> respectively. The draft Bills are also attached as part of this Report.

### **Use of Masculine or Feminine Gender**

The Commission resolved that in both the narrative of the Report and the proposed legislation, it shall use both the masculine and feminine gender, except where the context requires the use of either gender.

## **INTRODUCTION**

### **Background**

In September, 2001, a special Law Commission was empanelled under section 133 of the Constitution to undertake a review of the laws of Malawi in accordance with Government's policy to promote gender equality and the empowerment of women in all spheres of life in Malawi. This was in response to the new constitutional order; the emerging socio-political dispensation prevailing in Malawi; and in recognition of Government's commitment to international law and policy on gender equality and the empowerment of women.<sup>5</sup>

In November, 2002, the special Law Commission conducted two workshops with stakeholders: one with gender stakeholders and the other with the Parliamentary Women's Caucus, for the purpose of setting priorities for the law reform process. In the end, three areas of law were identified as in urgent need of reform or development, namely—

- (a) review of the laws on succession, particularly to address the practice of property grabbing;
- (b) review of the laws on marriage and divorce; and
- (c) development of a gender equality statute.

The Commission has since then finalized the review of the Wills and Inheritance Act;<sup>6</sup> and the review of statutory laws on marriage and divorce: the Marriage Act,<sup>7</sup> the African Marriage (Christian Rites) Registration Act,<sup>8</sup> the

<sup>1</sup> Cap. of the Laws of Malawi.

<sup>2</sup> Cap. 22:02 of the Laws of Malawi.

<sup>3</sup> Cap. 55:01 of the Laws of Malawi.

<sup>4</sup> Cap. 1:03 of the Laws of Malawi.

<sup>5</sup> Malawi Law Commission, 2003; *Overview and Issues of Gender-Based Law Reform in Malawi*. Limbe: Montfort Press, p. iii.

<sup>6</sup> Cap. 10:02 of the Laws of Malawi. The Report on the review of this statute was finalized in December, 2003 and was published as Law Commission Report No. 12, *Report of the Law Commission on the Review of the Wills and Inheritance Act*. Malawi Government Gazette Extraordinary, 30 January, 2004.

<sup>7</sup> Cap. 25:01 of the Laws of Malawi.

<sup>8</sup> Cap. 25:02 of the Laws of Malawi.

Asiatics (Marriage, Divorce and Succession) Act,<sup>9</sup> the Divorce Act,<sup>10</sup> the Married Women (Maintenance) Act,<sup>13</sup> the Affiliation Act and the Maintenance Orders (Enforcement) Act; as well as customary laws on marriage and divorce.<sup>14</sup> This Report is the culmination of the Commission's work on the development of a gender equality statute.

## Gender Equality in Perspective

### (a) Overview

Analysis of the social situation of women in Malawi has shown it to be in “a crisis of gender inequality”.<sup>15</sup> Women are disadvantaged in almost every sector of development. At the global level, Malawi, in 2008, ranked 129 out of 140 countries on UNDP's<sup>16</sup> gender related development index (GDI), with a GDI of 0.432.<sup>17</sup>

Malawi's international commitment to eradicating gender inequality dates back to its ratification of the CEDAW in 1979. The CEDAW is often described as the Bill of Rights of women.<sup>18</sup> It not only defines what constitutes discrimination against women but also sets up an agenda for national action in order to end such discrimination. The CEDAW defines “discrimination against women” as—

“...[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.<sup>19</sup>

By this definition, the CEDAW provides the basis for realizing equality between men and women in almost all spheres of life including political and public life, education, health, employment and domestic life. It singles out culture and tradition as influential forces in the shaping of gender roles of both men and women and in family relations.

---

<sup>9</sup> Cap. 25:03 of the Laws of Malawi.

<sup>10</sup> Cap. 25:04 of the Laws of Malawi.

<sup>11</sup> Cap. 25:05 of the Laws of Malawi.

<sup>12</sup> Cap. 26:02 of the Laws of Malawi.

<sup>13</sup> Cap. 26:04 of the Laws of Malawi.

<sup>14</sup> The Report was published in June 2006 as Law Commission Report No. 16: *Report of the Law Commission on the Review of the Laws on Marriage and Divorce*. Malawi Government Gazette Extraordinary, 26 June, 2006.

<sup>15</sup> Arehag L, De Vylder S, Durevall D and Sjoblom M, *The Impact of HIV/AIDS and the Economy of Malawi* Sida Studies No. 18, 2006, p. 42.

<sup>16</sup> As above.

<sup>17</sup> UNDP, 2008, Human Development Report 2008 and “Malawi Government: Ministry of Economic Planning and Development, Malawi Development and Growth Strategy Annual Review” 2007-2008. GDI measures gender inequality by using the unweighted average of three component indices: life expectancy at birth, education and income. GDI rankings values range from 0 to 1, where 1 is the highest level of gender equality

<sup>18</sup> See <http://www.un.org/womenwatch/daw/cedaw/> (Visited on 5 January, 2009).

<sup>19</sup> See Article 1 of the CEDAW.

At the national level, the Constitution, as supreme law of the land has captured the spirit of the CEDAW and other relevant international legal instruments on gender equality under the Principles of National Policy<sup>20</sup> and the Bill of Rights.<sup>21</sup>

The Constitution prohibits “discrimination of persons in any form” and “all persons are under any law, guaranteed equal and effective protection against discrimination” on several grounds, one of which is sex.<sup>22</sup> The Constitution provides, as a principle of national policy, an obligation on “the State to promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving”<sup>23</sup> the principle of gender equality. Further, section 24 of the Constitution specifically provides for rights of women. Section 24 (1) provides that “[w]omen have the right to full and equal protection by the law and have the right not to be discriminated against on the basis of their gender or marital status [...]” While equality and non-discrimination are some of the key tenets of the Constitution, these concepts have neither been defined nor adequately articulated under statutory law in Malawi.<sup>24</sup>

Key international legal instruments such as the CEDAW, the AU Women’s Protocol and the Beijing Declaration and the Beijing Platform for Action have had extensive impact on Government’s policy on gender equality. Since the Beijing Declaration, Government has developed various policy instruments aimed at implementing gender equality at the national level. These national policy instruments include: the Malawi National Plan for Action which was launched in 1997; the National Gender Policy which was launched in 2000; and the National Gender Programme which was launched in 2005 in order to operationalize the National Gender Policy.<sup>25</sup> The Beijing Declaration has remained the guiding principle for national policy instruments on women’s equality and empowerment.<sup>26</sup> Although the impact of Government policy on gender equality is yet to be measured, the translation of their key strategies through the review of certain laws and their subsequent implementation could see Malawi on the road to measurable actualization of gender equality.

### **(b) Gender Equality and Men**

Following the Beijing Declaration and the Platform of Action, the concept of “gender equality”, gained prominence and popularity worldwide. In Malawi, as its popularity grew, so did the misconception of its meaning. Gender equality became synonymous, albeit wrongly, with the empowerment of women to the detriment of men. This led, in some quarters, to negative resistance in embracing this concept. A clarification of “gender” and “gender equality” is pertinent.

---

<sup>20</sup> Section 13 of the Constitution.

<sup>21</sup> Chapter IV of the Constitution.

<sup>22</sup> Section 20 of the Constitution.

<sup>23</sup> See section 13 (a) of the Constitution.

<sup>24</sup> cf. the Employment Act (Cap. 55:02) which criminalizes discriminatory acts on the sole ground of one’s sex.

<sup>25</sup> The National Gender Programme runs from 2005 to 2009.

<sup>26</sup> United Nations Economic Commission for Africa, 2005; and the International Year of Microcredit 2005 at <http://www.yearofmicrocredit.org> (Visited 20 January, 2009).

“Gender”, in its technical sense, refers to “the social differences and relations between men and women which are learned, [which] vary widely among societies and cultures and change over time”<sup>27</sup>. “Gender equality” on the other hand entails the concept that “both men and women are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles and prejudices”<sup>28</sup>. Consequently, gender equality does not mean “women and men have to become the same.”<sup>29</sup> The inequality between men and women is generally tilted in favour of men. “Gender equality”, thus, aims at addressing this inequality in power relations.

Unfortunately, many gender equality initiatives continue to focus on women rather than trying to transform the unequal gender relations that drive and maintain women as the weaker partner in their interaction with men. In addition, many gender equality initiatives exclude men, pitching them as a stumbling block in the attainment of gender equality. This Report departs from this notion and takes a holistic approach by embracing men as an integral part to the attainment of gender equality. Men also suffer inequality at times. The Bridge (Development-Gender) Project notes that “while men as a group do exercise power over women and other men, at the individual level, many men feel powerless. The abundant ways in which men experience coercion in their sexual lives, irrespective of their sexual orientation or identity, suggests that men are not always the ‘winners’. Men may thus also be vulnerable as orphans or refugees, they may be unemployed or homeless; they may be dying of (AIDS related infections).”<sup>30</sup>

Hence, men also suffer gender inequality as they are also vulnerable in other, more subtle, ways. There are many potential costs for men who conform to, or try to conform to, rigid social expectations of “masculinity” (the culture-specific ideas, roles and behavior that men are supposed to live up to in order to become accepted members of their own communities). Making men more aware of the costs of conventional forms of masculinity, both for themselves and for women and children is an important step towards challenging gender inequalities.<sup>31</sup>

In order for any strategy or action plan towards achieving gender equality to work, the agency of men towards transformation of attitudes and mindsets is a necessity. It is generally recognized that although the vast majority of women have less recourse than men to legal recognition and protection; lower access to public knowledge and information; less decision-making power both within and outside the home; and little control over fertility, sexuality and marital choices,

---

<sup>27</sup> UNESCO, 2000, *Gender Equality and Equity: A Summary Review of UNESCO's Accomplishments Since the Fourth World Conference on Women*, p. 6.

<sup>28</sup> As above, p.5.

<sup>29</sup> Above.

<sup>30</sup> Esplen E, 2004; “*Engaging Men in Gender Equality: Positive Strategies and Approaches*” BRIDGE, Institute of Development Studies, University of Sussex, <http://www.bridge.ids.ac.uk/reports/BB15Masculinities.pdf> (Visited 20 January, 2009).

<sup>31</sup> Stocking B, Director of Oxfam GB cited in Ruxton, 2006; cited in Esplen E, 2004; above footnote 30.

addressing men is an essential element of efforts to build gender equality.<sup>32</sup> The inclusive nature of the modern approach to gender equality may thus be summarized as follows—

Our task is to consider men and boys not just as beneficiaries of women’s work or holders of privilege or perpetrators of violence against women, but also explicitly as agents of change, participants in reform and potential allies in search of gender justice.<sup>33</sup>

### (c) Gender Equality and Development

Gender equality is one of the eight Millennium Development Goals developed by the United Nations.<sup>34</sup> In this vein, gender equality is as much a human rights issue as it is a development one. The World Bank also recognizes gender equality as a “key component for growth and poverty reduction.”<sup>35</sup> Government confirms this viewpoint by acknowledging that development can neither be possible nor fair if gender relations are not equitable.<sup>36</sup>

Gender inequality and lack of development as manifested through poverty, are in fact two sides of the same coin. According to the World Bank, on one level, poverty exacerbates gender disparities. Inequalities between girls and boys in access to schooling or adequate health care, for example, are more acute among the poor than among those with higher incomes. These disparities disadvantage women and girls and limit their capacity to participate in and benefit from development. On another level, gender inequalities hinder development. Evidence from around the world shows this clearly.<sup>37</sup>

The central message is clear; ignoring gender disparities comes at a great cost to people’s well-being and to a country’s ability to grow sustainably, to be governed effectively and to reduce poverty. This conclusion presents an important challenge to development theory and begs the question as to what types of policies and strategies promote gender equality and foster more effective development. To enhance development effectiveness, gender issues must be an integral part of policy analysis, design and implementation.<sup>38</sup>

### (d) Definition of Sex

The recommendations towards the attainment of gender equality made in this Report apply to both sexes; male and female. In order to avoid any doubt as

<sup>33</sup> As above.

<sup>34</sup> See <http://www.un.org/millenniumgoals/> (Visited on 7 January, 2009).

<sup>35</sup> See World Bank, 2006; [http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,content\\_MDK:20823445~pagePK:34370~piPK:34424~theSitePK:4607,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,content_MDK:20823445~pagePK:34370~piPK:34424~theSitePK:4607,00.html). (Visited on 7 January, 2009).

<sup>36</sup> Government of Malawi, 2004; *National Gender Programme*. Lilongwe: Ministry of Gender, Child Welfare and Community Services, pp. 1-3 (hereafter the “National Gender Programme”).

<sup>37</sup> World Bank, 2001; “*Engendering Development Through Gender Equality in Rights, Resources and Voice*”. World Bank and Oxford University Press, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/01/000094946\\_01020805393496/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/01/000094946_01020805393496/Rendered/PDF/multi_page.pdf) (Visited 11 January, 2009).

<sup>38</sup> As above.

to the sex of a person, the Commission maintained its earlier recommendation in its Report on the Review on the Laws on Marriage and Divorce<sup>39</sup> where it stated that in accordance with the English common law, sex of a natural person is determined at birth. Therefore, any person who later undergoes sex change surgery or is a practicing transsexual shall be deemed to maintain their sex at birth.<sup>40</sup>

**(e) Desegregation of Women**

The 1996 Human Development Report notes that women are not a homogeneous category or population group. They come from many different cultures, races and faiths; they occupy different class and economic positions; they have different sexualities; they may be able-bodied or with disabilities; they may be married or single; they may be prisoners; and they vary in ages. There may also be disparities in female capabilities based on regions or ethnic groups in a country; or between urban and rural areas. The status of all women in a country cannot be expected to be the same. There may be disparities among different groups of women in respect of various socio-economic variables related to women's status. Gender gaps are generally greater in certain regions or States; in the rural areas; among the poor; in certain ethnic groups; among the married population; and among the older population.<sup>41</sup>

This Report proceeds on the premise that equality cannot be achieved without first recognizing that there are differences between groups of women. It is not enough to acknowledge that women are systematically discriminated against *for being women*, but that there are also different needs that women from different groups might have.

**(f) Framework of the Development of the Gender Equality Act**

In light of the pressing issues highlighted under the various national and international policy and legal instruments noted above, the Commission identified the following as crucial issues to form the core of the work surrounding the development of the Gender Equality Act—

- (i) prohibition of harmful (social or cultural) practices;
- (ii) participation of women in all spheres of life;
- (iii) health;
- (iv) education and training;
- (v) dignity, including sexual harassment; and
- (vi) poverty eradication and economic empowerment.

---

<sup>39</sup> Malawi Law Commission, 2006; above footnote 14.

<sup>40</sup> *Corbett v. Corbett* (1888) 13 P.D. 136.

<sup>41</sup> United Nations 1996; *Human Development Report* cited in Pochun, M, *Disaggregated Data to Measure the Status of Women in Society - The Case of Developing Countries*, <http://isi.cbs.nl/iamamember/cd2/pdf/327.PDF> (Visited on 8 January, 2009).

## SPECIFIC FINDINGS AND RECOMMENDATIONS

### 1.0 PRELIMINARY ISSUES

#### 1.1 SHORT TITLE

Pursuant to its mandate to develop legislation on gender equality, the Commission deliberated at length on a suitable title for the legislation which would convey the breadth of its mandate. In order to guide its deliberations, the Commission conducted comparative research on legislation from various jurisdictions that have specifically legislated on gender equality. The Commission noted that the title for equality legislation in those jurisdictions varied according to the intended focus of the legislation. For instance, the Republic of South Africa's law is entitled "Promotion of Equality and Prevention of Unfair Discrimination Act". In Iceland, the relevant legislation bears the title "Act on the Equal Status and Equal Rights of Women". In Lithuania, the legislation is called "Law of the Republic of Lithuania on Equal Opportunities". In Finland, it is the "Act on Equality Between Men and Women". In Slovenia, the title is "Equal Opportunities for Men and Women". Moldova's law is entitled "Law Regarding Equality Between Men and Women". Finally, Norway, Denmark, Switzerland designate their law as "Gender Equality Act".

The choices before the Commission included, whether to entitle the proposed law as a "Gender Equality Act" or to break down "gender" into its constituent parts, that is, men and women and entitle the law accordingly. The Commission also debated on whether to focus, in the title, on the issues of the elimination of discrimination and the promotion of equal opportunities as some jurisdictions have done.

The Commission concluded that the concept of gender is understood to refer to both men and women and thus it would not be necessary to refer to "men and women" if the word "gender" is used. Further, as the mandate of the Commission, as dictated by its Terms of Reference, is to make provision for gender equality, the Commission recommends that the proposed law should reflect this expressly in the title. The Commission recommends that the proposed law should bear the short title—

#### **Gender Equality Act.**

The Commission is satisfied that this short title ultimately encompasses the elimination of discrimination, the promotion of equal opportunities and status and also the importance of addressing inequalities between men and women in all spheres of life.

The legislative recommendations of the Commission will be contained in a draft Bill - the **Gender Equality Bill** - which forms part of this Report as Appendix I.

## 1.2 LONG TITLE

As noted earlier, the State has a constitutional duty to address inequality in society and prohibit discrimination. This constitutional duty expressly provides that “the State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities”<sup>42</sup> and that the [t]he State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving [...] gender equality.”<sup>43</sup>

The Commission therefore sought to supplement the short title with a comprehensive long title, encompassing the Commission’s mandate to guarantee gender equality in line with the State’s constitutional duty. In order to perform this task, the Commission developed a list of all relevant objectives so as to guide the process of developing the long title for the **Gender Equality Bill** as follows—

(a) to enact gender equality legislation as set out in the Terms of Reference;

(b) to give full effect to the letter and spirit of the Constitution, with particular reference to—

(i) the prohibition of discrimination of persons in any form;<sup>44</sup>

(ii) the obligation of the State to pass legislation addressing inequalities in society and in prohibiting discriminatory practices and the propagation of such practices;<sup>45</sup>

(iii) the constitutional principles of gender equality, health, rural life and education;<sup>46</sup> and

(iv) the protection of human dignity;<sup>47</sup>

(c) to provide measures to facilitate the eradication of unfair discrimination which prevents women from participating equally with men in all spheres of life, including education, public life and politics and health;

(d) to provide measures to facilitate the eradication of sexual harassment and harmful practices;

(e) to provide measures to facilitate the economic empowerment of women;

(f) to provide remedies for victims of unfair discrimination, harmful practices, sexual harassment and generally for all persons whose right to equality has been infringed; and

---

<sup>42</sup> Section 30 (2) of the Constitution.

<sup>43</sup> Section 13 of the Constitution.

<sup>44</sup> Section 20 (1) of the Constitution.

<sup>45</sup> Section 20 (2) of the Constitution.

<sup>46</sup> Section 13 (a), (c), (e) and (f) of the Constitution.

<sup>47</sup> Section 19 of the Constitution.

(g) to provide for measures to sensitize the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, harmful practices and sexual harassment.<sup>48</sup>

In light of the foregoing, the Commission recommends that the long title to the proposed law should read as follows—

**An Act to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society; to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment; to provide for public awareness on the promotion of gender equality; and to provide for connected matters.**

### 1.3 SCOPE OF APPLICATION

In deciding the scope of the **Gender Equality Bill**, the Commission also considered the practice by other countries when domesticating international human rights obligations such as the CEDAW. The practice in some jurisdictions tends to divide human life into “public” and “private” spheres. The result is that only the rights pertaining to the public sphere are protected under domestic law. The private sphere in human rights theory is often understood to mean the religious and domestic or familial sphere. In this vein, the public sphere ordinarily denotes the “State, official economy of paid employment and arenas of public discourse.”<sup>49</sup>

The division of life into “public” and “private” spheres has its roots in the desire to limit the jurisdiction of the State. In many countries, this has meant that what individuals do in the “public” sphere is subject to regulation, while activities taking place in the “private” sphere are thought to be exempt from State scrutiny. Since the “public” sphere is seen as the focus of interaction between State actors and legal and natural persons, abuses of that relationship have been the focus of international human rights action and legislative regulation.<sup>50</sup> In Malawi, this distinction was illustrated by the special Law Commission on Criminal Justice Reform<sup>51</sup> which when faced with the task of legislating against marital rape, opted not to. The justification given by this special Law Commission was that “creating the offence of marital rape might open up to the general public the private relations of husband and wife which, for valid social and family reasons, need to be strongly protected.” This is a clear illustration of how issues surrounding women have been relegated to the private sphere and thus not addressed in legislation. Such a classification of the issues of women as “private”

<sup>48</sup> In coming up with this list, the Commission was guided by the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 of South Africa.

<sup>49</sup> Landes, J, 1988; *Women and the Public Sphere in the Age of the French Revolution*. Ithaca, Cornell University Press.

<sup>50</sup> Bunch C, and Frost S, 2000; *Women’s Human Rights: An Introduction*, Routledge International Encyclopedia of Women: Global Women’s Issues and Knowledge, Routledge.

<sup>51</sup> Malawi Law Commission, 2000; *Report on the Review of the Penal Code*, Government Gazette Extraordinary, June, 2000, p. 3.

has meant that women<sup>52</sup> have generally been excluded from recognized definitions and interpretations of human rights.<sup>53</sup> These include the right to freely enter into sexual relations and bodily integrity, albeit within the matrimonial setting.

Evidence of the “private” and “public” debate was noted further by the Commission in its literature review of gender equality legislation from other jurisdictions. The Commission found that in certain cases, gender equality legislation excludes from its scope, the internal affairs of religious communities in general<sup>54</sup> or specific churches or other religious communities.<sup>55</sup> The “internal affairs of religious communities” were not defined by the legislation referred to.

The Commission observed that the exclusion of women in decision-making structures of religion tends to be regulated by internal administrative procedures. For instance, the Commission observed that universally, priesthood within the Roman Catholic Church is reserved for men to the total exclusion of women. This appears to be an administrative rule rather than doctrine. Similarly, in Islam, there is a controversy over whether women may act as Imams.<sup>56</sup> Three of the four Sunni schools,<sup>57</sup> as well as many Shia, agree that a woman may lead a congregation consisting of women alone in prayer. The general view seems to be that, unless in exceptional circumstances,<sup>58</sup> a woman cannot lead a mixed gender congregation in prayer.<sup>59</sup> This also appears to be as a result of administrative arrangements rather than doctrine. One woman who has led prayers has argued that the spirit of the Qur’an and the letter of a disputed *hadith* indicate that women should be able to lead mixed congregations as well as single-sex ones and that the prohibition to lead mixed congregations developed as a result of sexism in the medieval Near East and not as a part of true Islam<sup>60</sup>.

The Commission however noted two adverse consequences to imposing regulations on religious communities in such matters. Firstly, the regulation may, in terms of practice, isolate members of that religion from the rest of the members elsewhere as the internal affairs of that religion may be decided in another country at the headquarters of that religious community. Secondly, the imposition of this regulation may be perceived as State interference into the internal affairs of religious communities thereby blurring the separation between religion and the State. The Commission was also mindful that issues of “internal affairs” which include rules as to whether men and women have equal roles in leading worship,

<sup>52</sup> The offence of marital rape is committed against women; there are very few if any instances where husbands have been documented as having been raped within the matrimonial setting.

<sup>53</sup> See Amnesty International, <http://amnestyusa.org/women/humanrights/html> (Visited 20 January, 2009).

<sup>54</sup> cf. the Gender Equality Act of Norway.

<sup>55</sup> cf. the Act on the Ombudsman for Equality and the Equality Board of Finland.

<sup>56</sup> Imams lead congregation in salat (prayer).

<sup>57</sup> Imam Z, 2008; "Female Prayer Leadership (Revisited)", New Islamic Directions, 22 April, 2008, [http://www.newislamicdirections.com/nid/articles/female\\_prayer\\_leadership\\_revisited/](http://www.newislamicdirections.com/nid/articles/female_prayer_leadership_revisited/) (Visited 9 January, 2009).

<sup>58</sup> These include: *Tarawih* (optional Ramadan prayers) or for a congregation consisting only of close relatives.

<sup>59</sup> Imam Z; 2008; above footnote 57.

<sup>60</sup> Taylor, P K, 2006; "Score One More for Women Imams", <http://www.beliefnet.com/Faiths/Islam/2006/03/Score-One-More-For-Women-Imams.aspx/> (Visited 9 January, 2009).

preaching or taking up professional positions in religious community are not easily amenable to the legislative and judicial process.

However, the Commission also noted that such “internal affairs” cannot escape scrutiny if they are in contravention to the rights guaranteed under the Bill of Rights in the Constitution. The Commission had occasion to refer to two local cases. In the first case, in which there was no breach of any constitutional provision, the Court preferred to refer the religious denomination concerned and the aggrieved parties to mediation instead of deciding on the issue.<sup>61</sup> In the second case, the court clearly ruled that church institutions cannot make internal regulations that contravene the Constitution.<sup>62</sup>

Faced with the complexities surrounding how far the State should regulate the internal workings of religious communities, the Commission decided to consult on this matter before coming up with a decision so that the views of stakeholders could be taken into account.

Stakeholders at the National Consultative Workshop<sup>63</sup> and the Regional Consultative Workshops held in northern Malawi<sup>64</sup>, southern Malawi<sup>65</sup> and central Malawi<sup>66</sup> were divided in their views. Some advocated for the inclusion of all spheres in the **Gender Equality Bill**, thus the equality provisions should apply to religion as well. Others, on the same matter, rejected the often-cited human rights “private domain” exclusion which justifies non-inclusion of some spheres of life from legal regulation. These participants were adamant that no sector should be excluded from regulation by the law.

Upon reflection of the views of workshops participants and the Commission’s mandate to guarantee the right to equality without limitation, the Commission resolved not to exclude religion from the scope of the **Gender Equality Bill**.

By not restricting the application of the law as regards religion, the Commission rejected the practice of limiting the universality of the human rights of women, so that cultural and religious values rooted in unequal power relations between women and men do not become the justification for the systematic denial of the civil, cultural, economic, political and social rights of either sex. The Commission affirms that each of the rights set out in the Bill of Rights under the Constitution and in international treaties is essential for the realization of men and women’s full spectrum of rights. Human rights must thus be understood to apply universally, to all people, at all times, in all places.

As regards traditional leadership, especially chieftaincy the Commission was also faced with a similar dilemma as whether to exclude traditional leadership

---

<sup>61</sup> *The Registered Trustees of the Seventh Day Adventist Church vs. Y.B. Nankumba and others*, Civil Cause No. 141 of 2004 (Unreported).

<sup>62</sup> *Mwanamanga vs Malamulo Mission Hospital* (2008) MLR 457.

<sup>63</sup> Held at Sunbird Capital Hotel, Lilongwe on 13 September, 2007.

<sup>64</sup> Held at Mzuzu Hotel, Mzuzu, on 13 December, 2008.

<sup>65</sup> Held at Mount Soche Hotel, Blantyre, on 12 December, 2008.

<sup>66</sup> Held at Crossroads Hotel, Lilongwe, on 13 December, 2008.

from the scope of the proposed law or not. In some cases, traditional leadership, especially in male patriarchal societies like the Ngoni in the north of Malawi, for example, exclude women from ascending to traditional leadership. Whilst the Commission considered it unfairly discriminatory that customary law or practice in some cases does not permit female traditional leadership, the Commission also considered the practicality of extending the application of the proposed **Gender Equality Bill** to areas in which there are no formal settled structures.

The Commission noted that the whole area of traditional leadership is largely based on loose traditional structures and it is an area in which female participation in governance and decision-making is lacking. The Commission was aware that traditional leadership is an important and enduring feature of most African countries, including Malawi. Traditional leaders are variously described as guardians of traditional norms, values and practices and as such are an important channel through which social and cultural change can be realized. They are actors and embodiments of customary decision-making institutions; and a socio-political expression of local social organization. The reason for this is that traditional leaders have the status of an administrative magistrate presiding over customary, civil and even commercial disputes.<sup>67</sup> They do this over a distinct territorial unit occupied by a largely homogenous people, sharing more or less a common culture, social values and traditions. The values of traditional leaders are more often respected and so tend to bring about lasting peace and reconciliation among family members, clan members and even between clans. The power that traditional leaders wield in their jurisdictions is therefore important in terms of women's participation and their contribution to the development agenda that requires the participation of both men and women.

Unfortunately, for the most part, the structures that surround traditional leadership are still not legally regulated. The Chiefs Act,<sup>68</sup> which regulates traditional leadership, is largely an administrative law and is in its current form, ill-suited to factoring in gender equality concerns.

Faced with the complexities surrounding the legal regulation of traditional leadership, the Commission again decided to consult on this matter before coming up with a decision so that the views of stakeholders could be taken into account. With reference to traditional leadership, the participants at all National and Regional Consultative Workshops were once again divided. Traditional leaders themselves tended to be of the view that issues of tradition and custom should not be included in the proposed legislation as of yet. These participants recommended that Government should instead take measures aimed at facilitating civic education initiatives that are aimed at increasing female participation in traditional leadership. The participants pointed out that even among the *Ngoni*<sup>69</sup>

<sup>67</sup> Bloom A, 2002; "Ambiguous Political Space: Chiefs, Law and the Poor in Rural Mozambique", in Webster N and Eng-Pedersen, L, (Eds.); *In the Name of the Poor: Contesting Political Space for Poverty Reduction*. New York and London: Zed Books.

<sup>68</sup> Cap. 22:03 of the Laws of Malawi.

<sup>69</sup> A female traditional leader from Dedza, Senior Chief Kachindamoto, presented herself as evidence of this and narrated the struggle her family had to endure for her to ascend to the chieftaincy.

some traditional leadership positions are already being filled by women, who are ably executing their functions. The Commission fully considered the views presented at all the workshops and went further to examine the situation on the ground concerning the issues of gender equality in traditional leadership.

The Commission was informed that various efforts are already being undertaken to ensure some level of equal participation in traditional leadership. The Commission's sister Commission on Land Reform has proposed the introduction of Customary Land Dispute Settlement Tribunals<sup>70</sup>, which must include a fifty percent representation of women. Further, with the formalization of the role of traditional leaders in District Assemblies, Area Development Committees and Village Development Committees, it is anticipated that room will soon be created to legislate upon these formalities in a gender inclusive manner. The Commission was also aware that for cultures that are yet to accept women leadership such as the *Ngoni* in Mzimba, the male leaders are served by traditional ministers (*induna*); some of whom are female. As all traditional leaders are served by *induna*, the Commission recommends that Government should, as a minimum requirement, undertake intensive civic education campaigns to ensure that these *indunas* are engendered.

Nonetheless, the Commission was not satisfied that existing programmes and intensified civic education campaigns are enough to engender traditional leadership, which on account of its conservative adherence to patriarchy will take very long to change. The Commission sought to make significant strides into the advancement of the rights of women to participate in traditional leadership and therefore recommends that the **Gender Equality Bill** should apply without exception to traditional leadership.

The Commission once again justified its decision not to exclude traditional leadership from the scope of the **Gender Equality Bill** with reference to the Constitution which already recognizes equality between women and men in all spheres. In addition, the Commission reiterated that Malawi is also obliged under international law to respect women's human rights through its direct action, agents and structures of law.

It was the Commission's view that the **Gender Equality Bill** should therefore take the State's obligation further to ensure not only that State or official actors are held accountable when they discriminate against women; but also, private actors who discriminate against women, whether they fall within the umbrella of religion or traditional leadership, must be held accountable without exception.

In conclusion, the Commission was satisfied that by not removing traditional leadership and religion from the scope of the **Gender Equality Bill**, it was applying the law universally and creating a conducive legal environment in which any individual who feels that he or she has been unfairly discriminated against may seek redress.

