

18+ PROGRAMME ON ENDING CHILD MARRIAGE IN SOUTHERN AFRICA

POLICY BRIEF

ENDING CHILD MARRIAGE IN MALAWI: GAPS AND OPPORTUNITIES IN LEGAL AND REGULATORY FRAMEWORKS

Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age. The overwhelming majority of child marriages, both formal and informal, involve girls under 18 years old, although at times their spouses are also underage. A child marriage is considered as a form of forced marriage given that one or both parties have not expressed their full, free and informed consent.

[Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women (CEDAW) and No. 18 of the Committee on the Rights of the Child (CRC) on Harmful Practices (2014), paragraph 19]

There is a dramatically high proportion of girls who are already in marriage by the age of 18 years in Malawi. Early, child and forced marriages have damaging consequences for young women and their families, as noted by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).¹ These include higher than average maternal morbidity and

mortality rates; higher infant mortality among their children; incapacity to responsibly raise their children to be productive citizens; higher rates of school dropout/limited education; lack of personal and economic autonomy; limited participation in development; limited decision-making in relation to their own lives; increased risk of domestic violence and HIV; and severe limitations in the enjoyment of the right to freedom of movement.

1. The CEDAW and CRC Committees monitor the implementation of each convention respectively.

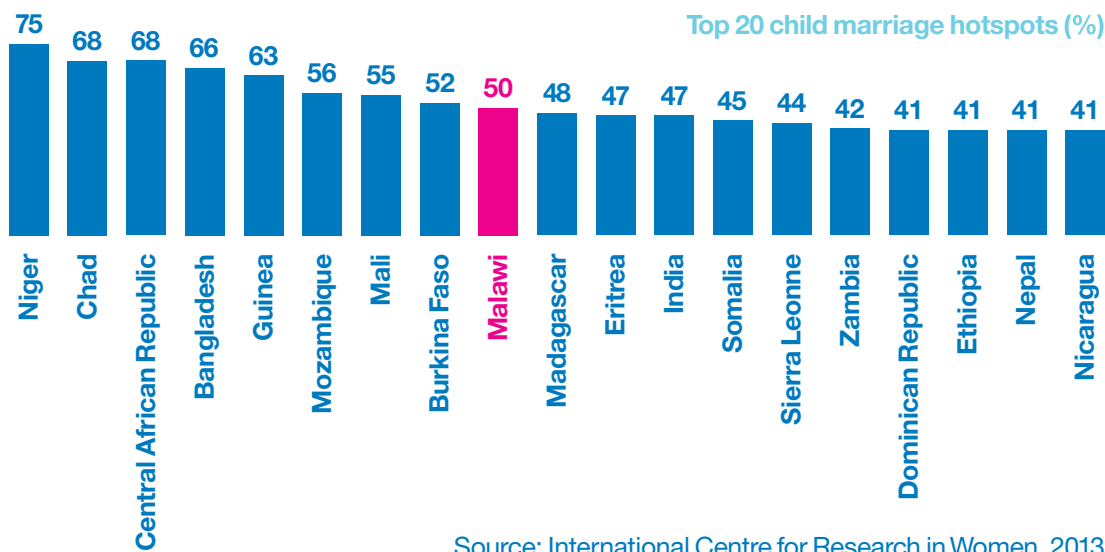
The government of Malawi has a duty to use practical and effective legal, policy and programmatic measures to stop early, child and forced marriage and this policy brief puts forward recommendations to utilise opportunities and address limitations in relation to:

- international frameworks that address child marriage, and the monitoring of their implementation;
- how formal law relates to customary and religious laws, in particular the extent to which the former is practically able to keep harmful customary/religious laws in check;
- provisions related to the minimum age of marriage and the age of consent to marriage under the Constitution, under Malawi's new marriage law, and under customary and religious laws;
- the implementation of a functional compulsory marriage registration system as prescribed by the new marriage law; and
- mechanisms that exist to facilitate access to justice for victims of early, child and forced marriage in Malawi.

Key statistics on child marriage in Malawi

- Currently 50 per cent of adolescent girls get married by the age of 18 years, compared to only 9 per cent of boys. Girls get married as young as 12 years.
- Malawi is eighth amongst the top 20 countries with the highest child marriage rates in the world (see Figure 1).
- Generally, the country has poor health indicators for adolescent girls as stipulated in Table 1.
- Education attendance is very low, thus increasing the probability of entry into child marriages. For instance, in 2012, only 35 per cent of girls and 41 per cent of boys completed Standard 8. Current secondary school attendance for girls is only 18 per cent and 14 per cent for boys. Since the youth constitute more than 40 per cent of the population, this is a recipe for perpetual national chronic poverty.

