

Law Commission Report No. 22



MALAWI LAW COMMISSION

**REPORT OF THE LAW COMMISSION
ON THE DEVELOPMENT OF
TRAFFICKING IN PERSONS
LEGISLATION**

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LAW COMMISSION REPORT NO. 22

REPORT OF THE LAW COMMISSION ON THE
DEVELOPMENT OF TRAFFICKING IN PERSONS LEGISLATION

The Report on the Development of Trafficking in Persons Legislation by the special Law Commission on the development of trafficking in persons legislation appointed under section 133 of the Constitution.

Dated this twentythird day of February, 2011.

(FILE NO. LC/01/61)

DR. GEORGE THAPATULA CHAPONDA
Minister of Justice

REPORT OF THE LAW COMMISSION ON THE DEVELOPMENT
OF TRAFFICKING IN PERSONS LEGISLATION

TO: HONOURABLE DR. GEORGE THAPATULA CHAPONDA, MINISTER OF JUSTICE

This is the Report on the Development of Trafficking in Persons Legislation by the special Law Commission on the Development of Trafficking in Persons Legislation appointed under section 133 of the Constitution.

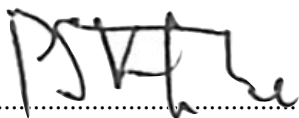
We, the members of the Commission, submit this Report under section 135 of the Constitution and commend the Report and its recommendations to the Government, Parliament and the people of Malawi.

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*Former Director of Child Affairs
Ministry of Women and Child
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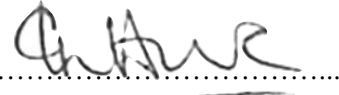
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Dated: December, 2009

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Acknowledgements

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Foreword

As the 1990s drew to a close; and particularly during the first decade of the new millennium, trafficking in persons occupied the centre stage as one of the major challenges facing society worldwide. Indeed, greater acknowledgement of the rising prevalence of trafficking in persons sharply focused the world's attention on this form of modern day slavery and laid bare the devastating plight of trafficked persons. This has resulted in greater concerted efforts by the international community to establish initiatives and measures to curb the phenomenon.

Trafficking in persons has come to be understood as a phenomenon fueled by globalization. It touches upon fundamental human rights, unfair labour practices and thrives on internal and trans-boundary exchanges of capital and labour. The main premise fuelling trafficking in persons is that increased poverty leads hopeless immigrants to seek opportunities beyond the borders of their countries.¹ Not only has globalisation affected the way that businesses, goods and capital are transported around the world, it has also had the effect of increasing the international trafficking of human beings and their body parts as goods or commodities. Thus trafficking in persons is one of the revelations of the negative side of globalization.

In response to the global phenomenon that trafficking in persons has become, the United Nations General Assembly in 2000 adopted the Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children (the "Trafficking Protocol") which came into force in 2003². The Trafficking Protocol supplements the United Nations Convention Against Transnational Organized Crime (the "CTOC")³ which came into force 2001.

Here in Malawi, initiatives to develop legislation to combat trafficking in persons started in November of 2004. The initiatives were intended to primarily fulfil Malawi's obligations under the Trafficking Protocol. Between 2004 and 2006, the Law Commission carried out a number of preparatory activities for the launch of its programme, in 2007 on the development of legislation on trafficking in persons. In April 2005, the Law Commission published a preliminary research paper on trafficking in persons; primarily focusing on the trafficking of women and children for sexual exploitation within and outside Malawi.⁴

The Commission's initiative to develop the anti-trafficking legislation coincided with the publication of the National Plan of Action for Orphans and Other Vulnerable Children, 2005-2009 and the Malawi HIV and AIDS National Action Framework, 2005-2009 by the Malawi Government in June, 2005. Both the Plan and the Framework envisaged the development of legislation aimed at

¹ Coonan T and Thompson R, 2005; "Ancient Evil, Modern Face: The fight against human trafficking", *Georgetown Journal of International Affairs*, 6, 1, 43-52.

² G.A Res. 25 U.N. GAOR 55th Sess. Supp. 49. [60]. U.N. Doc. A/49/49 (Vol. 1) (2001).

³ U.N. G.A Res. 25, U.N. Doc. A/55/383 (Nov. 15, 2000). Malawi ratified the UN Convention Against Transnational Organized Crime and its two protocols, the Trafficking Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air on March 17, 2005.

⁴ The Malawi Law Commission, 2005; *Human Trafficking in Malawi*: Research Paper. Lilongwe.

addressing the vulnerability and susceptibility to HIV and AIDS of orphans and other vulnerable children (OVC). While the Commission's scope was broader in that it intended to develop legislation covering all aspects of trafficking in persons, there was room to merge the two agendas. The Commission therefore undertook to structure its work programme in such a way that issues pertaining to the plight of OVC are addressed. OVC are targeted by traffickers and are immediately at risk to sexual exploitation and exposure to HIV and AIDS.

In view of the current HIV and AIDS pandemic, it is difficult to conduct any programme without regard to the challenges posed by it. In fact, the HIV and AIDS pandemic is seen as both a cause and a consequence of trafficking in persons. On the one hand, HIV and AIDS increases the number of children trafficked because there is an increased demand for sex with young girls, since they are perceived to be HIV negative. Young girls are in reality more vulnerable to HIV and AIDS. Women and girls are biologically more vulnerable to contracting sexually transmitted infections. On the other hand, victims of trafficking for the purposes of sexual exploitation are unable to negotiate condom use for their protection.⁵ Such victims may be forced to engage in sexual practices most associated with HIV transmission. These practices include being forced to have sex with multiple partners; suffering injuries (caused by violence during sex against their will) which further increases their vulnerability to, and risk of, infection.⁶

The Commission was also mindful that both the National Plan of Action for Orphans and Other Vulnerable Children and the National HIV and AIDS Action Framework place Government at the forefront of establishing institutional and legal frameworks within which services for the care and protection of OVC is to be organized and managed.⁷ This is intended to be achieved through, among other things, the amendment of laws that hinder efforts to effectively combat the HIV and AIDS pandemic and the promulgation of laws that promote the protection of OVC and militate against the exposure to exploitation and subsequently exposure to HIV and AIDS.⁸

With cooperation from the Ministry of Women and Child Development,⁹ the Law Commission has already completed the review of a number of laws required

⁵ Girls are less able to bargain for condom use. As stated in MAPODE, May 27 2004; "Research Report on Children in Prostitution, Pornography, and Trafficking for Commercial Sexual Exploitation, Labour and Crime in Zambia". Available at <http://www.childtrafficking.com/DOCS/kiremire-2004-trafficking-research-report.pdf>. (Visited 21 May 2009).

⁶ UNESCO, 2006, Policy Paper on Human Trafficking, Especially of Women and Children in Mozambique: Root Causes and Recommendations, Paper No. 14. /E. Available at <http://unesdoc.unesco.org/images/0014/00147846E.pdf>. (Visited 21 May 2009).

⁷ Government of Malawi, 2005; *The National Plan of Action for Orphans and Other Vulnerable Children*. Ministry of Women and Child Development, Lilongwe.

⁸ As above

⁹ As it was called then. The Ministry is now called the Ministry Of Gender, Children and Community Development

for review under the National Plan of Action such as the Children and Young Persons Act,¹⁰ the Affiliation Act,¹¹ the Marriage Act,¹² the Divorce Act,¹³ the Penal Code,¹⁴ the Wills and Inheritance Act,¹⁵ and some aspects, of the Adoption of Children Act.¹⁶

The Law Commission in its Report on the Review of the Penal Code gazetted in 2000¹⁷ made a number of recommendations; First, to create a new provision prohibiting sexual activities for commercial purposes to counteract the illicit trafficking of women, girls and boys for sexual purposes within Malawi and outside. This included recommendations to amend provisions on abduction and to proscribe the maintenance of brothels. Second the commission recommends the proscription of the abuse of children through their engagement in activities such as pornography, paedophilia and the drug courier trade. Third, the Wills and Inheritance Act was reviewed in 2004 to offer more stringent protection to OVC, widows and widowers.¹⁸ Fourth, the Review of the Laws on Marriage and Divorce sought to reform the statutory and customary laws on family relations in order to address the imbalances existing in the laws and to afford better protection to women and children.¹⁹ Fifth, the Review of the Children and Young Persons Act introduced extensive reforms to the legal framework surrounding child justice and the care and protection of children.²⁰ Finally, the Government enacted the Prevention of Domestic Violence Act²¹ in 2006 which protects men, women and children in abusive domestic relationships.

Despite all these reviews, however, there is still need to promulgate laws promoting the protection of orphans and vulnerable children from their exploitation. This special Law Commission is confident that the findings, recommendations and the draft Bills in this Report have captured the needs of Malawi as a country in setting a legislative framework for preventing and combating trafficking in persons. By developing this legislative framework, the Commission has also contributed to the fulfilment of the legislative aspirations of both the National Plan of Action for Orphans and Other Vulnerable Children and

¹⁰ Cap. 26:03 of the Laws of Malawi.

¹¹ Cap. 26:02 of the Laws of Malawi.

¹² Cap. 25:01 of the Laws of Malawi.

¹³ Cap. 25:04 of the Laws of Malawi.

¹⁴ Cap. 7:01 of the Laws of Malawi.

¹⁵ Cap. 10:02 of the Laws of Malawi.

¹⁶ Cap. 26:01 of the Laws of Malawi.

¹⁷ Malawi Law Commission, 2000; *Law Commission Report on the Review of the Penal Code*, Government Printer, Zomba Malawi 39-43, *et seq.*

¹⁸ Malawi Law Commission, 2004; *Law Commission Report on the Review of Wills and Inheritance Act*, Government Printer, Lilongwe, Malawi

¹⁹ Malawi Law Commission, 2006; *Law Commission Report on the Review of the Laws on Marriage and Divorce*, Government Printer, Lilongwe, Malawi 39-43, *et seq.*

²⁰ Malawi Law Commission, 2005; *Law Commission Report on the Review of the Children and Young Persons Act*, Government Printer, Lilongwe Malawi.

²¹ Act No. 5 of 2006.

the National HIV and AIDS Action Framework. We are equally confident that in so doing, the fulfilment of Malawi's obligations under international law in this aspect have also been accomplished.

I wish to thank, on behalf of this special Law Commission, the Global Fund Round Five for the invaluable financial support provided to the Law Commission for the entire Programme. I also wish to thank the National AIDS Commission (NAC) for administering the funds. I extend my gratitude to UNICEF who provided technical support in the drafting of the proposal for funding that went to the Global Fund and to Norwegian Church Aid who funded one of our activities.

Lastly, I extend my sincere gratitude to the entire staff of the Law Commission for the technical and logistical assistance rendered throughout the programme.

PENSTON KILEMBE
Chairperson

INTRODUCTION

In October, 2007, the Law Commissioner, in consultation with the Judicial Service Commission, empanelled a special Law Commission under 133 (b) of the Constitution. The mandate of this special Law Commission was to develop legislation for the prevention and elimination of trafficking in persons. The membership of the special Law Commission comprised representatives from various public sector institutions and civil society. The special Law Commission commenced its work in earnest in November, 2007.

TERMS OF REFERENCE

The special Law Commission developed the following Terms of Reference to guide its work—

- (a) reviewing and making recommendations on any statutory or customary laws that are related to trafficking in persons, having regard to the provisions of the Constitution in order to propose a legislation for the prevention and elimination of trafficking in persons; the promotion and protection of victims and potential victims of trafficking in persons; the prosecution of offenders; and the provision of care and support to victims of trafficking;
- (b) developing legislation on effective implementation and enforcement mechanisms against trafficking in persons;
- (c) creating an institutional legal framework for regulation and coordination of matters pertaining to trafficking in persons;
- (d) reviewing any relevant national policies including the Malawi Growth and Development Strategy in relation to trafficking in persons;
- (e) conducting comparative studies at national, regional and international levels, including, where necessary, study visits;
- (f) examining international instruments, such as—
 - (i) the CTOC;
 - (ii) the Protocol to the United Nations Convention against Transnational Organized Crime to Suppress, Prevent and Punish Trafficking in Persons, especially Women and Children;
 - (iii) the Convention on the Elimination of All Forms of Discrimination Against Women;
 - (iv) the Convention on the Rights of the Child;
 - (v) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography;
 - (vi) the Worst Forms of Child Labour Convention;

(vii) the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women;

(viii) the Southern Africa Development Community Protocol on Trafficking in Persons; and

(ix) the Millennium Development Goals,

to enrich the review of existing laws and the development of a new law;

(g) utilising local instruments in recognition of work already undertaken, having regard to all relevant documents and reports, including:

(i) the National Plan of Action on Orphans and Other Vulnerable Children and other relevant policy documents; and

(ii) reports of the Law Commission, particularly Reports on the Criminal Justice Law Reform, Reports on the Review of Gender-related Laws, and the Report on the Review of the Children and Young Persons Act;

(h) conducting a study on the extent of trafficking in persons in Malawi;

(i) consulting stakeholders at regional and national workshops in order to solicit views on the findings and recommendations of the Commission; and

(j) making recommendations on any other matters with the aim of preventing and eliminating trafficking in persons.

WORK METHODOLOGY

The Commission adopted the following methodology—

(a) inviting submissions from members of the general public through notices in newspapers;

(b) conducting meetings of the Commission in plenary;

(c) conducting a study visit to Nigeria in order to obtain a comparative perspective from another jurisdiction;

(d) conducting research on the nature and form of sexual exploitation in selected districts. This task was undertaken in Nkhata Bay, Rumphi and Karonga from 19 – 30 October, 2008;

(e) organising two National Consultative Workshops. The first of these workshops was held in Lilongwe in January, 2008 before embarking on the review process to solicit views on the procedural and substantive way forward. The second workshop was held at Sunbird Capital Hotel in Lilongwe in March, 2009 where the Commission presented its findings and recommendations to stakeholders who gave feedback on the entire process;

(f) organizing three regional consultative focus group discussions at which pertinent issues relating to particular stakeholders at regional level (incorporating the grassroots communities) were presented for input. These discussions were informal and disaggregated participants according to sex and age to get the best results. The participants at the discussions were drawn from the public service; academia; faith organizations; traditional leadership; private sector; and the general public.

The Commission met to discuss feedback from the various consultative fora. All submissions, comments and critiques received were considered and debated and have informed the findings and recommendations recorded in this Report.

SYNOPSIS OF THE DRAFT LEGISLATION

As required by section 7 (1) (g) of the Law Commission Act,²² the Commission has proposed draft legislation incorporating all its findings and recommendations. The main draft legislation is the proposed Bill, the **Trafficking in Persons Bill**, which is attached to this Report as Appendix I.

The **Trafficking in Persons Bill** provides a comprehensive legislative framework for combating and preventing trafficking in persons using a human rights-based approach. The Bill provides for the establishment of an institutional framework for effective regulation and coordination of trafficking in persons and related matters. The Bill also takes a multi-dimensional approach by combining issues of protection of trafficked persons and potential victims of trafficking, with prevention of trafficking in persons and prosecution of offences. It also increases participation of individuals, communities and institutions in the fight against trafficking in persons.

The Commission has also recommended the amendment of other pieces of legislation whose provisions deal with matters connected to the commission of the offence of trafficking in persons. The Commission has developed the Tourism and Hotels (Amendment) Bill, Penal Code (Amendment) Bill, Immigration (Amendment) Bill and the Extradition (Amendment) Bill. The Bills are attached to this Report as Appendices II, III, IV and V respectively.²³

STRUCTURE OF THE REPORT

The first part of this Report is the narrative part which contains specific findings and recommendations made by the Commission. All recommendations made by the Commission for enactment are indicated in **bold**.

The second part of this Report contains draft Bills which have been attached to this Report as Appendices.

²² Cap. 3:09 of the Laws of Malawi.

²³ N.B. The review of these laws is limited to the provisions that relate to trafficking in persons. It was not intended to be a comprehensive review of these laws; a task which would require a different special Law Commission specifically appointed for that purpose.

OVERVIEW OF THE EXISTING LEGAL FRAMEWORK

The existing legal framework in Malawi makes no express reference to the offence of trafficking in persons. Nonetheless, elements of the offence breach various fundamental rights and freedoms guaranteed under the Constitution. In addition, some elements of the offence of trafficking in persons are already criminalised under criminal provisions divided across various laws. These laws include the Penal Code,²⁴ the Immigration Act,²⁵ the Employment Act,²⁶ the Extradition Act,²⁷ and the Mutual Assistance in Criminal Matters Act.²⁸

Although some of the provisions in the Penal Code and the Employment Act have been used to prosecute persons accused of the offence of trafficking in persons, various technical difficulties have arisen. Sometimes the penalties attached to offences in the Penal Code and the Employment Act have been insufficient for trafficking in persons offences. For example, using the Employment Act to prosecute traffickers that have exploited their victims through forced labour has led to unsatisfactory results. For example in *Republic v. Masautso Banda*,²⁹ the accused trafficked children from Dedza to Mchinji for labour. He was charged under sections 21 and 24 of the Employment Act for employing 10 persons under 14 years of age. In this case, the accused pleaded guilty and was sentenced to pay a fine of K5, 000,³⁰ to pay the sum of K1, 500³¹ to each trafficked child as compensation for their suffering for 3 days; and to pay the children's transport expenses from Mchinji to Dedza. In default, the accused was sentenced to imprisonment for 11 months. The accused person was able to pay the fine and therefore managed to escape the prison sentence. The Commission noted that the Employment Act is thus not suitable to adequately punish perpetrators of trafficking in persons and to assist victims. The penalties under this Act are insufficient and there is no provision in the Act for an appropriate level of care and assistance to victims who have been traumatised by the ordeal suffered. The court also assumed that there would be a home for the children to return to which would protect them from being trafficked again.

Similarly, the prosecuting authority has also failed to secure convictions for trafficking in persons offences based on the fact that existing laws were not drafted to capture the peculiar nature of the offence.³² This peculiarity is illustrated by the case of *Republic v. Ruth Lourenco*³³ which involved cross-border trafficking. The facts of the case are : In 1999, three girls aged between 15 to 19 years from Lilongwe were arrested in a police raid at a sex club in

²⁴ Cap. 7:01 of the Laws of Malawi.

²⁵ Cap. 15:03 of the Laws of Malawi.

²⁶ Cap. 55:02 of the Laws of Malawi.

²⁷ Cap. 8:03 of the Laws of Malawi.

²⁸ Cap. 8:04 of the Laws of Malawi.

²⁹ Criminal Case No. 347 of 2005 decided at Mchinji Magistrate's Court (unreported).

³⁰ Equivalent to \$34.1 as at 21st December 2009.

³¹ Equivalent to \$10.2 as at 21st December 2009.

³² Criminal Case No. 150 of 1999. Lilongwe Senior Resident Magistrate's Court (unreported).

³³ As above

Amsterdam. They were subsequently deported to Malawi.³⁴ The accused, a local business woman, stood trial on charges of procuring for prostitution outside Malawi for what was clearly a trafficking in persons offence. She was acquitted.

The acquittal in *Lourenco* was on technical grounds. By the time the girls were recruited by the accused person,³⁵ due to their destitution, they were already prostitutes.³⁶ The court held that in this case, since the girls were already prostitutes prior to their recruitment, they could not have been procured for the purpose of prostitution as required under section 140 of the Penal Code.

The accused was able to go free despite the fact that the girls, in their testimony, had credibly described their ordeal from recruitment to deportation in graphic detail, which gave an insight of the immeasurable suffering that trafficked persons face. The girls were subjected to numerous abuses, beatings, threats of violence and sexual assault. They were forced to perform in strip shows and private dances for clients and their captors. Their passports were confiscated and they were told to say they were from Ghana and Sierra Leone if they were asked by anyone.³⁷ One of the girls was so young – 15 years old – that clients initially refused to have sexual relations with her until she started lying about her age.³⁸

In light of the above, the Commission was firmly of the view that the nature of trafficking in persons as an offence requires a clear articulation of all its elements if accused persons are to be successfully prosecuted, convicted and sentenced. Although the Penal Code may fill the gap in the law to prosecute trafficking in persons offences in the interim period, the *Lourenco* case illustrates the difficulty of using a law that was not specifically drafted to address the phenomenon. The provisions do not quite capture the essence of the nature of trafficking in persons thereby leading to inability to charge traffickers of any offence or indeed failing to secure convictions where they have been prosecuted. In addition, the penalties are not always commensurate with the level of criminal activity involved in trafficking in persons, and victim support is not conceivable under the current framework. Lastly, convictions cannot be secured for trafficking in persons offences that envisage a transnational process under the existing law.

³⁴ Contrary to s. 140 (d) of the Penal Code, Cap 7:01 of the Laws of Malawi.

³⁵ According to the Trial transcript, upon recruitment, the accused promised the girls a business trip to Holland. She obtained passports for them and took them to Holland from Chileka Airport via Johannesburg, London, and Brussels. In Amsterdam, she sold them to Nigerian traffickers for \$10,000.00 each. When they protested and demanded to be taken back to Malawi, they were told they had to first repay a debt of \$20,000.00 spent on their travel expenses. The Nigerian traffickers forced the girls to work in sex clubs, one of which was called “*The Zwolle*” and later resold them to other European traffickers.

³⁶ As above.

³⁷ As above.

³⁸ As above.

SPECIFIC FINDINGS AND RECOMMENDATIONS

1.0 SCOPE OF APPLICATION

1.1 *Long Title*

The Commission commenced its task of outlining the scope of the proposed legislation by first elaborating the elements of trafficking in persons for inclusion in the long title. The Trafficking Protocol defines trafficking in persons with reference to three elements, namely; the act of trafficking another person through recruitment, transport, transfer, receipt or harbouring that person; the means by which the act of trafficking is carried out, either by threat, the use of force, or other forms of coercion; and the purpose for which the act of trafficking is done. Examples of purposes under the Trafficking Protocol include prostitution or other forms of sexual exploitation, forced labour, slavery or the removal of body parts. The Commission agreed to adopt this formulation in outlining the scope of the legislation in the long title.

The Commission has also clarified the objective of the law. The Commission referred to the Trafficking Protocol which sets out its purpose³⁹ as—

- (a) to prevent and combat trafficking in persons, by paying particular attention to women and children;
- (b) to protect and assist the victims of such trafficking; and
- (c) to promote cooperation among States in order to meet those objectives.

The Commission considered that the purpose of the Trafficking Protocol provides important insight into the issues covered by the Protocol and subsequently, to be covered by legislation arising from it. As such, the Commission concluded that the elements of this purpose should feature in the long title of the proposed legislation.

The Commission was also concerned that there is a lack of awareness of the concept of trafficking in persons in Malawi.⁴⁰ A study conducted by Government in 2008 revealed that although most non-governmental organizations and Government departments appear to have some knowledge of the defining elements of trafficking in persons, many have been unable to identify cases of its occurrence. As a result, they have not taken appropriate action.⁴¹ This study also revealed that there is a common misconception among non-governmental organizations that if a child or the parents of the child have consented to the movement of the child, then trafficking in persons does not take place. In other instances, trafficking of children is incorrectly referred to as stealing of children, conveying the misconception that trafficked children are always stolen.

³⁹ See Article 2-Statement of purpose.

⁴⁰ Government of Malawi, 2008; Child Trafficking in Malawi, (UNICEF and ILO) Lilongwe, p. 10.

⁴¹ As above.

The Commission resolved to develop the long title of the proposed legislation in such a way as to encompass the purpose set out in the Trafficking Protocol and to address issues of publicity or civic awareness to counter the low levels of awareness of the definitive elements of trafficking in persons.

The Commission recommends that the long title of the proposed legislation should read as follows—

An Act to make provision for the prevention and elimination of trafficking in persons; to provide for the establishment of a Board for coordination and management of matters related to trafficking in persons; to make provision for care, assistance and protection of trafficked persons; to provide for international and local cooperation on matters of trafficking in persons; and to provide for connected matters.

1.2 *Short Title*

The Commission considered several titles for the proposed law. The Commission noted that its Terms of Reference collectively oblige it to develop a law aimed at combating, preventing and eliminating trafficking in persons as well as providing care and assistance to victims. As such, the Commission was of the view that this mandate must be reflected in the short title of the proposed law.

Initially, the Commission considered the title “Anti-Trafficking in Persons Act” as a suitable one that would convey the entirety of the Commission’s mandate. After lengthy deliberation, the Commission decided against the use of the prefix “anti—”.

The Commission, at one point, opted for a more descriptive short title, namely, the “Prevention of Trafficking in Persons Act”. After deliberation this title was considered overly restrictive in narrowing the scope of the Act to issues of prevention. The proposed law aims to address in addition to issues of criminalization, issues of adjudication, and care and support of trafficked persons.

In the end, the Commission preferred to adopt a short title that does not give the impression that any of these issues have been left out. After careful consideration, the Commission decided on a short title wide enough to cover the multi-faceted nature of trafficking in persons. The Commission recommends that the proposed law should be styled the “**Trafficking in Persons Act**”. The legislative recommendations of the Commission will be contained in a draft Bill – **the Trafficking in Persons Bill** – which forms part of this Report.

1.3 *Scope*

(a) *Transnationality*

The Commission then took time to consider the range of activities and the circumstances in which the **Trafficking in Persons Bill** should apply. Although

the CTOC⁴² and the Trafficking Protocol⁴³ generally apply to cases where at least one of the offences involved has some element of transnationality or has some involvement with an organised crime group, Article 34 (2) of the CTOC provides that legislators need not incorporate elements concerning transnationality or an organized crime group into domestic legislation.⁴⁴ Hence, the principle is that while State Parties should have to establish some degree of transnationality or involvement of an organized crime group with respect to most aspects of the Trafficking Protocol, their prosecutors do not have to prove either in order to obtain a conviction for trafficking in persons or any other offence established by the CTOC or its Protocols. In the case of trafficking in persons, domestic offences are valid even where the elements of transnationality and the involvement of organized crime groups are not established.⁴⁵

The Commission recommends a formulation of the scope of the application of the **Trafficking in Persons Bill**, to include domestic or internal trafficking especially as such cases are on the increase in Malawi. Although most studies on trafficking in persons have been concluded with reference to children⁴⁶ (and sometimes women), the studies do give guidance on internal trafficking trends which project that between 500 and 1500 women and children are trafficked within the country annually.⁴⁷ According to the Government study on “Child Trafficking in Malawi,”⁴⁸ actual data collected by Youth and Child Rights Shield (YOCRIS), a non-governmental organization in Dedza, 1,646 boys aged nine to thirteen years and eleven to fourteen years were trafficked from Dedza in 2005. In 2006, 958 boys aged between 9 to 16 years were also recorded as victims of internal trafficking, mainly for labour and sexual exploitation.⁴⁹ There was no doubt before the Commission that internal or domestic trafficking is an issue in Malawi that needs to be addressed within the scope of application of the proposed law.

(b) *Jurisdiction*

The Commission also considered the persons to whom the **Trafficking in Persons Bill** should apply and how far should the jurisdiction extend. Ordinarily, laws passed by any country only apply to the people within the territory of that country. Trafficking in persons, however, may also be a transnational crime and different elements of the commission of that offence may be perpetrated in

⁴² Articles 2 and 3.

⁴³ Article 4.

⁴⁴ UNODC, 2004; *Legislative Guide for The Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women in Children, Supplementing the United Nations Convention Against Transnational Organized Crime. Part Two* United Nations Publications – Vienna. Available at http://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf (Visited 20 January, 2009).

⁴⁵ As above.

⁴⁶ See Government of Malawi, 2008; above footnote 41.

⁴⁷ Centre for Social Research, July 2008 “Prevention of Trafficking in Women and Children for the purpose of Sexual Exploitation: Malawi:” A Report prepared for and submitted to Norwegian Church Aid, Lilongwe (Unpublished).

⁴⁸ See Government of Malawi, October 2008; above footnote 41.

⁴⁹ As above.

different countries. In keeping with section 5 of the Penal Code, the Commission recommends that jurisdiction should extend beyond the jurisdiction over offences committed partly within and partly beyond the jurisdiction. The CTOC requires State Parties to establish jurisdiction to investigate, prosecute and punish all offences established by it and any of the Protocols to which the State in question is a party.⁵⁰ The Commission also recommends that jurisdiction should be established over all offences committed within the territorial⁵¹ jurisdiction of the State, including its marine vessels and aircraft.⁵²

The Commission noted the progression in international criminal law throughout the twentieth century towards the application of extraterritorial jurisdiction over specific offences of a transnational nature. Extraterritorial jurisdiction which may take a number of forms generally refers to instances where a State seeks to influence the conduct of persons, acts or property outside its national territory through the use of its national legislation.⁵³

Thus, the need to address transnational crimes such as trafficking in persons, terrorism, international crimes (war crimes, forced disappearances and torture), crimes against humanity and genocide, justifies the use of extraterritorial jurisdiction. Due mainly to international humanitarian law treaty obligations as well as other United Nations treaty requirements,⁵⁴ a number of States have assumed extraterritorial jurisdiction by including in their criminal legislation provisions a requirement for investigation and prosecution of international crimes, even when such crimes are committed outside their national territory regardless of whether the perpetrators or the victims are nationals of the State concerned.⁵⁵ This is done where the nature of the crime is so heinous that international law imposes an obligation upon States to exercise prescription and adjudicate extraterritorial jurisdiction over the crime. Examples of international crimes in this category are war crimes, torture and forced disappearances which are backed by United Nations Conventions⁵⁶ obliging States to establish universal jurisdiction against the perpetrators.

In contrast, there are no international treaties imposing an obligation on States to establish universal jurisdiction on perpetrators of crimes against humanity and genocide or trafficking in persons.⁵⁷ As regards both genocide and

⁵⁰ UNODC, 2004; above footnote 45.

⁵¹ According to section 3 of the Constitution of Malawi, national territory includes airspace, waters and islands comprising the lawfully acquired territory of Malawi.

⁵² As above.

⁵³ De Schutter O, 2006; "Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations". Available at <http://www.corporate-accountability.org> (Visited 12 June, 2009).

⁵⁴ For example, United Nations Convention against Torture and Other Cruel or Degrading Treatment or Punishment.

⁵⁵ De Schutter, 2006 ; above footnote 54.

⁵⁶ For example, Geneva Convention (I) for the Amelioration of the Condition of the Wounded or Sick in Armed Forces in Field 12 August 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of the Shipwrecked Members of Armed Forces at Sea 12 August 1949, 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War 12 August 1949, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 12 August 1949, 75 UNTS 287.

⁵⁷ De Schutter, 2006 ; above footnote 54.

crimes against humanity, the *jus cogens*⁵⁸ character of the prohibitions is generally considered to imply an obligation to contribute to their universal repression which, at a minimum, requires that a State should not be allowed to lend refuge on its territory to perpetrators who cannot be extradited or for perpetrators for whom no extradition request has been made. As regards the crime of trafficking in persons, the CTOC does not mandate, but only encourages, the establishment of jurisdiction extraterritorially in certain circumstances. These include circumstances where the nationals of a State are either victims or offenders, or that part or all of the offence is committed in the State concerned.⁵⁹

In view of the foregoing, the Commission decided to extend the scope of application of the **Trafficking in Persons Bill** so as to include elements of extraterritorial jurisdiction in conformity with current international law trends. Therefore, where the offence of trafficking in persons is transnational in nature, the Commission recommends that the **Trafficking in Persons Bill** should have application as long as the crime has sufficient connection with Malawi. The Commission further resolved that sufficient connection may be established if the crime is committed wholly or partly in Malawi.⁶⁰ In the event that no element of the offence is committed in Malawi, sufficient connection may be established if the offence is committed by a Malawian citizen or a foreigner ordinarily resident in Malawi.⁶¹ If the victim of the offence is Malawian, a sufficient connection is established regardless of where the offence is committed.

Further, the Commission was of the view that since the **Trafficking in Persons Bill** shall be operative in Malawi as a national law, the offender and victim principles respectively have to be observed. The Commission was of the view that the Extradition Act and the Mutual Assistance in Criminal Matters Act⁶² would assist in prosecuting perpetrators if they are Malawian or if the victim is Malawian and also where the offence was partly or wholly committed in Malawi regardless of nationality of the perpetrator or victim.

The Commission was however concerned that in circumstances where an offence under the proposed law is committed outside Malawi or by a national of another country, a situation may arise in which both Malawi and the other country assume jurisdiction over the offence. Often, countries prefer to exercise jurisdiction over their own citizens and some may even go as far as to institute “sham” proceedings so that their citizens are protected from having to face trial in another country. Faced with such a possibility, the Commission found it necessary to recommend a provision in the **Trafficking in Persons Bill**, extending application of jurisdiction to instances where the accused person has

⁵⁸ This is also known as a peremptory norm or compelling law. It is a fundamental principle of international law which is accepted by the international community of States as a norm from which no derogation is ever permitted.

⁵⁹ Article 15 (1) (mandatory jurisdiction); Article 15 (2) (optional jurisdiction); and Article 16 (10) (obligation to prosecute where no extradition due to nationality of offender).

⁶⁰ A concept known in international law as the territorial principle

⁶¹ A concept known in international law as the nationality principle

⁶² Caps. 8:03 and 8:04 of the Laws of Malawi respectively.

already faced trial in another country, so long as that trial was merely to shield that person.

