

**Strengthening Regional and National Legislative  
Environments to Support the Human Rights of LGBT  
People and Women and Girls affected by HIV and AIDS in  
Sub-Saharan Africa: The Malawi Experience**

**A Case Study**

Program on Global Health and Human Rights  
University of Southern California Institute for Global Health  
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## **Introduction**

### *Project background*

The Program on Global Health and Human Rights at the University of Southern California's Institute for Global Health conducted a mid-term evaluation (MTE) of the United Nations Development Programme (UNDP) Regional Centre for Africa's project entitled *Strengthening Regional and National Legislative Environments to Support the Human Rights of LGBT People and Women and Girls affected by HIV and AIDS in Sub-Saharan Africa*. The project was initially an 11-country project, to occur between 1 January 2013 and 31 December 2015.<sup>i</sup> Within the context of countries' international human rights commitments, the project aimed to provide a comprehensive approach towards strengthening legal environments, with an emphasis on reducing the HIV-related vulnerability of LGBT people and women and girls affected by HIV in Sub-Saharan Africa. Key partners included governments; civil society and community-based organisations; legal experts and members of the judiciary; networks of people living with HIV and AIDS, and those most at risk of HIV; regional economic communities (e.g. SADC, EAC, ECOWAS); and the African Union Commission (AUC).

The MTE was conducted with attention to UNDP's theory of change, standard evaluation criteria relating to relevance, effectiveness, and sustainability, and with additional attention to the human rights principles of inclusion, participation, equality, non-discrimination, and accountability.<sup>ii</sup> Documents were reviewed using a data extraction tool designed for the MTE and qualitative data were collected through semi-structured key informant interviews.<sup>iii</sup> Outputs from the document review, data extraction, and qualitative interviews were analysed jointly.

After consultation with UNDP, Malawi was selected for in-depth qualitative data collection due to the breadth and depth of lessons of relevance to the project as a whole. Work in Malawi had started earlier than in any other country involved in the project and, by the time of the MTE, an LEA had been conducted, a National Dialogue had been held, and associated documentation and workplans were in place. In November 2014, as part of the MTE, a total of 33 interviews were carried out with key informants including different branches of government, UN agencies, Sweden, Regional Economic Communities (RECs), civil society organisations, and key populations. Where face-to-face meetings were not feasible, interviews were carried out over Skype. Eighteen of the interviews were specific to Malawi.

### *Case Study Methodology and Structure*

With a view to maximizing the project's learning from the MTE research specific to Malawi and helping to inform this in-country work moving forward, this case study presents the lessons learned from the MTE explicitly relevant to Malawi. Data extraction from the standardized data extraction process, summary documents generated as a part of the MTE, and relevant sections of the final MTE report were reviewed jointly along with a specific focus on key informant interview transcripts and records from the evaluation team's time in Malawi. Key observations that offer value moving forward are emphasized in an effort to help maintain momentum and support the considerable progress that Malawi has made implementing this project.

Several stakeholders, individuals and champions of change in Malawi were generous and willing to share nuanced insight into the project processes as they occurred, including the larger in-country context. This was invaluable information, and we are most grateful. The MTE could not have been as nuanced without their engagement. It is our sincere hope that some of the trends discussed in this case study will be useful to the work happening in Malawi, with full recognition that the pace of change in-country is faster and more complex than what can be seen through simple analysis of key informant interviews and data – collected for use in a multiple-country project several months ago. There are nonetheless numerous achievements to celebrate, but also some challenges of relevance moving forward. Written for an audience well-attuned to the issues in Malawi and in the interest of maximizing learning and continuing to support the project’s achievements to date, this case study includes: (1) a brief overview of key issues relevant to the political context within which this work is taking place; (2) insights from project implementation, further divided into sub-sections that each highlight a set of key lessons learned; (3) conclusions; and (4) recommendations.

### **Political Context**

In order to validly explore the project’s performance, the broad political context within which this work takes place must be recalled. The project, with its discrete focus on legislative environments, human rights, and key populations--including LGBT people, women and girls, and others affected by HIV and AIDS--is necessarily impacted by political currents in any participating country. Attention to these issues is by its very nature politically sensitive and requires concerted action from multiple sectors.

Malawi faced particular challenges of note: most importantly during the period of time reviewed for the MTE, there were three changes in government. Not only did each government have varying degrees of buy-in to the project as well as differing attitudes towards both HIV and key populations, but the rapid turnover of politicians has hampered the extended cultivation of champions within the political space and created challenges for building government capacity to understand and tackle relevant issues.