---

<sup>70</sup> Malawi Law Commission, *Report on the Review of Land-related Laws*, Government Gazette Extraordinary, 9 April, 2010

The Commission did however concede that legislation may be passed to make exception to the universal applicability of the proposed law in certain cases. An example cited was the case of employment. The nature of certain jobs may necessitate that an employee be of a particular sex. An example may be where an employee is employed in a private household or in a care institution and is engaged in the day to day care of a person of a particular sex. It would be a breach of that person's dignity and right to privacy if they were being bathed and dressed by a person of the opposite sex. In another example, some States exempt female soldiers from active participation in armed combat on the front line. Where these exceptions limit the general right to equality, they may be justifiable if provided for in another Act of Parliament and their overall effect would be deemed justifiable regardless of the sex of the person to whom they were applied.<sup>71</sup> Apart from noting the above examples of possible exceptions, the Commission did not consider it prudent to set down any instances of exception, and left it open to the State to legislate on the exceptions as and when need arises.

The Commission was also aware of the practice in Commonwealth countries that "a law does not bind the Government unless it so provides expressly or by necessary implication."<sup>72</sup> As gender equality is a matter of international law, it is usually a State obligation and not the responsibility of private persons. The obligation by the State to protect human rights such as the right to equality not only requires that States oversee the activities of private persons or entities to ensure that they do not breach the rights of other individuals<sup>73</sup>; but also requires States to take positive measures to eliminate inequality and not to breach the right themselves. Therefore, in making legislative recommendations for gender equality, the Commission also recommends that the proposed law should expressly bind the State.

The Commission recommends the following provisions on application in the **Gender Equality Bill**.

**Scope of application**      ... —(1) **Except where it is otherwise expressly provided for by any written law, this Act applies to all persons and all matters.**

**(2) This Act binds the State.**

## 2.0 IMPLEMENTATION AND ENFORCEMENT

The Commission noted that issues of gender equality must be pursued aggressively if they are to take root in the country. Very often, in fulfillment of international human rights treaty obligations, some States enact laws that are

<sup>71</sup> Refer to section 44 of the Constitution.

<sup>72</sup> See 44 *Halsbury's Laws of England, Fourth Edition*, p.578 cited in Thornton GC, 1996; *Legislative Drafting*, (Fourth Edition), Butterworths, London

<sup>73</sup> Ruggie JG, 2007; "State responsibilities to regulate and adjudicate corporate activities under the UN Core Human Rights Treaties, Report prepared for the mandate of the special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises", Kennedy School of Government and Harvard Law School, 12 February, para 141.

never enforced due to the lack of proper institutional mechanisms to see the enforcement and the implementation of the laws.

The Commission, being mindful of this, deliberated at length upon the kind of mechanisms that will ensure the implementation and enforcement of the **Gender Equality Bill**. The Commission was originally of the view that unless a particular authority is appointed to oversee the enforcement of the Act, implementation of its provisions may not be realized.

The Commission consequently undertook a comparative study of legislation of other jurisdictions that enforce their gender equality legislation through specifically created monitoring and enforcement mechanisms or structures. These include a Gender Equality Ombudsman;<sup>74</sup> an Equal Opportunities Ombudsman;<sup>75</sup> a Commission on Gender Equality;<sup>76</sup> or a Minister of Gender.<sup>77</sup> These formal State structures receive and decide on complaints in a quasi-judicial manner in the same way the office of the Ombudsman in Malawi currently handles administrative complaints. Upon consultation, participants at the National Consultative Workshops expressed two views on the issue. Proponents of the first view argued that a new institution would be necessary to ensure that the Act is implemented and enforced as the institutions or structures currently existing in the country do not specifically have a gender equality mandate. Other participants were of the view that the gender equality enforcement mandate could easily be taken up by an existing, albeit dormant institution. It was argued that if the dormant National Commission of Gender Trust, which was set up within the Ministry of Gender, Children and Community Development during the one party era could be revived, it would be the most ideal structure to perform this role. Proponents of this view argued that this Trust could be revived and commissioned to work independently of the Ministry of Gender, Children and Community Development to enforce and implement the Act.

Whilst the Commission accepted that such independent structures are an effective way of ensuring that issues pertaining to gender equality are enforced aggressively, it also noted that they are expensive to set up and maintain. Although the National Commission of Gender Trust is an existing institution, it has been inactive for so long that reviving it would be similar to creating a new institution. The Commission also observed that Malawi already has a number of independent institutions charged with the responsibility of ensuring that rights are protected and decided that it would be more practical and effective to use active and existing structures. Although the Commission appreciated the argument in favour of reviving the National Commission on Gender Trust, it concluded that it would be more rational to use a structure that is functional and whose establishment is certain. The Commission therefore decided against establishing a new enforcement institution; or reviving a dormant one, opting, instead, to use an existing and functioning institution.

---

<sup>74</sup> The Gender Equality Act for Norway.

<sup>75</sup> The Equal Opportunities Act of Sweden.

<sup>76</sup> The Commission on Gender Equality Act of South Africa.

<sup>77</sup> The Gender Equality (Consolidation) Act of Denmark.

Under the Constitution, where a person claims that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened, that person may, among other options, apply to the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.<sup>78</sup>

The Commission also observed that under the Human Rights Commission Act<sup>79</sup>, the Human Rights Commission has the competence “in every respect, to protect and promote human rights in Malawi in the broadest sense possible.”<sup>80</sup> The Commission therefore concluded that the mandate of the Human Rights Commission as an independent national institution is sufficient to oversee the enforcement of the **Gender Equality Bill**. The Human Rights Commission already has powers enabling it to investigate violations of human rights on its own motion or upon complaints received from an individual, class of persons or body.<sup>81</sup> The Human Rights Commission also has already in place, methods of operation which include the power to hear any person and obtain information; carry out investigations and conduct searches. It also has procedures for conducting hearings and investigations; and procedures for which petitions and complaints brought before it are conducted.<sup>82</sup> These provisions were considered satisfactory for the purpose of implementing and enforcing the **Gender Equality Bill**.

The Commission further learnt that the Human Rights Commission may perform any other function which the Government may assign it in connection with the duties imposed on Government under international agreements in the field of human rights to which Malawi is a party.<sup>83</sup> The Commission noted that some of the obligations sought to be enforced by the Human Rights Commission by this Report in respect of the **Gender Equality Bill** arise from the CEDAW, and the international Bill of Rights for women. The Commission therefore found that in order to clarify these obligations, the proposed law should clearly indicate the extent of the obligation to be shouldered by the Human Rights Commission in relation to gender equality.

This clarification will ensure that the Human Rights Commission is specifically mandated to guarantee the respect, protection and fulfillment of the right to gender equality. The Commission therefore recommends the adoption of the following provisions so as to equip the Human Rights Commission with appropriate powers to oversee the enforcement and implementation of gender equality rights in the Gender Equality Bill as follows—

**Enforcement by the Human Rights Commission ... The Human Rights Commission, hereinafter called the “Commission”, shall be responsible for the enforcement of the provisions of this Act.**

<sup>78</sup> Section 46 (2) (b) of the Constitution.

<sup>79</sup> Cap. 3:08 of the Laws of Malawi.

<sup>80</sup> Section 12 of the Human Rights Commission Act.

<sup>81</sup> As above.

<sup>82</sup> See sections 15 to 21 of the Human Rights Commission Act.

<sup>83</sup> See section 13 (1) (f) of the Constitution.

Powers and functions of the Commission in relation to gender equality  
Cap 3:08 ... —(1) In addition to the powers conferred upon the Commission by the Constitution, the Human Rights Commission Act or any other written law, the Commission, shall protect and promote gender equality.

(2) The Commission shall perform the following functions in the exercise of its powers in relation to this Act—

(a) monitor and evaluate the policies and practices of—

(i) State organs, State agencies and public bodies; and

(ii) the private sector,

in order to promote gender equality and make any recommendations that the Commission deems necessary;

(b) carry out investigations and conduct searches in relation to any gender issues on receipt of a complaint or on its own accord;

(c) consider, deliberate on and make recommendations to the Minister on any gender issues;

(d) provide information to any party in a gender dispute on rights, remedies or obligations;

(e) promote and facilitate access to remedies for any dispute concerning gender issues;

(f) promote ratification by Malawi of any international gender instruments; and

(g) perform any other function as is necessary for the implementation of this Act.

Duties of the Commission in relation to gender equality ... The Commission may perform the following duties in the exercise of its powers in relation to this Act—

(a) collaborate with the Minister, in establishing mechanisms aimed at progressively realizing gender equality;

(b) develop working relationships with international partners, civil society organizations and non-governmental organizations devoted to protecting and promoting gender issues; and

(c) do or perform any other duties as are necessary for the implementation of this Act.

The Commission further noted that the organizational structure of the Human Rights Commission establishes thematic committees which are assigned to perform its functions. There is sometimes lack of specialized expertise in the committees. For instance, the Human Rights Commission has a Gender Thematic Unit that is responsible for gender related issues; the Unit reports to a Human Rights Commissioner who may not be a gender specialist. The Commission therefore also recommends that the Government should reconsider the administrative set up of the Human Rights Commission and ensure that there is a gender specialist either within the Gender Unit or require that the Unit reports to a Human Rights Commissioner specifically appointed in view of his or her gender expertise.

### 3.0 PROHIBITION OF HARMFUL PRACTICES

#### 3.1 INTRODUCTION

The Commission noted that there are various practices, traditional or otherwise, in society which take various forms and undermine gender equality. These practices may be based on tradition or culture, custom, religion or the crystallization of social habits. The Commission was concerned that these practices while they may be enjoyed by a few could have detrimental effects on a large segment of society. Since such practices could be popular, albeit hidden, the victims do not openly seek redress for any detrimental effect they experience.

#### 3.2 TRADITIONAL OR CULTURAL PRACTICES

Traditional or cultural practices reflect values and beliefs held by members of a community for periods often spanning generations. Some are beneficial to all members, while others are harmful to a specific group, such as women and children. The Constitution describes as harmful, practices that undermine the dignity of persons purely on account of their sex, marital status or gender and calls for the elimination of such practices.<sup>84</sup> In particular, the Constitution obliges Government to pass legislation “to eliminate customs and practices that discriminate against women, particularly practices such as sexual abuse, harassment and violence”.<sup>85</sup> Generally, harmful cultural practices tend to be perpetuated against women. The perpetuation of such practices is a contravention of the right to equality, a non-derogable<sup>86</sup> constitutional right, which may be enforced through criminal penalties.<sup>87</sup>

Harmful cultural practices, for the most part, involve coerced or non-consensual sexual relations which in light of the HIV and AIDS pandemic put victims at risk of infection with HIV. Therefore, policy measures such as the National HIV and AIDS Policy<sup>88</sup> and others such as the National Gender Policy

---

<sup>84</sup> See section 24 (2) of the Constitution.

<sup>85</sup> See section 24 (2) (a) of the Constitution.

<sup>86</sup> Section 44 (1) (g) of the Constitution.

<sup>87</sup> Section 46 (5) of the Constitution.

<sup>88</sup> See Malawi Government, 2003; National HIV and AIDS Policy, Lilongwe; National AIDS Commission, p. 32; Appendix I. For a full discussion on HIV and AIDS, see Part 5.4 of this Report.

and the National Strategy on Gender Based Violence also recommend the proscription of some cultural, social and traditional practices that propagate the spread of HIV infection. For the purpose of this Report, all practices based on tradition, culture or custom are termed “cultural practices”.

Internationally recognized harmful cultural practices include early marriage, forced sex during initiation rites; practices that allow a man to marry his wife’s younger sisters; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; early pregnancy; and dowry.<sup>89</sup> Malawi has a specific obligation under international law to outlaw harmful social or cultural practices that negatively impinge on the rights of vulnerable groups such as women. Article 3 of the CEDAW provides that State Parties shall take appropriate measures (including legislation) in all fields; “and in particular [...] the cultural field [...] to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.” Further, Article 5 of the AU Women’s Protocol provides that, [S]tate Parties “shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards”.

The Commission observed that a number of cultural practices prevalent in Malawian society perpetuate the subservience of women and involve exploitative sexual relations. Among such cultural practices are practices like widow inheritance (*chiharo*), widow cleansing (*kulowa kufa*), initiation sex (*fisi*) and spouse swapping (*chimwanamaye*). Despite the harmful nature of these practices and the violation of human rights that ensues in consequence, they persist because they are not questioned and are considered moral or are valued and defended by those who practise them. The Commission also observed that some practices have similar negative effects on men and that some men do not always voluntarily participate in them.<sup>90</sup>

The Commission noted that forcing any person to undergo a sexual act against that person’s will is already prohibited under the Penal Code.<sup>91</sup> The Commission found that under the Penal Code, such practices fall within the definition of rape on account of the absence of consent or misrepresentation as to the nature of the act.<sup>92</sup> The Commission nonetheless found that there is need to develop specific provisions in the **Gender Equality Bill** which would supplement the general provisions under the Penal Code. It was the Commission’s view that such provisions prohibiting harmful practices involving non-consensual sexual intercourse would not be an unnecessary duplication. Whilst the criminal law is of general application, the forced acts perpetrated under harmful cultural practices have peculiar sensitivities that may make the successful prosecution of an offence under the Penal Code very difficult. In cases involving harmful cultural practices,

<sup>89</sup> UN Fact Sheet No. 23, *Harmful Traditional Practices Affecting the Health of Women and Children*, <http://www.unhchr.ch/html/menub/2/fs23.htm> (Visited 20 January, 2009).

<sup>90</sup> Chiharo is a case in point here.

<sup>91</sup> Cap. 7:01 of the Laws of Malawi.

<sup>92</sup> See section 132 of the Penal Code.

those practising them may not know that their rights are being infringed and may actually genuinely consent to such activities. Their consent is however based on the belief that the practice is a necessary and useful process in keeping with culture and tradition for the greater social good; or based on fear of the 'misfortune' that might befall their society if they do not participate in it.

Participants at all three Regional Consultative Workshops were reluctant to subscribe to the prohibition or statutory regulation of any harmful practice. The participants, mainly traditional leaders, did acknowledge that there are many harmful practices being perpetuated on innocent victims. In addition to the practices identified by the Commission, traditional leaders pointed out and added the practice of *bulangete la mfumu* to the list of harmful practices. The practice of *bulangete la mfumu* involves the procurement of a young girl, most often a virgin, to have sexual intercourse with a visiting traditional leader as part of the hospitality and entertainment offered to the visitor. Whilst it was acknowledged that this and other practices are harmful, participants suggested that the best way forward would be to intensify civic education initiatives so that these practices eventually die out. Participants were concerned that statutory regulation would merely force such practices to go underground; precluding any opportunity for the monitoring of the practice and thus more and more innocent women and men will continue to suffer.

The Commission considered the arguments against statutory regulation at length. The Commission nonetheless also took into account the numerous awareness and civic education campaigns that have been taking place in light of the HIV and AIDS pandemic. In the Commission's view, these campaigns have so far had limited impact over the prevalence and intensity of these practices which will take time to be eradicated. The Commission nonetheless acknowledges the importance of civic education in the eradication of harmful practices; but takes the view that statutory regulation working side by side with such initiatives will produce optimal results.

The Commission however also noted that not all the examples of harmful cultural practices cited above have negative implications on the dignity of men and women. The Commission, having learnt that there are variants of the practice known as *fisi*, observed that it was necessary to examine the function of each variant. The Commission observed that initiation *fisi*, which is practiced on girls who have just reached puberty and purports to give such girls practical sexual education by forcing them to have sexual intercourse with a male termed a *fisi* is obviously harmful. In the Commission's view, this type of *fisi* undermines the dignity of females purely on account of their sex and also poses a risk of infection with HIV and other sexually transmitted infections. The Commission was therefore unanimous in condemning and agreeing that the proposed law should prohibit the initiation *fisi*.

The other *fisi*, practised in circumstances where a childless couple hires a surrogate to have sexual intercourse with the wife for the purposes of procreation,

is considered very important in Malawi's social and cultural circles for preserving family dignity. Inevitably, the practice has its own problems and may, in certain cases, be traumatic for the husband as some surrogates have been known to come back to either blackmail the husband for money or claim the children he fathered as his. These problems were cited by workshop participants at the Central Region Consultative Workshop. Some participants even voiced concern that the surrogates, who are usually called upon to perform this duty in several households, may spread HIV and AIDS.

The Commission considered the value of the surrogate *fisi* and concurred with participants that such *fisi* is not harmful *per se*. The problems associated with it can be redressed by looking at the issue as a contractual one. Whilst a family is free to contract a surrogate *fisi* on specified terms, there are no guarantees that he will not breach the contract by either blackmailing the parents or by claiming the children as his own at a later stage. The Commission however noted that the law already takes care of these eventualities as blackmail is a crime and breach of contract may be redressed by instituting legal proceedings. Cases involving the surrogate *fisi* are usually very personal and it would be very difficult for a husband who has had to engage the services of such surrogate to speak out. However, this is one of the areas that participants at every workshop believed that with a lot of civic education and awareness initiatives including social support, men will eventually be empowered to enforce their rights.

The Commission also considered the issue of the risk of contracting HIV and AIDS through such contractual arrangements as very serious. Although participants at the Central Region Consultative Workshop suggested that all surrogates should mandatorily be tested prior to performing such a contractual duty, the Commission acknowledged the difficulty of enforcing such a requirement considering the secrecy within which the practice is shrouded. Further, the childless couple is usually so desperate that it does not have enough bargaining power to demand anything and is thus at the mercy of the surrogate *fisi*.

The Commission was of the view that for those practices that have social values in family life, the problems associated with them can be overcome through civic education initiatives aimed at demystifying the practices and helping men to accept that sterility is not to be equated with emasculation. It is only after men are socialized to accept sterility that they will be empowered to come out in the open to enforce their rights. The Commission recommends the incorporation of provisions for civic education in the **Gender Equality Bill**. The provisions shall apply to every aspect of the **Gender Equality Bill** that requires raising public awareness.

The Commission also considered the practice known as *chimwanamaye* or wife swapping. This is a social practice that takes place between consenting adults and it would be arbitrary for the law to curb personal preference which poses no harm to individuals or society in general. The Commission was however concerned that in certain instances the husbands may be the only willing

participants. The unequal power relations between men and women often leave women powerless to negotiate the terms under which any sexual act is undertaken. Women who are most often completely economically and socially dependent on their husbands may consent to wife swapping and silently suffer the physical, emotional and psychological as well as health consequences that might ensue. For this reason, the Commission recommends an approach in which certain practices of a sexual nature are prohibited in their entirety, whilst other practices such as the surrogate *fisi* and *chimwanamaye*, are left open so that the victims of these practices, who feel that their rights have been violated, may take up legal action to seek redress. This will only be possible in a society where there is enough awareness on the rights of women and men.

The Commission took note that not all harmful practices are clearly cultural like is the case with *chimwanamaye* or *fisi*. The Commission learnt of another practice, within certain obscure religious cults, known as *phoebe* where a young girl, preferably a virgin, is offered as part of the hospitality to a visiting reverend or pastor. The Commission also took note of a practice known as *gwamula* where a group of boys or men descend upon a *kuka* (residence or dormitory for girls) to have sexual acts (usually sexual intercourse) with the girls. Often such type of sex is non-consensual and unprotected. The Commission was aware that in such cases, the practices evolve within the social setting and cannot be ascribed to a particular culture or tradition as they are simply social but nonetheless harmful.

Consequently, the Commission recommends that the **Gender Equality Bill** should specifically prohibit social, cultural or religious practices that are inherently harmful. The Commission further recommends that, in keeping with the Constitution,<sup>93</sup> the consequences of failure to comply with this prohibition should be penal in nature.

The Commission was faced with the challenge of determining the precise nature of the provisions prohibiting harmful practices as there are many different practices under different names and not all of them are sexual in nature. The Commission did not wish to legislate on some practices and risk leaving others out. At one point, the Commission decided that the best way forward would be to generally define and prohibit all harmful practices with reference to the specific elements of the practice that make it harmful and then to list specific practices as examples. Upon careful reflection, the Commission however decided to leave out the list and simply describe the harmful practices; leaving the development of examples to civic educators during civic education campaigns and public awareness initiatives.<sup>94</sup> Such an approach will prevent a scenario where some practices which are harmless are included in the list purely on account of their sexual nature.

In order to properly describe “harmful practices”, the Commission found it necessary to define this term. The Commission therefore recommends the following definition of “harmful practices” in the **Gender Equality Bill**—

<sup>93</sup> cf footnote 87; and section 46 (5) of the Constitution.

<sup>94</sup> See Part 9 of this Report. Provisions for civic education under the Gender Equality Act have been made later in the Report

**“harmful practice” means a social, cultural or religious practice which, on account of sex, gender or marital status, does or is likely to—**

**(a) undermine the dignity, health or liberty of any person; or**

**(b) result in physical, sexual, emotional or psychological harm to any person;**

The Commission recommends the following provision prohibiting harmful practices for inclusion in the **Gender Equality Bill** as follows—

**Prohibition of harmful practices** ... —(1) **A person shall not—**

**(a) commit;**

**(b) engage in;**

**(c) subject another person to; or**

**(d) encourage the commission of,**

**any harmful practice.**

**(2) A person who contravenes this section commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.**

#### 4.0 PARTICIPATION OF WOMEN IN DECISION—MAKING IN POLITICS AND PUBLIC LIFE

##### 4.1 INTRODUCTION

Men have traditionally dominated the public sphere. Almost all public sector structures and decision-making positions are driven by men while women generally take inferior roles. The sphere of public life includes such areas as politics, public service and traditional leadership. These are areas which usually affect the lives of members of society on an everyday basis. Since women constitute over 51 percent<sup>95</sup> of the population, it is a sign of bad governance if decisions affecting them are made without them being involved in the decision-making process.

##### 4.2 MECHANISMS FOR ENSURING THE PARTICIPATION OF WOMEN

From a developing country’s perspective, the right of women to participate in politics and decision-making may seem a luxury compared to all the other rights that are critical to the reality of women’s livelihood.<sup>96</sup> Access to food, basic health care and education amongst other fundamental rights remains a challenge to women. These rights are the rights most widely cited as overly abused. The Commission nonetheless noted that the lack of equal participation in politics and decision-making between men and women is equally a significant violation that

<sup>95</sup> National Statistical Office, 2000; 1998 *Malawi Population and Housing Census*, Malawi Government Press, Zomba.

<sup>96</sup> As above.

ought to be addressed. The Commission therefore underscored its earlier position that development fundamentally rests on governance and without the input of half of the population, development is unlikely to be equitable or fair. Indeed, it has been argued that if women have sufficient access to decision-making, their health, education and legal position is likely to also benefit.<sup>97</sup> Since women are at the heart of all typically developmental issues, their input is necessary to meaningfully address those issues.<sup>98</sup>

In order to ensure quality participation of women in the areas singled out, the Commission resolved to implement section 20(2) of the Constitution which requires the promulgation of legislation intended to address inequalities in society. Therefore, as women have hitherto not featured prominently in politics and public life, the Commission was of the view that various strategic measures need to be employed if obstacles and barriers noted in the National Programme on Increasing Women Representation in Parliament and Local Government<sup>99</sup> are to be rooted out. These strategic measures include: public action that is directed to achieving equality, the introduction of affirmative action measures and, where possible, the introduction of quotas.

**(a) Public action**

Public action involves placing responsibility on the public at large to ensure that gender equality is attained in all areas of public life including politics and decision-making. Attached to public action is a “time frame” for achieving gender balance in political and public participation. Public action is basically a matter of policy and the Commission recommends that Government develops action plans requiring the Ministry of Gender, Children and Community Development to engage the general public in ensuring that gender equality is attained in politics and public life.

**(b) Affirmative Action**

Affirmative action is the step made famous in the United States<sup>100</sup> that results in ending any form of inequality, including the inequality between men and women. Overall, the Commission noted that, by definition, affirmative action, also called positive discrimination, may be defined as a public or private programme designed to equalize opportunities for historically disadvantaged groups, taking into account the characteristics that have been used to deny them equal treatment. Affirmative action aims to achieve equality without compromising acceptance and tolerance of differences. The basis of affirmative action is the concept of compensatory justice. Compensatory justice demands the

---

<sup>97</sup> Paragraph 181 of the Beijing Platform for Action.

<sup>98</sup> Mwale F, 2006; "Women's Participation in Public Life and Decision-Making: The Quest for Real Equality" Paper submitted at the Advanced Course of International Protection of Human Rights, Abo Akademi, Finland, 2006 (Unpublished).

<sup>99</sup> Malawi Government, 2007; *National Programme on Increasing Women Representation in Parliament and Local Government*, Lilongwe.

<sup>100</sup> See Executive Order 11246 of 1965 cited in Sykes M; "The Origins of Affirmative Action", <http://www.now.org/nmt/08-95/affirmhs.html> (Visited on 9 May, 2006).

transfer of goods and resources from a person or group of persons to other persons so as to (re)establish the situation of equality that existed or should have existed.<sup>101</sup>

The justification for compensatory justice is based on the fact that past injuries originate the right to reparation for those who have suffered. Compensatory justice is not only meant to rectify injustice but also it creates conditions that fully incorporate historically disadvantaged groups such as women into political or public life, thereby enabling them to unleash their potential to contribute positively to human development. Comparative studies<sup>102</sup> show that wherever it has been seriously tried, affirmative action has undoubtedly had some success.

As noted earlier, the Constitution advocates affirmative action in that it authorizes the passing of legislation aimed at addressing inequalities in society.<sup>103</sup> In terms of policy, the Malawi Growth Development Strategy recognizes the importance of special considerations for gender equality if development is to be achieved. The Malawi Growth Development Strategy has a sub-theme on gender whose overall priority is to mainstream gender in the national development process. Key strategies include undertaking affirmative action measures to include women in decision-making positions; and promotion of advocacy for gender equality.

In order to ensure meaningful representation of women, the Commission thus recommends the adoption of affirmative action measures in the **Gender Equality Bill** in line with the Constitution and the Malawi Growth Development Strategy. In developing the specific measures for affirmative action, the Commission was guided by the careful language of the CEDAW which describes affirmative action as follows—

“Adoption by State Parties of temporary measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination, but shall in no way entail, as a consequence, the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”<sup>104</sup>

In addition, the Commission was also guided by the AU Women’s Protocol which also requires Malawi to “take positive action to promote participative governance and the equal participation of women in political life [...] through affirmative action [...]”<sup>105</sup> Malawi is also a party to the 1997 SADC Declaration

<sup>101</sup> United Nations Development Programme, 2006; Gender and Legislation in Latin America and the Caribbean, Chapter 1. <http://www.undp.org/rblac/gender/legislation/politicalpart.htm> (Visited on 8 January, 2009).

<sup>102</sup> The Republic of South Africa and the United States have successfully used affirmative action to remedy inequalities to historically disadvantaged groups.

<sup>103</sup> Section 20 (2) of the Constitution.

<sup>104</sup> Article 4 of CEDAW.

<sup>105</sup> Article 9 of the Protocol. In June, 2003, Malawi became one of the first fifteen countries to sign the Protocol.

on Gender and Development which sought “the achievement of at least a thirty percent target of women in political and decision-making structures by the year 2005.”<sup>106</sup> The Commission also took note of the subsequent initiatives by SADC States in adopting the Protocol on Gender and Development which, among other things, urges member States to “put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and creating a conducive environment for such participation.”<sup>107</sup>

### (c) Quota Laws

The Commission also noted that although affirmative action policies are often accompanied by quota laws; the two are not the same but complementary. Affirmative action permits reparations for the violation of a legitimate right and may improve the future well being of a society. Affirmative action measures need not be coercive or legally binding. Implementers, including Government, are at liberty to offer incentives in order to encourage the use of affirmative action measures. Quotas, on the other hand, establish minimum percentage shares for target groups and are considered part of a larger program of affirmative action. For example, “quotas reserve a certain percentage of representation among candidates for office, students and teachers, police and the military, for members of hitherto disadvantaged groups, sometimes temporarily, to remedy long-term injustices.”<sup>108</sup>

Although quota systems as a mechanism for ensuring female participation are well grounded in the Constitution, the Malawi Growth Development Strategy as well as in international and regional human rights instruments, a fair number of participants at the National Consultative Workshop argued against their usage. The Commission therefore scrutinized all the merits and demerits of implementing a quota system from arguments advanced at the National Consultative Workshop, from its own research as well as from the findings of the special Law Commission on the Review of the Constitution.

One of the most notable arguments in favour of quota systems is that they allow women to stand out in a political election race. Most importantly quota systems always work in ensuring the participation of women. The figures presented in the Table below are evidence of the effectiveness of quotas.

The Commission carefully reflected on all the arguments for and against quotas, comments from the National and Regional Consultative Workshops, as well as the findings and recommendations of the special Law Commission on the Review of the Constitution. At first glance, the arguments against quotas appear convincing. In the context of elected public office, gender quotas precisely target the main problem whereby political parties, to a greater extent, select men as their

---

<sup>106</sup> Article H (ii) of the SADC Declaration on Gender and Development.

<sup>107</sup> Article 4 (3), Protocol on Gender and Development. Article 5 (1) of the Protocol further requires State Parties to implement the fifty per cent quota of women in decision-making positions by 2015.

<sup>108</sup> A “sunset clause” is a device often invoked in legislation to ensure that the quota measures are temporary.

candidates for election rather than women. This may be as a result of the party's own prejudice or an anticipation of the prejudice of the voters. Gender quotas in a way represent a leap over historical barriers. The Commission is convinced that quota laws give the voters a possibility to choose women candidates, which they may not have had before within their preferred party.<sup>109</sup>

*Table:* The Majority of countries with the most women in parliament use political quotas

Rank	Country	Lower or single house of parliament			
		Date of elections	% of women in parliament	Does the country have a quota?	Types of quota*
1	Rwanda	September 2003	48.8	Yes	1
2	Sweden	September 2002	45.3	Yes	3
3	Costa Rica	February 2006	38.6	Yes	2,3
4	Norway	September 2005	37.9	Yes	3
5	Finland	March 2003	37.5	No	-
6	Denmark	February 2005	36.9	Yes	3
7	Netherlands	January 2003	36.7	Yes	3
8	Cuba	January 2003	36.0	No	-
8	Spain	March 2004	36.0	Yes	3
10	Argentina	October 2005	35.0	Yes	1, 2, 3
11	Mozambique	December 2004	34.8	Yes	3
12	Belgium	May 2003	34.7	Yes	2,3
13	Austria	November 2003	33.9	Yes	3
14	Iceland	May 2003	33.3	Yes	3
15	South Africa	April 2004	32.8	Yes	3

\* There are several types of quotas, including (1) constitutional quotas; (2) election law quotas; and (3) political party quotas for electoral candidates. For definitions, see Panel, page 79.

Sources: Data are drawn from the Inter-Parliamentary Union database on 'Women in National Parliaments', <<http://www.ipu.org/wmn-e/classif.htm>>, accessed May 2006. The figures for those legislatures using quotas are derived from the Global Database of Quotas for Women, <<http://www.quotaproject.org/country.cfm>>, also accessed May 2006.