(c) *Legal persons*

Another issue that the Commission considered with regard to the scope of application of the **Trafficking in Persons Bill** relates to its application to persons at law. Under Article 10 of the CTOC, liability for offences must be established both for “natural” or biological persons and for “legal” persons, such as corporations. Traffickers may sometimes set up corporations, companies, and trusts etc. which are legal persons. These legal persons may operate in the style of travel agents, marriage brokers, bars, brothels, or even employment agencies. If there is no provision for the liability of such legal persons, their activities are carried out with impunity. Article 10 of the CTOC obliges State Parties to impose criminal sanctions not only on the legal persons but also on the natural persons running them. Liability may be criminal, civil or administrative.

The Commission concurs with the reasoning under the CTOC.⁶³ It is vital that the scope of the application of the **Trafficking in Persons Bill** is also extended to legal persons in addition to natural persons.

In view of the observations above, the Commission recommends the following provisions on the scope of application of the proposed law—

- | | |
|----------------------|---|
| Scope of application | <p>...—(1) This Act shall apply to a legal or natural person where the offence—</p> <p style="padding-left: 40px;">(a) is committed wholly or partly within Malawi;</p> <p style="padding-left: 40px;">(b) is committed outside Malawi and the trafficked person is a citizen of Malawi;</p> <p style="padding-left: 40px;">(c) is committed outside Malawi by a citizen of Malawi or a person who is resident in Malawi;</p> <p style="padding-left: 40px;">(d) is committed outside Malawi with a view to the commission of an offence under this Act, within Malawi; or</p> <p style="padding-left: 40px;">(e) involves an organized crime group.</p> <p>(2) Where a person has already been convicted or acquitted of an offence under this Act in a foreign jurisdiction, he shall not be prosecuted again for the same offence in Malawi; unless the proceedings of the court in the foreign jurisdiction—</p> |
|----------------------|---|

⁶³ Kartusch A, 2001 *Reference Guide for Anti-Trafficking Legislative Review with Particular Emphasis on South Eastern Europe*, (Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights) Warsaw.

(a) were for the purpose of shielding the person concerned from criminal proceedings outside the foreign jurisdiction; or

(b) were not conducted independently or impartially under the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

2.0 PREVENTION

2.1 *Poverty Alleviation*

The prevention of trafficking in persons cannot be achieved unless States are prepared to undertake creative and coordinated responses. It is not enough to simply concentrate on the deterrent impact of criminal sanctions. Efforts to deter traffickers must also address root causes of trafficking in persons so as to break the trafficking cycle.

The Commission noted that the major causes of trafficking in persons either across the border or internally in Malawi lie on the supply side of the problem.⁶⁴ Most trafficked persons come from relatively poor households and traffickers target them on account of their vulnerability as they look for opportunities to meet their basic needs.⁶⁵ The Commission was concerned that poverty encourages local and international migration which in turn fuels trafficking in persons. As one female cross border trader acknowledged in a local study on trafficking noted “poverty drives Malawians to seek *riches* abroad, without knowing what happens there”.⁶⁶

The Commission therefore concluded that unless strategies aimed at improving the social and economic situation are stepped up to complement the provisions of the **Trafficking in Persons Bill**, very little progress will be registered in combating, preventing and eliminating trafficking in persons.

The Commission also noted that in terms of cross-border trafficking and internal trafficking for the purposes of sexual exploitation; the majority of trafficked persons are women and girls. Therefore, a gender perspective should be taken into account in the strategies aimed at improving the economic and social situation in the country.⁶⁷ As for children trafficked for labour on tobacco or other agricultural estates, a child protection strategy backed by a social security safety net may be the key to arresting migration of children, especially young boys, to situations of servitude.

⁶⁴ Centre for Social Research, July 2008; above footnote 48, p. 31.

⁶⁵ As above. The study makes these observations in relation to women and children but the same is true across the entire spectrum of trafficked persons. See also Government of Malawi, 2008; above footnote 41 which also cites poverty as the main contributing factor to trafficking in children (p. 22).

⁶⁶ As above, p. 32. Emphasis supplied.

⁶⁷ See Kartusch A, 2001; above footnote 63, p. 21.

The Commission was however aware that the prevention of the human rights violations involved in trafficking in persons is a rather complex issue, making it very difficult to identify the most effective preventive measures.⁶⁸ There is no guarantee that an improved social and economic situation will automatically curb trafficking. Studies have shown that the amelioration of the status of the trafficked persons both in their countries of origin and destination cannot by itself guarantee that trafficking will be prevented in the future.⁶⁹ It is nonetheless the Commission's position that improving the economic status of vulnerable groups in the country or place of origin and thus reducing their vulnerability to trafficking is an issue that must be addressed. The Commission sought to build on this position by making recommendations aimed at eradicating poverty and eliminating gender discrimination as well as providing for child protection.

The Commission was, however, aware that in most of these areas of prevention, other special Law Commissions have already come up with recommendations that will complement the provisions of the **Trafficking in Persons Bill** by addressing some of the causes. The special Law Commission on the Review of Gender-Related Laws in the development of a gender equality statute⁷⁰ has proposed recommendations for the elimination of discrimination against women and girls, and for poverty eradication and the economic empowerment of women. These recommendations draw upon the Malawi Growth and Development Strategy which also addresses the issue of economic empowerment through sustainable economic growth and infrastructure development so that the country achieves wealth creation. A gender perspective is evident in the Malawi Growth and Development Strategy which has as one of its goals, the mainstreaming of gender equality in the national development process to enhance equal participation of both sexes for sustainable development.

The special Law Commission on Gender-Related Laws has also made recommendations on the elimination of harmful cultural practices. Such practices reinforce the low status of women and girls especially those from impoverished backgrounds and make them more susceptible to trafficking.

This special Law Commission acknowledges the work of the special Law Commission on Gender-Related Laws and recommends that Government champions these recommendations so that they are speedily enacted.

The Commission is also aware that the special Law Commission on the Review of the Children and Young Persons Act⁷¹ made substantial recommendations on child protection, which significantly protect children worst affected by poverty. These recommendations also made express reference to the criminalization of child trafficking and provided for children in need of care and protection. Once again, the Commission recommends that Government spearheads the process that will see the speedy enactment of these recommendations.

68. As above.

69. As above.

70. The Report of the special Law Commission is yet to be published.

71. Malawi Law Commission, 2005; above footnote 21.

In addition, the Commission noted with satisfaction that Government has already enacted a law aimed at improving the status of women and thereby making them less vulnerable to trafficking. This law, the Prevention of Domestic Violence Act,⁷² makes provision for social services for victims of domestic violence and thereby protecting them from destitution. The enactment of the Prevention of Domestic Violence Act is a particularly important development as women in countries in which poverty and violence against women are common are more susceptible to trafficking in persons.⁷³

Further, bearing in mind that the Malawi Growth and Development Strategy is a national document from which sectoral policies must be generated, the Commission recommends that Government must take specific measures within the framework of prevention of trafficking in persons through the institutional framework proposed in this Report⁷⁴ as a sector to operationalize aspects of the Malawi Growth and Development Strategy. Such action will enable any institution charged with the management and coordination of all issues connected with trafficking in persons to come up with income generating opportunities and activities for groups that are most susceptible to trafficking as well as for areas where trafficking in persons is prevalent. This would break the cycle of vulnerability and susceptibility to trafficking in persons due to poverty.

2.2 *Training and awareness raising*

Training and awareness raising among persons who may come into contact with any trafficked person is an essential component of any effective strategy aimed at preventing trafficking in persons. The experiences of a trafficked person may make that person particularly vulnerable to re-victimization if the complaint handling and criminal justice system personnel are not trained in proper victim handling techniques. In addition, victims cannot access assistance and support facilities unless the law enforcers they come into contact with identify them as victims in order to refer them to the appropriate criminal justice and social welfare structures.⁷⁵

The Commission had recourse to a recent criminal case involving a 17 year old girl smuggled into Malawi by a truck driver. In his caution statement, the driver admitted to facilitating the entry of the girl into Malawi without a passport by merely “talking nicely” to the officers of the Department of Immigration at the relevant port of entry.⁷⁶ The Commission noted from this case that where transnational trafficking is concerned, solid border control is a prerequisite for prevention.

⁷² Act No. 5 of 2006.

⁷³ Kartusch A, 2001; above footnote 63, p. 21.

⁷⁴ See Part 7 on Institutional Framework.

⁷⁵ Kartusch A, 2001; above foot note 62, p. 96.

⁷⁶ *The Republic v Cosmas Chagama* Criminal Case No. 117 of 2008 (Unreported).

Whilst strict border control is essential for the prevention of trafficking in persons, the Commission also noted that public awareness and training of all law enforcement officers, is equally as important. The Commission was able to note the importance of public awareness through the *Chagama* case. Training workshops for law enforcement officers in trafficking in persons were conducted by the Malawi Law Commission's secretariat⁷⁷ in 2008. It was because of this training programme that the relative of a law enforcement officer who had attended one such training was able to spot the 17 year old Zimbabwean victim and refer her to the authorities. It was also because of lack of training that the girl had been allowed to enter the country without proper documentation. Hence, the Commission underscores the importance of training and awareness raising as a vital tool towards the prevention of trafficking in persons. The following groups should be targeted—

(a) *Clients or end users of trafficked persons (the general public)*

This particular group are potential sources of information about cases of trafficking in persons as some may not be aware when benefiting from the services of the trafficked person that the person is a victim. By formulating specific programmes aimed at this group, members of the general public will be better informed and consequently more cautious when engaging the services of prostitutes or young domestic or farm labourers.

(b) *Trafficked persons (victims)*

Trafficked persons should be made aware of the nature of social, health, legal and immigration services available to them. Dissemination of information as to non-governmental organizations and other service providers assists in getting trafficked persons to escape from their captors as it gives them a safe place of refuge.

(c) *Law enforcement officers and the Judiciary*

There is need for specialised training of law enforcement officers especially from the Department of Immigration, the Malawi Police Service, and the Malawi Revenue Authority. These officers need regular in-service training on the peculiar nature of trafficking in persons so that they are up to date with local, regional and international developments on current trends in the mode of commission of the offence as well as victim identification techniques. Further, in light of an unspecialized Judiciary where any court has powers to try matters that fall within the jurisdiction of that cadre of courts, members of the Judiciary in their entirety need to be trained on adjudication techniques and evidential issues specifically aimed at trafficking offences. This will enable them to keep up with the ever changing ways in which the offence may be committed both locally and internationally.

⁷⁷ Training workshops were conducted in Lilongwe, Mzuzu and Blantyre as follows: Lilongwe, 7-10 September, 2008; Blantyre, 21-23 September, 2008; and Mzuzu, 1-2 December, 2008. See also the Report under Part 7 on "Institutional Framework".

(d) *Tourism and hotels industry*

Training modules and education materials need to be developed for travel and tourism students, educators and the tourism industry in general as well as officers in the Ministry responsible for tourism. Training programmes must build skills for tourism staff so that they become capable of identifying and responding to situations of exploitation and particularly situations where children may be at risk of sexual exploitation.

(e) *Civil society (including non-governmental organizations and faith-based institutions)*

Although civil society plays a vital role in partnering with Government to provide services to trafficked persons, the awareness campaigns aimed at this group should emphasize victim identification techniques and areas in which Government needs more non-governmental organizations to work in.

(f) *All service providers*

A mandatory obligation to report should be placed upon all citizens in general to report cases of suspected trafficking in persons. The obligation is doubly important with regard to all service providers such as health, education, social welfare, transportation and other providers who must report to relevant authorities, suspected or actual cases of trafficking especially with regard to orphans and vulnerable children at risk of exploitation.⁷⁸

2.3 *Tourism Industry*

In addition to addressing the need for specialized awareness raising and civic education initiatives, the Commission was of the view that the tourism industry in particular requires extra measures targeted at eliminating risks associated with trafficking in persons.

The Commission noted that tourism for the purpose of having sexual relations with a local person in the destination country is a very lucrative industry that spans the globe.⁷⁹ As the term is internationally understood, sex tourism may involve, for example, a national of country X paying a sex travel agency for a package trip to country Y which may include airfare, hotel, food, and women for sex. It is difficult to estimate the magnitude of people engaged in this phenomenon because so many women in the tourism and hospitality industry legitimately work as waitresses, hotel maids, sales clerks, bar girls and golf caddies but they are forced into prostitution as part of their work.⁸⁰

However, there are times when the sexual relations in question may be with a child. Where the person sexually exploited is a child, the phenomenon is termed

⁷⁸ Provisions recommended by the Commission on training and awareness raising appear in later in this Report under Part 7 on "Institutional Framework".

⁷⁹ Third World Women's Health Website, "Prostitution and Sex Tourism" <http://haneydaw.myweb.uga.edu/twwh/traf.html> (Visited 4 March, 2009).

⁸⁰ Rogers B, 1999; "Bitter harvest". *Ms. Magazine*, 9. New York: Liberty Media for Women. Available at <http://www.ms magazine.com/octoct99/bitterharvest.asp> (Visited 4 March, 2009).

child sex tourism. Child sex tourism not only involves the commission of a criminal offence, but it is also a clear and unambiguous violation of human rights⁸¹ under international treaties. In Malawi, a tourist who engages in sex with a child is in contravention of section 23 of the Constitution which protects children from exploitation and hazardous treatment; and violates section 138 of the Penal Code if the child is a girl under the age of thirteen years which prohibits sexual intercourse with a girl below the age of thirteen years. The tourist also breaches the UN Convention of the Rights of the Child (“CRC”) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. A child’s fundamental right to be protected against commercial sexual exploitation is addressed in the CRC. Article 34 of the CRC recognizes the cross-border aspects that are typical of the phenomenon.⁸²

New information increasingly links child sex tourism with trafficking in persons. Links between trafficking and child sex tourism have been noted by the United States of America’s Department of State Office to Monitor and Combat Trafficking in Persons (the “TIP Office”).⁸³ The Protection Project at Johns Hopkins University reviewed the 2006 edition of the TIP Office’s Report which found that 29 countries were referenced as either origin or destination countries for child sex tourism. The aspects of transportation, transfer, harbouring or receipt of persons’ in the trafficking definition therefore make it possible for the tourism industry to be used, voluntarily or involuntarily, in relation to the trafficking of children for sex tourism.⁸⁴

The Commission was unable to find data on instances of organized sex tourism and child sex tourism in Malawi. However, the Commission was aware that the terms are usually understood locally to mean the sexual involvement of a tourist with either an adult or a child respectively and this may include same sex relationships. These relations albeit exploitative, often lack the prearranged element of an organized tour and occur due to the availability of impoverished children and adults who are readily taken advantage of. For example, in 2002, a British national was convicted of sodomizing street children in Blantyre, southern Malawi.⁸⁵ The Commission concluded that sex tourism, in whatever form or manifestation, is happening in Malawi and should not be ignored. In addition, the Commission was informed that in Malawi children are reportedly trafficked internally for sex tourism along the lakeshore areas of Chilumba in Karonga; and the holiday resorts’ area in Chintcheche in Nkhata Bay; Nkhotakota; Salima; and

⁸¹ Tepelus C (ed), 2004; “Code of Conduct to Protect Children from Sexual Exploitation in Travel and Tourism. Overview and implementation examples”, UNWTO, Madrid. Cited in Tepelus C, 2008; “Social responsibility and innovation on trafficking and child sex tourism: Morphing of practice into sustainable tourism policies?” *Tourism and Hospitality Research* (2008) 8, pp. 98–115. doi:10.1057/thr.2008.10; published online 10 March 2008. Available at www.childtrafficking.com/DOCS/ecpat_code_engl_0408.pdf (Visited 21 May, 2009).

⁸² As above.

⁸³ The TIP office issues an annual Trafficking in Persons Report (TIP Report).

⁸⁴ Tepelus C, 2008; above footnote 81.

⁸⁵ *Republic v. Richard Hayles*, Criminal Case No. 655 of 2001(High Court), MSCA Criminal Appeal No. 8 of 2002 (Unreported). His conviction on three counts of sodomy was upheld by the Malawi Supreme Court of Appeal and he was sentenced to 12 years imprisonment but only served 1 year and 6 months of his sentence. He was pardoned by the President and subsequently deported.

Monkey Bay, Mangochi.⁸⁶ Other reports also indicate that sex tourism is firmly established at most of Malawi's tourist destination points. Mangochi, a town on the southern shore of Lake Malawi, is again singled out as becoming a prominent sex tourist destination.⁸⁷

In addition, the Commission received anecdotal submissions during its first National Consultative Workshop⁸⁸ relating to the existence of tourism for the purposes of pornography using young boys and girls. The Commission found no documented evidence on the existence of such incidents but the fact that the issue was raised was nonetheless an indication that women and children need to be protected from such practices.

The Commission further noted the growing use of the Internet in Malawi which if left without regulation, would clearly facilitate or even encourage sex tourism for the purpose of pornography or cyber sex.⁸⁹ Globalization and the use of the Internet to sell sexual services and pornography have contributed to the rise of sex tourism, and have made such exploitation more difficult to combat. The Internet has also facilitated the recent rise in sex tourism by providing a convenient marketing channel. Websites provide potential sex tourists with pornographic accounts compiled by other sex tourists. These websites detail sexual exploits with victims, especially children and supply information on sex establishments and prices in various destinations, including information on how to specifically procure child prostitutes.

Additionally, sex tourism travel agents may publish brochures and guides on the Internet that cater for child sex tourists. The easy availability of this information on the Internet generates interest in sex tourism and child sex tourism and assists child sex abusers in particular, in making their travel plans.⁹⁰ The Commission was aware that the Malawi Communications Regulatory Authority (MACRA) is considering developing regulations on issues relating to use of the Internet. The Commission recommends that MACRA should take into account the protection of children and all other vulnerable groups, from practices such as sex tourism, pornography and cyber sex when it develops this legislation.

The Commission also had recourse to practice and legislation from other jurisdictions in its quest to develop suitable interventions for the prevention of sex tourism in respect of trafficking in persons. The Commission found that in

⁸⁶ The Malawi Law Commission, 2005; *Human Trafficking in Malawi: Research Paper*, Design Printers, Lilongwe.

⁸⁷ ECPAT International, data index on CSEC, 2004. Available at http://www.globalmarch.org/child_labour/image/MALAWI.pdf (Visited 9 February, 2009).

⁸⁸ Held at Crossroads Hotel Lilongwe, 8-9 January, 2008.

⁸⁹ Cyber sex is a virtual sexual encounter in which one or more persons connected remotely via a computer network send each other sexually explicit messages describing a sexual experience. It is a form of role playing in which the participants pretend they are having actual sexual relations. The relative anonymity of Internet communication may provide encouragement to seek out underage cyber sex partners. In the course of such encounters, sexual predators try to send child pornography to others or to arrange real life meetings with minors.

⁹⁰ US Department of Justice <http://www.usdoj.gov/criminal/ceos/trafficking-faqs.html>. (Visited 9 February 2009).

addition to legislation, other models of responsible practice against trafficking have emerged in the last decade from a variety of tourism stakeholders, including non-governmental organizations, international governmental organizations, industry and national tourism authorities. These models of practice have come to complement national laws, including extraterritorial legislation created by many governments to prevent trafficking and sex tourism. Accordingly, the general aims of tourism industry innovations that have led to the development of these models were, first, to create awareness within the industry regarding its potential preventive role, and secondly, to equip the tourism industry with the tools to exercise it. The Commission was particularly interested in measures adopted in Brazil which could easily be adapted to Malawi.

The Commission noted that in 1997, the Government of Brazil was among the first governments to take a clear and official stand against child sex tourism.⁹¹ Brazil took this stand by launching a “No Child Sex Tourism” campaign. Further, in 2002, a Ministry of Tourism was created and a “Sustainable Tourism and Childhood Thematic Chamber” was institutionalized within the structure of the National Tourism Chamber. The principal objectives of the Sustainable Tourism and Childhood Thematic Chamber programme were to assist the creation of public policies on the protection of children in relation to tourism and to promote good practices of the private sector; including the introduction of codes of conduct.⁹² The Commission found this to be a sound and sustainable initiative and accordingly recommends that the Government similarly institute a “Sustainable Tourism and Childhood Thematic Chamber Programme” in the Ministry responsible for tourism. The Commission further recommends that this programme is to be charged with the creation of public policies to protect children in relation to tourism, and to promote good practices in the private sector, including the introduction of Codes of Conduct within the tourism and hospitality industry which protect not only children but vulnerable groups generally.

The Commission noted that Government efforts in curbing sex tourism and trafficking must be complemented by partnerships with non-governmental actors. The example from Brazil shows that in its efforts to protect children and teenagers from sexual exploitation in tourism, the Brazilian Federal Government worked together with non-governmental partners.⁹³ The multi-faceted nature of trafficking and sex tourism and the challenge this poses to child victims calls for the mobilization of tourism stakeholders ranging from the academia, private sector and policy-making bodies; to explore these issues thoroughly. The Commission recommends that Government especially the Ministry responsible for tourism continues to engage with these partners in the discharge of any of its obligations under the **Trafficking in Persons Bill** and in all of the policy recommendations made in this Report.

⁹¹ Tepelus C, 2008; above footnote 81.

⁹² As above.

⁹³ As above.

The Commission went further to review the Tourism and Hotels Act⁹⁴, a largely administrative Act, providing for the control and regulation of the tourism industry through the grant of licences. The Tourism and Hotels Act does not contain express provisions for the prevention of trafficking in persons. Section 9 (d) of the Act provides for the cancellation of licences where a hotel is being used for prostitution or for other unlawful activities. The Act also makes provision for the establishment of a Tourism and Hotels Board⁹⁵ whose functions are connected with the grant of licences and the variation, cancellation or suspension of the same and the classification of hotels into grades.

The Commission was of the view that there is need to amend the Tourism and Hotels Act to take into account the specific illegal purposes of sex tourism.

The Commission's proposed amendments to the Tourism and Hotels Act are attached to this Report as Appendix II.

3.0 CRIMINALIZATION OF TRAFFICKING IN PERSONS

3.1 *Background*

Numerous international studies give various estimates of figures of men, women and children trafficked every year within and across national borders. The International Labour Organization (ILO) estimates that there are 12.3 million people in forced labour, bonded labour, forced child labour and sexual servitude.⁹⁶ According to the U.S. State Department, other studies estimate higher figures, ranging from 4 million to 27 million.⁹⁷ In 2006, a study sponsored by the U.S. Government suggested that approximately more than 800,000 people are trafficked across national borders; this does not include millions trafficked within national borders.⁹⁸ The Trafficking in Persons Report, June 2008 estimates that 80 per cent of transnational victims are women and girls and up to 50 per cent are minors. The numbers of trafficked persons are high because trafficking is a "relatively low risk business, but if successful, garners high payoffs".⁹⁹ According to Interpol, trafficking in women for sexual exploitation is a multi-billion dollar business which involves citizens of most countries and helps sustain organized crime; whilst as a violation of human rights, it destroys the lives of its victims.¹⁰⁰

The Commission concluded that the trafficking in persons and their exploitation, whether internally or internationally; involving children or adults, is a growing industry.¹⁰¹ The uniqueness of trafficking as a criminal activity makes

⁹⁴ Cap. 50:01 of the Laws of Malawi.

⁹⁵ Section 3.

⁹⁶ See U.S. State Department, 2008; *Trafficking in Persons Report 2008*, p. 6 "The Scope and Nature of Modern-Day Slavery," Available at www.state.gov/g/tip/rls/tiprpt/2008/105376.htm (Visited 20 January, 2009).

⁹⁷ As above.

⁹⁸ As above.

⁹⁹ Dolan C, April 2001; "Shattered Innocence, the Millennium Holocaust". A Report on the Exploitation of Children Emanating from the Balkan Crises, p. 12. Available at www.helpsavekids.org (Visited 21 May, 2009).

¹⁰⁰ INTERPOL Website, "Trafficking in Human Beings". Available at <http://www.interpol.int/Public/THB/default.asp> (Visited 23 January, 2008).

¹⁰¹ Dolan C, above footnote 99, p. 5.

it particularly attractive as a money making venture. Unlike smuggling contraband in the form of drugs or weapons; eventually the contraband finds itself in the hands of users, they are used up and cannot be replenished. Human beings, on the other hand, are “recyclable” for “as long as they are alive, they can be used at every step of the trafficking process, sold and resold. There is a cash staying power”.¹⁰² If human beings are kept alive so that they are “moved, used and re-used for a variety of different reasons including migrant workers, domestic workers, domestic slaves, sex slaves, indentured servants, prostitutes, sweat shop workers, garment dungeon workers, begging slaves and even mail order brides, who are then exploited by their own husbands”.¹⁰³ For as long as there is a limitless supply of human beings from poor countries, a limitless supply of customers, whether domestic or international, and a limitless supply of ruthless traffickers,¹⁰⁴ trafficking in persons cannot be eradicated.

For many African governments, the problem of trafficking in persons has only recently been acknowledged.¹⁰⁵ As far as Malawi is concerned, findings from the National Consultative Workshop¹⁰⁶ firmly entrenched the Commission’s view that trafficking in persons is not just an international phenomenon but also one that is occurring within the borders of Malawi as well as outside Malawi involving Malawian victims and perpetrators.

In its background research, the Commission found that in the period leading up to 2004, Malawi came in the spotlight as a country of origin, transit and destination for victims of trafficking in persons from Eastern and Southern Africa. It was also established as a country of origin and transit for victims heading for South Africa and Western Europe, based on the publication of a study by the International Organization for Migration carried out in 2003.¹⁰⁷ Partly because of this study, Malawi was classified in the Tier 2 Watchlist by the 2004 U.S. Traffic in Persons Report.¹⁰⁸

The Commission was aware that issues surrounding external and internal migration, primarily for labour that has at times been exploitative, are deeply entrenched in Malawi’s history. International labour migration from Malawi to the neighbouring mining countries of South Africa, Zimbabwe and Zambia dates back to the historical ties that arose since British colonization and up to the

¹⁰² As above.

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ Fitzgibbon K, 2003; “Modern-Day Slavery? The Scope of Trafficking in Persons in Africa”, *African Security Review Vol 12 No 1, 2003*. Available at <http://www.iss.co.za/Pubs/ASR/12No1/EFitz.html> (Visited 23 January, 2008).

¹⁰⁶ See footnote 88.

¹⁰⁷ The International Organization for Migration, 2003, *Seduction, Sale and Slavery; Human trafficking in Women and Children for Sexual Exploitation in Southern Africa page 2*. Available at www.iom.org.za/CounterTrafficking.html (Visited 21 May, 2009).

¹⁰⁸ US Department of State, June 2004; Human Trafficking in Persons Report June 2004. Available at www.state.gov/g/tip/rls/tiprpt/2004 (Visited 21 May, 2009).

creation of the Federation of Rhodesia and Nyasaland¹⁰⁹ in 1953 when cheap labour from Nyasaland was used to work in the mines of Northern and Southern Rhodesia. Upon the dissolution of the Federation and after attaining independence, labour flows continued out from Malawi, and were formalised in the early 1980s by the Temporary Employment Bureau of Africa (TEBA) which used to recruit Malawian men to work in mines in South Africa and Zimbabwe. Although the migrant workers worked under extremely exploitative conditions, those that returned were able to raise their standard of living and thus the prospect of working abroad attracted many others.

TEBA stopped recruiting labour sometime between 1989 and 1990 after an aeroplane carrying returnees crashed. Since then, there have been a number of difficulties in reintroducing the system despite interest among the potential local labour force. The gap created by the end of centrally organized mine migration to South Africa and other countries has led to informal and illegal smuggling rackets taking people across the border to these countries. The contemporary movements that have emerged are more diverse and less tied to labour as informal trade has developed alongside labour migration.¹¹⁰

The Commission also noted that internally, labour migration flows from rural to urban areas or areas with large agricultural estates are also common. Entire families, including children, are often recruited and transported to work in large tea and tobacco estates in predominantly exploitative conditions. Children are particularly affected by exploitative labour. The Malawi Child Labour Report¹¹¹ established that child labour is extensive in the country. 1.4 million children were or had been involved in child labour, mainly in the agricultural sector (e.g. tea and tobacco estates).¹¹²

From the foregoing, the Commission concluded that trafficking in persons is a prevalent phenomenon in Malawi arising from multi-faceted and deeply ingrained causes.

(a) *Constitutional Rights*

In order to create a preventive legal framework that takes into account the magnitude of the phenomenon as both a global and a Malawian problem, the Commission resolved to first outline a clear criminal justice response with adequate penal sanctions. As the Commission had resolved to create a legislative framework that uses a human rights-based approach, it decided to work within the

¹⁰⁹ The Federation of Rhodesia and Nyasaland, also called Central African Federation, was created in 1953 and embraced the colony of Southern Rhodesia (later Rhodesia and now Zimbabwe) and the territories of Northern Rhodesia (now Zambia) and Nyasaland (now Malawi).

¹¹⁰ Andersson, J, 2006; "Informal moves, informal markets: International migrants and traders from Mzimba District, Malawi", *Oxford Journal of African Affairs*. Vol. 105 No. 420 pp.375-397.

¹¹¹ Government of Malawi, February 2004, "Malawi Child Labour 2002 Report" (ILO, National Statistical office and Ministry of Labour and Vocational Training), Lilongwe, Malawi.

¹¹² As above.

context of the human rights provided under the Constitution. The Constitution provides a firm legal basis for the prohibition of trafficking in persons through its protection of various rights associated with dignity and freedom; the rights most often infringed upon when a person is recruited, transported and exploited.

The Bill of Rights in Chapter IV of the Constitution guarantees a variety of rights. Section 18 provides for the right to personal liberty; section 19 guarantees the right to dignity and prohibition of cruel, inhuman and degrading treatment or torture; section 20 is the general provision prohibiting discrimination on various grounds which include sex, race, colour, language, ethnic or social origin, nationality and religion among other grounds, and also guarantees equal and effective protection against discrimination; and section 23 specifically provides for the protection of children. Under this provision, children are protected from economic exploitation or any treatment, work or punishment that is hazardous or harmful to their health or their physical, mental or spiritual development or that may interfere with their education.

Rights of women against any form of sexual harassment, abuse and violence have been enshrined under section 24 of the Constitution. These rights are frequently infringed when women are exploited through prostitution, other forms of sexual exploitation or forced labour or services. This provision also prohibits discrimination against women on the basis of gender and marital status. It also empowers the State to pass legislation to eliminate customs and practices that discriminate against women. Unless the discrimination of women is eliminated, more and more women will find themselves marginalized and vulnerable to the tactics of traffickers. Expressly in line with the Trafficking Protocol, section 27 prohibits slavery and servitude, forced, tied or bonded labour. Finally, for purpose of this Report, section 31 provides for fair and safe labour practices.

The Commission was of the view that the constitutional rights cited above are critical to setting the standards necessary to guide the development of a legislative framework aimed at preventing and eliminating trafficking in persons; prosecuting offenders; and providing protection, care and support to victims. The Commission committed itself to using the guidance of the constitutional rights in the development of the substantive provisions of the **Trafficking in Persons Bill**.

(b) Definition of “Trafficking in Persons” under the Trafficking Protocol

The Commission referred to the Trafficking Protocol which defines trafficking in persons in a way that criminalizes the key constitutive element of the *act* of trafficking in persons. The Commission considered it necessary to adopt the definition in national legislation because Malawi ratified and acceded to the CTOC and the Trafficking Protocol. The definition was carefully drafted to

capture the multi-faceted nature of trafficking in persons at international level and has been the basis of definitions drafted by signatories to the Trafficking Protocol for the criminalization of both internal and external trafficking. The Trafficking Protocol defines trafficking in persons as follows:

“(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this Article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this *does not involve any of the means*¹¹³ set forth in subparagraph (a) of this Article;

(d) “Child” shall mean any person under eighteen years of age.”¹¹⁴

The Commission, having examined the above definition, isolated three elements as follows—

- (a) acts that constitute trafficking in persons;
- (b) the means that are employed in executing the acts; and
- (c) the objective of the acts in question.

These three elements must be included in the formulation of the offence of “trafficking in persons” in order to comply with Article 5 of the Trafficking Protocol. Article 5 obliges State Parties to adopt legislative and other measures as may be necessary to establish as criminal offences all three elements in Article 3 of the Protocol when committed *intentionally*.¹¹⁵

3.2 *The Offence of Trafficking in Persons*

In view of the foregoing, the Commission recommends that the definition of trafficking in the Trafficking Protocol be adopted for the purposes of the

¹¹³ Emphasis supplied.

¹¹⁴ See Article 3 of the Trafficking Protocol.

¹¹⁵ Emphasis supplied.

Trafficking in Persons Bill, not as a definition but as a substantive provision.

The Commission also consulted various stakeholders at three regional consultative workshops, in the north, south and centre¹¹⁶ of the country to seek guidance on elements to be included in the formulation of the offence of trafficking in persons. Participants at all three workshops generally agreed that in addition to incorporating the elements of the definition in the Trafficking Protocol, the offence should be formulated with sufficient penalties to deter traffickers. The Commission agreed with this position since it has been already noted that trafficking in persons is, by its very nature, a very lucrative business. As such, the Commission recommends that the offence of trafficking in persons should have significant deterrent sanctions so that it should be punished by a maximum term of imprisonment of fourteen years without the option of a fine. This will prevent perpetrators from drawing on their resources to pay a fine without suffering proportional punishment to the harm inflicted and without being given a chance to rehabilitate.

Most participants at all three regional workshops also generally agreed that, in keeping with the Trafficking Protocol, the offence of trafficking Children needs to be formulated separately from the offence of trafficking in persons. The special Law Commission on the Review of the Children and Young Persons Act reiterated this view, making specific reference to the vulnerability of children. As noted earlier, under the Trafficking Protocol, if the trafficked person is a child, the offence of trafficking is committed regardless of whether or not any specific means have been used in the commission of the offence. The Commission agreed that a child requires the widest protection the law can afford to give and therefore, it should be immaterial that the child consented to the commission of the offence.

