

USING THE LAW TO RESPOND TO GENDER-BASED VIOLENCE IN MALAWI

A BOOKLET OF SIMPLIFIED LAWS AND PROCEDURES (2022)



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CHAPTER ONE

INTRODUCTION

The Gender and Justice Unit (GJU) is a non-governmental organisation that hones in on legal empowerment as one of the most potent catalysts of gender equality and social justice. The GJU utilises the law as a tool for gender equality and social justice through strategic litigation, legal research, mobilisation through strategic partnerships and strengthening access to justice through pro bono legal representation, research and advocacy. The GJU provides critical COVID19 sanitised and secure shelter for GBV victims, survivors and witnesses. Additionally, the GJU has set up a GBV hotline and other forms of communication, which allows the organisation to provide remote trauma counselling and legal assistance for GBV victims and survivors. The GJU developed this GBV Booklet with the financial support of the Open Society Initiative for Southern Africa (OSISA); the booklet is a legal empowerment tool that is meant to assist with accessing legal services in response to the incidence of gender-based violence (GBV).

In Malawi, there are a series of laws about GBV. These laws prohibit GBV and provide for protection as well as assistance to survivors of GBV. Some of the laws that relate to GBV include”

- the Constitution of the Republic of Malawi (the Constitution);
- Penal Code (the Code); the Trafficking in Person Act (TIPA);
- the HIV and AIDS (Management and Prevention) Act (HIV and AIDS Act);
- the Prevention of Domestic Violence Act (PDVA);
- the Gender Equality Act (GEA);
- the Child Care Protection and Justice Act (CCPJA);
- the Deceased Estates (Wills, Inheritance and Protection) Act (DEA);
- the Marriage Divorce and Family Relations Act (MDFRA); and
- the Electronic Transactions and Cyber Security Act (ETCSA).

Despite these laws, cases of GBV still occur in Malawi; women and girls, especially those with disabilities and in need of care, suffer GBV the most. According to the 2015-2016 Malawi Demographic and Health Survey (MDHS), 34% of women in Malawi have experienced physical violence since the age of 15, and 20% have experienced sexual violence. One of the reasons this is the case is that few survivors of GBV report cases of GBV. According to the 2015-2016 MDHS, only 40% of women survivors of GBV have reported or sought help to stop GBV.

This booklet intends to equip persons with basic knowledge of the laws relating to GBV in Malawi and what they are required to do when they, their relatives, or other persons they know have experienced GBV. It is hoped that this booklet will be of great assistance to the most vulnerable in our society, especially women and girls.

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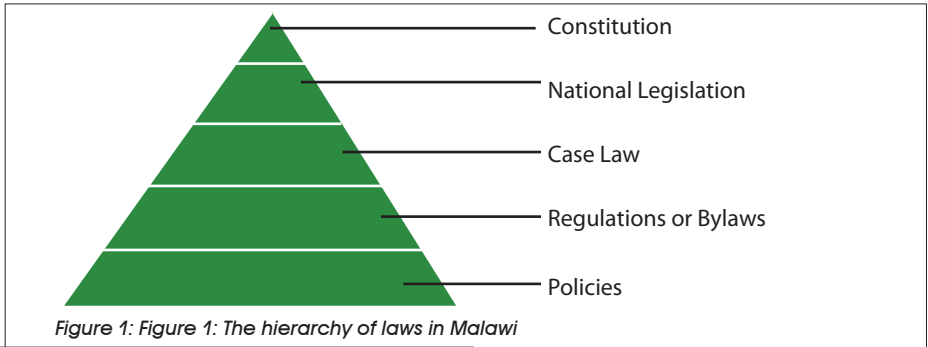
2.0 LAWS THAT RELATE TO GENDER-BASED VIOLENCE

All laws are arranged in a hierarchical order of importance. The most important law is the Constitution, and it is on top of the hierarchy. Any laws or policies opposing what the Constitution says should be disregarded because they are invalid and illegal.

After the Constitution are the Acts of Parliament. Acts of Parliament are laws made in Parliament by Members of Parliament (MPs). Most of the laws that protect persons from GBV in Malawi are Acts of Parliament.

After the laws of Parliament, are judges' decisions made in court at the end of a trial. This is the law that judges make when interpreting the Constitution or Acts of Parliament, or any other law in court. This law is called case law.

After the case law, are regulations or by-laws made by the Minister or any other person or institution. Sometimes, an Act of Parliament gives the Minister or any other person or institution the power to make rules that would facilitate the effective implementation of that law. These laws are called regulations or by-laws and are next to case law in importance. After the regulations or by-laws come government policies, policies contain detailed guidelines for public institutions and others to follow in implementing the 'Government's plans for the country.



2.1. CONSTITUTION OF THE REPUBLIC OF MALAWI (1994)

The following provisions of the Constitution relate to Gender-Based Violence (GBV):

Section	Summary of the Provision
Section 12(2)	encourages people to tolerate and respect each other and to live peacefully together.
Section 13(a)	requires the Government to promote gender equality and end domestic violence.
Section 19	requires that every person be respected, treated with dignity and not to be tortured
Section 20	prohibits persons from discriminating against each other because of one's sex or gender and makes discrimination a criminal offence. It requires the Government to make laws that would prevent persons from discriminating against each other.
Section 22	states that every person has the right to marry and have a family. It prohibits forcing another person to get married. It prohibits persons under the age of 18 (children) from getting married. It states that no person in a family should be neglected, exploited or be treated with cruelty
Section 23	states that: • all children should be treated equally. • People should consider the best interests and welfare of children when they are making decisions for children. • Parents and guardians should provide for their children or wards • All children should live in safe and secure homes or environments. • All children should be protected from harmful practices
Section 24	states that women should not be discriminated against based on their gender or marital status. In this regards, women have the right to: 1. Have or own property alone or with other people 2. Be given a fair share of the property at the end of her marriage 3. To be provided for fair maintenance at the end of her marriage It states that any law that discriminates against women based on sex or gender, or marital status is of no legal effect. It requires Government to put in place laws that end customs and practices that discriminate against women. These practices include sexual abuse, harassment, violence, discrimination and; property grabbing.
Section 4 ¹	states that persons should seek assistance from institutions such as courts, the office of the Ombudsman, the Malawi Human Rights Commission when their human rights or those of persons that they know are violated.

