

A List of Critical Issues to the Sixth Periodic Report of Malawi on CEDAW

Identified by Women and Law in Southern Africa Research and Education Trust (WLSA
Malawi)

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**A LIST OF CRITICAL ISSUES
TO THE SIXTH PERIODIC REPORT OF MALAWI ON THE IMPLEMENTATION
OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN**

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I. Introduction

Women and Law in Southern Africa Research and Educational Trust (WLSA Malawi Office) submits this list of critical issues to be raised in the pre-session scheduled for 9th to 13th February, 2009 to discuss the Sixth Periodic Report of Malawi on the Implementation of The Convention on the Elimination of All Forms of Discrimination against Women. WLSA Malawi has identified eight critical issues, some of which arise out of the government of Malawi's direct failure to implement the Concluding comments of the Committee on the Elimination when the Committee considered the combined second, third, fourth and fifth periodic report of Malawi (CEDAW/C/MWI/2-5) at its 727th and 728th meetings, on 19 May 2006 (see CEDAW/C/SR.727 and CEDAW/C/SR.728). The identified critical issues that are barricading women's full development in Malawi are that:

1. The failure to pass any gender related laws submitted to Parliament by the Law Commission is entrenching statute-sanctioned discrimination against women
2. A weak public legal aid department is exacerbating the inaccessibility of justice to women
3. Lack of implementation of the Prevention of Domestic Violence Act 2006 is depriving victims of domestic violence of maximum legal protection
4. Women's property rights are insecure due to constitutional ambiguities
5. The proposed HIV/AIDS Bill contains provisions that perpetuate the victimization and stigmatization of women and the infringement of their rights
6. The criminal justice system is hostile towards women
7. Women continue to be the poorest, signaling the weak responsiveness of government's development strategies to women's challenges
8. Maternal mortality rate continues to be staggering and to be triggered by the avoidable cause of unsafe abortion

This report briefly elaborates on each of the eight issues by making reference to the CEDAW Articles that are being violated, and where relevant, to 2006 CEDAW Committee's concluding comments that the government of Malawi has failed to implement. It ends with a list of questions that could guide the Committee in seeking relevant responses from Malawi as a State Party.

II. The Critical Issues

Critical issue 1: The failure to pass any gender related laws submitted to Parliament by the Law Commission is entrenching statute-sanctioned discrimination against women

From 2000 to date, the Malawi Law Commission has developed gender related Bills which could have the effect of implementing CEDAW Article 2 (a), (b), (f) and (g); and Article 16 (c). These are the Penal Code Reform Bill (submitted to the Ministry of Justice in 2000), which proposed to adjust the age of defilement from 13 years to 16 years; the Citizenship Act (submitted to the Ministry of Justice in 1996), which seeks to give women and men equal rights in passing citizenship; the Deceased Estates (Wills, Inheritance and protection) Bill, which seeks to repeal the current discriminatory laws on the distribution of intestate property (submitted to Ministry of Justice in 2003); and the Marriage, Divorce and Family Relations Bill, which seeks to give equal rights and responsibilities to all parties in all marriage regimes, including customary (submitted to Parliament in 2005). The reluctance by Parliament to prioritise the passing of these Bills, even after the submission and discussion of Malawi's fourth combined periodic report in 2006, demonstrates lack of commitment by the State to implement the CEDAW Committee's concluding comment urging "the State party to set a clear time frame for the adoption of the revised Citizenship Act, Immigration Act and the Wills and Inheritance Act and for the new Marriage, Divorce and Family Relations Bill, designed to eliminate discrimination against women."¹

Critical issue 2: A weak public legal aid department is exacerbating the inaccessibility of justice to women

Contrary to the State's obligations under CEDAW Article 2(c), poor women's access to justice continues to be gravely inhibited by the low availability of government funded legal aid. The Legal Aid Department remains underfunded and understaffed, signalling that the State is giving low priority to the CEDAW Committee's concluding comment in 2006 that "the Committee is concerned that, although women's access to justice is provided for by law, their ability in practice to exercise this right and to bring cases of discrimination before the courts is limited by factors such as lack of information on their rights, lack of assistance in pursuing their rights, practical difficulties to reach courts and

¹ See paragraph 14

legal costs. . .”² The Legal aid department remains understaffed with less than 10 lawyers and most of whom are concentrated in the Southern Region of Malawi.