*Source:* United Nations Development Programme, Gender and Legislation in Latin America and the Caribbean, Chapter 1, <http://www.undp.org/rblac/gender/legislation/politicalpart.htm>

The argument often used against quota systems, on other hand, is that quotas go against the principle of equal opportunity for all. The perception being that quotas give women preference over men and are therefore undemocratic. The special Law Commission on the Review of the Constitution also declined to implement a quota system in the Constitution "within the range of 30 percent to 50 percent as adopted by the Southern African Development Community Heads of State, to guarantee a fair level of participation for women."<sup>110</sup> In the view of that special Law Commission, it would be futile to consider introducing equal representation<sup>111</sup> when Malawi has failed to reach the 30 percent target set by the Southern African Development Community Declaration for 2005. Hence, the rejection of quotas by the special Law Commission on the Review of the Constitution is based on futility. Without further analysis by that special Law

<sup>109</sup> Dahlerup D and Freidenvall L, 2003; "Quotas as a "Fast Track" to Equal Political Representation for Women. Why Scandinavia is No Longer the Model" Paper presented at the IPSA World Congress, Durban, South Africa, June 29 to July 4, 2003 and in the present updated version at the APSA Annual Meeting in Philadelphia, August 28 to 31, 2003; <http://www.statsvet.su.se/quotas/APSAS5.doc> (Visited 7 January, 2009).

<sup>110</sup> Malawi Law Commission, 2007; *Report on the Review of the Constitution*. Malawi Government Gazette Extraordinary 21 September, 2007, p. 41.

<sup>111</sup> The ultimate state where both sexes are equally represented.

Commission, this Commission finds the basis of rejection of quotas weak and emotive.

The Commission however found the merits of a quota system and the evidence of their effectiveness very persuasive. The Commission therefore recommends the use of quotas to enhance the participation of women in the proposed law.

#### 4.3 POLITICAL PARTICIPATION

Political participation has been defined “as a series of activities linked to political processes practised by members of a society with intent to influence public life.”<sup>112</sup> By its very nature, democracy requires the full and active participation of all citizens, women and men alike, in all spheres of life. It is only when the participation of men and women in politics and decision-making is on an equal footing that the face of governance gains credibility by reflecting an accurate representation of the composition of the population.<sup>113</sup> Historical and existing organizational and institutional cultures and practices are undoubtedly responsible for the low visibility of women in politics and decision-making worldwide; but more so in Africa<sup>114</sup> and other parts of the developing world such as Latin America and the Caribbean.<sup>115</sup> These ingrained cultures and practices are prevalent in Malawi despite the constitutional recognition of the right of women to participate in politics and decision-making.

The reasons for the failure of women to participate in politics in Malawi despite election race being open to both sexes are many. These include the fact that women are powerless economically, financially and often do not attain high educational qualifications. Women also have limited financial and political resources and as a consequence they lack solid political standing to push them into the political sphere. More specifically, the National Programme on Increasing Women Representation in Parliament and Local Government<sup>116</sup> has identified the following as obstacles that hinder women’s participation and representation in the political sphere—

##### *(a) Rejection of women within political parties:*

In the 2004 parliamentary and presidential elections, some women were rejected as candidates on party tickets. These women either gave up or contested as independent candidates and many who stood as independent candidates lost. This clearly indicates lack of democratic principles in some political parties. Further, women are subjected to political pressure from male-dominated political party leadership structures to vote for male candidates.

---

<sup>112</sup> United Nations Development Programme, 2006; *Gender and Legislation in Latin America and the Caribbean*, Chapter 1. <http://www.undp.org/rblac/gender/legislation/politicalpart.htm> (Visited on 8 January, 2009).

<sup>113</sup> Mwale F, 2006; above footnote 98.

<sup>114</sup> Ward M, “Gender in Transition. Social and Political Transformation in Northern Ireland” Paper delivered at the Constitutionalism and Governance In Transition Seminar, University Of Ulster, Transitional Justice Seminar Series, Waterfront Hall, 2 November 2001. cited in Mwale F, 2006, above footnote 98.

<sup>115</sup> United Nations Development Programme, 2006; above footnote 113.

<sup>116</sup> Malawi Government, 2007; above footnote 99.

*(b) Limited financial muscle for campaigns and publicity materials by women aspirants:*

Culturally, men dominate the access and control of resources as a result women aspirants fail to carry out effective campaigns. Primary elections within political parties are mostly associated with the giving out of handouts in order to entice voters and to conduct underground campaigns. Women rarely have the resources to give out handouts.

*(c) Limited campaign skills and strategies:*

Women lack public speaking skills, conflict management, woman-candidate campaigning tips and generally lack an understanding of the election process.

*(d) Predominant patriarchal customs and traditions in the Malawian society:*

Social stereotyping against women is so widespread that an assertive woman is culturally considered rude and this affects voter decision-making. Intimidation and harassment associated with political campaigns is also widespread and particularly intense against women. Even within the family structure, husbands have a tendency of discouraging wives from participating in public affairs and unduly influence women's voting decisions.

*(e) Weak monitoring system of elections on gender perspective:*

Electoral laws are not engendered and female candidates are challenged by not having their own elections monitors at each voting centre. There is also limited effort in developing and disseminating gender perspective elections reports.

In consequence, although Malawian women constitute over 51 percent of the national population, their representation in politics is extremely low. The membership in Parliament is illustrative. For the period 2004 to 2009, out of 193 Members of Parliament, only 27 were women, making a total of 14 percent. This is an improvement from 1999 when women only represented 8 percent of the total number of Parliamentarians and from 1994 when women only constituted 5 percent. The levels of participation at this level nonetheless fall foul of achieving a critical mass of women participating in politics at the highest level.

Equally, Cabinet shows levels of under representation. As at March, 2004, out of 37 ministers, only 6 were women and one of these, was a deputy minister.<sup>117</sup> Following the May, 2009 elections there are now 42 women Members of Parliament out of 193 making up 22 percent of the total. There are currently 5 women ministers and 5 deputy ministers out of a Cabinet of 44. The Vice President is also a woman, making a total of 11 women in Cabinet. The percentage of women in Cabinet has thus risen from 18 percent to 25 percent since the last elections. There are currently no councillors at local government level, but the last recorded figure in 2004 indicates that only 70 out of 842 councillors were women.<sup>118</sup>

<sup>117</sup> See <http://www.malawi.gov.mw> (Visited on 9 January, 2009).

<sup>118</sup> Malawi Country Profile; The Local Government System at <http://www.cigf.org.uk> p.147 (Visited on 9 January, 2009).

Women therefore face a lot of barriers to participating as candidates in elections. The Commission also noted that Malawi political culture has however evolved in such a way that women's participation in politics is limited to non-decision-making roles, for example, as dancers. It has been noted that in Africa "dance and poetic performances are important forms of social discourse."<sup>119</sup> However, Malawi has witnessed the appropriation of popular culture for the entrenchment of a political system centred on the then President, Dr. H. Kamuzu Banda. While the practice of using women to perform "traditional dances" was denigrated by the advocates of multiparty politics in the run up to the general elections of May, 1994, the trend has visibly continued in post-1994 Malawi. Forms of popular art have emerged or re-emerged glorifying an incumbent President and his political party at a given point in time.<sup>120</sup>

After lengthy deliberations, the Commission decided that the only thing to overcome the barriers that women face and to make them serious contenders in decision-making was to employ the use of quotas. Gender quotas precisely target the main problem that women face within political party structures and in voter patterns. Gender quotas represent a leap over historical barriers and give voters the possibility to choose women candidates which they may not have had before within their preferred party.<sup>121</sup>

One of the challenges before the Commission was therefore to devise mechanisms for uplifting the status of women so that they are treated as serious contenders in decision-making, and not merely as "coteries of women" used as a tool for political mobilization<sup>122</sup> in a political field where their developmental partnership role is not appreciated.

In deciding to implement a quota system, the Commission noted that there are three main types of quotas in practice around the world to choose from. These are constitutional quotas, election law quotas,<sup>123</sup> and political party quotas. The Commission found that 46 countries worldwide mandate gender quotas under their Constitutions or laws; and 14 of those countries also have voluntary quota systems by political parties. An additional 55 countries rely solely on voluntary quota systems by political parties.<sup>124</sup>

---

<sup>119</sup> See Chijere Chirwa, W, 2001; Dancing towards Dictatorship: Political Songs and Popular Culture in Malawi in 10(1) *Nordic Journal of African Studies* 1-27, p.1. See also Spencer, P. (ed.), 1985; *Society and the Dance: The Social Anthropology of Process and Performance*. Cambridge: Cambridge University Press; Vail L, and White L, 1991; *Power and the Praise-Poem: Southern African Voices in History*. Charlottesville and London: University of Virginia; Kamlongera, C. et al., 1992; *Kubvina: An Introduction to Malawian Dance and Theatre*, Zomba: Centre for Social Research; and Page, 1993; *Dancing Towards Freedom: The Malawi Congress Party and the Popular Origins of Mass Nationalism in Malawi*, Mimeo.

<sup>120</sup> See Chijere Chirwa, 2001; above.

<sup>121</sup> Dahterup D, 2002; above footnote 109.

<sup>122</sup> Above, p.23.

<sup>123</sup> This is widely used in Scandinavia: See Denmark (the Equality between Women and Men Statute, 1987) and Norway (Gender Equality Act).

<sup>124</sup> Dopplick R, 2008; "Quotas for Electing Women: Path to Empowerment or Peril?" [http://www.insidejustice.com/law/index.php/intl/2008/10/17/quotas\\_for\\_women\\_politicians\\_2](http://www.insidejustice.com/law/index.php/intl/2008/10/17/quotas_for_women_politicians_2) (Visited 6 January, 2009).

### *Constitutional Quotas*

Constitutional quotas are quota provisions for national parliament or government that are mandated in the constitution of a country. Countries with constitutional quotas include Burkina Faso, Nepal, the Philippines and Uganda. Depending on how difficult it is to amend a constitution, constitutional quotas tend to be entrenched.<sup>125</sup>

The Commission noted that its sister special Law Commission on the Review of the Constitution was of the view that it is “impracticable to stipulate a quota in the Constitution since the proposed percentage may change all the time”<sup>126</sup> and it may not be that easy to keep on amending the Constitution. Further, the special Law Commission on the Review of the Constitution also took cognizance of the work of the special Law Commission on Gender Related Law Reform and recommended that issues of quotas be dealt with through an Act of Parliament developed by this Commission as opposed to the review of the Constitution.

The debate before the Commission centred around the question whether quotas in constitutions should be considered permanent or non—temporary measures because of the normative value placed on national constitutions as slowly changing, that is living, instruments. An argument was advanced by some members of the Commission that constitutions do change and have been changing frequently worldwide and, as such, constitutionally-mandated quotas could be temporary. However, other members of the Commission also advanced a different argument that a constitution may define the quota but the implementation of such quota could be stipulated as temporary and triggered only when necessary by enabling legislation. Hence, the implementation of such a quota would be temporary and discontinued during times when equal rates of representation are achieved. Ultimately, however, the Commission resolved the issue by deciding against constitutional amendment. The Commission was satisfied that a statute would ably establish a quota system capable of being enforced. For this reason, the Commission concurred with the reasoning of the special Law Commission on the Review of the Constitution and recommends that the **Gender Equality Bill** and not the Constitution should provide for the establishment of quotas.

#### 4.3.1 *Legislative or Electoral Law Quotas*

Legislative or electoral law quotas are quotas for national parliament or government that are provided for in national legislation. Belgium, Bosnia-Herzegovina, Serbia and Sudan as well as many countries in Latin America are examples of jurisdictions with legislative or electoral law quota systems. Legislative or electoral law quotas may apply to the number of women candidates proposed by a party for election, or may take the form of reserved seats in a national assembly or local government.

---

<sup>125</sup> Dahlerup D, 2002; above footnote 109.

<sup>126</sup> Malawi Law Commission, 2007; above footnote 111, page 41.

Legislative or electoral law quotas applying to the number of women candidates proposed by any party for election only operate in electoral systems of proportional representation. This type of quota system ensures that political parties come up with an engendered candidate list where, depending on the number of votes the party wins in elections, names will be drawn from that list for membership to parliament or local government.

Where the legislative or electoral law quotas apply to reserved seats, the quota in such cases stipulates that a certain percentage or number among those elected must be women. Increasingly, worldwide gender quotas are being introduced using the reserved seat systems. The women targeted by reserved seat quota systems are not appointed, but elected as in Jordan, Morocco, Uganda and Rwanda; and as at local government level in India, Bangladesh and Pakistan.<sup>127</sup> In the case of Uganda, 56 seats in parliament are reserved for women, one woman being elected from each of the 56 districts, on competitive elections among women candidates. Countries which have adopted the reserved seats quotas also have proportional representation electoral systems.

Upon lengthy deliberation on the issues of candidate quotas and reserved seat quotas, the Commission found that both systems would be difficult to implement in view of the Malawi electoral process. The Commission observed that election to the National Assembly depends on popular choice exercised through elections. At present Malawi uses the “Plurality-Majority Electoral System: the First-Past-the-Post (FPTP) electoral system where male and female candidates for membership of Parliament and local Government compete on an equal footing.”<sup>128</sup> The Commission noted nonetheless that although the First-Past-the-Post system appears fair since male and female candidates have the freedom to compete, election results show that men always outnumber women by far during polls. However, the Commission recalled that its mandate is limited to issues of gender equality and while it is accepted that in this case the current electoral process is not gender friendly, the Commission is ill-suited to reforming the electoral law in a gender-related law reform programme. Any legislative reform proposing a switch from an electoral system based on single-member constituencies to proportional representation would require detailed study and comprehensive consultation with Government and the Electoral Commission as well as the guidance of electoral law expertise within the Electoral Commission. The special Law Commission therefore recommends that Government should review the country’s electoral laws comprehensively to ensure that gender concerns are properly considered.

---

<sup>127</sup> Dahlerup D, 1998; “Using Quotas to Increase Women’s Political Representation”, in International IDEA, : Women in Parliament. Beyond Numbers. An updated version is to be found on the net: [www.idea.int/women](http://www.idea.int/women) (Visited 22 December, 2008).

<sup>128</sup> See also Malawi Law Commission, 2006; *The Constitution and the Electoral System in Malawi*. Lilongwe (Unpublished).

### 4.3.3 *Political Party Quotas*

In view of the recommendation to consider engendering gender laws, the Commission consequently resolved to address the issue of quotas through the regulation of political parties. Political party quotas are rules or targets set voluntarily by parties for the gender balance of the individuals they place in office. This quota system, also known as the voluntary party quota system, obliges parties to include a certain percentage of women as election candidates. It remains for the electorate to decide whether to vote for the candidate put forward by the party or not.

A comparative study conducted by the Commission revealed that 130 political parties in 61 countries<sup>129</sup> including Argentina, Bolivia, Ecuador, Germany, Italy, Norway, Sweden, South Africa and Mozambique have adopted political party quotas. Party quotas are different from constitutional quotas and legislative or electoral law quotas in that they lack the sanctioning power of the State as they are voluntarily agreed upon by political parties themselves. Parties simply promise to improve the gender balance of their elected officials, but there are no legal sanctions for failing to live up to these promises.

To date, the African National Congress (ANC) is the only party in South Africa to have introduced political party quotas. If the leading party in a country such as the African National Congress in South Africa, uses such a quota, this may have a significant impact on the overall rate of female representation. Yet most of the world's political parties do not employ any kind of quota at all. In South Africa, this system was introduced before the first democratic general elections in 1994. It is not legislated upon but is found in the African National Congress Party's guidelines for the nomination of public representatives. South African women, particularly women members of the ANC, have come a long way to achieve this. When the African National Congress was formed in 1912, women were not allowed under its constitution to be full members of the organization. They were regarded as auxiliary members with no voting rights.<sup>130</sup> Political party quotas are therefore a self-regulatory mechanism which political parties must bind themselves by.

As can be seen with the case of South Africa, only the African National Congress has a political party quota system. The process of binding political parties internally is however very important to women's political participation. The political party quotas cannot work if the political parties themselves do not submit female candidates for the electorate to choose from. As noted earlier, women are disadvantaged economically and financially; and often possess inadequate educational qualifications; as well as having limited access to financial and political resources to compete with their male counterparts even at the party primary elections.

<sup>129</sup> Louise K D, "Implementation of Political Party Gender Quotas: Evidence from the German Länder 1990-2000" *Party Politics*, 12 (March, 2006), 211-232.

<sup>130</sup> Myakayaka-Manzini M, 2003; "Political Party Quotas in South Africa", A paper presented at the International Institute for Democracy and Electoral Assistance (IDEA)/Electoral Institute of Southern Africa (EISA)/Southern African Development Community (SADC) Parliamentary Forum Conference on The Implementation of Quotas: African Experiences. Pretoria, South Africa, 11-12 November, 2003.

The Commission was not convinced however that leaving political party quotas to self-regulation will assist in the case of Malawi. The Commission was of the view that if parties are left to come up with their own quota systems with no regulation, there will be no consistency in the types of quotas and they may not be implemented. The Commission further noted that even in countries where this self-regulation is practiced, such as South Africa, the quota is not well enforced.

The Commission noted though that hardly any jurisdiction has enforced political party quotas through legislation, leaving enforcement to voluntary mechanisms. However, as noted earlier, where regulation is voluntary, there is very little compliance. The Commission was of the view that political party regulation presents the only possible space for the introduction of gender quotas in the Malawi electoral system. The Commission noted that in almost all political systems, no matter what electoral regime obtains, it is the political parties, and not the voters, that constitute the real gatekeepers into elected offices.<sup>131</sup>

Political parties are correctly referred to as “gatekeepers” because it is the political parties in democratic political systems that control or dominate the selection and nominations processes of representatives.<sup>132</sup> The crucial issue, who will get elected, is often decided by the political party’s internal nominations committee. These nominations committees select the candidate and place him or her in a constituency that gives him or her either a good chance of being elected. Invariably, even before the elections, political parties are privileged to know which the safe seats are. Unless there is a legal obligation to guide the political parties, women will be allocated seats in a constituency in which they are unlikely to win and thus male dominance in political participation is perpetuated. It is therefore very important that political party quotas should be backed by legislation.<sup>133</sup>

The Commission’s view is that while political parties may still be encouraged to set up affirmative action strategies for women that are voluntary, there is nothing in principle that prevents Malawi from formally regulating political party quotas by law to promote gender equality in political participation.

Although most countries prefer to adopt voluntary party quotas without legal regulation, Britain has used legislative party-based quotas to increase the number of women in Westminster and the devolved administrations of the Scottish and Welsh Assemblies respectively.<sup>134</sup>

As regards the length that the proposed quota should remain effective, the Commission noted that the Sex Discrimination (Election Candidates) Act (2002) of the United Kingdom sets up a time limit, or a “sunset clause”, of 15 years after which the quota will cease to have effect. Stakeholders at the various

---

<sup>131</sup> Dahlerup D, 1998; above footnote 127.

<sup>132</sup> See Dahlerup D, and Freidenvall L, 2003; above footnote 109.

<sup>133</sup> As above.

<sup>134</sup> Squires J, 2004; Gender Quotas in Britain: A Fast Track to Equality? Working Paper Series 2004:1 The Research Program on Gender Quotas. [http://www.quotaproject.org/publications/WPS\\_2004\\_1.pdf](http://www.quotaproject.org/publications/WPS_2004_1.pdf) (Visited 7 January, 2009).

consultations facilitated by the Commission also expressed concern that in many instances, countries have adopted affirmative action measures, backed by law, that have endured indefinitely. The Commission fully appreciates the importance of “sunset clauses” which prevent the quota from continuing after the situation for which they were implemented improves. Nonetheless, it was the Commission’s view that where the quota is constructed as gender-neutral, such a “sunset clause” would not be necessary. The Commission reasoned that it is only in circumstances where the quota aims to set up a critical mass of 30 percent for women only, for example, that a “sunset clause” would be necessary to review the system after more women than men start to get elected or after the system proves ineffective. Gender-neutral quotas, on the other hand, apply to both sexes and therefore do not require such review.

In light of the foregoing, therefore, the Commission recommends the amendment of the Parliamentary and Presidential Elections Act and the Local Government Elections Act to establish a gender parity quota with a minimum floor of 40 percent and a maximum ceiling of 60 percent for either sex. The Commission further recommends that a party that fails to comply with this quota system should face sanctions. The Commission recommends that the sanctions for non-compliance should be serious enough to act as an incentive for a party to adopt the quota system. Thus, the Commission recommends that any party that breaches the quota system should not be allowed to participate in an election and should be liable to pay a fine of 5 million Kwacha.

The Commission found the establishment of legislative gender political party quotas to be an absolute necessity. There can be little progress in achieving gender parity in political representation if the political parties themselves are not the targets of enforceable affirmative action measures. The Commission’s proposed amendments to the Parliamentary and Presidential Elections Act and the Local Government Elections Act have been attached to this Report as the draft Parliamentary and Presidential Elections (Amendment) Bill and the draft Local Government Elections (Amendment) Bill as Appendices II and III respectively.

#### 4.4 PARTICIPATION IN DECISION-MAKING IN THE PUBLIC SERVICE

The Commission recognized the importance of women’s participation in positions of power and decision-making in the public service. The Commission noted that with the emergence of several constitutional institutions, parastatal institutions and other public bodies after 1994, there are persons who have been employed in the public service beyond what has been traditionally known as the civil service. The Commission therefore reiterates the position of the CEDAW Committee, which in its General Recommendation No. 23 on political and public life,<sup>135</sup> stated as follows—

“In order to achieve broad representation in public life, women must have full equality in the exercise of political and economic power; they must be

<sup>135</sup> Office of the Human Rights Commissioner, 1997, (Sixteenth session, 13/01/1997), paragraph 17, <http://www.iwraw-ap.org/convention/details23.htm> (Visited on 8 January, 2009).

fully and equally involved in decision-making at all levels, both nationally and internationally, so that they may make their contribution to the goals of equality, development and the achievement of peace. A gender perspective is critical if these goals are to be met and if true democracy is to be assured. For these reasons, it is essential to involve women in public life to take advantage of their contribution, to assure their interests are protected and to fulfill the guarantee that the enjoyment of human rights is for all people regardless of gender. Women's full participation is essential not only for their empowerment but also for the advancement of society as a whole."

The Commission was very pleased to note that Government has already initiated various processes aimed at enhancing the participation of women in public appointments.<sup>136</sup> The Commission lauded the deliberate efforts by Government to put qualified women in key public positions in the public service which so far have resulted in the appointment of, among others, a female Deputy Governor of the Reserve Bank, a female Attorney General, a female Clerk of Parliament, a female Law Commissioner, a female Chief Legislative Counsel and a female Administrator General as a demonstration of political will aimed at promoting the visibility of women in public life. The Commission also noted that there has been, since 1999, female representation in the Speakership of the National Assembly. The Commission nonetheless regrettably noted that female representation is not very high in the Judiciary. Between the High Court and the Supreme Court of Appeal, there are 4 female Judges out of 27 Judges.

The Commission observed that the initiatives that have seen a rise in the number of female appointments are based on the political will of the Government of the day. As such, the Commission recommends that Government should adopt a clear and definitive policy to ensure consistency in the promotion of the participation of women. A more systematic approach, backed by clear guidelines in law or policy, is necessary to ensure that Government efforts to promote female representation are more consistent and enduring.

The Commission was therefore tasked with deciding whether to review public appointments legislation and administrative policy procedures and make recommendations accordingly, or to make provisions for the enhancement of the appointment of women in the **Gender Equality Bill**.

The Commission reviewed the practice from other jurisdictions where affirmative action measures have been introduced in the public service. For

---

<sup>136</sup> During its consultations with the Secretary to the President and Cabinet in the Office of the President and Cabinet Boardroom on 9 December, 2008, the Commission was informed that the Office of the President and Cabinet has already engaged a Gender Equality Officer in its Human Resources Department under the auspices of the CIDA Gender Equality Support Programme. The Department of Human Resources and Management which in offering advanced tertiary training opportunities for personnel in public service has also taken significant strides to guarantee equality between men and women. In 2007, 22 of 54 scholarships went to women. The Department of Human Resources and Management, in conjunction with Ministry of Women and Child Welfare, has also set up a Human Resources Systems Database with the intention of identifying and promoting capable and qualified women.

example, North Korea, introduced a 10 percent quota policy in 2004 in an attempt to systematically increase number of women entering senior positions in government. The North Korea Government undertook to increase the target quota of women employment to 30 percent by implementing its gender equality policy in appointments until 2007. The Government of North Korea also undertook to institute complementary policies aimed at securing gender equality in personnel management such as hiring, appointment and training of public servants. In addition, the Government of North Korea undertook to encourage each ministry to appoint at least one female in the post of Division Director or higher post. Finally, the Government of North Korea also created a legal basis to consider child care leave as part of work experience in promotion review to provide opportunity for women to better take care of children and work at the same time.<sup>137</sup>

The Commission notes that the North Korea Government<sup>138</sup> preferred to set up its quota system through policy and not law. Further, the North Korea affirmative action measures were made in the public service arena and not in gender equality legislation.

In Israel, on the other hand, affirmative action measures in public service are mandated by a law, the Women's Equal Rights Law (1951). This piece of legislation uses sweeping provisions to mandate the use of affirmative action measures aimed at achieving gender equality in public life. Section 6C of the legislation sets out a requirement of "adequate representation" which significantly expands the span of institutions to which the principle of affirmative action is to be adopted. All government ministries, local authorities, municipal corporations, statutory corporations and government corporations are thereby required to have adequate representation of women.<sup>139</sup>

In addition, to remedy shortcomings of affirmative action measures in the Israel Civil Service (Appointments) Law, 1959, two amendments have been made to this law. First, in 1995, a new structure was developed for the Civil Service Commission by adding a unit responsible for hiring and promoting women in the Israel civil service. Heading the unit is the General-Supervisor on the Advancement of Women. Initial guidelines for implementation of the amendment include a dual reporting process between the Commission and government ministries on—

(a) the number and rank of women in the public service;

(b) upcoming vacancies;

(c) the rate of women in top positions in each ministry relative to their overall rate in the ministry;

---

<sup>137</sup> Republic of Korea, Civil Service Commission website. [http://www.csc.go.kr/eng/news/news01-02.asp?bbs\\_id=500&brd\\_id=45&page=9&qryt=&qryv=](http://www.csc.go.kr/eng/news/news01-02.asp?bbs_id=500&brd_id=45&page=9&qryt=&qryv=) (Visited 9 January, 2009).

<sup>138</sup> As above.

<sup>139</sup> See Halperin-Kaddari R, 2004; *Women in Israel: A State of Their Own*, University of Pennsylvania Press

- (d) the number of women in internal and external committees;
- (e) the number of women with personal contracts; and
- (f) the participation of both sexes in seminars, educational tours abroad, etc.<sup>140</sup>

In December, 2000, another amendment to the Israel Civil Service (Appointments) Law was passed. This amendment obliges the application of affirmative action measures to all methods of hiring in the civil service. The amendment also authorizes the safeguarding of certain positions for women only.<sup>141</sup>

The Commission therefore noted that, as regards Israel, both a women's equality law and a reform of existing civil service appointment law, were used to introduce affirmative action measures for women's participation.

In order to find the best approach for the public service in Malawi, the Commission found it necessary to examine the whole public service appointments procedure. The Commission was of the view that it is only by analysing the structure and appointments procedure in the public service that the most ideal target for affirmative action measures for women's participation can be identified and recommendations for their incorporation duly made. The Commission concluded that in order to increase the participation of women within the higher levels of decision-making in the public service, the entry point into the service must be reviewed so that more women can enter, be retained and subsequently be promoted into decision-making positions.

The Commission was aware that the President is responsible for the public service and the Secretary to the President and Cabinet, also known as the Chief Secretary, is the head of the public service. The Department of Human Resource Management and Development (DHRMD) is the Central Government Agency responsible for overall policy on the management of human resources in the public service. It is a Department in the Office of the President and Cabinet (OPC) in Central Government.<sup>142</sup>

Two target areas for affirmative action mechanisms were therefore identified by the Commission; the issue of entry level appointments, presided over by the Department of Human Resource Management and Development, and appointments made by the President. Whilst it is important to ensure that women are appointed at entry level, it is equally important to ensure that at the higher echelons, where women are appointed by higher authorities such as the President, women are also represented. Having more women in the higher echelons will

<sup>140</sup> Government Programmes in Israel - Civil Service Commission website, <http://www.ilo.org/public/english/employment/gems/eo/program/israel/csc.htm> (Visited 9 January, 2009).

<sup>141</sup> See Halperin-Kaddari R, 2004; above footnote 139.

<sup>142</sup> Cap.1:03 of the Laws of Malawi. The Office of the President and Cabinet underwent major reform in 1993 and its present form derives from that restructuring and the Public Service Act enacted in 1994.

generate a trickle-down effect, leading to increased numbers in all areas of the public service.<sup>143</sup>

In general terms, public service recruitment is conditional on the existence of a vacancy; this being an established post approved in advance by Parliament when adopting the budget. The Constitution<sup>144</sup> sets out the legal basis of public administration in Malawi while the Public Service Act clarifies and operationalizes the legal mandate under the Constitution. The procedure for appointment in the Public Service is contained in Book One of the Malawi Public Service Regulations (MPSR).<sup>145</sup> Each Ministry and Department is responsible for recruitment of employees to fill positions on its establishment. Recruitment and promotion policy is formulated by the Department of Human Resource Management and Development for implementation by Ministries and Departments.

Where a vacancy occurs or it is written that a vacancy will occur in any post within the civil service, the Responsible Officer<sup>146</sup> for that office reports the vacancy to the appropriate service Commission in accordance with the Regulations of that Commission unless the appropriate Service Commission has delegated to him or her, authority to fill the vacancy. Examples of appropriate Commissions in the public service include the Judicial Service Commission; the Police Service Commission; the Prisons Service Commission; the Local Government Service Commission and Teaching Service Commission.<sup>147</sup>

Once an office obtains authority to fill the position from the Department of Human Resource Management and Development and the Office of the President and Cabinet, it prepares job specifications to give minimum qualifications and experience required that will be translated into an advertisement. This is then submitted to the appropriate service Commission.

Applications for a vacancy advertised by an appropriate service Commission are submitted through the Responsible Officer. The Responsible Officer then forwards the application with his or her comments to the appropriate service Commission in accordance with the Regulations of that Commission. Under Regulation 105 of the Malawi Public Service Regulations, the Secretary for Human Resource Management and Development prescribes the minimum qualifications required for entry into all grades of the Civil Service. In addition to these, the Responsible Officer may require such additional and specific qualifications or experience as are deemed necessary for the proper performance of the duties of a particular post. However, such additional qualifications or

<sup>143</sup> Devlin D, Independent Newspaper, "I Want to Aim My Stiletto at the Glass Ceiling". Ireland, Thursday, January 03, 2008, <http://www.independent.ie/opinion/columnists/martina-devlin/i-want-to-aim-my-stiletto-heel-at-the-glass-ceiling-1256190.html> (Visited 7 January, 2009).

<sup>144</sup> Chapter 20 of the Constitution.

<sup>145</sup> These Regulations fall under the Public Service Act.

<sup>146</sup> The independent authority in the Public Service responsible for recruitment, promotions, transfers and disciplinary matters.

<sup>147</sup> Government of Malawi, Office of the Vice President, Policy and Analysis Initiative Chapter 1, Technical Report No. 16, [www.econmancap.com/reports/sect\\_report\\_16\\_psmrp.pdf](http://www.econmancap.com/reports/sect_report_16_psmrp.pdf) (Visited 9 January, 2009).

experience shall not be designed or be so restrictive in their effect to favour a particular candidate for appointment, or interfere with the due performance by any Service Commission of the functions vested in it by the Constitution.