The Commission noted that other jurisdictions¹¹⁷ deal with the offence of child trafficking by making it an aggravated feature of the main offence of trafficking in persons. The Commission however resolved that in order to highlight the importance of child protection in the context of trafficking in persons where the consequences of the commission of the offence have very serious repercussions, the offence of child trafficking should stand alone. The Commission recommends that as this offence is more serious in nature, it should attract a higher sentence of twenty-one years, without the option of a fine so as to have maximum deterrent effect. Technically, however, the offence of child trafficking will still fall under the general terminology of trafficking in persons.

The Commission recommends the following provisions to criminalize trafficking in persons under the **Trafficking in Persons Bill**—

¹¹⁷ See the Philippines and Tanzania.

Trafficking in
persons

...—(1) A person who recruits, transports, transfers, harbours or receives another person through—

(a) threats or use of force;

(b) coercion;

(c) abduction;

(d) fraud;

(e) deception;

(f) abuse of power or position;

(g) abuse of position of vulnerability; or

(h) giving or receiving of payments to obtain consent of a person having control of that other person,

for purposes of exploitation of that person commits the offence of trafficking in persons.

(2) The consent of a trafficked person is immaterial where any of the means set out in subsection (1) (a) to (g) have been used.

(3) A person who commits an offence of trafficking in persons shall be liable to imprisonment for fourteen years without the option of a fine.

Trafficking in
children

...—(1) Notwithstanding section ...,¹¹⁸ recruitment, transportation, harbouring or receipt of a child for the purposes of exploitation constitutes the offence of trafficking in persons regardless of whether or not—

(a) the commission of the offence includes the means set out in section ... (1) (a) to (h); or

(b) the child consented to the commission of the offence.

(2) A person who commits an offence of trafficking in persons where the trafficked person is a child shall be liable to imprisonment for twenty-one years without the option of a fine.

The Commission nonetheless noted that the term “exploitation” is not defined at international law and, furthermore, that the Trafficking Protocol intentionally leaves it undefined.¹¹⁹ A State may choose to limit its interpretation of this term to forced participation in the sex industry (which is consistent with forced labour, slavery or servitude) or rather to interpret these terms to apply to

¹¹⁸ See the Philippines and Tanzania.

¹¹⁹ Section on “Trafficking in Persons”.

any and all participation in the sex industry.¹²⁰ For the purposes of clarity in the proposed law, the Commission resolved to define, in the definition section of the **Trafficking in Persons Bill**, the term “exploitation”.

The Commission also noted that there is need to clearly set out the definition of “child” in the **Trafficking in Persons Bill**. While the Trafficking Protocol definition deems a child to be a person under the age of eighteen years, the Commission observed that various laws have different formulations for the age of child.¹²¹ The special Law Commission on the Review of the Children and Young Persons Act¹²² came up with “eighteen” as the cutting off point for the age of a child. Having taken into account all relevant considerations, including international instruments, the Commission recommends that the age of a child under the **Trafficking in Persons Bill** shall be eighteen years.

Hence the Commission recommends the following definitions under the **Trafficking in Persons Bill**—

“child” means a person below the age of eighteen years;

“exploitation” means—

(a) the extraction of work or services from any person;

(b) the participation of a person in all forms of commercial sexual activity such as prostitution, sexually-explicit performance, forced prostitution and forced participation in the production of pornography;

(c) the removal of body parts or the extraction of organs or tissue; or

(d) any other practice in terms of which it cannot be said that the person participated willingly;

3.3 *Aggravated Forms of the Offence of Trafficking in Persons*

Although the offence of trafficking in persons is already an extremely serious one, the Commission noted that there are circumstances surrounding the commission of the offence that would make it even more serious and hence warrant more severe punishment. In its comparative research of other jurisdictions,¹²³ the Commission found that trafficking in persons legislation in these jurisdictions tends to qualify more serious forms of the offence and to attach penalties commensurate with the level of seriousness.

¹²⁰ As above. The delegates to the Protocol negotiations expressly agreed not to define “sexual exploitation” and “exploitation of the prostitution” of others and included the following explanation in the *travaux préparatoires* (Sec. 64) “The *travaux préparatoires* indicate that this Protocol addresses the exploitation of prostitution of others or other forms of sexual exploitation are not defined in the Protocol. The Protocol is therefore without prejudice to how State Parties should address prostitution in their respective laws.”

¹²¹ See Malawi Law Commission, 2005; above footnote 21, p.108.

¹²² As above. See p. 17 for a discussion of these Laws.

¹²³ The Philippines, The Union of Myanmar, Ireland, Mozambique and Tanzania all single out aggravated forms of the offence of trafficking in their formulation of anti-trafficking provisions.

The Commission considered various circumstances surrounding the commission of the offence of trafficking in persons that would be serious enough to constitute the aggravated forms of the offence. The Commission also took time to discuss the levels of sentences for these offences as follows—

(a) Abuse of legal processes and persons in loco parentis¹²⁴ to traffic a child

The Commission was concerned that as the number of orphans continues to grow they will be susceptible to more abuse at the hands of unscrupulous adults and hence the importance of safeguarding them under a strict legal scheme. Thus, the offence of trafficking committed on them by guardians or other persons in *loco parentis* ought to attract more serious penalties.

Currently, according to the Malawi Multiple Indicator Cluster Survey 2006,¹²⁵ more and more children are becoming orphaned due to HIV and AIDS-related deaths of their parents. To date, nearly 13 per cent of children aged 0-17 years are orphans; meaning they have lost one or both parents and 17.4 per cent of children are not living with a biological parent.¹²⁶ The extended family structure that previously took care of such children is diminishing. The lack of a social security system drives these children to destitution which makes them most susceptible to exploitation by those in their circle of trust. Other children in these situations resort to prostitution whilst others will align themselves with a possible “trafficker” for a better life lured by “needs, hopes and dreams”.¹²⁷ Once taken away from any familiar family setting, the children are susceptible to coercion, torture, sexual and labour exploitation, geographical, physical, emotional and physical isolation and loneliness. For the girl child, and in some cases the boy child, non-consensual sexual intercourse is also a consequence of trafficking which may sometimes lead to infection and death.¹²⁸ It is unfortunate when all this occurs because the person placed in charge of the child has facilitated or conducted the trauma occasioned on the child.

Although trafficking of a child was noted by the Commission as a more serious offence than the offence of trafficking an adult, commission of the offence by persons in *loco parentis* is even more serious. Trafficking can also be aggravated further where legal processes such as adoption are abused as a means to recruit the child; or the recruitment of a child is done or consented to by a relative. The Commission also noted that in certain instances, law enforcement officers, public servants or traditional leaders charged with ensuring the welfare of children breach their duty and traffic children. This also aggravates the commission of the offence. The Commission considered instances where “sham” non-governmental organizations may be formed under the guise of assisting

¹²⁴ This refers to situations in which a person exercises parental rights and responsibilities over a child in the place of a parent. Examples include guardians or foster parents.

¹²⁵ Government of Malawi, 2007; *Malawi Multiple Indicator Cluster Survey 2007*, (National Statistical Office and UNICEF) Zomba.

¹²⁶ As above.

¹²⁷ International Organization for Migration, May 2003; above footnote 107.

¹²⁸ Dolan C; April 2001; above footnote 99

children, while facilitating their recruitment for trafficking. Such circumstances where the perpetrators purport to act in an official capacity or in breach of a relationship of trust were also deemed aggravating factors by the Commission. In other instances others charged with a moral duty to the public such as religious leaders could also commit the offence and hence make it more serious.

The circumstances above are considered aggravating factors because they involve the abuse of processes or positions of trust which were instituted to protect children in the first place. The Commission noted that the prevailing socio-economic challenges in Malawi brought about by the rise in orphans due to the HIV and AIDS epidemic make it essential that close family members, religious leaders and faith-based organizations, non-governmental organization, legal processes in relation to custody of children as well as adults in positions of responsibility actually safeguard the welfare of children; and most especially, orphans. Instead, it is these very people and organizations who might expose the child to a magnitude of ills. The Commission thus recommends that the aggravated form of the offence may only be committed by close relatives or guardians charged with a moral or legal duty to protect the well-being of the child and to provide for the child's welfare. It may also be committed by public officials, traditional leaders and religious leaders.

Where the offence is committed by relatives, the Commission recommends that the term "relative" should be defined in the interpretation section of the **Trafficking in Persons Bill** to limit it to only those relatives that have a legal or moral obligation to provide care and protection for the child such as parents, grandparents, siblings or guardians. The Commission was aware that the term "guardian" has a legal connotation and reference to guardian would automatically connote a legally appointed guardian. However, the reality in Malawi is that some children especially orphans are kept by relatives who are loosely termed "guardian", even though such "guardianship" is not awarded by a court. As many instances of abuse of children in the country are committed by such informal guardians who are keeping and maintaining a child, the Commission recommends that a stipulation of this type of relationship should be included in the definition of "relative".

The Commission had recourse to the findings and recommendations of its sister special Law Commission on the Review of the Penal Code¹²⁹ which recommended the criminalization of sexual relations between a child under the age of eighteen years and a person in a position of responsibility. The special Law Commission on the Review of the Penal Code captured the scenario as follows—

“(i) a step parent, a foster parent, a person for whom the child is a dependant or a ward; or

(ii) a person who, at the time the offence was committed, the child was living with the person as a member of that person's family or was under the person's family care and protection.”

¹²⁹ Malawi Law Commission, 2000; above footnote 18, pp158-159.

The Commission was of the view that this definition captures “guardians” not appointed by the courts and therefore resolved to adapt this definition under the **Trafficking in Persons Bill**.

(b) Exposure to health risks

In many instances, exploitation of the trafficked person may lead to very serious risks to their health. These risks often lead to actual psychological or physical trauma. In other instances, the risks may lead to the victim actually contracting serious diseases through exposure to infection or to developing certain medical conditions. Other instances where the health of a trafficked person may be compromised include developing occupational health related complication, and being forced to terminate a pregnancy especially under less than sanitary conditions.

Particularly serious trauma may be experienced by a trafficked person where the act of trafficking is executed for the purposes of organ removal or extraction of body parts or tissue. A number of reasons make trafficking for the purpose of harvesting body parts very serious. Firstly, trafficked persons for the purpose of organ removal are often recruited from vulnerable groups (the extremely poor, persons with disabilities, women and children).¹³⁰ Secondly, traffickers involved in the sale of body parts, organs or tissue are often part of transnational organized crime groups¹³¹ engaged in the wholesale commodification and commercialization of these items. Organized crime groups lure their victims abroad under false promises and extract, or convince or force them to sell, their organs¹³².

Trafficking in persons for the purpose of removal of organs, body parts or tissue is addressed by the Trafficking Protocol to cover those situations where a person is exploited for the purposes of a trafficker obtaining profit in the “organ market” and situations where a person is trafficked for the purpose of the removal of their organs, body parts, or tissue¹³³ for purposes of witchcraft and traditional medicine. In the former situation, market forces drive supply and demand; those in desperate need of an organ transplant will purchase an organ from those who are desperately poor, or from “brokers” who forcibly or deceptively obtained the organ. The latter situation involves the removal of skulls, hearts, eyes and genitals which are usually sold and used to purportedly increase wealth, influence, health or fertility.¹³⁴

¹³⁰ United Nations Global Initiative to Fight Human Trafficking (UNGIFT), 2008, “011 Workshop Human Trafficking for the Removal of Organs and Body Parts”. Background Paper, The Vienna Forum to fight Human Trafficking, 13-15 February 2008, Austria Center Vienna <http://www.unodc.org/documents/human-trafficking/Marika-Misc/BP011HumanTraffickingfortheRemovalofOrgans.pdf> (Visited 20 February, 2009).

¹³¹ As above

¹³² As above.

¹³³ Article 3.

¹³⁴ UNGIFT 2008; above footnote 128, citing Scheper-Hughes, N., 1999; “Bodies of Apartheid: the ethics and economics of Organ Transplantation in South Africa”, Center for African Studies, September 28, 1999. Available at <http://sunsite.berkeley.edu/biotech/organswatch/pages/bodiesapart.html> (Visited 20 February, 2009).

Thirdly, the fact that recipients of the organs must pay a much higher price than donors receive makes the offence more serious. The commission of this offence in relation to organ, body parts and tissue extraction transgresses upon issues of medical ethics as it can be distinguished from other forms of trafficking in persons in terms of the sectors from which traffickers and organ “brokers” derive the body parts. It is doctors and other healthcare practitioners, ambulance drivers and mortuary workers who are often involved in organ, tissue or body part extraction.¹³⁵ Health care personnel are endowed with trust in the care and general wellbeing of patients and their bodily integrity and as such should not be involved in any abuse of this trust.

The Commission noted that instances of body parts removal and organ extraction have been reported in Malawi. The Malawi “Sixth Periodic Report to the United Nations Committee on the Elimination of All Forms of Discrimination against Women”¹³⁶ recorded that in May, 2003 seven people accused of removal of organs and trafficking in human body parts were sentenced to fourteen years imprisonment. These facts arose in the case of *Bokhobokho and another v. The Republic*.¹³⁷ Although there are no other recorded cases of body parts removal and organ extraction by health care workers for transplantation, this case proves that exploitation through organ extraction and removal of body parts is a real issue, which if not addressed by the law could spiral into the different aggravated forms highlighted above.

Another health risk considered by the Commission is usually occasioned as a result of sexual exploitation which may end up with a woman or girl falling pregnant. The Commission was of the view that pregnancy or forced abortion of a trafficked person’s pregnancy also constitutes health risks that aggravate the commission of the offence. In other circumstances, sexual exploitation may lead to exposure to HIV and AIDS or other sexually transmitted infections.

Further, the Commission noted that there may be some instances where traffickers may take advantage of a pre-existing health condition to ease the commission of the offence such as targeting a mentally ill person. In order to protect such persons, the Commission decided that such conduct should constitute an aggravated form of the offence.

The last category of health risk that the Commission considered was in consequence to prolonged forced labour which may also expose trafficked persons to serious diseases or other health related occupational hazards. These include poor posture-related conditions due to prolonged farming and exposure to hazardous chemicals such as fertilizers and insecticides.

Unlike organ, tissue and body parts extraction and insanity, death or pregnancy which are more common types of health risks associated with trafficking in persons, the Commission resolved to use the phrase “exposure to

¹³⁵ As above.

¹³⁶ CEDAW/C/MWI/6, 20 October 2008.

¹³⁷ Malawi Supreme Court of Appeal, Criminal Appeal No. 10 of 2000 (unreported).

substantial health risk” to cover miscellaneous health risks listed above, as an aggravating feature of the offence of trafficking.

(c) *Number of perpetrators or trafficked persons*

The Commission noted that under the general principles of the law the fact that a crime is committed by more than one person such as by an organized crime group or syndicate, automatically makes it an aggravating factor in the commission of the offence.

The CTOC defines an organized crime group as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.¹³⁸ The Commission decided to make any offence committed by an organised group an aggravating factor.

The Commission noted that in other jurisdictions,¹³⁹ the number of trafficked persons and the length of time in captivity also play a role in contributing to the seriousness of the offence. The Commission similarly recommends that where there are a number of trafficked persons, the offence should be deemed to be aggravated. However, unlike the practice in other jurisdictions where a specific number of trafficked persons is mentioned in the legislation, the Commission observed that it may not always be easy to draw the line as to determine that the offence is less serious because there are, for example, only two trafficked persons, but more serious because there are three trafficked persons. In order to avoid such arbitrary distinctions, the Commission recommends a formulation that gives the court the discretion to determine the number of trafficked persons that would render the offence aggravated taking all the circumstances of the case into account.

At one point the Commission also considered including the length of time a trafficked person spends in captivity and the trauma experienced by the trafficked person to be included as aggravating factors of the offence. Upon deliberation, the Commission resolved that this was not necessary as the courts automatically look to the suffering of the trafficked person either in terms of length of time in captivity or the psychological trauma experienced when deciding upon a sentence. The Commission decided to leave these issues to judicial discretion.

The Commission recommends that in all the instances detailed above, the offence that is committed should be deemed aggravated and as such the more severe penalty of life imprisonment should be imposed. Once again, the Commission recommends that there should be no option of a fine for reasons given earlier.

¹³⁸ Article 2 of the CTOC.

¹³⁹ For example, the Philippines.

The Commission recommends the following provision in relation to aggravated forms of trafficking in persons under the **Trafficking in Persons Bill**—

Aggravated form of trafficking ...—(1) An offence of trafficking in persons shall be deemed to be aggravated if committed in any of the following circumstances—

(a) the judicial processes of adoption, fosterage, guardianship, or wardship have been used to recruit a child;

(b) the accused is a relative of the child;

(c) the trafficked person is of unsound mind;

(d) the offence is committed by an organized crime group;

(e) the offence is committed by a public servant, a religious leader, a traditional leader or any person acting in an official capacity in the exercise of his duties;

(f) the offence is committed by a person purporting to act in an official capacity, and his act is an abuse of authority or moral decadence;

(g) the offence is committed for the purpose of removing body parts or extracting tissue or organs;

(h) on the occasion of the commission of the offence the trafficked person—

(i) dies;

(ii) develops a mental condition;

(iii) becomes pregnant or is forced to terminate a pregnancy;

(iv) suffers mutilation, disfigurement or permanent bodily injury; or

(v) is exposed to any other substantial health risk.

(2) A person who commits an offence of trafficking in persons in any of the circumstances in subsection (1) shall be liable to imprisonment for life without the option of a fine.

In view of the foregoing, provisions, the Commission recommends the following definitions for the avoidance of any doubt with regard to the terms used—

“AIDS” means Acquired Immune Deficiency Syndrome;

“HIV” means the Human Immuno-deficiency Virus which causes AIDS;

“organized crime group” means a group of three or more persons, existing for a period of time and acting in concert with the aim of committing an offence under this Act;

“relative” means—

(a) a parent, step parent, foster parent, grandparent, sibling, guardian or any person who has legal custody over the child or to whom the child is a dependant; or

(b) at the time the offence under the Act is committed, a person who is living with the child as a member of that person’s family or was under the person’s family care and protection;

“substantial health risk” means—

(a) infection with—

(i) HIV;

(ii) a sexually transmitted disease;

(iii) any other disease; or

(b) any medical condition occasioned as a result of the exploitation;

3.4 *Additional Penalties*

The Commission was of the view that the penalties should not stop at imprisonment where the aggravated form of the offence is committed. The Commission was concerned that after serving their sentence, persons previously convicted of an offence of trafficking in persons may easily put themselves forward for nomination to public office or even continue to work in an official capacity that is connected with children. While the Commission was aware that in some instances, a person may be rehabilitated and his or her conviction may be spent thus rendering that person eligible to run for public office, the length of time before which such person can run for public office must be clearly spelled out.

The Commission was of the view that it is necessary to give the court guidance that an offence of trafficking in persons is one constituting “dishonesty or moral turpitude” and thus rendering a person ineligible to stand for public office. The question has arisen for determination by the courts¹⁴⁰ when deciding whether a person is eligible to run for the office of a Member of Parliament or President or Vice President under the Constitution¹⁴¹ due to a past conviction regarding whether the criminal conduct in question amounted to “dishonesty and moral turpitude”. The courts will then be easily guided that where a person is convicted of an offence of trafficking in persons, that person cannot stand for election or nomination or appointment into public office until seven years have elapsed after the conviction. The convict may also not be appointed into an office

¹⁴⁰ *John Tembo and Kate Kainja v. The Attorney General*, Civil Cause No. 50 of 2003, High Court, Mzuzu District Registry (unreported).

¹⁴¹ Sections 51 and 80 of the Constitution.

established by the Constitution until the same period has elapsed. The Commission further recommends that such a person should also not be allowed to work with children for a period of seven years following the conviction. If the accused person committed the offence whilst employed or operating a non-governmental organization, that non-governmental organization, should be closed and deregistered.

The Commission recommends the following provisions under the **Trafficking in Persons Bill**—

<p>Trafficking in persons an offence involving dishonesty or moral turpitude</p>	<p>... An offence of trafficking in persons constitutes an offence of dishonesty or moral turpitude for purposes of sections 51 and 80 of the Constitution.</p>
<p>Prohibition against working with children</p>	<p>... A person convicted of an offence of trafficking in persons is ineligible to work in any capacity with children for a period of seven years following the conviction.</p>
<p>Court to order closure of establishment</p>	<p>... Where an offence of trafficking in persons is committed by a person acting or purporting to act in an official capacity for a non-governmental organization or other establishment or body, the court may, upon conviction, order the closure and de-registration of the non-governmental organization, establishment or body under which the person acted.</p>

3.5 *Criminalization of attempts and aiding and abetting the Commission of an Offence*

The Commission noted that internationally most cases of trafficking involve activities of organized crime groups carrying out different elements of the offence. These include recruitment; transportation; renting or leasing accommodation or escorting trafficked persons, or the arrangement of their travel, employment or other formalities.¹⁴² Whilst some of these acts may be prosecuted under a substantive offence of trafficking in persons, there may be minor acts such as the arrangement of employment possibilities, or the occasional escorting of trafficked persons between their accommodation and place of work. These acts may not be sufficient to raise criminal liability for a substantive offence but may raise questions of aiding, abetting, counselling or procuring of persons to commit the offence. Such occasional auxiliary activities may also raise questions as to whether the people involved in them are parties to an offence of trafficking. It is necessary to ensure that all actors involved in any part of the process are prosecuted.¹⁴³ The Commission was also mindful of the submission by

¹⁴² Kartusch A, 2001; above footnote 63, p.47.

¹⁴³ As above.

participants at all three regional consultative workshops that all people involved in the commission of the offence from the country or place of origin to the place of destination should be included as parties to the offence in the **Trafficking in Persons Bill**.

The criminalization of attempts is crucial in order to ensure that traffickers will be prosecuted even if the trafficking cycle is not completed. An example of this situation would be where the person who was supposed to receive the trafficked persons in the destination country does not receive them because they managed to escape or because he was arrested by the Police in the interim. It is the Commission's view that such a person should not escape prosecution merely because the offence was not completed.¹⁴⁴

The Trafficking Protocol urges State Parties to also criminalize attempts to commit the substantive offence of trafficking in persons, participation as accomplices in trafficking and related offences and organizing or directing other persons to commit such offences.¹⁴⁵ The requirement to criminalize attempts to commit the offence as well as aiding and abetting the commission of the offence of trafficking in persons is subject to the basic concepts of a State Party's legal system. There is no obligation to provide for these matters separately if the legal system already provides for them.

The Commission noted that sections 21 to 23 of the Penal Code comprehensively provide for attempts as well as the parties to an offence. Under section 21 of the Code, any criminal offence is deemed to have been actually committed by every person who participates in it, who commits the offence for the purpose of enabling or aiding or abetting another person to commit the offence, who aids or abets another person to commit the offence, or who counsels or procures any other person to commit the offence. These persons may be charged and convicted as though they actually committed the offence. Section 22 of the Code refers to joint offenders committing the same offence and provides that each offender shall be deemed to have committed the offence as the main offender. Finally Section 23 of the Code provides that where a person counsels another to commit an offence, that person will be liable even if the offence is eventually committed in a different manner to that originally planned.

The Commission considered the provisions in the Penal Code and nonetheless decided that attempting, aiding, abetting, counselling or procuring, to commit an offence of trafficking in persons should be expressly provided for under the **Trafficking in Persons Bill**. This will ensure ease of prosecution so that ultimately all actors involved at every stage are prosecuted under one statute. In keeping with the general principles of law surrounding attempts, aiding, abetting, counselling and procuring as set out under the Penal Code, the Commission recommends that the penalties for these offences should be the same as the penalties for the principal offence of trafficking in persons as perpetrators will be deemed to have committed the principal offence.

¹⁴⁴ As above.

¹⁴⁵ Article 5 (2).

The Commission recommends the following provisions under the **Trafficking in Persons Bill**—

Aiding or
abetting
trafficking
in persons

...—(1) Where any offence under this Act is committed, each of the following persons is deemed to have taken part in the commission of the offence and may be charged and convicted with the actual commission of the offence—

(a) every person who attempts to do the act or to make the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of aiding or enabling another person to commit the offence;

(c) every person who aids or abets another person to commit the offence;

(d) every person who counsels or procures any other person to commit the offence; or

(e) every person who being an employee or agent, acted in the course of employment, or under instructions.

(2) A conviction of counselling or procuring the commission of any offence under this Act entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or commit to do any act of such nature that if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission and he may be charged with himself doing the act or making the omission.

3.6 *Benefiting from the Exploitation of Trafficked Persons*

The Commission also considered other criminal acts incidental to the commission of an offence of trafficking in persons that may not by itself be sufficient to raise the criminal liability necessary for the commission of the principal offence or attempt. One such example that the Commission considered was the act of benefiting from the exploitation of trafficked persons.¹⁴⁶ The perpetrators of such an offence may not know that they are engaging the services of a trafficked person. Hence, such perpetrator may not have intended to play any part in the trafficking cycle.

¹⁴⁶ This is in line with Article 9 (5) of the Trafficking Protocol which urges States Parties to adopt or strengthen legislative or other measures, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Participants at all regional consultative workshops suggested that all clients, customers or other end users of trafficked persons should be criminally liable for their actions if they are aware that they are benefiting from the exploitation of a trafficked person. The Commission supports this view especially as the Trafficking Protocol calls for criminalization only in instances where the offence is committed intentionally.¹⁴⁷

The Commission noted that other jurisdictions that criminalize the act of benefiting from the services of a trafficked person tend to limit the exploitation to prostitution.¹⁴⁸ The Commission however took the view that perpetrators of this offence may unintentionally benefit from exploitation of trafficked persons in other ways such as by being the end users of body parts, organs or tissue extracted through trafficking. The Commission recommends the incorporation of the offence of benefiting from exploitation in any form under the **Trafficking in Persons Bill** as follows—

Benefiting from exploitation of trafficked person	... A person who intentionally benefits from the exploitation of a trafficked person or causes or enables another person to benefit from the exploitation of a trafficked person for any purpose, commits an offence and shall be liable to imprisonment for five years.
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3.7 *Obligation to report Trafficking in Persons and Related Activities*

The Commission noted that trafficking in persons thrives on its clandestine nature. Unless members of the general public are aware of the manner in which the offence is perpetrated and can recognize trafficked persons, the offence shall continue to go undetected. In order to complement the recommendations on civic education and public awareness made earlier in this Report, the Commission further recommends that a mandatory duty to report should be imposed upon members of general public when they witness the commission of any offence under the **Trafficking in Persons Bill** or suspect that an offence is about to be committed. The Commission recommends the following provision—

Duty to report	... — (1) A person who knows, suspects or has reason to suspect that an offence under this Act is being, has been or is about to be committed, shall as soon as is practicable, report this to the Police.
	(2) A person who, contrary to subsection (1), fails to report to the Police, commits an offence and shall be liable to a fine of K200,000 and to imprisonment for two years.
	(3) The Officer-in-Charge of a police station to which a report under this section has been made shall ensure that the identity of the informant is not revealed.

¹⁴⁷ Article 5 (1).

¹⁴⁸ See section 8 of the Anti-Trafficking in Persons Act of Tanzania, Act (No. 6 of 2008), and Anti-Trafficking Law, Philippines (Republic Act, No. 9208 of 2003), section 11.

3.8 *Liability of Legal Person*

As noted earlier, the scope of application of the **Trafficking in Persons Bill** extends to a legal person which may be a company, a body corporate, a body of persons, a society or an association. The Commission debated at length whether individual liability should ensue against responsible officers individually or whether their corporate liability would suffice. The Commission resolved the issue by recommending that where a legal person is liable, a fine should be payable commensurate with the crime committed but this should not absolve the individual employees or directors from personal liability if such personal liability can be proved. The Commission found guidance under section 24 of the Penal Code which provides that where an offence is committed by a company, a body corporate, a body of persons, society or association; every person in control or management of that body shall be punished unless it is proved that he or she was not aware that the offence was being; or was intended; or was about to be committed; or that he or she took all reasonable steps to prevent its commission.

Once again, the Commission resolved to repeat the provisions in the Penal Code under the **Trafficking in Persons Bill** so as to ease the process of prosecution:

Liability of
legal person

...Where an offence under this Act has been committed by a legal person, any person who, at the time of the commission of the offence was in any manner responsible for the management of any affairs of the legal person shall be liable for the offence unless he proves that—

(a) the offence was committed without his knowledge, consent or connivance; or

(b) he exercised all diligence to prevent the commission of the offence under the circumstances.

4.0 CRIMINALIZATION OF ACTIVITIES RELATED TO TRAFFICKING

As noted earlier, the Trafficking Protocol obliges State Parties to adopt legislative and other measures necessary to criminalize the offence of trafficking in persons when the offence is committed *intentionally*.¹⁴⁹ The Commission however noted that in certain instances, a person may commit different offences that ease or facilitate the commission of an offence of trafficking without that person actually intending to commit the offence of trafficking itself. These different offences need to be acted upon under the proposed law if they are not provided for elsewhere under any written law.

4.1 *Smuggling*

Smuggling is an example of a separate offence which may facilitate trafficking. The Commission first noted that the CTOC and its two supplementary

¹⁴⁹ Article 5, emphasis supplied.

Protocols make a distinction between “trafficking in persons” and “human smuggling” that should clearly be appreciated. While trafficking in persons is defined by the Trafficking Protocol, smuggling of migrants is defined in a different Protocol¹⁵⁰ as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” Although these two concepts are distinct, in practice, this distinction may be blurred as once a person is smuggled into another country, he or she ends up in a precarious position because of his or her illegal status and is susceptible to exploitation. Traffickers may take advantage of a smuggled person’s status and exploit that person in the same manner as a trafficked person, keeping them in a perpetual state of bondage for forced labour, sexual exploitation or other form of exploitation.

The Commission therefore acknowledged that smuggling is a separate offence which would not warrant prosecution under the **Trafficking in Persons Bill**. It is nonetheless necessary to distinguish trafficking in persons and smuggling so as to simplify the process of victim identification and to provide redress for situations which may appear to involve smuggling only but nonetheless present challenges to the anti-trafficking framework. The Commission highlighted some of the significant distinctions between trafficking in persons and migrant smuggling to assist in this endeavour as follows—

(a) *Consent*

In migrant smuggling, the person being smuggled intends and consents to being transported from one country into another in which he is neither a citizen nor a permanent resident. The smuggling may be undertaken in dangerous or degrading conditions. Trafficked persons, in contrast, do not agree to being transported or moved across borders, or if they do, they are often deceived about the purpose for which they are moved or transported.

(b) *Exploitation*

When the smuggled migrants arrive in the destination country, they are at liberty to go about their intended business and the relationship with the smuggler comes to an end. In contrast, the trafficker, upon arrival in the destination country, commences exploitation of the trafficked person or sells them on to others that then begins the exploitation in various forms.

(c) *How money is made*

Traffickers make their money through the exploitation of the persons they traffic or by selling them on to third parties. On the other hand, smugglers receive payment from the smuggled migrants or their relatives. They charge fees to perform a service.

¹⁵⁰ The Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Article. 3, hereinafter referred to as the “Migrant Smuggling Protocol”.

(d) *Transportation*

Trafficking in persons can be committed within the borders of one country or indeed across borders of different countries and at times victims of trafficking may sometimes possess genuine travel documents and have approval to enter the destination country. Migrant smuggling however always occurs across borders, and always illegally since the clients have no permission to enter the countries they seek to be smuggled into.

Where it is established that a person is a *bona fide* smuggled migrant, the legal consequences are different and the perpetrators are best dealt with under immigration laws for irregular entry or regular entry facilitated by fraudulent means. Migrants who are smuggled across borders ostensibly violate national laws of the countries to which they seek entry. They do so willingly under no compulsion. To that end, smuggled migrants are law breakers who must face all consequences of violating immigration laws of the destination country. They would naturally be liable to punishment under the laws of such countries and may be deported, fined or even imprisoned.

The Commission observed that Nigeria has reported challenges in the implementation of its anti-trafficking law because the law excludes the smuggling of migrants. The Commission noted however that migrant smuggling is the subject of an entirely different Protocol. As Malawi is signatory to both protocols, there remains an obligation to domesticate the Migrant Smuggling Protocol in its entirety either as a separate statute or through the revision of Malawi's immigration laws. The Commission recommends that Government take action in this respect. The Commission resolved that the concerns raised by the interconnectedness of trafficking in persons and migrant smuggling should be addressed by enhancing punishments under the existing immigration laws so that traffickers do not take advantage of the discrepancy and get away with lighter punishments when they breach immigration laws in the commission of the offences of trafficking or related offences. The Commission's recommendations for the enhancement of penalties under the Immigration Act appear in this Report as the Immigration (Amendment) Bill which is attached as Appendix III. The Commission further recommends that Government fully reviews the Immigration Act so that it better reflects Malawi's obligations under the Migrant Smuggling Protocol.

(e) *Adoption of children*

The Commission acknowledged that intercountry adoptions have often been used as one of the means of trafficking children. To that end, the Commission saw a great need and discussed the importance of addressing intercountry adoptions in the course of developing the **Trafficking in Persons Bill**. Nevertheless, the Commission was aware of a number of factors that ultimately influenced its final recommendation on this point.

