

A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi

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Summary

Sexual violence and abuse in prison are largely ignored in Malawi. There has been some advocacy focusing on HIV and AIDS in prisons, and discussions about providing condoms to prisoners, but the issue of sexual violence has for the most part been ignored. However difficult or controversial the issue of sexuality in prison might be, the government has a duty to protect prisoners from sexual violence. It is illusory to think that sexual violence in prisons may be controlled merely by repressing sexual activity. This article suggests that the best way to respond to sexual violence in prison is to follow the expert counsel of the Technical Consultation on Sexual Health convened by the World Health Organisation and World Association of Sexology in 2002. The Consultation suggested that to achieve sexual health, sexuality and sexual relationships should be approached positively and respectfully. Further, the sexual rights of every person must be protected. Sexual rights are already recognised in national laws and policies, international human rights instruments and consensus documents. They include the right of persons to be free from coercion, discrimination and violence in their sexual relationships. Malawi has a panoply of laws and policies designed to advance sexual health and curb gender-based violence, including the Gender Equality Act, the National Policy on Sexual and Reproductive Health and Rights and sexual offences legislation. In order to end sexual

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violence and abuse in prisons, these laws and policies must be applied to and implemented in prison. Moreover, these laws and policies must reflect a positive and respectful approach to sexuality and sexual relationships, including those among prisoners.

1 Introduction

Reports on several studies and other sources reveal a significant level of sexual violence and abuse amongst male inmates in the prisons of Malawi.¹ Although several inquiries and studies have touched on prison sexual violence in Malawi, this subject has largely been ignored, not only in Malawi but in the rest of Africa. One reason for this is that sex is generally regarded a taboo topic. Talking about sex in prisons is a cause for anxiety among prison officials and governments, especially because it concerns sexual conduct between prisoners who usually are persons of the same sex.² For example, when a Zambian prison official was asked if condoms could be distributed in prisons, he was reported to have said that it was 'madness' and would portray a bad image about Zambia to other countries.³

Although the advent of HIV necessitated talking about sex in prison, sex and sexuality of prisoners are avoided or denied.⁴ One avoidance strategy has been to frame HIV/AIDS as a medical problem only and ignoring aspects of sexual activity. This over-medicalisation of the discourse diverts attention away from the fact of sexual violence

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- 1 D Jolofani & J DeGabriele 'HIV/AIDS in Malawi prisons' (1999) <http://www.penalreform.org/publications/hiv-aids-malawi-prisons-0> (accessed 9 December 2012); B Ligomeka 'Critics against massive rape and sexual abuse in Malawi prisons' *Afrol News* 9 January 2001 http://www.afrol.com/News2001/maw001_prison_rape.htm (accessed 8 December 2012); S Khan 'Still abuse of juveniles in Malawi prisons' *Afrol News* February 2001 http://www.afrol.com/News2001/maw006_prison_abuse.htm (accessed 1 December 2012); African Commission on Human and Peoples' Rights 'Prisons in Malawi, report on a visit 17 to 28 June 2001 by Dr Vera Mlangazuwa Chirwa, Special Rapporteur on Prisons and Conditions of Detention in Africa' http://www.achpr.org/files/sessions/30th/mission-reports/malawi/achpr30_misrep_specmec_priso_malawi_2001_eng.pdf (accessed 19 December 2012).
 - 2 G Kamlomo 'NGOs decry homophobia in Malawi' *The Daily Times* 21 May 2012 <http://www.bnltimes.com/index.php/daily-times/headlines/national/6542-ngos-decry-homophobia-in-malawi> (accessed 20 December 2012).
 - 3 'Zambia jail official rejects condoms, sex for prisoners' *Panapress* 9 April 2003 <http://www.panapress.com/Zambian-prison-official-rejects-condoms-sex-for-prisoners--13-476218-18-lang1-index.html> (accessed 13 February 2013).
 - 4 'To give or not to give Namibian prisoners condoms' *Africa Review* 11 May 2011 <http://www.africareview.com/Special-Reports/To-give-or-not-to-give-Namibian-prisoners-condoms/-/979182/1403754/-/kctbr1z/-/index.html> (accessed 13 February 2013).

and abuse.⁵ Consequently, proposed interventions have focused on the biological aspects of HIV and have failed to address the broader aspects of sexual health – including sexual violence. The various studies on HIV and AIDS in prisons have addressed sexual violence only tangentially.⁶

Inquiries on prison conditions have side-lined the topic. For instance, after recounting stories of rape and sexual abuse in a report on prison conditions in Malawi, the Special Rapporteur on Prisons and Conditions of Detention in Africa (Special Rapporteur on Prisons) does not address this at all in the concluding recommendations.⁷ Another example is the recent study on pre-trial detention in Malawi by Open Society Initiative for Southern Africa (OSISA) and others in collaboration with the government of Malawi.⁸ This was probably the most thorough study on prison conditions by the time the report was published in 2011. Amazingly, this study mentioned nothing about sexual violence or abuse despite that there had been evidence of this in previous studies and inquiries. It is almost as if the literature on sexual violence was deliberately ignored in this particular study.

The failure to address the problem of sexual violence in prisons also has to do with social and political attitudes about prison. Prisoners are regarded as persons deserving of bad living conditions. What Jones and Pratt say about American society might reflect the attitudes in Malawi and other African countries:⁹

American society may be guilty of accepting prison sexual assault as a part of prison life, largely because of the belief that inmates are undeserving of protection and that sexual victimisation in prison is a natural consequence of having violated society's norms and mores.

Prison conditions are generally poor in Malawi. There is overcrowding, poor sanitation and a lack of access to basic needs such as adequate food, bedding, clothing, security and health care. Advocacy for better

5 F Namangale 'HIV rate high in Malawi prisons' *Malawi Nation* 29 June 2012 <http://www.mwnation.com/national-news-the-nation/7378-hiv-rate-high-in-malawi-prisons> (accessed 20 November 2012). The comment by the Minister on HIV transmission was that homosexuality is not the only way this is transmitted. While that may be true, the Minister was avoiding talking about sex in prison.

6 R Zachariah *et al* 'Sexually-transmitted infections among prison inmates in a rural district of Malawi' (2002) 96 *Transactions of the Royal Society of Tropical Medicine and Hygiene* 617; OO Simooya *et al* 'Behind walls: A study of HIV risk behaviours and seroprevalence in prisons in Zambia' (2001) 15 *AIDS* 1741; CA Okochi *et al* 'Knowledge about AIDS and sexual behaviours of inmates of Agodi Prison in Ibadan, Nigeria' (2000) 19 *International Quarterly of Community Health Education* 353.