¹See also sections 15(2) and 46(2)

2.2. THE PENAL CODE (1929) (CAP. 7:01 OF THE LAWS OF MALAWI)

The Penal Code is the primary law that prohibits GBV. The Penal Code deals with different forms of abuse, such as sexual and physical assaults. The Penal Code has some provisions that protect people from GBV. It provides legal definitions for various criminal offences relating to GBV and their punishments. The table below presents some of the prohibited actions or crimes that relate to GBV:

Section	Offence	Explanation	Punishment
88	Intimidation	Threatening another person with physical injury or injury to their reputation	MK50,000.00 fine and/or 5 years imprisonment (7 years imprisonment for subsequent offence)
132 & 133	Rape	A male person having sex (penetration of the vagina by the penis) with an adult female by force or without her consent	Death or imprisonment for life
134	Attempted Rape	Attempting to have sex with a woman without her consent or trying to have sex with her by force	Imprisonment for life
135	Abduction	Abducting or detaining a woman or girl, against her will, to marry her or to marry her to somebody, or to let somebody have sex with her.	7 years imprisonment
136	Abduction of girls under sixteen	Taking an unmarried girl under the age of 16 away from her parents or guardian against the parents' or guardians' will	Less than 3 years of imprisonment
137 (1) & (2)	Indecent assault on females	Indecently assaulting a woman or girl. It will not be a defence if the woman or girls agrees to be indecently assaulted.	14 years imprisonment
138	Defilement of girls under sixteen years of age	Having penetrative sex with a girl under 16	Imprisonment for life
138(2)	Attempted Defilement of girls under sixteen years of age	Trying to have sex with a girl under 16	4 years imprisonment

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139	Defilement of women or girls with mental disabilities²	Having sex with a person with mental disabilities	14 years imprisonment
140	Procuration	Forcing a woman or girl under the age of 21 years have unwanted sex; to be a sex worker, or to be at a brothel	14 years imprisonment
141	Procuring defilement of woman by threats or fraud or administering drugs	Making a woman or girl have unlawful sex by using intimidation, false pretences or false representations; or Drugging a woman or girl to overpower her so that one or someone can have unlawful sex with her.	14 years imprisonment
142	Householder etc. permitting defilement of girl under sixteen years of age on his premises	An owner of premises inducing a girl under the age of 16 of age to come to his premises to have sex with any man	5 years imprisonment
143	Detention with intent or in a brothel	Detaining a woman or girl against her will at a premise or brothel for her to have unlawful sex with any man. Hiding clothes or property belong to the woman or girl to force her to remain at the premises, or brothel amounts to constructive detention	5 years imprisonment
145	Male person living on earnings of sex work or persistently soliciting	A male person living on the income of sex work	Less than 3 years imprisonment
146	Woman aiding etc. for gain sex work of another woman	A woman living on the earnings of sex work or controls the movements of a sex worker to get money.	Less than 3 years imprisonment

²The legal term remains idiots and imbeciles

147	Brothel	Keeping premises for purposes of sex work	7 years imprisonment
147A	Promoting sex work	Keeping a house or business for sex work Making another person to be a sex worker; or allowing a place to be used for sex work	14 years imprisonment
148	Conspiracy to defile	Collaborating with another person to induce a woman or girl by false pretences, false representation etc. to allow any man to have unlawful sex with her.	3 years imprisonment
155	Indecent assault of boys under fourteen	Any person having sex with boys under the age of 14 years	7 years imprisonment
155A	Indecent assault against males with mental disability³	Any person having sex with a male person with mental disability	7 years imprisonment
156	Indecent practices between males	A male person having sex with another male person	5 years imprisonment
159	Sexual intercourse with minors under one's care or protection	A man having sex with a person under the age of 21 years under their care and protection. The minor may be a relation or just a member of the man's household. Commencement of this offence is sanctioned by the Director of Public Prosecution.	5 years imprisonment
160B	Sex activity with a minor	Engaging in sexual activity (i.e. any sexual contact other than sexual intercourse) with a child	5 'years' imprisonment. However, if the offence is committed in aggravating circumstances, the imprisonment can be for 21 years imprisonment
160D	Showing or exposing offensive material to a child	Showing or exposing offensive material to a child. Offensive material is any material that describes, depicts or expresses sex, cruelty or violence that describes, depicts or expresses sex, cruelty or violence	7 years imprisonment

³The legal term remains idiots and imbeciles

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161	Fraudulent pretence of marriage	A man causing a woman to believe that she is lawfully married to him and she cohabits or has sexual intercourse with him in that belief	10 years imprisonment
162	Bigamy	A man or woman contracting marriage with another spouse ⁴	5 years imprisonment
182	Use of insulting language	Using insulting language which is likely to provoke somebody to break the peace or commit any offence against that person	MK100.00 fine and/or 6 months imprisonment
200	Libel	Printing, writing or publishing any defamatory matter concerning another person to injure them. Defamatory matter is defined as any matter that is likely to damage a person's reputation or expose her to hatred, contempt or ridicule.	
208	Manslaughter	Causing the death of another unintentionally.	Imprisonment for life
209	Murder	Causing the death of another with bad intentions and planning.	Death or imprisonment for life
223	Attempt to murder	Attempting to unlawfully cause the death of another with bad intentions and planning.	Imprisonment for life
226	Written threats to murder	writing threatening to kill somebody	7 years imprisonment
235	Action intended to cause grievous harm	Doing some grievous harm to any person with the intent to harm or disfigure them. Grievous harm is harm that disfigures, or seriously injures health or any organ of another.	Imprisonment for life
238	Grievous harm	Unlawfully doing grievous harm to another. Grievous harm is harm that disfigures or seriously injures health or any organ	14 years imprisonment

⁴[define the form of marriage to which this applies – it is not all marriages]

241	Unlawful wounding another	Unlawfully wounding another person	7 years imprisonment
253	Common assaults	Physically attacking another person	1 year imprisonment
254	Assaults occasioning bodily harm	Committing an assault occasioning actual bodily harm	5 years imprisonment
260	Kidnapping	Unlawfully taking any person from Malawi or from lawful guardianship without consent	7 years imprisonment
259	Abduction	Compelling any person by force or by any deceitful means to go from any place	

2.3. PREVENTION OF DOMESTIC VIOLENCE ACT (2006) (CAP. 7:05 OF THE LAWS OF MALAWI)

This law aims at ending violence in the home. It spells out the type of assistance available for survivors of domestic violence. The law defines “*Domestic Violence*” as violence committed by one person against another within a domestic relationship. The law defines a “*domestic relationship*” as a relationship between persons who are family members and share a home or are dependent on each other. These relationships include:

1. husband and wife;
2. persons who have a child (or children) together;
3. Parent or guardian and child or dependent
4. Persons are parent and child or dependant;
5. Persons in a sexual relationship who do not cohabit but have been in an intimate relationship, for a period exceeding twelve months.