Figure 1: Comparative statistics on child marriage amongst 20 hotspots



Source: International Centre for Research in Women, 2013

Table 1: Adolescent health indicators in Malawi

Indicator	Gender disparity where applicable	
	Female	Male
Marriage before the age of 18 years	49.9%	9.1%
Adolescent birth rate	143 births per 1,000 girls	-
Women aged 20-24 years with one live birth before 18 years	31.3%	-
People aged 15-49 years who were married/in union before 15 years	10.3%	1.5%
Young women 15-19 years married/in union whose spouse is 10 or more years older	7.8%	-
Young women 20-24 years married/in union whose spouse is 10 or more years older	10.4%	-
Young people 15-24 years who had sex before 15 years	14.7%	18.2%
HIV prevalence among young people aged 15-24 years	5.2%	1.9%

Source: MDG Endline Report, 2014

For Malawi to signal true commitment to international frameworks that address child marriage, monitoring the implementation of relevant commitments cannot lag behind

One factor that provides optimism is that Malawi has an international and regional mandate to address child, early and forced marriages, since it has ratified important treaties such as CEDAW, CRC, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, and the SADC Gender and Development Protocol. Malawi also subscribes to the Universal Periodic Review (UPR) process.

However, these frameworks cannot meaningfully serve the agenda of stopping child marriage without an effective monitoring system. Malawi currently lacks an organised mechanism for monitoring how international

commitments are being implemented by different players. There is no clarity amongst stakeholders on who bears the primary responsibility of coordinating the implementation and monitoring of relevant international recommendations, and there are no concrete strategies to purposefully disseminate such recommendations to all relevant stakeholders so that implementation can be followed up appropriately.

While formal law strives to keep customary/religious laws accountable to human rights values, child marriage continues to be sustained by lack of diligent enforcement

The relationship between formal law and customary law in Malawi is clear in that formal law has the capacity to invalidate and declare as illegal any other law that is harmful. Thus the Constitution only promotes laws (including religious and customary) that are compatible

with Constitutional provisions, principles and values. Furthermore, harmful practices (including cultural and religious) are specifically outlawed by the Gender Equality Act No. 3 of 2013, and the Child Care, Justice and Protection Act No. 22 of 2010.

Apart from the differences in how customary, religious and civil marriages are celebrated, the Marriage, Divorce and Family Relations Act No. 4 of 2015 has unified formal law and customary/religious law by prescribing only one law which applies to all forms of marriage in Malawi.

However, the downside is that despite the progressiveness of formal law, customary laws/religious laws that contradict formal law and reinforce child marriage are still commonplace because of the lack of strict enforcement and monitoring of existing laws against these harmful practices. Religious doctrines that are harmful are particularly hard to critique and dismantle, since they are held sacred by their practitioners. Reversing the situation means seriously considering replicating some good practices. In recent years, the translation of customary laws into legislative principles is becoming visible in a few parts of Malawi through by-laws, which are being driven by some chiefs as a tool for implementing formal laws against child marriage, gender-based violence, harmful practices, compulsory primary education, etc.

The minimum age of marriage is still problematic despite current legal advances

Malawi has ratified all key international and regional human rights frameworks that uphold the minimum age of marriage of 18 years. Through the enactment of the Marriage, Divorce and Family Relations Act No. 4 of 2015, Malawi has one law that governs all forms of marriage, and which fixes the minimum age for marriage at 18 for both boys and girls.

However, the minimum age of marriage under the new marriage law is not absolute, since the Constitution of the Republic of Malawi (1994) allows those between 15 and 18 years to get

married with parental consent, and only discourages marriages for those aged below 15 years. Unless these Constitutional amendments are immediately amended, the new marriage law will lack authority, since parents or guardians who want to practice child marriage will use the Constitution to do so.