7 African Commission (n 1 above) 43.

8 Open Society Initiative of Southern Africa *Pre-trial detention in Malawi: Understanding caseload management and conditions of incarceration* (2011).

9 TR Jones & TC Pratt 'The prevalence of sexual violence in prison: The state of the knowledge base and implications for evidence-based correctional policy making' (2008) 52 *International Journal of Offender Therapy and Comparative Criminology* 292.

prison conditions in Malawi has focused on these but has ignored sexual health.

The aim of this article, therefore, is to start a discussion about sexuality and sexual violence in prisons. It will use the concepts of sexual health and rights to argue that prisons could shape sexual expression of prisoners away from sexual violence and toward sexual health. This requires a transformation of attitudes about prison sexuality and sexual relationships so that the prison system may be reformed towards protecting the sexual health of prisoners.

2 Sexuality, sexual health and rights of prisoners

In 2002, the World Health Organisation (WHO) and the World Association of Sexology (WAS) convened a technical consultation on sexual health in Geneva. This was a meeting of international and national experts on sexuality and sexual health-related issues, drawn from across all the regions of the world. The report of the technical consultation informs the discussion on sexuality, sexual health and the rights of prisoners.

2.1 Concepts

It is not disputed that sexuality is a central aspect of being human. Sexuality is experienced and expressed in diverse ways in relationships to the self or others, in solitude or in communion. Sexuality is therefore part and parcel of all cultures, including prison cultures. Various factors influence the expression of sexuality, including biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors. These interrelated factors also influence prison conditions, and how society treats prisoners. The experience and expression of sexuality in prison is inevitably shaped by prison conditions which are influenced by the above-mentioned factors.

Prisoners are human and sexual beings. They will therefore always express themselves sexually in one way or another, and this may include physical sexual activity. The prison system cannot control or repress the expression of sexuality, although it can play a role in shaping such expression. Indeed, Haney notes that prisons generally have a powerful influence on the expression of sexuality:¹⁰

[T]hese inverted sexual dynamics in which hypermasculinity is performed through forced homosexual behaviour are a testament to the power of prison to fundamentally change people, to distort and disturb their sexual identities as well as other core aspects of their pre-existing 'self'.

¹⁰ C Haney 'Perversions of prison: On the origins of hypermasculinity and sexual violence in confinement' (2011) 48 *American Criminal Law Review* 127.

In prison, men (and women) spend long periods of time together and in close proximity. This increases the likelihood of sexual activity amongst them. Persons who do not identify as homosexual may nevertheless be involved in sex with other men simply because there are no women in prison. Although prisons have the power to shape sexual expression, it would be illusory to suppose that prisons have control over the sexuality of prisoners. Prison systems can only shape the expression and experience of sexuality. This is crucial because prisons contribute towards the sexual health of prisoners, positively or negatively.

The technical consultation defined sexual health as follows:¹¹

Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.

Sexual health in prisons is not merely the absence of disease or dysfunction. It is not merely the absence of HIV in prison. Indeed, neither is it the mere absence of sexual violence or abuse.

Sexual health involves the whole person; the physical, the emotional, the mental and social aspects of the person. Advancing sexual health in prisons means paying attention to all these aspects, and addressing the needs of the prisoner holistically rather than piecemeal. Sexual health is related to life's basic necessities, such as food, clothing, bedding, leisure activities, the personal security of the person, and adequate living space. General living conditions are not dissociated from sexual health. Separating these from sexuality and sexual health is perhaps another illusion of prison systems.

A crucial step to advancing sexual health in prison is to foster a positive and respectful approach to sexuality and sexual relationships. Prison systems must imagine the possibility for healthy sexual experiences among prisoners. This, however, is one of the greatest challenges and involves a shift of social attitudes about sexuality and gender relations. Social norms and laws about same-sex intimacy in Malawi reflect a negative view about same-sex sexuality; that it is shameful and immoral. This negativity is a hindrance because the very possibility of healthy sexual relationships among prisoners is denied. This repression contributes toward prison conditions that sustain unhealthy expressions of sexuality.

The technical consultation also stated that, in order to achieve sexual health, sexual rights must be respected, protected and fulfilled. Sexual rights were defined as follows:¹²

11 World Health Organisation (WHO) *Defining sexual health: Report of a Technical Consultation on Sexual Health 28-31 January 2002* (2006) 5.

12 As above.

Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus documents. They include the right of all persons, free of coercion, discrimination and violence, to ... respect for bodily integrity ... consensual sexual relations ... pursue a satisfying, safe and pleasurable sexual life.

The concept of sexual rights is still a contested one and there is no consensus at the global level. However, the technical consultation appeals to the fact that sexual rights are not new rights but the very same human rights already recognised in national laws and international human rights documents. Freedom from violence, respect for bodily integrity, and the right to choose one's sexual partner and to pursue sexual intimacy that enriches one's life are founded upon the fundamental and basic rights already articulated in various human rights documents. Human rights are sexual rights when the basic fundamental rights are applied to sexuality and sexual relationships. Sexual rights are therefore a conceptual tool for advocating for sexual health, because without the realisation of these rights, sexual health cannot be attained.

2.2 Human rights and prison sexuality

The very first principle to guide prison systems toward addressing sexual violence in prisons is to treat prisoners as human beings entitled to certain rights that must be protected. Prisoners have the right to be treated in a humane manner and with respect for the inherent dignity of the human person.¹³ They have the right to physical and moral integrity, and not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁴ Prisoners also have the right to the highest attainable standard of physical and mental health, including sexual health.¹⁵

Lawful imprisonment does not strip prisoners of all human rights. This principle was first stated in 1912 by Innes J in *Whittaker & Morant v Roos & Bateman*, where he held that '[i]nmates were entitled to all the personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed'.¹⁶ In 1979, this *dictum* came to be known as the *residuum principle* when it was quoted by Corbett J in *Goldberg & Others v Minister of Prisons & Others*.¹⁷ In 2008, Plasket J held that the *residuum principle* enjoys even stronger protection in the era of

13 Principle 1 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' A/RES/43/173 (1988) <http://www.un.org/documents/ga/res/43/a43r173.htm> (accessed 13 February 2013).

14 Art 5 Universal Declaration; art 7 ICCPR; Preamble & art 2 Convention against Torture.

15 Art 25 Universal Declaration; art 12 ICESCR.

16 1912 AD 122-123.