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Forms of Domestic Violence

The law recognizes and prohibits various forms of violence that happen in the domestic setting. These forms of violence include⁵ :

Form of abuse	Examples
Economic abuse	• Preventing one from working or doing business • Refusing to provide basic household necessities • Withholding one's income or salary
Emotional abuse	• Persistently intimidating or threatening a person • Persistently following a person everywhere • Persistently telephoning or messaging a person
Financial abuse	• Controlling another 'person's financial resources
Physical abuse	• Causing physical injury to another person • Causing fear of physical injury in another person
Sexual abuse	• Making sexual contact using force or threat; • Committing sexual offences, e.g. rape or defilement (rape of a minor under the age of 16 years)
Social abuse	• Preventing somebody from associating freely with others of the Provision

⁵ See section 2 of PDVA

Assistance, the law, provides to Survivors or Survivors of Domestic Violence

The law makes provision for forms of assistance that should be offered to survivors or survivors of domestic violence. Any affected person can approach the courts to get the following orders:

Section	Order	Who should ask the courts to provide the order	What the order does
5- 10	Protection Order	• a husband or wife • a person who has a child with the abuser • a parent/guardian of the abused child or dependant • a dependant • parent or sibling of the survivor or abuser who does not live in the home in question. • a police officer; • an enforcement officer; • a service provider approved by the Minister responsible for Gender	• Prohibits a person from continuing to abuse another • Directs an Abuser to be of good behaviour • Directs an Abuser to compensate the survivor
11- 14	Occupation Order	• a husband or wife • a dependant • parent or sibling of the survivor or aabuser who does not live in the home in question. • a police officer; • an enforcement officer; • a service provider approved by the Minister responsible for Gender	It gives a survivor the right to live in or occupy a house
15-18	Tenancy Order	• a husband or wife • by a parent or guardian of a child or dependant subjected to violence, and a husband or wife is unwilling to make an application.	Allows a survivor to continue staying in a rented house without the abuser while the abuser continues to pay rent.

Service of Orders

When the court makes a protection order, occupation order or tenancy order, the law requires that the order be given to the abuser personally by the person who asked for it in court. The survivor may ask the court officer(s), a paralegal or any other person to help them give the order to the abuser. Apart from the abuser, the order may also be given to the following people:

1. any other person to whom the order applies
2. the police officer-in-charge (OC) of the station located nearest to the area where the Abuser or Applicant resides
3. Registrar of titles of property (i.e. if the order relates to real property)

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If it is impossible to personally give the order to the abuser, the law requires that order be can be:

1. Posted to the last known postal address of the abuser
2. Left at last known physical address of the abuser
3. Advertised in two daily newspapers

Enforcement of Orders

An Abuser or any person against whom an order is made is supposed to follow or do what the order says. However, if that person does otherwise, they can be fined an amount of money up to MK 500, 000. The court can also order that the abuser be arrested for refusing to obey the order.

If the Abuser or Survivor neglects or refuses to seek counselling or therapy services when the court directs so in the order, they can be fined money up to MK50,000.

Roles, responsibilities and powers of enforcement officers

The law gives the Minister responsible for Gender the responsibility to appoint enforcement officers who are supposed to make sure that survivors of domestic violence are given proper treatment and the necessary assistance.

The enforcement officers have the power to

- investigate cases of domestic violence
- protect survivors of domestic violence from further violence
- apply for a protection, occupation or tenancy order on behalf of the survivor of
- get services of any service provider to assist with any action to be taken under the law

The enforcement officers work under the direction of the Ministry responsible for Gender and can be found at any of the Ministry's district offices.

Roles, responsibilities and powers of police officers

The law requires every police officer to respond to every complaint or report alleging domestic violence whether or not the complainant is the survivor.

A police officer has the power to enter premises for the purpose of

- giving assistance to a survivor or suspected survivor of domestic violence,
- ensuring the welfare and safety of any vulnerable persons on the premises,
- preventing any further breaking of the law.

The law also empowers police officers to detain and arrest a person who has breached an order given by the court under the law.

Duty to report domestic violence

The law requires any person who witnesses domestic violence taking place; or suspects that an act of domestic violence has been or is likely to be committed to report the matter to a police officer or enforcement officer.

2.4. CHILD CARE PROTECTION AND JUSTICE ACT (2010)(CAP.26:03 OF THE LAWS OF MALAWI)

The law provides child care, child protection and child justice, and social development matters of the child.

Children in need of care and protection

These have been at risk of being abused physically, psychologically, emotionally, or sexually by relatives or others⁶. Children in need of care and protection may be placed in a place of safety or in the care of a fit and proper person.

Undesirable Practices

The law protects children from the following undesirable practices:

Section	Undesirable Practice	Explanation	Punishment
78	Child Abduction	taking a child without the consent of the parent or guardian	10 years in prison
79	Child Trafficking	Recruiting a child for the purposes of exploitation	To be in prison for life
80	Harmful cultural practices	Subjecting a child to a practice that is harmful to health and development	10 years in prison
81	Forced marriage or betrothal	Forcing a child into marriage or to be betrothed.	10 years in prison
82	Pledge of a child as security	Selling a child or pledging him or her to obtain credit	10 years in prison

Principle of best interests and welfare of the Child

The law demands that the children's best interests and welfare are the primary consideration in all matters concerning children.

Child Justice Court

The law establishes the Child Justice Court. The court handles matters relating to children in a child-friendly manner.

⁶Section 23(1) of CCPJA

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2.5. DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT (2011)

This law explains the processes of distributing property left behind by a person who has died, leaving a will or not, and protecting deceased property.

