



Convention on the Rights of the Child

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Committee on the Rights of the Child

Consideration of reports submitted by States parties under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

Reports of States parties due in 2011

Malawi*

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I. Introduction

1. In 1991, Malawi adopted the United Nations (UN) Convention on the Rights of the Child (CRC) which came into effect in 1989. Malawi has submitted 2 Reports to the UN Committee on the Rights of the Child in line with the State Party Reporting requirements under the CRC. The initial Report was submitted 10 years after it became due while the Second Report was submitted in 2009. The Combined Third, Fourth and Fifth Report is due in 2013.

2. On 18th January, 2002, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC) entered into force. The OPSC has 163 State Parties and 120 signatories to date. Malawi signed the OPSC on 7th September, 2000 and ratified the same on 7th October, 2009.

3. With respect to sale of children, it is clear under law that sale of human beings is prohibited by the Constitution and legislation. However, reports still arise with respect to practices that involve or are akin to sale of children.

4. Child prostitution has been reported through the media on several instances. This is exacerbated by the fact that most of the Malawian population does not have proper identification and knowledge of date of birth. During the reporting period, Malawi has revised the age of sexual debut from 13 years to 16 years but it remains true that most people including the children themselves are not aware of their exact date of birth. In fact, before the revision in 2010, it was a defence under law that a person would be exonerated from the crime of defilement if the accused had reasonable cause to believe and did in fact believe that the victim was of or above the age of 13 years.

5. Pornography remains an unacknowledged vice in Malawian society. Even for adults, it is rare that information or statistics emerge regarding the malpractice. However, instances especially through the media keep resurfacing regarding the involvement of children.

6. The Constitution, as adopted in 1994, provides specifically in section 23, rights of the child. At statutory level, the Child Care, Protection and Justice Act is the key piece of legislation on child rights. Developed by the Law Commission in 2006, the Act reflects a new paradigm in comprehensive protection of the rights of children in Malawi. These efforts demonstrate a commitment to promoting the attainment of all rights for all children in the country. There are various national policies, legislations and programmes which are further assisting in the implementation of the CRC in Malawi.

7. A number of statutes regulate child rights in Malawi. Of notable interest is the Child Care, Protection and Justice Act of 2010. Other statutes (enacted and in draft form) on child rights include the Adoption of Children Act; the Employment Act; the National Registration Act; the Prevention of Domestic Violence Act; the Deceased Estates (Wills, Inheritance and Protection) Act; the Gender Equality Act; the Disability Act; the Law Commission Report on Trafficking in Persons; the HIV and AIDS (Prevention and Management) Bill; the Marriage, Divorce and Family Relations Bill; and the Education Bill.

8. The main challenge in Malawi has been the definition of a child as different legislation defines the child differently. Although this has bred perceptions of inadequate protection, it must be measured against the particular subject matter under every age categorization for children. This reflects on the Reporting obligations as in some instances, since the age of majority is attained earlier, the local policy and legal framework does not address persons between the lower age and eighteen as a child.

9. Government, in developing this Report, consulted relevant public institutions, civil society organizations and international bodies present and working in Malawi. These

institutions include the Defence Force; Ministry of Defence and National Security; the Ministry of Gender, Children and Social Welfare; the Ministry of Finance; the Ministry of Economic Planning and Development; the Ministry of Education, Science and Technology; the Ministry of Foreign Affairs; the Ministry of Justice and Constitutional Affairs; Plan International (Malawi); Save the Children (Malawi); National Registration Bureau; the Malawi Police Service; the Judiciary; UNHCR; and the Malawi Red Cross Society. Government used questionnaires, Consultative Workshops and Key Informant Interviews to obtain relevant information regarding the Protocol. The findings from the consultative process were subjected to public scrutiny at another Workshop where participants vetted the contents of the Report.

II. General measures of implementation

10. Malawi ratified the Protocol without any reservations. In accordance with section 211 of the Constitution, any international agreement entered into after the commencement of the Constitution forms part of the law of the Republic if it is so provided by statute. International agreements that bound the State before the commencement of the Constitution continue to bind the State unless a statute provides otherwise. The Protocol is therefore applicable as law in Malawi to the extent that legislation, stand alone or integrated, provides for measures under it. It must be noted, however, that the Constitution, in section 11 on Interpretation provides that courts shall, where applicable, have regard to current norms of public international law in interpreting the provisions of the Constitution.

11. The Constitution of Malawi came into effect in 1994 and, contrary to its immediate predecessor, introduced a comprehensive Bill of Rights. One of the basic constitutional principles provides that the inherent dignity and worth of each Malawian requires the State and all persons to recognize and protect human rights and to afford the fullest protection to the rights and views of all individuals, groups and minorities.

12. In 1998, the Law Commission concluded a technical review of the Constitution. The proposed changes from that process were not enacted until 2010. Most importantly, with respect to children, the Constitution introduced changes to section 23 on the rights of children and introduced the principle of “best interests of the child”. On matters of child sale, prostitution and pornography, the Constitution has first provided for, under Principles of National Policy, that Government shall encourage and promote conditions conducive to full development of healthy, productive and responsible members of society.