Critical issue 3: Lack of implementation of the Prevention of Domestic Violence Act 2006 is depriving victims of domestic violence of maximum legal protection

By passing the Prevention of Domestic Violence Act in April 2006, Malawi has taken an important step towards implementing CEDAW Committee’s General Recommendation No.19,³ as read with Article 2 (b) and (f). However, the full implementation of these provisions remains rhetorical due to the inability of government to ensure (i) that courts are equipped with necessary resources, including Forms and Orders; (ii) that relevant implementing structures, like Alternative Dispute Resolution avenues, are set up and trained. Since 2006 when the law was passed there has not been a budgetary allocation by the Government to ensure that the law now becomes effectively institutionalised within the justice delivery system. Efforts to do so are mainly done by NGOs and because of this the Law is not effectively institutionalised.

Critical issue 4: Women’s property rights are insecure due to constitutional ambiguities

CEDAW Articles 2 and 3 are not being fully implemented by the lack of unequivocal protection of married women’s property rights in Malawi. Section 24 of the Republican Constitution provides that on dissolution of marriage, women are entitled to a fair distribution of property which is “jointly held” with the husband. However, the Constitution or any statute has not defined joint ownership. This position has seen the courts adopting the common law definition of jointly-held property that fails to take into account non-monetary contributions in acquiring property. This makes it more difficult for women to control their own lives and leave high risk marriages which are one of the major conduits for HIV transmission for women. Women’s status as owners of property remains comparatively poorer than that of men because of inequitable construction of gender roles. Due to the socio-cultural construction of gender in Malawi, women tend to earn less and in marital situation do not usually buy property of value. It is usually their husbands who, due to men’s socio-economic position, have more economic prowess,

² See paragraph 17

³ a. “The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman, or that affects women disproportionately. It includes actions that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations....”

b. “Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violation of rights, or to investigate and punish acts of violence....”

and are therefore able to acquire properties of value. Notable is also the fact that women commonly take over household financial responsibilities that do not draw huge resources, i.e. buying food, paying utility bills etc- leaving the acquisition of tangible property of high value to men. And sometimes, due to the notion of “head of household,” a woman may not find it unusual for title to be in a husband’s name. However, she may still very much regard herself as having a vested interest and contribute immense labour to the construction and maintenance of a home.

Critical issue 5: The proposed HIV/AIDS Bill contains provisions that perpetuate the victimization and stigmatization of women and the infringement of their rights

Malawi stands to contravene CEDAW Article 2 (d) and (e) if the 2008 Law Commission’s provision (under the HIV And AIDS (Prevention And Management) Bill) to make HIV infection mandatory for commercial workers is adopted by Parliament. This proposed provision also contravenes Article 19 (1) of the Republican Constitution which provides that “the dignity of all persons shall be inviolable;” and Article 20 which states that “discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.” This provision continues to stigmatise women as vectors and transmitters of the disease. The ripple effect of this over and above its inherently discriminatory and degrading nature is that it is bound to victimize commercial sex workers and thus increase violations of women’s rights at the hands of public authorities and male clients.

The proposed Bill proposes Deliberate or Negligent Transmission of HIV
The draft provision penalizes “deliberate or negligent” transmission in two places. The section on health makes it offence to “deliberately or negligently” do “any act which is, and which he knows or has reason to believe to be likely to spread the infection of HIV and AIDS.” The section on “deliberate transmission and exposure to HIV infection” similarly penalizes “any person who deliberately or negligently does an act or omission that he knows or has reason to believe to be likely to spread the infection of another person with HIV.”⁴ These provisions, as drafted, are inconsistent with international guidance on HIV/AIDS and human rights. The International Guidelines on HIV/AIDS and human rights recommend that “[c]riminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and harsher penalties.”³ There is no evidence that using the criminal law to respond to HIV is

⁴ Obtained from Human Rights Watch Submission to the Malawi Law Commission, 2008

effective in protecting public health, and some evidence that it may in fact cause harm.⁴ Criminalizing transmission may deter people from getting tested, since ignorance of HIV status may be a defence. This, in turn, deters people from getting tested, and if they don't know their HIV status, they can't take steps to obtain treatment, care, and support, and keep from infecting others. In addition, criminalizing HIV transmission may also keep people from disclosing their HIV status to health care providers and other health professionals for fear it may be used against them in the criminal justice system⁵.

Critical issue 6: Women in State Custody are most excluded and vulnerable

In contravention to the general spirit of CEDAW Article 2. Women caught in the web of the law are tried unfairly and most of whom are accused of witchcraft which cannot be fundamentally proved in a court and law and yet courts have gone on a rampage of convicting women so accused. Once women enter the prison machinery they are incarcerated as opposed to rehabilitation. So much that most of them leave prison without any new skills, stigmatised and unable to cope with the rest of the world.