How to make a Will and Distribute Property under a Will

The law also explains the process and formalities of making a Will. The property of a person who has died leaving a Will is distributed following their wishes in the Will. Suppose a maker of the Will did not adequately provide in their Will for an immediate family member. In that case, the family member is entitled to go to court to claim their reasonable benefit. If satisfied, the court may grant a reasonable benefit after taking into account several considerations.

Any person who does not have a mental disability, and who is not a minor, can make a will⁷. A Will is made in writing and is signed by the maker of the Will in the presence of two adult witnesses who also sign the Will in the presence of each other as well as in the presence of the marker of the Will.

Generally, a witness of a Will and their spouse shall not be entitled to benefit from the Will that they have witnessed but can act as executor of the Will. However, a member of the immediate family who witnesses a Will may take benefit under the Will when the court establishes that:

- There was no other person who could have been witness to the Will;
- The benefit is fair or consists of property that would go to them anyway if the deceased died without leaving a will.
- There is no evidence of suspicious circumstances surrounding the making of the will such as fraud, coercion, undue influence etc.

Once a Will is made, it can be sent to the following for safekeeping: District Commissioner (DC); court; bank, an insurance company, law firm, employer etc.

The maker of a Will may cancel the Will at any time by destroying the Will or a subsequent Will. A Will is cancelled if a maker of the Will marries after making the Will. However, the Will may still be valid if it was made in contemplation of the marriage.

Any gift made in a Will in existence at the time of marriage between a maker of a Will to a spouse will be cancelled upon divorce.

⁷However, a soldier on actual service is exempted from following formalities in making a Will. He can make a valid Will even though he is minor or has not followed formalities

Distribution of Property of a Person who has Died without Leaving a Will

The law explains how the property of a person who has died without leaving a Will should be distributed. The husband or wife, children and dependents of the person who has passed are given priority when distributing such property.

The distribution shall be made in shares that shall be ascertained upon the following principles of fair distribution:

- First, the family shall be given items of property that would protect them from hardship;
- Then, the surviving spouse shall retain all the domestic property which the family uses every day at the house, e.g. kitchen utensils etc.;
- Then, the remaining property shall be divided between the surviving spouse or spouses and the deceased person's children. Generally, spouses and children are entitled to equal shares.

Otherwise, the shares will be determined according to:

- o The express wishes of the deceased in the presence of reliable witnesses;
- o The assistance received from the deceased (i.e. education or provision of basic necessities) during their lifetime
- o The contribution made by the spouse or child of the deceased to the business or property of the deceased.
- o The younger the child of the deceased, the greater the share

In the absence of any spouse or child, the remaining property shall be distributed between dependants in equal shares.

- Suppose the deceased left more than one female spouse living in different localities. In that case, each spouse and her children shall be entitled to the deceased property in their locality.
- Suppose the deceased left more than one female spouse who lives in the same locality. In that case, each spouse and her children shall be entitled to a share of the deceased property proportionate to their contribution.
- The law prohibits "property grabbing", which is the taking away of deceased property that a spouse had inherited when she remarries. However, this does not apply to customary land, which goes to children upon remarriage of the surviving spouse.
- In absences of the immediate family members, the deceased property shall be distributed to the following in the following order:
 - o Grandchildren
 - o Brothers and sisters who share the same biological father and mother, in equal shares
 - o Brothers and sisters who share the same biological parent, in equal shares
 - o Grandparents in equal shares
 - o Uncles, aunts, nephews and nieces in equal shares
 - o Other close relatives in equal shares
 - o Government

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Power of the courts

The High Court has powers to handle matters related to property left behind by a person who has died. However, magistrates can handle matters related to the property whose value does not exceed MK1,000,000

Prohibited Practices

The law prohibits and punishes the following practices:

Section	Prohibited Practice	Punishment
84	Unlawful possession of deceased property (Property grabbing)	A fine of not less than the values of the property grabbed and 10 years in prison
74	Depriving beneficiaries of their share in the deceased property	A fine of MK1, 000, 000. 00 and/or up to 3 years in prison

2.6. GENDER EQUALITY ACT (2013)(CAP. 25:06 OF THE LAWS OF MALAWI)

The law to promote gender equality. The law also prohibits and punishes sex discrimination, harmful practices, and sexual harassment as follows:

Section	Prohibited Practice	Explanation	Punishment
4	Sex Discrimination	Treating another person less favourably because of their gender	MK1, 000, 000 fine and/ or 5 years imprisonment
5	Harmful Practice	A practice that undermines the dignity, health or liberty of another; or harms another	MK1, 000, 000 fine and/ or 5 years imprisonment
6	Sexual Harassment	Unwanted verbal, non-verbal or conduct of a sexual nature that offends, humiliates or intimidates another	MK1, 000, 000 fine and/ or 5 years imprisonment

The law requires employers to develop and implement sexual harassment policies. In addition, the law specifically gives power to the Malawi Human Rights Commission (MHRC) to enforce the provisions of this law.

The right to adequate sexual and reproductive health

The law guarantees the right to adequate sexual and reproductive health, which includes the right to:

- access to sexual and reproductive health services; and family planning services
- be protected from sexually transmitted infection
- choose the number of children and when to bear those children
- control fertility
- choose an appropriate method of contraception
- choose whether or not to have children

Regarding the right to adequate sexual and reproductive health, the law requires every health officer to:

- respect the right without discrimination
- respect the dignity and integrity of any person accessing sexual and reproductive health services
- provide family planning services to any person demanding them irrespective of marital status; or whether a spouse accompanies that person

Under the law, any health officer who does not do what the law says will be fined MK 750,000.00 and/or imprisoned for 3 years if convicted.

2.7. MARRIAGE DIVORCE AND FAMILY RELATIONS ACT (2015) (CAP.25:01 OF THE LAWS OF MALAWI)

The law covers marriage, divorce and family relations between spouses and unmarried couples and their welfare and that of their children. According to this law, a marriage is validly entered into between two persons.