The Commission acknowledged that its sister special Law Commission on the Review of the Children and Young Persons Act¹⁵¹ has already undertaken a review of adoption laws in so far as intercountry adoptions are concerned. In its recommendations, that special Law Commission noted that it would not be appropriate to make an outright prohibition of intercountry adoptions as at times the best interests of the child would lie in favour of allowing such adoptions. However, the special Law Commission recognized the dangers involved in intercountry adoptions without appropriate safe guards. Hence, the special Law Commission recommended that intercountry adoptions should be allowed upon satisfaction of a number of conditions, among which are that the adoptive parents should be citizens or residents of a country that is a signatory to the United Nations Hague Convention on Protection of Children and Cooperation in Respect of Inter Country Adoption.¹⁵²

The Law Commission has also empanelled a special Law Commission to undertake a comprehensive review of the Adoption of Children Act.¹⁵³ This programme will comprehensively review and reform the current law on adoption and will thus be better suited to addressing the question of intercountry adoption in its entirety.

Further, the Commission reiterates its recommendation regarding the abuse of legal and judicial processes, including adoption, as a means of trafficking children. These factors render the commission of the offence of trafficking aggravated. The Commission is confident that this course of action will in the interim address the gap that otherwise exists whilst awaiting completion of the review of the law on adoption.

4.2 *Carrier Liability*

Article 11 of the Trafficking Protocol obliges each State Party to adopt legislative or other appropriate measures to prevent, to the fullest extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with Article 5 of the Protocol.¹⁵⁴ Where appropriate, and without prejudice to applicable international conventions, such measures should establish the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.¹⁵⁵ States are obliged to ensure that commercial carriers are required to ascertain that all passengers possess the necessary travel documents required for entry into the destination State and that failure to do so results in appropriate sanctions; the “carrier sanctions”.

¹⁵¹ See Malawi Law Commission, 2005; above footnote 21.

¹⁵² As above.

¹⁵³ Cap 26:01 of the Laws of Malawi.

¹⁵⁴ Article 11 (1) of the Trafficking Protocol.

¹⁵⁵ Article 11 (2) of the Trafficking Protocol.

Through Article 11, the Trafficking Protocol seeks to prevent the use of international commercial carriers as a means of transport in the trafficking of persons by making it more difficult for traffickers to use conventional means of transport in the commission of the offence. The implementation of such provisions may differ from country to country depending on the means preferred by traffickers but there is an underlying obligation to enact domestic legislation that makes it more difficult for traffickers to use international commercial carriers.

The United Nations Office on Drugs and Crimes' (UNODC) "Toolkit to Combat Trafficking in Persons"¹⁵⁶ recommends that drafters of domestic legislation, in order to implement the requirements of paragraphs 2 and 3 of Article 11 of the Trafficking Protocol, should give consideration to the following points—

(a) The basic obligation to be placed on carriers is to ascertain basic possession of whatever documents may be needed to enter the State of destination—there is no obligation to assess the authenticity or validity of the documents, or whether they have been validly issued to the person who possesses them.

(b) The Protocol requires that liability be attached to carriers for not having checked the documents as required; States may attach liability to carriers for having transported undocumented persons, but the Protocol does not require this.

(c) Paragraph 4 of Article 11, obliges States to provide for sanctions. The precise nature of such sanctions is not explicitly specified, but if criminal liability is to be imposed, drafters should consider Article 10 of the United Nations Convention against Transnational Organized Crime (CTOC), regarding the obligation to provide for liability of legal persons, such as corporations.

(d) The relevant "travel or identity document" is understood to include any document that can be used for inter-State travel and any document commonly used to establish identity in a State under the laws of that State.

In view of the foregoing obligations and recommendations, the Commission recommends the following provisions under the Trafficking in Persons Bill—

Carrier
liability

...—(1) An international commercial transportation provider shall verify that each passenger to any destination into or outside Malawi possesses the necessary travel documents, including a passport and a visa, to enter the destination country and any transit countries.

(2) Subsection (1) shall apply to the international commercial transportation provider, his agents, and any

¹⁵⁶ UNODC Tool 5.11, <http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296-tool-5-11.pdf> (Visited 10th March 2009).

person selling or issuing tickets, boarding passes or similar documents allowing passengers to travel, and to persons collecting or checking such tickets, boarding passes or similar documents prior to or subsequent to boarding.

(3) Any person referred to in subsection (2) who fails to comply with subsection (1) commits an offence and shall be liable to a fine of K5,000,000 and to imprisonment for five years.

(4) Where an offence is committed under this section, the international commercial transportation provider shall bear the costs of returning the person to his initial point of embarkation and shall be liable to pay costs associated with providing accommodation and meals for the person and any accompanying children.

(5) Where an international commercial transportation provider knowingly transports a trafficked person into or from Malawi, such international commercial transportation provider shall be liable for the duration of the trafficked person's stay outside or inside Malawi.

(6) An international commercial transportation provider shall not be guilty of an offence under subsection (1) if—

(a) the international commercial transportation provider had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry of that person into the receiving country;

(b) the person possessed the travel documents required for lawful entry into the receiving country when that person boarded, or last boarded, the means of transport to travel to the receiving country; or

(c) entry into the receiving country occurred only because of illness of or injury to a person on board, stress of weather or other circumstances beyond the control of the international commercial transportation provider.

4.3 *Acts Promoting Trafficking*

Often trafficked persons are subjected to threats, physical and sexual violence or being locked up; their passports are confiscated; they are forced to work without payment; or are forced to work in cruel or degrading conditions, just

to mention a few examples. Sometimes, public officers in the execution of their duties are corruptly involved in trafficking. Instances include where immigration officers charged with border control either turn a blind eye or actually assist in the facilitation of trafficking. All these acts are already criminalized under the Penal Code or other existing laws such as the Immigration Act and the Employment Act. However, the Commission noted that in the criminalization of these acts in other laws, the penalties for the offences that are related to trafficking do not always sufficiently reflect the level of seriousness of the crime as they were enacted at a time when the trafficking phenomenon was relatively unknown.

The Commission recommends the following provisions as regards acts that promote trafficking—

Other
acts that
promote or
facilitate
trafficking

... A person who, for the purpose of the promotion of trafficking in persons, intentionally—

(a) leases or subleases, uses or allows to be used any house, building or establishment;

(b) produces, prints, broadcasts or distributes by any means including the use of information technology or the Internet, any brochure, flyer or any other communication material that promotes trafficking in persons;

(c) assists in misrepresentation or fraud for the purposes of procuring or facilitating the acquisition of necessary exit documents from the Department of Immigration for the purposes of trafficking in persons;

(d) facilitates exit from or entry to Malawi, a person who is in possession of unissued, tampered or fraudulent travel documents for the purpose of trafficking in persons;

(e) confiscates, withholds or destroys the passport, travelling documents or personal documents which belong to a trafficked person for the purposes of furthering trafficking in persons; or

(f) prevents a trafficked person from leaving Malawi or seeking redress from appropriate law enforcement authorities,

commits an offence and shall be liable to imprisonment for seven years without the option of a fine.

5.0 OTHER CRIMINAL OFFENCES RELATED TO TRAFFICKING

As noted earlier, there are various offences, in a number of laws that contain some of the elements of trafficking in persons. The punishments for these offences are however very low. It was the Commission's view that since these offences are related to trafficking in persons, the levels of punishment attached to them should be commensurate with the levels under the proposed law. The Commission decided to review these laws in turn.

5.1 *Criminal Acts: The Penal Code*

The Commission was aware of the recommendations made by its sister special Law Commission on Criminal Justice Reform¹⁵⁷ to review the Penal Code. The Commission resolved to review the Penal Code again, in as far as offences related to trafficking are concerned. This will ensure that the entire anti-trafficking legal framework in Malawi is consistent with the Commission's objective to extensively review all issues connected with trafficking in persons.

In reviewing the Penal Code, the Commission concentrated on offences it considered are closely related to trafficking in persons and classified them into various categories such as sexual offences, deprivation of liberty offences and exploitation-related offences. The Commission's deliberations and recommendations on the review of the Penal Code were as follows—

SECTIONS 132-134 (*Rape and related offences*)

Sections 132, 133 and 134 of the Penal Code provide for rape, punishment of rape and attempted rape, the punishment for which is life imprisonment or death. The Commission considered these provisions in light of the exploitation that women face when they have been trafficked. The Commission reviewed the punishment for these offences and recommends that the provisions should be left intact since life imprisonment and death are the harshest penalties the law can impose.

SECTIONS 135, 136 AND 137 (*Abduction and related offences*)

Section 135 of the Code provides for abduction which involves taking away, or detaining a woman of any age against her will, with intent that she should have sexual intercourse with the abductor or with some other person or with intention to marry her off. The punishment for this offence is 7 years imprisonment. Section 136 of the Code provides for the abduction of an unmarried girl under 16 years of age out of the custody of her parents or lawful guardian without their knowledge and consent. This offence is a misdemeanour. Under section 137 of the Code, there is provision against indecent assault of young girls which is punishable with 14 years imprisonment.

As abduction is one of the means that could be used to commit the offence of trafficking, the Commission recommends that the punishment for this offence should be enhanced. The Commission recommends that section 135 of the Code

¹⁵⁷ Malawi Law Commission, 2000; above footnote 18.

be amended by deleting the word “seven” and replacing it with the word “**fourteen**”. The Commission noted that its sister Commission on Criminal Justice Reform, during the review of the Penal Code,¹⁵⁸ recommended in many instances that the terms “misdemeanour” and “felony” should be replaced with the term “offences”. In order to ensure consistency, the Commission adopts these recommendations. The Commission further noted that whilst this recommendation was made by the special Law Commission on Criminal Justice Reform with respect to most of the sections of the Penal Code, it was not expressly made with regard to section 135 and this Commission accordingly recommends that the term “misdemeanour” be replaced with the term “**offence**”.

SECTIONS 140-141 (*Procuring a person*)

Section 140 of the Code criminalizes procuring a woman for sexual exploitation whether within or outside Malawi. The offence is a misdemeanour. Section 141 of the Code provides for prohibition of procuring women or girls through threats, fraud, or the administration of drugs. These acts were considered particularly relevant to trafficking as they involve the use of means which are also covered in the offence of trafficking in persons. The Commission noted that the special Law Commission on Criminal Justice Reform already recommended that the term “misdemeanour” be replaced with the term “**offence**” and that the sentence be enhanced to fourteen years for both sections 140 and 141 of the Code. The Commission recommends the adoption of both these recommendations.

SECTIONS 142, 143, 145 AND 147 (*Offences related to prostitution*)

Section 142 of the Code provides for a situation where an owner or occupier of premises permits the defilement of a girl under thirteen years of age at his premises. Section 143 of the Code proscribes the detention of a woman or girl against her will. Section 145 of the Code applies to men living off the earnings of prostitution or soliciting for immoral purposes. Section 146 of the Code applies to women living off the earnings of prostitution. Section 147 of the Code criminalizes the operation of a brothel or keeping any premises for purposes of prostitution. The punishment ranges from three to five years imprisonment.

The Commission noted that these provisions regulate the operation of brothels which with respect to trafficking in persons create facilities for recruitment and exploitation of trafficked persons.

The Commission noted that the special Law Commission on Criminal Justice Reform¹⁵⁹ made various amendments to section 142, including raising the age of defilement to sixteen years. However, the special Law Commission on Criminal Justice Reform did not enhance the punishment for this offence. The Commission recommends that the punishment be enhanced by deleting the word “five” in section 142 and replacing it with the word “**fourteen**”.

¹⁵⁸ As above, p. 36.

¹⁵⁹ As above, p. 38.

The Commission also observed that the special Law Commission on Criminal Justice Reform¹⁶⁰ held the view that the offence of detaining women and girls against their will for sexual purposes in section 143 of the Code is a serious offence warranting substantial punishment. The punishment was enhanced to five years and the Commission recommends the adoption of this recommendation.

With regard to section 145 (1) of the Code, the Commission was of the view that living off the earnings of prostitution is exploitative behaviour within the purview of the offences of trafficking in persons. It was considered necessary to enhance the sentence as the special Law Commission on Criminal Justice Reform¹⁶¹ did not do so. The Commission recommends that section 145 (1) of the Code be amended by deleting the word “misdemeanour” and all the words appearing after it, and by replacing them with the words “**commits an offence and shall be liable to imprisonment for seven years**”.

The Commission considered the offence of keeping a brothel or any premises for the purposes of prostitution as exploitative behaviour and thus requiring enhanced sentencing in keeping with the sentencing structure under the **Trafficking in Persons Bill**. The Commission recommends the adoption of the enhanced sentence of seven years recommended by the special Law Commission on Criminal Justice Reform.

SECTIONS 257-268 (*Offences related to kidnapping*)

Section 257 of the Code defines kidnapping to mean the conveying of any person beyond the limits of Malawi without the consent of such person or that of some person legally authorized to consent on their behalf. Similarly, under section 258 of the Code, taking or enticing minors less than fourteen years of age if the minor is a boy and sixteen years of age if the minor is a girl, or persons of unsound mind of any age, out of the keeping of their lawful guardians without their consent is also an offence. Section 259 of the Code also defines abduction through compelling, by means of force or inducement by deceitful means, of any person to go from any place by anyone. The Commission found these provisions in order and consistent with its proposed legal framework for trafficking in persons offences.

Section 260 of the Code provides that kidnapping any person from Malawi or from a lawful guardian is a felony and is punishable with a term of seven years imprisonment. The Commission recommends that the punishment should be enhanced and that no option for a fine for these offences should be provided for. With respect to the punishment, the Commission recommends that the provision should be amended by deleting the word “seven” and replacing it with the word “**fourteen**”. The Commission makes this recommendation as the special Law Commission on Criminal Justice Reform¹⁶² did not make any amendment to this section.

¹⁶⁰ As above, p. 39.

¹⁶¹ As above

¹⁶² As above, p. 58.

Section 261 of the Code proscribes kidnapping with a view to murdering the victim; the kidnapping results in the death of the victim; or the victim is placed in a situation that endangers life. The punishment for this offence is ten years imprisonment. The Commission noted that the special Law Commission on Criminal Justice Reform¹⁶³ amended this section by enhancing the penalty to life imprisonment. The Commission recommends the adoption of this recommendation.

Section 262 of the Code provides for the offence of kidnapping with intent that the trafficked person should be secretly confined. Contravention of this provision is punishable with a term of imprisonment for seven years. The Commission also noted that with respect to the definition of trafficking in persons, secret confinement could be a form of exploitation and as such this offence should be punishable as the other offences where kidnapping or confinement is done for purposes of exploiting the trafficked person. The Commission recommends the amendment of the provision by deleting the word “seven” and replacing it with the word “**fourteen**”. The Commission makes this recommendation as the special Law Commission on Criminal Justice Reform¹⁶⁴ did not make any amendment to this section.

Section 263 of the Code provides for kidnapping or abducting any person in order that such person may be subjected, or may be so disposed, as to be put in danger of being subjected to grievous harm, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed off. This is punishable by imprisonment for ten years. The Commission recommends that the punishment for the offence should be enhanced and that the provision should be amended by deleting the word “ten” and replacing it with the word “**fourteen**”. The Commission makes this recommendation as the special Law Commission on Criminal Justice Reform did not make any amendment with regards to the penalty.

Under section 264 of the Code, a person who knows that any person has been kidnapped or has been abducted, and wrongfully conceals or confines such person shall be punished in the same manner as if he had kidnapped or abducted the victim. The Commission found this provision to be in order and accordingly adopts it.

Under section 265 of the Code, any person who kidnaps or abducts any child under the age of fourteen years with the intention of stealing from that child, is punishable by seven years imprisonment. The Commission noted that the special Law Commission on Criminal Justice Reform¹⁶⁵ revised this section by enhancing the punishment to sixteen years. The Commission adopts this recommendation.

¹⁶³ As above, p. 59.

¹⁶⁴ As above.

¹⁶⁵ As above.

Section 266 of the Code proscribes wrongful confinement of any person which is punishable with a fine of £700 or five years imprisonment. The Commission noted that the special Law Commission on Criminal Justice Reform amended this section by replacing “£700” with “K100,000”. The Commission however noted further that the Fines (Conversion) Act,¹⁶⁶ passed after the special Law Commission on Criminal Justice Reform had suggested this amendment, makes provision for the conversion of amounts of existing fines for offences expressed in Kwacha or in pounds, to penalty values that take into account depreciation in value of the Malawi currency.¹⁶⁷ According to section 5 of that Act, where a fine is expressed in pounds, the current value is to be obtained by multiplying the amount in pounds by a multiplier provided in the Act. In this case, the multiplier being the number “1000”, the fine automatically becomes K700,000.00. The Commission therefore found the enhanced fine, using the formula under the Fines (Conversion) Act to be in order.

Section 267 of the Code punishes importing, exporting, removing, buying, selling or disposing of any person as a slave, or accepting, receiving or detaining against his will any person as a slave with imprisonment for seven years. Section 268 of the Code punishes habitually importing, exporting, removing, buying, selling, trafficking or dealing in slaves with ten years imprisonment.

The Commission discussed the content of each of these provisions and was satisfied with the penalties as sufficient to punish activities related to trafficking. The Commission was satisfied with section 267 and 268 of the Code. All amendments to the Penal Code are attached to this Report as the Penal Code (Amendment) Bill in Appendix IV.

5.2 *Control of Ports of Entry*

The Immigration Act makes provision for lawful entry into and exit out of Malawi. As such, it is an important piece of legislation for transnational trafficking offences as it curbs the illegal inflows and outflows of trafficked persons. Lax immigration controls and ineffective legislation make any country a haven for traffickers. The Commission considered it crucial that the Immigration Act be reviewed in its entirety and accordingly recommends that Government should institute the review as a matter of urgency. Nonetheless, the Commission also resolved to make specific recommendations for the amendment of various sections in the Immigration Act which facilitate or ease trafficking, pending the review of the whole Act.

SECTIONS 34—36 (*Offences related to permits*)

It is an offence under section 34 of the Immigration Act to illegally possess a residence permit or to make use of one unlawfully. This offence is punishable with twelve months’ imprisonment. With respect to trafficking in persons, the Commission observed that illegal possession of residence permits or making

¹⁶⁶ Act No. 10 of 2005.

¹⁶⁷ See the long title to the Fines (Conversion) Act.

unlawful use of them is one way of ensuring that trafficked persons are moved from one place or country to another. The Commission therefore recognizing the role of unlawful possession and use of residence permits in the trafficking in persons enterprise recommends that section 34 of the Immigration Act be amended by adding the words “**and a fine of K1,000,000**” after the word “imprisonment” so as to provide a disincentive to traffickers. The Commission also recommends that the sentence be enhanced to five years imprisonment.

Section 35 of the Immigration Act proscribes forging a permit or passport which is punishable with five years imprisonment. For the same reason that procurement and alteration of travel documents is an essential ingredient especially in transnational trafficking in persons, the Commission was satisfied with the penalty and makes no recommendations with regard to this section.

Section 36 of the Immigration Act prohibits aiding and abetting an alien to enter Malawi illegally. This is punishable with twelve months imprisonment. The Commission observed that this is an offence which is likely to be committed by traffickers and persons in the public service especially those that work at ports of entry. The Commission was of the view that the section should be amended by enhancing the punishment to include a fine. The Commission recommends that the provision be amended by adding the words “**and a fine of K1,000,000**” after the words “imprisonment”. The Commission also recommends that the sentence be enhanced to five years imprisonment. The amendments to the Immigration Act are attached to this Report as the Immigration (Amendment) Bill in Appendix III.

5.3 *Labour-related Issues: The Penal Code and the Employment Act*

SECTION 269 OF THE PENAL CODE (*Forced labour*)

It is a misdemeanour under section 269 of the Penal Code to compel another person to work against their will. The Commission observed that forced labour is one of the forms of exploitation under the definition of trafficking in persons under the Trafficking Protocol. As such, the punishment ought to be in line with other recommendations on exploitative activities against victims of forced labour or trafficking in persons. The Commission recommends that section 269 should be amended by deleting the word “misdemeanour” and replacing it with “**offence**” and adding the words “**and shall be liable to imprisonment for fourteen years.**” immediately after it..

SECTION 21-24 OF THE EMPLOYMENT ACT (*Child labour*)

Sections 21 to 24 of the Employment Act prohibit child labour by proscribing employment of a young person under the age of fourteen years on public or private agricultural or industrial undertakings. The punishment is a fine of K20,000 or five years imprisonment.

The Commission also recommends the retention of these provisions in the Employment Act. The Commission did not make any recommendation to enhance

the punishment for contravening section 21 of the Employment Act. The commission noted that the scheme for conversion of fine under the Fines (Conversion) Act is adequate.

6.0 ENFORCEMENT

6.1 *Investigations and Criminal Proceedings*

Having formulated the offences for the proposed law, the Commission turned to matters of enforcement of the law. By domesticating the Trafficking Protocol, the Commission found that new offences have been created requiring new techniques for which the existing criminal law enforcement mechanism must be expanded to accommodate. Further, the Commission considered that where necessary, new approaches as well as new institutions would have to be established to complement existing ones so as to give full effect to the **Trafficking in Persons Bill**. The Commission noted that neither the CTOC nor the Trafficking Protocol oblige State Parties to set up any specialized enforcement mechanism nor to appoint any specific specialised personnel to enforce a trafficking in persons law.

Comparative study of other jurisdictions revealed that many countries have enhanced the effectiveness of efforts to investigate and prosecute trafficking offences by establishing specially equipped and well trained units within the police or prosecutorial authority.¹⁶⁸ Examples include Albania and Lithuania, which have set up specialized police divisions to combat trafficking in persons, Belgium which has a specialized police unit for trafficking and Bulgaria which has a special trafficking unit in the National Border Police Service. The Commission was also aware that there already exist various specialized units in the Malawi Police Service and as such, such a structure could easily be set up in Malawi.

The necessary action to ensure that investigations and prosecutions are effectively carried out include training of police criminal investigation officers, intelligence officers, immigration officers, police prosecutors, prosecutors in the office of the Director of Public Prosecutions, labour inspectors, probation officers and social welfare officers. The Commission recommends that the Minister responsible for internal affairs and public security should designate enforcement officers from the public service to carry out enforcement duties under the proposed law. More specifically, the Commission recommends that these should be police officers; immigration officers or other public officer that the Minister deems fit.

In addition to the designation of enforcement officers as above, the Commission further observed that administratively, there may be need for the Malawi Police Service and the Immigration Department to jointly create a specialized unit to deal with trafficking in persons so that the enforcement officers designated by the Minister would be based in this unit. The Commission considered that such an arrangement would allow the specialized unit to develop capacity and experience in time. In addition, the Commission also recommends

¹⁶⁸ Kartusch A, 2001; above footnote 63, p. 50.

that this unit should in time be tasked with the development and use of effective investigation and prosecution methods, as well as the coordination of anti-trafficking in activities in cooperation with other similar national, regional and international authorities.

In order to ensure that the personnel in this unit, namely the enforcement officers, are given adequate powers to enforce the proposed law, the Commission recommends that they be specifically empowered to—

(a) carry out investigations in connection with trafficking offences;

(b) arrest suspects;

(c) interrogate suspects; and

(d) enter and search premises and seize any items which are suspected of being used in connection with trafficking in persons.

The Commission considered that electronic means of communication may be used in organized crimes including trafficking in persons. The Commission considered that specific mention of powers to access electronic data by enforcement officers should be made. The Commission therefore recommends that these powers also be expressly provided for under the **Trafficking in Persons Bill**.

The Commission noted that as a lucrative enterprise, trafficking in persons is likely to enable the perpetrators to amass wealth acquired through the commission of the offence. Therefore, in order to ensure that perpetrators do not continue to benefit from the proceeds of their crime after conviction, the Commission recommends that the proposed enforcement officers should have powers to confiscate the proceeds of crime. The Commission observed that under the Constitution, every person is entitled to protection from arbitrary deprivation of property.¹⁶⁹ However, the Commission considered that if property can be traced as having been acquired through commission of trafficking offences, then such property should be liable to confiscation. The Commission noted that provisions for confiscation already appear in existing law, namely, the Money Laundering and Proceeds of Crime Act¹⁷⁰ which, in principle, allows for State confiscation of property acquired through illegal means. However, the Commission recommends that express reference to these powers should nonetheless be made in the proposed law to ease enforcement and prosecution.

The Commission agreed that confiscation of property should not be carried out only when the offender is convicted but should also extend to powers of search and seizure. The Commission resolved that if in the course of a search, an enforcement officer encounters an item that he or she suspects was used in the commission of trafficking in persons or related offences, then powers to seize that property should be exercised. The Commission also recommends that the cost of

¹⁶⁹ Section 28 (2).

¹⁷⁰ Act No 9 of 2006. This Act domesticates the tracing of proceeds of crime and money laundering as provided for in the CTOC.

holding the property, in the event of a conviction for an offence under the proposed law, should be recoverable from the convict as a civil debt due to the Government.

The Commission further noted that in the course of investigating or prosecuting an offence under the **Trafficking in Persons Bill**, an offender or any other person, whether acting on instructions from the offender or out of other motivation, may take steps to either frustrate the investigation or prosecution of the offence. Such acts may involve tampering with evidence or intimidation of witnesses and even intimidation of the law enforcement officials. The Commission was of the view that such acts should be included in the proposed law and should be specifically criminalized. The Commission recommends that the **Trafficking in Persons Bill** should provide for an offence on obstruction of justice and corresponding deterrent punishment for the offence.

The Commission recommends the following provisions on investigation and criminal proceedings—

PART ...

INVESTIGATION AND CRIMINAL PROCEEDINGS

... —The Minister may, by notice published in the *Gazette*, designate the following persons as enforcement officers for the purposes of this Act—

Designation of
enforcement
officer

(a) a police officer;

(b) an immigration officer; or

(c) other public officer the Minister that may deem fit.

Powers of
enforcement
officer
Cap. 8:01

... Notwithstanding the provisions of the Criminal Procedure and Evidence Code, an enforcement officer who reasonably suspects or receives information that any offence under this Act has been committed, or is about to be committed, shall have the power to—

(a) institute and carry out an investigation;

(b) arrest any suspect;

(c) interrogate any suspect;

(d) enter premises and search and seize any item under section ...;

(e) interview any person suspected of being trafficked in accordance with the Guiding Principles for Conducting for the Identification of Trafficked Persons contained in the *Second Schedule*; and

- (f) certify a person as a trafficked person if such person provides satisfactory information to that effect during the screening interview, having duly completed Form A contained in the *Third Schedule* hereto.
- Duties of enforcement officer** ... An enforcement officer shall—
- (a) record all cases of offences under this Act in accordance with section ...;
- (b) refer all trafficked persons to a protection officer for screening, as soon as is practicably possible, but in any case no later than twenty-four hours after such a person is brought to the attention of the enforcement officer;
- (c) ensure the proper administration and enforcement of the provisions of this Act;
- (d) submit quarterly reports of all cases of offences in this Act within ten days of the last day of each preceding quarter to the Chairperson of the Board;
- (e) advise the Board on the effective implementation of this Act and other ancillary matters; and
- (f) perform such other duties as are necessary for the effective carrying out of the purposes of this Act.
- Identification of enforcement officers** ... An enforcement officer, in the exercise of any powers or in the discharge of any functions under this Act, shall—
- (a) declare his designation as an enforcement officer; and
- (b) produce evidence of the designation to any person, if required.
- Arrest by person who is not a police officer** ... Where an arrest of any person under this Act is made by a private person or an enforcement officer who is not a police officer, the person effecting the arrest shall present the arrested person to the nearest police station, as soon as it is practicable to do so, but in any case no later than twenty four hours after the arrest.
- Records** ...—(1) An enforcement officer shall during interrogation, cause to be registered all relevant information about the offence in a book to be kept in every police station for such purpose and to be called “The Trafficking in Persons Register Book” which shall be kept in addition to the Occurrence Book.

(2) The Trafficking in Persons Register Book shall be in *Form B* contained in the Second Schedule in triplicate.

(3) The officer in charge of the police station to which a person suspected of having committed, or is about to commit, an offence under this Act is presented, shall within ten days after the last day of each quarter send to the Inspector General of Police a certified copy of all entries made in the Trafficking in Persons Register Book during the preceding quarter.

(4) The Inspector General of Police shall file the certified copy of the entry in the Trafficking in Persons Register Book in his office and shall maintain a database of the same.

Search and
seizure

... —(1) An enforcement officer may, where he has reasonable cause to believe that any premises or conveyance—

(a) has or is being or is about to be used for; or

(b) has evidence for an offence under this Act,

apply to a magistrate on written information under oath, for a warrant authorizing entry into the premises or conveyance.

(2) A warrant issued under subsection (1) may authorize the enforcement officer to—

(a) search the premises or conveyance for any matter connected to the commission of an offence under this Act;

(b) seize or remove any matter which may be used in evidence for an offence under this Act; or

(c) copy or extract any matter found in the premises or conveyance.

(3) Where it is deemed necessary, the enforcement officer may, in exercise of his powers under this Act—

(a) break a door of premises or a conveyance or obstruction to the premises or conveyance in order to effect entry into the premises or conveyance;

(b) remove, by force, any obstruction to entry, search, seizure or removal of any matter, to which this section applies; or

(c) detain a person found in the premises or conveyance until the search is completed.

(4) Where, by reason of its nature, size or quantity, it is not possible to remove any matter seized under this section, the enforcement officer shall—

(a) seal the matter, premises or conveyance; and

(b) indicate, where possible, that the matter, premises or conveyance has been sealed.

(5) A person who, without written authority—

(a) breaks, tampers with, damages or alters the seal referred to in subsection (4); or

(b) attempts, aids or abets in breaking, tampering with, damaging or altering the seal,

commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for five years.

Search and
seizure
without
warrant

... — (1) Where an enforcement officer has reasonable grounds to believe that obtaining a warrant under section ... may cause delay or would adversely affect investigation of an offence under this Act, he may, without warrant, with such assistance and force as reasonable—

(a) enter or search any premises or conveyance;

(b) stop, enter and search any conveyance;

(c) seize or detain a conveyance or any matter connected to investigation for an offence under this Act; or

(d) inspect, copy or extract any matter found at any premises or conveyance.

(2) In exercising powers under this section, the enforcement officer shall have all powers conferred on him under this Act.

List of seized
items

... — (1) An enforcement officer shall prepare a list of all items seized under this Part, in triplicate, and immediately deliver one copy of the list, duly signed by the enforcement officer, to an occupier or owner or an agent or servant of the premises or conveyance to which the list applies, and another copy to the Chairperson of the Board.

(2) Where the premises or conveyance are not occupied, the enforcement officer shall, if possible, post the list of items seized at a conspicuous place on the premises or conveyance.

Access to electronic data	<p>...—(1) A search to which the provisions under this Part applies, shall include data in a computer or other electronic device.</p> <p>(2) When exercising powers under subsection (1), an enforcement officer shall be given a password, encryption code, decryption code, software or hardware or any other means required to enable access or comprehension of the data.</p> <p>(3) A person who contravenes this section commits an offence and shall be liable to a fine of K1,000,000 and imprisonment for five years.</p>
Confiscation	<p>... Where an arrested person is convicted of an offence under this Act, an enforcement officer shall apply to court for an order of confiscation, and disposal of the convicted person's assets and properties acquired, obtained or associated with the offence under which the person was convicted.</p>
Disposal of confiscated property	<p>... — (1) Where an order under section ... is granted, the court shall, by sale or otherwise, dispose of assets and property to which the order applies.</p> <p>(2) The proceeds realised from the disposal of assets shall be paid into the Trafficking in Persons Fund.</p>
Acquittal and assets	<p>... Where an accused person whose property was seized under this Act has been acquitted for an offence under the Act, the court may order that the seized property be—</p> <p>(a) released to the accused person; or</p> <p>(b) attached where the acquittal is based on technical grounds.</p>
Right to institute civil action	<p>... A trafficked person, irrespective of his immigration status, has the right to—</p> <p>(a) institute civil proceedings against any person, including a public officer in respect of an offence under this Act; or</p> <p>(b) seek compensation, restitution and recovery in damages from any person or from the proceeds of disposal of assets of any person connected with an offence under this Act.</p>
Obstruction	<p>... A person who obstructs, impedes, interferes with or fails to comply with a lawful demand of an enforcement officer in performance of powers conferred under this Act commits an offence and shall be liable to imprisonment for five years without the option of a fine.</p>

6.2 *International Cooperation*

Sovereignty under international law has in the past been a major shield behind which organized crime groups engaged in trafficking in persons and many other transnational crimes evaded prosecution. In addition to the shield of sovereignty, organized crime groups take advantage of different legal systems, and limited capacity of nations to cooperate in fighting transnational organized crime.

With increasing levels of international cooperation over the last century, States have made slow but significant strides towards curbing international and transnational aspects of crime through bilateral and multilateral assistance agreements to facilitate extradition in criminal matters. This has been done by States abdicating their claim to sovereignty and advocating international cooperation in various matters.¹⁷¹

International cooperation to stem the operations of organized crime groups involved in trafficking in persons and its effects has become a necessity in efforts to combat trafficking. Unless States cooperate and consolidate their efforts to combat trafficking, transnational trafficking syndicates will continue to engage in this type of activity with impunity, and thus any law developed will be rendered ineffective. The transnational character of trafficking in persons requires that source, transit and destination countries must work together to effectively deal with this issue. To this end, Article 1 of the CTOC states its purpose as to promote cooperation to prevent and combat transnational organized crime more effectively. Further, Article 2 (c) of the Trafficking Protocol in turn states its purpose as the promotion of cooperation among State Parties in order to meet the objectives of preventing trafficking and protecting and assisting victims of trafficking, with full respect for their human rights.

