

Council for Non-Governmental Organisations in Malawi



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21 November 2018

Secretary for Gender, Children, Disability and Social Welfare
Ministry of Gender, Children, Disability and Social Welfare
Private Bag 330
LILONGWE 3

Dear Madam,

NGO AMENDMENT BILL 2018

Following the meeting with the Minister of Gender, Children, Disability and Social Welfare, Hon. Cecilia Chazama and yourselves at Walmont President Hotel, Bingu International Conference Centre on 20 November 2018 in relation to the above subject, we are pleased to enclose our position paper as agreed.

Should there be need for clarity on any of the issues raised in the position paper, feel free to contact the Chairperson of CONGOMA, Mr. Steven Duwa.

We thank you as we look forward to hearing from you by Monday, 26 November 2018.

Yours faithfully

Ronald Mtonga
EXECUTIVE DIRECTOR



TO : The Minister of Gender, Children, Disability and Social Welfare
Ministry of Gender, Children, Disability and Social Welfare
Private Bag 330
Lilongwe 3
Malawi

Date: 21 November 2018

Honourable Minister,

**CONGOMA POSITION ON THE NON-GOVERNMENTAL ORGANIZATIONS
(AMENDMENT) ACT, 2018**

1.0. Introduction

We write to bring to your attention our candid observations and concerns as regards to the Non-Governmental Organisations (Amendment) Bill, 2018 which was gazetted on 9th November 2018. According to the intent and objects of the Bill, it is stipulated that the Bill seeks to promote freedom of association as enshrined in Section 32 of the Constitution; removing the requirement for mandatory double registration; and enhancing the role of the NGO Board in the oversight and regulation of NGOs in Malawi. However, a critical analysis of the proposed provisions of the amendment reveals that the Bill largely runs counter to the promotion of freedom of association, and that it is aimed at restricting the civic space in Malawi.

2.0. Some Positives worthy noting in the Amendment Bill

We note the following as some of the positives that have been included in this Amendment Bill:



2.1 The requirement that members of the proposed NGO Regulatory Authority to have relevant expertise and experience.

2.2 The consideration of gender and social inclusion in making appointments into the proposed NGO Regulatory Authority by ensuring that at least half of the appointees are women and also taking into account the provisions of the Disability Act.

3.0 Areas of Concern with the Amendment Bill

Having observed a few positives with the Amendment Bill, we also note that there are many areas of concern with this Bill. We note as follows:

3.1 There has been lack of consultation on the Amendment Bill, which is a clear breach of the spirit and letter of the Constitution. We observe with dismay that the entire consultation process on the Amendment Bill was devoid of thorough consultations with relevant NGO sectors including CONGOMA despite the fact that such a Bill would directly affect the sector. CONGOMA and the NGO sector only learnt through social media on 15th November 2018 about the amendment after the Bill had been gazetted. We strongly feel this is unwarranted and a clear breach of the spirit and letter of the Constitution of Malawi which requires that there must be adequate time between the gazetting of the Bill and the Parliament deliberations so that the citizens and MPs are well conversant with the issues raised in this Bill. Section 8 of the Constitution clearly stipulates that Parliamentary deliberations must reflect the interests of the people of Malawi, and that the Law requires Members of Parliament to have a fair opportunity to make consultations and appreciate the interests of their constituents and the public at large including those that the Law would directly affect. Besides, it is a common practice of Law making that Bills should be tabled after wide public participation. Sadly, we note that this was not done.

3.2 The Bill creates a monster regulator and coordinator of NGOs in the proposed NGO Regulatory Authority with absolute powers without accountability checks. It nullifies CONGOMA – a registered trust- and grabs its registered mandate and transfers it to the proposed NGO Regulatory Authority. It is understood that this direction is coming from an opinion that S32 of the Constitution of the Republic of Malawi is inconsistent with S20(3)(a)(v) of the principal Act on freedom of association. However, the said S32 does not make the freedom of association absolute in view of S40 of the same Constitution.

3.3 The Bill eliminates the NGO's role (through CONGOMA) in appointment and removal of members of the NGO Regulatory Authority. The powers to appoint are retained with the Minister who is said to effect such appointments in "consultation with relevant professional and other bodies". The vagueness in the identity of the said "professional and other bodies" in our considered view is a recipe for disaster as the Minister may only appoint those that are his or her party cronies. Furthermore, in the absence of clear justification the inclusion of the Secretary responsible for Home Affairs and Internal Security is suspicious especially in comparison with the mandate of the Ministry and the NGO's work.

3.4 Lack of grounds for removal of members creates room for abuse and manipulation.

3.5 The removal of CONGOMA as coordinator and collective representative of NGOs entails that the NGOs shall not have an independent platform where they can voice out their concerns and hold the NGO Authority accountable.

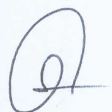
3.6 The amended section 34 of the Bill however provides that where the Act is contravened by an NGO it is liable to a fine of MK15 million and imprisonment of 7 years of a director or trustee. Whilst such a penalty could be justifiable in the case of fraud and a gross breach of a director or trustee's fiduciary responsibility, it would not be a proportionate sentence for lesser violations of the provisions in the NGO Act. As such, it could be said that Section 34 is disproportionate and will have a chilling effect on freedom of association.

4.0 Recommendations

In view of the above, we recommend as follows:

4.1 That there should be meaningful and thorough consultations with CONGOMA and the member NGOs on the proposed amendments before the Bill is tabled in Parliament.

4.2 The Bill should include seats to be occupied by members of the NGO Sector in the proposed NGO Authority. In addition, all appointments by the Minister (excluding the permanent ex-officios) should be done in direct consultation with CONGOMA. Such appointments should further be approved by Parliament through the Public Appointments Committee.

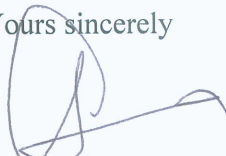


- 4.3 The role of CONGOMA as NGO Coordinating body should be retained as the proposed Regulatory Authority cannot represent and promote the collective interests and concerns of NGOs in Malawi because the proposed Authority is a Government entity.
- 4.4 Remove imposition of criminal responsibility on individual trustees and directors as this is the responsibility of the Courts to remove Corporate veil.
- 4.5 The Bill should further clearly stipulate which infractions of the Act are criminal offences, and that petty infractions should not be subject of criminal sanctions.
- 4.6 The requirement of mandatory registration with NGO Board should be removed as it is in conflict with freedom of association universal.

5.0 Conclusion

Looking at the gravity of the issues of concern which require time and adequate consultation, we as CONGOMA are of the view that the Bill should not be tabled in Parliament as it is not a product of a thorough, inclusive and democratic process. To this end, we propose that all processes around Law reform or review around NGO Act and other NGO related laws should be spearheaded by an independent Constitutional body such as the Law Commission. We would greatly appreciate if ALL our recommendations are considered in the affirmative. Further, we request that you come back to us preferably Monday, 26 November 2018.

Yours sincerely



Steven Duwa

CHAIRPERSON