- of the opposite sex
- who are both above the age of eighteen years, and
- who do not have a mental disability

Recognition of marriage by repute or permanent cohabitation

The law regards unmarried persons who stay together as a husband and wife for five years as being in a marriage (known as marriage by repute or permanent cohabitation). For the court to make a finding that there exists a marriage by repute or permanent cohabitation, it considers the following:

- the length of the relationship, which shall not be less than five years
- the fact of cohabitation
- the existence of a conjugal relationship (sexual intercourse)
- the degree of financial dependence or interdependence
- ownership, use and acquisition of property
- the degree of a mutual commitment to a shared life
- whether the parties mutually have, care for, or support children
- the reputation of the parties in the community as being married and the public display of aspects of their shared relation

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Rights and obligations of parties to a marriage

The law entitles equal rights to both parties in a marriage. According to the law:

- A wife may retain her father's name or use the surname of the husband or both
- A wife may continue using the surname of her husband after the end of a marriage
- A spouse may refuse to have sex in a marriage on the following reasonable grounds:
 - o Poor health
 - o Post-natal recuperation
 - o Post-surgical convalescence
 - o Reasonable fear that sex would cause injury or harm
 - o Reasonable respect for custom

According to this law, it is an offence of rape for a husband to have sex with his wife by force after the courts have legally separated them pending divorce. In addition, according to this law, both the wife and husband have a duty to maintain each other and any children of the marriage through monetary or non-monetary contributions.

Maintenance of single pregnant woman

According to the law,

- an alleged father who accepts responsibility or has been found responsible by the court for pregnancy is liable to maintain the woman during the period of the pregnancy or pay for or reimburse the cost of delivery.
- If the alleged father is a child, his parents or guardian shall maintain the woman. However, the liability shall go back to the father after the father has become an adult.

Maintenance orders

The law gives courts the power to make orders of maintenance and enforce them.

Prohibited Practices

The law prohibits the following:

Section	Practice	Explanation	Punishment
15 and 77(1)(b)	Marriage between close relatives/ incest	Marriage between close relatives is prohibited on the ground of kindred or affinity	Nullification of marriage
51	Polygamy and bigamy in civil marriages	A person who contracts a civil marriage shall not be married to another spouse	MK100, 000 fine and/or 5 years imprisonment
90	Notifiable family misconduct	Neglecting to maintain the other party or provide for children to such extent that the health, safety or security, nutrition, and education of such party or children is affected	Issued with maintenance order or dissolution of marriage

Equitable distribution of property upon dissolution of marriage

The law mandates courts to equitably distribute property upon dissolution of marriage by taking into account the following:

- the income of each spouse
- assets of each spouse
- financial needs of each spouse
- obligations of each spouse
- standard of living of the family during the subsistence of the marriage
- the age and health of each spouse; or
- the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

2.8. TRAFFICKING IN PERSONS ACT (2015)(CAP. 7:06 OF THE LAWS OF MALAWI)

The law makes provision for the prevention and elimination of trafficking in persons

Definition of trafficking in persons

Under the law “trafficking in persons” means recruiting, transporting, transferring, harbouring, receiving or obtaining a person, within or beyond Malawi, through various means to exploit that person. A person may be trafficked through

- threats or use of force or coercion;
- abduction;
- fraud or deception;
- abuse or threats of abuse of power; a position of vulnerability; the law or legal process; or
- giving or receiving payments to obtain the consent of a person having control of the trafficked person.

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Offences

The law criminalises the following practices:

Section	Prohibited Practice	Explanation	Punishment
14	Trafficking in persons	Trafficking another person. The consent of the person trafficked is not a defence.	14 years imprisonment without the option of fine
15	Trafficking children	Trafficking a child. The consent of the child trafficked is not a defence.	21 years imprisonment without the option of fine
16	Aggravated forms of trafficking	Aggravated trafficking is committed in the following circumstances: • The trafficked child was recruited by using the court, e.g. through adoption etc. • The offence is committed by a relative of the trafficked person. • The trafficked person has a mental disability • The offence is committed by an organized criminal group; • The crime is committed by a person acting in an official capacity. • The offence is committed for the purpose of removing body parts, tissues or organs • The trafficked person dies or is injured or becomes sick or pregnant; or is forced to abort.	Imprisonment for life with the option of fine
20	Benefiting from the exploitation of a trafficked person	Profiting from the exploitation of a trafficked person	5 years imprisonment
22	Failure to report offence under the law	Knowing or suspecting that trafficking is being committed and failed to report to the Police	MK500,000 fine and/ or 1 year imprisonment
46	Disclosure of information	Disclosing any information that would endanger the safety or the provision of care and protection to any trafficked person	MK1,000,000 fine and/ 2 years imprisonment

Appointment of enforcement officers

The Minister responsible can appoint police officers, immigration officers, or any other officers to be enforcement officers. The enforcement officers have power to:

- Carry out investigations
- Arrest and interrogate any suspect;
- Enter premises and search and seize any items
- Interview any person suspected of being trafficked
- Certify a person as a trafficked person

Appointment of protection officers

The Minister has the power to appoint a protection officer. The protection officers have the following duties:

- Ensure that trafficked persons are given proper treatment and are provided with the necessary care and assistance
- Ensure that all interviews of trafficked persons are correctly conducted and according to the law.

Designation of shelters

The Minister responsible is supposed to put in place shelters for the care protection of trafficked persons and make regulations on administering them. A person who manages a shelter has a duty to ensure that trafficked persons' rights and freedoms are observed and protected. A person or organization willing to operate a shelter must seek approval from the Minister responsible for Gender.

Witness protection

The law provides for the protection of witnesses. It creates an offence in instances where a person negligently discloses a witness's identity in a case involving trafficking or the survivor in such cases without the authorization of the courts. If convicted, such a person is liable to imprisonment for 7 years without the option of a fine. The law also allows any witness to apply for protection where he or she reasonably believes that their safety or that of any family member is threatened because of being a witness in a case.

Establishment and administration of an Anti-Trafficking Fund

The law provides for the establishment and administration of an Anti-Trafficking Fund to support the provision of adequate care and support to survivors of trafficking, training of law enforcement officers, protection officers, and any other personnel engaged in implementing the requirements of the law.