6.3 *Mutual Legal Assistance*

Generally, the principle of sovereignty prevents law enforcement agents from one country from conducting an investigation in another country. Hence, a legal framework of mutual assistance and cooperation in the investigation of trafficking offences and the prosecution and punishment of offenders is a vital necessity addressing transnational crime. The international mobility of offenders and their use of advanced technology, among other factors, makes it more necessary than ever that law enforcement and judicial authorities collaborate and assist the State that has assumed jurisdiction over the matter. In order to achieve this goal, States must enact laws to permit them to provide such international cooperation by entering into treaties on mutual legal assistance in criminal matters.

¹⁷¹ United Nations Office on Drugs and Crime, 2004; Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto. Available at www.unodc.org/.../crime/legislativeguides/01%20Introduction%20and%20List%20of%20Experts.pdf, pp. 194- 196. (Visited 17 June 2009).

Examples of matters for which States may require mutual legal assistance are as follows—

- (a) executing searches and seizures, and freezing of assets;
 - (b) taking evidence or statements from persons;
 - (c) effecting a temporary transfer of persons in custody to appear as a witness;
 - (d) hearing of witnesses or experts by means of video conference;
 - (e) effecting service of judicial documents;
 - (f) examining objects and sites;
 - (g) providing originals or certified copies of relevant documents and records, including government;
 - (h) bank, financial, corporate or business records;
 - (i) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
 - (j) facilitating the personal appearance of a witness;
 - (k) exchanging information, evidentiary items and expert evaluation;
- and
- (l) any other type of assistance that is not contrary to the domestic law of the requested country.

Mutual legal assistance may be facilitated bilaterally between States or multilaterally within regional blocs. Some examples of multilateral agreements include the Inter-American Convention on Mutual Legal Assistance in Criminal Matters¹⁷², the Economic Community of West African States¹⁷³ and the SADC Protocol on Extradition.

As far as Malawi is concerned, the Commission noted that the Mutual Assistance in Criminal Matters Act¹⁷⁴ sufficiently addresses the mutuality required to enforce the law on trafficking in persons. This Act was passed with a view to providing for a scheme relating to mutual assistance in criminal matters within the Commonwealth; facilitation of the scheme in Malawi; and providing for mutual assistance in criminal matters between Malawi and other Commonwealth countries.¹⁷⁵ The Act provides for requests by Malawi to Commonwealth countries in obtaining evidence; in locating or identifying persons; in obtaining an article or thing by search and seizure if necessary; in arranging attendance of persons; in transferring prisoners; in serving documents;

¹⁷² See *Canada Gazette*, 1996; Part I, p.2483 (Vol. 130, No. 35).

¹⁷³ Signed in July, 1992.

¹⁷⁴ Cap. 8:04 of the Laws of Malawi.

¹⁷⁵ See the long title.

immunities and privileges.¹⁷⁶ Similar obligations apply to Malawi in providing assistance to other countries.¹⁷⁷ The Commission is satisfied that Malawi has the necessary legal framework in terms of mutual legal assistance to support the **Trafficking in Persons Bill**.

6.4 *Extradition*

Extradition is a formal process leading to the surrender by the requested State of the person sought in the requesting State. Perpetrators of transnational crimes who are sought for prosecution, or who have been convicted and are sought for the enforcement of a sentence, sometimes escape to or may be in, a foreign State. Extradition proceedings are required to bring them to justice in the prosecuting State to avoid the possibility that such offenders will escape prosecution and operate with impunity by moving their activities to another country.¹⁷⁸

Extradition is provided under Article 16 of the CTOC. The provision sets a basic minimum standard for extradition in relation to offences covered by this Convention and encourages the adoption of a variety of mechanisms to streamline the extradition process.¹⁷⁹ Offences covered by the CTOC are thus deemed to have been included in any existing extradition treaty between State Parties and are also included as extraditable offences in any future treaties between State Parties.¹⁸⁰ Therefore, as Malawi is a signatory to the CTOC, it may make or receive a request of extradition from any State that has also ratified this Convention.

In addition, Malawi already has an Extradition Act that was enacted in 1972 with a view to providing for the extradition of offenders into and out of Malawi mostly on a bilateral agreement basis. The Act provides for arrangements for surrender of fugitive offenders; proceedings for extradition; reciprocal backing of warrants; fugitive offenders surrendered to Malawi; and other general matters. Under the Act, the Government may enter into bilateral arrangements with the government of any country for the surrender of fugitive offenders on the basis of reciprocity.¹⁸¹ The Act lists “designated countries” with which Malawi may enter into extradition agreements. The Act also specifies types of extraditable offences. Trafficking in persons is not listed as a relevant offence although some crimes related to trafficking in persons and discussed earlier in this Report have been listed such as rape, unlawful sexual intercourse with a female; indecent assault; procuring or trafficking in women or young persons for immoral purposes; kidnapping, abduction or false imprisonment or dealing in slaves; and blackmail or extortion by means of threats or by abuse of authority.

¹⁷⁶ Part II.

¹⁷⁷ Part III.

¹⁷⁸ Kartusch A, 2001, above footnote 63, p. 53.

¹⁷⁹ UNODC, 2006; Toolkit to Combat Trafficking in Persons, Tool 4.12, Extradition. Available at <http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296-tool-4-2.pdf> or www.unodc.org/pdf/Trafficking-toolkit-Oct06.pdf-1150k. (Visited 21 May 2009).

¹⁸⁰ Article 16 (3) of the CTOC.

¹⁸¹ Section 3 (1) of the Extradition Act.

The offence cited as “trafficking in women or young persons” in the Extradition Act is not the same as “trafficking in persons” as envisioned by the Trafficking Protocol. Indeed, the reference to “trafficking in women and young persons” relates to the offence under section 268 of the Penal code which states that “any person who habitually imports, exports, removes, buys, sells, *traffics* or deals in slaves shall be guilty of a felony, and shall be liable to imprisonment for ten years.”¹⁸²

The Commission noted that extradition practices elsewhere reveal that there is a “new” approach to extradition which has departed from listing extraditable offences. Rather, there is use of a conduct and punishment test where the conduct in question must constitute an offence under both jurisdictions and is punishable by a prescribed period of imprisonment or other set penalty.

The Commission recommends the review of the Extradition Act in its entirety to take into account the new approach. In the meantime, the Commission recommends that the Second Schedule to the Extradition Act should be amended to include any offence under the **Trafficking in Persons Bill** punishable by seven years or more as an extraditable offence. The proposed amendment is attached to this Report as the Extradition (Amendment) Bill under Appendix V.

7.0 INSTITUTIONAL FRAMEWORK

As noted earlier, neither the Trafficking Protocol nor the CTOC oblige State Parties to adopt any particular institutional framework for the enforcement of trafficking in persons legislation.

The Commission took the issue of establishment of a coordinating and implementing body for the proposed law to all participants at all the consultative workshops referred to earlier in this Report. It was the Commission’s intention to create an institutional framework that would respond to the unique nature of the offence and captures the divergent range of actors needed to enforce the law and readily absorb the challenge that it poses to traditional methods of investigation and prosecution. In order to provide guidance to participants on the type of institutional framework that the Commission was considering, the Commission proposed two alternatives. Firstly, whether to set up an entirely new independent and autonomous institution within Government or, secondly, to set up an *ad hoc* board comprising various stakeholders from existing public and private institutions. In order to guide the stakeholders further, the Commission also clarified the duties stipulated for the body, whichever one participants opted for, as follows—

- (a) to coordinate and oversee matters of investigations and prevention;
- (b) to oversee matters of care, assistance and protection of trafficked persons;

¹⁸² Emphasis supplied.

- (c) to provide policy direction;
- (d) to initiate education and awareness programmes;
- (e) to coordinate and oversee training of all relevant law enforcement and judicial officers;
- (f) to coordinate and manage activities with Government agencies and NGOs;
- (g) to take responsibility and management of a specially created “Trafficking in Persons Fund”;
- (h) to coordinate research and data collection; and
- (i) to perform any other duties necessary to coordinate and monitor the implementation of the **Trafficking in Persons Bill**.

Most participants preferred the creation of an independent institution so as to ensure that trafficking in persons would become the core business of the established entity. It was the view of the majority that *ad hoc* boards are very expensive to run and would cost the country more than a permanent institution. The dissenting and minority view was concerned that such an approach would have significant cost-implications to Government. As such, establishing an independent institution would delay the implementation of the proposed law when time and finance are taken into account.

In considering the views of the participants, the Commission reviewed the practice in other jurisdictions. The Commission observed that in Nigeria,¹⁸³ which it had an opportunity to visit, government has established a permanent one-stop agency as a body corporate headed by an Executive Secretary and called the National Agency for Prohibition of Traffic in Persons and Other Related Matters (NAPTIP). The affairs of NAPTIP are supervised by a governing board headed by a part time Chairperson and six members. NAPTIP is further divided into three departments. The Public Enlightenment Department oversees matters of prevention; the Investigations and Prosecution Department oversees prosecution; and the Counselling and Rehabilitation Department oversees protection. For administrative convenience, there is also an Administration, Research and Programmes Department. NAPTIP is placed under the Federal Ministry of Justice.

In Ghana, the arrangement is different. The Human Trafficking Act, 2005¹⁸⁴ has established an *ad hoc* board called the Human Trafficking Management Board.¹⁸⁵ The Board comprises the Minister or Deputy Minister of Women and Children Affairs who is the Chairperson; one representative from each of the following: the Attorney-General; the Ministry of Local Government; the Ministry

¹⁸³ The Commission conducted study visit in Nigeria between 5 and 14 April, 2008. Among the institutions visited was the NAPTIP.

¹⁸⁴ Act No. 694 of 2005.

¹⁸⁵ See section 28 of the Human Trafficking Act (Ghana).

of the Interior; the Ministry of Health; the Ministry of Education; the Ministry of Women and Children Affairs; Police Service; Immigration Service; Customs, Excise and Preventive Service; Director of Social Welfare; Labour Department; the private sector; and three other persons one of whom must be a woman.

The Ghanaian Board is mandated to make recommendations for a national plan of action against trafficking in persons, monitor and report on the progress of the national plan of action; advise the Ministry of Women and Children Affairs on policy matters; provide assistance on investigation and prosecution of trafficking cases; propose and promote strategies to prevent and combat trafficking in persons; liaise with Government agencies and organizations to promote rehabilitation and reintegration of trafficked persons; prepare guidelines for disbursement from the Fund; conduct research on international and regional developments and standards on trafficking in persons; and deal with any other matters connected with human trafficking.

The Ghanaian Board meets once every three months and has a quorum of five members. Matters of management of the Board are decided by a majority of members present and voting and the Board may coopt any person in its meetings and has powers to determine its own procedures. The secretariat of the Board is at the Ministry of Women and Children Affairs.¹⁸⁶

Outside the continent, the Commission looked at the institutional arrangement of Malaysia which has also adopted an *ad hoc* arrangement. The Anti-Trafficking in Persons Act, 2007¹⁸⁷ establishes the Council for Anti-Trafficking in Persons. The Act provides that the Council shall comprise the Secretaries-General of the Ministries of Internal Security (Chairperson); Foreign Affairs; Internal Affairs and Public Security; Women, Family and Community Development; Human Resources; Transport; Information; the Attorney General; the Inspector-General of Police; the Directors-General of Immigration; Customs; Malaysian Maritime Enforcement; a representative of the Ministry of Internal Security and not more than three persons from NGOs or relevant organizations with knowledge, expertise and experience in trafficking in persons, appointed by the Minister.

The broad mandate of the Malaysian Council is to coordinate the implementation of the Act, formulate policies and programmes to prevent and suppress trafficking in persons including programmes for rendering assistance to trafficked persons and initiating programmes to increase public awareness of causes and consequences of trafficking in persons.¹⁸⁸ The Council meets as often as is necessary, and as determined by the Chairperson.

The Commission then debated both the views submitted by participants and the lessons learned from comparable jurisdictions at length. The Commission acknowledged that indeed the ideal situation would be to create a specialized

¹⁸⁶ See section 30 of the Human Trafficking Act (Ghana).

¹⁸⁷ Act No. 670 of 2007.

¹⁸⁸ See section 7(1) of the Anti-Trafficking in Persons Act (Malaysia).

institution. However, the Commission agreed that in light of Malawi's economic situation, it would be impracticable to create a new institution for the sole purpose of combating trafficking in persons however important such a function may be. Further, in the absence of data on reported cases of trafficking in persons, the Commission was of the view that not enough cases are reported at present to warrant the establishment of a separate institution whose only function would be to address issues of trafficking in persons. The Commission recommends that the issue regarding the establishment of a separate institution be revisited by Government once civic education initiatives are well established, and a growing trend of reported and prosecuted matters, as well as a growing number of victims handled, are recorded.

The Commission observed that in the mean time there are numerous institutions with a broad mandate to accommodate matters of trafficking in persons in all its aspects. The Commission observed, as an example, that looking at the issue of trafficking in persons which is largely a human rights issue, the Human Rights Commission is competent to process matters surrounding trafficking in persons. Under the Human Rights Commission Act,¹⁸⁹ the Human Rights Commission is mandated to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.¹⁹⁰ Thus, in order to execute this broad mandate, the Human Rights Commission is required and mandated to educate the public on issues of human rights and to promote awareness and respect for human rights; and, more particularly, to promote and protect human rights of vulnerable groups, such as children, illiterate persons, persons with disabilities and the elderly. These functions are consonant with the areas that the Commission considered as appropriately falling under the mandate of any institutional arrangement for the handling and administration of complaints relating to trafficking in persons. The Malawi Police Service, the Department of Immigration, the Ministry of Justice and the Ministry of Gender, Children and Community Development, could therefore collaborate with the Human Rights Commission in undertaking such functions as prosecution, civic protection and provision of social services and protection to victims of trafficking in persons.

It was the Commission's considered view that the most prudent way of establishing a cost effective and multi-sectoral approach would be to create an *ad hoc* Board working within a designated responsible Government Ministry as its secretariat. As to the choice of the Ministry, the Commission was confronted with three possible alternatives. First, the conduct of matters of trafficking in persons is traditionally associated with a country's obligation to protect its citizens and its territorial integrity. These duties are traditionally reposed in a country's Ministry of internal affairs and public security which has the overall responsibility over the police and immigration services. Naturally the obvious choice for hosting a

¹⁸⁹ Chapter 3:08 of the Law of Malawi.

¹⁹⁰ See section 12 of the Human Rights Commission Act.

secretariat charged with the responsibility over the conduct of matters of trafficking in persons would be the Ministry of Internal Affairs and Public Security. Secondly, the Commission considered the obligation imposed by the Trafficking Protocol to provide care, assistance and protection to victims of trafficking in persons and related offences. This duty to provide shelter and other social services to victims goes beyond the provision of protection and as such falls within the mandate of the Ministry of Gender, Children and Community Development. Thirdly, in terms of the prosecution of the offence of trafficking in persons or any other offences related to it, the Ministry of Justice being the ministry responsible for justice and therefore prosecution would also be ideal.

Ultimately, the Commission settled on the Ministry of Internal Affairs and Public Security as the most suitable Ministry to house the secretariat for the Board. Ultimately, most matters in the process of conducting trafficking offences fall within its mandate. This Ministry would still have to liaise with all the other Ministries as well as the Human Rights Commission whose duties also fall within the purview of trafficking in persons offences. In addition, the Board would also comprise different sectors such as relevant Government departments and representatives of relevant civil society organizations.

The Commission recommends that the Board should be mandated to perform such functions as coordinating and implementing activities relating to combating trafficking in persons, such as civic education and awareness programmes, action plans and care and protection of trafficked person other activities of the Board will include liaising with public institutions and non-governmental organizations on various activities necessary for the suppression of trafficking in persons. The Commission observed that such an approach is in line with what obtains in Ghana.

The Commission recommends that the institutional framework to combat trafficking in persons in Malawi should constitute an independent Board working within the Ministry of Internal Affairs and Public Security as its secretariat. The Commission further recommends that the proposed Board should be called the **Trafficking in Persons Board** and that it should consist of no more than 15 members.

The Commission however observed that it is not appropriate for substantive legislation to spell out the administrative arrangements for any institutional establishment. While recommending an *ad hoc* independent board under the Ministry of Internal Affairs and Public Security, it may be possible that in future, Government may see the need for changing this arrangement. The Commission recommends that the Government should still be able to change this arrangement but should be limited in its powers to alter the composition or the independence of the Board.

The Commission recommends the following provisions on institutional arrangement—

PART ...

TRAFFICKING IN PERSONS BOARD

Establishment
of a Board

... —(1) There is hereby established a Board to be known as the Trafficking in Persons Board (in this Act otherwise referred to as the “Board”).

(2) The Board shall be independent and shall have its secretariat at the Ministry of Internal Affairs and Public Security or any other ministry as the President may direct.

Composition
of the Board

... — (1) The Board shall consist of—

(a) the following members nominated by the Minister responsible for Gender, Children and Community Development and appointed by the President, at least two of whom shall be women—

(i) two persons representing women’s interests; and

(ii) two persons representing children’s interests ;

(b) two persons nominated by the Council for Non-Governmental Organization (CONGOMA) and appointed by the President;

(c) the following *ex-officio* members—

(i) the Principal Secretary of the Ministry responsible for Internal Affairs and Public Security or his designated alternate;

(ii) the Director of Public Prosecutions or his designated alternate;

(iii) the Principal Secretary of the Ministry responsible for Gender, Children and Community Development or his designated alternate;

(iv) the Principal Secretary of the Ministry responsible for Local Government and Rural Development or his designated alternate;

(v) the Principal Secretary of the Ministry of Education, Science and Technology or his designated alternate;

(vi) the Principal Secretary of the Ministry responsible for Health or his designated alternate;

(vii) the Principal Secretary of the Ministry responsible for Labour or his designated alternate;

(viii) the Inspector General of Police or his designated alternate; and

(ix) the Chief Immigration Officer or his designated alternate.

(2) The Resident Representatives of the United Nations High Commissioner for Refugees in Malawi and the United Nations Children Fund or their designated alternates and in the absence of either, a representative of the Resident Representative of the United Nations Development Programme in Malawi may be invited by the Board to attend any meeting of the Board as observers but shall not have the right to vote.

(3) The Minister shall publish names of all members of the Board, as first constituted and every change in the membership, in the *Gazette*.

(4) A member shall not be in the employ of the Board nor serve on a full time basis.

(5) A person shall not be qualified for appointment by the President as a member of the Board if he—

(a) holds a political office; or

(b) with the exception of the members listed in section ..., is an employee in the public service.

Chairperson
and Vice-
Chairperson
of the Board

... — (1) There shall be a Chairperson and a Vice-Chairperson who shall be elected by the Board from among the appointed members at the first meeting of the Board:

Provided that no member appointed under section... (1) (c) shall be elected as Chairperson or Vice-Chairperson.

(2) Subject to subsection (3), the Chairperson and the Vice-Chairperson shall hold their office until the expiry of their term of office.

(3) The Chairperson or the Vice-Chairperson may be removed from office as Chairperson or Vice-Chairperson, as the case may be, by the Board on a majority vote of two-thirds on the following grounds—

(a) misconduct;

(b) incompetence in the execution of the functions of the office; or

(c) any other good cause.

Tenure of office

...— (1) Save as for the members appointed under section ..., a member of the Board, shall, unless he resigns, hold office for a period of three years from the date of appointment and may be eligible for re-appointment once.

(2) When making the appointment after the expiry of the three years, the President shall have regard to the need to maintain a reasonable degree of continuity on the membership of the Board so that at least half of the appointed members shall be re-appointed for the next term of office.

(3) A vacancy in the office of an appointed member of the Board shall occur if the member—

(a) dies;

(b) is adjudged bankrupt;

(c) is sentenced for an offence against any written law to any term of imprisonment without the option of a fine;

(d) he fails, without the permission of the Chairperson or the Vice-Chairperson, to attend three successive meetings of the Board of which he has had notice;

(e) becomes incapacitated by reason of physical or mental disability; and

(f) resigns in accordance with subsection (4).

(4) A member other than an *ex-officio* member, may at any time resign his office by giving one month written notice to the Chairperson, who shall then forward the resignation to the President.

(5) A vacancy in the membership of the Board shall be filled by the appointment of a person appointed in accordance with the relevant provision of section ... (1) (a) or (b) under which the former member was appointed.

(6) A person appointed to fill a vacancy shall serve for the remainder of the term of his office but a person shall not be appointed to fill a vacancy of the remainder of the term of office for the resigning officer if the remainder of the term is less than six months.

Functions
and
powers of
the
Board

...— (1) The Board shall have powers to—

(a) coordinate and oversee investigations and receive reports from enforcement officers on the investigation and prosecution of offences under this Act;

(b) ensure that trafficked persons are treated with dignity and respect of their rights during interviews and throughout the investigation and prosecution process;

(c) ensure that all screening interviews of trafficked persons are conducted in accordance with the Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons contained in the *Second Schedule*;

(d) supervise protection officers in the provision of care, assistance, support and protection of trafficked persons;

(e) initiate education and awareness programmes on causes and consequences of trafficking in persons;

(f) formulate and oversee implementation activities aimed at the suppression of trafficking in persons;

(g) formulate policy, programmes and strategies to prevent and suppress trafficking in persons;

(h) make recommendations to the Minister on all aspects of prevention and suppression of trafficking in persons;

(i) coordinate and oversee training of relevant law enforcement and judicial officers;

(j) liaise with public institutions and NGOs on rehabilitation and reintegration of trafficked persons;

(k) manage the Trafficking in Persons Fund and prepare guidelines for disbursements from the Fund;

(l) coordinate research on international, regional and national developments and standards on trafficking in persons;

(m) coordinate and oversee data collection; and

(n) generally coordinate and monitor the implementation of the Act.

(2) The Board shall have powers as may be necessary for, or in connection with, or incidental to the performance of its functions under this Act on matters of or related to trafficking in persons.

Duties of the Board in relation to trafficked persons

... The Board shall ensure that a trafficked person—

(a) is not subjected to any discriminatory practice;

(b) has access to adequate health care during their residence at a shelter or any other place;

(c) where applicable, has access to his diplomatic mission within Malawi on any matter;

(d) has the right, facilitated by the State, to return to his country of origin;

(e) is granted a temporary residence permit pending completion of any matter before a court or tribunal in Malawi;

(f) has full rights respected and observed during investigation, gathering and interpretation of evidence;

(g) is kept separately from adults if the trafficked person is a child; or

(h) is protected from any harm during residence at a shelter.

Meetings of the Board

... —(1) The Board shall hold meetings at least once every three months at a place and time determined by the Chairperson.

(2) The quorum of a meeting of the Board shall be half its membership.

(3) The Chairperson shall convene and preside over meetings of the Board.

(4) In the absence of the Chairperson, the Vice-Chairperson shall preside over meetings of the Board.

(5) In the absence of both the Chairperson and the Vice-Chairperson, the membership of the Board shall elect a member present to preside over the meeting.

(6) At a meeting of the Board—

(a) a matter for the decision of the Board shall be decided by a majority of members present and voting;

(b) the Chairperson or a person elected to act as such, in the event of equality of votes, shall have a deliberative vote in addition to a casting vote.

(7) The Chairperson shall call an extra-ordinary meeting of the Board by a written request of at least four members within seven days after receipt of the request.

(8) Where the urgency of any particular matter does not permit the giving of such notice, an extra-ordinary meeting may be called upon giving shorter notice.

(9) Where a member of the Board is unable to attend a meeting of the Board, the member shall not send a representative but may request that his apologies for failure to attend be recorded.

Allowances
of the Board

... A member of the Board shall be paid such allowances or other benefits as the Minister on recommendation of the Board, may from time to time approve.

Procedure

... The Board may determine the procedure for its meetings and proceedings.

Committees

...—(1) The Board may establish such number of committees as it deems necessary or expedient to perform such functions and exercise such powers as may be determined by the Board.

(2) A committee established under this section shall elect a Chairperson and a Vice-Chairperson from among its members.

(3) A member of a committee appointed under this section may include a member of the Board or any other person appointed by the Board.

(4) A member of the committee appointed by the Board, may be paid an allowance as the Minister may determine.

(5) A member of the committee appointed by the Board shall hold office for the period specified in the letter of appointment and is eligible for re-appointment once.

(6) A member of a committee may—

(a) resign by giving notice to the Chairperson of the Board;

(b) be removed by revocation of appointment by the Board with or without reason.

(7) A committee shall hold its meetings at a place and time determined by the Chairperson of the committee.

(8) A committee may invite any person to attend its meetings but the person shall not be entitled to vote at the meeting.

(9) A person invited to attend a meeting under this section may be paid an allowance as the Minister may determine.

Minutes of meetings

...The Board shall cause minutes to be kept of proceedings of every meeting of the Board and of every meeting of a committee of the Board.

The Commission further recommends that prosecution of traffickers should remain the domain of the Director of Public Prosecution who is constitutionally mandated to conduct prosecution in the country. The Commission was convinced that such an arrangement shall not undermine the efforts of the Board in combating trafficking in persons. In any case, the Director of Public Prosecution or his designated alternate shall be a member of the Board.

8.0 FINANCIAL PROVISIONS

In order for any coordinating and implementing body to be effective in carrying out its designated duties and functions, it must be adequately funded. The Commission was concerned about the funding of the Board in relation to trafficking as it did not want to see the implementation of the proposed law defeated through lack of funding. The Commission was thus faced with the challenge of coming up with a mechanism that would ensure that the Board has sufficient funding to operate and implement the proposed law. The Commission while appreciative of the fact that Government is obliged to appropriate funds for the combat of trafficking in persons, sought to find other sustainable ways of complementing this funding. The Commission conducted comparative study on how other jurisdictions with similar arrangements achieve sustainability.

The Commission discovered that in some jurisdictions there is a fund established under law. In Ghana, Nigeria and Tanzania, for instance, such a fund has been established under trafficking in persons legislation. In Ghana, the fund termed the “Trafficking in Persons Fund” is established by the Trafficking in Persons Act.¹⁹¹ In Nigeria, the fund, termed the “Victims of Trafficking Trust Fund” is established under the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act.¹⁹² In Tanzania, the fund is termed “Anti-Trafficking Fund” and it is established by the Anti-Trafficking in Persons Act.¹⁹³

¹⁹¹ Section 20 of the Act.

¹⁹² See section 54 of the Act (Act No. 156 of 2003) as amended by Act No. 209 of 2005.

¹⁹³ Section 25 of the Act (Act No. 8 of 2008).

In keeping with this trend, the Commission recommends that a special fund should be established. The Commission recommends that the fund should be styled the “**Trafficking in Persons Fund**”, (hereinafter referred to as the “Fund”) and established under the **Trafficking in Persons Bill** to complement Government funding of the Board. The Commission thus recommends that the Board should be given powers to acquire funding from other sources. Such other sources would include voluntary contributions to the Fund from individuals and organizations; grants from bilateral and multilateral sources; proceeds from sale of confiscated property connected with trafficking offences; as well as money from any other source approved by the Minister responsible for finance.

Since the Fund shall be a public one, the Commission also considered issues of transparency and accountability which must be applied in the management of such funds. The Commission recommends that proper mechanisms should be put in place in the proposed law to guard against abuse of the Fund. Proper accountability and transparency mechanisms will ensure public trust and confidence in the Board. The Commission recommends that these provisions must be supplemented by provisions outlining proper audit principles in line with the financial year of Government. The Commission further recommends that a procedure be put in place for the Minister responsible for internal affairs and public security to receive an audit report from the Board to ensure proper checks and balances. The Minister shall, in turn, present the audit report to the President.

The Commission recommends adoption of the following Part—

PART...

FINANCIAL PROVISIONS

Funding of the Board ...— (1) **The Government shall adequately fund the Board to enable it to perform its duties and functions and to exercise its powers effectively.**

(2) **The Board may receive grants or donations of funds, material or any other forms of assistance for the purposes of performing its duties and functions.**

Trafficking in Persons Fund ...— (1) **There is hereby established a fund to be known as the Trafficking in Persons Fund (in this Act otherwise referred to as the “Fund”).**

(2) **The Fund shall consist of—**

(a) **such amount of money as may be appropriated by Parliament for payment into the Fund;**

(b) **such amount of money as may be paid to the Fund by way of loans, grants or donations;**

Purpose of the Fund	<p>(c) such amount of money as may be realized from proceeds of confiscation, seizure, or sale of property connected with trafficking in persons after conviction of any offence under this Act; or</p> <p>(d) such amount of money from any source approved by the Minister responsible for finance.</p> <p>... The purpose of the Fund is to finance—</p> <p>(a) the training of enforcement officers, protection officers or any other personnel engaged in any capacity to implement the provisions of this Act;</p> <p>(b) the provision of care, assistance and support to victims of offences under this Act, specifically by—</p> <p>(i) constructing or commissioning a building as a reception shelter for such victims;</p> <p>(ii) tracing the family of a victim of offences under this Act and where possible facilitating the reintegration of such a victim with his family; or</p> <p>(iii) any activity or matter as the Board may deem fit for the prevention and suppression of trafficking in persons.</p>
Management of the Fund	<p>...—(1) The Fund shall be managed by the Board which shall deposit all money due to the Fund in an account opened for that purpose.</p> <p>(2) The Board shall develop guidelines for disbursements of money from the Fund.</p> <p>(3) The Board shall not later than three months before the end of each financial year, prepare and submit to the Minister detailed estimates of income and expenditure for the next financial year.</p>
Accounts and audit	<p>... —(1) The Board shall keep books of accounts of the Fund and proper records in relation to them as approved by the Auditor General.</p> <p>(2) The Board shall submit accounts of the Fund to the Auditor General for audit within three months after the end of the financial year.</p> <p>(3) The Auditor General shall not later than three months after the receipt of the accounts, audit the accounts of the Fund in accordance with the provisions of the Public</p>
Act No. 7 of 2003	<p>of the Fund in accordance with the provisions of the Public</p>

Finance Act and forward a copy of the audit report to the Minister who shall, in turn, present the report to the President.

Financial year ... **The financial year for the Fund shall be the same as the financial year of Government.**

Annual Report ... **—(1) The Minister shall within one month after the receipt of the audit report, submit an annual report to Parliament covering the activities and the operations of the Fund for the year to which the report relates.**

(2) The annual report shall include—

(a) the audited accounts of the Fund and the Auditor General’s report on the accounts of the Fund; and

(b) other information that the Minister may consider necessary.

9.0 CARE AND PROTECTION OF TRAFFICKED PERSONS

Care, assistance and protection of trafficked persons is very important as the trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked.¹⁹⁴ Insufficient protection and support reinforces victimization and subjects trafficked persons to further victimization.

Care, assistance and protection for trafficked persons in a manner that is compatible with the full respect to their rights¹⁹⁵ includes providing, at the minimum, accommodation or shelter, education, health care, legal aid, financial support, social support, interpretation assistance, and other needs in the place of destination. Other levels of support include compensation and assistance with the right to return to ones country which encompasses repatriation and reintegration assistance. Such assistance must however be targeted to the needs of each particular trafficked person in order to be effective.

Trafficked persons are not a homogenous group and they must be disaggregated to provide them with the best possible care. Such disaggregation must be done without discriminating against them so as to provide the best possible care, protection and assistance. As such, trafficked persons must first be screened and identified or certified as trafficked persons and then categorized as either men or women, girls or boys, persons with disabilities, etc., so that they can benefit from the full levels of assistance available to their category.

¹⁹⁴ United Nations High Commissioner for Human Rights; “Recommended Principles and Guidelines on Human Rights and Human Trafficking “(E/2002/68/Add.1), Guideline 6.

¹⁹⁵ See Article 2 (a) of the Trafficking Protocol.

The particular physical, psychological and psychosocial harm suffered by trafficked children as well as their increased vulnerability to exploitation require that they be dealt with separately from adults in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs. It is equally important that such children must be separated from adult victims at all stages of the process of providing them with care, assistance and protection.

Overall, the Commission also noted that offering assistance, care and protection presents a unique opportunity for data collection opportunities. If those charged with providing such care, assistance and protection also collected all relevant data about the trafficked person and how they came into the trafficking system, more would be learned about traffickers and their methods. Efforts to prevent trafficking would thus be more meaningfully targeted.

9.1 *Identification and Registration of Victims of Trafficking*

Victims of trafficking do not readily make themselves known to the relevant authorities. It is for this reason that it is impossible to have a precise estimate of the number of trafficked persons worldwide. However, without knowing who the actual trafficked persons are and where to find them, it is impossible to fully combat trafficking in persons. It is vital for any legislative intervention aimed at combating trafficking to develop formal procedures to confirm the “trafficked person status” of individuals and their eligibility for various services, including temporary residence permits, health services, shelter and protection.