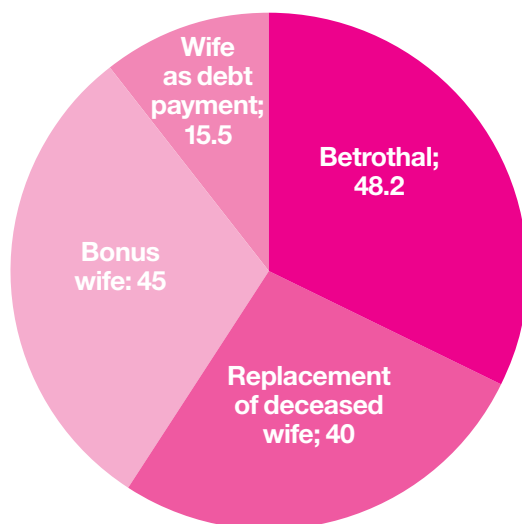
The need for the Constitution and the new marriage law to talk the same language and protect girls is urgent, given that some customary and religious practices permit girls in Malawi to get married much earlier (upon puberty). Currently, 10.3 per cent of girls get married before the age of 15 years, compared to 1.5 per cent for boys. In parts of the northern region, while girls can get married from the age of 12 years, their male counterparts may do so at about 17 years.

Addressing child marriage cannot be achieved without immediately addressing existing gaps related to the age of consent to marriage

Marriage should not be forced. The Child Care, Protection and Justice Act No. 22 of 2010 prohibits child betrothal and forced child marriage. The Constitution also forbids forcing any person into a marriage. The Marriage, Divorce and Family Relations Act (2015) regards obtaining the consent of a party to a marriage by force as grounds for nullifying a marriage. Nonetheless, the following gaps related to 'consent to marriage' are making the battle against child marriages difficult to win:

- The Constitution allows children aged between 15 and 18 years to get married with parental consent. This means that parents or guardians can facilitate the entry into marriage by a child against her or his will, eg if a girl gets pregnant, is orphaned, etc. Figure 2 demonstrates that forced child marriage with parental consent continues to be culturally justified in some traditions.
- There is weak implementation, enforcement and monitoring of existing legal provisions that prohibit harmful practices under the Gender Equality Act No. 3 of 2013 and the Child Care, Protection and Justice Act No. 22

Figure 2: Rate of forced marriage legitimised by parental consent



of 2010; as well as prohibitions of child betrothal and forced child marriage under the latter act. As a result, although illegal, harmful customary, religious and social practices that undermine the consent of parties that are getting married continue to exist without legal consequences.

Without speedily instituting a functional compulsory marriage registration system, efforts to combat child marriage will remain weak

One milestone that has been made through the Marriage, Divorce and Family Relations Act No. 4 of 2015 is that all civil, customary and religious marriages that will be celebrated after the law comes into force will have to be registered by marriage registrars, namely district commissioners, traditional authorities and clerics. This is an important way to check child marriage. At the same time, the compulsory marriage registration system faces the following challenges:

- If the establishment of the marriage system on the ground is to be delayed in the same way as birth registrations (despite enacting the National Registration Act in 2009, the birth and death registration system has only been rolled out since August 2015 – about six years

later); there is a danger that child marriage will not be preventable in the near future.

- Training of marriage registrars in order to create competent authorities for the compulsory registration of all marriages is not legally mandated. Neither is education and awareness-raising of the new registration system. This has a negative impact on the efficiency of the system.

Access to justice for many victims of child marriage is problematic because of legal gaps and implementation shortfalls

- Laws against defilement, abduction, child betrothal, forced marriage and harmful practices are rarely used as a police initiative to crack down on early, child and forced marriage. Even some courts have been known to acquit those charged with the defilement of girls of 15 years because of the interpretation that the Constitution allows for child marriages. The confusion is more evident when the perpetrator is also an adolescent.
- Knowledge about child marriage, related impacts and laws is not widespread amongst the police, judicial personnel and the general public.
- The Child Care, Protection and Justice Act No. 22 of 2010 does not criminalise child marriage generally, but only forced child marriage and child betrothal. Nor does the Marriage, Divorce and Family Relations Act No. 4 of 2015 specify that child marriage is a specific ground for nullifying a marriage, which may deny child marriage victims access to justice in issues of child custody, property distribution, etc.
- The Gender Equality Act No. 3 of 2013 is yet to be costed, and resources need to be committed for its full implementation.
- Though by-laws have proven to be effective for chiefs, they are not required as a national standard for district councils to use to promote compulsory education, address

harmful practices and stop child marriage. The fact that current by-laws are being made by chiefs outside the district council system sabotages their legal validity.