17 1979 (1) SA 14 (A) 39 C-E.

democratic constitutionalism as it is rooted in human rights principles which are the bedrock of democracy.¹⁸

Like many other democratic constitutions, the Constitution of Malawi extends the protection of rights to prisoners.¹⁹ In *Masangano v Attorney-General & Others* (*Masangano case*), prisoners from Chichiri Prison sought the protection of their rights under the Constitution.²⁰ The plaintiffs alleged that the prison conditions were such that their non-derogable right to freedom from torture and cruel, inhuman and degrading treatment or punishment was infringed.²¹ They raised the issue of a lack of basic necessities, such as blankets and food. Another issue was the lack of space in prison cells, leading to congestion. The court held that the overcrowding and other poor conditions were a violation of basic human dignity; that it amounted to inhuman and degrading treatment and was therefore unconstitutional. The court stated that '[p]risoners may have the right to liberty curtailed by reason of lawful incarceration; they, however, retain all their other human rights as guaranteed by the Constitution ...'²² The court therefore ordered, *inter alia*, that the prison authorities take steps to reduce congestion and improve conditions generally to meet minimum international standards.

Even if the plaintiffs in the *Masangano* case did not directly raise the issue of sexual violence or sexual health, the basic rights they claimed are not dissociated from sexuality and sexual expression in prison. Respect for the right to dignity of prisoners therefore entails deliberate efforts on the part of the penal system to take into account the power of the prison to shape expression of sexuality. It means engaging with the factors that create prison conditions that sustain sexual abuse and violence.

Prison systems foster unhealthy expressions of sexuality when they treat prisoners inhumanely, that is, when they fail to respect their human and sexual rights. Haney notes that 'many correctional institutions function as though the people that they house are not fully human – performing what some have characterised as “waste management functions.”'²³ Apart from denying prisoners the enjoyment of basic human rights, as revealed in the *Masangano* case, prison systems also tend to deny the sexuality of prisoners and to treat them as if they were non-sexual beings that should not engage in any sexual relationships. This repression of sexuality does not make sexual activity disappear. Rather, it contributes to the negative expression of sexuality, such as sexual violence. In order to promote sexual health

18 *Ehrlich v Minister of Correctional Services & Another* 2009 (2) SA 373 (E) para 7.

19 Art 164 Constitution of Malawi Act 20 of 1994.

20 *Gable Masangano v Attorney-General & Others* Constitutional Case 15 of 2007 (unreported), <http://www.malawilii.org/mw/judgment/high-court-general-division/2009/31> (accessed 11 November 2012).

21 Art 44 Constitution of Malawi.

22 *Masangano case* (n 20 above).

23 Haney (n 10 above) 126.

amongst prisoners, it must be accepted that sexual activity will take place. With this in mind, prison systems must adopt a respectful and positive approach to the sexuality of prisoners. This entails respecting the prisoner as a human being entitled to certain rights, including the right to be free from sexual violence. Ultimately, therefore, sexual health in prisons can only be advanced if sexual rights are respected, protected and fulfilled.

4 Gender-based sexual violence among men

Sexual violence among prisoners can be explained and understood through the concept of masculinity. Masculinity describes and explains the behaviour of men in relation to gender and sexual identities. It is the complex set of social regulations governing the conduct of 'real men'. It shapes attitudes and behaviours through socially-constructed expectations and meanings of what is the proper behaviour for a man as opposed to a 'non-man'.²⁴ These expectations shape behaviour by constructing the ideal (man) to which males strive to conform in order to be regarded as a real man. Therefore, males are always in a constant struggle to prove themselves. This is the 'hegemonic masculinity'.²⁵

Hegemonic masculinity shapes sexual behaviour among men by creating expectations of how a 'real man' should behave with regard to sex and sexual relationships. This links masculinity to heterosexuality, and specifically to heterosexism. Heterosexism is the cultural belief system that recognises heterosexuality as the only desired form of sexual expression to the exclusion of any other.²⁶ Heterosexual intimacy and sex is therefore the expected sexual expression of both the masculine and feminine genders. Patriarchal societies despise non-heterosexual intimacy because it is a subversion of the social order. Law argues that the legal and cultural contempt against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is because their identity and life styles challenge the social meanings attached to gender.²⁷

[H]omosexuality is censured because it violates the prescriptions of gender role expectations. A panoply of legal rules and cultural institutions reinforce the assumption that heterosexual intimacy is the only natural and legitimate form of sexual expression.

24 R Robinson 'Masculinity as prison: Sexual identity, race, and incarceration' (2011) 99 *California Law Review* 1331.

25 DR Karp 'Unlocking men, unmasking masculinities: Doing men's work in prison' (2010) 18 *The Journal of Men's Studies* 65.

26 GM Herek 'Beyond "homophobia": Thinking about sexual prejudice and stigma in the twenty-first century' (2004) 1 *Sexuality Research and Social Policy* 14-15.

27 SA Law 'Homosexuality and the social meaning of gender' (1988) *Wisconsin Law Review* 196.

One of the defining characteristics of masculinity with regard to gendered sexual relations is the capacity to sexually penetrate a woman. By associating manhood with the capacity to engage in penile and penetrative sex with a woman, men internalise the belief that sexual penetration affirms masculinity. For instance, in several Malawian sub-cultures, rites of passage reinforce the idea that boys prove their manhood by having sex with girls.²⁸ The girl or woman may consent, but sometimes proving manhood may involve subduing the other. The pursuit of the masculine ideal to its logical end creates conditions for sexual violence by justifying the subjugation of women. Indeed, Kaufman notes that '[t]he various forms of men's violence against women are a dynamic affirmation of a masculinity that can only exist as contradistinguished from femininity'.²⁹ However, it is not only the woman who is subjected to this violence. The destructive force of masculinity casts an oppressive web across all who threaten the hegemonic masculinity ideal, including men and women.³⁰ As Harris puts it:³¹

[M]en achieve masculinity at the expense of women: at best by being 'not a woman', at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women. Even in male-male relations, the domination of men over women arguably continues to function: Men in all-male groups often prove their individual and collective manhood by symbolically reducing others in the group to women and abusing them accordingly.

A great deal of sexual violence in prisons is gender-based. Gender-based violence is manifested in the victimisation and the stigmatisation of female qualities in men, where perpetrators sexually abuse other men who are perceived to exhibit such female qualities.³² The perpetrator of gender-based sexual violence against another man does not perceive the act as a homosexual act, but rather imagines himself as engaging in a heterosexual act.³³ The victimised becomes symbolically his 'woman'. The heterosexual aggressor engages in a homosexual act but as an expression of despise of femininity and homosexuality. This is how sexual violence driven by hegemonic masculinities simultaneously entrenches misogyny and homophobia.