As regards transnational trafficking, it is sometimes difficult to distinguish between trafficked persons and smuggled persons. Whilst smuggled persons are answerable for their breach of immigration laws, trafficked persons are not. Taking a human rights approach to anti-trafficking measures, trafficked persons should not be treated as criminals. They have been deceived and have crossed borders unintentionally in the sense that they are either compelled by their traffickers to do so or have been told lies about what they will be doing once they reach their destination. According to the United Nations Office on Drugs and Crime, trafficking means much more than the organized movement of persons for profit.¹⁹⁶ As noted elsewhere, the critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and deception throughout or at some stage in the process. Such deception, force or coercion is used for the purpose of exploitation. While the additional elements

¹⁹⁶ UNODC, 2006; Toolkit to Combat Trafficking in Persons, Tool 6.13, Trafficked person certification. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_6-13.pdf or www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf - 1150k (Visited 21 May, 2009).

that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. The Commission has previously in this Report highlighted that this distinction is important from the standpoint of first responders, especially law enforcement officers such as the police and immigration officers. A full appreciation of this distinction enables first responders to appropriately classify smuggled migrants as distinct from victims of trafficking.

The Commission noted that the types of social support services available to trafficked persons may in some cases encourage illegal immigrants to claim to be victims of trafficking and, as such, stringent measures need to be put in place to ensure that only *bona fide* victims of trafficking are accorded protection, care and assistance. The Commission was also concerned that there is need to have a proper balance to ensure that the screening is not so overly rigorous that it constitutes an infringement of the rights of the victim. Although the Trafficking Protocol provides, as one of its objectives, the assistance and support of trafficked persons, no specific process is provided for determining whether a person has indeed been trafficked. In establishing a process whereby trafficked persons or others acting on their behalf can seek such status, the Commission was guided by the United Nations Office on Drugs and Crime “Toolkit to Combat Trafficking in Persons”¹⁹⁷ which takes into account the role that public officers and non-governmental organizations actors have to play in identifying trafficked persons.

The Commission noted from the United Nations Toolkit that persons suspected of being trafficked may come to the attention of various private or public actors in the course of their work. For example, the courts as well as tribunals may come into contact with persons they suspect of being trafficked during the course of unrelated proceedings. This can be during criminal proceedings involving smuggling or other proceedings that deal with other aspects of trafficking in civil or other litigation. In the course of such proceedings, the evidence may point to other persons who are identified during the proceedings, who may or may not be parties to those proceedings. If the court or tribunal reasonably believes such persons to be trafficked persons, the Commission recommends that it should refer them to law enforcement officers, particularly, enforcement officers designated under the **Trafficking in Persons Bill**. The same applies to any person acting in an official capacity or otherwise who comes across a person reasonably suspected of being trafficked. The enforcement officers shall then interview the persons suspected of being trafficked in order to ascertain their status. If the enforcement officer is satisfied that the person is indeed a trafficked person after conducting a screening interview he shall so certify, thus making such person eligible for care, assistance and protection services under the **Trafficking in Persons Bill**.

¹⁹⁷ UNODC, 2006; Toolkit to Combat Trafficking in Persons, Tool 6.13, Trafficked person certification. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_6-13.pdf or www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf - 1150k (Visited 21 May, 2009).

During the screening interview, enforcement officers should spot key indicators and obtain relevant information necessary to make a determination. The Commission recommends that the enforcement officer should, wherever possible, involve members of non-governmental organizations who may be helpful in approaching and interviewing suspected trafficked persons. The Commission also considered that it may not always be possible for members of non-governmental organizations to wait until an enforcement officer has interviewed and certified the trafficked person before such person can be assisted. The Commission recommends that members of non-governmental organizations who come across persons suspected of trafficking should also be able to interview the presumed trafficked person and offer them services as trafficked persons pending a formal interview and certification by an enforcement officer. As the Commission recommends that various actors shall have the power to interview trafficked persons, the Commission also recommends the development of standard guidelines and minimum standards for ensuring human rights principles and consistency in interviewing persons suspected of being trafficked. The guidelines should be based on the following principles—

- (a) truthfulness;
- (b) respect;
- (c) competence;
- (d) pragmatism; and
- (e) responsibility.¹⁹⁸

By adhering to these principles, interviewers should respect the rights of trafficked persons, their choices and their autonomy. The Commission also recommends that the special needs of children and the best interests of the child should be the primary considerations in interviews involving children. For example, girls should be interviewed by women; interview times should be short and the environment should not be threatening to children. Similarly, women's special needs should also be taken into account and they should be interviewed by other women or in the presence of other women. Further, potential cultural and language barriers should be thought about in advance and cultural mediators and language interpreters should be involved where possible.¹⁹⁹ Generally, the interview screening process should not re-victimise or re-traumatise the trafficked person. To accomplish these objectives, the Commission recommends that the trafficked person identification process should be an integral part of the victim protection mechanisms set out under the **Trafficking in Persons Bill**.

The Commission further recommends that the content of questions asked during interviews should be standardized not only to ensure consistency but also to ensure that there is no confusion in distinguishing persons who have been trafficked from persons who have been smuggled. A failure to identify a trafficked

¹⁹⁸ As above.

¹⁹⁹ As above.

person correctly is likely to result in a further denial of that person's rights.²⁰⁰ In order to bring out the element of trafficking, the Commission recommends that the screening interview, in addition to gathering demographic data and bio-data, must ask questions aimed at determining whether the essential elements of trafficking such as recruitment; deception; lack of freedom of movement; coercion through violence or threats of violence or other threats; poor and inhumane working conditions and living conditions; movement from one place to another; and evidence of being controlled.

As a result of the foregoing recommendations, the Commission has developed "Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons" and a "Trafficked Person Screening Identification Form" as the *First* and *Second Schedules* respectively of the **Trafficking in Persons Bill**.

9.2 *Immigration Status of Trafficked Persons and their Return and Reintegration*

Victims of transnational trafficking very often do not have regular residence status in the State of destination either because they arrived in the country of destination illegally or their residence permit has expired. As a result of this they may fear being expelled from the State if they report their victimization to the authorities or if their illegal presence in the State comes to the attention of the authorities in the course of an investigation.²⁰¹ The Commission formed the view that from the time a trafficked person is identified, the State machinery must still take responsibility and exert its weight to protect that trafficked person by ensuring that the exploitation is discontinued. Such protection includes, amongst other things, ensuring that the immigration status of the trafficked person is regularized. In the process of identification of trafficked persons and subsequent certification as such, the enforcement officers shall also be empowered to inquire into the residence status of the trafficked persons. The Commission recommends that temporary residence should be granted to the trafficked person in the course of criminal or civil proceedings, and pending arrangements to repatriate the trafficked person to his or her country of origin.

The Commission also considered the issue of return and reintegration of trafficked persons. Return and reintegration is generally the most desirable long term goal in processing trafficked persons. Returning to their country of origin is, however, often a difficult process for trafficked persons in which they face psychological, family-related, health, legal and financial problems and problems in reintegrating into their families and communities.²⁰²

²⁰⁰ UNODC, 2006, "Toolkit to Combat Trafficking in Persons", Tool 6.3 Guidelines on Trafficked person Identification. Available at <http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296-tool-6-3.pdf>. (Visited 21 May 2009).

²⁰¹ UNODC, 2006, "Toolkit to Combat Trafficking in Persons", Chapter 7-Immigration Status of Trafficked persons and their Return and Reintegration. Available at <http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296-tool-7-1.pdf>. (Visited 21 May 2009).

²⁰² UNODC, 2006, "Toolkit to Combat Trafficking in Persons", Tool 7.3 Understanding the challenges for returnee victims of trafficking. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-3.pdf (Visited 21 May, 2009).

If the problems that make it difficult for the victim to return home are not resolved and the returnees are not supported, it is likely that they will be abused and exploited again, sometimes even trafficked yet again. Since every trafficked person's situation is different, State authorities and organizations providing support for the return and reintegration in the home State need to find out exactly what kind of support the returnee may need. The necessary information can be obtained through careful planning, prior to return, by consulting, in the destination State, the person who wishes to return and any institution or organization that is helping or taking care of her or him in the State of origin. The family or nearest relatives to whom the returnee will go back must also be consulted.²⁰³ The Commission thus recommends that Government should ensure that reintegration assistance in collaboration with the country of origin, with a view to empowering trafficked persons in their State of origin, is an integral part of return programmes.

The Commission also noted that where children are concerned, the Trafficking Protocol²⁰⁴ obliges State Parties, in considering measures to assist and protect victims of trafficking, to take into account the special needs of child victims. When the age of a victim is uncertain and there are reasons to believe that the victim is a child, a State Party may wish to treat the victim as a child in accordance with the Convention on the Rights of the Child, until his or her age is verified.²⁰⁵ Therefore, in considering the return and reintegration of child victims of trafficking, best practice requires that measures should only be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest. In many situations where a child victim is involved, returning the child to the State of origin may not be appropriate. Therefore, in all cases involving children, the Commission recommends that the Board should ensure that special precautions are taken to guarantee that returning the child is in the child's best interests. The Board shall also ensure that prior to the return, a suitable caregiver such as a parent, other relative, other adult caretaker, a Government agency or a child care agency in the State of origin has agreed and is able to take responsibility for the child and provide him or her with appropriate care and protection.

The Commission also recommends that in situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, the Board should establish adequate care arrangements that respect the rights and dignity of the trafficked child in the country of

²⁰³ Save the Children; United Nations Inter Agency Project on Trafficking in Women and Children in the Sub Mekong Region (UNIAP); International Organization for Migration (IOM), 2001; "Training Manual for Combating Trafficking in Women and Children", developed as part of the United Nations inter-agency project on trafficking in women and children in the sub-Mekong region. Cited in UNODC toolkit to Combat Trafficking, op. cit supra, Tool 7.2 Temporary or permanent residence permit. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-3.pdf. (Visited 21 May, 2009).

²⁰⁴ Article 6(4).

²⁰⁵ UNODC, 2006, Toolkit to Combat Trafficking in Persons, Tool 7.9, Protecting refugee victims of trafficking. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-9.pdf or www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf - 1150k (Visited 21 May, 2009).

destination. In both situations, the Commission recommends that a child who is capable of forming his or her own views should enjoy the right to express those views freely in all matters affecting him or her, and in particular, concerning decisions about his or her possible return to the family, the views of the child should be given due weight in accordance with his or her age and maturity²⁰⁶.

The Commission further recommends that after a trafficked person has been granted temporary residence status, in special circumstances, that person ought to qualify for long term permanent residence on humanitarian grounds if local integration is the best solution.²⁰⁷

Currently, the Immigration Act deems any person who is illegally in the country as a prohibited immigrant, and as such their entry or presence in Malawi is unlawful.²⁰⁸ Article 7 of the Trafficking Protocol (on the status of trafficked persons in receiving States) addresses the issue of treating trafficked persons as prohibited immigrants. The provision recommends the adoption of measures that can permit trafficked persons to remain, in appropriate cases, in a State temporarily or even permanently. Although there is no obligation on the part of State Parties to the Convention to adopt legislative measures relating to the status of trafficked persons, where such measures have been adopted they have had a positive effect. Such measures have enabled trafficked persons to come forward to testify against traffickers. These measures also assist non-governmental organizations' to encourage trafficked persons, to whom they provide services, to report incidents to State authorities.²⁰⁹ The measures also ensure that no deportations are carried out during judicial proceedings.

The Commission recommends the amendment of the Immigration Act to ensure that the immigration status of trafficked persons is regularized to allow either temporary or permanent residence. Such amendment shall exclude any trafficked person properly identified as such, from the list of persons capable of being classified as illegal immigrants under the Immigration Act. Further, the amendment shall ensure that trafficked persons are offered temporary residence permits throughout criminal investigations and judicial proceedings. In case the return and reintegration of the trafficked persons to their country is impossible or inappropriate or against the best interests of a child victim or any other trafficked person, the Commission recommends that the Immigration Act should be amended further to enable such persons to seek permanent residence in the country. The proposed amendments are contained in the Immigration (Amendment) Bill attached to this Report as Appendix III.

²⁰⁶ Guideline 8, United Nations High Commissioner for Human Rights, 20 May, 2002, "Recommended Principles and Guidelines on Human Rights and Human Trafficking" (E/2002/68/Add.1)

²⁰⁷ UNICEF, September, 2006, UNICEF Guidelines on the Protection of Child Victims of Trafficking. Provisional Version 2.1. Available at <http://www.childtrafficking.org/eng/publication/html> (Visited 20 January, 2009).

²⁰⁸ Section 4 of the Immigration Act.

²⁰⁹ UNODC, 2006, Toolkit to Combat Trafficking in Persons, Chapter 7 - Immigration Status of Trafficked persons and their Return and Reintegration. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-1.pdf (Visited 21 May, 2009).

The Commission also noted that trafficked persons can sometimes be refugees. This is particularly applicable to Malawi which is home to refugees mainly from Somalia, Rwanda and Burundi. In some instances, traffickers recruit these refugees from refugee camps and traffic them outside the country.²¹⁰ Therefore, trafficked persons may be eligible to claim asylum status, in particular, when repatriation is not possible and applying for permanent residence may take time. The Commission was of the opinion that helping victims seek asylum is a crucial part of the victim assistance services offered. The Commission recommends that under the **Trafficking in Persons Bill**, programmes and interventions on trafficking, should not affect the right of victims to seek and enjoy asylum from persecution in accordance with international refugee law.

In order for a person trafficked transnationally who ends up in Malawi to claim refugee status, he or she needs to qualify as a refugee under the Refugee Act.²¹¹ The Refugee Act defines a “refugee” as any person who—

- (a) owing a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the State of his former habitual residence as a result of such events, owing to such fear, is unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either or part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²¹²

A trafficking victim who has a well-founded fear of persecution in his or her country of origin, based on one or more of the five grounds stipulated in the refugee definition under paragraph (a), would therefore qualify for refugee status. Similarly, a trafficked person who satisfies the definition under paragraph (b) may be eligible to remain in the country as a refugee having satisfied all the other requirements of the Refugee Act.

9.3 *Provision of Protection, Care, Assistance and Support to Trafficked Persons*

The Commission noted that the Trafficking Protocol²¹³ requires State Parties of origin and of destination to consider implementing measures to provide for the

²¹⁰ Consultations with the Department of Immigration and the Police Department on 29 May, 2009 indicated that this sometimes happens but no data was given of the amount or frequency.

²¹¹ Cap. 15:04 of the Laws of Malawi.

²¹² Section 2 of the Act.

²¹³ Article 6 (3).

physical, psychological and social recovery of trafficked victims. According to the Protocol, States should, in cooperation with non-governmental organizations, provide medical, psychological, language and translation, rehabilitation, skill training and education, and shelter.

The most critical factor in assistance and support programmes is that they should be both comprehensive and integrated. To plan and provide services in a coordinated and collaborative manner is in the best interests of victims. As noted earlier, providing support, shelter and protection to victims increases the likelihood that they will be willing to cooperate with and assist investigators and prosecutors.²¹⁴ The Commission however underscores that such care, assistance, support and protection should not be made conditional upon the victim's participation in legal proceedings.

In order to ensure that well coordinated care and protection is offered and monitored by the Trafficking in Persons Board, the Commission recommends that there should be specially designated officers appointed from the Ministry of Gender, Children and Community Development, under the supervision of the Board, as protection officers who shall be empowered to—

- (a) offer care and protection to a trafficked person;
- (b) carry out inquiries on trafficked persons and compile reports on any matters affecting the trafficked persons for the Board; and
- (c) supervise the trafficked persons and advise on what needs have arisen with respect to trafficked persons.

These officers should be designated as “protection officers”.

Further, the Commission noted that Article 6 of the Trafficking Protocol²¹⁵ obliges States Parties to take into account, in applying the provisions of this Article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. It was the Commission's view that the Board should be charged with the responsibility for realizing this obligation. The Commission went further to list the types of assistance that Government, through the Board, should ensure for trafficked persons as follows—²¹⁶

- (a) medical assistance;
- (b) psychological assistance;
- (c) legal assistance;

²¹⁴ Article 6 (3).

²¹⁵ UNODC, 2006, Toolkit to Combat Trafficking in Persons, Chapter 8 – Victim Assistance. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_8-1.pdf (Visited 21 May, 2009).

²¹⁶ Article 6 (4).

²¹⁷ This list is reproduced from the UNODC, 2006, Toolkit to Combat Trafficking in Persons, Tool.8.1 Obligation of States. Available at http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_8-1.pdf (Visited 21 May, 2009).

- (d) language and translation assistance;
- (e) rehabilitation, skills training and education;
- (f) reinsertion into education;
- (g) vocational training
- (h) shelter.

Shelter was considered the most urgent need for victims by the Commission. All other forms of assistance and support can only be provided if the victim is safely housed. In order to escape from the control of traffickers, victims of trafficking need a safe and secure refuge. The importance of having access to a safe shelter cannot be overemphasized. Despite the prospect of continued abuse, victims remain in an abusive or exploitative situation because they do not have a safe place to go to. The victims' need for safe shelter is both immediate and long-term.

The Commission concluded that there is need for Government either independently, or in conjunction with NGOs, to make safe shelter available to victims of trafficking found in the country and those who are returned having been trafficked to another country, if they cannot be reintegrated into their own communities. The length of time a trafficked person may spend in a shelter therefore varies depending on the circumstances of the person. A trafficked person pending repatriation or return may only need temporary shelter whereas as in some circumstances, a returned trafficked person will be so ill that their need for shelter will be a permanent one. This is often the case for trafficked persons who are seriously ill with hepatitis or HIV and AIDS-related illnesses. These victims may be rejected by their families or communities and have little chance of finding employment or security. Their emotional needs may be great and opportunities for assistance and self-development may best be provided by longer-term or permanent shelter and support. Safe housing and shelter should be flexible to adapt to different target groups (men, women, and children) and individual needs. Specialist non-governmental organizations may provide the expertise and operational management in partnership with Government.

The Commission went on to consider how the shelters would be sustained in light of the huge expenses that are likely to be involved. The Commission resolved that since the shelters would fall under the management of the Trafficking in Persons Board, funding that goes to the Board would also cater for expenses towards the running of shelters. In any event, the Commission was of the view that the Board should be given powers to recover quantifiable expenses incurred in the process of sheltering trafficked persons as a civil debt due to the Government in case the trafficker is convicted. The Commission considered this as a way of defraying expenses incurred in the process of offering protection to trafficked persons.

The Commission noted that in comparable jurisdictions, care and protection is offered to trafficked persons by non-governmental organizations. The Commission appreciated the role that civil society institutions play in the protection of human rights in general and resolved that although the law cannot grant the responsibility of offering care and protection to such organizations, it would be prudent if the institutional arrangement was empowered to coordinate issues of care and protection offered by accredited institutions.

The Commission learnt that in Nigeria, for instance, one non-governmental organization has been accredited by Government to offer care and protection to trafficked persons by way of a shelter for trafficked children. This notwithstanding, Government still has a supervisory role over the shelter and is informed of the operations and records that are maintained by the non-governmental organization at its shelters. The Commission also considered the approach taken by the United States under the Victims Protection Act which enables the Federal Government to make grants to States, local government units and victims' service non-governmental organizations in order to develop, expand or strengthen service programmes for victims.²¹⁷ In Europe, several countries provide funding to non-governmental organizations running reception centres that offer protection and assistance to victims.²¹⁸

The Commission noted from the foregoing that the responsibility of providing for shelter mainly lies in the hands of the State. However, due to various constraints that the State machinery faces in the provision of various social services to the public, non-governmental organizations often complement the efforts of government. The Commission further noted the essential role that non-governmental organizations play in ensuring delivery of appropriate services to trafficked persons, protection of rights of trafficked persons and as a source of information on various matters connected with trafficking in persons. However, the Commission was of the view that there is need for the law and policy here to provide that due to the peculiarity of trafficking in persons, non-governmental organizations cannot take roles in provision of care and support unsupervised. As a policy intervention, there is need for documented terms of reference to be developed by the Board once it is operational under which non state actors take responsibility for various aspects of care, assistance and protection. These arrangements between Government and non-governmental organizations may be enforced through the execution of Memoranda of Understanding (MOU) or contracts between the Board, on behalf of Government, and the non-governmental organizations.

9.4 *Immunity of Trafficked Persons*

The Commission observed that the Trafficking Protocol does not explicitly oblige States to refrain from criminalizing trafficked persons. The Recommended

²¹⁷ Section 107 (b) (2) of the Victims Protection Act (USA).

²¹⁸ This includes countries like Austria, Belgium, Germany, Italy and the Netherlands.

Principles and Guidelines on Human Rights and Human Trafficking²¹⁹ provide that trafficked persons should not be detained, charged or prosecuted for the illegality of their entry or residence into countries of transit and destination.²²⁰ The Recommended Principles further provide that trafficked persons should also not be prosecuted for their involvement in unlawful activities where their involvement in the illegal activity is a direct consequence of their situation as trafficked persons.²²¹ The General Assembly Resolution on Beijing +5 also recommends that States should consider preventing trafficked persons from being prosecuted for illegal entry or residence.²²² For instance, in Ireland, when the Criminal Law Human Trafficking Bill was proposed, Amnesty International criticized the Bill on several accounts including that it did not ensure that victims of crime would be considered immune from prosecution from misdemeanours. It only guaranteed the right to anonymity for those who would testify in court.²²³

The Recommendations to Strengthen the October 2004 Draft of the European Convention on Action Against Trafficking in Human Beings by the Council of Europe²²⁴ have provided for the prohibition of detention, charge or prosecution of victims for illegal entry or residence and activities which are a direct consequence of their situation as victims.²²⁵ The Council of Europe has noted that to provide for non-criminalization of victims is to recognize trafficking in persons as a human rights abuse and it is also consistent with treatment of trafficked persons as victims of crime whether the offender is convicted or not. It is also the view of the Council of Europe that non-criminalization of trafficked persons is likely to enhance cooperation from trafficked persons in the criminal process where there is no apprehension or arrest.

The Commission fully supports these views and recommends the adoption of the following provision on immunity of trafficked persons—

**Immunity of
trafficked
persons**

... A person who has been assessed and certified as a trafficked person by an enforcement officer or a protection officer under the terms of this Act shall not be subjected to any criminal proceedings directly relating to the prosecution of any offence under this Act or any other written law.

The Commission also recommends the following Part on Care and Protection—

²¹⁹ E/2002/68/Add.1.above footnote 203.

²²⁰ As above.

²²¹ As above.

²²² General Assembly Resolution A/RES/S-23/3 (para 70 (c)).

²²³ See <http://www.amnesty.ie/amnesty/live/irish/action/article.asp?id=14529&page=14524> (Visited 21 May, 2009).

²²³ As above.

²²³ Article 25 of the Council of Europe Recommendations.

PART ...

CARE AND PROTECTION

Appointment
of protection
officer

...The Minister may, by notice published in the *Gazette*, appoint an officer charged with duties in relation to social welfare to exercise and perform the duties of a protection officer under this Act.

Duties of
protection
officer

...The protection officer shall perform the following duties—

(a) ensure that trafficked persons are accorded with proper treatment and are provided with the necessary care, assistance and protection;

(b) ensure that all interviews of trafficked persons are conducted in accordance with the Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons contained in the *Second Schedule* and that *Form A* contained in the *Third Schedule* is duly completed; and

(c) perform any other function that the Minister may, from time to time, by notice in the *Gazette* prescribe.

Shelters

... —(1) The Minister may, by notice in the *Gazette*,—

(a) designate any premises to be a shelter for the care and protection of trafficked persons;

(b) make rules for the standard of care and protection services for trafficked persons at a shelter; or

(c) make regulations for the administration of any shelter within Malawi.

(2) A person in charge of a shelter shall ensure that the rights and freedoms of trafficked persons are observed and protected.

(3) A person or an organization may apply to the Minister to designate premises of that person or organization as a shelter.

(4) A person who operates a shelter in contravention of this section commits an offence and shall be liable to a fine of K300,000 and to imprisonment for five years.

(5) For the purposes of this Part, “Minister” means the Minister responsible for social welfare.

10.0 WITNESS PROTECTION

The ability of a witness to cooperate with law enforcement agents and give testimony in a court of law or any other tribunal without fear of reprisals or intimidation is crucial to the successful prosecution of offenders. The Commission observed that the offence of trafficking in persons is often controlled by international organized crime networks and the potential level of risk to witnesses and service delivery personnel who interact with witnesses is significant. Protecting witnesses is an inherently risky business and no security system, no matter how sophisticated and well equipped, can completely eliminate the element of risk. The capacity of the traffickers to retaliate against trafficked persons who have managed to escape or have testified against them is well documented all over the world. The risk may be expected to increase as service delivery organizations help more trafficked persons to escape from their exploiters and more trafficked persons testify against their traffickers.²²⁶

In view of the threat to trafficked persons and witnesses, the Commission observed that such trafficked person, or witnesses may be unable to testify in an open court. Witnesses including trafficked persons may be intimidated if their identity is known.

The Commission also noted that, in other instances, the intimidation, violence, aggression or force may not only be directed against the witness in court, but also his or her family, friends or other persons. This, the Commission noted, is further exacerbated through the involvement of international organized criminal gangs. The Commission learnt during its study visit to Nigeria that, in some cases, the threats could be based on the “supernatural” such as the purported use of witchcraft and related practices. The Commission was informed of numerous anecdotes where trafficked persons are brought before a witchdoctor in the country of origin to be intimidated by being required to take an oath of secrecy under threat of death or injury to them or their family. Usually, the witchdoctor extracts some personal body items from the trafficked person such as pubic hair or menstrual blood in order to convince the trafficked person that they have left a part of themselves in the country of origin. This ensures a link between the trafficked person and the witchdoctor through which they believe they may be harmed if they break their oath of secrecy.

The Commission noted that witness protection first came to prominence in the United States of America in the early 1970s. The procedure was provided for specifically under the law and was initially intended for dismantling criminal organizations linked to the *Mafia* and similar organized crime groups. On a vow of silence, the *Mafia* threatened death to anyone who cooperated with law enforcers. It is this practice that convinced the Department of Justice that a programme for protection of witnesses had to be instituted.

²²⁶ IOM; 2007, IOM Handbook on Direct Assistance to Victims of Trafficking http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/ (Visited 10 March, 2009).

The Commission noted that international practice shows that witness protection comes about as a result of legislative and policy interventions. With respect to trafficking in persons, witness protection falls under the greater realm of care and protection of trafficked persons. However, there are some specific aspects of witness protection that go beyond mere care and protection of victims. Witness protection varies in form and there are three common types of witness protection—

- (a) physical protection;
- (b) domestic or foreign relocation; and
- (c) special arrangement for giving evidence.²²⁷

Under these forms, protection may actually involve provision of escort to court, provision of temporary residence in a safe house or use of modern equipment during testimony. In cases where the threat from the offender is so great, there may be need for provision of resettlement of the witness under a new identity in a new and undisclosed location.

Malawi has no witness protection legislation and as such this poses a challenge in that trafficked persons or other witnesses may be scared to testify in criminal proceedings. It is believed that other measures which would necessitate the creation of an environment that may encourage people to come forward and give evidence in such issues, may be of assistance in this respect. Such measures would include use of witness protection, closed circuit television, and *in camera*, that is closed door, hearings. Ordinarily in criminal proceedings under the English common law tradition, an accused person is entitled to a hearing that is public. In which case, the accused person is entitled to know his or her accusers. The accusers are required to make and prove their allegations in an open court and the accused person is entitled to challenge their testimony in an adversarial manner.

The Commission considered that the risks posed by perpetrators of offences of trafficking in persons to witnesses justify a departure from the open court practice. Disclosure of the identity of the trafficked person or allowing the trafficked person to come face to face with the accused may not serve the interests of justice. As such, there is need for the law governing criminal procedure to develop special arrangements for giving evidence in risky criminal trials. The Commission recommends that in criminal trials against trafficking offenders, the courts should be empowered, on application by the prosecution to allow proceedings to be conducted *in camera*. In such cases, the public shall not be allowed to observe the proceedings. The Commission further recommends that whether or not the proceedings are *in camera*, in the interests of justice and, on application by the prosecution, a trafficked person should be allowed to testify without having to face the accused. In such cases, the trafficked person may testify while he or she is in another room within the court premises or a shield may be placed in order to prevent the accused from facing or intimidating the

²²⁷ Articles 24 and 25 of the Witness Protection Act, No. 56 of 2000 (Queensland, Australia).

trafficked person. Where possible, technological interventions such as videoconferencing may be used. The Commission therefore reiterates its recommendation that the Judiciary should develop Regulations in appropriate legislation such as the Courts Act to²²⁸ provide for situations and modalities of giving evidence in the nonconventional manner as stipulated above.

The Commission was aware that the National Juvenile Justice Forum is currently piloting child justice courts departing from established principles in the giving of evidence. Three pilot child justice courts have been established in Zomba, Blantyre and Mzuzu and it is anticipated that another shall be established in Lilongwe before the end of 2010. The courts have special facilities for the testimony by children which may be given in a separate room linked to the court by closed circuit television. The magistrate as well as the accused can see the child, but the child stays in a separate room or hidden behind a screen so that he or she does not have to face the accused person. There should be no problems with making arrangements to accommodate all victims of trafficking so that they are shielded from the accused person during trials.

The Commission further saw the need to create an environment which would bring about trust and confidence between witnesses and the implementing officers of the proposed legislation. The Commission noted that different officials have been given responsibilities by the **Trafficking in Persons Bill**, giving them access to sensitive and confidential information. The Commission considers it prudent to ensure that these offices maintain confidentiality so as to protect the victims of trafficking. The Commission thus recommends that an oath should be administered to officers and members of Board who will be charged with implementation of the proposed law. The Commission further recommends punishment for those who breach the oath.

The Commission having noted the likelihood of the commission of offences, such as the breach of confidentiality of witnesses, unauthorized disclosure of witness identity, unlawful access to records of the witnesses and other related offences under the proposed legislation, makes a recommendation to legislate on these matters so as to guard against their occurrence.

The Commission recommends the following provisions—

Restriction on publication and reporting **...A person shall not, without leave of the court, publish or report in the media regarding—**

(a) any step taken in relation to a trafficked person capable of identifying that person at any stage of any judicial proceedings under this Act; or

(b) the identity of a trafficked person or any particular that may lead to disclosure of his identity.

²²⁸ Cap. 3:02 of the Laws of Malawi.

Witness
protection

... A person who—

(a) wilfully or negligently allows any unauthorized person to gain access to any witness or trafficked person;

(b) wilfully or negligently discloses, in contravention of any provision of this Act—

(i) the identity of any protected person;

(ii) information that a particular protected person is under protection;

(iii) the place of safety or location where any person is under protection or has been relocated in terms of this Act;

(iv) any information which could lead to the identification of any such person or any such place of safety;

(v) any information which undermines or compromises or could undermine or compromise the integrity of any effort to protect a witness; or

(vi) any information relating to the relocation or change of identity of a protected person,

commits an offence and shall be liable to imprisonment for seven years without the option of a fine.

Application
for protection

... —(1) A witness who reasonably believes that his safety or the safety of any connected person is or may be threatened by any person or group or class of persons, by reason of his being a witness, shall—

(a) report such belief—

(i) to the investigating officer in the proceedings concerned;

(ii) to the officer in charge of a police station;

(iii) if he is in prison, to the officer in charge of the prison where he is being detained; or

(iv) to the Director of Public Prosecutions;

and may,

(b) make an application to the court for an order placing him or any person connected to him under protection.

(2) If a witness is for any reason unable to make the report or to make an application for protection referred to under subsection (1), any interested person or the investigating officer concerned, who reasonably believes that the safety of the witness or any connected person is or may be threatened as contemplated in subsection (1), may make such a report or application on behalf of the witness.

(3) An application for the protection of a minor may be made by or on behalf of the minor without the consent of his parent or guardian.

(4) Any person to whom a report is made under subsection (1), shall assist the applicant in the making of an application for protection and, unless he is the Chairperson of the Board, shall—

(a) inform the Chairperson of the Board of the application; and

(b) submit the application to the court.

Confidentiality
of information

...—(1) The Chairperson of the Board, every member of the Board, enforcement officers, protection officers and members of non-governmental organizations accredited by the Board to handle cases dealing with trafficked persons, shall upon taking office take an oath or make an affirmation in the form specified in the ...Schedule before a Commissioner for Oaths.

(2) A person who discloses any information, capable of prejudicing the safety or provision of care and protection to any trafficked person, acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him by or under this Act, commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for two years.

The form of the oath to be taken by the Board is attached to this Report as the *Third Schedule*.

11.0 MISCELLANEOUS PROVISIONS

11.1 *Powers of the Minister*

The Commission observed that under the Laws of Malawi, it is common practice that the Minister responsible is empowered to make subsidiary registration facilitating the implementation of the Act. Under the proposed law, the Commission has previously recommended that the Minister should be given powers to make rules and regulations over various matters.

The Commission proposed the following provision to give effect to its recommendations in this regard—

**Powers of the
Minister**

...—(1) The Minister may, on the advice of the Board, make regulations for the better carrying into effect the provisions of this Act.

(2) The Minister may, by notice published in the *Gazette*, amend a schedule to this Act.

11.2 *Repeal of existing legal provisions relating to trafficking*

As the Commission has made extensive provisions to combat trafficking in persons, it is no longer necessary to have separate provisions in any other law. Therefore, the Commission recommends the repeal of section 79 of the Child Care, Protection and Justice Act.²²⁹ The Child Care, Protection and Justice (Amendment) Bill is Part of this Report as Appendix VI.

11.3 *Schedules*

The Commission recommends the adoption of the following schedules under the **Trafficking in Persons Bill**—

(a) *The First Schedule*: This covers Guiding Principles in Conducting Trafficked Person Identification Screening Interviews;

(b) *The Second Schedule*: This covers the Trafficked Person Screening Form; and

(c) *The Third Schedule*: This covers the Confidentiality Oath Form.