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2.9. ELECTRONIC TRANSACTIONS AND CYBERSECURITY ACT (2016) (CAP. 74:02 OF THE LAWS OF MALAWI)

The law provides for freedom of online public communication. However, the law:

- Prohibits child pornography
- prohibits incitement of violence.
- Promote human dignity and pluralism in the expression of thoughts and opinions

The law prohibits the following practices that relate to computer systems and information communication technologies:

Section	Prohibited Practice	Explanation	Punishment
85	Child pornography	producing, reproducing, distributing, or transmitting pornographic materials.	MK10, 000, 000.00 and/or 10 year imprisonment term
86	Cyber-harassment	making an obscene statement or threatening a person with harm.	MK2, 000, 000.00 and/or 5 year imprisonment term
87	Offensive Communication	disturbing the peace or quietness or privacy of another person.	MK1, 000, 000.00 and 1 year imprisonment term
88	Cyber-stalking	harassing or threatening another person or her immediate family member.	MK1, 000, 000.00 and 1 year imprisonment term

2.10. HIV AND AIDS (PREVENTION AND MANAGEMENT) ACT (2018)

This law is about preventing and managing HIV and AIDS and protecting the rights and obligations of persons living with HIV or affected by HIV and AIDS. The law prohibits the following practices:

Section	Practice	Explanation	Punishment
4 and 5	Harmful Practice⁸	Practising harmful practice that is likely to result in or expose someone to the transmission of HIV	MK5, 000, 000 fine and/or 5 years imprisonment
		Subjecting, permitting or encouraging another to indulge in harmful practice	MK5, 000, 000 fine and/or 5 years imprisonment
6	Discrimination based on HIV and AIDS	Discriminating against another based on their real or perceived HIV status	Individual: MK5, 000, 000 fine and/ 5 'years' imprisonment. Legal person: MK10, 000, 000 fine
11	Unlawful disclosure	Disclosing the HIV status of another person unlawfully	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment. Legal person: MK10, 000, 000 fine
18	Compulsory testing	Compulsory testing for HIV	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment; revocation of practising licence Legal person: MK10, 000, 000 fine; revocation or permit or licence
21	Discrimination in a health facility	Denying a person access to health services or charging a higher fee for any health service at a health facility based on the person's actual or perceived HIV status.	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment; revocation of practising licence Legal person: MK10, 000, 000 fine; revocation or permit or licence
26	Pre-recruitment testing	Requiring any person to undergo HIV testing as a pre-condition for recruitment.	

⁸The law defines harmful practice as any social, religious or cultural p practice that puts a person at risk of HIV infection or re-infection; or may catalyse progression of HIV infection to AIDS;

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27	Termination of employment on the grounds of HIV or AIDS	Terminating employment solely on the ground that the employee is living with HIV or is perceived to be living with HIV	Individual: MK5, 000, 000 fine and 5 'years' imprisonment. Legal person: MK10, 000, 000 fine
28	Discrimination at the workplace	Discriminating against or subjecting an employee to unfair treatment solely on the ground that she is perceived to be or is living with HIV	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment. Legal person: MK10, 000, 000 fine
34	Testing for educational opportunities	Requiring a person to undergo HIV testing as a condition for entry into an educational institution, an award of a scholarship, or remaining as a student in any educational institution.	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment. Legal person: MK10, 000, 000 fine
35	Discrimination at an education institution	Discriminating against a person solely because the person is living with HIV or is perceived to be living with HIV	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment; revocation of practising licence Legal person: MK10, 000, 000 fine; revocation or permit or licence
8	Violation of the rights of persons living with or vulnerable to contracting HIV	Violating the rights of persons living with or vulnerable to contracting HIV	Individual: MK5, 000, 000 fine and/or 5 'years' imprisonment. Legal person: MK10, 000, 000 fine

Consent to HIV Testing

The law states that a person cannot test another person for HIV infection without their informed consent to be tested. If the person to be tested is a child, a parent or legal guardian's consent should be sought. However, if the person to be tested has an intellectual disability, then the permission of the following persons should be sought:

- their partner or spouse;
- legal guardian; or
- immediate family member

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3.0 PROCESSES FOR ACCESSING JUSTICE FOR GENDER-BASED VIOLENCE

According to the baseline survey conducted by the Gender and Justice Unit (GJU) in August 2019, some civil justice needs for women and men relate to engaging a legal practitioner; how to get child custody; how to access child maintenance; how to get protection, occupation and tenancy orders; and how to distribute property left by a person who died without leaving a will. This section explains the step-by-step processes for achieving these. Those affected by GBV follow these guidelines to report cases of GBV or seek assistance from relevant authorities on their own; or with the help of their representatives or persons they trust.

3.1. HOW TO GET PROTECTION, OCCUPATION, AND TENANCY ORDERS

Domestic violence survivors can approach the courts and get protection, occupation, and tenancy orders. The orders have the following effects:

Order	Effect
Protection Order (Section 5- 10 Prevention of Domestic Violence Act)	• Prohibits a person from continuing to abuse another • Directs an Abuser to be of good behaviour • Directs an Abuser to compensate the survivor
Occupation Order (Section 11- 14 Prevention of Domestic Violence Act)	• Gives a survivor the right to live/occupy a house
Tenancy Order (Section 15- 18 Prevention of Domestic Violence Act)	• Allows a survivor to continue staying in a rented house without the abuser while the abuser continues to pay rent.

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Here is a **step by step process** for getting a protection order from the court

Step	Process
Step 1	Go to the nearest magistrate court and meet a court clerk for assistance. However, if you have been physically injured, first report the matter to the police and seek medical attention from the hospital.
Step 2	Inform the court clerk that you are a survivor of domestic violence and intend to apply for a protection order.
Step 3	Give the court clerk all the necessary details about your case. This information should relate to the personal and contact details of the abuser, your relationship with the abuser, and the form, nature, and frequency of the violence you have been subjected to. This information will be used to complete a protection order application form. Your case will then be registered and given a case number.
Step 4	Pay K500 for the protection order application form.
Step 5	When you are brought before the Magistrate, narrate your story and explain to the Magistrate that you are a survivor of abuse and that your life and health are at risk and will continue to be at risk if you are not protected.
Step 6	You will be given a temporary protection order lasting for a specified period, usually a month if the Magistrate is convinced that you are a survivor of abuse and you really need to be protected from the abuser. The court will only issue a permanent protection order upon hearing both you and the abuser. The order may ask the abuser to stop abusing you or to be of good behaviour, failing which she would be sent to prison or asked to pay a fine.
Step 7	Pay MK1000 for the protection order. Then, take the protection order and serve it personally on the abuser or ask to have it served on them by the court marshal.
Step 8	If you intend to have the protection order conditions changed, go back to court and meet the court clerk for assistance. The Magistrate will change the conditions in the order depending on the circumstances of the case.
Step 9	Report the abuser to court if she continues to abuse you even after the court has issued a protection order against them. The court can order that the abuser is sent to prison or pay a fine for disobeying a court order.