28 AC Munthali *et al* *Adolescent sexual and reproductive health in Malawi: A synthesis of research evidence* (2004) 13-14; EAT Pemba 'The changes in the conduct of Yao boys' initiation ceremonies: An empirical study of the impact of HIV and AIDS NGOs/projects interventions' unpublished Master's thesis, University of Nordland, 2012 15 http://brage.bibsys.no/hibo/retrieve/2370/Pemba_EAT.pdf (accessed 21 May 2013).

29 M Kaufman (ed) *Beyond patriarchy: Essays by men on pleasure, power, and change* (1987) 590.

30 L Segal *Slow motion: Changing masculinities, changing men* (1990) 16.

31 A Harris 'Gender violence, race, and criminal justice' (2000) 52 *Stanford Law Review* 785-786.

32 TA Kupers 'Role of misogyny and homophobia in prison sexual abuse' (2010) 18 *UCLA Women's Law Journal* 113.

33 As above.

Gender-based violence against women or any other person and in its many forms is therefore not a random occurrence of isolated events. Gender-based violence is a system of oppression within heteropatriarchy. This is the system which shapes the expression of hegemonic masculinities. Harris defines heteropatriarchy as 'a system of subordination that burdens not only women and sexual minorities but also the straight-identified men that it purports to privilege'.³⁴ Gender-based violence is therefore an interconnected web of intersecting forms of oppression stretching across civil society and the state.³⁵ State machinery, such as laws that criminalise sex between same-sex persons, forms part of this oppressive structure because of complicity with these masculinity ideals.³⁶ This, at least in part, explains the sexual victimisation amongst men in prison.

However, relationships amongst men are not governed by hegemonic masculinities alone. In their research on masculinity narratives amongst prisoners, Evans and Wallace described three groups.³⁷ The first group were gentler and softer men who had not internalised hegemonic masculinities. The second were those who lived by the hegemonic masculinity code and perceived themselves inadequate men who constantly had to prove their manhood through violence. The third initially internalised the hegemonic masculine codes, but had undergone certain transformative experiences that empowered them to re-evaluate their lives and adopt a more balanced view of their masculinities.

Sexual health and rights are about creating conditions for respectful gender and sexual relations which are the bases for persons to engage in sexual relationships and activity without coercion and discrimination, and based on mutuality and equality rather than power and subjugation. The concept of sexual rights is a useful tool to guide the transformation of hegemonic masculinities into positive and gender-equal relationships among men in prison.

34 A Harris 'Heteropatriarchy kills: Challenging gender violence in a prison nation' (2011) 7 *Washington University Journal of Law and Policy* 17.

35 As above.

36 DL Hutchinson 'Ignoring the sexualisation of race: Heteronormativity, critical race theory and anti-racist politics' (1999) 47 *Buffalo Law Review* 19-20; EM Schneider *Battered women and feminist law making* (2000) 499.

37 T Evans & P Wallace 'A prison within a prison? The masculinity narratives of male prisoners' (2008) 10 *Men and Masculinities* 498-499.

5 Sexual relationships among male prisoners in Malawi

5.1 Characteristics

5.1.1 Power and subjugation

The Special Rapporteur on Prisons described one incident of sexual violence characterised as rape.³⁸ In this instance, a newcomer to the prison was violently raped by fellow prisoners and had to be treated for trauma. Jolofani and DeGabriele also interviewed prisoners who admitted that ‘homosexual rape’ occurs in prison. Some prisoners said it was a common occurrence while others said it happened only occasionally, maybe once or twice a year.³⁹ The inquiry and study did not measure the prevalence or extent of sexual violence in Malawi’s prisons.

Kainja, who was actually a prison official in Malawi when he conducted his study, designed his investigation specifically to determine the extent of sexual violence in prison, the common forms of sexual violence, and the prevalence and factors that shape sexual violence. According to the opinions of the prisoners he interviewed, 34 per cent of sexual violence in prison was coerced anal sex, 26 per cent was unwanted touching and 4 per cent was rape.⁴⁰ It is not clear how coerced anal sex was distinguished from rape because these two could easily be conflated. In any case, he also found that 21 per cent of the prisoners he interviewed had experienced some form of sexual violence.⁴¹

The most important characteristic of sexual relationships which are based on power and control is coercion. There are various levels of sexual coercion in prison. Some acts resemble rape, while others might appear consensual. In their report, Jolofani and DeGabriele observe that ‘[s]ome men have a “wife” with whom they have a constant relationship, while others have several long-term “wives”’.⁴² That some relationships are constant or long-term suggests that they may be or become consensual in nature. However, the fact that the prisoners described their sexual partners as ‘wives’ reflects the misogyny and homophobia associated with hegemonic masculinity ideals.

Sexual violence and abuse in Malawi’s prisons should not be ignored. The finding that 21 per cent of the prisoners interviewed by

38 African Commission (n 1 above) 29.

39 Jolofani & DeGabriele (n 1 above) 9.

40 C Kainja ‘Analysis of “inmate on inmate” sexual victimisation in prisons: A case study of a few selected prisons in Malawi’ (2011) unpublished BA dissertation, Mzuzu University, 2011 18.

41 Kainja (n 40 above) 19.

42 Jolofani & DeGabriele (n 1 above) 9.

Kainja were sexually violated at one time indicates a prevalence of one in five prisoners, which is very high. The question is how prison systems can address sexual coercion, so that if there is sexual activity, at least then it is based on gender equality and positive attitudes towards sexuality.

5.1.2 Transactional

The boundaries between coercive and non-coercive sex in prison tend to be blurred, and sometimes the two may be conflated.⁴³ This is especially difficult where sex is used as a medium of exchange. Evidence suggests that the more prevalent sex in Malawi's prisons is between adults and juveniles, and is sometimes not necessarily accompanied by physical violence. This type of sex does not have the characteristics of forcible rape. The report of the Special Rapporteur on Prisons on Malawi recorded how adult prisoners propose sex to young prisoners in exchange for food.⁴⁴ Jolofani and DeGabriele capture a similar experience from a prisoner:⁴⁵

These juveniles agreed to have sex with these men because they had no clothes and no blanket, and they were hungry. One day these boys started to cry and refused to have sex. The men took away their blankets and after spending a night in the cold they agreed to allow the men to have sex with them again.

In this instance, the boys were not physically forced by the adult prisoners. Rather, the adult prisoners asked for sex and offered the boys food, clothing and blankets in exchange. By analogy with mainstream society, a person may choose to engage in sex in exchange for money or other commodities.