Critical issue 7: Women continue to be the poorest, signalling the weak responsiveness of government's development strategies to women's challenges

Malawi is failing to fully implement CEDAW Articles 13 and 14 by its failure to dramatically improve the economic status of women (including rural women) as well as reduce women's poverty levels. About 55 percent of people in male-headed households in the rural areas are poor compared to 60 percent those who reside in female-headed households.⁶ And currently, 62.9 percent of female headed households report inadequate consumption of food, compared to 54.6 percent of male headed households. Out of those who participate in national economic decision making bodies, only 21 percent are women compared to 79 per cent men.⁷ The Malawi Growth and Development Strategy (MGDS) 2006-2011 has been critiqued for its failure to capture the centrality of gender issues in attaining national economic growth and poverty reduction. It fails to recognize the socio-cultural dynamics that govern the social, economic and political interactions between men and women at different levels.⁸ Even the Business Environment Strengthening Technical Assistance Project (BESTAP), which was started in 2007 (funded by the World Bank with support from the EU), only notes that the main constraints to doing business in Malawi are macro-economic

⁵ Ibid HRW 2008

⁶ National Statistical Office, Integrated Household Survey 2004-2005, Vol.1 (October 2005), at 147.

⁷ Gender and Economic Empowerment Fact Sheet

⁸ Olivia Mchaju Liwewe, Dr Naomi Ngwira and Bright Sibale, Gender Needs Assessment of the Malawi Growth and Development Strategy (July 2006), at 5

instability and the tax rate and its administration. Gender is not mentioned in the project proposal, or in any of the indicators.⁹

In 2006, the CEDAW Committee expressed the concern that prostitution continues to thrive, owing to the poverty of women and girls.¹⁰ It was also particularly concerned that widespread poverty among women and poor socio-economic conditions are among the causes of the violation of women's human rights and discrimination against women.¹¹ The fact that more recent key national policies continue to sideline gender demonstrates the lack of adherence to the CEDAW Committee 2006 concluding comment urging "the State party to make the promotion of gender equality an explicit component of its national development plans and policies, in particular those aimed at poverty alleviation and sustainable development . . . The Committee invites the State party to place emphasis on women's human rights in all development cooperation programmes with international organizations and bilateral donors, so as to address the socio-economic causes of discrimination against women, including those impacting women in rural areas, through all available sources of support."¹²

Critical issue 8: Maternal mortality rate continues to be staggering and to be triggered by the avoidable cause of unsafe abortion

At 980 deaths per 100,000 live births,¹³ Malawi's maternal mortality rates (MMR) continue to be one of the highest in the world, thereby contravening Articles 12(2) and 16 (e) of CEDAW. One reason for the abnormally high MMR in Malawi is the de-link between the lived realities of women that die due to pregnancy related complications and the interventions that are put in place. For instance, while it is known that unsafe abortions contribute to about 30 percent of Malawi's maternal mortality rates, Malawi continues to harbour one of the most restrictive abortion laws in the world. This situation is prevailing notwithstanding that in 2006, the CEDAW Committee already expressed 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."¹⁴ So far, Malawi has therefore failed to meet the Committee's concluding observation calling on "the State party to integrate a gender perspective in all health sector reforms, while also ensuring that women's sexual and reproductive health needs are adequately addressed."¹⁵ One of the missing actions is for government to create an

⁹UNDP Malawi, National Human Development Report 2008 soon forthcoming

¹⁰ See paragraph 23

¹¹ See paragraph 33

¹² See paragraph 34

¹³ National Statistical Office and ORC Macro, Malawi Demographic and Health Survey 2004 (2005), at 1.

¹⁴ See paragraph 31

¹⁵ See paragraph 32

enabling environment for the health sector to provide safe abortions to the full extent of the law.

III. Helpful questions

These are some of the relevant questions which the committee may pose to the government of Malawi at this stage or at the reporting stage.

1. Kindly appraise the committee on the following issues:

The status of the following Bills which have been submitted by the Law commission to Ministry of Justice which is responsible for presenting these before parliament and have not yet been passed:

- a. Penal Code Reform Bill
 - b. Citizenship Act
 - c. the Deceased Estates (Wills, Inheritance and protection) Bill,
 - d. (submitted to Ministry of Justice in 2003);
 - e. Marriage, Divorce and Family Relations Bill,
- 2. Kindly appraise this committee on the Status female headed household and demographic survey indicators.**
 - 3. We understand that the Maternal Mortality rates remain high, kindly appraise the committee on what the government is doing about this?**
 - 4. We understand that unsafe abortion is quite prevalent; can the government make a comment about this?**
 - 5. Kindly comment on the status of women in state custody.**
 - 6. In particular kindly let us know about the crimes committed by women and rehabilitation programme aimed at such women**