According to regulation 106 of the Malawi Public Service Regulations, no appointment may be made unless the candidate possesses the qualifications, whether minimum or additional, required for appointment to any grade or post but if the appropriate service Commission finds that none of the candidates possesses all specified qualifications, it reports to the Secretary for Human Resource Management and Development who informs the Commission to what extent it may accept alternative candidates or lower the standards for the qualifications required.

For positions lower than Executive Officer (EO) or Technical Officer (TO) grade, that is, diploma level, the vacancies are declared to the individual Ministry or public institution's Appointments and Disciplinary Committees (ADC) These bodies advertise the vacancies and once the originating Ministry or public institution completes short listing eligible candidates, the Commission or the Appointments and Disciplinary Committee, assesses the candidates mostly through oral interviews. Sometimes written examinations, aptitude tests and practical examinations are administered depending on the nature of the job.

For promotions, the procedure is similar to the one above. For positions at Executive Officer or Technical Officer grade, there is need for either training or acquisition of a diploma or writing departmental examinations for purposes of promotion.<sup>148</sup>

Where senior appointments are concerned, section 187 of the Constitution confers power on the Civil Service Commission to appoint persons to hold or act in offices in the civil service, including the power to confirm appointments and to remove such persons from office. However, by virtue of section 189(1) of the Constitution, the Civil Service Commission's power cannot be exercised on appointments that are regulated by the Judicial Service Commission, the Police Service Commission and the Prisons Service Commissions, appointments in the Defence Force of Malawi and other appointments that are made by the President.

The Judicial Service Commission, which is established under section 116 of the Constitution, has powers to nominate persons for judicial office except the office of the Chief Justice and it exercises disciplinary powers on such officers.

The Police Service Commission, which is established under section 155 of the Constitution, has powers to appoint persons to hold or act in offices in the Malawi Police Service, except the office of the Inspector General of Police. Its powers include the power to confirm appointments and to remove such persons from office.

Section 167 of the Constitution establishes the Prison Service Commission and confers upon it the power to appoint persons to hold or act in offices in the

---

<sup>148</sup> As above.

Prison Service of Malawi, except the Chief Commissioner for Prisons. Its powers include power to confirm appointments and to remove such persons from office.

The President has powers to appoint the following officers—

(a) the Chief Justice, the Attorney General and the Director of Public Prosecution;

(b) such personal staff of the President as he or she shall determine subject to approval of the Public Appointments Committee or as an Act of Parliament may allow;

(c) the Secretary to the Cabinet;

(d) Ambassadors, High Commissioners and other principal diplomatic staff, within the meaning of section 190 of the Constitution;<sup>149</sup>

(e) the High Command of the Defence Force;

(f) the Inspector General of Police;

(g) the Chief Commissioner of Prisons;

(h) the office of a Principal Secretary; and

(i) such other public office of sufficient seniority as may be prescribed by an Act of Parliament.<sup>150</sup>

From the foregoing, the Commission noted that under the legal mandate of the Constitution, the Employment Act, the Public Service Act, the Malawi Public Service Regulations, the Public Service Commission Regulations and the administrative mandate of Personnel Procedure Manuals and Internal Administrative Circulars, the public service recruitment and promotion policy is based on equal opportunity to all who qualify. Whilst there is guidance in terms of qualification and eligibility criteria for the entry posts in the mainstream civil services presided over by the Department of Human Resources Management and Development, the more senior offices depend upon the exercise of presidential prerogative. Although, in principle, gender considerations are supposed to be factored in at all levels of these processes as required by the National Gender Policy and the National Gender Programme, there are no legislative measures in place to complement them. Action taken in the absence of legislative measures to incorporate gender considerations in conjunction with merit at entry level and senior appointments could open up Government to sex discrimination law suits. The current situation is that without legislation to authorize affirmative action measures, any action taken to favour women outside the set procedures described above could be taken as being discriminatory to men.

<sup>149</sup> Section 190 of the Constitution provides that the above-mentioned officers appointments are subject to confirmation by the Public Appointments Committee which may require persons so appointed to answer questions as to their competence and financial probity.

<sup>150</sup> See Section 189 of the Constitution.

The Commission therefore recommends the introduction of public service appointment quotas within the **Gender Equality Bill**. This course of action shall ensure that public appointments are a guided process in which recognition is made of the merits of women and the obstacles that prevent them from competing on an equal footing with men. The Commission's decision is made on the premise that although the procedures for filling vacancies, promotions and appointments under the Malawi Public Service Commission and the Constitution are gender neutral, they have not been conducive to enhancing the participation of women in the public service. It is the Commission's view that it is necessary to provide a legal basis for a quantitative and qualitative feminization of public administration otherwise the numbers of women decision-makers in the public service will depend upon the benevolence of different government administrations.

The Commission opted to address these issues in the **Gender Equality Bill** and not by amending the Public Service Act. Further, the review of the Public Service Act and the Malawi Public Service Regulations would require a central government effort backed with all the necessary resources of adequate time and expertise. The Commission also recommends that Government should review the Malawi Public Service Regulations so that in addition to qualifications, recognition should be made of the need to recruit, promote and train more women in the civil and public services. The Commission therefore anticipates that Government will soon bring the Malawi Public Service Regulations in line with the obligation towards affirmative action for women as set out in the Constitution so that in due course, the provisions of the **Gender Equality Bill** shall complement the Malawi Public Service Regulations.

The Commission also noted nonetheless that some provisions in the Malawi Public Service Regulations are gender insensitive and recommends their immediate repeal. In particular, the Commission recommends the repeal of Regulation 1:122 which governs issues relating to married women as follows—

- 1:122**
- (1) A married woman shall be appointed only upon the terms and conditions applicable to a permanent officer.
  - (2) A female civil servant, who is married must bear in mind that should domestic affairs arising out of her marriage conflict or interfere with her official duties, such as posting or transfers, the Minister reserves the right to terminate her appointment.
  - (3) In calculating the pension or any gratuity payable upon the retirement from the public service of any female civil servant who exercised her right to elect to be re-appointed upon the terms and conditions applicable to a permanent officer, her pensionable service shall be the total of the following periods—
    - (a) qualifying service prior to 1st May, 1981, if (not a pensionable officer) she had continuously served in or had

been held against a pensionable post as defined in regulation 1:802 and

(b) qualifying service since 1st May, 1981, in a pensionable post.”

The Commission finds these provisions untenable in view of the constitutional right to equality and the equality and fair treatment provisions under the Employment Act. Both male and female civil servants have the right to employment on equal terms and women should not be subjected to less favourable employment conditions as a result of their marital status. Regulation 1:122 of the Malawi Public Service Regulations is a remnant of patriarchy that has no place in the current democratic dispensation. A Public Service (Amendment) Bill effecting this recommendation is attached to this Report as Appendix IV.

The Commission further concludes that development of legislative provisions on strategic measures to ensure the participation of women in public appointed positions alone is not enough. More needs to be done in order to ensure that the system for getting women into such positions is transparent; otherwise it is a system that can be subject to abuse, to the detriment of women. If qualified women are to be given an opportunity to fill senior public positions, the process by which such positions are filled should be well documented. Such practice will enhance accountability and curb corruption. The Commission therefore recommends that reliable evidence in the form of records of interviews should therefore be made available to the concerned parties upon request.

The Commission thus recommends that the proposed legislative provisions on quotas should be supplemented by provisions on transparent record management of the process of appointments in the public service. The Commission noted that records management is a recognized discipline described “as the cornerstone of any entity’s ability to fulfill its responsibility for good management.”<sup>151</sup> Without reliable, verifiable and authentic records, decisions and official transactions cannot be traced; and transparency cannot be guaranteed. In sum, without proper records, which are accessible to the people who are affected by them; neither integrity nor abuse can be demonstrated and no person can hold anybody accountable for failing to treat him or her fairly.<sup>152</sup>

The Commission also resolved that the legislative provisions proposed in this regard should expressly give the concerned parties the right to access the information or records held on them so as to enable them to institute legal action to enforce their right to equality if necessary. This was considered a very important enabling provision considering that Malawi has no freedom of information legislation enabling people to access records held by public or other authorities concerning them.

---

<sup>151</sup> International Records Management Trust website, <http://www.irmt.org> (visited 20 January, 2009).

<sup>152</sup> UNDP, 2001; *Country Assessment in Accountability and Transparency (CONTACT)*. New York.

The Commission recommends that Government should look into legislating on the whole area of access to information urgently as generally no rights can be enforced without access to information. Women are usually the worst affected when it comes to accessing information and therefore need specific measures if the gender equality obtaining in the country is to improve.

The Commission recommends the following provisions in the **Gender Equality Bill** on transparency in public appointments—

Transparency in public appointments ...—(1) A person who is interviewed for employment by a public institution, shall be entitled, upon request,—

(a) to be furnished with reasons, in writing, why that person was not appointed; or

(b) subject to subsection (2), to view records of the appointment process.

(2) Records that do not directly affect the applicant or cannot be disclosed in the public interest shall be exempted from disclosure.

(3) Where a public institution—

(a) requires further information in order to locate the records requested; and

(b) has informed the applicant of that requirement, it shall comply with subsection (1) only when it is supplied with that further information.

(4) For purposes of this section, “record” means information held at the time when the request is received.

As regards enhancing the actual participation of women in public life and decision-making positions, the Commission recommends the following Part in the **Gender Equality Bill**—

#### PART ...

##### EMPLOYMENT IN PUBLIC SERVICE

Quotas in public appointment or employment Cap. 1:03 ...—(1) Notwithstanding anything contained in the Public Service Act and subject to subsection (2), an appointing or recruiting authority in the public service shall appoint no less than forty percent and no more than sixty percent of either sex in any department in the public service.

(2) Subsection (1) shall not apply where—

(a) a member of either sex applying for the post, does not hold the minimum relevant educational qualifications or experience for the post;

(b) a member of either sex offered the post has not accepted the offer; or

(c) a member of either sex with the relevant educational qualifications or experience required for the post was not available or could not be identified for the post.

Compliance  
order

...—(1) Where an appointing or recruiting authority does not comply with section ..., the court shall, on application by the aggrieved person, make an order against the appointing or recruiting authority to ensure compliance.

(2) A compliance order issued by the court under subsection (1) shall be implemented by the appointing or recruiting authority against whom the order is made within such period as specified in the order.

(3) Where an appointing or recruiting authority fails to implement the terms of a compliance order, the authority commits an offence and shall be liable to a fine of K10,000 for every day the compliance order remains unimplemented.

The Commission also recommends the following definitions—

**“appointing or recruiting authority”** means a public office in whose power the decision to appoint or recruit any person lies;

**“public institution”** means an institution that is part of the public service within the meaning of “public service” under the Public Service Act.

Cap. 1:03

The Commission also recommends that the Department of Human Resource Management and Development should adopt a clear policy to guide the President from a gender perspective in exercising his prerogative in making appointments so that considerations of gender equality are firmly entrenched when executing powers under section 189 of the Constitution.

#### 4.5 THE PRIVATE SECTOR

The private sector is an important partner of the public sector in development and the main catalyst for economic growth. The Commission observed that the private sector is primarily oriented towards making profit which usually drives private sector institutions into optimizing their workforce in order to achieve greater revenue. The Commission considered how the private sector could be made more socially responsible and accountable to the general public with respect to incorporating issues of gender equality in its pursuit of profit. The Commission then considered whether to extend the application of quotas in the **Gender Equality Bill** to the private sector.

The Commission was aware that whilst quotas or reservations for women in public sector employment and in politics are more widely acceptable, there is usually resistance when it comes to regulating the private sector in this manner. One argument in opposition tends to be that there is no room for reservations in companies that compete globally as they are regulated by market forces. Others, adopting measured tones, have argued that whilst it is true to say social responsibility is not the prime motive for the private sector; it is in the interest of companies to contribute to larger social causes. A more prosperous society provides for a stable political environment; creates a larger consumer base and allows for harmonious conduct of business. Therefore it is in the interest of the private sector to cooperate with the Government in bringing about social prosperity. With respect to gender quotas, the general practice however is that the private sector may participate voluntarily and not mandatorily.

The Commission had recourse to some case studies from India and the United States of America where the private sector has been legally mandated to effect a minority quota when employing staff. The cost of adhering to the legislation alone has proved that mandatory regulation is impractical and crippling to small, privately owned companies which governments should be striving to protect. In the United States, all employers with more than fifteen members of staff, public, private or non-profit, come under the Equal Employment Opportunity Commission's (EEOC) Uniform Guidelines on Employee Selection Procedures. All sectors can be sued by the Equal Employment Opportunity Commission for discrimination if the racial, ethnic and sex mix of new employees diverges sufficiently from that of all other qualified applicants. For example, if the percentage of African-Americans hired is lower than the percentage of African-Americans applying the Commission can sue the employer.<sup>153</sup> In the United States, every dollar spent on the Equal Employment Opportunity Commission's regulatory enforcement inflicts about US\$20 million in compliance costs. The United States' federal government spent some US\$425 million on civil rights oversight in 1991, of which about US\$303 million appears to have been directed at the private sector. The implied private-sector compliance cost was a crippling US\$6 billion.<sup>154</sup> The enforcement and implementation costs for quotas in the private sector can thus be extremely high and stifling on business.

The Commission recalled views expressed by participants at the Regional Consultative Workshops in all three regions that Malawi is suffering from poor private sector investment as it is and it would be suicidal for the economy to add to the already high set up costs, compliance costs for employment quotas on the private sector.

Further, from a practical point of view, experience from the United States of America has led to the conclusion that maintaining private sector gender quotas is a major challenge for any small company. Many companies in Malawi tend to

<sup>153</sup> Brimelow P, and Spencer L., 1993; "When quotas replace merit, everybody suffers" Forbes, <http://www.vdare.com.pb/when-quotas.html> (Visited 9 January, 2009).

<sup>154</sup> As above.

be small. If a female employee leaves, a candidate from the same category must be hired irrespective of availability.<sup>155</sup> Secondly, such regulations are prime targets for an automatic regulatory framework which, in the case of the United States, the Equal Employment Opportunity Commission may sue a company for discrimination even if no female potential employee has complained. An Indian commentator maintains that this can only make things harder for small companies.<sup>156</sup> The Commission thus recommends that the private sector should not be subjected to mandatory gender quotas.

The Commission nonetheless reiterates the need to encourage the private sector to promote participation of women in that sphere and discussed at length the method through which this might be achieved. The Commission proposes that as the private sector will not be subject to legislative quotas, Government should implement policy measures to ensure that private sector institutions are engendered. One of the most effective ways of achieving this is to implement programmes and policies aimed at ensuring that private sector institutions dealing with Government shall receive special consideration in case of awards of contracts or any other business dealings. A private entity or institution that has a gender enhancement measure in its staff or a demonstrable track record of preferential treatment of women shall receive bonus points towards any decision in the award of a contract. Other measures include policies aimed at requiring equal access to employment for men and women in the private sector and policies aimed at assisting women entrepreneurs entering the private sector to have access to equal opportunities as men at the same level. The Commission recommends that Government initiate policies of this nature as a matter of urgency.

In summary, it is the Commission's recommendation that the **Gender Equality Bill** shall not legislate on employment gender parity quota requirements for the private sector. However, any aggrieved individual within the private sector who feels that he or she has been unfairly discriminated against on account of his or her sex, gender or marital status may still seek redress under the **Gender Equality Bill** or the Employment Act provided that he or she can prove that he or she has been unfairly discriminated against.

## 5.0 HEALTH

### 5.1 INTRODUCTION

Health is an integral part of any discussion on the rights of men, women and children. Without a right to health, the right to life is illusory. In the absence of good health, participation in any sphere is limited. Pervasively however, gender inequality and discrimination harm girls' and women's health directly and indirectly, throughout their life cycle; and the neglect of their health needs prevents many women from taking a full part in society.<sup>157</sup>

---

<sup>155</sup> Bhatnagar G, 2006; "Regarding job quotas" *New Delhi Times*, India.

[http://www.newdelhitimes.org/archives/2006/04/regarding\\_job-q.html](http://www.newdelhitimes.org/archives/2006/04/regarding_job-q.html) (Visited 9 January, 2009).

<sup>156</sup> As above

<sup>157</sup> UNFPA, 2000, State of the World Population Report.

Gender perspectives are important in designing health care policies due to the different health profiles of women and men based on both biological and social factors. Health care financing, health system reforms, health education and health policies and programmes could increase their cost effectiveness by considering gender dimensions. Increasing the quality and lowering the expense of health care is one of the highest social priorities in all countries and demography plays a major role in achieving this aim.<sup>158</sup>

A gender perspective is also important in efforts to extend life expectancy since differences between men and women start at birth. Women live longer than men due to genetic factors but also due to different behavioural, lifestyle and working patterns. For the world as a whole, female life expectancy is about 6 percent higher than for men.<sup>159</sup> Prevention and treatment should be planned and cost on the basis of gender. Females, as well as males, require specific health services for gender-specific diseases (breast cancer, cervical cancer and prostate cancer) reproduction (pregnancy, menopause, osteoporosis) and socio-economic concerns (malnutrition, violence against women, work-related stress).

In Malawi, maternal mortality is the primary health concern for women. According to the Malawi Multiple Indicator Cluster Survey (MICS) Preliminary Report for 2006,<sup>160</sup> the maternal mortality ratio (MMR) in Malawi rose sharply from 620 to 1120 per 100,000 live births from 1992 to 2000. Although the maternal mortality rate for the period 2000-04 has not yet been officially reported, there are indications that there is a downward trend from the 2000 figure. The preliminary report of the 2004 Malawi Demographic and Health Survey (MDHS)<sup>161</sup> shows a figure of 984 maternal deaths per 100,000 live births. Even with this figure, again Malawi remains one of the countries with the highest maternal mortality rate in the world.

For men in Malawi, reproductive health remains a large concern. Anecdotal reports received by the Commission at all Regional Consultative Workshops suggest that the health care service in the country is more attuned to responding to women's sexual and reproductive health concerns than men's. Although the Commission did not get any indication as to the exact numbers, many men in the country suffer serious illness such as prostate cancer and experience problems with sterility and sexual dysfunction for which they do not get adequate healthcare support. Although this is largely due to their inability to seek out services on account of the social stigma attached to these conditions, problems of capacity and resources, within the health care system were also cited.

Government has made efforts to respond to the health needs of men, women and children generally by ensuring the enjoyment of the right to health by everyone. The Commission observed however that the Constitution obliges the State to draft policies and laws to ensure the provision of adequate health care

---

<sup>158</sup> OECD, 2008; Gender and Sustainable Development "Maximising The Economic, Social and Environmental Role of Women" <http://www.oecd.org/dataoecd/58/1/40881538.pdf> (Visited 9 January, 2009)

<sup>159</sup> As above.

<sup>160</sup> National Statistical Office and UNICEF, 2006

<sup>161</sup> 2004 MDHS Estimates.

“commensurate with the health needs of Malawi society and international standards of health care.”<sup>162</sup> This Constitutional provision not only states an aspiration of Government, but also sets out a minimum standard in the delivery of health care. The Constitution also provides an equal opportunity for all in accessing health services in the pursuit of the right to development.<sup>163</sup> Notwithstanding these provisions, there is no express provision that gives an enforceable right to health under the Constitution or legislation and the Commission therefore considered it necessary to incorporate obligations in relation to the gender aspects of health in the **Gender Equality Bill**.

The increasing numbers of health specific protocols and conventions in the past three decades have seen dramatic changes in the levels of understanding of the right to health in such aspects as mental health, general health and well-being from a gender perspective. The HIV and AIDS pandemic has also played a major role in this. The toll taken on people’s health by other sexually transmitted infections (STIs), unwanted pregnancies, unsafe abortion, infertility, gender-based violence, sexual dysfunction and discrimination as a result of stigma has been amply documented and highlighted in national and international studies. In line with the recognition of the extent of these problems, there have been huge advances in knowledge about sexual function and sexual behavior. However, the Commission noted that because the right to health is such a wide topic, the general increase in knowledge about some of its gender concerns has not trickled down to all the components of the issues of health. Further the increase in knowledge has not seen a correlative rise in the health system’s response to these issues. In order to address these issues, the Commission decided to narrow down its consideration of the gender aspects of the right to health to its most crucial concerns for redress in the **Gender Equality Bill**. In this vein, the Commission chose to consider, in turn, the following issues: sexual and reproductive health, termination of pregnancy, and HIV and AIDS.

## 5.2 SEXUAL AND REPRODUCTIVE HEALTH

Sexual and reproductive health and well-being are essential if people are to have responsible, safe and satisfying sexual lives. Sexual and reproductive health requires a positive approach to human sexuality and an understanding of the complex factors that shape human sexual behavior. These factors address the question whether the expression of sexuality leads to sexual health and well-being or to sexual behavior that puts people at risk or makes them vulnerable to sexual and reproductive ill-health. The Commission was committed to promoting the potentially positive role sexuality can play in people’s lives and to recommending legislative provisions that can promote sexually healthy societies.

Sexual and reproductive health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. As such, sexual and reproductive health requires a

---

<sup>162</sup> See section 13 (c) of the Constitution; Article 12 of the CEDAW.

<sup>163</sup> Section 30 (2) of the Constitution.

positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual and reproductive health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled. Sexual rights are a subset of human rights that are already recognized in national laws, international human rights law and other consensus statements. They include the right of all persons, free of coercion, discrimination and violence, to—

- (a) the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
- (b) seek, receive and impart information related to sexuality;
- (c) sexuality education;
- (d) respect for bodily integrity;
- (e) choose their sexual partner;
- (f) decide to be sexually active or not;
- (g) have consensual sexual relations;
- (h) enter into consensual marriage;
- (i) decide whether or not and when, to have children; and
- (j) pursue a satisfying, safe and pleasurable sexual life.<sup>164</sup>

There are three principles key for any government action towards fulfilling women's reproductive health rights. The first is based on the rights to liberty, marry and found a family and to decide the number and spacing of one's children respectively. Women as well as men have the right to reproductive self-determination, that is, to control their sexual and reproductive lives and make reproductive health decisions without interference or coercion. The second principle is that the right to non-discrimination and respect for difference requires governments to offer everyone, including adolescents, unmarried women, sex workers, refugees and other marginal groups equal access to health care and to address the unique health needs of women and men. The third principle is based on the obligation to fulfill people's rights to life and health respectively. Governments must make comprehensive reproductive health services available to all and remove barriers to accessing health, many of which are rooted in gender inequality.<sup>165</sup>

The Commission observed that international practice urges governments to engage a rights-based approach in fulfillment of sexual and reproductive health rights. This is in contrast to the public health approach, which focuses on the

<sup>164</sup> WHO, 2002, "Gender and Reproductive Health Glossary", Draft Working Definition.

<sup>165</sup> Center for Reproductive Law and Policy (CRLP), *Reproductive Rights 2000: Moving Forward*. New York: CRLP; 2000. Available in English at: [www.reproductiverights.org/pub\\_bo\\_nr2k.html](http://www.reproductiverights.org/pub_bo_nr2k.html) (Visited on 12 January, 2009).

outcomes of health services for the whole population. A rights-based approach emphasizes the service delivery process and the well-being of individuals.<sup>166</sup> What matters most in such an approach is whether women and men have access to comprehensive reproductive health services and are treated with respect by providers.

On its part, the Malawi Government has manifested its commitment to improve reproductive health through the Reproductive Health Policy, 2002 which is presently being implemented through the Reproductive Health Programme.<sup>167</sup> Further, the National Post Abortion Care Strategy recognises access to sexual and reproductive health services as a fundamental human right.<sup>168</sup> The goal of the reproductive health programme is “to provide accessible, affordable and convenient comprehensive reproductive health services to all women, men and young people in Malawi through informed choice in order to enable them to attain their reproductive health goals and rights.”<sup>169</sup> The Programme also seeks to, among other things, improve safe maternal health care, achieve quality family planning, promote adolescent reproductive health services and management of unsafe abortions.<sup>170</sup>

Government also currently seeks to address sexual and reproductive health challenges through the implementation of a Roadmap for Accelerating the Reduction of Maternal and Neonatal Mortality and Morbidity in Malawi<sup>171</sup> (the “Roadmap”). Overall, the Roadmap acknowledges that the reduction of the current maternal crisis in Malawi is dependent upon addressing several factors, including the existing challenges relating to maternal health service delivery. Beyond this intervention, it is self-evident that the improvement of reproductive health services depends much on the national budgetary allocation to the health sector. An analyses of Malawi national budget has shown that the budget is generally inadequate to transform the conditions of the health sector and bring about the consequent improvement of reproductive health services.<sup>172</sup>

Hence, women and men are still not able to enjoy the highest standard of health and reproductive health due to national budgetary challenges, which have rendered the implementation of the Essential Health Package by the Government difficult. By extension, these constraints have negatively impacted on the delivery of Basic Emergency Obstetric Care.<sup>173</sup> Women continue to suffer with as few as 56 percent of skilled medical attendants at child delivery.<sup>174</sup> The position as regards women’s access to sexual and reproductive health largely remains as it

---

<sup>166</sup> Jacobson J L, 2000; “Transforming family planning programmes: towards a framework for advancing the reproductive rights agenda”. *Reproductive Health Matters*, 8 (15):21-32.

<sup>167</sup> Malawi Government; 2002, *Reproductive Health Policy*, Lilongwe: Ministry of Health.

<sup>168</sup> Ministry of Health and Population, 2003; *National Post Abortion Care Strategy*, p. 1.

<sup>169</sup> As above, p.3.

<sup>170</sup> As above.

<sup>171</sup> Malawi Government, 2006; Ministry of Health and Population.

<sup>172</sup> See for example IPAS Africa Alliance, “Legislative And Policy Framework On Access To Safe Abortion Services In Malawi” by Kachika, T., 2006.

<sup>173</sup> As above.

<sup>174</sup> Malawi Government, 2002; above footnote 167.

was when the CEDAW Committee,<sup>175</sup> at the 35th Session, commented as follows when Malawi presented its combined periodic report—

The Committee expresses concerns about the lack of access of women and girls to adequate health care services, including [...] family planning information, particularly in rural areas [...] The Committee is alarmed at the persistent high maternal mortality rate, particularly the number of deaths resulting from unsafe abortions, high fertility rates and inadequate family planning services, especially in rural areas, low rates of contraceptive use and lack of sex education [...].<sup>176</sup>

In consequence, the CEDAW Committee urged Malawi to continue its efforts to improve the country's health infrastructure and to ensure sufficient budgetary allocations for accessible health services. It also called on Malawi to integrate a gender perspective in all health sector reforms, while also ensuring that women's sexual and reproductive health needs are adequately addressed. In particular, the Committee recommended that the Malawi Government should undertake appropriate measures to improve women's access to health care and health related services and information, including access for women who live in rural areas. It called upon the Malawi Government to improve the availability of sexual and reproductive health services, including family planning information and services, as well as access to antenatal, postnatal and obstetric services to reduce maternal mortality and to achieve the Millennium Development Goal to reduce maternal mortality [...].<sup>177</sup>

The Commission recommends that Government should take measures to ensure adequate budgetary allocation to reproductive health rights issues and to make specific provisions for men's reproductive health in the budgetary allocations if the situation is to improve.

Further, under the CEDAW, Malawi is obliged to ensure that women have the same rights as men to decide freely and responsibly on the number and spacing of their children<sup>178</sup> and, by implication, the right to choose a sexual partner by guaranteeing women to the right to freely choose a spouse and to enter into marriage only with their free and full consent.<sup>179</sup> The AU Women's Protocol also includes under the right to health of women, the rights to control fertility; to decide whether to have children; the number of children and the spacing of children; and to choose the method of contraception.<sup>180</sup>

Other issues of concern pressing upon the Commission, were submissions received at all Consultative Workshops that some health facilities sometimes deny women their reproductive health care rights by denying them access to family

<sup>175</sup> IPAS Africa Alliance, 2006; above footnote 172.

<sup>176</sup> Second, Third, Fourth and Fifth Periodic Report of Malawi on the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW/C/MW1/2-5).

<sup>177</sup> Paragraphs 31 and 32, CEDAW/C/MW1/CO/5.

<sup>178</sup> Article 1 (e) of Article 16 of CEDAW.

<sup>179</sup> Article 1 (b) of Article 16 of CEDAW.

<sup>180</sup> Article 14 of the AU Women's Protocol.

planning in the absence of a spouse. The Commission was also concerned about the undignified and humiliating circumstances that women face when they visit health care facilities either as patients or guardians of family members. Whilst the Commission accepts that health care workers have been reported to subject patients and guardians of either sex to cruel and undignified treatment, the impact is more on women as they tend to visit health facilities more in their nurturing role as mothers and carers for other family members.

The Commission also noted that with low education and literacy levels,<sup>181</sup> especially among women in the country, the right to access sexual and reproductive health should be complemented by a right to information about those services so that women can make informed choices. Anecdotal reports of forced sterilization, lack of choice in family planning methods and reproductive health surgical procedures were a matter of concern to the Commission.

To address these ills, the Commission recommends the following Part on sexual and reproductive health in the **Gender Equality Bill**—

#### PART ...

#### SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

Right to  
sexual and  
reproductive  
health

... Every person has a right to adequate sexual and reproductive health which includes the right to—

- (a) access sexual and reproductive health care services;
- (b) access family planning services;
- (c) be protected from sexually transmitted infection;
- (d) self-protection from sexually transmitted infection;
- (e) choose whether or not to have a child;
- (f) choose the number of children and when to bear those children;
- (g) control fertility; and
- (h) choose an appropriate method of contraception.

<sup>181</sup> According to the Second Periodic Report of Malawi on the Convention of the Rights of the Child, (CRC/C/MWI/2) 17 July, 2008, although the adult literacy rate is currently at 64 percent, the majority of the population have no formal educational qualifications. In 2000, a survey conducted by the National Statistical Office indicated that 88 percent of the population (84 percent males and 92 percent females) had no formal educational qualifications (i.e. possessed neither a Primary School Leaving Certificate, a Junior Certificate of Education, a Malawi School Certificate of Education, 'A' Levels, a Diploma nor Bachelor's Degree).

Duties of  
Health  
Officers in  
respect to  
sexual and  
reproductive  
health  
Cap. 34:01

... —(1) In addition to the duties imposed or powers conferred on health officers by the Public Health Act or any other relevant law, every health officer shall—

(a) respect the sexual and reproductive health rights of every person without discrimination;

(b) respect the dignity and integrity of every person accessing those services;

(c) provide family planning services to any person the services irrespective of marital status or whether that person is accompanied by a spouse;

(d) impart all information necessary for a person to make a decision regarding whether or not to undergo any procedure or to accept any service affecting his or her sexual and reproductive health;

(e) record the manner in which the information imparted to the person seeking reproductive health care services was given and whether it was understood; and

(f) obtain the written consent of a person being offered sexual and reproductive health services or family planning services before performing any procedure or offering any service.

(2) Any person who contravenes this section commits an offence and shall be liable to a fine of K500,000 and to imprisonment for three years.

### 5.3 UNSAFE TERMINATION OF PREGNANCY

The Commission received submissions from the Reproductive Health Unit at the Ministry of Health and the Human Rights Commission respectively in relation to the high maternal mortality rates affecting Malawian women. High maternal mortality is making the realization of the fifth Millennium Development Goal to reduce maternal mortality by 75 percent by 2015 difficult to attain. Maternal mortality is a serious gender concern because it robs women and girls of their lives prematurely in the process of fulfilling their biological role in reproduction. Around the world, more than 500,000 women die in pregnancy or childbirth annually.