But perhaps the issue here is the underlying power relations which are influenced by a lack of basic needs. If one is forced into exchange because of destitution, this can be a very disempowering and humiliating experience. Therefore, even if it were debatable whether the boys had sex under coercion, it was certainly under conditions of destitution and disempowerment. So, while the question of whether this was consensual is problematic, the question of whether this was based on equality and mutual respect might be easier to answer, and it is in the negative.

Jolofani and DeGabriele also describe transaction sex where other prisoners are rented out for sex, especially boys.⁴⁶ This kind of arrangement points to the victimisation of these boys and is most likely based on their perceived or actual feminine qualities.

43 S Gear 'Behind the bars of masculinity: Male rape and homophobia in and about South African men's prisons' (2007) 10 *Sexualities* 214.

44 African Commission (n 1 above) 37.

45 Jolofani & DeGabriele (n 1 above) 10.

46 Jolofani & DeGabriele (n 1 above) 9.

Transactional sex in prison is perhaps the more problematic to address because it may not be possible to eliminate the place of sex as a highly-desirable commodity which can be used as exchange.⁴⁷ Even if all prisoners are given basic necessities, there will still be differences among prisoners, creating conditions for exchange. However, providing the basic necessities may at least avoid prisoners having to engage in sex out of destitution. As for exchange beyond the basic necessities, prison systems may just have to make sure that there is no coercion involved, and that the sexual activity is based on equality and mutuality.

5.1.3 Mutual and consensual

Sexual relationships in prison may be violent and abusive, but they may also be consensual. Jolofani and DeGabriele reported that juvenile prisoners in Malawi admitted to having consensual sexual relations amongst themselves.⁴⁸ However, the characteristics of such relationships were not elaborated upon. It can only be postulated that they are for mutual pleasuring and based on respect for the other rather than based on power, domination and control. This would also point to positive attitudes about men having sex with men.

While there has been a great deal of research on sexual violence in prisons, there has been comparatively little literature on consensual sex and love relationships. Anecdotal evidence, however, does suggest that some prisoners may engage in consensual sex with one another as an expression of love. Writing about his experience in a prison in the United States of America (USA), one prisoner said that some relationships in prison end up to be love affairs, even if out of necessity.⁴⁹ Another prisoner recounts his experience in prison with another inmate:⁵⁰

This man made love to me like no one else had ever has. It was wonderful each and every time. This was a man so straight that I was terrified to even kiss him the first time. This straight man completely, unreservedly, met every need that I had sexually.

There is a need for further research to find out what kind of mutual sexual relationships exist in Malawian prisons, and to what extent they are based on gender equality, and positive and respectful ideas about sexuality and sexual relationships among men. Perhaps one of the reasons this has not been investigated is because of the prejudice and bias of researchers in a homophobic environment, where the very

47 BV Smith 'Analysing prison sex: Reconciling self-expression with safety' (2006) 13 *Human Rights Brief* 18.

48 Jolofani & DeGabriele (n 1 above) 11.

49 J Urbaniak 'Lockdown: Prison love' *Qnotes* 29 November 2008 <http://goqnotes.com/1150/lockdown-prison-love/> (accessed 13 December 2012).

50 CJ Richardson 'I am a gay man in prison: How some straight men find comfort in the arms of another man' *Yahoo Voices* 5 January 2011 <http://voices.yahoo.com/i-am-gay-man-prison-7510292.html?cat=43> (accessed 18 December 2012).

notion of positive and respectful sexual relationships among men is disregarded.

5.2 Factors influencing sexual expression

Kainja identifies several factors that in the opinion of the prisoners influence sexual relationships. Thirty-eight per cent of the prisoners thought the pressure for sex is the most important; another 38 per cent thought it was the length of sentence; and 6 per cent said it was boredom and congestion. Another study found that there was a greater tendency for sexual violence in maximum-security prisons than in other prisons. Interviewed prisoners thought that most perpetrators were among the prisoners with longer sentences rather than those serving shorter sentences.⁵¹ The respondents in Jolofani and DeGabriele's study also thought that overcrowding in cells contributes to an increased risk of sexual assault and violence.⁵²

These factors (that is, pressures of sex, the length of sentence, boredom and congestion) do not, however, by themselves explain why the sex should be abusive or violent. There is an interplay with other factors that create conditions for sexual violence, including the internalisation of hegemonic masculinities, and the emotional and psychological makeup of the individual. This is the reason behind the abuse of younger men and effeminate men by adult prisoners, where the adults idealise their victims as women or wives rather than as equal partners.⁵³

Systemic or structural factors, that is, the penal governance system, also play an important role. Jolofani and DeGabriele describe how adult prisoners in connivance with *nyapalas* (prison cell leaders) and warders smuggle juvenile prisoners into the adult section for sex.⁵⁴ Also, the *nyapalas* are supposed to report any acts of sexual violence and abuse, but they are bribed by other prisoners to keep quiet.⁵⁵ While the juveniles are encouraged to report such abuse to prison officials, they fear repercussions, which include being treated harshly by fellow prisoners or prison officials.

Another important structural factor is the socio-political and legal framework that perpetuates stigma against same-sex intimacy and the criminalisation of sex between persons of the same sex. This indiscriminately makes all physical sexual expression criminal, whether

51 V Mwapasa *et al* *Prevalence and risks factors for HIV, sexually-transmitted infections and tuberculosis in Malawian prisons* (2011). This is an unpublished report of a study that was commissioned by Malawi Prison Services and funded by the United Nations Office on Drugs and Crime (UNODC) in 2011 and presented to stakeholders in June 2012.

52 Jolofani & DeGabriele (n 1 above) 8.

53 African Commission (n 1 above) 29; Legal Assistance Center, AIDS Law Unit & University of Wyoming College of Law *Struggle to survive: A report on HIV/AIDS and prisoners' rights in Namibia* (2008) 30-31.

54 Jolofani & DeGabriele (n 1 above) 9.

55 As above.

there is consent or no consent, whether sex is a tool for gender-based violence or is a mutual, safe and pleasurable experience free of coercion or violence. However, since sexual expression may not be entirely repressed, prison officials have either remained passive and condoned sexual practices, or exploited the situation and facilitated the perpetration of sexual abuse and violence.⁵⁶ It is not surprising that prison authorities are anxious to acknowledge the existence of sexual activity in prison.⁵⁷ This invisibility hinders any efforts to address sexual violence in prison.