NOTE: The process of getting the occupation order and tenancy order is the same as that of getting the protection order

3.2. CHILD MAINTENANCE

A father, mother, or guardian is responsible for maintaining their child or children. However, when a person who is supposed to maintain a child or children neglects to do so, an application can be made to the child justice court for child maintenance.

Child maintenance caters to the needs of the child or children, such as accommodation, food, clothing, and medical care. The application for maintenance can be made by the child, the father or mother of the child, the guardian of the child, or any appropriate person.

Here is the **step by step process** of accessing child maintenance from the one who is supposed to maintain the child or children:

Step	Process
Step 1	Go to a child justice court closest to you and meet a court clerk for assistance.
Step 2	Inform the court clerk that you intend to apply for child maintenance and give the court clerk the necessary details about your case. The court clerk will register the case and give it a case number.
Step 3	Pay MK500 for the court to issue a summons inviting the person you would not want to get child maintenance from to come to court on a specified date to explain why she neglects to maintain the child or children.
Step 4	After the Magistrate has signed, stamped, and put a court seal on the summons, take the original summons and serve it on the other person for them to sign. Alternatively, you can assign a court marshal to serve the other person's summons and bring back the signed summons to court.
Step 5	Leave one copy of the summons with the other person and take the signed summons (the original) back to court to be filed in the court file as evidence that the summons was served on the other person. Again, take and keep one copy of the summons.
Step 6	At the hearing, if the court is convinced that the other person is under a duty to maintain the child or children and that he is neglecting to do so despite having the means, then the Magistrate will order that that person should maintain the child or children.
Step 7	When the father tells the court that he is not the child or children's father, the Magistrate conducts an inquiry into whether or not the other person is the father of the child. The Magistrate may order that a DNA test be performed. The Magistrate will continue to hear the child maintenance matter when she determines that the other person is indeed the father of the child or children.
Step 8	You will be entitled to receive money to cater for periodic expenses for the child or children when the Magistrate gives you an award for child maintenance. In making the award, the Magistrate will consider the cost of living, the income, and the financial responsibilities of the other person. The Magistrate may order that the money for the periodic expenses be paid through court or directly to you. The court may also order that the payment be made by deducting from the other 'person's salary or the sale of their property.
Step 9	If the other person still neglects to maintain the child or children, you should report them to court. The court will issue a summons in Form 17, inviting the other person to come to court and explain why she is not maintaining the child or children as ordered by the court. You will be required to pay MK500 for the summons. The summons will be served on the other person as before.
Step 10	If the other person still neglects to maintain the child, you should report them to court again. This time around, the court will issue a summons inviting the other person to tell the court why she should not be sent to prison or pay a fine for not obeying the court's order. You will also be required to pay MK500 for the summons. The summons will be served on the other person as before. It must be noted that the court has the power to allow someone to go without paying for the summons if you convince them that you do not have the means to do so.
Step 11	Whenever the other person's financial position has improved or when the cost of taking care of the child or children has gone up, you are free to go back to court and ask the Magistrate to change the order.

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3.3. CHILD CUSTODY

Children are entitled to be raised by their parents or guardians. Suppose parents no longer stay together for various reasons, including separation or divorce. In that case, a father or mother may want to live or stay with their child or children. Under the law, the father, mother, or any person intending to live or stay with the child or children can apply to the child justice court to get custody of the child or children.

Here is the **step by step process** of getting child custody:

Step	Process
Step 1	Go to a child justice court closest to you and meet a court clerk for assistance.
Step 2	Inform the court clerk that you intend to apply for child custody and give the court clerk the necessary details about your case. The court clerk will register the case and give it a case number.
Step 3	Pay MK500 for the court to issue a summons inviting the person you would not want to live or stay with the child or children to come to court on a specified date to state whether or not she is opposing the application for child custody.
Step 4	After the Magistrate has signed, stamped, and put a court seal on the summons, take the original summons and serve it on the other person for them to sign. Alternatively, you can assign a court marshal to serve the other person's summons and bring back the signed summons to court.
Step 5	Leave one copy of the summons with the other person and take the signed summons (the original) back to court to be filed in the court file as evidence that the summons was served on the other person. Take and keep one copy of the summons.
Step 6	On the day of the hearing, you will be required to tell the Magistrate the reasons why you are a suitable person to be given custody and not any other person. The other person will also be asked to make a statement opposing or supporting the child custody application. After considering statements or arguments from you and the other person, the Magistrate will determine whether or not you should be given child custody. In making the order, the Magistrate will consider the child's best interest; their age and views (usually, custody of very young children is given to the mother); and the desire for siblings to live together.
Step 7	You will then be entitled to be living or staying with the child or children when the Magistrate gives you child custody. The court may order that child custody be given to the other person and not you. The court may order that the person who has not to be given child custody be entitled to see; or visit or be visited by the child or children periodically.
Step 8	You and the other person are supposed, at all times, to obey the conditions imposed by the Magistrate in their order. If you disobey the court order, you can be imprisoned or made to pay a fine upon application by the other person.

3.4. HOW TO DISTRIBUTE PROPERTY LEFT BY A PERSON WHO HAS DIED WITHOUT LEAVING A WILL

When a person has died and left property, the law requires that the property be distributed to his family members and close relative. Family members and close relatives are required to approach courts, the Office of the Administrator-General and the Office of the District Commissioner to be assisted on how the property left behind by the person who has died should be distributed following the law. However, these persons are entitled to distribute the property on their own if the property's value does not exceed MK1,000,000). The Deceased Estates (Wills Inheritance and Protection) Act refers to this property as a small estate.

Here is a **step by step process** of distributing a small estate:

Step	Process
Step 1	Have a meeting of all immediate family members and close relatives to discuss the property left behind by the person who has died.
Step 2	At the meeting, agree on how to distribute the property among those entitled to benefit from the property and in what shares. (institutional money and private land cannot be distributed by agreement).
Step 3	If necessary, engage a magistrate in your area to assist you in coming up with a legal agreement.
Step 4	Put the agreement in writing.
Step 5	Take the agreement and submit it to the District Commissioner (DC) for registration.
Step 6	Distribute the property in the manner and in shares agreed upon at the meeting.