- There are still a number of conflicting laws and policies that inhibit a holistic approach to combat child marriage. These are the Constitution and laws and/or policies related to children, marriage, sexual conduct and sexual offences, child labour, education, sexual and reproductive health, people trafficking, gender equality, access to justice, birth registration, adoption, etc.

Recommended actions

For policymakers:

a) Institutionalise the systematic implementation of the recommendations of human rights bodies

Ensure that there is an organised mechanism to routinely disseminate and track the implementation of recommendations of human rights bodies on how Malawi can effectively address child marriage across different sectors.

b) Facilitate law reform/review

Advocate for the urgent amendment of the Constitution so that all provisions that encourage child marriage under Section 22 are discarded in order to give full force to the minimum marriage age of 18 years under the Marriage, Divorce and Family Relations Act No. 4 of 2015.

Take the initiative to scrutinise how various sectoral laws and policies can be harmonised with other laws and policies that affect child marriage, and use the findings to support various legal and policy reforms/reviews. Table 2 provides examples of some laws that need to be harmonised.

Facilitate efforts for the Malawi Law Commission to immediately embark on strengthening the Marriage, Divorce and Family Relations Act No. 4 of 2015 through amendments that would:

- ensure that most of the provisions under the act are also applicable to existing marriages (this would offer protection in all matters related to marriage, separation and divorce to the many young women who entered into child marriage before the act became operational);
- broaden the scope of marital rape in order to protect girls that are forced into marriage and thereby effectively sanctioning their rape when the marriage is consummated;
- include child marriage as a specific ground for nullification of a marriage;
- mandate a written declaration/proof of age of the parties during marriage registration process(es); and
- consider awareness-raising of the public and capacity building of registration structures as a necessary and important measure to implement the law.

c) Support the wide implementation and dissemination of the new marriage law

Hold the ministry responsible for gender accountable for ensuring that all systems that need to be put in place for the Marriage, Divorce and Family Relations Act No. 4 of 2015 to be operational are in existence as soon as possible, and offer any necessary support to achieve this.

Integrate into sectoral interventions awareness-raising of the way civil, customary, religious marriages and marriages by repute/permanent cohabitation have been united under one marriage law. Ensure that laws are simplified, translated into multiple languages, and widely disseminated. Other forms of media should be employed to capture those who are illiterate.

d) Address child marriage in sector specific interventions across all sectors

Ensure the prominence of child marriage and related strategic actions in the successor to the Malawi Growth and Development Strategy (MGDS) II and all relevant emerging policies.

Ask the questions: How do child marriage and its negative consequences affect the development of my sector? What transformative interventions can my sector adopt to stop child marriage within the context of its mandate, including by collaborating with other sectors?

Through gender-responsive budgeting, consistently ensure that sectoral budgets dedicate resources towards implementing and monitoring child marriage-related interventions. In particular, the Ministry of Local Government and Rural Development should be central to the response; and its planning and budgets should routinely display commitment to addressing issues of child marriage, early pregnancy, violence against women and children, and child marriage generally.

Support the development and implementation of a multi-sectoral action plan/strategy on combating child marriage that also ensures that monitoring and access to justice at all levels is strengthened.

Support the introduction/scaling up of interventions to meticulously work with traditional and religious systems with the aim of promoting human rights principles and values that safeguard against early, child and forced marriage in customary and religious laws.

For politicians:

a. Strengthen parliamentary oversight

Take responsibility to ensure that the national budget is funding various multi-sectoral interventions that are necessary to combat child marriage using a holistic approach. These include promoting quality education for girls as prescribed under the National Girls Education Strategy (2014), and the Gender Equality Act No. 3 of 2013; the establishment of functional systems for registration of marriages; the education of marriage registration personnel and the public in the new marriage law (and all relevant laws); the promotion of adolescents' sexual and reproductive health; the development and strengthening of nationwide structures to address child marriage; the training of community structures, justice delivery systems, etc.

Demand accountability from police, courts and relevant government ministries on the enforcement of child marriage-related criminal laws, and the implementation of other laws that create an enabling environment for eradicating child marriage. Ensure that there is a presence of functional monitoring mechanisms to trace reporting, investigation, prosecution and quality of court judgements in child marriage-related cases.