Beyond full government change, restructuring within the government and a lack of clarity as to areas of responsibility, at times further obfuscated who was responsible for carrying project processes forward, potentially stalling progress. It was, for example, clear that the Department of Nutrition, HIV and AIDS (DNHA) had a central role to play, but a potential move to the Ministry of Health (MOH) left them with uncertainty regarding their autonomy, mandate and ability to operate more generally, with negative impact on their ability to drive the project specifically. In addition, the lack of clarity regarding DNHA’s roles and relationships vis-à-vis the National AIDS Commission (NAC) is also seen to have stymied some possible quick “wins.”<sup>iv</sup>

Human Rights Highlight: Attention to the political context in which the project operates is consistent with the human rights principles of participation, transparency, and accountability, and recognizes the importance of a multi-sectoral response to HIV as a health and development issue.

## **Project Implementation and Communication**

### *National legal and policy context: an overview by the project*

Through the legal environment assessment (LEA), the project revealed several considerable strengths in Malawi's legal and policy framework that support progress. International human rights instruments, regional human rights instruments, and the Bill of Rights in Malawi's constitution collectively and individually promote the rights of all people in Malawi.<sup>v</sup> The Constitution of Malawi includes, *inter alia*, the rights to equality, non-discrimination, gender equality, and security of the person.<sup>vi</sup> Further, the Constitution is amendable, and Malawi enjoys a law reform process that seems open to change and progress, with notable examples including the fairly recent passage of the Prevention of Domestic Violence Act, Deceased Estates Act, and Child Care Protection and Justice Act.<sup>vii</sup> Additionally, though they can still be improved and strengthened, HIV and AIDS policies and plans exist and promote the rights of vulnerable and key populations, and in general there is space for dialogue amongst stakeholders on the range of relevant issues. However, as noted above, this space vacillates in relation to the government in place.

While a lack of clarity persists with regard to the future of the 'HIV Bill', whatever ultimately happens with the Bill itself it is encouraging that there is traction, at least among some stakeholders, around the idea of a progressive bill that comprehensively addresses HIV.

Project processes also found important gaps in the legal environment, including the absence of HIV and AIDS as specific grounds for non-discrimination, a lack of a clear and justiciable right to health, and the absence of attention to HIV in some relevant health laws that pre-date the epidemic (e.g. the Public Health Act and the Pharmacy, Medicines and Poisons Act).<sup>viii</sup> The LEA also revealed criminal laws that do not adequately protect women and girls from harmful gender norms, GBV, and rape within marriage, and punitive laws that block effective responses to HIV and AIDS for certain key populations (e.g. laws that criminalize sex between men and provide for the arrest and targeting of sex workers).<sup>ix</sup> Finally, access to justice remains limited for the majority of the population, including with respect to relevant mechanisms --such as the courts, the Ombudsman, the Human Rights Commission, and private lawyers—encouraging many communities to seek justice from traditional structures even as they may enforce customary values, conflict with human rights norms and increase stigma and discrimination.<sup>x</sup> The LEA contains useful recommendations for addressing these gaps.<sup>xi</sup>

### *National legal and policy context: effecting change*

In Malawi, as in the rest of the world, legal change does not happen overnight, and interim successes and incremental steps along the process towards legal change are of prime importance. Increased attention to recognizing, supporting, and celebrating these successes can further project goals in upcoming stages of work. For example, simply the process of carrying out the LEA has the potential for considerable impact, above and beyond providing a snapshot of the legal environment at the time it is conducted. In Malawi, the LEA highlighted the need for a good deal of legal change. It analysed the law

reform proposals made by the Malawi Law Commission, and where they fell short (e.g. criminalisation of HIV transmission), and it suggested why some of the proposals were ill-conceived from a human rights perspective. While actual legal reform resulting from the LEA may be a more drawn-out process, the report itself is, not only a statement of what should happen and a recognition from each institution involved that specified gaps and weaknesses exist, but a document which can be used for advocacy and mobilization, all of which are vital steps on the path to change. Malawi's 2012 communiqué suggests that the LEA received exposure in the President's office, several national ministries and departments, several international institutions, and local NGOs, in part through a national dissemination workshop. It remains to be seen what next steps can be derived from the report itself and relevant processes.

There is, in fact, ample evidence of reform in several areas as a result of the LEA, such as the National HIV and AIDS Policy and Strategic Plan which have been revised. As noted in UNDP's 2013 report to Sida, "the HIV Policy now commits to addressing gaps in law to respect, protect, promote and fulfil human rights and freedoms for all people in the context of HIV as well as to address religious and cultural values and norms that promote gender inequality, stigma and discrimination towards key populations and vulnerable populations".<sup>xii</sup> Thus, actual policy change and increased knowledge of critical issues have occurred as a result of Malawi's engagement with the project, despite the fact that the future of the HIV bill was not clear at the time of evaluation.