In the developing world, the risk of dying in childbirth is 1 in 48, even though virtually all countries now have safe motherhood programmes.<sup>182</sup> As noted earlier, the statistics for maternal mortality in Malawi are equally disheartening. There are 5,904 expected maternal deaths per year at the present

<sup>182</sup> United Nations Volunteer Programme, 2007; “MDG 5 Improve Maternal Health”.

maternal mortality rate.<sup>183</sup> The reasons for such high maternal mortality figures are complex and multifaceted. These range from Government's inadequate budgetary allocation to the health sector, lack of skilled personnel to attend to women at delivery, shortage of health care facilities, beliefs that prevent women from seeking hospital care at the earliest possible moment, severe bleeding, infection, unsafe abortion, hypertensive disorders, obstructed labour, HIV and AIDS, and many others. Reduction in the rate of maternal mortality will require ingenuity, solidarity and effort on the part of the Government and various partners. The Commission was, through the submissions of stakeholders requested to include unsafe abortion in the **Gender Equality Bill**.

Unsafe abortion is defined by the World Health Organization as "a procedure for terminating an unwanted pregnancy by either persons lacking the necessary skill or in an environment lacking the minimum medical standards or both."<sup>184</sup> Unsafe abortion normally occurs where abortion is prohibited or restricted by law and women try to terminate the pregnancy themselves or they turn to unskilled practitioners who use a variety of unsafe methods. It is estimated that approximately 15 percent of the maternal mortality rate worldwide is a result of unsafe abortions performed in "back street" abortion clinics or facilities.<sup>185</sup>

According to IPAS Alliance for Africa, a leading reproductive health international non-governmental organization, incomplete abortions caused largely as a result of unsafe abortions are the most common reason for admission to gynaecological wards in Malawi.<sup>186</sup> Further, various studies in Malawi have consistently established the fact that unsafe abortion is one of the contributing factors to Malawi's unacceptably high mortality rate.<sup>187</sup> IPAS cites a study conducted by Stewart and others in 1998 which found that 20 to 30 percent of maternal deaths annually are due to complications of abortions.<sup>188</sup> An audit conducted in the southern part of Malawi by Ratsma in 2003 established that 10.2 percent of direct maternal mortality were due to complications of abortions.<sup>189</sup> In his speech to the International Course on Population and Development Conference in 1994, the then Vice President of Malawi, the Right Honourable Justin Malewezi, confirmed that despite the criminalization of abortion in Malawi, nearly 35 percent of all maternal deaths are due to induced abortions, translating into an increasing rate of clandestine and back-door abortions. Unsafe abortion accounts for 60 percent of all acute gynaecological admissions.<sup>190</sup> These findings are emphasized in recent statistics which show that central hospitals in Malawi are attending to high numbers of women seeking post-abortion care. Following an examination of records in Malawi's central hospitals between 1999

---

<sup>183</sup> Maternal Mortality Rate (MMR) 984 per 100,000 live births: See Government of Malawi, National Statistical Office, 2004 ; "Malawi Demographic Health Survey" estimates.

<sup>184</sup> World Health Organization, 2002.

<sup>185</sup> Population Reference Bureau, 2006; "Unsafe Abortion Facts and Figures".

<sup>186</sup> IPAS Africa Alliance, 2006; above footnote 172.

<sup>187</sup> As above.

<sup>188</sup> As above.

<sup>189</sup> As above.

<sup>190</sup> As above.

and early 2006, Kamuzu Central Hospital had registered 2384 cases, while Queen Elizabeth Central Hospital (QECH) had registered 3178 cases; and Zomba Central Hospital had registered 1239 cases.<sup>191</sup>

In a recent assessment of the availability of Emergency Obstetric Care in Malawi,<sup>192</sup> out of the 48 hospitals assessed, complications of abortion accounted for the second most frequent direct obstetric complication (at 30 percent of obstetric cases). Further, a key informant discussion<sup>193</sup> with nursing staff in the Gynaecological Ward of Queen Elizabeth Central Hospital uncovered that the hospital receives an estimated 15 to 20 gynaecological cases on a daily basis, half of which are complications related to abortion. According to both nursing staff and specialists in the Department of Gynaecology and Obstetrics at Queen Elizabeth Central Hospital, a good number of patients who come for post-abortion care are adolescents.<sup>194</sup> This corroborates the 1992 Demographic Health Survey findings, which showed that 25 percent of all abortions occurred among adolescents.<sup>195</sup>

From the above findings, the Commission noted that the burden of treating women who have developed complications because of unlawful and unsafe termination of pregnancy still falls under the general health care and service delivery of the relevant Government hospitals. Currently, Government efforts to deal with abortion include provision of post-abortion care services in 55 health facilities throughout the country while Emergency Contraception Services are provided in approximately 87 facilities throughout the country.<sup>196</sup> These services are provided under the National Post Abortion Care Strategy and Service Delivery Guidelines developed by the Ministry of Health and Population.<sup>197</sup>

The general health care services are involved in treating complications which could have been prevented. The Commission concluded that in view of all the facts and figures surrounding the magnitude of the problem of unsafe abortion, there is no doubt that it is a gender concern and a human rights issue that can no longer be ignored. The Commission noted that the restriction against termination of pregnancy has been in the statute book since 1930 when the Penal Code was enacted. The Penal Code proscribes the unlawful administration of any poison or other noxious thing or use of force or any other means with intent to procure a miscarriage of a woman.<sup>198</sup> The Penal Code also proscribes similar conduct by a woman intending to procure her own miscarriage.<sup>199</sup> Further, the Penal Code proscribes supplying or procuring anything that is intended to be used

---

<sup>191</sup> As above.

<sup>192</sup> As above, quoting Government of Malawi, Ministry of Health; 2005.

<sup>193</sup> As above, the key informant discussion was conducted to support the IPAS desk review.

<sup>194</sup> As above.

<sup>195</sup> As above.

<sup>196</sup> Based on presentation made by Mrs. Linyenga to the Commission on 28 August, 2006.

<sup>197</sup> The Ministry is now referred to as the Ministry of Health. Objectives of this strategy include raising awareness of the magnitude of the problem of incomplete abortion, its complications and availability of post abortion care services, among others. Statistics emerging from post abortion care services indicate high usage in the urban centres.

<sup>198</sup> Section 149.

<sup>199</sup> Section 150.

to procure the miscarriage of a woman.<sup>200</sup> It may be argued that section 243 of the Penal Code allows for abortion in exceptional cases. The provision reads—

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.<sup>201</sup>

Section 243 of the Penal Code falls under Chapter XXII dealing with "Offences Endangering Life or Health". The side note to the provision reads "Surgical operation". It is clear from this provision that the person intended to be protected under this provision is the person performing the surgical operation and not the patient. The patient under this provision is only a beneficiary. Further, the provision states that a surgical operation may be performed either upon any person for his benefit or upon an unborn child for the preservation of the mother's life. In any event, it appears that the only method covered under this provision is a surgical operation and yet sections 149 to 151 of the Penal Code include many other forms of termination including administration of poison in order to procure an abortion.

If it is accepted that section 243 justifies termination of pregnancy, then abortion that is administered or procured on any other ground other than for the benefit of the patient or preservation of the mother's life is a felony.<sup>202</sup> The Commission observed that the provisions of the Penal Code in respect of abortion are overly restrictive and inconsistent with the spirit of the Reproductive Health Policy as well as international conventions to which Malawi is a party.

The AU Women's Protocol to which Malawi is a signatory has provided for women's reproductive health rights<sup>203</sup> that include entitlement to medical abortion.<sup>204</sup> This Protocol<sup>205</sup> also provides for the removal of the liability for women who seek, and providers who perform, abortions. It also provides clarification of the requirements for health facilities offering pregnancy termination. In addition, the AU Women's Protocol obliges State Parties to protect reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the mental and physical health of the mother of the foetus is endangered.<sup>206</sup>

---

<sup>200</sup> Section 151.

<sup>201</sup> The use of the test of good faith, and reasonable care and skill protects the person performing the surgical operation..

<sup>202</sup> Sections.149 & 150 of the Penal Code.

<sup>203</sup> Article 14 (2) (c) calls on member States "to protect the reproductive rights of women and recommends that states review laws that hinder women from enjoying or exercising their full reproductive rights".

<sup>204</sup> Article 14 (2) (c) of the Protocol to the African Charter.

<sup>205</sup> The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, in Article 14 (2) (c) provides for legal abortion where an abortion is necessary to save the life of the mother, or where the continued pregnancy endangers the mental or physical health of the mother of the fetus, or where a pregnancy arises from sexual assault, incest or rape.

<sup>206</sup> Article 17 of the AU Women's Protocol.

Malawi is also a signatory to the CEDAW which obliges State Parties to take all appropriate measures to eliminate discrimination in the field of health care including those related to family planning.<sup>207</sup> Under the Maputo Plan of Action for the Operationalization of the Continental Policy Framework for Sexual and Reproductive Rights 2007-2010<sup>208</sup> to which Malawi is a signatory, African Union member States are bound to reduce the incidence of unsafe abortion and some of the strategies for this obligation include adopting policies and enacting laws to reduce the incidence of unsafe abortion.

The Commission observed that the restriction of abortion under the Penal Code fails to recognize that there are instances where pregnancy may arise out of criminal conduct such as rape, incest and defilement and that it may not be recommended that the pregnancy should continue because it affects and endangers the life of the mother physically or psychologically. There are also some instances where the life of the mother or post-natal survival of the unborn child may be endangered by the continued pregnancy. As noted above, these exceptions are recognized under the AU Women's Protocol for the authorization of abortion.<sup>209</sup>

The Commission was aware that some countries such as South Africa, Zambia, the United Kingdom and Ghana have laws that are less restrictive and allow for abortions in a wide range of circumstances. The Commission noted that there are varying extremes in the laws, some liberal and some conservative. In liberal States like South Africa which enacted the Choice on Termination of Pregnancy Act in 1996; termination of pregnancy is, up to a certain extent, practically permitted on demand. Under this law, termination is permitted on request during the first 12 weeks of the gestation period; and termination of pregnancy between the 12th and 13th weeks is also permitted on recommendation of a medical practitioner giving reasons prescribed by the Act. Termination of pregnancy after 20 weeks is also permitted on recommendation of a medical practitioner or a registered midwife if they are of the opinion that continued pregnancy would endanger the woman's life or that of the foetus.<sup>210</sup>

Zambian law on abortion offers a different approach by expanding the medical exceptions on the restriction on abortion. The Termination of Pregnancy Act of Zambia, 1972, permits termination of pregnancy where continued pregnancy would involve risk to life or injury to the mental or physical health of the pregnant woman or any existing children; and where there is a substantial risk of seriously disabling physical or mental abnormality to the unborn child.<sup>211</sup>

In Great Britain, abortion has been legal since the Abortion Act, 1967. The grounds under which an abortion is permitted include saving the mother's life; prevention of permanent injury to the mother's or existing children's physical or

---

<sup>207</sup> Article 12 of the AU Women's Protocol.

<sup>208</sup> African Union, Sp/MIN/CAMH/5(1), 18-20 September, 2006.

<sup>209</sup> Article 17 of the AU Women's Protocol.

<sup>210</sup> Section 2 of the Choice on Termination of Pregnancy Act, 1996 of South Africa.

<sup>211</sup> Section 3 of the Termination of Pregnancy Act, 1972 of Zambia. The termination has to be performed by a medical practitioner and must be carried out in a hospital.

mental health; and if the child is likely to be severely physically or mentally handicapped.

The Commission noted that in all the jurisdictions cited, abortion is dealt with in a separate statute, dedicated to dealing with issues of abortion alone. The Commission acknowledges that the issue of abortion, especially unsafe abortion, is a gender issue and should be dealt with if the reproductive health of women is to improve in this country. A limited number of participants at all the Consultative Workshops as well as those working within the health sector made submissions to the effect that unsafe abortion is a gender issue, for which the failure to tackle is taking the status of women's reproductive health rights far below acceptable levels. The challenge before the Commission was with the incorporation of the issue of unsafe abortion in the context of a gender equality statute.

After lengthy deliberations during which the Commission contemplated providing for safe abortion within the **Gender Equality Bill**, the Commission concluded that the reason comparable foreign jurisdictions dedicate separate legislation to abortion is that it is a highly specialized area, requiring detailed input, expertise and research. The issue of abortion is multifaceted, touching on controversial issues in the legal, medical, human rights, religious, moral and reproductive health arenas.

The Commission was aware that its sister special Law Commission on the Review of Criminal Justice Legislation in its Report on the Review of the Penal Code;<sup>212</sup> having had occasion to review the Penal Code restrictions on abortion, elected not to. This Commission found that due to constraints of time and the need for wide and thorough consultations the review of the law on abortion should be handled by a special Law Commission set up specifically for that purpose. The Commission therefore recommends that Government with the understanding of all the dimensions attending to the abortion issue, through the Ministry of Health as a lead ministry, should carefully scrutinize the issues on unsafe termination of pregnancy highlighted in this Report and make immediate plans to institute a review of the law on abortion so that a new statute specifically on termination of pregnancy is enacted.

#### 5.4 HIV AND AIDS

The Commission observed that a person's gender plays a role in determining an individual's vulnerability to infection, his or her ability to access care, support or treatment for HIV and AIDS and the ability to cope when affected or infected.<sup>213</sup> Today, women account for nearly half the 40 million people living with HIV worldwide.<sup>214</sup> In Malawi, over 20 years since HIV was first discovered, young women aged 15 to 24 are more than three times as likely to be infected as

<sup>212</sup> Malawi Law Commission, 2000; above footnote 51.

<sup>213</sup> WHO, 2003, "Integrating Gender in HIV/AIDS Programmes: A Review Paper". Department of Gender and Women's Health, Family and Community Health, [www.who.int/gender/hiv-aids/en/integrating%5B2581CB%5D.pdf](http://www.who.int/gender/hiv-aids/en/integrating%5B2581CB%5D.pdf) (Visited 12 January, 2009).

<sup>214</sup> UNFPA, The Gender Dimensions of the HIV/AIDS Epidemic, 2006; <http://www.unfpa.org/gender/aids.htm> (Visited on 12 January, 2009).

young men.<sup>215</sup> Despite these alarming trends, women know less than men about how HIV is transmitted and how to prevent infection. Whatever little they know is often rendered useless by the discrimination and violence they face and their relative powerlessness to refuse sex or negotiate safe sex, especially in the context of marriage.<sup>216</sup> Indeed, women and girls face a range of HIV-related risk factors and vulnerabilities that men and boys do not face; many of which are embedded in the social relations and economic realities of their societies.<sup>217</sup> The HIV and AIDS pandemic has also increased the responsibility that women bear towards caring for the sick. In Malawi, the Government's policy is to promote home-based care for AIDS patients, due to the inadequacy of the health system to handle larger numbers of patients suffering from AIDS-related diseases admitted in hospitals. This has compounded the health care responsibilities of women in households.<sup>218</sup>

The Commission further noted that various national policies have underscored the gender nexus between HIV and AIDS. The National HIV and AIDS Policy states that often the socially, culturally, economically or legally underprivileged are vulnerable to HIV infection.<sup>219</sup> The National HIV and AIDS Policy states that women and girls are culturally taught to be subservient to men and become more susceptible to physical and sexual abuse.<sup>220</sup> Economically, women and girls attain lower education levels and as such their access to highly-paying employment is limited.<sup>221</sup> The Commission was aware that the Policy proposes comprehensive reforms of relevant laws that touch on HIV and AIDS and recommends that Government should undertake to ensure that women and girls regardless of marital status have equal access to appropriate, sound HIV-related information and education programmes, means of prevention and health services.<sup>222</sup>

Further, the National Gender Programme emphasizes that women and girls are particularly vulnerable to HIV infection for cultural and biological reasons.<sup>223</sup> This position is supported by the recommendation under the SADC Declaration on HIV/AIDS that State parties should create and sustain an enabling environment conducive to gender balance, rapid and broad-based socio-economic development of the Region and addressing major underlying factors that lead to the spread of the HIV infection.<sup>224</sup> Among the reasons for increased vulnerability of women and girls is the inability to negotiate for safe sex due to their lower status and fear of violence and sexual abuse from relatives and teachers.<sup>225</sup>

---

<sup>215</sup> Malawi Government, National Statistics Office, 2004; "Malawi Demographic Health Survey".

<sup>216</sup> As above.

<sup>217</sup> As above.

<sup>218</sup> Semu L, Ngwira N and Kamchezera G, 2004; "Malawi, Strategic Country Gender Assessment, May 2004". World Bank and UNDP, p.7.

<sup>219</sup> As above.

<sup>220</sup> As above, p. 45.

<sup>221</sup> As above.

<sup>222</sup> As above.

<sup>223</sup> National Gender Programme, p. 45.

<sup>224</sup> Article 3 (a) of the SADC Declaration on HIV/AIDS.

<sup>225</sup> Semu, Ngwira and Kamchedzera, above footnote 218.

The Declaration also notes that acceptability of women and girls in society depends largely on their being meek and sexually submissive. It also highlights traditional rituals especially those involving sexual practices that increase vulnerability to HIV infection.

The Malawi Strategic Country Gender Assessment<sup>226</sup> blames the cultural acceptance of male sexuality within the context of male dominance and patriarchal norms perpetuating a culture of violence that victimises women and especially the girl child which is common at the workplace and in the domestic arena.<sup>227</sup> At work, women often suffer sexual harassment, verbal assault and economic abuse while wife battering is culturally condoned and defilement of the girl child is common both inside and outside the family. As the girl child grows, sexual abusers gradually transform from male relatives to male employers and colleagues in the workplace. Many cultural songs condone such violence, telling women to persevere and encourage women to be sexually submissive to men. In the event of the death of male partner, women, laden with economic and emotional insecurity, are subjected to practices that put them in most vulnerable positions to risk of HIV infection. Such practices include a degrading practice referred to earlier in this Report as *kulowa kufa*, a practice aimed at exorcising the spirit of the deceased which literally means “widow cleansing”. Gender insensitive cultural and traditional beliefs also play a role in promulgating the spread of HIV infection and there are such beliefs as that sexual intercourse with a virgin cures HIV infection.

The Malawi Growth and Development Strategy incorporates strategies of the National AIDS Framework. It seeks not only to reduce the prevalence of HIV and AIDS but also to decrease the negative impact of HIV and AIDS on people living with AIDS and to reduce the economic, social and gender consequences for people living with HIV and AIDS.

The Commission further observed that, in 2003, SADC Heads of State committed their respective States to integrating gender in the process of community and nation building under the SADC Declaration on HIV/AIDS. The SADC Heads of States also declared that they would strengthen the initiatives that would increase the capacities of women and adolescent girls to protect themselves from the risk of HIV infection among others.<sup>228</sup> The AU Women’s Protocol gives the right to women to be protected against sexually transmitted infections, (including HIV and AIDS) and the right to be informed of one’s health status including a sexual partners’ status (including HIV and AIDS).<sup>229</sup> This Protocol also gives women the right to self-protection from sexually transmitted infections including HIV and AIDS.<sup>230</sup>

The Commission was of the view that all the observations and findings made in relation to HIV and AIDS within a gender context are in urgent need of redress

---

<sup>226</sup> As above.

<sup>227</sup> As above.

<sup>228</sup> SADC Declaration on HIV and AIDS.

<sup>229</sup> Article 14 (1) of the Protocol to the African Charter.

<sup>230</sup> Article 14 (1) (a) to (d) of the Protocol to the African Charter.

through law reform to incorporate the progressive views held in various national policies and programmes as well as international treaty obligations. The Commission recommends that legislative interventions aimed at reversing the spread of HIV and AIDS should address the critical role that gender relations plays in sexual and reproductive life and how it affects HIV prevention. Many HIV strategies assume an idealized world in which everyone is equal and free to make empowered choices and can opt to abstain from sex, stay faithful to one's partner or use condoms consistently.<sup>231</sup>

The Commission further observed that generally issues of HIV and AIDS go beyond matters of gender equality and was aware that a special Law Commission empanelled for the development of legislation governing issues of HIV and AIDS has completed its work and has produced a Report that addresses matters of gender inequality in relation to HIV and AIDS specifically.<sup>232</sup> The Commission has noted that the recommendations of that special Law Commission have addressed issues of HIV and AIDS from human rights, criminal law and public health perspectives. The Commission also agrees with that special Law Commission on its findings that issues of HIV and AIDS go beyond the bio-medical aspects where HIV and AIDS are understood simply in terms of disease. The Commission learned from the findings and recommendations of its sister special Law Commission that the social, economic, political and bio-medical aspects of the epidemic are equally significant and have been addressed; as have gender-related issues arising from international treaties been incorporated. The Commission therefore adopts the findings of its sister Commission and urges the Government to speedily enact them.

#### 5.5 MATERNITY LEAVE, PATERNITY LEAVE AND OTHER BENEFITS

Although pregnancy and maternity are biologically specific to women, reproduction itself is a social function; which should be protected for both women and men. Pregnancy and maternity should not restrict women from their right to work and should not constitute grounds for discrimination against them. The Constitution protects women from any form of discrimination including discrimination at work and in business. It also provides that legislation should be passed to eliminate practices that discriminate against women.

The Commission noted that at statutory level, issues of maternity are addressed only with respect to formal employment under the Employment Act. The Employment Act provides that a woman<sup>233</sup> is entitled to a paid maternity leave of a minimum period of 8 weeks every 3 years.<sup>234</sup> Nonetheless, there are many anecdotal cases of women who lose their employment on account of pregnancy. In other cases, benefits, including pay, are withheld from women

<sup>231</sup> UNFPA, 2009; The Gender Dimensions of the HIV/AIDS Epidemic: 2006; <http://www.unfpa.org/gender/aids.htm> (Visited on 12th January, 2009).

<sup>232</sup> Malawi Law Commission, 2008; Report of the Law Commission on the Development of HIV and AIDS Legislation. Government *Gazette* Extraordinary, 31 December, 2008.

<sup>233</sup> The Employment Act does not distinguish between an unmarried and a married woman.

<sup>234</sup> Section 47(1) of the Employment Act.

during maternity leave if it is granted at all. Cases of employers not allowing women to continue with their professional progression because they were absent from work due to pregnancy have also been cited. Although both the Employment Act and the Constitution prohibit discrimination, employers in the country have been known to discriminate against women who appear pregnant during the interview process. Women have also been asked to take pregnancy tests before they are offered employment.

At policy level, the issue of maternity leave falls within the National Gender Policy which sets out specific gender objectives. One such objective concerns employment. This objective aims at promoting advocacy for the creation of a favourable environment for equal employment opportunities and benefits for women, men, girls and boys. One of the strategies for achieving this objective is the review of conditions of service and labour laws so that they are gender responsive. Maternity and paternity leave fall under conditions of service which may or may not be in favour of women and men.

The Commission observed that Malawi is also obliged under the CEDAW to prevent discrimination against women on the grounds of marital or maternity status and to ensure their effective right to work by prohibiting the imposition of sanctions or dismissal on the grounds of pregnancy or of maternity leave and to prevent discrimination in dismissals purely on the basis of marital status.<sup>235</sup> The State is further obliged to introduce maternity leave with pay or with comparable social benefits without loss of employment, seniority or social allowances.<sup>236</sup> The AU Women's Protocol echoes this sentiment by urging State Parties to guarantee adequate and paid pre-natal and post-natal maternity leave in both public and private sectors.<sup>237</sup>

The Commission deliberated at length as to whether the provisions for maternity leave in the Employment Act are sufficient to protect women from the many injustices that they suffer at the workplace when they fall pregnant. In terms of length of maternity leave, it was originally argued that the minimum leave period is too short considering that it stipulates a three year cycle and does not take into account the recovery needs of the mother and development needs of the child. The Commission however finally decided that in view of the precarious nature of the Malawi economy, it was unrealistic to demand a longer period of paid leave and an extension in this period would be counterproductive for women in the long run. Further, the complexities involved in reaching consensus over the appropriate length of time for maternity leave between employees and employers and their respective interests was also considered. The Commission was satisfied that as a minimum period, 8 weeks is a fair compromise and therefore recommends that the minimum period of 8 weeks should be retained. The Commission noted that most employers voluntarily give at least 12 weeks of maternity leave.

---

<sup>235</sup> Article 11 (2) (a) of CEDAW.

<sup>236</sup> Article 11(2) (b) of CEDAW.

<sup>237</sup> Article 13 (i) of the Protocol to the African Charter.

Although section 47 (3) of the Employment Act allows for extension of the leave period where it is necessary, the Commission observed that leaving the extension of maternity leave entirely in the hands of the employer might not serve the purpose for which the leave is intended or for which a medical practitioner might have intended the extension. Any illness related to pregnancy should warrant extra leave as well as in the case of multiple births such as twins, or other exceptional deliveries such as caesarean delivery. The Commission thus recommends an amendment to this provision so that the discretion of the employer should be guided by, and depend upon, the recommendations of a certified medical practitioner. The proposed amendment to the Employment Act form part of this Report under the Employment (Amendment) Bill as Appendix V.

The Commission also considered other issues in relation to the working conditions of women during pregnancy which are not included in the Employment Act. Pregnant women who work in certain industries are put at risk when they come into contact with hazardous chemicals, equipment or are exposed to heavy workloads as part of their work. Adequate protection for pregnant women in such circumstances is not provided under the Employment Act. In other instances, women who return to work after maternity leave are unable to continue nursing their children due to the demands of their work. Adequate nursing breaks consistent with child health care needs are not provided for in the Employment Act.

The Commission thus concluded that provisions in the Employment Act on maternity benefits are incomplete. Maternity leave and accruing benefits should be viewed as a package including non-discrimination, job security, cash benefits, health protection measures and nursing breaks. The Commission accordingly recommends additional amendments to the Employment Act to improve the working conditions for pregnant women especially those involved in industries which by their very nature pose a health risk to the pregnant woman and her unborn child. As noted earlier, all proposed amendments to the Employment Act are attached to this Report as Appendix V.

Further, recognising that reproduction is both a masculine and feminine function, the Commission noted that the current provisions relating to pregnancy only recognize the entitlement of mothers to maternity leave. The Commission therefore considered the introduction of paternity leave for fathers. The Commission noted that under the Constitution, both parents have an obligation to raise their children. The AU Women's Protocol obliges State Parties to "recognise that both parents bear the primary responsibility for the upbringing and development of children."<sup>238</sup>

The Commission also deliberated on this collective responsibility of parents in the upbringing of their children and observed that while maternity leave affords the mother a natural opportunity to create a bond with the newborn child, there is

---

<sup>238</sup> As above.

no corresponding opportunity for the father, especially in cases where the father is under formal employment. In any event, while maternity leave also affords the mother an opportunity to take care of any pregnancy complications that might arise, her spouse would equally need time to avail himself for the care of the mother or the child. The Commission was also of the view that paternity leave would also provide an opportunity for the father to be present during and immediately after delivery of a child in order to allow for bonding between the child and the father and also to encourage involvement of men in parenting.

Various submissions were received by the Commission at all Consultative Workshops on the issue of paternity leave. Participants were concerned about productivity in cases where a polygamous husband applies for paternity leave in respect of all his wives, thus reducing the amount of time he spends at work. Connected to this issue was the concern that only legally recognized wives and not concubines should entitle a man the right to paternity leave. Other concerns were raised as to whether such leave should be paid, as it would cost employers a lot if all male employees were entitled to paternity leave. Stipulations were also made as to the time period that fathers would be off work. Views varied from 5 days to 2 weeks; with participants being concerned that some fathers would be irresponsible and not spend this time with the newborn child or the mother at all.

The Commission is confident that all the concerns raised can easily be addressed. The Commission has already dealt with the issue of polygamy in its second Report on the Review of Gender-Related Laws<sup>239</sup> by proscribing it. Originally, the Commission proposed that paternity leave should only apply in respect of a man's legally recognized wife. Evidence of the union in the form of a marriage certificate would, in that case, be required for any person wishing to benefit from paternity leave. However, upon deliberation, the Commission considered this position to be discriminatory against children born out of wedlock, who are guaranteed the constitutional right to equality.<sup>240</sup> Instead of tying the grant of paternity leave to marriage formalities, the Commission recommends the incorporation of a requirement that paternity leave shall be for a period of 2 weeks. Like maternity leave, the Commission recommends that paternity leave should only be taken once every 3 years. This will not only enhance workplace productivity but will also ensure that a father is free to take such leave for any child, regardless of the circumstances of birth.

The Commission therefore recommends the introduction of paternity leave by amending the Employment Act in line with the proposals set out above. As noted earlier, the Employment (Amendment) Bill forms part of this Report as Appendix V.

---

<sup>239</sup> See Malawi Law Commission, 2006; above footnote 14, pp 29-32.

<sup>240</sup> Section 23 of the Constitution.

## 6.0 EDUCATION AND TRAINING

### 6.1 INTRODUCTION

Education is a fundamental human right and a pressing development priority. When that right is granted and fully implemented, the society as a whole is more likely to improve in areas such as health, nutrition, general income and living standards and population fertility rates.<sup>241</sup> Education is critical to the development of every individual as it is linked to every facet of human welfare. For these reasons, education plays a prominent role in the Millennium Development Goals. Goal 2 of the Millennium Development Goals, “achieve universal primary education”, has the following target: “[E]nsure that by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling.” Three indicators were chosen for this target and these are net primary school enrollment ratio; proportion of students starting Grade 1 who reach Grade 5; and the literacy rate of 15 to 24 year-olds. In addition, Goal 3 which strives to achieve gender equality focuses squarely on gender parity in education at all levels with ambitious targets for both 2005 and 2015.<sup>242</sup> Education is therefore a cross-cutting issue without which none of the rights for women advocated for legislative intervention in this Report will take substantial effect.

### 6.2 CAPACITY FOR WOMEN

Without an educated critical mass of women, there will be few complainants to take up action when their rights have been violated. It takes an informed or educated woman to realize that certain practices, cultural or social, are harmful. It is only by having a pool of educated and qualified women that women will be more confident to stand for election into political positions. Further, unless there is a pool of educated and qualified women to draw from, there will be no women to draw on for decision-making positions in the public sector. Education is thus a prerequisite for the enjoyment of social, economic and political rights by women thereby enabling them to vote and be voted for.

Further, education ends generational cycles of poverty and disease and provides a foundation for sustainable development. In terms of development for a country that is dependent on agriculture, not only is education positively associated with agricultural productivity, higher incomes, lower fertility rates and improved nutrition and health, it is also very important for attaining these outcomes. Education is also vital for women to engage in viable economic activities including access to higher levels of income and loan facilities. Hence, education has a central role under any poverty reduction strategy.<sup>243</sup>

---

<sup>241</sup> See, for example, Taking IT Global-Understanding the Issues website, <http://issues.tigweb.org/education> (Visited 7 January, 2009).

<sup>242</sup> Millennium Project, Commissioned by the UN Secretary General and supported by the UN Development Group, April 18, 2003, “Achieving Universal Primary Education by 2015” Background Paper of the Task Force on Education and Gender Equality, <http://www.unmillenniumproject.org/documents/uf03edapr18.pdf> (Visited 12 January, 2009).

<sup>243</sup> Malawi Government, 2002; Malawi Poverty Reduction Strategy Paper . Ministry of Finance available at <http://www.finance.malawi.gov.mw/prsp.htm> (Visited 12 January, 2009), pp. 48-49.