Follow up on efforts to amend the Constitution, and harmonise all child marriage-related laws so that there is congruence between the following multi-sectoral areas of law and policy that are critical to addressing early, child and forced marriage:

- child protection
- marriage and family relations
- sexual conduct and sexual offences
- child labour
- education
- sexual and reproductive health/comprehensive sexuality education
- trafficking in persons
- gender equality
- access to justice, etc.

b. Amend the Constitution and other laws

Unite in the demand for the Constitution to scrap parental consent for marriages of parties between 15 and 18 years old, as this allows young girls and women to encounter health, social and economic-related harms with the permission of the law. Additionally, this is an important measure for addressing child marriage generally, in particular forced marriages that parents, but not children, want.

Swiftly pass all amendment/new laws that are submitted before parliament with the view of harmonising all child marriage-related laws.

c. As councillors, formulate and implement relevant by-laws through district councils

Take immediate steps to advocate for, adopt, and enforce child marriage-related laws in district councils. This includes formalising chiefs' by-laws that already exist in some areas, and ensuring their district-wide coverage.

Table 2: Examples of laws where harmonisation is needed

LEGAL ISSUE	STATUS AND BRIEF EXPLANATION
a) Marriage laws	
Is the minimum age of marriage under the Marriage Divorce and Family Relations Act absolute?	No <i>The Constitution permits marriages of those aged between 15 and 18 years with parental consent, and this weakens the new marriage law.</i>
Does the law prescribe a minimum age of consent to marriage that is consistent with at least a minimum age of marriage at 18 for both girls and boys?	No <i>While the Constitution and the new marriage law prescribes 18 years as the minimum age of marriage without parental consent (regardless of whether it is a civil, religious, customary marriage or marriage by repute and permanent cohabitation), parents can give consent to marriages of those aged 15–18 years. This allows child marriage.</i>
Is the age of defilement under the penal code (16 years) consistent with the minimum age of marriage with parental consent?	No <i>The Constitution permits marriages at 15 years with parental consent, and only discourages marriages of those below 15 years.</i>
Does the law prescribe consequences for persons conducting child marriage?	Yes <i>The Marriage Divorce and Family Relations Act has penalties for registrars who contravene the act.</i>
Does the law prescribe consequences for other persons who promote child marriage?	Yes and No <i>The Gender Equality Act and the Child Care, Protection and Justice Act have penalties for the offence of harmful practices.</i> <i>The Child Care, Protection and Justice Act only provides offences for forced child marriage (not child marriage generally) and child betrothal.</i> <i>Apart from marriage registrars, the new marriage law is silent on offences against other persons who may violate laws relating to celebration of marriages.</i>
Does the law require the registration of all marriages for validity, including customary and religious marriages?	Yes <i>Relevant provisions in the new marriage law only have to be made operational</i>
Are there differences in what the Constitution or statutory law demands of customary and religious laws, and what is the reality in practice?	Yes <i>While customary or religious laws that are inconsistent with the Constitution are deemed invalid, and while harmful practices are prohibited by statute, poor enforcement still allows the prevalence of harmful customary or religious laws or practices.</i>
Does the law provide for redress (compensation, access to services, psychosocial support) for victims of child marriages?	No

Table 2 continued.

LEGAL ISSUE	STATUS AND BRIEF EXPLANATION
b) Sexual conduct	
Does the law avoid criminalising consensual sexual activity between teenagers	No <i>Because the defilement law is universally applicable, some courts have been at pains to convict teenage/younger boys.</i>
Does the law sufficiently distinguish between consensual sexual activity (defilement) and non-consensual sexual activity with children?	No <i>Because there is a generalisation that girls under 16 years are incapable of consenting to sex, this often blurs the gravity of the offence for such children that have actually been raped by force.</i>
Does the law prohibit the withdrawal of rape charges if the perpetrator agrees to marry the victim?	Not specifically <i>As a result, at custom, arrangements can be made for some rapists/abductors to marry victims in order to save a family's honour.</i>
Does the law criminalise marital rape?	Yes and No <i>Despite the high risk of rape in child marriages, the new marriage law only criminalises marital rape when spouses are on judicial separation, and not otherwise.</i>
c) Education	
Are sanctions prescribed for parents who fail to send their children to school in the face of the provision of free education, especially adolescent girl children?	No <i>Only some chiefs' by-laws are trying to do this, but these are not integrated into the district council machinery, which weakens their legal validity.</i>
Is there a national law, policy or regulation concerning pregnant girls or girls who have given birth that allows them to complete their schooling?	Yes <i>The re-admission policy exists; although its enforcement is weak.</i>
Is there a law, regulation or directive that provides for sexual and reproductive health (SRH) education in schools as part of the curriculum?	No <i>There is tension between the need to promote SRH as part of school curriculum as a health objective, and conservative views that such an approach is in a way inconsistent with education objectives and culture.</i>
d) Sexual and reproductive health	
Does the law provide for access to termination of pregnancy for teenagers without parental consent?	No <i>A proposed abortion law was formulated in July 2015, and its draft regulations promote the consent of parents/guardians if a girl is below 16 years.</i>
Does the law guarantee confidentiality of sexual and reproductive health services provided to teenagers, except where instances of sexual abuse require reporting to authorities?	Not specifically

Table 2 continued.