Review of LEAs and National Dialogues from several countries as a part of the mid-term evaluation revealed that countries often prioritize a specific HIV bill or policy to carry forward project work – even if this is not the easiest "win". While such an approach is of course beneficial in making concrete steps towards changing the legal environment to be more supportive of people living with HIV, focused attention on passage of a single, specific HIV bill or policy may not ultimately be as beneficial as engaging with the range of relevant laws, policies, practices, and issues negatively impacting peoples lives in the country. This was a potential pitfall in Malawi, where significant attention was given to revising the HIV bill, perhaps overshadowing other key project successes, as well as potential actions and challenges. The HIV bill is perhaps the most obvious place to turn in seeking to improve the legal and policy environment relevant to this work, but it is not the only, or perhaps even the most immediately relevant, entry point for action. In Malawi, the HIV bill has been controversial and politically fraught for a host of reasons, so while efforts should continue to try to influence the bill's content and passage, it would be advisable for this to be only one of many strands of work rather than the project's primary focus.

### *Adapting to political change*

Awareness of election cycles and important political moments are key, and clearly influence any governments' willingness to tackle sensitive issues. It can be extremely difficult to produce legal change and to improve the overall legal and policy environment of a country when the political actors whose championing efforts are so crucial to carrying forward this work are constantly shifting or have other political agendas. Of course, the project can adapt to political change: written assessment of the legal environment and strengthened relationships between government and civil society can persist, and may

even help new leaders to form their agendas. However, with political change comes the need for (renewed) sensitization of government officials who are key to the project's ultimate success. The changes in government that have occurred during the project period have necessitated alterations in strategy, different approaches to maintaining project momentum, including repeated sensitization as well as capacity building of government officials as turnover has been so high.<sup>xiii</sup>

Given the importance of the political context to this work, and the particular impact that it has had on project progress in Malawi, one potential way to mitigate challenges and identify pathways to change going forward would seem to be a political mapping with concrete attention to project objectives. This could include a mapping of what is known about potential champions and roadblocks within the political arena, as well as a timeline which takes into account forthcoming elections as well as planned policy and strategy reforms that the project could usefully try to influence.

#### *Opening spaces for discussion*

Initially, it appears the majority of stakeholders within Malawi were most comfortable considering the legal environment relevant to women and girls, but the project's explicit focus on key populations brought additional topics and populations to the table. Because there was a focus on these populations from the outset, and key stakeholders were involved, the LEA process itself provided sensitization for stakeholders more generally, opening space to discuss and consider additional issues and populations otherwise ignored.

Evidence suggests that space is opening up to at least discuss MSM issues within the context of HIV, which may slowly facilitate discussion around other key populations. The consistent focus on key populations brings the attention of stakeholders to legal obstacles for LGBT populations, and has sparked interest among some stakeholders in building a more equal, accessible legal environment for everyone, particularly regarding access to health services, access to justice, and non-discrimination. This is a major shift of relevance to work going forward.

#### *Broad-based stakeholder participation*

Malawi's LEA was a highly participatory process, engaging key populations and using national consultants with strong local relationships.<sup>xiv</sup> The involvement of local consultants in all aspects of the project and the promotion of national ownership through project activities greatly contributed to ensuring a culturally appropriate approach to the range of topics addressed by the project.

Traditional community structures served as a valuable entry point for community dialogue and engagement in project activities, particularly with regard to women and girls. As one interview participant stated: "If a chief speaks, in most cases, the community will listen".<sup>xv</sup> As one example of success, the seven Paramount Chiefs in Malawi committed to a "Chiefs' Declaration," which included a commitment to raise the age of marriage.<sup>xvi</sup> Cultural and religious leaders can play vital and growing roles in communication and implementation of the project. To the extent possible, it would be beneficial to consider what can be done

additionally with this important group, and to engage even more diverse groups, including those that have been reluctant to engage with this work to date, moving forward.

The role and importance of key champions warrants significant attention. In Malawi, it was the role played by certain individual people that was vital to moving the project forward despite the aforementioned hurdles. Some of these individuals were in government positions, while others were UNDP staff and others still members of civil society. Identifying project champions and supporting them to fulfill this role, particularly in a difficult political environment, will continue to be central to project success and may usefully be prioritized moving forward. This support might include moral, logistical and technical support, including ensuring that champions have sufficient time carved out of their work schedule to promote this work, capacity building for champions and their colleagues, giving explicit recognition to their contributions, as well as providing information and assistance with access to decision-making spaces.