Another invisibility is the very victimisation of males in countries like Malawi where the legal definition of rape is not gender-neutral. This not only perpetuates the myth that males cannot be raped, but trivialises violent sex and relegates it to the category of sexual assault, which is a lesser offence. The denial that males cannot be sexually victimised creates an attitude that even if sexual violence is taking place in prison, it is not that bad. There is no outcry, nor a sense of urgency to address it.

Ultimately, the question is not whether there will be sexual activity in prison, but whether it is possible to create conditions for positive and respectful sexual relationships, where the sexual rights of prisoners will be respected and protected. Prisons should use their power to shape their sexual energies into positive sexual activity and away from gender-based sexual violence.

6 Toward transforming prison sexual health

6.1 Prison governance for sexual health

To transform the prison sexuality culture and address sexual violence requires transformation of the prison governance system. According to Tapscott:⁵⁸

[E]ffective governance of any correctional institution is a function not only of the state's administrative efficiency, but also of the extent to which society, at large, understands, and engages in, the challenges faced in combating crime and in incarcerating and rehabilitating offenders. These relate to issues of socio-economic development, to policing, judicial reform and, crucially, to the extent to which civil society is engaged in oversight of the prison system.

Prison governance therefore goes beyond the prison administration machinery created under chapter 17 of the Constitution of Malawi. Rather, it includes other government departments such as gender,

⁵⁶ Jolofani and DeGabriele (n 1 above) 10.

⁵⁷ African Commission (n 1 above). In response to the report of the Special Rapporteur on Prisons, the Chief Commissioner of Malawi prisons said: 'While it is an undeniable fact that homosexuality may exist in our prisons, it is very difficult to prove if it happens, as it is done in the absence of prison officers and behind curtains.'

⁵⁸ C Tapscott *A study of best practice in prison governance* (2005) 3.

finance, health and justice, the courts and legislature, but also civil society organisations and individuals, including the prisoners themselves. This is the governance system that should advocate for and promote sexual health in the prisons of Malawi.

Borrowing and adapting the term governance for health as defined in a study by WHO, good prison governance for health can be defined as the attempts of the government and various actors to steer society and the community to pursue sexual health as integral to the well-being of prisoners.⁵⁹ This requires an enabling legal and policy environment that empowers the prison administration to work in collaboration with all the stakeholders in order to advance the interests of society to incarcerate and manage offenders, but also taking into account the rights and interests of the prisoners. The legal and policy environment not only comprises of prison policies and laws, but includes other laws and policies relating to sexual health, such as (for Malawi) the Gender Equality Act, which prohibits sex and gender discrimination and harassment in institutions; sexual offences legislation; and the National Policy for Sexual and Reproductive Health and Rights, which is the government's plan to promote the sexual and reproductive health and rights of all Malawians. This legal and policy framework must also be implemented for the benefit of prisoners.

6.2 Zero tolerance of sexual violence

The prison governance system must protect prisoners from sexual harassment, abuse and violence. As a bare minimum, sexual violence should not be tolerated in prisons. Unabated sexual violence should certainly not be part of prison culture. The ever-present threat of sexual violence and actual violence in the prison environment can result in severe mental and physical pain and suffering. Since this takes place under the close control and monitoring of the state, the failure to prevent sexual violence is not only contrary to the right to health, but amounts to the infringement of the right against torture under international law.⁶⁰ In *Farmer v Brennan*, the Supreme Court of the USA said that prison officials had a duty to protect prisoners and therefore held that the indifference of prison officials to the risk of inmate-on-inmate rape amounted to cruel and unusual punishment.⁶¹

Addressing sexual violence in prisons is not a simple affair because of the interrelated factors that create, produce and sustain sexual violence in that environment. While there are laws on sexual offences, there may still be a need to tailor policies to the peculiarities of prison violence. In 2003, the USA enacted the Prison Rape Elimination Act (PREA) to protect individuals from sexual violence in prisons. The

59 I Kickbusch & D Gleicher *Governance for health in the 21st century* (2012) 4.

60 L Muntingh & Z Satardien 'Sexual violence in prisons Part 1: The duty to provide safe custody and the nature of prison sex' (2011) 24 *South African Journal of Criminal Justice* 7-12.

61 *Farmer v Brennan* 511 US 825 847 (1994).

significance of this law is first of all the acknowledgment that prison rape exists and that it is not to be tolerated.

Another function of the PREA is to define sexual violence in prisons. As discussed earlier, it might be difficult to distinguish between consensual and non-consensual sex and there is a need to define what is meant by sexual violence in prisons. The PREA includes the following terms in its definition section: carnal knowledge; rape; prison rape; sexual assault with an object; and sexual fondling. Defining what constitutes sexual abuse or violence is important for prison management and the prisoners themselves so that there is no confusion about what is allowed and what is not allowed.

This discussion is not meant to portray the PREA as a model law for Malawi, or any other country. However, it does show that it makes a great deal of sense to address sexual violence in prisons through adopting policies and laws that would guide prison officials and systems rather than expecting that the current sexual offences laws will deal with the problem.

6.3 Promoting healthy sexual relationships

The question of what expressions of sexuality should or could be allowed in prisons is much more challenging. There is a dearth of literature on what positive and healthy expressions of sexuality in prison are or could be. It is not enough for prison systems to prevent sexual violence, but they should also create conditions that support positive sexuality and sexual relationships.

The following anecdote from a prisoner writing about his experience appeals to common sense:⁶²

A man either turns homosexual ... entirely forgets about women out of religious or some other belief, abstains or becomes asexual, or manages to get hold of some good porn to masturbate to ...

Prisoners have to cope with sexual needs, and there are various ways of doing this, including engaging in sex and masturbation. Yet there are others who altogether abstain from the physical expression of sex. This is not unlike how persons cope with sexual needs in mainstream society. The difference, however, is that in mainstream society persons have the privacy and liberty that allow them to indulge in satisfying and pleasurable activities that are otherwise morally, culturally or socially stigmatised, such as masturbation. Masturbation has been shown to provide relief from sexual tension, and people do indulge in it to meet their sexual needs.⁶³ In prison, however, such sexual expression might be restricted by policy or circumstances, such as a lack of private space.

⁶² Urbaniak (n 49 above).

⁶³ E Coleman 'Masturbation as a means of achieving sexual health' (2003) 14 *Journal of Psychology and Human Sexuality* 7.

One way to approach sexuality positively is to promote constructive attitudes about masturbation and to support prisoners who want to engage in this practice to release sexual tension. The prison systems may need to ensure that prison conditions can as much as possible accommodate the needs of prisoners to masturbate and, indeed, to engage in any other sexual practices that are not harmful to themselves or others.