There is no doubt that education also leads to greater choices or what has been termed the full realization of human capacity by the human capacity theory.<sup>244</sup> In this theory, education is essential for making informed choices; for seeing beyond the immediate horizon and opportunities; and for having a voice in public decision-making. Education is a counterweight to limits on social and economic mobility that are imposed by cultural biases, gender and ethnic discrimination and history.<sup>245</sup>

It is for the above reasons that more than any other sector-specific Millennium Development Goal, the education goal carries with it a promise of fundamental social transformation. Increasingly recognized as an essential ingredient, or even the main catalyst, for the transition to effective democracy and for sustained economic growth, education has the potential not only to change an individual's life chances, but also to profoundly alter society itself.<sup>246</sup>

Despite the recognition of the centrality of education to human development and the attainment of women's rights, gender disparity in education persists in enrolment, retention, delivery and attainment.<sup>247</sup> Worldwide, 115 million children of primary school age are denied the right to education.<sup>248</sup> The loss of potential in this respect has far reaching consequences as—

- (a) educated women have more economic opportunities and engage more fully in public life;
- (b) women who are educated tend to have fewer and healthier children and their children are more likely to attend school;
- (c) education also increases the ability of women and girls to protect themselves against sexually transmitted infections including HIV;<sup>249</sup>
- (d) educated girls tend to marry later;
- (e) they are better paid in the workplace; and
- (f) they assume a more active role in social, economic and political decision-making throughout their lives<sup>250</sup>.

Consequently, recognizing the importance of pursuing education for all as a key strategy to attaining the Millennium Development Goals, Government has made significant efforts in responding to the challenges facing women and girls in their quest to access education. Such efforts include the Girls' Attainment of Basic Literacy Education- Social Mobilization Campaign (GABLE-SMC), Social Mobilization Campaign on Education Quality (SMC-EQ), the Re-Entry Policy for Girls into Schools and the engendering of school's curriculum.

---

<sup>244</sup> Millennium Project, above footnote 242.

<sup>245</sup> As above.

<sup>246</sup> As above.

<sup>247</sup> See the CEDAW Report, as above footnote 176, p. 49.

<sup>248</sup> United Nations, 2005; The Millennium Development Goals Report, 2005. New York: United Nations.

<sup>249</sup> UNFPA, Gender Equality Factsheet, 2005,

[http://www.unfpa.org/swp/2005/presskit/factsheets/facts\\_gender.htm#gender\\_equality\\_education](http://www.unfpa.org/swp/2005/presskit/factsheets/facts_gender.htm#gender_equality_education).

<sup>250</sup> CARE website <http://www.change.org/care/videos> (Visited 7 January, 2009).

Generally, however, education indicators for Malawi are among the lowest in Sub-Saharan Africa. Although the adult literacy rate is currently at 64 percent, the majority of the population has no formal educational qualifications. In 2000, a survey conducted by the National Statistical Office indicated that 88 percent of the population (84 percent males and 92 percent females) had no formal educational qualifications.<sup>251</sup> The illiteracy rates for women are particularly high, with the proportion of women who have never attended formal schooling, increasing from 19 percent, in the age group 20 to 24 years, to 70 percent for those aged 65 years and older.<sup>252</sup> In comparison, the figures for men are 9 percent and 38 percent respectively.<sup>253</sup>

While the introduction of free primary education in 1994 increased the gross enrolment rate to 132 percent and the net enrolment rate to 78 percent in 1999,<sup>254</sup> the challenges surrounding primary education have resulted in high dropout rates. It is estimated that, currently, only 30 percent of children who start primary school complete primary education.<sup>255</sup> The retention rates of children are especially low in poorer households and for the girl child.<sup>256</sup> Since 2004, the annual enrolment for primary education has averaged about 32,000 pupils for the years 2004, 2005 and 2006.<sup>257</sup> The figures for these years in secondary school enrolment have averaged at 19,000 students.<sup>258</sup>

The reasons for the low figures as regards the enrolment and retention of the girl child are varied and multifaceted. The Commission is aware that some of the more common reasons include early marriages, sexual harassment and poor ethical values by male teachers, and lack of proper sanitation facilities which forces girls to drop out of school after attaining puberty.

The challenges for girls in accessing education continue throughout life with girl's accounting for only 37 percent of gross enrolment in secondary schools.<sup>259</sup> The figures are equally low in higher education where out of the approximately 4000 places available, less than 30 percent are occupied by female students.<sup>260</sup> Enrolment is limited by inadequate school places, boarding facilities, learning and financial resources. Statistics for enrolment into technical, entrepreneurial and vocational training also indicate a low figure for girls.

Current constitutional and statutory provisions on the right to education, together with various education policies and multi-sectoral policies, recognize the need to reform the education system in Malawi. The right to education for all

---

<sup>251</sup> See Semu, Ngwira and Kamchedzera, above footnote 218, p. 49.

<sup>252</sup> As above.

<sup>253</sup> As above.

<sup>254</sup> The MPRSP, above footnote 243, p. 49.

<sup>255</sup> As above.

<sup>256</sup> As above.

<sup>257</sup> Government of Malawi, 2006; EMIS, Ministry of Education.

<sup>258</sup> As above.

<sup>259</sup> As above.

<sup>260</sup> As above.

persons is recognized under section 25 of the Constitution.<sup>261</sup> This right is being implemented under the current National Education Sector Plan (NESP) 2006-2011, which reflects the Government of Malawi's commitment to both regional and international targets and priorities. It incorporates the existing Education For All (EFA) National Plan of Action, aligned with the Education For All Fast Track Initiative. In addition, the National Gender Policy echoes the sentiments of the Beijing Platform for Action in recognizing education not only as a human right, but also as an essential tool for achieving the goals of equality, development and peace.<sup>262</sup> The National Gender Programme which operationalizes the National Gender Policy specifically addresses the issue of education by advocating the increased access to quality education for girls. The Programme aims to pay particular attention to increasing access to all levels of education for girls, improving quality and relevance of curricula to address the special needs of girls and to achieving gender equality in the recruitment of teachers.

In terms of development, the Malawi Growth and Development Strategy also underscores Government's recognition of, and commitment to, education. Education is hailed as the key to attaining prosperity and the catalyst to socio-economic development; industrial growth; and an instrument for empowering the poor, the weak and the voiceless. In recognition of the poor state of education quality in the country, the Malawi Growth Development Strategy resonates with the National Education Sector Plan by touting improvements to quality through construction of suitable school buildings and classrooms, provision of relevant school supplies, training of qualified teachers and upgrading existing ones. The push towards quality reforms also aims at reviewing curricula with the aim of improving the relevance of education to job market needs and also to engender curricula.

The Commission was of the view that in order to see a significant improvement in the quality of education for boys and girls, a lot of effort needs to be invested in realizing the State's obligations under international law and policy.

As already noted, the National Education Sector Plan takes into account the Education For All principles which in terms of gender equality, commit States to the elimination of gender disparities in primary and secondary education by 2005 and achieving gender equality in education by 2015, with a focus on ensuring girls' full and equal access to, and achievement in, basic education of good quality. Under Article 10 of the CEDAW, Government is also obliged to take all appropriate measures to eliminate discrimination against women in order to ensure that equal rights with men in the field of education are protected. Further, the Beijing Declaration identified education as a human right and an essential tool for achieving equality, development and peace.<sup>263</sup> Lastly, the AU Women's Protocol also addresses the elimination of discrimination as vital in the attainment

---

<sup>261</sup> Section 13 (f) of the Constitution implores the State to provide adequate resources to improve education in Malawi.

<sup>262</sup> See the National Gender Policy, 2002.

<sup>263</sup> See Article 10 of the CEDAW.

of education for women. It specifically calls for the elimination of stereotypes in textbooks and syllabuses that perpetuate discrimination.<sup>264</sup> It further advocates for gender sensitization and human rights education at all levels of education and tertiary training.<sup>265</sup>

In order to complement the efforts and great strides made by Government in improving education, the Commission recommends the adoption of specific provisions in the **Gender Equality Bill** that give legal force to the various existing programmes and policies and that domesticate Malawi's international obligations. The Commission was aware that its sister special Law Commission on the Review of the Education Act undertook a comprehensive review on the Education Act; and that a Report is currently in press. The Commission, nonetheless, took the view that in order to underscore the importance of education as a gender equality issue, specific provisions aimed at ensuring gender equality in education should be incorporated in the **Gender Equality Bill**.

In coming up with specific areas for legislative intervention in the context of gender equality, the Commission examined problems arising out of the current status of education in Malawi and the emphasis on focal areas for action as outlined in the existing policies and strategies outlined earlier. From these, the Commission concluded that the following issues need to be acted upon—

(a) General Issues

- (i) increased enrolment and retention of girls in primary, secondary and tertiary education;
- (ii) increased access to quality education;
- (iii) increased access to opportunities and the award of grants, scholarships, bursaries, etc.; and
- (iv) increased access to career and vocational guidance.

(b) Tertiary education

- (i) guaranteed percentage of enrolment for girls; and
- (ii) increased access to grants scholarships and bursaries.

(c) Technical education and training

- (i) guaranteed enrolment of girls;
- (ii) increased access to grants, scholarships and bursaries;
- (iii) increased opportunities to participate in continuing education programmes; and
- (iv) increased number of females in training programmes in traditionally male-dominated programmes.

---

<sup>264</sup> Article 1 (a) and (b) of the Protocol to the African Charter.

<sup>265</sup> Article 1(e) of the Protocol to the African Charter.

(d) Curriculum development

(i) development of curricula that eliminates gender stereotypes in textbooks and the syllabus itself;

(ii) inclusion of gender sensitization and human rights education at all levels of curricula;

(iii) inclusion of environmental management subjects at all levels of curricula; and

(iv) inclusion of life skills including sex education.

The issue of curriculum, in particular, was noted as crucial and of paramount importance to any reform in education policy if gender disparities are to be eliminated. The Commission recommends that in addressing the issue of curriculum, the proposed legislation should consider not only eliminating negative stereotypical material, but should also include specific topics aimed at maintaining enrolment rates and equipping the girl child especially and subsequently the young woman with relevant life skills. The Commission noted that the Malawi Institute of Education has the responsibility of developing schools' curricula in the country. In this regard, the Commission proposes minimum statutory requirements to be fulfilled by the Institute in the development of curricula.<sup>266</sup>

Further, the Commission was of the view that setting up a robust and engendered education system must take into account the plight of rural women by equipping them with the life skills necessary to survive in a sustainable environment. Rural women carry greater responsibility in provision of food (which includes cultivation, processing and food preparation), wood collection, water provision, ensuring the well-being of children, and caring for the elderly and the sick.<sup>267</sup> The extent of the responsibilities of women in this regard are further exacerbated by external factors ranging from the state of the environment. For example, extreme drought conditions in the face of widespread deforestation makes tasks such as collecting cooking fuel and water difficult.<sup>268</sup> For this reason, the Commission considered it vital that sustainable natural resource management should be taught in schools so that both boys and girls are able to look after their environment with the result that women and girls suffer less from the results of natural resource degradation.

The Commission recommends the following Part on Education and Training—

---

<sup>266</sup> The Commission justified its approach with reference to the United Kingdom which also proposes minimum statutory requirements for the content of its National Curriculum. See Chapter 32, Part 6 of the Education Act, 2002 (of England and Wales).

<sup>267</sup> Semu, Ngwira and Kamchedzera, above footnote 218, p.7.

<sup>268</sup> Mwale F, 2006; above footnote 98.

## PART ...

## EDUCATION AND TRAINING

Equality in access to education and training	<p>... —(1) Every person has the right to access education and training including vocational guidance at all levels.</p> <p>(2) Except in the cases of special need, the State shall take active measures to ensure that educational institutions provide equal access to girls and boys and women and men, to—</p> <p style="padding-left: 40px;">(a) the same curricula;</p> <p style="padding-left: 40px;">(b) the same examinations;</p> <p style="padding-left: 40px;">(c) teaching staff with qualifications of the same standard;</p> <p style="padding-left: 40px;">(d) institutional premises and equipment of the same quality, irrespective of sex of students at the same level; or</p> <p style="padding-left: 40px;">(e) provision of sanitary facilities that take into account the specific needs of the sex of the students.</p>
Equal access to scholarships, etc.	<p>... —(1) Every person has the right to access a scholarship, grant, bursary, benefit or other scholastic endowment without regard to his or her sex.</p> <p>(2) The State shall take active measures to ensure that every educational institution has guidelines that facilitate compliance with subsection (1).</p>
Tertiary education institutions	<p>... The State shall take active measures to ensure the enrollment at tertiary education institutions of either sex to a minimum of forty percent and a maximum of sixty percent of students.</p>
Exception for single sex establishments	<p>... Sections ..., ... and ...<sup>269</sup> shall not apply to equality in access to education, training, the grant of scholarships and bursaries where the educational institution is a single sex institution which admits students of one sex only.</p>
General duties in relation to curriculum	<p>... —(1) The State shall take active measures to ensure that the curricula for all primary and secondary schools—</p> <p style="padding-left: 40px;">(a) integrates principles of gender equality within the spiritual, moral, cultural and mental development of students at the school, society and experience of life after completion of school with specific focus on gender equality;</p>

---

<sup>269</sup> Provisions on Equality in access to education, equal access to scholarships and tertiary education.

**(b) integrates gender issues and human rights at all levels;**

**(c) addresses the special needs of female students by incorporating life skills, including sex education;**

**(d) addresses issues of environmental care and protection; and**

**(e) introduces subjects that enhance the integration of female students in disciplines that are traditionally male-dominated, including sustainable natural resource management.**

The Commission also recommends the following definition in the interpretation provision of the Gender Equality Bill—

**“educational institution” means a school, college, university or other institution at which education or training is provided;**

## 7.0 DIGNITY

### 7.1 INTRODUCTION

Article 1 of the Universal Declaration of Human Rights stipulates that “all human beings are born free and equal in dignity and rights.” Sixty years after its adoption, the Universal Declaration is largely flouted by discriminatory legislation and practices against women and men. The right to dignity is accepted as “the highest human right” and “the source of rights.”<sup>270</sup> The right to dignity it has been argued has neither been granted by the State nor created by the person himself or herself but exists

irrespectively of sex, race and nationality, as well as from lifestyle. Every human being has been provided [...] with it [...] Dignity is related to human subsistence [...] itself; no one can take this right to dignity away. This right is owned not only by the honest, but also by dictators, children molesters or other asocial individuals [...] Even an unborn life in the body of a mother; mortally ill [...] have the matter-of-course dignity.<sup>271</sup>

### 7.2 DIGNITY OF WOMEN

The Commission observed that despite the constitutional recognition of the right of every person to dignity, it tends to be frequently violated. However, in the case of women, their dignity has received special recognition in some international instruments. The Preamble to the CEDAW states that “the discrimination of women violates the principle of equality of rights and respect for human dignity.” Article 3 of the AU Women’s Protocol specifically provides that “[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”

<sup>270</sup> Vaišvila, A, 2008; “Human dignity and the right to dignity in terms of legal personalism” Available at <http://www.mruni.lt> (Visited 20 January, 2009).

<sup>271</sup> As above.

The Commission was of the view that many of the discriminatory practices that are perpetuated against women occur because there is limited observance of the right to dignity of women. In relation to the specific cases of sex discrimination, it involves the denigration of women's dignity (and sometimes the dignity of men) and takes various forms. These include sexual harassment, deprivation of property, undignified portrayal of women in the media, and domestic violence. As the issue of dignity is cross-cutting, some aspects have already been tackled elsewhere in this Report with reference to health, education and participation in public life and politics.

### 7.3 SEXUAL HARASSMENT

The Commission was aware that the dignity of a person can also be violated by unwanted and unwelcome behavior or attention of a sexual nature that interferes with the victim's life. This type of conduct exemplifies sexual harassment. Generally, sexual harassment manifests itself through unwanted or unwelcome sexual advances, forced sexual activity, statements about sexual orientation or sexuality, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

Sexual harassment can still be committed in a situation where those involved are mutually attracted to each other or are friends. The behavior may be direct or implied. In most cases, sexual harassment is a manifestation of an imbalance in power relations and is likely to occur in the workplace as well as in other relationships involving trust such as that of a teacher and a student; a doctor and a patient; a lawyer and a client; an employer and an employee; between or among employees; and in some cases, between an employee and a customer.<sup>272</sup> Consequently, sexual harassment can affect an individual's work or school performance and can create an intimidating, hostile or an offensive environment.

The Commission observed that the issue of sexual harassment falls within the greater realm of sex discrimination. Sex discrimination occurs when a person is treated less fairly than another person because of his or her sex or marital status, or in the case of a woman, also because she is pregnant.<sup>273</sup>

The concept of sexual harassment as described above is generally considered a western concept in Malawi. Indeed, during the Consultative Workshops the Commission noted that many participants had difficulty in appreciating the concept. While it was accepted that women do suffer vulgar abuse and sometimes unwanted sexual contact, participants were more concerned about women's dress at the workplace. Participants were more inclined to believe that men are usually the victims of what they term as harassment when women dress in a sexually provocative manner such that men are uncomfortable and unable to concentrate on their work. Participants also viewed this as a type of harassment in its widest

<sup>272</sup> See Addison, N. and Lawson-Cottenden, T., 1998; *Harassment Law and Practice*; Bird R (2001) *Domestic Violence and Protection from Harassment*. London: Jordan.

<sup>273</sup> Preventing Sexual Harassment in the Workplace, <http://www.nolo.com/article.cfm/objectID/7440C7F8-0B89-46E4-A1DE73FE99AA61E0/111/259/283/ART/> (Visited on 12 January, 2009).

sense, not restricting it to the workplace. It was their view that men's rights are violated even as they walk on the street on account of the way women dress.

Whilst women's dress could arguably have a negative effect on men, the Commission stressed that the issue of sexual harassment must be understood as a concept that has developed in international human rights law. It is this legal concept that Malawi is obliged to address through national laws by virtue of its ratification of, and ascension to, international instruments such as the CEDAW. Issues surrounding women's dress fall within the realm of freedom of expression and the debate surrounding this matter is outside the scope of the Commission's mandate.

Sexual harassment has traditionally been associated solely with labour-related offences and is defined as occurring only in the context of unequal power relations (such as boss and employee). As a result, sexual harassment has often been dealt with under labour codes and only applied to those who experience such behavior in the formal employment sector. Over time, countries have acknowledged the limitations of this approach and have begun to address sexual harassment in a more comprehensive manner and in various areas of the law, such as anti-discrimination law and criminal law. For example, the Anti-Discrimination Act<sup>274</sup> of the State of New South Wales (Australia) provides that sexual harassment is against the law when it takes place in employment; educational institutions; receipt of goods or services; renting or attempting to rent accommodation; buying or selling land; and sporting activities. In Turkey, one of the major reforms to the Penal Code in 2004 was the criminalization of sexual harassment. In Kenya, sexual harassment is covered under three statutes: section 23 of the Sexual Offences Act<sup>275</sup> (criminalization of harassment by any person in a position of authority or holding public office); section 6 of the Employment Act<sup>276</sup> (harassment by employers or co-workers); and section 21 of the Public Officer Ethics Act<sup>277</sup> (harassment within public service and provision of public services). Indeed, in the case of *Vishaka v State of Rajasthan & Ors.*,<sup>278</sup> the Supreme Court of India applied Articles 11, 22, and 23 of the CEDAW, as well as General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women, and the relevant sections of the Beijing Platform for Action (pertaining to promotion of health and safety in work), in order to create a legally binding definition of sexual harassment, which invokes a broad definition of "workplace".<sup>279</sup>

Although anecdotal reports received by the Commission at all Consultative Workshops indicate that numerous women in Malawi have experienced some

---

<sup>274</sup> Act No. 48 of 1977.

<sup>275</sup> Act No. 3 of 2006.

<sup>276</sup> Act No. 11 of 2007.

<sup>277</sup> Act No. 4 of 2003.

<sup>278</sup> AIR 1997 S.C.3011.

<sup>279</sup> United Nations, 2008, Report on the Expert Group Meeting on good practices in legislation. p.30 [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf) (Visited 20 January, 2009).

form of sexual harassment, the Commission had recourse to only one court case regarding sexual harassment. In *Rose K. Kankosi v The Office of the Ombudsman*,<sup>280</sup> the complainant instituted the case based on unfair labour practice amounting to breach of her rights in terms of section 31 of the Constitution, and constructive dismissal in terms of section 60 of the Employment Act. The complainant alleged that she was victimized at her workplace for resisting the sexual advances of the then Ombudsman, Enoch Chibwana. The Court concluded that on the basis of available evidence before it, the conduct of the Ombudsman towards the complainant amounted to unwarranted sexual advances. The Court further concluded that the sexual advances in question constituted sexual harassment.<sup>281</sup>

It is possible to conclude that women are reluctant to report cases of sexual harassment in Malawi. The Commission noted that the perpetuation of sexual harassment actually thrives on a victim's uncertainty about how to describe what is happening to them. In addition, it is usually the case that the people around the victim may have difficulty understanding and accepting that the harassment is occurring and their reaction may increase the victim's confusion and isolation. Culturally, when a sexual harassment victim speaks out about what they are experiencing, it is the victim who is considered as the cause of the harassment as it is believed in some quarters that a woman must have welcomed or even prompted any sexual advances that she receives. For these reasons and the fear that harassment can incite, most victims never report what they have experienced. Often, they do not even talk about it to family and friends.

Further, the Commission was aware that there are two forms of sexual harassment *Quid Pro Quo* ('This for That') and Hostile Environment. *Quid pro quo* harassment is widely known. An example includes a supervisor who tells a subordinate that he or she must be "sexually cooperative" with the supervisor or he or she will be fired and who then indeed fires the subordinate for being "uncooperative".<sup>282</sup>

Hostile environment harassment can result from the gender-based, unwelcome conduct of supervisors, co-workers, customers, vendors, or anyone else with whom the victimized employee interacts at the workplace. Case law from the United States Supreme Court has isolated behaviours that have contributed to a hostile environment as follows—

- (a) unfulfilled threats to impose a sexual *quid pro quo*;
- (b) discussing sexual activities;
- (c) telling off-colour jokes;<sup>283</sup>

---

<sup>280</sup> IRC Matter No. 70 of 2003, Industrial Relations Court, Lilongwe Registry (Unreported).

<sup>281</sup> See the ruling of the Chairman of the Industrial Relations Court, MCC Mkandawire (as he then was) at pp. 6-10.

<sup>282</sup> Kadue, D., 2000; "Preventing Sexual harassment: A Fact Sheet for Employees" [http://www.dotcr.ost.dot.gov/Documents/complaint/Preventing\\_Sexual\\_Harassment.htm](http://www.dotcr.ost.dot.gov/Documents/complaint/Preventing_Sexual_Harassment.htm) (Visited 20 January, 2009).

- (d) unnecessary touching;
- (e) commenting on physical attributes;
- (f) displaying sexually suggestive pictures;
- (g) using demeaning or inappropriate terms, such as “babe”;
- (h) using indecent gestures;
- (i) sabotaging the victim’s work;
- (j) engaging in hostile physical conduct;
- (k) granting job favours to those who participate in consensual sexual activity; and
- (l) using crude and offensive language.<sup>284</sup>

The examples above can create legal liability only if they are based on the affected employee’s gender and are severe or pervasive. Nonetheless, even if unwelcome conduct falls short of a legal violation, employers have moral and organizational reasons as well as legal incentives to address and correct that conduct at its earliest stages.

The conduct constituting sexual harassment is not always sexual in nature. In the United States of America, the courts have held that a man’s violent physical assault on a woman was sexual harassment because the assault was based on the woman’s gender, even though there was nothing sexual about the assault itself. Alternatively, if a male employee sabotaged the work of a female co-worker because she is a woman that would still be considered sexual harassment. Even if the male employee did not engage in typical or common sexual behavior, such as telling off-colour jokes or displaying pornographic photos on the walls, their behavior is sexual harassment because the behavior is based on the woman’s gender.<sup>285</sup>

Just because the unwelcome conduct is aimed at a person on the basis of his or her gender is not always sufficient for a court to return a finding of sexual harassment. The Commission noted that American case law demands that the conduct must meet two additional requirements. Firstly, it must be subjectively abusive to the person(s) affected. Secondly, it must be objectively severe or pervasive enough to create a work environment that a reasonable person would find abusive. To determine whether the behavior is severe or pervasive enough to create a hostile environment, the court considers the frequency and the severity of

---

<sup>283</sup> The term “off-colour jokes” (also known as dirty jokes) is an Americanism used to describe jokes, prose, poems, black comedy, blue comedy and skits that deal with topics that are considered to be in poor taste or overly vulgar by the prevailing morality of a culture. Most commonly labeled as “off-colour” are acts concerned with sex, a particular ethnic group, or gender. Other off-color topics include violence, particularly domestic abuse; excessive swearing or profanity; “toilet humor”; national superiority or inferiority; dead baby jokes; pedophilic content; and any other topics generally considered impolite or indecent.

<sup>284</sup> Kadue, D., 2000; above footnote 282.

<sup>285</sup> As above.

the unwelcome discriminatory conduct. The court also considers whether the conduct was physically threatening or humiliating, or a mere offensive utterance, or whether the conduct unreasonably interfered with work performance. In addition, the court considers the effect on the employee's psychological well-being and whether the harasser was a superior in the organization.<sup>286</sup>

Each factor is relevant and the factors gain strength cumulatively. No single factor is required to establish that there is a hostile environment. Relatively trivial, isolated incidents generally do not create a hostile environment. In the American case of *Weiss v. Coca Cola Bottling Co. of Chicago*,<sup>287</sup> the court found no legal violation where a woman's supervisor, over the course of a few months, had asked her out on dates; called her a "dumb blonde"; placed his hand on her shoulder; placed "I love you" signs in her work area and attempted to kiss her. A hostile environment constituting sexual harassment also was not found where women were asked for a couple of dates by co-workers; subjected to three offensive incidents over 18 months; or subjected to only occasional teasing or isolated crude jokes or sexual remarks.<sup>288</sup> Sexual harassment was found, on the other hand, where women were touched in a sexually offensive manner while in confined workspace; subjected to a long pattern of ridicule and abuse on the basis of gender; or forced to endure repeated unwelcome sexual advances.<sup>289</sup>

The examples cited above serve to illustrate how severe discriminatory conduct must be to be legally actionable. In view of the uncertainty in determining whether harassment has in fact occurred, jurisdictions that have outlawed sexual harassment also generally have in place legislative or policy guidelines. These guidelines oblige employers to address incidents of unwelcome gender-based conduct long before they approach the level of severity or pervasiveness that would create a hostile environment resulting in a potential cause of action at law.<sup>290</sup>

The Commission also established that in a number of jurisdictions, sexual harassment is dealt with under a separate statute.<sup>291</sup> The statutes on sexual harassment define the scope of acts that would constitute sexual harassment, very often in similar terms to those developed by the courts in the United States and lay out a complaint procedure for victims.<sup>292</sup> In the case of employers, there is a duty placed on them to investigate and take action against employees who commit acts of sexual harassment. The relevant law also provides for strategies for prevention of incidents of sexual harassment and provide for training for employees, supervisors and managers. In the event of an incidence of sexual

---

<sup>286</sup> As above.

<sup>287</sup> 990F.2d333, or 1993 US App 7th 182.

<sup>288</sup> As above.

<sup>289</sup> As above.

<sup>290</sup> Kadue, D., 2000; above footnote 282.

<sup>291</sup> See for example the Anti-Sexual Harassment Act of the Philippines, the Protection Against Sexual Harassment Act of Belize, the Protection from Harassment Act of the England and Wales, and the Civil Rights Act of the United States of America, to mention a few.

<sup>292</sup> See, for example, the Sexual Discrimination Act (of Australia).

harassment, the law outlines punitive measures including disciplinary action against the perpetrators.<sup>293</sup>

The Commission also noted that sexual discrimination takes place in educational establishments in Malawi.<sup>294</sup> Sexual harassment is common at every stage of education. Verbal and physical harassment begins in primary school and generally 4 out of 5 children experience some form of sexual harassment or bullying. As many as 8 out of 10 will experience this at some point in their school lives and roughly 25 percent will experience this often. Boys are more likely to physically harass and bully others, or to be physically bullied themselves. Girls are more likely to use and experience, verbal and psychological harassment and bullying. Six out of ten students will experience some form of physical sexual harassment.<sup>295</sup> In addition, at tertiary level, sexual harassment by teachers and lecturers also occurs and this can have serious, sometimes devastating, consequences for the victim.

Sexual harassment in an educational establishment can have the most serious consequences of all because education is one of the few arenas where victims have absolutely no power and no advocates. Similar to sexual harassment in the workplace, most students who experience sexual harassment do not report what is happening. The causes of sexual harassment and exploitation by teachers and lecturers can be complex. Relationships between students and teachers are often quite intimate and intense, particularly in higher education where so many students work closely with their lecturers. Students share common passions and interests with their teachers and are dependent on their teachers' approval for academic success, opportunities and career success. Teachers often relish the admiration they receive from their students and they can grow accustomed to the power they have in the relationship. Such closeness can blur the professional boundaries and lead people, teacher and student alike, to step over the line.

The dynamics of sexual harassment in an educational institution often involve an aggressor who holds a position of power over the victim and this is especially intense in a student-teacher relationship. Relying on the teacher as a model of right and wrong, a student may doubt his or her own reaction to the situation. Like peer harassment, most complaints about teachers' behavior tend to centre around what is felt to be inappropriate talk in a class or discussion, such as using sexist or sexual references to make a point. However, some teachers will ask for sexual favours in exchange for grades or academic opportunities, or will downgrade a student who is not "attentive enough" to the teacher. Both are examples of *Quid pro quo* harassment.

---

<sup>293</sup> In the United States of America, the Equal Employment Opportunities Commission is the federal agency that enforces sexual harassment laws.

<sup>294</sup> See Mbilizi, A M, 2001; "Gender Equality in Malawian Tertiary Education and Employment: Unequal Opportunities and Violence against Women". A presentation at a SADC workshop on institutional transformation for Southern African tertiary institutions: Johannesburg: 16-18 July, 2001 (unpublished).

<sup>295</sup> Sexual Harassment Support Website, "Sexual harassment in Education" <http://www.sexualharassmentsupport.org/SHed.html> (Visited 20 January, 2009).

Others have used the presence of an academic advisory session, or one-on-one instruction, to take advantage of a student behind closed doors. Indeed, a teacher may use the guise of professional concern or interest to mask that they are actually stalking a student and planning a seduction.

The effects of sexual harassment on the victim can be devastating. The Commission observed that it is difficult enough to retain girls in school without having them drop out or having increased absenteeism to avoid harassment. In some cases, victims have to drop courses, or change academic plans and academic transcripts may be weakened because of decreased school performance or because of illness from the stress.

The above discussion on sexual harassment is consistent with anecdotal reports of the experiences of many women and girls in Malawi.<sup>296</sup> In order to avoid girls from suffering in their education and the rights of women and men being violated at the workplace, the Commission recommends the incorporation of provisions prohibiting sexual harassment in the **Gender Equality Bill**. The current lack of legislative provisions on sexual harassment in Malawi attracted censure by the CEDAW Committee at the presentation of Malawi's combined periodic CEDAW report at the 35th Session in May, 2006.<sup>297</sup> The Commission recommends the adoption of provisions to address the issue of sexual harassment. Further, as Malawi has also failed to define "discrimination" and to adequately articulate it under statutory law as required by the CEDAW Committee, the Commission recommends that the definition under the CEDAW should be reflected in the recommended provisions.

The Commission recommends the following provisions on the prohibition of discrimination and sexual harassment in the **Gender Equality Bill**—

- Sex discrimination ... —(1) A person discriminates against another person if—
- (a) on the grounds of sex, he or she treats the other person less favourably than he or she would treat a person of his or her opposite sex; or
  - (b) he or she applies to the other person an exclusion, distinction or restriction which applies or would apply equally to both sexes but—
    - (i) which is such that the proportion of one sex who can comply with it is considerably smaller than the proportion of the opposite sex who cannot comply with it;
    - (ii) which he or she cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and

<sup>296</sup> Anecdotes were narrated by participants at the National and Regional Consultative Workshops.