²²⁹ Act Number 22 of 2010.

FIRST SCHEDULE
TRAFFICKING IN PERSONS ACT

SECTION... ²³⁰

FORM A

GUIDING PRINCIPLES FOR CONDUCTING SCREENING INTERVIEWS
FOR IDENTIFICATION OF TRAFFICKED PERSON

PART I—MINIMUM STANDARDS FOR INTERVIEWS

In all interviews under this Act, the person conducting the interview shall ensure that the following minimum standards are in place—

- | | |
|----------------|--|
| Information | 1. The presumed trafficked person should be informed about the procedure of the police interrogation and its consequences. |
| Language | 2. The information given should be clear, accurate and in the native language of the presumed trafficked person. |
| Interpretation | 3. Experienced interpreters should be present during the interview. |
| Privacy | 4. Questions touching upon the person's privacy, for instance regarding intimate relationships and experiences in prostitution, should be avoided. |
| Identification | 5. A trafficked person can only be conclusively identified as such if the distinct elements of the crime of trafficking have been detected. This may require time because of the complexity of the crime of trafficking and the vulnerable status of trafficked persons suffering from post-traumatic stress disorder. |
| Evidence | 6. Besides the statements of the presumed trafficked person, other evidence should be collected to identify all the facts and relevant information to determine if the case is one of trafficking. |

PART II — GENERAL PRINCIPLES

In all interviews under this Act, the person conducting the interview shall do the following—

- | | |
|------------|--|
| Do no harm | 1. Treat each presumed trafficked person and the situation as if the potential for harm is extreme until there is evidence to the contrary. Do not undertake any interview |
|------------|--|

²³⁰ See provisions on interviews.

	that will make a presumed trafficked person's situation worse in the short or longer term.
Case familiarization	2. Learn the risks associated with trafficking and each presumed trafficked person's case before undertaking an interview.
Preparation of referral information	3. Be prepared to provide information in a presumed trafficked person's native language and the official language about appropriate legal, health, shelter, care and assistance services and to help with referral, if requested.
Careful selection and preparation of interpreters and co-workers	4. Weigh the risks and benefits associated with employing interpreters, co-workers or others and develop adequate methods for training.
Ensuring anonymity and confidentiality	5. Protect the presumed trafficked person's identity and confidentiality throughout the entire interview process; from the moment the case file is opened to the time the case is completed.
Getting informed consent	6. Make certain that each presumed trafficked person clearly understands the content and purpose of the interview, the intended use of the information, his right not to answer questions, his right to terminate the interview at any time and his right to put restrictions on how the information is used.
Listening to and respecting each presumed trafficked person's assessment of her situation and risk to her safety	7. Recognize that each presumed trafficked person will have different concerns and that the way he views his concerns may be different from how others might assess them.
Retraumatization	8. Do not ask questions intended to provoke an emotionally charged response. Be prepared to respond to a presumed trafficked person's distress and highlight his strengths.
Emergency intervention	9. Be prepared to respond if a presumed trafficked person says he is in imminent danger.
Use of information collected	10. Use information in a way that benefits the individual presumed trafficked person or that advances the development of good policies and interventions for persons suspected of being trafficked generally.

PART III—CHILDREN

The following principles shall be used in all cases concerning children—

- | | |
|--|---|
| Time is of the essence | 1. Interviews should take place as soon as possible after the allegation or suspicion of abuse emerges. |
| Safety and support | 2. The child should feel safe and supported during the interview. |
| Sex/age appropriate interviewers | 3. Girls and younger boys should be interviewed by female interviewers. Older boys can be interviewed by male interviewers. |
| Presence of appropriate adult during interview | 4. An appropriate adult that the child trusts should generally be present during the interview. This person's responsibility is to look after the child's best interests. It could be a guardian, a legal representative or, if neither has been appointed, a teacher or a social worker. |
| Informal setting | 5. Interviews should take place in an informal setting and be conducted by interviewers trained to talk with children. |
| Language of interview | 6. Interviews should be in the child's own language. If this is impossible to organize, considerable care must be taken in arranging interpretation. |
| Length of interview | 7. If possible, interviews should not be too long to avoid tiring the child. |
| Child's developmental stage | 8. The child's developmental stage and needs should be considered in planning the interview. |
| Child's characteristics | 9. The characteristics of the child and the child's family background should be considered in planning the interview. |
| Opportunity to narrate | 10. The children should be given an opportunity to narrate their story in their own way, before they are asked explicit questions. |
| Interview plan | 11. The questions should begin with open questions and direct or leading questions should be reserved for the latter part of the interview. |

SECOND SCHEDULE
 TRAFFICKING IN PERSONS ACT
 FORM A
 Section....²³¹

TRAFFICKED PERSONS SCREENING AND IDENTIFICATION FORM

PART I—INFORMED CONSENT

1. Has the individual been informed that the Enforcement Officer and/or
 (name of partnering organization) reserves the right to share her/his individual case data for assistance purposes and only with authorized officers in the Malawi Police Service, the Department of Immigration and partnering organizations involved in direct assistance? (Yes/No)*
2. Has the individual further been informed that the Malawi Government reserves the right to use (only anonymous, aggregate) data for research purposes? (Yes/No)
3. Has the individual’s full and informed consent been obtained to conduct the screening interview based on information given regarding the designation of the enforcement officer, the role of the organization, the voluntary nature of the interview and the use of the information provided by the individual as outlined above? (Yes/No)*

Note: Informed consent is necessary for all services, such as medical examination and procedure, health assessments, assisted voluntary returns and reintegration assistance.

If the individual is a minor, has the consent of the parent(s)/guardian(s) been obtained? (Yes/No)

Signature of interviewer: Date:

Signature of trafficked person: Date:.....

Signature of witness: Date:

PART II—REGISTRATION DATA

First name(s):

Family name(s):

Sex:

Country of birth:

Place of birth:

²³¹ See provision on identification of trafficked persons.

Last place of residence in country of origin:

Date of birth:

Is date of birth an estimate? (Yes/No)

Age (in number of years):

Citizenship:

Ethnicity:

Identity document (type, country, number and expiry date):

PART III—CASE AND INTERVIEW DATA

(Where the trafficked person is referred:)

Type of referring organization/individual: (NGO/international organization/law enforcement/ immigration/ Government/ embassy/ IOM mission/ hotline/ self referral walk-in/family/friend/client/other)* Other, please specify

Name/location of referring organization/individual:

Address and telephone number of referring organization:

Screening date:

Screening location:

Name/Designation/Rank of interviewer:

Name of organization/institution:

Contact details of interviewer:

Interviewee's language(s):

Interpreter? (Yes/No)

Name of interpreter:

If minor: Name(s), address (es) and telephone number of parent(s) or guardian(s):

PART IV—ENTRY INTO TRAFFICKING

- 1. How did the individual enter the process (indicate multiple options and continue on separate sheet if necessary)?

.....

.....

.....

.....

.....

.....

- 2. Did entry into the process involve recruitment? (Yes/No)* If Yes, how was the contact initiated between the individual and her/his recruiter? (personal contact/employment agency/travel agency/Internet advertisement/newspaper advertisement/radio advertisement/television advertisement/other)*

- 3. If labour migration, what activity did the individual believe he or she was going to be engaged in following arrival at the final destination (indicate multiple options if necessary)? (Agricultural work/begging/child care/construction/domestic work/factory work/fishing/low-level criminal activities/ military service/mining/prostitution/restaurants and hotel work/study/small street commerce/trade/transport/other)* If other, please specify

.....

- 4. What was the individual told would be their benefits following arrival at final destination?

Salary (equivalent in \$US per month)

.....

Other benefits

.....

.....

.....

.....

- 5. In which month/year did the individual enter into the process?

.....

- 6. Minor at the time of entry into the process? (Yes/No) *

- 7. From which place/country did the individual enter into the process?
.....
- 8. What place/country is the last (or intended) destination?
.....
- 9. Did the individual travel alone? (Yes/No)* If No, who did the individual travel with (indicate multiple options if necessary)? Husband /wife/ partner/ relative/ friend/recruiter/transporter/unknown persons/other)* If other, specify
.....
- 10. Did the individual spend any time in transit place(s)/country(ies) (Yes/No)*
(a) If Yes, who did the individual travel with? (husband/wife/partner/ relative/friend/recruiter/transporter/unknown persons/other)* If other, specify
.....
- 11. Did he or she engage in any activity in this place(s)/country(ies) (Yes/No)*
If Yes, which activity in first/only transit place/country? (agricultural work/ begging /childcare/ construction /domestic work /factory work/ fishing/low-level criminal activities/ marriage/ military service/ mining/ prostitution/ restaurants and hotel work/ study /small street commerce/ trade/ transport sector/other)* If other, specify
.....
- 12. If individual spent anytime in more places/countries, add respective places and activities engaged in.
.....
.....
.....
.....
- 13. Were any of the following means used to control the individual?
(a) Physical abuse? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
(b) Psychological abuse? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....

- (c) Sexual abuse? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (d) Threats to individual? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (e) Threat of action by law enforcement? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (f) Threats to family? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (g) False promises/deception? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (h) Denial of freedom of movement? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (i) Giving of drugs? (Yes/No)* If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (j) Giving of alcohol? (Yes/No)* If Yes, who by? If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (k) Denial of medical treatment? (Yes/No)* If Yes, who by? If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (l) Denial of food/drink? (Yes/No)* If Yes, who by? If Yes, who by?
(Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify
.....
- (m) Withholding of identity documents? (Yes/No)* If Yes, who by? If Yes,
who by? (Recruiter/Transporter/Harbourer/Receiver/Other)* If other,
specify
.....

(n) Withholding of travel documents? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify

.....

(o) Debt bondage? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harbourer/Receiver/Other)* If other, specify

.....

*Circle as appropriate

PART V—EXPLOITATION PHASE

1. What activity has the individual undertaken since her/his arrival in the last destination? (Agricultural work/begging/child care/construction/domestic work/factory work/ fishing/low-level criminal activities/marriage/military service/mining/prostitution/ restaurants and hotel work/study/small street commerce/trade/transport sector/ unemployed/other)* If other, specify

.....

(a) How old was the individual when the activity began?

.....

(b) How long did the only/most significant activity last?

.....

2. Were any of the following means used to control the individual during the activity?

(a) Physical abuse? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify

.....

(b) Psychological abuse? (Yes/No)* If Yes, who by? (Receiver/ Exploiter/ Clients/ Other)* If other, specify

.....

(c) Sexual abuse? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify

.....

(d) Threats to individual? (Yes/No)* If Yes, who by? (Receiver/ Exploiter/ Clients/ Other)* If other, specify

.....

- (e) Threat of action by law enforcement? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (f) Other Threats to family? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (g) False promises/deception? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (h) Denial of freedom of movement? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (i) Giving of drugs? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (j) Giving of alcohol? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (k) Denial of medical treatment? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (l) Denial of food/drink? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (m) Withholding of wages? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (n) Withholding of identity documents? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....
- (o) Withholding of travel documents? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify
.....

(p) Debt bondage? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....

(q) Excessive working hours? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....

3. If exploited for prostitution (sexual exploitation) were any of the following means used to control the individual during the exploitation?

(a) Denial of freedom to refuse client? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....

(b) Denial of freedom to refuse certain acts ? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....

(c) Denial of freedom to use condom? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....

(d) Other means of control. Specify:

.....

.....

4. Did the individual experience exploitation? (Yes/No)* If no exploitation took place:

(a) was there any indication of a real and substantial threat of exploitation?

.....

.....

(b) if Yes, what were the reasons that exploitation never took place?
(Rescue/Escape /Other)* If other, specify

.....

**Circle as appropriate*

PART VI—ADDITIONAL CORROBORATIVE EVIDENCE

(To be answered by the interviewer)

1. Are any of the following additional corroborative materials available:
 - (a) Police or other official reports (Yes/No)*
 - (b) Identity documents (Yes/No)*
 - (c) Travel documents (Yes/No)*
 - (d) Medical reports (Yes/No)*
 - (e) Copies of employment contract or (Yes/No)*
 - (f) Recruitment offer (Yes/No)*
 - (g) Personal writings by the individual (Yes/No)*
 - (h) Hotline reports (Yes/No)*
 - (i) If other, specify

.....

2. Is the individual a trafficked person? Justify this decision with reference to responses to questions 1-17 above. (Continue on separate sheet if necessary).

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3. Certification that the individual is a trafficked person made by: (specify names, designation or rank)

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.....
.....

- 4. If the individual is a trafficked person, was the type of trafficking in-country or transnational? (in-country/transnational/both)*
- 5. If the individual is not a trafficked person, is he or she in need of assistance? (Yes/No)* (Please give details.)

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- 6. Additional remarks

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* circle as appropriate

THIRD SCHEDULE

FORM B

Section ...²³²

FORM OF OATH

I, A.B, of swear by Almighty God that I shall not make a record of, divulge or communicate, information in contravention of this Act.

FORM OF AFFIRMATION

I, A.B, of do solemnly, sincerely and truly declare and affirm that I shall not make a record of, divulge or communicate, information in contravention of this Act.

²³²[See provision on confidentiality.

APPENDIX I

TRAFFICKING IN PERSONS BILL, 20..

TRAFFICKING IN PERSONS BILL, 20...

ARRANGEMENT OF SECTIONS

PART I—PRELIMINARY

SECTION

1. Short title
2. Interpretation
3. Scope of application

PART II—TRAFFICKING IN PERSONS BOARD

4. Establishment of a Board
5. Composition of the Board
6. Chairperson and Vice-Chairperson of the Board
7. Tenure
8. Function and powers of the Board
9. Duties of the Board in relation to trafficked persons
10. Meetings of the Board
11. Allowances of the Board
12. Procedure
13. Committees
14. Minutes of the Board

PART III—OFFENCES

15. Trafficking in persons
16. Trafficking in children
17. Aggravated form of trafficking
18. Trafficking in persons an offence involving dishonesty and moral turpitude
19. Prohibition against working with children
20. Court to order closure of establishment
21. Benefiting from exploitation of trafficked persons
22. Aiding or abetting trafficking in persons
23. Duty to report
24. Liability of legal person
25. Carrier liability
26. Other acts that promote or facilitate trafficking

PART IV—INVESTIGATION AND JUDICIAL PROCEEDINGS

27. Designation of enforcement officer
28. Powers of enforcement officer
29. Duties of enforcement officer
30. Identification of enforcement officers
31. Arrest by person who is not a police officer
32. Records
33. Search and seizure

SECTION

34. Search and seizure without warrant
35. List of seized items
36. Access to electronic data
37. Confiscation
38. Disposal of confiscated property
39. Acquittal and assets
40. Right to institute civil action
41. Obstruction
42. Immunity of trafficked person

PART V—CARE AND PROTECTION

43. Appointment of Protection Officers
44. Duties of Protection officer
45. Shelters

PART VI—WITNESS PROTECTION

46. Restriction on publication and reporting
47. Witness protection
48. Application for protection
49. Confidentiality of information

PART VII—FINANCIAL PROVISIONS

50. Funding of the Board
51. Trafficking in persons Fund
52. Purpose of the Fund
53. Management of the Fund
54. Accounts and Audit
55. Financial year
56. Annual report

PART VIII—MISCELLANEOUS

57. Powers of the Minister

A BILL*entitled*

An Act to make provision for the prevention and elimination of trafficking in persons; to provide for the establishment of a Board for coordination and management of matters related to trafficking in persons; to make provision for care, assistance and protection of trafficked persons; to provide for international and local co-operation on matters of trafficking in persons; and to provide for connected matters.

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Trafficking in Persons Act, 20... Short title
2. In this Act, unless the context otherwise requires— Interpretation
- “AIDS” means Acquired Immune Deficiency Syndrome;
- “child” means a person below the age of eighteen years;
- “exploitation” means—
- (a) the extraction of work or services from any person;
- (b) the participation of a person in all forms of commercial sexual activity such as prostitution, sexually-explicit performance, forced prostitution, and forced participation in the production of pornography;
- (c) the removal of body parts or the extraction of organs or tissue; or
- (d) any other practice in terms of which it cannot be said that the person participated willingly;
- “HIV” means the Human Immuno-deficiency Virus which causes AIDS;
- “organized criminal group” means a group of three or more persons, existing for a period of time and acting in concert with the aim of committing an offence under this Act;
- “relative” means—
- (a) a parent, step parent, foster parent, grandparent, sibling, guardian or any person who has legal custody over the child or to whom the child is a dependant; or
- (b) at the time the offence under the Act is committed, a person who is living with the child as a member of that person’s family or was under the person’s family care and protection;
- “substantial health risk” means—
- (a) infection with—
- (i) HIV;
- (ii) a sexually transmitted disease; or
- (iii) any other disease;
- (b) any medical condition, occasioned as a result of the exploitation.
- 3.—(1) This Act shall apply to a legal or natural person where the offence— Scope of application
- (a) is committed wholly or partly within Malawi;

(b) is committed outside Malawi and the trafficked person is a citizen of Malawi;

(c) is committed outside Malawi by a citizen of Malawi or a person who is resident in Malawi;

(d) committed outside Malawi with a view to the commission of an offence under this Act, within Malawi; or

(e) involves an organized criminal group.

(2) Where a person has already been convicted or acquitted of an offence under this Act in the foreign jurisdiction, he shall not be prosecuted again for the same offence in the Republic; unless the proceedings of the court in the foreign jurisdiction—

(a) were for the purpose of shielding the person concerned from criminal proceedings outside a foreign jurisdiction; or

(b) were not conducted independently or impartially in the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

PART II—TRAFFICKING IN PERSONS BOARD

Establishment
of a Board

4.—(1) There is hereby established a Board to be known as the Trafficking in Persons Board (in this Act otherwise referred to as the “Board”).

(2) The Board shall be an independent Board and shall have its secretariat at the Ministry of Internal Affairs and Public Security or any ministry as the President may direct.

Composition
of the Board

5.—(1) The Board shall consist of—

(a) the following members nominated by the Minister responsible for Gender and Child Development and appointed by the President, at least two of whom shall be women—

(i) two persons representing women interests; and

(ii) two persons representing children’s interests ;

(b) two persons nominated by the Council for Non-Governmental Organization (CONGOMA) and appointed by the President;

(c) the following ex-officio members—

(i) the Principal Secretary of the Ministry responsible for Internal Affairs and Public Security or his designated alternate;

- (ii) the Director of Public Prosecutions or his designated alternate;
 - (iii) the Principal Secretary of the Ministry responsible for Women and Children Development or his designated alternate;
 - (iv) the Principal Secretary of the Ministry responsible for Local Government or his designated alternate;
 - (v) the Principal Secretary of the Ministry of Education or his designated alternate;
 - (vi) the Principal Secretary of the Ministry responsible for Health or his designate alternate or his designated alternate;
 - (xii) the Principal Secretary of the Ministry responsible for Labour or his designated alternate;
 - (xiii) the Inspector General of Police or his designated alternate;
 - (ix) the Chief Immigration Officer or his designated alternate;
- and

(2) The Resident Representatives of the United Nations High Commissioner for Refugees in Malawi and the United Nations Children Fund or their designated alternates and in the absence of either, a representative of the Resident Representative of the United Nations Development Programme in Malawi may be invited by the Board to attend any meeting of the Board as observers but shall not have the right to vote.

(3) The Minister shall publish names of all members of the Board as first constituted and every change in the membership, in the *Gazette*.

(4) A member, shall not be in the employ of the Board nor serve on a full time basis.

(5) A person shall not be qualified for appointment by the Minister as a member of the Board if he—

(a) holds a political office; or

(b) with the exception of the members listed in section 5, is an employee in the public service.

6.—(1) There shall be a Chairperson and a Vice-Chairperson who shall be elected by the Board from among the appointed members at the first meeting of the Board:

Chairperson
and Vice-
Chairperson
of the Board

Provided that no member appointed under paragraph (c) of subsection (1) shall be elected as Chairperson.

(2) Subject to subsection (3), the Chairperson and the Vice-Chairperson shall hold their office until the expiry of their term of office.

(3) The Chairperson or the Vice-Chairperson may be removed from office as Chairperson or Vice-Chairperson, as the case may be, by the Board by the majority vote of two-thirds on the following grounds—

(a) misconduct;

(b) incompetence in the execution of the functions of the office;
or

(c) any other good cause.

Tenure of
office

7.—(1) Save as for the members appointed under section 5, a member of the Board shall unless he resigns, hold office for a period of three years from the date of appointment and may be eligible for re-appointment once.

(2) When making the appointment after the expiry of the three years, the President shall have regard to the need to maintain a reasonable degree of continuity on the membership of the Board so that at least half of the appointed members shall be re-appointed for the next term of office.

(3) A vacancy in the office of an appointed member of the Board shall occur if the member—

(a) dies;

(b) is adjudged bankrupt;

(c) is sentenced for an offence against any written law to any term of imprisonment without the option of a fine;

(d) he fails, without the permission of the Chairperson or the Vice-Chairperson, to attend three successive meetings of the Board of which he has had notice;

(e) becomes incapacitated by reason of physical or mental disability; and

(f) resigns in accordance with subsection (4).

(4) Member other than *ex-officio* member, may at any time resign his office by giving one month written notice to the Chairperson, who shall then forward the resignation to the Minister.

(5) A vacancy in the membership of the Board shall be filled by the appointment of a person appointed in accordance with the relevant provision of section 5 (1) (a) and (b) under which the former member was appointed.

(6) A person appointed to fill a vacancy shall serve for the remainder of the term of his office but a person shall not be appointed to fill a vacancy of the remainder of term of office for the resigning officer if the remainder of the term is less than six months.

8. The Board shall have powers to—

Functions and
powers of the
Board

(a) coordinate and oversee investigations and receive reports from enforcement officers on the investigation and prosecution of offences under this Act;

(b) ensure that trafficked persons are treated with dignity and respect of their right during interviews and throughout the investigation and prosecution process;

(c) ensure that all screening interviews of trafficked persons are conducted in accordance with the Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons contained in the *Second Schedule* hereto;

(d) supervise protection officers in the provision of care, assistance, support and protection of trafficked persons;

(e) initiate education and awareness programmes on causes and consequences of trafficking in persons and children;

(f) formulate and oversee implementation activities aimed at the suppression of trafficking in person;

(g) formulate policy, programmes and strategies to prevent and suppress trafficking in persons and children;

(h) make recommendations to the Minister on all aspects of prevention and suppression of trafficking in persons;

(i) coordinate and oversee training of relevant law enforcement and judicial officers;

(j) liaise with Government agencies and NGOs on rehabilitation and reintegration of trafficked persons;

(k) manage the Trafficking in Persons Fund and prepare guidelines for disbursements from the Fund;

(l) coordinate research on international, regional and national developments and standards on trafficking in persons;

(m) coordinate and oversee data collection; and

(n) generally coordinate and monitor the implementation of the Act.

(2) The Board shall have powers as may be necessary for, or in connection with or incidental to the performance of its functions under this Act on matters of or related to trafficking in persons.

Duties of the Board in relation to trafficked persons

9. The Board shall ensure that a trafficked person—

- (a) is not subjected to any discriminatory practice;
- (b) has access to adequate health care during their residence at a shelter or any other place;
- (c) where applicable, has access to his diplomatic mission within Malawi on any matter;
- (d) has the right, facilitated by the State, to return to his country of origin;
- (e) is granted a temporary residence permit pending completion of any matter before a court or tribunal in Malawi;
- (f) has full rights respected and observed during investigation, gathering and interpretation of evidence;
- (g) is kept separately from adults if the trafficked person is a child; or
- (h) is protected from any harm during residence at a shelter.

Meetings of the Board

10.—(1) The Board shall hold meetings at least once every three months at a place and time determined by the Chairperson.

(2) The quorum of a meeting of the Board shall be half its membership.

(3) The Chairperson shall convene and preside over meetings of the Board.

(4) In the absence of the Chairperson, the Vice-Chairperson shall preside over meetings of the Board.

(5) In the absence of both the Chairperson and the Vice-Chairperson, the membership of the Board shall elect a member present to preside over the meeting.

(6) At a meeting of the Board—

(a) a matter for the decision of the Board shall be decided by a majority of members present and voting;

(b) the Chairperson or a person elected to act as such in the event of equality of votes, shall have a deliberative vote in addition to a casting vote.

(7) The Chairperson shall call an extraordinary meeting of the Board by written request of at least four members within seven (7) days after receipt of the request.

(8) Where the urgency of any particular matter does not permit the giving of such notice, an extra-ordinary meeting may be called upon giving shorter notice.

(9) Where a member of the Board is unable to attend a meeting of the Board, the member shall not send a representative but may request that his apologies for failure to attend be recorded.

11. A member of the Board shall be such allowances or other benefits as the Minister may on, on recommendation of the Board shall from time to time approve. Allowances of the Board

12. The Board may determine the procedure for its meetings and proceedings. Procedure

13.—(1) The Board may establish such number of committees as it deems necessary or expedient to perform such functions and powers as may be determined by the Board. Committees

(2) A committee established under this section shall elect a chairperson and a Vice-Chairperson from among its members.

(3) A member of a committee appointed under this section may include a member of the Board or any other person appointed by the Board.

(4) A member of the committee appointed by the Board, may be paid an allowance as the Minister may determine.

(5) A member of the committee appointed by the Board shall hold office for the period specified in the letter of appointment and is eligible for re-appointment.

(6) A member of a committee may—

(a) resign by giving notice to the chairperson of the Board;

(b) be removed by revocation of appointment by the Board with or without reason.

(7) A committee shall hold its meetings at a place and time determined by the chairperson of the committee.

(8) A committee may invite any person to attend its meetings but the person shall not be entitled to vote at the meeting.

(9) A person invited to attend a meeting under this section may be paid an allowance as the Minister may determine.

14. The Board shall cause minutes to be kept of proceedings of every meeting of the Board and of every meeting of a committee of the Board. Minutes of meetings

PART III—OFFENCES

Trafficking in
persons

15.—(1) A person who recruits, harbours, transports or obtains another person through—

(a) threats or use of force;

(b) coercion;

(c) abduction;

(d) fraud;

(e) deception;

(f) abuse of power or position;

(g) abuse of position of vulnerability; or

(h) giving or receiving of payments to obtain consent of a person having control of that other person,

for purposes of exploitation of that person commits the offence of trafficking in persons.

(2) The consent of a trafficked person is immaterial where any of the means set out in subsection (1) (a) to (g) have been used.

(3) A person who commits trafficking in persons shall be liable to imprisonment for fourteen years without the option of a fine.

Trafficking in
children

16.—(1) Notwithstanding section 15, the recruitment, transportation, harbouring or receipt of a child for the purposes of exploitation constitutes the offence of trafficking in persons regardless of whether or not—

(a) the commission of the offence includes the means set out in section 15 (1) (a) to (h); or

(b) the child consented to the commission of the offence.

(2) A person convicted of the offence of trafficking in children shall be liable to imprisonment for twenty-one years without the option of a fine.

Aggravated
form of
trafficking

17.—(1) An offence of trafficking in persons or children is deemed to be aggravated if committed in any of the following circumstances—

(a) the judicial processes of adoption, fosterage, guardianship, or wardship have been used to recruit a child;

(b) the accused is a relative of the child;

(c) the trafficked person is of unsound mind;

(d) the offence is committed by an organized criminal group;

(e) the offence is committed by a public servant, a religious leader, a traditional leader or any person acting in an official capacity in the exercise of his duties;

(f) the offence is committed by a person purporting to act, in the exercise of an official duty where such official acts in abuse of authority or moral ascendancy;

(g) the offence is committed for the purpose of removing body parts or extracting, tissue or organs;

(h) on occasion of the commission of the offence the trafficked person—

(i) dies;

(ii) develops a mental condition;

(iii) becomes pregnant or is forced to terminate a pregnancy;

(iv) suffers mutilation, disfigurement or permanent bodily injury; or

(v) is exposed to any other substantial health risk.

(2) A person who commits the offence of trafficking in persons or trafficking in children in any of the circumstances in subsection (1), shall be liable, to imprisonment for life without the option of a fine.

18. The offence of trafficking in persons or children constitutes an offence of dishonesty or moral turpitude for purposes of sections 51 and 80 of the Constitution.

Trafficking in persons an offence involving dishonesty or moral turpitude

19. A person convicted of the offence of trafficking in persons or trafficking in children is ineligible to work in any capacity with children for a period of seven years following the conviction.

Prohibition against working with children

20. Where an offence of trafficking in persons is committed by a person acting or purporting to act in an official capacity for a non-governmental organization or other establishment or body, the court may, upon conviction, order the closure and de-registration of the non-governmental organization, establishment or body under which the person acted

Court to order closure of establishment

21. A person who intentionally benefits from the exploitation of a trafficked person or causes or enables another person to benefit from exploitation of a trafficked person for any purpose, commits an offence and shall be liable to imprisonment for five years.

Benefiting from exploitation of trafficked persons

Aiding or
abetting
trafficking in
persons

22.—(1) Where an offence under this Act is committed, each of the following persons is deemed to have taken part in the commission of the offence and may be charged and convicted with the actual commission of the offence—

(a) every person who attempts to do the act or to make the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of aiding or enabling another person to commit the offences;

(c) every person who aids or abets another person to commit the offence;

(d) every person who counsels or procures any other person to commit the offence; or

(e) every person who being an employee or agent, acted in the course of employment, or under instructions.

(2) A conviction of counselling or procuring the commission of any offence under this Act entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or commit to do any act of such nature that if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission and he may be charged with himself doing the act or making the omission.

Duty to report

23.—(1) A person who knows, suspects or has reason to suspect that an offence under this Act is being, has been or is about to be committed shall, as soon as is practicable, report this to the Police.

(2) A person who, contrary to subsection (1), fails to report to the Police, commits an offence and shall be liable to a fine of K200,000, and to imprisonment for two years.

(3) The Officer-in-Charge of the Police Station to which a report has been made shall ensure that the identity of the informant is not revealed.

Liability of
legal person

24. Where an offence under this Act has been committed by a legal person, any person who, at the time of the commission of the offence was in any manner responsible for the management of any

affairs of the legal person shall be liable for the offence unless he or she proves that—

(a) the offence was committed without his knowledge, consent or connivance; or

(b) he exercised all diligence to prevent commission of the offence under the circumstances.

25.—(1) An international commercial transportation provider shall verify that each passenger to any destination into or outside the Republic possesses the necessary travel documents, including a passport and a visa, to enter the destination country and any transit countries. Carrier
liability

(2) Subsection (1) shall apply to the international commercial transportation provider, his agents, and any person selling or issuing tickets, boarding passes or similar documents allowing passengers to travel, and to persons collecting or checking such tickets, boarding passes or similar documents prior to or subsequent to boarding.

(3) Any person referred to in subsection (2) who fails to comply with subsection (1) commits an offence and shall be liable to a fine of K5,000,000 and to imprisonment for five years.

(4) Where an offence is committed under this section, the international commercial transportation provider shall bear the costs of returning the person to his initial point of embarkation and shall be liable to pay the person's costs associated with providing accommodation and meals for the person and any accompanying children.

(5) Where an international commercial transportation provider knowingly transports a trafficked person into or from Malawi, such international commercial transportation provider shall be liable for costs associated with providing accommodation and meals for the trafficked person and any accompanying children for the duration of the person's stay outside or inside Malawi.

(6) An international commercial transportation provider shall not be guilty of an offence under subsection (1) if—

(a) the international commercial transportation provider had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry of that person into the receiving country;

(b) the person possessed the travel documents required for lawful entry into the receiving country when that person boarded, or last boarded, the means of transport to travel to the receiving country;

(c) entry into the receiving country occurred only because of illness of or injury to a person on board, stress of weather or other circumstances beyond the control of the international commercial transportation provider.

Other acts
that promote
or facilitate
trafficking

26. A person who, for the purpose of the promotion of trafficking in persons and child trafficking, intentionally—

(a) leases or subleases, uses or allows to be used any house, building or establishment;

(b) produces, prints, broadcasts or distributes by any means including the use of information technology or the Internet, any brochure, flyer or any other communication material that promotes trafficking in persons;

(c) assists in misrepresentation or fraud for the purposes of procuring or facilitating the acquisition of necessary exit documents from the Department of Immigration for the purposes of trafficking in persons;

(d) facilitates exit from or entry to the Malawi, a person who is in possession of unissued, tampered or fraudulent travel documents for the purpose of trafficking in persons;

(e) confiscates, withholds or destroys the passport, travelling documents or personal documents which belong to a trafficked person for the purposes of furthering trafficking in persons; or

(f) prevents a trafficked person from leaving the Republic or seeking redress from appropriate law enforcement authorities,

commits an offence and shall, be liable to imprisonment for seven years without the option of a fine.

PART IV—INVESTIGATION AND CRIMINAL PROCEEDINGS

Designation
of
enforcement
officer

27. The Minister may, by notice published in the *Gazette* designate the following persons as enforcement officers for the purposes of this Act—

(a) a police officer;

(b) an Immigration officer; or

(c) any other public officer as the Minister may deem fit.

28. Notwithstanding the provisions of the Criminal Procedure and Evidence Code, an enforcement officer who reasonably suspects or receives information that any offence under this Act has been committed or is about to be committed shall have the power to—

Powers of
enforcement
officer
Cap. 8:01

- (a) institute and carry out an investigation;
- (b) arrest any suspect;
- (c) interrogate any suspect;
- (d) enter premises and search and seize any item under section 34;
- (e) interview any person suspected of being trafficked in accordance with the Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons contained in the *Second Schedule* hereto; and
- (f) certify a person as a trafficked person if such person provides satisfactory information to that effect during the screening interview, having duly completed *Form A* contained in the *Third Schedule* hereto.