A more challenging question is what to do with prisoners who wish to or are actually having consensual sex. It is certainly a topic that generates controversy. In the light of HIV and AIDS, there has been advocacy about providing condoms to prisoners. This has been condemned by others as promoting immorality or criminalised sexual conduct.

Despite the topic being controversial, there is a need to engage in constructive dialogue about sex in prison and to generate ideas about how to curb sexual violence and promote sexual health. One solution could be to allow private visitation by sexual partners. A study documented by D'Alessio *et al* found that of the 50 states of the USA, those with prison conjugal visitation programmes had lower sexual violence in prisons than those which did not have.⁶⁴ In some jurisdictions, there are efforts to meet the sexual needs of prisoners through such programmes. Smith recounts a few examples: Brazil has communal visits, where relatives and friends can visit without restraint, and intimate partners can visit prisoners in their individual cells. Czech Republic and Spain have programmes for married prisoners to be visited by their spouses in privacy. Denmark has a prison 'leave' system where the inmate can spend a day or so at home and come back to prison.⁶⁵ The issue of prison visitations for sex has, however, provoked mixed reactions from African governments. When the issue was raised in Zimbabwe and Zambia, the government authorities cited economic constraints as prohibitive.⁶⁶ An online source reports that in Tanzania, the request was made by women to the Constitutional Review Commission. Tanzanian authorities seem to have responded favourably to these suggestions, at least in principle.⁶⁷

Apart from physical sex, sexuality concerns psychological and mental wellbeing. This relates to cognitive, affective and emotional needs such as sexual self-esteem. The quality of sexual wellbeing

64 SJ D'Alessio *et al* 'The effect of conjugal visitation on sexual violence in prison' (2013) 38 *American Journal of Criminal Justice* 22-23. However, they point to the need for more research.

65 Smith (n 47 above) 20.

66 'Health: Conjugal visits not the right answer for AIDS in prisons' *Inter Press Service* 21 July 1998 <http://www.ipsnews.net/1998/07/health-conjugal-visits-not-the-right-answer-for-aids-in-prisons/> (accessed 10 February 2013).

67 C Majaliwa 'Tanzania: Conjugal rights to be granted to prisoners' *Tanzania Daily News* 2 November 2012 <http://allafrica.com/stories/201211030279.html> (accessed 1 December 2012).

depends on various factors, such as socialisation, attitudes about sexuality, self-esteem, and the extent to which one is able to meet sexual needs. The failure to attain a certain threshold of social and emotional wellbeing may impact negatively on sexual behaviour, regardless of whether one wants to engage in a particular sexual activity or not. As Kainja found, there was a high prevalence of sexual abuse among juvenile prisoners. This could as well be due to the fact that their evolving sexuality and sexual wellbeing needs are frustrated under conditions of incarceration:⁶⁸

Despite the fact that many men are confined in jails and prison at an age when their sexual needs and wants (both physical and psychological) are at their peak, there are literally no officially sanctioned outlets through which they can express or satisfy them.

Young and juvenile prisoners, in particular, may require assistance in sexual development since their capacities are still evolving. They may need help with the adaption to conditions of incarceration where there is no opportunity to interact with a sexual partner according to their sexual orientation if they are heterosexual. It is important to mentor them to pursue positive and healthy sexual lifestyles, and to avoid or prevent sexual violence and HIV infection.

Sexuality education may be crucial in this regard so that young and even older prisoners understand about their sexuality, relationships and intimacy and the possibilities that are there in prison to pursue sexual health. Beyond this, some prisoners may need counsel that addresses gender norms and hegemonic masculinities. It is therefore necessary to talk about sex and sexuality with prisoners, rather than just imposing some piecemeal or quick-fix interventions like distributing condoms without tackling sexual violence.

In the light of the foregoing discussion, it is obvious that solutions to sexual violence in prison, or indeed to the problem of HIV infection, cannot be resolved effectively without taking into account gender and sexuality dynamics. Further, without understanding the interaction of sociocultural norms and sexuality, society may unwittingly impose hegemonic views about sexuality. For instance, distributing condoms without any accompanying discussion about sexuality may send the message that only penetrative sex is valued. It is also imperative that prisoners have positive attitudes about sexuality and sex in prison. If comprehensive sexual education could be part of the process, prisoners could be assisted to explore other possibilities of having intimate sexual relationships that do not necessarily involve penetration.

It is therefore proposed that, in order to generate creative solutions to sexual coercion and curb the unhealthy expression of sexuality; there is a need to talk about sex and sexuality more constructively.

68 Haney (n 10 above) 127.

The prisoner should be re-imagined as a human being with sexual needs, and a subject of sexual rights.

7 Some primary considerations

To begin to address the problem, its profile must be raised nationally and even regionally. There is still a great deal to be done to improve prison conditions in Malawi, as has been highlighted in the *Masangano* case and the other reports that have been referred to above. The challenge with advocacy for the protection of sexual rights is that it adds a dimension that is regarded as even more controversial. However difficult the issue of sexuality might be, Africa must not avoid the discourse. Sexuality and sexual health should be taken as integral to the wellbeing of prisoners and should be addressed together with all the other issues regarding prison conditions. The author agrees with Dolovich that⁶⁹

[p]risons ... and the problems they pose – including prison rape – admit no easy fix. Indeed, to wait for such a fix would be to consign some of the most vulnerable people behind bars to the worst forms of suffering and abuse.

Addressing sexual violence and promoting health sexuality in prisons should not wait until there is better food or clothing in prison, or until the controversy of sex between males in prison is sorted out. Every second of delay costs some prisoner his freedom from sexual violence.

7.1 Raising awareness

One of the important political bodies that has the potential to influence the agenda at the national and regional levels in Africa is the office of Special Rapporteur on Prisons. So far, the reports of the Rapporteur have failed to adequately address the issue of sexuality and sexual violence in prisons. In the report on Malawi, although the issue of rape was raised, it was not addressed in the concluding recommendations. Another example is the 2004 report on South African prison conditions. The Special Rapporteur on Prisons noted that⁷⁰

[t]he 28s are more interested in having forced sexual relationships with other prisoners which they refer to as 'wyfies' (meaning wives). They join by either being sodomised or like the 27s by stabbing.