<sup>297</sup> On 19 May, 2006, the CEDAW Committee considered the combined second, third, fourth and fifth periodic report of Malawi (CEDAW/C/MW1/2-5). The Committees list of issues and questions is contained in CEDAW/C/MWI/Q/5 and Malawi's responses are contained in the CEDAW/C/MWI/Q/5/Add.1.

(iii) which is to the detriment of the other person because he or she cannot comply with it,

with the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of the rights and fundamental freedoms of that person.<sup>298</sup>

(2) A person who discriminates against another person commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.

Sexual harassment

... —(1) A person commits an act of sexual harassment if he or she engages in any form of unwanted verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

(2) A person who sexually harasses another in terms of subsection (1) commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.

Workplace policy for sexual harassment

... —(1) The State shall take active measures to ensure that employers have developed and are implementing appropriate policy and procedures aimed at eliminating sexual harassment in the workplace which shall—

(a) entitle all persons who have been subjected to sexual harassment in the workplace to raise a grievance about its occurrence and be guaranteed that appropriate disciplinary action will be taken against perpetrators;

(b) entitle a non-employee who has been subjected to sexual harassment to lodge a grievance with the employer of the perpetrator where the conduct giving rise to the complaint has taken place at the work place or in the course of the perpetrator's employment;

(c) entitle all employees, job applicants and other persons who have dealings with the workplace to be treated with dignity;

(d) oblige the person in charge of the work place to—

(i) implement the policy and procedures and impose disciplinary action against employees who do not comply;

<sup>298</sup> The Commission adapted the definition of discrimination in the CEDAW to capture discrimination of both men and women and not just women as is the case in the CEDAW.

(ii) deal seriously, expeditiously, sensitively and confidentially with all allegations of sexual harassment;

(iii) protect employees against victimization, retaliation for lodging grievances and from false accusations;

(iv) explain the procedure which shall be followed by persons who are victims of sexual harassment;

(v) communicate the sexual harassment policy and grievance procedures effectively to all employees; and

(vi) designate a person outside of line management whom a person who has been subjected to sexual harassment may approach for confidential advice and counselling.

**(2) Any person who has been subjected to sexual harassment need not have exhausted internal sexual harassment procedures before prosecution of the offence can be commenced or civil proceedings can be instituted.**

#### 7.4 RIGHT TO PROPERTY<sup>299</sup>

The legal meaning of 'property' does not refer to a 'thing' but to the relation among persons on the basis of a 'thing'. The 'thing' has been dephysicalized and the focus is no longer on the dominion of persons over 'things' but the dominion of the interpersonal relation or relationship.<sup>300</sup> In this dephysicalized mould of 'property', Kevin Gray has conceived of 'property' as 'thin air' and has defined 'property' as a 'power relationship constituted by legally sanctioned control over access to benefits of excludable resources'.<sup>301</sup> The relation can be strictly legal or social.<sup>302</sup> The relation is what, at law, constitutes the 'right' or 'interest' in 'property'.<sup>303</sup> Hence, in property discourse, the primary reference is to a 'right' to 'property'; the secondary reference being to a 'right' to 'property' in land.<sup>304</sup>

<sup>299</sup> For the constitutional basis of the right to property in Malawi, see sections 28, 44 and 208 of the Constitution. See also Silungwe, CM, 2009; "The Rhetoric and Practice in Land Reform in Malawi: A Contextualised Governmentality Analysis", *Malawi Law Journal*, Volume 3, Issue 1, 26-54, 47-50.

<sup>300</sup> Vandavelde, K, 1980; "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" 29 *Buffalo Law Review* 325. See also Reich, C, 1964; "The New Property" 73 *Yale Law Journal* 773.

<sup>301</sup> Gray, K, 1991; "Property in Thin Air" 50(2) *Cambridge Law Journal* 252, 295.

<sup>302</sup> Munzer, S, 2001; "Property as Social Relations" in SR Munzer (ed.) *New Essays in the Legal and Political Theory of Property*. Cambridge: Cambridge University Press, 36-75, 37.

<sup>303</sup> Penner, JE, 1997; *The Idea of Property in Law*. Oxford: Oxford University Press, 49-51.

<sup>304</sup> Honore, T, 2006; "Property and Ownership: Marginal Comments" in T Endicott *et al.*, *Properties of Law: Essays in Honour of Jim Harris*. Oxford: Oxford University Press, 129-136, 131.

The Commission noted that due to the socio-economic situation in Malawi that perpetuates gender inequality, women own very little, if any, property. Indeed, having noted the nuanced conception of the right to property, in Malawi, what is critical for the discussion here is the ownership of real property such as land, or personal property such as household utensils and livestock. Further, women often lack the educational qualifications and paid wage status to enter the job market and their subordinate status to men sometimes prevents them from exercising rights of ownership even when they accumulate property. In the absence of property, women are left subservient to men and totally dependent on them in a manner that robs them of their dignity.

The Commission observed that under the Constitution, women are entitled to acquire and dispose of property alone or in association with others. The right under the Constitution extends to the protection of property acquired through inheritance. Women who are prevented from inheriting property left by a deceased spouse have been subjected to grave indignity in trying to find a way for them and their children to survive. The Commission recalled its earlier work in addressing a gap in the law with respect to property acquired through inheritance during the Review of the Wills and Inheritance Act.<sup>305</sup> In January, 2004, the Commission published its report which, among other things, enhances the rights of women and men to dispose of property including the right to acquire property upon the death of a spouse.

The Commission further recalled and affirms its earlier recommendations in the Report on the review of Laws on Marriage and Divorce.<sup>306</sup> These are comprehensive recommendations on the rights of women with respect to property on entry into, during the subsistence of, and on dissolution of marriage.

The Commission also considered another submission in relation to women and property made during the Second National Constitutional Review Workshop<sup>307</sup> which was found to be unsuitable for constitutional reform and was accordingly referred to this Commission. The submission relates to the fact that under the Constitution, upon the dissolution of marriage, women are entitled to a fair disposition of property that is held jointly with a husband.<sup>308</sup> The Commission reiterated its earlier findings and recommendations as regards this provision, which it made during the review of the Laws on Marriage and Divorce.<sup>309</sup> The Commission recalled that the recommendations contained in its Review of the Laws on Marriage and Divorce advocate as fair, a system of distribution based upon such factors as the welfare needs of children, earning capacity and other obligations of both spouses after divorce as determined by a court. The Commission found this recommendation adequate to protect the dignity of women. The Commission recommends that Government must expedite the

---

<sup>305</sup> Malawi Law Commission, 2004; above footnote 6.

<sup>306</sup> Malawi Law Commission, 2006; above footnote 14.

<sup>307</sup> Second National Constitutional Conference conducted from 17 to 19 April, 2007 at Capital Hotel.

<sup>308</sup> Section 24 (b) (ii) of the Constitution.

<sup>309</sup> Malawi Law Commission, 2006; above footnote 14.

enactment on the recommendations relating to the Wills and Inheritance Act,<sup>310</sup> and the laws on marriage and divorce in order to ensure the protection of the right to dignity of women through the protection of their right to property acquired through inheritance.

#### 7.5 CENSORSHIP AND CLASSIFICATION OF ENTERTAINMENT

The Commission was concerned with the portrayal of women in the print, visual and audio media. The Commission was aware of certain songs aired on the radio and television that are degrading to women and denigrating of their right to dignity. The Commission bemoaned this practice which exposes young children to unsuitable messages about the female sex so that they grow up perpetuating learned gender-based prejudice. The Commission was also aware that as regards radio and television broadcasts; the Communications Act<sup>311</sup> has a strict broadcasting policy<sup>312</sup> and a Code of Conduct for Broadcasting Services<sup>313</sup> that have to be complied with. Whilst respecting the right to freedom of information, the Code of Conduct for Broadcasting Services highlights the general obligation of broadcasters not to broadcast any material that is indecent, obscene or offensive to public morals (including abusive or insulting language).<sup>314</sup> Hence, the Commission recommends that the Malawi Communications Regulatory Authority (MACRA) should enforce the regulations of that Code to ensure that messages relating to women, men and children are not violating their dignity.

The Commission noted that as regards the print media, there is no legal regulatory framework governing newspapers' or periodicals' codes of ethics. Newspapers have been known to serialize cartoons that depict women in the least modest of dress and portray them as immoral objects for sexual pleasure. In light of HIV and AIDS, and with regard to the country's heightened gender sensitivities, the Commission believes that these are not messages Malawian children or any part of the population should be exposed to. The provisions of the Censorship and Control of Entertainments Act<sup>315</sup> are largely outdated and the review of this Act by a sister special Law Commission in 2001<sup>316</sup> is yet to be enacted into law. The Commission strongly urges Government to look into the enactment of the recommendations of that special Law Commission.

The Commission had occasion to consult journalists from various newspaper houses during the National Consultative Workshop and the three Regional Consultative Workshops. Representatives from the print media were uncomfortable with proposals for regulation as they were of the view that the right to freedom of speech should not be curtailed. The representatives preferred self-regulation which is already being done through the recently revived Media Council of Malawi.

<sup>310</sup> Malawi Law Commission; 2004 above footnote 6.

<sup>311</sup> Communications Act, No. 41 of 1998.

<sup>312</sup> Section 45 of the Act.

<sup>313</sup> Third Schedule.

<sup>314</sup> As above, rule 2.

<sup>315</sup> Cap. 21:01 of the Laws of Malawi.

<sup>316</sup> Law Commission, *Report of the Law Commission on the Review of the Censorship Act*, Malawi Government Gazette Extraordinary.

The representatives from the print media accepted that to some extent certain cartoons such as *Taxina*,<sup>317</sup> *Zabweka*<sup>318</sup> and *Alisha*<sup>319</sup> appear to be degrading to women, but they are actually intended to be satirical works of art, aimed at poking fun at men. Defence of freedom of speech at the expense of offence has gained acceptance in the international legal fraternity regardless of the level of offence caused by such satirical works. The representatives cited the position of the European Court of Human Rights which has held several times that freedom of expression is the foundation of a democratic society. In case of conflicts between the right to freedom of expression and protection of other human rights, freedom of expression of the press in particular carries greater weight if the matter concerns a subject of general interest.<sup>320</sup>

The case of the notorious Mohammed cartoons in 2005<sup>321</sup> which sparked controversy in the Muslim world was cited as an example of the triumph of press freedom over religious rights. Despite the public outcry against these cartoons, the Director of Public Prosecutions in Denmark refused to prosecute. The refusal has shown that the right by the general public not to be offended is far outweighed by a magazine or newspaper's right to provoke.<sup>322</sup>

The Commission however takes the view that the right of freedom of the press can only be defended when the offending material carries great weight in that it concerns a subject of general interest. As has been stated—

[...] free speech has a purpose beyond itself, namely to benefit the well-being of society [...] Like free speech, public satire is not an end in itself but serves a 'higher' end, namely the well-being of society. While satire is a valuable means of social critique, like all areas of human activity it too must be subject to ethics - when satire actually undermines the well-being of society, satire itself needs to be critiqued.<sup>323</sup>

<sup>317</sup> Cartoon series previously appearing in the *Malawi News* Newspaper.

<sup>318</sup> Cartoon series previously appearing in the *Nation* Newspaper.

<sup>319</sup> Cartoon series currently appearing in the *Nation* Newspaper.

<sup>320</sup> [http://www.rigsadvokaten.dk/media/bilag/afgorelse\\_engelsk.pdf](http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf)-ateMaxMoseyleylase (Visited on 16 January, 2009).

<sup>321</sup> In January 2006; a wave of protests spread through Muslim countries all over the world, some of them violent. The riots and the controversy are a reaction to a handful of political cartoons depicting the prophet Mohammed. Originally published in September 2005 by the Danish newspaper *Jyllands-Posten*, the cartoons were commissioned by editor Flemming Rose, who invited 25 newspaper cartoonists to draw the prophet Mohammed as "they saw him," and then printed the submissions of the 12 cartoonists who responded in the 30 September, 2005 edition of the paper. See [www.silha.umn.edu/Winter%202006%20Bulletin/Cartoon%20Riots0405.pdf](http://www.silha.umn.edu/Winter%202006%20Bulletin/Cartoon%20Riots0405.pdf) (Visited 16 January, 2009).

<sup>322</sup> Official Report of the Danish Government to the UN Special Rapporteurs (Response by the Danish Government to letter of 24 November, 2005 from UN Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diène, regarding cartoons representing the Prophet Mohammed published in a newspaper) at <http://www.um.dk/NR/rdonlyres/00D9E6F7-32DC-4C5A-8E24-F0C96E813C06/0/060123final.pdf> (Visited 16 January, 2009)

<sup>323</sup> Barrigar C, 17 May, 2006; "The Danish Cartoons and Freedom of Speech" article appearing on the Institute for Global Engagement website: available at <http://www.globalengage.org/issues/articles.html?start=40> (Visited 19 December, 2008).

Whilst the cartoons *Taxina*, *Zabweka* and *Alisha* may have satirical content, it was the Commission's opinion that their benefit to the well-being of society is debatable. Arguably such cartoons may have a counter effect of exposing young, susceptible minds to the wrong message on issues surrounding gender equality and dignity. The Commission however conceded that this is a subjective, value-laden issue that would require extensive analysis on the issue of freedom of speech, which was beyond the Commission's mandate.

Therefore, the Commission resolved to leave the issue of the dignified portrayal of women to the self-regulation of the print media by the ethical standards set out by the Media Council of Malawi. The Commission however recommends that Government should take action to ensure that the portrayal of women in the media is not degrading.

The Commission also received submissions during its consultations that women are equally degraded by their portrayal in cyberspace. The Internet has become a gateway to instantaneous sharing of information that violates the dignity of both men and women; although, in the Commission's view, there tends to be more degrading material on women. The Commission takes cognizance of the fact that MACRA is a more competent body to regulate issues relating to cyberspace. The Commission strongly recommends that MACRA, which is responsible for drafting policy and legislation in this area, should consider the dignity of women in their portrayal over the Internet so as to prevent proliferation of material that offends the dignity of either sex.

The Commission also recommends that MACRA should put initiatives in place that would enforce the portrayal of persons in the media in a manner that respects and upholds their dignity.

#### 7.6 DOMESTIC VIOLENCE

Domestic violence undermines the dignity of men and women. The Commission noted that the Prevention of Domestic Violence Act<sup>324</sup> has attempted to reduce, through the law, the incidences of violence against women in the domestic setting. The Commission observed however that the definition of "domestic violence" under this law is limited since it is confined to a criminal offence arising out of various abuses listed under the Act. The Commission observed that in the event that conduct does not amount to a criminal offence, no matter how abusive it might be, it does not fall within the definition of domestic violence under the Act. The Commission further noted that the Prevention of Domestic Violence Act presupposes the existence of certain relationships between various parties in the domestic setting before the violence is considered domestic and therefore criminal in nature.

Briefly, domestic violence is defined as "any *criminal offence*<sup>325</sup> arising out of physical, sexual, emotional or psychological, social, economic, or financial

---

<sup>324</sup> Act No. 2 of 2006.

<sup>325</sup> Emphasis added.

abuse committed by a person against another person within a domestic relationship.”<sup>326</sup> In other words, unless the act of domestic violence arising out of economic abuse, for example, is a criminal offence, it does not qualify as domestic violence under the Act. This poses a problem especially where the act of domestic violence arises out of emotional or psychological, social, economic or financial abuse. To illustrate; a wife may be abused emotionally by the act of constantly being ignored by a husband. Whilst the act of ignoring may give rise to emotional or psychological abuse, it is not a criminal act and such woman cannot seek redress under the Act no matter how serious the consequences of such psychological or emotional abuse she suffers from are. The Commission was aware that a special Law Commission has been empanelled to review the Prevention of Domestic Violence Act and has commenced its work. The Commission recommends that this special Law Commission should revisit the definition of “domestic violence” in order to include conduct that does not necessarily constitute a criminal offence.

## 8.0 POVERTY ERADICATION AND ECONOMIC EMPOWERMENT

### 8.1 INTRODUCTION

Poverty in Malawi is widespread, severe and has a distinct gender dimension. Gender inequalities restrict economic growth, exacerbate poverty and deny full access to human rights. Gender differentiations in roles, priorities and access to assets and resources required for development in Malawi are well documented. Poverty has not changed significantly for the past seven years. Female-headed households are worse off and income inequality persists in Malawi.<sup>327</sup> Key causes of poverty have been identified as limited access to land, low education, poor health, limited off-farm employment and lack of access to credit (including agricultural credit). Evidence of the severity of poverty is manifested through various negative socio-economic indicators. According to the 2004-2005 Integrated Household Survey, the current status of poverty shows that 52.4 per cent of the population lives below the poverty line.<sup>328</sup>

### 8.2 IMPACT ON WOMEN

The poverty situation has been aggravated by a harsh macro-economic environment which has led to a weak industrial base. From 1975-1995, manufacturing, concentrated in a limited number of areas, has merely maintained a fairly steady 13 percent share of GDP.<sup>329</sup> Investment in Malawi’s industrial development is strongly hampered, on the one hand, by the high interest rates imposed by the commercial banks on loans (approximately 27 percent) and, on the other hand, the artificially maintained exchange rate of the Malawi Kwacha.<sup>330</sup>

---

<sup>326</sup> Section 3 of the Act.

<sup>327</sup> Government of Malawi, 2006; Malawi Growth and Development Strategy, 2006-2011.

<sup>328</sup> As above.

<sup>329</sup> As above.

<sup>330</sup> National Gender Programme, December, 2004 to December, 2009.

The Commission also noted that women are disproportionately affected by constraints to agricultural production, such as lack of access to land, capital, labour and markets. Most women access credit from micro-finance institutions, which charge very high interest rates and require weekly repayments. As a result, women have difficulties gaining economic returns from agricultural and non-agricultural business. Credit restrictions for women, including loan size, mean that they are not able to engage in more productive medium-to-large-scale income generating projects. In the agricultural sector it has been difficult for women to access seasonal agricultural credit, since the demise of the Smallholder Agricultural Credit Administration (SACA) in the early 1990s.

The informal sector is increasingly becoming an important source of livelihood for many Malawian women. Business in the informal sector is vibrant and growing rapidly as the majority of poor women start micro and small businesses for survival. However, women still face constraints including inefficient marketing and storage. Observations have been made that the retrenchment of workers from the recently privatized companies has also resulted in some displacement of women in the informal sector and markets, as more and more of the retrenched men joined the informal sector and took up businesses and trades that were predominantly done by women.

Female entrepreneurs also lack the skills in business identification, planning, management and expansion that are necessary for developing product markets and improving the quality of their products so that they can access international markets. While women engage in businesses, it has also been noted that due to cultural factors, most business decisions are made by their husbands or other male relatives. This sometimes erodes women's control over their businesses.

Although Government's policy to relocate vendors into designated markets within cities and towns has brought order and better sanitation, it has had some adverse effects on women traders and vendors. Countrywide, anecdotal reports indicate that due to limited space in the markets, more female petty traders have been pushed far from the proximity to customers and this has severely affected the returns women are making from their businesses.

Further, the Commission noted that the HIV and AIDS pandemic has also brought very negative impacts on people's livelihoods. The pandemic has affected women in multiple ways, as individuals, mothers, partners and care givers. The impact of the pandemic is making more women poorer due to a number of reasons, some of which are—

(a) the process of nursing sick people (and people are usually sick for prolonged periods of time) involves investing their little wealth in treatment and therefore households are left without security;

(b) women often have less labour to engage in production, because they are now pre-occupied with provision of care for the sick and looking after orphans (with a single growing season in Malawi, families lose out food for the whole year);

(c) children who have no parental care or are involved in nursing sick people drop out of school;<sup>331</sup>

(d) with more deaths as a result of HIV-related illness, more women are likely to lose their partners and in cultures in which property grabbing is a practice, there is likelihood that more women and their families will lose their property and assets, thereby being rendered poor; and

(e) women and orphans have resorted to socially destructive ways of earning a living, such as commercial sex work, thereby increasing their risk to sexually transmitted infections;

These issues reflect a vicious cycle, which needs to be broken if the poor, particularly women, are going to prosper economically.

To counter the harsh realities for women on the ground, Government has made some important policy commitments to eradicating poverty. Poverty eradication and economic empowerment are crucial elements of the right to development as provided under section 30 of the Constitution which states that “women, children and the disabled shall be given special consideration in the application of [the] right.”<sup>332</sup> The various policies and programmes aimed at poverty reduction and the economic empowerment of women are discussed below.

Government launched the Malawi Growth and Development Strategy as the overarching strategy for Malawi for the years 2006 to 2011. The overriding philosophy of the Malawi Growth and Development Strategy is poverty reduction through sustainable economic growth and infrastructure development. The Strategy identifies six key priority areas<sup>333</sup> which define the direction the country intends to take over the five year period to achieve economic growth and wealth creation.<sup>334</sup> Gender is a sub-theme under the Strategy and the goal is to mainstream gender equality in the national development process to enhance equal participation of both sexes for sustainable development. In effect, the Strategy recognizes women as equal partners to men in development whose participation must be enhanced through special measures.

Various institutions ranging from non-governmental organizations, statutory corporations, development partners, and the private sector have over the years played a crucial role in enhancing economic empowerment of women. The National Association of Business Women (NABW), Foundation for International Community Assistance (FINCA) Malawi, PRIDE Malawi, Opportunity International Bank of Malawi (OIBM), Concern Universal Micro finance

<sup>331</sup> Evidence shows that the female children are taking on care activities at household level more than their male counterparts. They lose the opportunity to develop their capacity to earn a decent living in the future and thereby perpetuating the generations of women that are uneducated and therefore likely to be in poverty

<sup>332</sup> Section 30 (1) of the Constitution.

<sup>333</sup> These are Agriculture and food security, irrigation and water development, transport infrastructure development, energy generation and supply, integrated rural development, prevention and management of nutrition disorders, HIV and AIDS.

<sup>334</sup> Government of Malawi, above footnote 322, p.xii.

Operations (CUMO), Ecumenical Church Loan Fund (ECLOF), Development of Malawian Enterprises Trust (DEMAT), Small Enterprise Development Organization of Malawi (SEDOM) and Malawi Rural Development Fund (MARDEF), to name a few, have been providing credit facilities to women. While most of these organizations charge interest at commercial base lending rate like the commercial banks,<sup>335</sup> they are preferred by the women because of the soft condition of not requiring heavy collateral as may be required by commercial banks. The Commission however noted that the high interest rates are not in fact a deterrent to women who ultimately end up working to pay off loans and interest rates whilst realizing very little in profit. Sometimes these women end up in more serious problems as family property is repossessed when they cannot pay back the loan.

The Commission concluded that despite various strategies and policies, very little has changed in terms of the economic empowerment of women. The Commission was consequently of the view that unless the position and roles of women in the context of development are taken into account, no development programmes aimed at actualizing eradication of poverty, or at economic empowerment of women, will have their intended effect.<sup>336</sup>

The Commission also reviewed Malawi's international obligations in relation to poverty eradication and the economic empowerment of women. The instruments reviewed recognize the disproportionate representation of women caught up in poverty. Women make up the majority of the world's poor. The eight Millennium Development Goals highlight the need to reduce gender disparities in all sectors and recognize the importance of addressing gender inequality in reducing global poverty.

In addition, the Beijing Platform for Action identifies poverty eradication and economic empowerment of women, as one of the critical areas of concern. The AU Women's Protocol highlights the importance of economic empowerment of women in Article 13 on Economic and Social Welfare Rights and obliges State parties to "adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities." In Article 19, which guarantees the right to sustainable development, women's economic empowerment is prioritized and State Parties are obliged to, among other requirements—

(a) promote women's access to and control over productive resources such as land and guarantee their right to property;

(b) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women; and

---

<sup>335</sup> With exception of MARDEF whose interest is at 15%.

<sup>336</sup> Mvula M E G, 2004; *Unequal Gender Relations in the Distribution of Marital Assets at the End of Family Unions and the Potential of the Constructive Trust in Malawi*, LL.B. (Hons) Dissertation: University of Malawi, pp. 13-14.

(c) ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

Further, the Commission was of the view that despite the various national programmes and policies which aim, in part, at domesticating the obligations set out in these international policy instruments, the situation of women still remains unchanged. The Commission concluded that additional measures need to be taken in order to ensure that the goal to achieve the economic empowerment of women is not lost in rhetoric. The Commission was however convinced that economic empowerment and poverty eradication of women cannot be achieved by legislative provisions. A conducive economic environment needs to be created by Government incrementally with the support of the private sector.

The crux of the matter, according to the Commission, is one of renewed commitment and re-prioritization so that gender equality is effectively mainstreamed and mindsets towards women's participation are changed. With Government's role in civic education under the **Gender Equality Bill**, and in partnership with the private sector, much can be achieved. The private sector needs to be committed to social responsibility so that much is given back to the communities from which private sector institutions get their income. Government needs to strengthen its commitment by investing in current strategies and the Commission has below highlighted the areas in which it recommends Government to take specific action to improve the economic situation of women in the country:

*(a) Strengthening entrepreneurial skills among women entrepreneurs*

The Commission noted that the National Gender Policy proposes that a baseline assessment is carried out to assess the current status and capacity building needs of female entrepreneurs. The Commission was not aware of any action being carried out in this area and accordingly recommends that this baseline assessment be carried out by the Ministry of Gender, Children and Community Development and that it should be followed up by a capacity building programme addressing the needs identified in the study. The Commission also recommends that this Ministry should reactivate leadership and decision making training programmes for women.

*(b) Improving access to credit for women entrepreneurs*

Entrepreneurs, or individuals starting up new ventures, are crucial to productivity and growth in all countries. Women entrepreneurs often have less experience than men dealing with complicated procedures, including financial arrangements and little information about sources of help. Women are also disadvantaged in accessing financial information and resources because they are less likely to be able to afford these services and are not linked to mainstream business networks.

Women also have more problems obtaining business credit despite evidence<sup>337</sup> that women demonstrate higher loan repayment rates than men. Banks and financial institutions traditionally have little experience in lending to women and may have a bias against them as poor credit risks. This bias is entrenched due to the disadvantaged position of women and the lack of enforcement of their legal rights; as banks require that borrowers be wage earners or property owners who can provide acceptable collateral.

In some cases, anecdotal reports indicate that some banks still discriminate against women by denying them loans because of factors not related to their ability to repay the loans, but rather on gender considerations. In the past, women were routinely denied loans as banks demanded the husband's guarantee as one of the conditions for granting a loan to a married woman. Banks are now obliged to comply with the constitutional guarantee to gender equality<sup>338</sup> and also to recognize that women are equally free to enter into contracts for loans, irrespective of spousal consent. The Constitution provides that women have a right to full and equal protection by the law and have a right not to be discriminated against on the basis of their gender or marital status which includes the right to be accorded the same rights as men in civil law including the capacity to enter into contracts.<sup>339</sup>

It is the Commission's view that the problem facing women and credit needs to be approached in three ways. Firstly, by creating linkages and providing information and sources of help. Secondly, by ensuring that women are accorded access to credit facilities on an equal footing with men. Thirdly, by addressing the issue of bureaucracy in accessing bank loans by setting up more channels for microfinance and micro-credit especially for rural women.

As regards the first approach, the issue of linkages for women needs to be addressed at governmental level. The Commission recommends that linkages need to be made through district level extension staff in the Ministry of Gender, Children and Community Development as well as in the Ministry of Agriculture, between women's groups that have been trained in credit-related skills and appropriate lending institutions. The Commission recommends that the Ministry of Gender, Children and Community Development should facilitate these linkages. These linkages can also assist women by partnering them with non-governmental organizations that have links with mainstream business entities.

The Commission also recommends that Government should align its continuing civic education activities with the provisions in the **Gender Equality Bill**<sup>340</sup> to disseminate all necessary information. For example, the Commission

<sup>337</sup> See Grameen Foundation, *Fighting Poverty with Microfinance*, [www.grameenfoundation.org/](http://www.grameenfoundation.org/) (Visited 20 January, 2009). Muhammed Yunus, founder of the Grameen Bank in Bangladesh loans money for self-employment to over 4 million women in Bangladesh, and has reported that the loan repayment rate for women is much higher than that of men. This model has been reproduced in many other development countries with similar results.

<sup>338</sup> Section 20 of the Constitution.

<sup>339</sup> Section 24 (a) (i) of the Constitution.

<sup>340</sup> See Chapter IX of this Report for the civic education provisions that are being proposed.

recommends that Government should regulate the industry to ensure that credit provisions are accompanied by supportive advisory and networking services to provide women with basic marketing information and advice. These include advisory bureaus established at chambers of commerce and industry associations and points of entry where women can access information and communication materials and services provided by various public agencies. For urban women, business incubators, often established at universities or business schools, are of particular value to women entrepreneurs in providing infrastructure, links to investors and market opportunities as well as personalized assistance and training.

For women in general, networking programmes have been effective in increasing both the number and success rates of women starting their own businesses. Programmes engaging experienced female business owners in providing advice to potential women entrepreneurs help build such networks. Women entrepreneur associations formed as part of a Government and non-governmental organizations partnership can be a conduit for dissemination of business information and provide support services for new female-owned start-ups. Initiatives to foster women entrepreneurs should also be part of local development strategies and enterprise creation policies.<sup>341</sup>

Regarding the second approach, the Commission also recommends that Government through the Reserve Bank and the Ministry of Finance, should engage with financial institutions on their lending policy so that elements that are discriminatory, both explicitly and implicitly are removed. It is implicitly discriminatory to women for banks to require collateral in the form of land or other property when it is known that women lack access to such property. Whilst it is accepted that banks are profit-making institutions which cannot lend out money without security, Government can still engage them for a compromise where the borrower has neither land nor evidence of regular stable employment or employer guarantees.

Finally as regards the third approach, bureaucracy is a major problem in Malawi. In the case of women, especially rural women whose literacy levels are very low, the whole idea of accessing credit approaches impossibility. Banks tend to exclude the poor by requiring a minimum deposit.<sup>342</sup> The steps and procedures that are required before credit is accessed are neither pro-poor nor woman-friendly. In many cases, married women end up enlisting the help of their spouses who are better equipped to handle the procedures. Poor, single women are therefore at a great disadvantage. The Commission recommends that Government should engage the banks on these issues so as to come up with a policy that both the banks and Government are in agreement on pro-poor and gender sensitive lending policies.

In addition, the Commission recommends that Government should create a conducive economic environment for the establishment of commercial banks at

<sup>341</sup> OECD, 2008; Maximising The Economic, Social And Environmental Role Of Women.

<sup>342</sup> United Nations, International Year of Microcredit 2005; "Malawi Country Profile" <http://www.yearofmicrocredit.org/docs/countryprofiles/Malawi.doc> (Visited on 20 January, 2009).

district level and rural growth centers as well as major trading centers which will improve women's access to financial services. Interest rates and appropriate loan sizes can then be set at levels that are accessible to female borrowers. The Commission also recommends that Government should encourage and strengthen the establishment of village based savings clubs, women groups, associations, banks and cooperatives which will act as channels through which women's access to credit can be improved.