29. An enforcement officer shall—

Duties of
enforcement
officer

- (a) record all cases of offences under this Act in accordance with section 21;
- (b) refer all trafficked persons to a protection officer for screening as soon as is practicably possible, but in any case no later than twenty-four hours after such a person is brought to the attention of the enforcement officer;
- (c) ensure the proper administration and enforcement of the provisions of this Act;
- (d) submit quarterly reports of all cases of offences in this Act within ten days of the last day of each preceding quarter to the Chairperson of the Board;
- (e) advise the Board on the effective implementation of this Act and other ancillary matters; and
- (f) perform such other duties as are necessary for the effective carrying out of the purposes of this Act.

30. An enforcement officer, in the exercise of any powers or in the discharge of any functions under this Act, shall—

Identification
of
enforcement
officers

- (a) declare his designation as an enforcement officer; and
- (b) produce evidence of the designation to any person if required.

Arrest by
person who is
not a police
officer

31. Where an arrest of any person under this Act is made by a private person or an enforcement officer who is not a police officer, the person effecting the arrest shall present the arrested person to the nearest police station, as soon as it is practicable to do so, but in any case no later than twenty four hours after the arrest.

Records

32.—(1) An enforcement officer shall during interrogation register all relevant information about the offence in a book to be kept in every police station for such purpose and to be called “The Trafficking in Persons Register Book” in addition to being recorded in the Occurrence Book, according to *Form B* contained in the *Second Schedule* hereto in triplicate.

(2) The officer in charge of the police station to which a person suspected of having committed or is about to commit an offence under this Act is presented, shall within ten (10) days after the last day of each quarter send to the Inspector General of Police a certified copy of all entries made in the Trafficking in Persons Register Book during the preceding quarter.

(3) The Inspector General of Police shall file the certified copy of the entry in the Trafficking in Persons Register Book in his office and maintain a database of the same.

Search and
seizure

33.—(1) An enforcement officer may, where he has reasonable cause to believe that—

(a) any premises or conveyance has or is being or is about to be used for; or

(b) any premises or conveyance has evidence for an offence under this Act,

apply to a magistrate on written information under oath for a warrant authorizing entry into the premises or conveyance.

(2) A warrant issued under subsection (1) may authorize the enforcement officer to—

(a) search the premises or conveyance for any matter connected to the commission of an offence under this Act;

(b) seize or remove any matter which may be used in evidence for an offence under this Act; or

(c) copy or extract any matter found in the premises or conveyance.

(3) Where it is deemed necessary, the enforcement officer may, in exercise of his powers under this Act—

(a) break a door of premises or a conveyance or obstruction to the premises or conveyance in order to effect entry into the premises or conveyance;

(b) remove, by force, any obstruction to entry, search, seizure or removal of any matter, to which this section applies; or

(c) detain a person found in the premises or conveyance until the search is completed.

(4) Where, by reason of its nature, size or quantity, it is not possible to remove any matter seized under this section, the enforcement officer shall—

(a) seal the matter, premises or conveyance; and

(b) indicate, where possible, that the matter, premises or conveyance has been sealed.

(5) A person who, without written authority—

(a) breaks, tampers with, damages or alters the seal referred to in subsection (4); or

(b) attempts, aids or abets in breaking, tampering with, damaging or altering the seal,

commits an offence and, shall be liable to a fine of K1,000,000 and imprisonment for five years.

34.—(1) Where an enforcement officer has reasonable grounds to believe that obtaining a warrant under section 33 may cause delay or would adversely affect investigation of an offence under this Act, he may, without warrant, with assistance and force as is necessary—

Search and
seizure
without
warrant

(a) enter or search any premises or conveyance;

(b) stop, enter and search any conveyance;

(c) seize or detain a conveyance or any matter connected to investigation for an offence under this Act; or

(d) inspect, copy or extract any matter found at any premises or conveyance.

(2) In exercising powers under this section, the enforcement officer shall have all powers conferred on him under this Act.

35.—(1) An enforcement officer shall prepare a list of all items seized under this Part, in triplicate, and immediately deliver one copy of the list, duly signed by the enforcement officer, to an occupier or

List of seized
items

owner or an agent or servant of premises or conveyance to which the list applies, and another copy to the Chairperson of the Board.

(2) Where premises or conveyance are not occupied, the enforcement officer shall, if possible, post the list of items seized at a conspicuous place on the premises or conveyance.

Access to
electronic
data

36.—(1) A search to which the provisions under this Part applies, shall include data in a computer or other electronic device.

(2) When exercising powers under subsection (1), an enforcement officer shall be given a password, encryption code, decryption code, software or hardware or any other means required to enable access or comprehension of the data.

(3) A person who contravenes this section commits an offence and shall be liable to a fine of K1,000,000 and imprisonment for two five years.

Confiscation

37. Where an arrested person is convicted of an offence under this Act, an enforcement officer shall apply to court for an order of confiscation, and disposal of the convicted person's assets and properties acquired, obtained or associated with the offence under which the person was convicted.

Disposal of
confiscated
property

38.—(1) Where an order under section 37 is issued, the Minister shall, by sale or otherwise, dispose off assets and property to which the order applies.

(2) The proceeds realised from disposal of confiscated assets shall be paid into the Trafficking in Persons Fund.

Acquittal and
assets

39. Where an accused person whose property was seized under this Act has been acquitted for an offence under the Act, the court may order that the seized property be—

(a) released to the accused person; or

(b) attached, where the acquittal is based on technical grounds.

Right to
institute civil
action

40. A trafficked person, irrespective of his immigration status, has the right to—

(a) institute civil proceedings against any person including a public officer in respect of an offence under this Act; or

(b) seek compensation, restitution and recovery in damages from any person or from the proceeds of disposal of assets of any person connected with an offence under this Act.

Obstruction

41. A person who obstructs, impedes, interferes with or fails to comply with a lawful demand of an enforcement officer in

performance of powers conferred under this Act commits an offence, and shall be liable to imprisonment for five years without the option of a fine.

42. A person or child who is trafficked shall, upon being found to have indeed been trafficked, not be subjected to any criminal proceedings directly relating to the prosecution of offences under this Act or any other law.

Immunity
of trafficked
person

PART V—CARE AND PROTECTION

43. The Minister may, by a notice published in the *Gazette*, appoint an officer charged with duties in relation to social welfare to exercise and perform the duties of a protection officer under this Act.

Appointment
of Protection
Officers

44.—(1) The protection officer shall perform the following duties—

Duties of
protection
officers

(a) ensure that trafficked persons are accorded with proper treatment and are provided with the necessary care, assistance and protection;

(b) ensure that all interviews of trafficked persons are conducted in accordance with the Guiding Principles for Conducting Screening Interviews for the Identification of Trafficked Persons contained in the *Second Schedule* and that *Form A* contained in the *Third Schedule* is duly completed; and

45.—(1) The Minister may, by notice in the *Gazette*,—

Shelters

(a) designate any premises to be a shelter for the care and protection of trafficked persons;

(b) make rules for the standard of care and protection services for trafficked persons at a shelter; or

(c) make regulations for the administration of any shelter within Malawi.

(2) A person in charge of a shelter shall ensure that the rights and freedoms of trafficked persons are observed and protected.

(3) A person or organization may apply to the Minister to designate the premises of that person or organization as a shelter.

(4) A person who operates a shelter in contravention of this section commits an offence and shall be liable to a fine of K300,000 and to imprisonment for five years.

(5) For the purposes of this Part, “Minister” means the Minister responsible for social welfare.

PART VI—WITNESS PROTECTION

- Restriction on publication and reporting
- 46.** A person shall not, without leave of court, publish or report in the public media regarding—
- (a) any step taken in relation to a trafficked person at any stage of any judicial proceedings under this Act; or
 - (b) the identity of a trafficked person or any particular that may lead to disclosure of his identity.
- Witness protection
- 47.** A person who—
- (a) wilfully or negligently allows any unauthorized person to gain access to any witness, trafficked person or child;
 - (b) wilfully or negligently discloses, in contravention of any provision of this Act—
 - (i) the identity of any protected person;
 - (ii) information that a particular protected person is under protection;
 - (iii) the place of safety or location where any person is under protection or has been relocated in terms of this Act;
 - (iv) any information which could lead to the identification of any such person or any such place of safety;
 - (v) any information which undermines or compromises or could undermine or compromise the integrity of a witness protection programme in terms of this Act; or
 - (vi) any information relating to the relocation or change of identity of a protected person,
- commits an offence and shall be liable to imprisonment for seven years without the option of a fine.
- Application for protection
- 48.—(1)** A witness who reasonably believes that his safety or the safety of any family member is or may be threatened by any person or group or class of persons, by reason of his being a witness, shall—
- (a) report such belief—
 - (i) to the investigating officer in the proceedings concerned;
 - (ii) to the officer in charge of a police station;
 - (iii) if he is in prison, to the officer in charge of the prison where he is being detained; or
 - (iv) to the Director of Public Prosecutions;
- and may,

(b) apply to the court requesting that the applicant or any family member be placed under protection.

(2) If a witness is for any reason unable to make the report or to make an or application for protection referred to under subsection (1), any interested person or the investigating officer concerned, who reasonably believes that the safety of the witness or any family member is or may be threatened as contemplated in subsection (1), may make such a report or application on behalf of the witness.

(3) Unless otherwise provided for under this Act, an application for protection of a minor may be made by or on behalf of the minor without the consent of his parent or guardian.

(4) Any person to whom a report is made as contemplated in subsection (1), shall assist the applicant in the making of an application for protection and, unless he is the Chairperson of the Board, shall—

(a) inform the Chairperson of the Board of the application; and

(b) submit the application to the court.

49.—(1) The Chairperson of the Board, every member of the Board, enforcement officers, protection officers and members of non governmental organizations, accredited by the Board to handle cases dealing with trafficked persons, shall either upon taking office or upon handling every case, take an oath or make affirmation in the form specified in the *Third Schedule* hereto before a Commissioner for Oaths.

Confidentiality of information

(2) A person who discloses any information, capable of prejudicing the safety or provision of care and protection to any trafficked person, acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him by or under this Act, commits an offence and shall be liable to a fine of K1,000,000 and to imprisonment for two years.

PART VII—FINANCIAL PROVISIONS

50.—(1) The Government shall adequately fund the Board to enable it to perform its duties and functions and exercise its powers effectively.

Funding of the Board

(2) The Board may receive grants or donations of funds, material or any other forms of assistance for the purposes of performing its duties and functions.

- Trafficking in persons Fund
- 51.**—(1) There is hereby established a fund to be known as the Trafficking in Persons Fund (in this Act otherwise referred to as the “Fund”).
- (2) The Fund shall consist of—
- (a) such amount of money as may be appropriated by Parliament for payment into the Fund;
- (b) such amount of money as may be paid to the Fund by way of loans, grants or donations;
- (c) such amount of money as may be realized from proceeds of confiscation, seizure, or sale of property connected with trafficking in persons after conviction of the offence under this Act; or
- (d) such amount of money from any source approved by the Minister.
- Purpose of the Fund
- 52.** The purpose of the Fund is to finance—
- (a) the training of enforcement officers, protection officers or any other personnel engaged in any capacity to effect the provisions of this Act;
- (b) the provision of care, assistance and support to victims of trafficking in persons, specifically by—
- (i) constructing or commissioning a building as a reception shelter for such victims;
- (ii) tracing the family of a victim of offences under this Act and where possible facilitating the reintegration of such a victim with his family; or
- (iii) any activity or matter as the Board may deem fit for the prevention and suppression of trafficking in persons.
- Management of the Fund
- 53.**—(1) The Fund shall be managed by the Board which shall deposit all money due to the Fund in an account opened for that purpose.
- (2) The Board shall develop guidelines for disbursements of money from the Fund.
- (3) The Board shall, not later than three months before the end of each financial year, prepare and submit to the Minister detailed estimates of income and expenditure for the next financial year.
- Accounts and Audit
- 54.**—(1) The Board shall keep books of accounts of the Fund and proper records in relation to them as approved by the Auditor General.

(2) The Board shall submit accounts of the Fund to the Auditor General for audit within three months after the end of the financial year.

(3) The Auditor General shall, not later than three months after the receipt of the accounts, audit the account of the Fund in accordance with the provisions of the Public Finance Act and forward a copy of the audit report to the Minister.

Act No. 7
of 2003

55. The financial year for the Fund shall be the same as the financial year of Government.

Financial
year

56.—(1) The Minister shall within one month after the receipt of the audit report, submit an annual report to Parliament covering the activities and the operations of the Fund for the year to which the report relates.

Annual
report

(2) The annual report shall include—

(a) the audited accounts of the Fund and the Auditor General's report on the accounts of the Fund; and

Powers of the
Minister

(b) other information that the Minister may consider necessary.

PART VIII—MISCELLANEOUS

57.—(1) The Minister, may on the advice of the Board, make regulations for the better carrying into effect the provisions of this Act.

Amendments

(2) The Minister may by notice published in the *Gazette* amend a schedule to this Act.

FIRST SCHEDULE

TRAFFICKING IN PERSONS ACT

Sections 8 and 28

GUIDING PRINCIPLES IN CONDUCTING SCREENING INTERVIEWS FOR THE IDENTIFICATION OF TRAFFICKED PERSONS

PART I—MINIMUM STANDARDS FOR INTERVIEWS

In all interviews under this Act, regardless of the legal status of the person being interviewed, the person conducting the interview shall ensure that the following minimum standards are in place—

Information 1. The presumed trafficked person should be informed about the procedure of the police interrogation and its consequences.

- | | |
|----------------|--|
| Language | 2. The information given should be clear, accurate and in the native language of the presumed trafficked person. |
| Interpretation | 3. Experienced interpreters should be present during the interview. |
| Privacy | 4. Questions touching upon the person's privacy, for instance regarding intimate relationships and experiences in prostitution, should be avoided. |
| Identification | 5. A trafficked person can only be conclusively identified as such if the distinct elements of the crime of trafficking have been detected. This may require time because of the complexity of the crime of trafficking and the vulnerable status of trafficked persons suffering from post-traumatic stress disorder. |
| Evidence | 6. Besides the statements of the presumed trafficked person, other evidence should be collected to identify all the facts and relevant information to determine if the case is one of trafficking. |

PART II—GENERAL PRINCIPLES

In all interviews under this Act, regardless of the immigration status of the person being interviewed, the person conducting the interview shall endeavour to do the following—

- | | |
|--|--|
| Do no harm | 1. Treat each presumed trafficked person and the situation as if the potential for harm is extreme until there is evidence to the contrary. Do not undertake any interview that will make a presumed trafficked person's situation worse in the short term or longer term. |
| Case familiarization and risk assessment | 2. Learn the risks associated with trafficking and each presumed trafficked person's case before undertaking an interview. |
| Preparation of referral information | 3. Be prepared to provide information in a presumed victim's native language and the local language (if different) about appropriate legal, health, shelter, social support and security services and to help with referral, if requested. |
| Careful selection and preparation of interpreters and co-workers | 4. Weigh the risks and benefits associated with employing interpreters, co-workers or others and develop adequate methods for training. |
| Ensuring anonymity and confidentiality | 5. Protect a respondent's identity and confidentiality |

- throughout the entire interview process - from the moment a presumed trafficked person is contacted to the time that details of his case are made public.
- | | |
|--|---|
| Getting informed consent | 6. Make certain that each presumed trafficked person clearly understands the content and purpose of the interview, the intended use of the information, his right not to answer questions, his right to terminate the interview at any time and his right to put restrictions on how the information is used. |
| Listening to and respecting each presumed trafficked person's assessment of her situation and risk to her safety | 7. Recognize that each presumed trafficked person will have different concerns and that the way he views his concerns may be different from how others might assess them. |
| Re-traumatization | 8. Do not ask questions intended to provoke an emotionally charged response. Be prepared to respond to a presumed trafficked person's distress and highlight his strengths. |
| Emergency intervention | 9. Be prepared to respond if a presumed trafficked person says he is in imminent danger. |
| Use of information collected | 10. Use information in a way that benefits an individual presumed trafficked person or that advances the development of good policies and interventions for persons suspected of being trafficked generally. |

PART III—CHILDREN

The following principles shall be used in all cases concerning children—

- | | |
|---|---|
| Time is of the essence | 1. Interviews should take place as soon as possible after the allegation or suspicion of abuse emerges. |
| Safety and support | 2. The child should feel safe and supported during the interview. |
| Sex/age appropriate interviewers | 3. Girls and younger boys should be interviewed by female interviewers. Older boys can be interviewed by male interviewers. |
| Presence of familiar adult during interview | 4. An adult that the child trusts should generally be present during the interview. This person's responsibility is to look after the child's best interests. It could be a guardian, a legal representative or, if neither has been appointed, a teacher or social worker. |

- | | |
|-----------------------------|--|
| Informal setting | 5. Interviews should take place in an informal setting and be conducted by interviewers trained to talk with children. |
| Language of interview | 6. Interviews should be in the child's own language. If this is impossible to organize, considerable care must be taken in arranging interpretation. |
| Length of interview | 7. If possible, interviews should not be too long to avoid tiring the child. |
| Child's developmental stage | 8. The child's developmental stage and needs should be considered in planning the interview. |
| Child,s characteristics | 9. The characteristics of the child and the child's family background should be considered in planning the interview. |
| Opportunity to narrate | 10. The children should be given an opportunity to narrate their story in their own way, before they are asked explicit questions. |
| Interview plan | 11. The questions should begin with open questions and direct or leading questions should be reserved for the latter part of the interview. |

SECOND SCHEDULE

TRAFFICKING IN PERSONS ACT

FORM A

Sections 8, 28 and 43

TRAFFICKED PERSONS SCREENING AND IDENTIFICATION FORM

PART I—INFORMED CONSENT

- Has the individual been informed that the Enforcement Officer and/or
 (name of partnering
 organization) reserves the right to share her/his individual case data for
 assistance purposes and only with authorized officers in the Malawi
 Police Service, the Department of Immigration and partnering
 organizations involved in direct assistance? (Yes/No)*
1. Has the individual further been informed that the Malawi Government
 reserves the right to use (only anonymous, aggregate) data for research
 purposes? (Yes/No)

- 2. Has the individual’s full and informed consent been obtained to conduct the screening interview based on information given regarding the designation of the enforcement officer, the role of the organization, the voluntary nature of the interview and the use of the information provided by the individual as outlined above? (Yes/No)*

Note: Informed consent is necessary for all services, such as medical examination and procedure, health assessments, assisted voluntary returns and reintegration assistance.

If the individual is a minor, has the consent of the parent(s)/guardian(s) been obtained? (Yes/No)

Signature of interviewer: Date:

Signature of trafficked person: Date:

**Circle as appropriate*

PART II—REGISTRATION DATA

- 1. First name(s):
- 2. Family name(s):
- 3. Sex:
- 4. Country of birth:
- 5. Place of birth:
- 6. Last place of residence in country of origin:
- 7. Date of birth:
- 8. Is date of birth an estimate? (Yes/No)
- 9. Age (in number of years):
- 10. Citizenship:
- 11. Ethnicity:
- 12. Identity document (type, country, number and expiry date):

PART III—CASE AND INTERVIEW DATA

- 1. (*Where the trafficked person is referred:*)
 Type of referring organization/individual: (NGO/international organization/
 law enforcement/ immigration/ Government/ embassy/ IOM mission/
 hotline/ self-referral walk-in/family/friend/client/other)* Other, please
 specify

- 2. Name/location of referring organization/individual:
- 3. Address and telephone number of referring organization:
- 4. Screening date:.....
- 5. Screening location:.....
- 6. Name/Designation/Rank of interviewer:.....
- 7. Name of organization/institution:.....
- 8. Interviewee’s language(s):.....
- 9. Interpreter? (Yes/No).....
- 10. Name of interpreter:.....
- 11. If minor: Name(s), address(es) and telephone number of parent(s) or guardian(s):.....

PART IV—ENTRY INTO TRAFFICKING

- 1. How did the individual enter the process (indicate multiple options and continue on separate sheet if necessary)?
.....
.....
.....
.....
.....
.....
.....
.....
- 2. Did entry into the process involve recruitment? (Yes/No)* If Yes, how was the contact initiated between the individual and her/his recruiter? (personal contact/employment agency/travel agency/Internet advertisement/newspaper advertisement/radio advertisement/television advertisement/other)*
- 3. If labour migration, what activity did the individual believe he or she was going to be engaged in following arrival at the final destination (indicate multiple options if necessary)? (Agricultural work/begging/child care/construction/domestic work/factory work/fishing/low-level criminal activities/

military service/mining/prostitution/restaurants and hotel work/study/small street commerce/trade/transport/other)* If other, please specify

.....

- 4. What was the individual told would be their benefits following arrival at final destination?

Salary (equivalent in \$US per month)

.....

Other benefits

.....

.....

.....

.....

- 5. In which month/year did the individual enter into the process?

.....

- 6. Was the individual a minor at the time of entry into the process? (Yes/No) *

- 7. From which place/country did the individual enter into the process?

.....

- 8. What place/country is the last (or intended) destination?

.....

- 9. Did the individual travel alone? (Yes/No)* If No, who did the individual travel with (indicate multiple options if necessary)? Husband /wife/partner/relative/ friend/recruiter/transporter/unknown persons/other)* If other, specify

.....

- 10. Did the individual spend any time in transit place(s)/country(ies) (Yes/No)*

(a) If Yes, who did the individual travel with? (husband/wife/partner/relative/friend/recruiter/transporter/unknown persons/ other)* If other, specify

.....

- 11. Did he or she engage in any activity in this place(s)/country(ies) (Yes/No)*

If Yes, which activity in first/only transit place/country? (agricultural work/begging/child care/construction/domestic work/factory work/fishing/low-level criminal activities/marriage/military service/mining/prostitution

/restaurants and hotel work/study/small street commerce/trade/transport sector/other)* If other, specify

.....

12. If more places/countries, add respective places and activities engaged in.

.....

.....

.....

.....

13. Were any of the following means used to control the individual?

(a) Physical abuse? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(b) Psychological abuse? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(c) Sexual abuse? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(d) Threats to individual? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(e) Threat of action by law enforcement? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(f) Threats to family? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(g) False promises/deception? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(h) Denial of freedom of movement? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(i) Giving of drugs? (Yes/No)* If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(j) Giving of alcohol? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(k) Denial of medical treatment? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(l) Denial of food/drink? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(m) Withholding of identity documents? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(n) Withholding of travel documents? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

(o) Debt bondage? (Yes/No)* If Yes, who by? If Yes, who by? (Recruiter/Transporter/Harboured/Receiver/Other)* If other, specify

.....

* Circle as appropriate

PART V—EXPLOITATION PHASE

1. What activity has the individual undertaken since her/his arrival in the last destination? (Agricultural work/begging/child care/construction/domestic work/factory work/ fishing/low-level criminal activities/marriage/military service/mining/prostitution/ restaurants and hotel work/study/small street commerce/trade/transport sector/ unemployed/other)* If other, specify

.....

(a) How old was the individual when the activity began?

.....

(b) How long did the only/most significant activity last?

.....

2. Were any of the following means used to control the individual during the activity? Physical abuse? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (a) Psychological abuse? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (b) Sexual abuse? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (c) Threats to individual? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (d) Threat of action by law enforcement? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (e) Other Threats to family? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (f) False promises/deception? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (g) Denial of freedom of movement? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (h) Giving of drugs? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (i) Giving of alcohol? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (j) Denial of medical treatment? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify
-
- (k) Denial of food/drink? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/Other)* If other, specify

.....
(l) Withholding of wages? (Yes/No)* If Yes, who by? (Receiver/Exploiter/
Clients/Other)* If other, specify

.....
(m) Withholding of identity documents? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....
(n) Withholding of travel documents? (Yes/No)* If Yes, who by? (Receiver/
Exploiter/Clients/Other)* If other, specify

.....
(o) Debt bondage? (Yes/No)* If Yes, who by? (Receiver/Exploiter/Clients/
Other)* If other, specify

.....
(p) Excessive working hours? (Yes/No)* If Yes, who by? (Receiver/
Exploiter/Clients/Other)* If other, specify

.....
3. If exploited for prostitution (sexual exploitation) were any of the following
means used to control the individual during the exploitation?

(a) Denial of freedom to refuse client? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....
(b) Denial of freedom to refuse certain acts? (Yes/No)* If Yes, who by?
(Receiver/Exploiter/Clients/Other)* If other, specify

.....
(c) Denial of freedom to use condom? (Yes/No)* If Yes, who by? (Receiver/
Exploiter/Clients/Other)* If other, specify

.....
(d) Other means of control. Specify:
.....

4. Did the individual experience exploitation? (Yes/No)* If no exploitation took
place

(a) was there any indication of a real and substantial threat of exploitation?
.....
.....

3. Certification that the individual is a trafficked person made by: (specify names, designation and rank):

.....
.....
.....
.....

4. If the individual is a trafficked person, was the type of trafficking in-country or transnational? (in-country/transnational/both)*

5. If the individual is not a trafficked person, is he or she in need of assistance? (Yes/No)* If Yes, what is the individual's situation? (Please specify all that applies.)

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6. Additional remarks

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* circle as appropriate

THIRD SCHEDULE

FORM B

Section ...²³³

FORM OF OATH

I, A.B, of swear by Almighty God that I shall not make a record of, divulge or communicate, information in contravention of this Act.

FORM OF AFFIRMATION

I, A.B, of do solemnly, sincerely and truly declare and affirm that I shall not make a record of, divulge or communicate, information in contravention of this Act.

APPENDIX II

TOURISM AND HOTELS (AMENDMENT) BILL, 20..

TOURISM AND HOTELS (AMENDMENT) BILL, 20....
ARRANGEMENT OF SECTIONS

SECTION

1. Short Title
2. Amendment of section 2 of the principal Act
3. Amendment of section 9 of the principal Act

A BILL

entitled

An Act to amend the Tourism and Hotels Act.

ENACTED by the Parliament of Malawi as follows—

- | | |
|---|--|
| <p>1. This Act may be cited as the Tourism and Hotels (Amendment) Act, 20...</p> | <p>Short title</p> |
| <p>2. Section 2 of the Tourism and Hotels Act (hereinafter referred to as the “principal Act”) is amended by inserting therein the following new definition of “child sex tourism” after the definition of “board”—</p> <p style="padding-left: 40px;">“ “child sex tourism” means a programme organized by a tourism related established or an individual, which consists of forum packages or activities utilizing and offering escort or sexual services of children as enticement for tourists.”</p> | <p>Amendment of Section 2 of the principal Act</p> |
| <p>3. Section 9 of the principal Act is amended by deleting paragraph (d) and substituting therefor a new paragraph—</p> <p style="padding-left: 40px;">“(d) an hotel is being used for prostitution, child sex tourism or other unlawful activities;”.</p> | <p>Amendment of section 9 of the Principal Act</p> |

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the development of anti-trafficking in persons legislation which extends the commission of offences covered under the present sections 2 and 9 of the Tourism and Hotels Act to prescribe child sex tourism.

ATTORNEY GENERAL

APPENDIX III

**IMMIGRATION (AMENDMENT)
BILL, 20..**

IMMIGRATION (AMENDMENT) BILL, 20....,
ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Insertion of new section 4A into the principal Act
3. Amendment of a new subsection 17 of the principal Act.
4. Insertion of a new subsection (7) into section 22 of the principal Act
5. Amendment of section 34 of the principal Act
6. Amendment of section 36 (1) of the principal Act

A BILL

entitled

An Act to amend the Immigration Act.

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Immigration Act (Amended) Act,
20 ... Short title
2. Section 4 of the Immigration Act (hereinafter referred to as the
“principal Act”) is amended by inserting therein a new section 4A— Insertion of
new section
4A into the
principal Act

“Victims of
Trafficking **4 A.** Any person who is trafficked into Malawi in
terms of the Trafficking in Persons Act shall not be
deemed to be a prohibited immigrant.”
3. Section 17 of the principal Act is amended by— Insertion of a
new section
17 (2) of the
principal Act

(a) the renumbering of section 17 as section 17 (1); and

(b) inserting the following new subsection as subsection (2)—

“(2) An immigration officer shall issue a temporary permit to
any person allowing him to stay in Malawi as a legal immigrant
during the period of investigations and judicial proceedings
against a person accused of trafficking that person, in terms of
the Trafficking in Persons Act.”
4. Section 22 of the principal Act is amended by inserting therein Insertion of a
new section
22 (7) of the
principal Act
a new subsection as subsection (7)—

“(7) A person who is trafficked into Malawi may
apply for a permanent resident permit under this Act
after the completion of investigations and judicial
proceedings in terms of the Trafficking in Persons Act,
where the circumstances are such that it would be in
the best interests of the trafficked person to remain
permanently in Malawi.”

Amendment
of section 34
of the
principal Act

5. Section 34 of the principal Act is amended by deleting the words “to a fine of K500 or imprisonment for twelve months.” and replacing them with the words “to a fine of K1,000,000 and to imprisonment for five years”.

Amendment
of section 36
(1) of the
principal Act

6. Section 36 (1) of the principal Act is amended by deleting the words “to fine of K500 or to imprisonment for twelve months,” and replacing them with the words “to a fine of K1,000,000 and to imprisonment for five years.”

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the development of anti-trafficking in persons legislation which extends the provisions covered under the present sections 4, 17, 22, 34 and 36 of the Immigration Act to regularize the immigration status of trafficked persons and to revise penalties for immigration offences connected with trafficking in persons.

ATTORNEY GENERAL

APPENDIX IV

**PENAL CODE (AMENDMENT)
BILL, 20..**

PENAL CODE (AMENDMENT) BILL, 20...

ARRANGEMENT OF SECTIONS

SECTION

1. Short Title
2. Amendment of section 135 of Cap. 7:01
3. Amendment of section 142 of the principal Act
4. Amendment of section 145 of the principal Act
5. Amendment of section 260 of the principal Act
6. Amendment of section 262 of the principal Act
7. Amendment of section 263 of the principal Act
8. Amendment of section 265 of the principal Act
9. Amendment of section 269 of the principal Act

A BILL*entitled***An Act to amend the Penal Code.**

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Penal Code (Amendment) Act, 20... Short title
2. The Penal Code (hereinafter referred to as the “principal Act”) is amended by deleting the word “seven” in section 135 and replacing it with the word “fourteen”. Amendment of section 135 of Cap. 7:01
3. The principal Act is amended by deleting the word “five” in section 142 and replacing it with the word “fourteen”. Amendment of section 142 of the principal Act
4. The principal Act is amended by deleting the word “misdemeanor” in section 145 (1) and all the words appearing after it, and replacing them with the words, “commits an offence and shall be liable to imprisonment for seven years.” Amendment of section 145 of the principal Act
5. The principal Act is amended by deleting the word “seven” in section 260 and replacing it with the word “fourteen”. Amendment of section 260 of the principal Act
6. The principal Act is amended by deleting the word “seven” in section 262 and replacing it with the word “fourteen”. Amendment of section 262 of the principal Act
7. The principal Act is amended by deleting the word “ten” in section 263 and replacing it with the word “fourteen”. Amendment of section 263 of the principal Act

Amendment
of section 265
of the
principal Act

8. The principal Act is amended by deleting the word “seven” in section 265 and replacing it with the word “fourteen”.

Amendment
of section 269
of the
principal Act

9. The principal Act is amended by deleting the word “misdemeanor” in section 269 and by replacing it with the phrase “offence, and shall be liable to imprisonment for fourteen years.”

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the development of anti-trafficking in persons legislation which extends the commission of the offences covered under the present sections 135, 142, 145, 260, 262, 263, 265 and 269 of the Penal Code.

ATTORNEY GENERAL

APPENDIX V
EXTRADITION (AMENDMENT)
BILL 20.....

EXTRADITION (AMENDMENT) BILL 20..
ARRANGEMENT OF SECTIONS

SECTION

1. Short Title
2. Amendment of the Second Schedule

A BILL

entitled

An Act to amend the Extradition Act.

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Extradition (Amendment) Act, 20.. Short title
2. The Second Schedule to the Extradition Act is amended by Amendment of the Second Schedule inserting the following paragraph 31—
“31. Any offence under the Trafficking in Persons Act with a sentence of seven years imprisonment or more”

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the development of anti-trafficking in persons legislation which extends the Second Schedule of the Extradition Act to include aggravated offences relating to trafficking in persons in the list extraditable offences.

ATTORNEY GENERAL

APPENDIX VI

**CHILD CARE, PROTECTION
AND JUSTICE
(AMENDMENT) BILL 20.....**

CHILD CARE, PROTECTION AND JUSTICE (AMENDMENT) BILL 20..

ARRANGEMENT OF SECTIONS

SECTION

1. Short Title
2. Repeal of section 79 of the Child Care, Protection and Justice Act

A BILL

entitled

An Act to amend the Child Care, Protection and Justice Act. Short title

ENACTED by the Parliament of Malawi as follows–

1. This Act may be cited as the Child Care, Protection and Justice (Amendment) Act, 20..
 2. Section 79 of the Child Care, Protection and Justice Act is repealed.
- Repeal of section 79 of the Child Care, Protection and Justice Act

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the Development of Trafficking in Persons legislation which supersedes the provisions of the Child Care, Protection and Justice Act on trafficking.

ATTORNEY GENERAL