LEGAL ISSUE	STATUS AND BRIEF EXPLANATION
<p>d) Sexual and reproductive health (continued)</p> <p>Does the law sufficiently accommodate the needs for sexual and reproductive health services of children with disabilities?</p>	<p>Not specifically</p>
<p>e) Access to justice</p> <p>Are child friendly justice principles given authority in law, policy regulations and training, including regarding statement taking from children, the provision of evidence by children, court set-up when children testify, privacy and confidentiality?</p> <p>Does the law provide for training of police and judicial officers in order to reinforce child protection?</p> <p>Is knowledge on the part of the police and courts ensured through the constant availability of relevant laws in all justice delivery structures?</p>	<p>Yes and No <i>Child justice courts exist, and the police have Child Protection Units. However, deficiencies in resources hamper the effectiveness of these structures, and not all police personnel have been trained in child protection.</i></p> <p>Not specifically</p> <p>No <i>Many justice enforcement personnel continue to lack access to relevant laws for reference.</i></p>



About Plan International

Founded in 1937, Plan International is one of the oldest and largest children's development organisations in the world. Plan International is currently working in 71 countries worldwide. Their vision is of a world in which all children realise their full potential in societies that respect people's rights and dignity. Through its *Because I Am A Girl* (BIAAG) global campaign, Plan International has had a major focus on promoting gender equality to lift millions of girls out of poverty.

About the 18+ Programme

The 18+ Programme on Ending Child Marriage in Southern Africa was conceptualised as an initiative to domesticate and operationalise the BIAAG campaign. It is a programming model with a clear theory of change and pathways for attaining the desired change. The programme, hosted in Zambia, covers Malawi, Mozambique, Zambia, and Zimbabwe and has three main objectives:

1. To mobilise girls at risk of child marriage so that they have the capabilities to determine their own futures and make their own choices about if, when and whom they marry.
2. To transform, through social movement-building, the gender norms and practices that drive child marriage.
3. To facilitate an enabling legal and policy environment to protect girls from child marriage.

About the study

The study, which took place between November 2014 and April 2015, analysed and documented domestic and regional legislation that prohibits and/or perpetuates the practice of child, early and forced marriage in the four countries. It interrogated whether formal, customary or religious laws are in conformity with international human (child) rights standards. The validation workshop was held in April 2015 and the final draft reports were out in July 2015. This in-depth review of the legal and policy environment has informed the development of policy briefs for the four participating countries, which recommend legal and policy changes at country and regional levels.

Acknowledgements

On behalf of Plan International, the chairperson of the *18+ Programme on Ending Child Marriage in Southern Africa*, Samuel Musyoki, would like to acknowledge the support accorded by our partners namely: the Open Society Initiative of Southern Africa (OSISA), Plan Netherlands, the Royal Netherlands Government and Plan Norway. We are thankful to Emmily Kamwendo-Naphambo, manager of the 18+ Programme, for the pivotal role she played in coordinating this study; and the 18+ focal point persons in Malawi, Mozambique, Zambia and Zimbabwe, the CSO and government partners and the Southern Africa Development Community (SADC) Parliamentary Forum (PF) for providing information and participating in the validation workshop. Finally, we would like to thank Tinyade Kachika, a gender and legal consultant from LawPlus, Malawi, who carried out the review of legal and regulatory frameworks in Malawi which informed this brief. Our thanks go also to the editorial team.

This policy brief

This policy brief is part of the four-country review of domestic and regional legislation relating to the practice of child, early and forced marriage in Malawi, Mozambique, Zambia, and Zimbabwe. Each policy brief is accompanied by a longer report which provides an in-depth review of the legal and regulatory frameworks in each country. An overview report is also available which reviews applicable international and regional law and policy on child, early and forced marriage.

Published by Plan International, 2016.