The Commission recommends that Government should encourage more usage and establishment of microfinance institutions (MFIs). Microfinance is now a proven strategy for reaching poor women.<sup>343</sup> Hence, the Commission recommends that Government specifically looks into, and scales up, microfinance schemes in the country. The Microcredit Summit Campaign reports that 14.2 million of the world's poorest women now have access to financial services; accounting for nearly 74 percent of the 19.3 million poorest served by microfinance.<sup>344</sup> The Commission was aware that public and private financial institutions as well as non-governmental organizations are involved in microfinance in Malawi.

According to the Consultative Group to Assist the Poor (CGAP), there are eleven commercial financial institutions in Malawi, although the total number of clients for these banks is unavailable.<sup>345</sup> Of the eleven banks, two are directly involved in microfinance, although in a limited role, according to a Ministry of Agriculture, Irrigation and Food Security report. This report states that commercial banks had 29,000 clients participating in microfinance initiatives. The CGAP counts more than seven microfinance institutions in the country while the Ministry of Agriculture, Irrigation and Food Security notes that there are four Development Financial Institutions (DFIs), two Savings Institutions and a few non-governmental organizations (no precise number but three are mentioned explicitly). The CGAP also notes that there are at least 170,000 clients, mostly belonging to the Malawi Rural Finance Company. These microfinance institutions offer credit extension services, identification of workshop space, seasonal and small business loans and other credit or loans.<sup>346</sup>

For countries that have registered high levels of women's economic empowerment, every microfinance institution serving those countries has stories of women who are not only empowered economically as a result of access to financial services, but who are also socially empowered in other areas. Simply getting cash into the hands of women (by way of working capital) can lead to increased self-esteem, control and social empowerment. Helping women achieve greater economic independence and security, gives them the chance to contribute financially to their households and communities.<sup>347</sup>

---

<sup>343</sup> Cheston S and Kuhn L, Empowering Women Through Microfinance [http://www.microcreditsummit.org/papers/+5cheston\\_kuhn.pdf](http://www.microcreditsummit.org/papers/+5cheston_kuhn.pdf) (Visited 9 January, 2009).

<sup>344</sup> As above.

<sup>345</sup> United Nations, International Year of Microcredit 2005; above footnote 342.

<sup>346</sup> As above.

From its research on the impact of microfinance on the greater social empowerment that resulted from having economically empowered women, the Commission found increased self-confidence and increased self-esteem, women's increased participation in decision-making, increase in their decision making role in the areas of family planning, children's marriage, buying and selling property and sending their daughters to school. Further, the combination of education and microcredit put women in a stronger position to ensure more equal access for female children to food, schooling and medical care, increased ability to make purchasing choices, manage household funds and manage enterprise funds. The Commission also found improved status and gender relations in the home with reduced family quarrels over money, increased respect from and better relationships with extended family and in-laws and reduced incidence of violence among women who were members of credit organizations than among the general population.<sup>348</sup>

Nonetheless, the Commission also observed that there are some problems noted in the operations of microfinance institutions, namely that is usually the practice to allocate larger individual loans to men and smaller group loans are left to women. It is sometimes also the case that microfinance institutions lack women in governance, management and operations; meaning that women's voices and perspectives are not always incorporated into the design and implementation of products and services.<sup>349</sup> Another downfall of microfinance institutions is to simply accept as a given fact that cash-in-hand for women will always result in the financial and social empowerment. This is not the case and it is important for Government to note when restructuring microfinance schemes that economic empowerment and the resulting social change is about choice and power. Just because a woman has been given cash in hand does not automatically result in a transformation of her life. Indeed, the Commission received many anecdotal reports about women who take out loan after loan with absolutely no impact on their lives. It must be realized that the ability of a woman to transform her life through access to financial services depends on many factors - some of them linked to her individual situation and abilities and others dependent upon her environment and the status of women as a group. Microfinance programs can only have the intended impact on the empowerment process if their products and services take these circumstances into account.<sup>350</sup>

It is also not clear from the operations of existing microfinance institutions how far they seek to empower women socially as an implicit or explicit goal. Where banks were involved in agricultural microfinance initiatives (which are now diminishing because of the lack of profitability of such lending) some limited information is available. These agricultural microfinance initiatives included group lending under a United Nations Capital Development Fund (UNCDF) sponsored program that also provided credit training and supervision, with a high

---

<sup>347</sup> Cheston, S. and Kuhn. L., 2002; above footnote 343.

<sup>348</sup> As above.

<sup>349</sup> As above.

<sup>350</sup> As above.

recovery rate of 98 percent.<sup>351</sup> The training provided under this programme appears to have been restricted to credit training without other aspects of social empowerment. While there is evidence of a high rate of recovery for the loan, there is no information as to whether the loans actually translated into economic empowerment and wider social empowerment for the beneficiaries. Further, it is not clear whether the beneficiaries were women.

It is generally the *ethos* of microfinance institutions that they cannot afford to focus on social empowerment because it is incompatible with financial sustainability or because it detracts from the core business of providing financial services. The reality is that there are trade-offs when providing a range of services. Research conducted by the Commission also shows ample evidence of efficient, sustainable microfinance institutions from other jurisdictions whose programs are intentionally socially empowering. In some cases, it is through a commitment to excellent customer service, including people at all levels of the organization treating clients with respect. In other cases, “soft” services such as health education, literacy training or business training can be packaged with financial services in a way that creates “economies of scope” and powerful synergies and can even help reduce client exit and arrears.<sup>352</sup> Internationally, there are several institutions that are both focused on social empowerment and are financially self-sufficient. One such example is the Working Women’s Forum (WWF) in India, which organizes women to achieve better wages and working conditions in addition to providing microfinance.<sup>353</sup>

The Commission recommends that microfinance schemes should be restructured to address the issue of women’s empowerment holistically so that women can better absorb the financial product and services offered. The Commission recommends that leadership training, personal development and business training should also be integrated into the loan programmes.

The Commission also recommends that Government should use existing frameworks such as the microfinance network in Malawi, namely, the Malawi Microfinance Network (MMN) in facilitating a review of current microfinance institutions operations and procedures so that all pertinent concerns relating to women are addressed.

*(c) Access to appropriate technology by women entrepreneurs improved*

The Commission noted that a network of technological centers needs to be developed through which women’s access may be enhanced. The Commission recommends that Government should identify appropriate technology products from all information technology institutions and disseminate them in a way that increases opportunities for women to adopt them. The Commission further

---

<sup>351</sup> United Nations, International Year of Microcredit 2005, above footnote 342.

<sup>352</sup> See Dunford, C, “Building Better Lives: Sustainable Integration of Microfinance with Education in Child Survival, Reproductive Health and HIV/AIDS Prevention for the Poorest Entrepreneurs”, commissioned by the Microcredit Summit Campaign; cited in Cheston, S. and Kuhn, L., 2002; above footnote 343.

<sup>353</sup> As above.

recommends that Government should strengthen research in appropriate technology and disseminate the findings.

*(d) Access to local and international markets developed and improved*

The Commission recommends that comprehensive programmes should be developed by the Malawi Confederation of Chambers of Commerce and Industry and other relevant institutions to enable women to participate in trade fairs. Links can be made between Small and Medium Enterprises and multinational companies. The Commission also recommends that Government should facilitate the equitable setting of quality control standards for products by women, in liaison with the Malawi Bureau of Standards. Government should also be required to identify marketing outlets for products from small scale entrepreneurs, especially those from rural areas. The Commission further recommends that Government should facilitate an efficient and effective Market Information System (MIS) in order to create a better marketing network that links women entrepreneurs to markets. The Commission also recommends that extension workers and other key service providers should be trained in providing market oriented information to clients. Formal and informal networks can be promoted between traders in consequence.

*(e) A Policy environment to support and sustain growth of micro, small and medium enterprises (MSME)*

The Commission recommends that the Ministry of Gender, Children and Community Development should work with the Ministry of Economic Planning and Development to ensure that the implementation of the Malawi Growth Development Strategy addresses the needs of women relating to micro, small and medium enterprises. The Commission also recommends that the Ministry of Trade and Private Sector Development should finalize the Micro, Small and Medium Enterprises Policy and ensure that it has taken into consideration issues, which affect women entrepreneurs.

## 9.0 INCIDENTAL PROVISIONS

The Commission further considered the incorporation of a number of incidental provisions in the **Gender Equality Bill** which are necessary to ease its implementation.

The Commission took into account the suggestion by stakeholders at all consultative workshops that Government is to continue civic education initiatives aimed at facilitation of gender equality in all spheres of life, but more specifically in traditional structures. The Commission finds this suggestion crucial to developing a culture in which gender equality is promoted as well as a mindset that values women and considers them to be equal participants with men in all spheres of life.

The Commission appreciated that law alone cannot guarantee gender equality. Hence, social and cultural norms that support gender-based power imbalances must be seriously reconsidered, particularly when they become relevant to public life. This should be in recognition of the fact that a mere withdrawal of formal obstacles that hinder inclusion of women in public life is not sufficient to eliminate discrimination. Thus, education, training and consciousness-raising as well as the elimination of stereotypes and paradigms play an important role in these processes.

The Commission is confident that its recommendations for legal provisions on civic education will eventually also address another concern voiced by participants at all consultation workshops. Participants were concerned that whilst many efforts are being made to ensure women equal status with men, experience has shown that in some cases, women are unwilling to promote each other and in fact tend to pull each other down. The Commission acknowledges this as an important concern which can only be addressed if women are socialized to value each other's contributions and to promote each other. By focusing on civic education initiatives aimed at increasing women's confidence, the Commission is positive that over time, these attitudes which usually stem from low self esteem and lack of confidence will fade away.

The Commission recommends that the Ministry of Gender, Children and Community Development should devote some of its civic education initiatives to mobilizing the general public to take up action against the barriers that prevent the achievement of gender equality in public life and politics within the next twenty years. Without time bound goals, Government, political parties, lobbyists and women's groups cannot be held accountable.<sup>354</sup>

The Commission therefore recommends the following provision to place responsibility on the Minister of Gender, Children and Community Development to ensure that programmes aimed at educating the public are developed and implemented. The recommended provision shall build on a similar provision under section 84C of the Wills and Inheritance Act<sup>355</sup> to read as follows—

Civic awareness ... **—(1) The Minister shall design and implement programmes for the public awareness of this Act and, for that purpose, the Minister shall specifically—**

**(a) develop programmes aimed at promoting gender equality in all spheres of life;**

**(b) develop programmes that create awareness of fundamental human rights, equality and mutual understanding and respect;**

<sup>354</sup> United Nations Development Programme, 2002; Report on Women's Political Participation and Good Governance: 21st Century Challenges. New York: United Nations: <http://www.citeulike.org/article/3426> (Visited 12 January, 2009).

<sup>355</sup> Cap 10:02 of the Laws of Malawi.

(c) develop programmes that create awareness of sexual harassment and provide assistance and social support for victims of sexual harassment; and

(d) enlist the services of traditional leadership and non-governmental organizations in disseminating information and in the conduct of any other activities connected with such programmes.

(2) The Minister shall appoint, in the public service, officers required to carry out activities for the implementation of the programmes under sub-section (1).

The Commission further considered that the power to make regulations guiding the practice and procedure of issues arising from the proposed Act in relation to court procedures should be vested in the Chief Justice. The Commission recommends the following provision—

**Powers of the Chief Justice** ... —(1) The Chief Justice may make rules for the purpose of regulating the practice and procedure of the court in proceedings under this Act.

(2) The Chief Justice may prescribe the forms to be used and the fees to be paid by a person applying for an order under this Act.

The Commission then considered the powers of the Minister in giving effect to the provisions of the **Gender Equality Bill** and recommends the following provision—

**Regulations** ... —(1) The Minister may, by a notice published in the *Gazette*, make regulations for the effective carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may provide for—

(a) the approval of services or programmes undertaken for the purpose of this Act;

(b) the certification of persons or organizations that may provide services under this Act;

(c) the qualifications and experience for persons who may provide services under this Act; or

(d) the collection of data in incidences and causes of discrimination on account of gender and sexual harassment for purposes of policy reform and programming, and any other matter prescribed under this Act.

**APPENDIX I**  
**GENDER EQUALITY BILL, 20...**

## GENDER EQUALITY BILL, 20...

## ARRANGEMENT OF SECTIONS

## SECTION

## PART I—PRELIMINARY

1. Short title
2. Scope of application
3. Interpretation

## PART II—SEX DISCRIMINATION

4. Sex discrimination
5. Prohibition of harmful practices
6. Sexual harassment
7. Workplace policy for sexual harassment

## PART III—ENFORCEMENT

8. Enforcement by the Human Rights Commission
9. Powers of the Human Rights Commission in relation to Gender Equality
10. Duties of the Human Rights Commission in relation to gender equality

## PART IV—EMPLOYMENT IN THE PUBLIC SERVICE

11. Quotas in public appointment or employment
12. Compliance order
13. Transparency in public appointments

## PART V—EDUCATION AND TRAINING

14. Equality in access to education and training
15. Equal access to scholarships, etc.
16. Tertiary education institutions
17. Exception for single sex establishments
18. General duties in relation to curriculum

## PART VI—SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

19. Right to sexual and reproductive health
20. Health service providers

## PART VII—CIVIC AWARENESS

21. Civic awareness

## PART VIII—MISCELLANEOUS

22. Powers of the Chief Justice
23. Regulations

## A B I L L

*entitled*

**An Act to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society; to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment; to provide for public awareness on promotion of gender equality; and to provide for connected matters.**

ENACTED by the Parliament of Malawi as follows—

## PART I—PRELIMINARY

Short title	1. This Act may be cited as the Gender Equality Act, 20...
Scope of application	2.—(1) Except where it is otherwise expressly provided for by any written law, this Act applies to all persons and to all matters. (2) This Act binds the State.
Interpretation	3. In this Act, unless the context otherwise requires— “appointing or recruiting authority” means a public office in whose power the decision to appoint or recruit any person lies; “educational institution” means a school, college, university or other institution at which education or training is provided; “harmful practice” means a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to— (a) undermine the dignity, health or liberty of any person; or (b) result in physical, sexual, emotional, or psychological harm to any person;
Cap. 1:03	“public institution” means an institution that is part of the public service within the meaning of “public service” under the Public Service Act.

## PART II—SEX DISCRIMINATION

Sex discrimination	4. —(1) A person discriminates against another person if— (a) on the grounds of sex, he or she treats the other person less favourably than he or she would treat a person of his or her opposite sex; or (b) he or she applies to the other person an exclusion, distinction or restriction which applies or would apply equally to both sexes but—
--------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

(i) which is such that the proportion of one sex who can comply with it is considerably smaller than the proportion of the opposite sex who can comply with it;

(ii) which he or she cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and

(iii) which is to the detriment of the other person because he or she cannot comply with it, with the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of the rights and fundamental freedoms of that person.

(2) A person who discriminates against another person commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.

5.—(1) A person shall not—

(a) commit;

(b) engage in;

(c) subject another person to; or

(d) encourage the commission of,

any harmful cultural practice.

Prohibition of  
harmful  
practices

(2) Any person who contravenes this section commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.

6. —(1) A person commits an act of sexual harassment if he or she engages in any form of unwanted verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

Sexual  
harassment

(2) A person who sexually harasses another in terms of subsection (1) commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.

7.—(1) The State shall take active measures to ensure that employers have developed and are implementing appropriate policy and procedures aimed at eliminating sexual harassment in the workplace which shall—

Workplace  
policy for  
sexual  
harassment

(a) entitle all persons who have been subjected to sexual harassment in the workplace to raise a grievance about its occurrence and be guaranteed that appropriate disciplinary action will be taken against perpetrators;

(b) entitle a non-employee who has been subjected to sexual harassment to lodge a grievance with the employer of the

perpetrator where the conduct giving rise to the complaint has taken place at the work place or in the course of the perpetrator's employment;

(c) entitle all employees, job applicants and other persons who have dealings with the workplace to be treated with dignity; and

(d) oblige the person in charge of the work place to—

(i) implement the policy and procedures and impose disciplinary action against employees who do not comply;

(ii) deal seriously, expeditiously, sensitively and confidentially with all allegations of sexual harassment;

(iii) protect employees against victimization, retaliation for lodging grievances and from false accusations;

(iv) explain the procedure which shall be followed by persons who are victims of sexual harassment;

(v) communicate the sexual harassment policy and grievance procedures effectively to all employees; and

(vi) designate a person outside of line management whom a person who has been subjected to sexual harassment may approach for confidential advice and counselling.

(2) Any person who has been subjected to sexual harassment need not have exhausted internal sexual harassment procedures before prosecution of the offence can be commenced or civil proceedings can be instituted.

### PART III—ENFORCEMENT

Enforcement  
by the Human  
Rights  
Commission

**8.** The Human Rights Commission, hereinafter called the "Commission", shall be responsible for the enforcement of the provisions of this Act.

Powers and  
functions of  
the  
Commission  
in relation to  
gender  
equality

**9.—(1)** In addition to the powers conferred upon the Commission by the Constitution, the Human Rights Commission Act or any other written law, the Commission, shall protect and promote gender equality.

(2) The Commission shall perform the following functions in the exercise of its powers in relation to this Act—

(a) monitor and evaluate the policies and practices of—

(i) State organs, State agencies and public bodies; and

(ii) the private sector,

in order to promote gender equality and make any recommendations that the Commission deems necessary;

(b) carry out investigations and conduct searches in relation to any gender issues on receipt of a complaint or on its own accord;

(c) consider, deliberate on and make recommendations to the Minister on any gender issues;

(d) provide information to any party in a gender dispute on rights, remedies or obligations;

(e) promote and facilitate access to remedies for any dispute concerning gender issues;

(f) promote ratification by Malawi of any international gender instruments; and

(g) perform any other function as is necessary for the implementation of this Act.

**10.** The Commission may perform the following duties in the exercise of its powers in relation to this Act—

Duties of the Commission in relation to gender equality

(a) collaborate with the Minister, in establishing mechanisms aimed at progressively realizing gender equality;

(b) develop working relationships with international partners, civil society organizations and non-governmental organizations devoted to protecting and promoting gender issues; and

(c) do or perform any other duties as are necessary for the implementation of this Act.

#### PART IV—EMPLOYMENT IN THE PUBLIC SERVICE

**11.—(1)** Notwithstanding anything contained in the Public Service Act and subject to subsection (2), an appointing or recruiting authority in the public service shall appoint no less than forty percent and no more than sixty percent of either sex in any department in the public service.

Quotas in public appointment or employment

Cap. 1:03

(2) Subsection (1) shall not apply where—

(a) a member of either sex applying for the post, does not hold the minimum relevant educational qualifications or experience for the post;

(b) a member of either sex offered the post has not accepted the offer; or

(c) a member of either sex with the relevant educational qualifications or experience required for the post was not available or could not be identified for the post.

Compliance  
order

**12.**—(1) Where an appointing or recruiting authority does not comply with section 11, the court shall, on application by the aggrieved person, make an order against the appointing or recruiting authority to ensure compliance.

(2) A compliance order issued by the court under subsection (1) shall be implemented by the appointing or recruiting authority against whom the order is made within such period as specified in the order.

(3) Where an appointing or recruiting authority fails to implement the terms of a compliance order, the authority commits an offence and shall be liable to a fine of K10,000 for every day the compliance order remains unimplemented.

Transparency  
in public  
appointments

**13.**—(1) A person who is interviewed for employment by a public institution, shall be entitled, upon request—

(a) to be furnished with reasons, in writing, why that person was not appointed; or

(b) subject to subsection (2), to view records of the appointment process.

(2) Records that do not directly affect the applicant or cannot be disclosed in the public interest shall be exempted from disclosure.

(3) Where a public institution—

(a) requires further information in order to locate the records requested; and

(b) has informed the applicant of that requirement,

it shall comply with subsection (1) only when it is supplied with that further information.

(4) For purposes of this section, “record” means information held at the time when the request is received.

#### PART V—EDUCATION AND TRAINING

Equality in  
access to  
education and  
training

**14.**—(1) Every person has the right to access education and training including vocational guidance at all levels.

(2) Except in the cases of special need, the State shall take active measures to ensure that educational institutions provide equal access to girls and boys and women and men, to—

(a) the same curricula;

(b) the same examinations;

(c) teaching staff with qualifications of the same standard;

(d) institutional premises and equipment of the same quality, irrespective of sex of students at the same level; or

(e) provision of sanitary facilities that take into account the specific needs of the sex of the students.

**15.** —(1) Every person has the right to access a scholarship, grant, bursary, benefit or other scholastic endowment without regard to his or her sex.

Equal access to scholarships, etc.

(2) The State shall take active measures to ensure that every educational institution has guidelines that facilitate compliance with subsection (1).

**16.** The State shall take active measures to ensure the enrollment at tertiary education institutions of either sex to a minimum of forty percent and a maximum of sixty percent of students.

Tertiary education institutions

**17.** Sections 15, 16 and 17 shall not apply to equality in access to education, training, the grant of scholarships and bursaries where the educational institution is a single sex institution which admits students of one sex only.

Exception for single sex establishments

**18.** —(1) The State shall take active measures to ensure that the curricula for all primary and secondary schools—

General duties in relation to curriculum

(a) integrates principles of gender equality within the spiritual, moral, cultural and mental development of students at the school, society and experience of life after completion of school with specifications on gender equality;

(b) integrates gender issues and human rights at all levels;

(c) addresses the special needs of female students by incorporating life skills, including sex education;

(d) addresses issues of environmental care and protection; and

(e) introduces subjects that enhance the integration of female students in disciplines that are traditionally male-dominated, including sustainable natural resource management.

PART VI—SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

**19.** Every person has a right to adequate sexual and reproductive health which includes the right to—

Right to sexual and reproductive health

(a) access sexual and reproductive health care services;

(b) access family planning services;

(c) be protected from sexually transmitted infection;

(d) self-protection from sexually transmitted infection;

- (e) choose whether or not to have a child;
- (f) choose the number of children and when to bear those children;
- (g) control fertility; and
- (h) choose an appropriate method of contraception.

Duties of  
Health  
Officers in  
respect to  
sexual and  
reproductive  
health  
Cap. 34:01

**20.**—(1) In addition to the duties imposed or powers conferred on health officers by the Public Health Act or any other relevant law, every health officer shall—

- (a) respect the sexual and reproductive health rights of every person without discrimination;
- (b) respect the dignity and integrity of every person accessing those services;
- (c) provide family planning services to any person irrespective of marital status or whether that person is accompanied by a spouse;
- (d) impart all information necessary for a person to make a decision regarding whether or not to undergo any procedure or to accept any service affecting his or her sexual and reproductive health;
- (e) record the manner in which the information imparted to the person seeking reproductive health care services was given and whether it was understood; and
- (f) obtain the written consent of a person being offered sexual and reproductive health services or family planning services before performing any procedure or offering any service.

(2) Any person who contravenes this section commits an offence and shall be liable to a fine of K500,000 and to imprisonment for three years.

#### PART VII—CIVIC AWARENESS

Civic  
awareness

**21.** —(1) The Minister shall design and implement programmes for the public awareness of this Act and, for that purpose, the Minister shall specifically—

- (a) develop programmes aimed at promoting gender equality in all spheres of life;
- (b) develop programmes that create awareness of fundamental human rights, equality and mutual understanding and respect;

(c) develop programmes that create awareness of sexual harassment and provide assistance and social support for victims of sexual harassment; and

(d) enlist the services of traditional leadership and non-governmental organizations in disseminating information and in the conduct of any other activities connected with such programmes.

(2) The Minister shall appoint, in the public service, officers required to carry out activities for the implementation of the programmes under subsection (1).

#### PART VIII—MISCELLANEOUS

**22.** —(1) The Chief Justice may make rules for the purpose of regulating the practice and procedure of the court in proceedings under this Act.

Powers of the  
Chief Justice

(2) The Chief Justice may prescribe the forms to be used and the fees to be paid by a person applying for an order under this Act.

**23.** —(1) The Minister may, by a notice published in the *Gazette*, make regulations for the effective carrying out of the provisions of this Act.

Regulations

(2) Without prejudice to the generality of subsection (1), the regulations may provide for—

(a) the approval of services or programmes undertaken for the purpose of this Act;

(b) the certification of persons or organizations that may provide services under this Act;

(c) the prescribing of qualifications and experience for persons who may provide services under this Act; or

(d) the collection of data in incidences and causes of discrimination on account of gender and sexual harassment for purposes of policy reform and programming, and any other matter prescribed under this Act.

**APPENDIX II**  
**PARLIAMENTARY AND PRESIDENTIAL**  
**ELECTIONS (AMENDMENT) BILL, 20...**

PARLIAMENTARY AND PRESIDENTIAL ELECTIONS  
(AMENDMENT) BILL, 20...

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Insertion of new sections 37A and 37B in the Parliamentary and Presidential Elections Act

**A BILL**

*entitled*

**An Act to amend the Parliamentary and Presidential Elections Act**

ENACTED by the Parliament of Malawi as follows—

**1.** This Act shall be cited as the Parliamentary and Presidential Elections (Amendment) Act, 20...

Short title

**2.** The Parliamentary and Presidential Elections Act (hereinafter referred to as the “principal Act”) is amended by inserting therein after section 37 the following new sections as sections 37A and 37B—

Insertion of new sections 37A and 37B in the Parliamentary and Presidential Elections Act

Insertion of new section 37A in the Parliamentary and Presidential Elections Act

**37A.**—(1) A person shall not be prevented from participating in an election on grounds of his or her sex or marital status.

(2) Every person has the right to vote and to be voted for irrespective of his or her sex or marital status.

(3) The Electoral Commission shall ensure the representation of either sex to a minimum of forty per cent and a maximum of sixty per cent of the candidates nominated in all electoral lists in an election; including those persons contesting in the elections as independent candidates.

Cap. 2:07

(4) Every political party duly registered under the Political Parties (Registration and Regulation) Act participating in an election shall ensure equal rights and opportunities of men and women by ensuring a gender composition in the executive machinery of their party members of either sex of a minimum of forty percent and a maximum of sixty per centum.

Cap. 2:07

(5) Every political party duly registered under the Political Parties (Registration and Regulation) Act and participating in an election shall guarantee and maintain candidate lists in which there is a minimum of forty percent and a maximum of sixty percent representation of either sex.

(6) Any person that contravenes this section commits an offence and shall be liable to a fine of K5,000, 000.

Insertion of  
new section  
37B in the  
Parliamentary  
and Presidential  
Elections Act

**37B.** A political party that does not comply with section 37A shall not participate in an election under this Act.”

#### OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in the Report on the Development of the Gender Equality Act which makes provision for the introduction of quotas in the electoral law.

ATTORNEY GENERAL

**APPENDIX III**  
**LOCAL GOVERNMENT ELECTIONS**  
**(AMENDMENT) BILL, 20...**

LOCAL GOVERNMENT ELECTIONS (AMENDMENT)  
BILL, 20...

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Insertion of new sections 29A and 29B in the Local Government Elections Act

**A B I L L**

*entitled*

**An Act to amend the Local Government Elections Act**

ENACTED by the Parliament of Malawi as follows—

**1.** This Act shall be cited as the Local Government Elections (Amendment) Act, 20... Short title

**2.** The Local Government Elections Act is amended by inserting therein after section 29 the following new sections as sections 29A and 29B— Insertion of section 29A in the new Local Government Elections Act

“Insertion of section 29A in the new Local Government Elections Act **29A.**—(1) A person shall not be prevented from participating in an election on grounds of his or her sex or marital status.

(2) Every person has the right to vote and to be voted for irrespective of his or her sex or marital status.

(3) The Electoral Commission shall ensure the representation of either sex to a minimum of forty percent and a maximum of sixty percent of the candidates nominated in all electoral lists in an election; including those persons contesting in the elections as independent candidates.

(4) Every political party duly registered under the Political Parties (Registration and Regulation) Act participating in an election shall ensure equal rights and opportunities of men and women by ensuring a gender composition in the in the executive machinery of their party of either sex of a minimum of forty percent and a maximum of sixty percent.

(5) Every political party duly registered under the Political Parties (Registration and Regulation) Act and participating in an election shall guarantee and maintain candidate lists in which there is a

minimum of forty percent and a maximum of sixty percent representation of either sex.

(6) Any person that contravenes this section commits an offence and shall be liable to a fine of K5, 000, 000.

Insertion of  
section 29A in  
the new Local  
Government  
Elections Act

**29 B.** A political party that does not comply with section 29A shall not be allowed to participate in an election.”.

#### OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in the Report on the development of the Gender Equality Act which makes provision for the introduction of quotas in the electoral law.

ATTORNEY GENERAL

**APPENDIX IV**  
**EMPLOYMENT (AMENDMENT) BILL,**  
**20...**

## EMPLOYMENT (AMENDMENT) BILL, 20...

## ARRANGEMENT OF SECTIONS

## SECTION

1. Short title
2. Amendment of section 3
3. Insertion of a new section 46A
4. Amendment of section 47 (3)
5. Insertion of a new section 47 A

**A BILL***entitled***An Act to amend the Employment Act**

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Employment (Amendment) Act, 20... Short title
2. The Employment Act (hereinafter referred to as the “principal Act”) is amended in section 3 the definition of “industrial undertaking” and inserting the following new definition— Amendment of section 3 of the principal Act

““industrial undertaking” includes—

  - (a) mines, quarries and other works for the extraction of minerals from the earth;
  - (b) industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed; including shipbuilding and the generation, transformation and transmission of electricity or motive power of any kind;
  - (c) construction, reconstruction, maintenance, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gas work, water work, or other work of construction, as well as the preparation for or laying the foundation of any such work or structure;
  - (d) transport of passengers or goods by road, rail, sea, or inland waterway, including the handling of goods at docks, quays, wharves and warehouses;”.

3. The principal Act is amended by inserting therein after section 46 the following new section as section 46A—

“Working conditions for pregnant women **46A.** A pregnant woman, on recommendation by a registered medical practitioner, shall—

(a) if engaged in any industrial undertaking, be accommodated to perform lighter and non-hazardous work, especially where hazardous chemicals are used or heavy weights are lifted by workers manually;

(b) be permitted to work either flexible or shorter working hours without reduction in pay or benefits;

(c) if she is nursing her child, be allowed half an hour twice a day during her working hours for this purpose; or

(d) if she is involved in work shifts, be allowed to change shifts.”.

Amendment of section 47 (3)

4. The principal Act is amended by deleting the word “employer” in section 47 (3) and substituting therefor with the words “medical practitioner”.

Insertion of a new section 47A

5. The principal Act is amended by inserting therein after section 47 the following new section as section 47A—

“Paternity leave **47A.** —(1) A male employee shall be entitled, within every three years, to at least two weeks’ paternity leave on full pay.

(2) During the period when an employee is on paternity leave, his normal benefits and entitlements, including his contractual rights and accumulation of seniority, shall continue uninterrupted and his period of employment shall not be considered to have been interrupted, reduced or broken.”.

#### OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in the Report on the development of the Gender Equality Act which makes provision for improved working conditions for pregnant women and for paternity leave in formal employment.

ATTORNEY GENERAL

**APPENDIX V**  
**PUBLIC SERVICE (AMENDMENT)**  
**BILL, 20...**

PUBLIC SERVICE (AMENDMENT) BILL, 20...

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Repeal of Regulation 1:122 of the Malawi Public Service Regulations.

**A B I L L**

*entitled*

**An Act to amend the Public Service Act**

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Public Service (Amendment) Act, 20...

Short title

2. Regulation 1: 122 of the Malawi Public Service Regulations is hereby repealed.

Repeal of regulation 1:122 of the Malawi Public Service Regulations

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in the Report on the development of the Gender Equality Act which proscribes sex discrimination and makes provision for the repeal of discriminatory conditions of service in existing laws.

ATTORNEY GENERAL