Yet, in the recommendations of the report, there is no mention at all of sexual violence. The closest it comes to mentioning anything about gang-orchestrated rape is where it recommends that '[c]omplaints of

69 S Dolovich 'Strategic segregation in the modern prison' (2011) 48 *Criminal Law Review* 8.

70 African Commission on Human and Peoples' Rights *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa's mission to the Republic of South Africa 14-30 June 2004* (2004) 49.

abuse should be investigated and dealt with expeditiously so as not to encourage impunity'.⁷¹

The 2012 draft activity report of the Special Rapporteur on Prisons addresses substantive issues on prison conditions in much more detail than previous reports. The report recounts the missions undertaken up to 2012, and the issues that had been raised at those and other meetings. On sexual violence, the report mentions that '[w]omen prisoners are particularly vulnerable to sexual abuse by prison guards'.⁷² Elsewhere, it notes that '[o]vercrowding compromises child prisoners' health and hygiene and exposes them to increased risk of sexual abuse'.⁷³ Unfortunately, this is pretty much all that the report says on the subject of violence in prisons.

The Special Rapporteur on Prisons needs to undertake and inspire a more robust analysis of prison conditions and the factors that perpetuate sexual violence. This should include discussions on how to transform hegemonic masculinities and to bring about better gender and sexual relations in prisons. The concepts of sexual health and sexual rights discussed at the technical consultation on sexual health should guide this analysis.

7.2 Developing and harmonising laws and policies on gender and sexuality

Socio-cultural norms about sexuality and gender relations are important factors in addressing sexual violence in prisons. The criminalisation of sexual intimacy between persons of the same sex forecloses the possibility of solutions that involve promoting healthy same-sex relationships. Indeed, as Ngwena succinctly states:⁷⁴

[T]he strong official political antipathy towards homosexuality that currently prevails in several African countries militates against liberal reforms to the detriment of creating synergy between human rights and public health.

Ngwena's conclusion applies to same-sex intimacy in prison. The failure to acknowledge the possibility of healthy sexual relationships between men in prison fails human rights, fails the sexual health of prisoners and ultimately fails public health. Rather, such antipathy fosters hegemonic masculinities and fuels the synergy between misogyny and homophobia. The consequences include unabated sexual violence in prisons and the physical and psychological *sequelae*, including HIV, and these are threats to public health in prison but also beyond the walls of prison.

⁷¹ African Commission (n 70 above) 66.

⁷² African Commission on Human and Peoples' Rights *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (2012) 12.

⁷³ African Commission (n 72 above) 14.

⁷⁴ C Ngwena 'Sexual health and human rights in the African region' (2011) Working Paper commissioned by the World Health Organisation, Geneva.

The failure to recognise that men can be victims of rape condemns prisoners to pain, injury and suffering. Stemple has described how the international human rights regime and advocacy to eliminate gender-based violence have tended to perpetuate the gender-biased notion that only women can be raped.⁷⁵ This sustains myths and misconceptions about men which are linked to notions of masculinities. One is that men are aggressors and cannot themselves be raped unless they are not real men. A related misconception is that rape between men involves homosexuals. This conflates the sexual victimisation of males with 'homosexual rape' which, in turn, especially for countries such as Malawi which criminalise homosexuality, makes the subject of prison sex the more politically unpalatable for prison governance to address. This is why government and civil society advocates for the elimination of gender-based violence have given prison sexual violence a wide berth. These gender-biased notions about sexual victimisation and negative views about same-sex sexuality, coupled with the attitude that prisoners are transgressors of social norms and deserve prevailing prison conditions, condemn many boys and men to unjustifiable sexual violence and abuse without any recourse to justice.

Laws and policies on gender and sexuality play an important role in shaping attitudes and sexual behaviour. In order to reshape prison culture around sexuality, and to promote sexual health in prisons, laws and policies need to be harmonised with the concepts of sexual health and rights and to advance gender equality.

It would be problematic to address prison sexual violence without the concomitant positive acceptance of physical sexual intimacy among prisoners and the acknowledgment that this can be safe, pleasurable and free of violence and coercion. This necessitates the decriminalisation of same-sex intimacy, as well as recognising that men can be sexuality victimised. Therefore, there is a need to comprehensively reform sexual offences laws in Malawi so that they are gender neutral and reflect a positive and respectful perspective about same-sex sexuality. It would be difficult to realise sexual health and rights of prisoners without these intermediate interventions.

8 Conclusion

Prison conditions in Malawi are generally very poor, and this has prompted the Special Rapporteur on Prisons, the courts and civil society to call upon the government to improve prison conditions. It is important for prisons to have adequate food, clothing and good living space. However, despite evidence of significant levels of sexual violence and abuse in prison, none of these stakeholders have said

⁷⁵ L Stemple 'Male rape and human rights' (2008) 60 *Hastings Law Journal* 618-625 627-637.

much about it, except that some have called for a better response to HIV and AIDS. There have not been adequate investigations of the phenomenon of gender-based sexual violence in prisons or how some prisoners are actually having positive mutual sexual relationships.

Sexuality in Malawian culture is a taboo topic and it is especially difficult to talk about men having sex with men because of homophobia supported by laws that criminalise homosexual sex. It has been easier for human rights advocates to talk about the lack of food, clothing and space in prison and to call on government to provide these, than to talk about sexuality and the sexual health needs of prisoners and to call on government to address sexual violence and promote sexual health.

It is not possible or even desirable to completely repress sexual activity among prisoners. Prisons, however, do shape sexuality and sexual relationships positively or negatively. The Malawian prison system has to date fostered unhealthy sexuality and sexual relationships. The reasons include socially and legally-sanctioned homophobia which forecloses the possibility of there being positive and respectful sexual relationships between and among men. Another reason is the gender-biased notion that men cannot be raped. This makes it difficult for prisons to address sexual violence justly.

Sexual health in prisons cannot be attained unless these misconceptions and misunderstandings about gender and sexuality based on hegemonic masculinities ideals are quashed. The challenge therefore is how Malawian society should genuinely transform gender and sexual relations, including in prisons, which is a microcosm of society. Such transformation requires that Malawi approach sexuality and sexual relationships positively, including same-sex sexualities and sexual relationships. It requires transforming laws and policies to accommodate sexual and gender diversity and to protect every person from sexual violence, and to allow every person the freedom to pursue sexual relationships safely and freely without discrimination, coercion and violence.

Perhaps the failure to address sexual violence by Malawian prison governance is related to the failure generally of the justice system to respond to sexual violence and discrimination against boys and men, but also women and LGBTI persons in Malawian society. The failure to address gender-based sexual violence in prisons says a great deal about how Malawi is faring in terms of moving the country towards greater gender equality. If Malawi is truly committed to advancing gender equality and the sexual health of all, then it must no longer neglect addressing gender-based and sexual violence in prisons.