The process of conducting an LEA, and support for the various actions taken by key champions, has advanced the human rights principles of inclusion and participation, including for LGBT populations and women and girls. The information reviewed to date suggests that, there remains good potential for generating explicit focus on actions to increase equality in access to health services and reduction of stigma and discrimination within the community more broadly through project activities.

Human Rights Highlight: Increased participation of affected populations and increased knowledge of human rights principles by key stakeholders have occurred as a result of project activities .

### *Project Ownership*

The fact that a wide array of stakeholders was involved in producing the Malawi LEA was a notable achievement: this fostered inclusion and participation, and allowed for an array of viewpoints to be taken into consideration. On the flip side, a challenge arising from such wide participation was the question of ownership of project processes and products.

Some stakeholders perceived the LEA as a government document, which was seen to lend the document credibility in some circles. However, rifts between different parts of the government became apparent with sections of the government who were not involved in the LEA reluctant to acknowledge the document as a government publication. Other stakeholders perceived the LEA as jointly owned by the wide range of partners involved in its production, which they said was important as it represented collaboration and a common position amongst a range of stakeholders on these issues. Civil society organisations considered this broad-based ownership essential for promoting follow-up actions by all stakeholders.<sup>xvii</sup> These differences in perspectives may highlight important issues to consider in determining how best to foster broad-based ownership of project processes and outputs, including the LEA, moving forward.

Civil society organizations (CSOs) were among the first groups to use the LEA report, and they used it to successfully advocate for a change in first line therapy for HIV treatment.<sup>xviii</sup> New partnerships have emerged as a result of this work, including direct government funding of an organization advocating for key populations, which was unprecedented in Malawi.<sup>xix</sup> CSOs have tremendous advocacy power, and it will be useful to ensure their continued engagement and leadership moving forward in all aspects of the project. A grassroots movement, led by CSOs and cultural leaders, could help to further progress made by the project to date, and ensure engagement moving forward from a bottom-up basis (alongside government and institutional leadership, working from a top-down perspective).

Linked to this, a considerable challenge arises as to leadership and ownership of the post-LEA processes, and in determining who are best suited to be driving this work now. Up to the point of the MTE, UNDP had played a key leadership role in this process, in part because of the political context noted earlier. However, staff turnover and reduced human resource capacity at the UNDP country office have all reduced the institutional time that can be allocated to driving this project, which presents important challenges moving forward with significant implications for continuity and capacity. While the UNDP Country Office's work on this project will of course continue, without additional staffing it may be a challenge to give the time needed to operate at the level required, including galvanizing all the necessary stakeholders and following up the multiple strands of work within this project. Ideally, UNDP could invest time now in helping to build the capacity of other stakeholders to lead this work in the future.

This is another area where the strength of the wide array of stakeholders who were involved in the LEA process may be of help. One option may be to have a meeting bringing together all of the various actors involved including government, UNDP and civil society, to discuss successes to date, the current political climate, and to strategize about current opportunities for taking this work forward. As previously mentioned, the project has had success with several religious and cultural leaders in Malawi; given the importance of these leaders, efforts could be made to engage these and other actors who have been involved since completion of the LEA in such a meeting.

Human Rights Highlight: Careful attention to ownership of the project from a multitude of stakeholders moving forward will help not only to make this a more inclusive, participatory and sustainable process, but will ensure some level of transparency and accountability.

## **Conclusion**

Malawi has engaged in very positive work in this arena, with visible results. The observations included in this case study arose from application of the methodology in the MTE process, including evaluation of the relevance, effectiveness, and sustainability of the project, supplemented by additional attention to the human rights principles of inclusion,



participation, equality, non-discrimination, and accountability. Human rights principles offer legal grounding, a common language, and a useful lens through which to evaluate projects working to improve HIV responses

From key informant interviews, it seems that several key stakeholders in Malawi were dismayed with the slow pace of progress on passing the HIV bill. While it is true that progress on the HIV bill has been complicated, if there is a single takeaway from discussion of the project in Malawi, it is that the project achieved several “wins” that should be celebrated. These include policy changes; sensitization regarding key populations and the opening of space for addressing issues faced by LGBT people, and women and girls; increased awareness of and knowledge about human rights norms, principles, and standards; increased participation of key populations and those affected by HIV; and documentation of strengths and gaps in the legal and policy framework which can be used for advocacy and reform. Celebrating interim successes is not solely to lift spirits—recognizing these achievements helps to maintain momentum, but also paves the way for sustainable and lasting changes in the legal and policy environment. A critical component of recognizing interim successes in upcoming stages of this work will be communication, both internally within the project and externally about project processes and achievements.