3.5. HOW TO DISTRIBUTE INSTITUTIONAL MONEY LEFT BY A PERSON WHO HAS DIED

Institutional money is money left with the bank or employer by a person who has died. The law requires that this money be distributed to members of the deceased's family. The law requires that this money be distributed to members of the immediate family members, dependents, and close relatives of the person who has died.

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Here is a **step by step process** of distributing the institutional money:

Step	Process
Step 1	Go to the office of the DC of the original home of the person who has died; or to the office of the DC of the district where the person who has died was staying before she died.
Step 2	Inform the DC that the person in question died and left behind institutional money with their bank or employer that needs to be distributed to their immediate family member, dependants, and close relatives.
Step 3	Present to the DC documents showing proof of the institutional money and death certificate as proof of death.
Step 4	Wait for the DC: • to certify that the money is/was not left in a Will; • to identify persons who are entitled to benefit from the funds; • to have the persons entitled to benefit from the money and their shares certified by the court. • to request the bank or the employer keeping the money to pay the money within 30 days from the request's date. The bank or employer keeping the money will send the money to the DC in separate cheques payable to each person entitled to receive the money in the amounts as certified by the court.
Step 5	Go to the office of the DC to collect your cheques. However, the law requires the DC not to give cheques to children. She is supposed to open a bank account and deposit the cheque of any child who is entitled to receive the money. The DC will be managing the account on behalf of the child.

3.6. ENGAGING A LEGAL PRACTITIONER/LAWYER

Any person has a right to engage a private lawyer if she can do so. All persons have the right to hire a legal practitioner's services of their choice to help them get justice and legal remedies. The Legal Aid Bureau (the Bureau) was established to assist poor people or people of insufficient means who cannot afford private lawyers who are mostly expensive. The services at the Bureau are not entirely free. However, a person is requested to pay for the services at the Bureau based on their means.

Here is the **step by step process** of engaging a legal practitioner at the Bureau:

Step	Process
Step 1	Go to the 'Bureau's offices in Lilongwe, Blantyre, or Zomba and meet a legal aid officer for assistance.
Step 2	Inform the legal aid officer that you have a matter that requires the attention of a legal practitioner. The officer will take down your statement.
Step 3	Complete a legal aid application form with the assistance of the legal aid officer. Provide information about your personal and contact details and more information about your income or financial position.
Step 4	Submit your statement, legal aid application form, and supporting documents such as police reports, medical reports, letters, etc., to the legal aid officer.
Step 5	Wait for approval from the Authorising Officer, who can decide regarding the application and indicate the amount of money to pay.
Step 6	Pay the fees approved by the Authorising Officer once she has assigned you a case handling officer or a legal practitioner.
Step 7	Engage with the legal practitioner assigned to you at the Bureau.

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4.0 COMPLAINTS HANDLING INSTITUTIONS

Every person has the right to have disputes resolved and get appropriate remedies for GBV or other human rights violations from any complaint handling institution

4.1. LODGING A COMPLAINT AT THE SURVIVOR SUPPORT UNIT

Most police stations, substations, posts, and units across the country have survivor support units (VSUs) that handle cases of violence, including GBV.

Any person can lodge a case of violence at any survivor support unit, and the case will be handled free of charge

Police officers at the VSUs are trained to handle violence cases in a child-friendly, gender-sensitive, and survivor-centred way.

Among other things, police officers at VSUs do the following:

- Receives and records cases of GBV
- Collect information about cases GBV and send it to the Police Headquarters for analysis to improve target interventions for GBV. The information they collect includes stories of survivors of GBV and evidence about GBV
- Detain and arrest perpetrators of GBV
- Ensure that survivors of GBV access justice
- Refer survivors of GBV to service providers who provide counselling, psychological, clinical, and legal services

4.2. INSTITUTIONS THAT PROVIDE ACCESS TO JUSTICE FOR GBV

The following are some of the institutions where persons can go to seek assistance or have their disputes resolved and get effective remedies:

Institution	Physical Address	Phone	Punishment
Anti-Corruption Bureau	Lilongwe, Blantyre, Zomba and Mzuzu	01770370 01770153	Services provided Preventing and prosecuting corruption
Courts	Various	Various	Providing access to justice and legal remedies
Hospital Ombudsman	Various hospitals across the country	Various	Handling complaints about public health service delivery
Malawi Human Rights Commission	Lilongwe and Blantyre	01750900	Handling of complaints about violations of human rights and fundamental freedoms
Legal Aid Bureau	Lilongwe, Blantyre, Zomba and Mzuzu	Various	Providing legal assistance and representation
Malawi Law Society	Blantyre	01821043	Malpractices of lawyers
Mhub	Lilongwe	0888988046 0997117664	Provision of solutions to socio-economic challenges using ICT
Ministry of Gender, Children, Disability and Social Welfare	Capitol Hill, Lilongwe	01770411	Handling issues relating to children, women, the elderly, and persons with disabilities
Office of the Ombudsman	Lilongwe, Blantyre, Mzuzu and Balaka	01774899 01771436	Handling cases of maladministration, injustice, and human rights violations
One-Stop Centres	All District Hospitals		Combined services for GBV –medical
The Gender and Justice Unit; GBV Response Unit	Lilongwe	0999300911 0888100911	Provision of legal services and legal empowerment solutions for social justice and gender equality
Ufulu Wanga Platform	Lilongwe	0993892234	Provision of basic and educative information on human rights issues

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Survivor Support Unit	Almost in all police stations/units/posts across the country	01796333	Handling domestic and gender-based violence
Women Judges Association of Malawi (WOJAM)			Advancing the cause of justice in Malawi by bringing the courts closer to the people
Women Lawyers Association (WLA)	Lilongwe and Blantyre		Providing legal assistance to vulnerable women and children
Youth Net and Counselling (YONECO)	Zomba, Chikwawa, Lilongwe, Mangochi, Balaka, Ntcheu, Machinga, Nkhatabay, Mchinji, Ntchisi and Rumphi	01526199 0888958726 Tithandizane National Child Helpline Number 116 (Toll-Free Line)	Handling issues relating to youth, women, and children



USING THE LAW TO RESPOND TO GENDER-BASED VIOLENCE IN MALAWI

The Gender and Justice Unit
Private Bag B324,
House 12/165, Mkango Road,
Lilongwe