## **Recommendations**

Based on the findings presented in this report, the recommendations below are designed to help maintain project momentum and maximize its impact moving forward:

- *Consider conducting an assessment of the political context in which the project operates, and conduct a political mapping to mitigate challenges and identify pathways for change. As part of this, UNDP could liaise with the government to ascertain where leadership for HIV lies (or should lie) within the government and to advocate for prioritization of issues relevant to the project.*
- *Recognize the importance of the project’s myriad interim successes and achievements along the pathway to legal change, including (but not limited to) related policy changes; sensitization regarding key populations and the opening of space for addressing issues faced by LGBT people, women and girls; increased awareness of and knowledge about human rights norms, principles, and standards; increased participation of key populations and those affected by HIV; and documentation of strengths and gaps in the legal and policy framework.*
- *Communicate achievements broadly to all relevant stakeholders, internally and externally, while continuing work on other avenues to support further change.*
- *Support the continued and expanded inclusion and leadership of traditional community and religious leaders in this work.*

- *Support broad based ownership of the project, including ownership by government, UNDP, CSOs, cultural and religious leaders, and others supportive of activities related to this work. Champions within these different spheres should be fostered and supported to promote this work from their respective leadership positions.*
- *Support continued sensitization at all levels to ensure that law- and policy-makers understand the issues they are being asked to legislate or create policy on. Despite the frustrations of rapid turnover, the investment in time and resources is needed to ensure better understanding of the impacts of discriminatory laws and policies and may help protect against political expediency as a driver for decision-making.*
- *To the extent possible, determine those responsible, and with interest, within different institutions for carrying this work forward, and establish lines of communication to allow for collaboration on these efforts. Consider holding a meeting to bring these different actors together and leading the establishment of a joint workplan for follow-up actions across different possible areas of interventions.*

Though these insights were revealed specifically related to experiences with the project in Malawi, it is hoped this case study will be useful for informing further work related to this project (and similar projects) moving forward, in other country and institutional contexts.

As a final note, we again wish to thank those in Malawi who were generous with their time and expertise, and hope that this work can continue to improve the lives of people living with and affected by HIV.

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## Endnotes

<sup>i</sup> For more information on the project, see Mid-term Evaluation – UNDP RSC Africa: “Strengthening Regional and National Legislative Environments to Support the Human Rights of LGBT People and Women and Girls affected by HIV and AIDS in Sub-Saharan Africa” (A Sida Supported Project), available at: <http://www.hivlawcommission.org/index.php/africa-follow-up-activities/420-mid-term-evaluation-report-strengthening-regional-and-national-legislative-environments-to-support-the-human-rights-of-lgbt-people-and-women-and-girls-affected-by-hiv-and-aids-in-sub-saharan-africa>.

Initial countries were The Democratic Republic of the Congo, Ghana, Kenya, Lesotho, Malawi, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, and Zambia.

<sup>ii</sup> Mid-term Evaluation – UNDP RSC Africa: “Strengthening Regional and National Legislative Environments to Support the Human Rights of LGBT People and Women and Girls affected by HIV and AIDS in Sub-Saharan Africa” (A Sida Supported Project), p. 9.

<sup>iii</sup> Mid-term Evaluation – UNDP RSC Africa: “Strengthening Regional and National Legislative Environments to Support the Human Rights of LGBT People and Women and Girls affected by HIV and AIDS in Sub-Saharan Africa” (A Sida Supported Project), Annex D.

<sup>iv</sup> Key Informant Interview 31

<sup>v</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 8.

<sup>vi</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 8.

<sup>vii</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 124.

<sup>viii</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 125.

<sup>ix</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 125.

<sup>x</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 125.

<sup>xi</sup> Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012, p. 126-140.

<sup>xii</sup> See Malawi: Assessment of Legal, Regulatory & Policy Environment for HIV and AIDS in Malawi, July 2012; Communiqué of the National Conference on HIV&AIDS Legal Environment, Malawi, October 2012; Legal Environment Assessment for HIV: An Operational Guide to Conducting National Legal, Regulatory and Policy Assessments for HIV, United Nations Development Programme, January 2014, p. 66.

<sup>xiii</sup> Key Informant Interview 15

<sup>xiv</sup> Key Informant Interview 8

<sup>xv</sup> Key Informant Interview 30

<sup>xvi</sup> Key Informant Interview 17; Key Informant Interview 29

<sup>xvii</sup> Key Informant Interview 15

<sup>xviii</sup> Key Informant Interview 31

<sup>xix</sup> Key Informant Interview 31