13. The Constitution, then under section 23 provides for equality of all children before the law, regardless of the circumstances attending their birth. The Constitution also protects children from economic exploitation and any treatment, work or punishment that is or is likely to be hazardous; to interfere with their education; and harmful to their health or their physical, mental, spiritual or social development. Under section 23, a child is a person under the age of 16 years.

14. Prior to this provision, the Constitution has guaranteed, under section 19, the dignity of all persons as inviolable and has protected the right to freedom and security of the person of every person.

15. Section 27 of the Constitution prohibits the holding of any person in slavery or servitude. Both slavery and slave trade are prohibited. The Constitution, in the same vein, prohibits subjection of any person to forced labour or subjection to tied labour that amounts to servitude. Every person is further guaranteed a right to freely engage in economic activity, to work and to pursue a livelihood anywhere in Malawi. Where employed, every employee is entitled to fair and safe labour practices, fair remuneration and equal remuneration for work of equal value without distinction or discrimination of any kind.

16. With respect to legislation, matters of sale, prostitution and pornography are basically dealt with under the Penal Code. The provisions regarding the matters of prostitution and pornography were introduced in the Penal Code under the Penal Code (Amendment) Act of 2010. The Amendment Act was a product of a review process undertaken by the Law Commission and concluded in 2000. Chapter XV of the Penal Code provides for Offences Against Morality. The Law Commission proposed a number of changes to provisions under this Part. The Commission having received written and oral submissions regarding offences of a sexual nature against children, found the submissions attesting to the fact that such abuses are on the increase in Malawi and that the offences are committed in various and diverse forms not adequately addressed by the Penal Code then. The Commission then recommended the enactment of a new Part styled Chapter XV A on Offences Against Morality Relating to Children.

17. The main piece of legislation covering matters of children is the Child Care, Protection and Justice Act (CCPJA) (Act. No. 22 of 2010). The CCPJA consolidates the law relating to children by making provision for care and protection for children and addressing matters of child justice. The CCPJA also provides for matters of social development of children. Under Division 6 of the CCPJA on Protection of Children from Undesirable Practice, the Act prohibits child abduction, child trafficking and some harmful practices. Forced marriages, forced betrothal and pledging as security for a debt of children are prohibited. These offences are punishable by imprisonment for 10 years. So generally, the measures provided for under the Protocol are reflected under the Constitution, the Penal Code and the Child Care, Protection and Justice Act. The regulations that are being developed in 2013 are aimed at improving the challenges of implementation of the CCPJA and will cover issues of institutional child care.

18. Government, through the Law Commission, has developed legislation on trafficking in persons, the Report on which was published in February, 2011. The Report proposes the enactment of the Trafficking in Persons Bill and after Cabinet made its observations on the Bill, the Bill is currently being perfected by the Ministry of Justice and Constitutional Affairs for minor amendments. The Bill has since returned to Cabinet for finalization and is expected to be presented in Parliament in 2014. The proposed legislation on trafficking in persons has defined and criminalized trafficking in persons; child trafficking; and aggravated forms of trafficking. It provides for an enforcement mechanism of the law by creating a Trafficking in Persons Board and a Trafficking in Persons Fund. The Bill also provides for care and protection of victims and witnesses and has also introduced special methods of conducting investigations and proceedings. When enacted into law, the Trafficking in Persons Act will increase the categories of conduct that is punishable including aiding and abetting trafficking in persons and children; provide for aggravated forms of committing offences under the Act; and enhance the penalties of various activities related to trafficking in persons.

19. The Adoption of Children Act is the main piece of legislation covering matters of adoption of children. It was enacted in 1949 as the Adoption Ordinance and is currently undergoing review at the Law Commission. The main areas being examined and proposed under the review process are provisions on the purpose of adoption; provisions on suitability for adoption and provisions on register of children eligible for adoption; provisions elaborating on the eligibility of applicants for adoption; provisions on rescission of an adoption order; provisions on guardian *ad litem* by lifting from subsidiary legislation to the principal legislation; provisions on the establishment of the Prospective Adoptive Parent Register; provisions regulating inter-country adoptions; and provisions on offences. The proposed offences include unauthorized communication with a child whom

the offender, by reason of the adoption, has ceased to be a parent or guardian of;¹ harbouring of a child taken from adoptive parents;² payments in consideration for adoption;³ unauthorized publication and advertising certain matters related to adoption;⁴ exercising undue influence in the course of adoption;⁵ violating the restrictions on publishable materials in respect of adoption;⁶ making or attempting to make an unauthorized adoption arrangement;⁷ failure to disclose information required under the law;⁸ and unauthorized disclosure of confidential information.⁹ The programme is expected to be completed by December, 2013.

20. This Initial Report will be made available to the public together with information on the CRC. The Ministry responsible for children, Ministry of Gender, Children and Social Welfare (MGCSW), shall disseminate this Report to relevant Government Departments, Civil Society Organizations and International institutions working in the areas affected by the Protocol.

21. With respect to the promotion and protection of the rights of the child, statute has established the Human Rights Commission (HRC). The Human Rights Commission Act of 1998 provides, in section 11, that all authorities including all organs of Government, shall recognize the status of the HRC as a national institution independent of the authority or direction of any other body or person. The mandate of the HRC is very broad and according to statute, the HRC is competent “in every respect 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”.¹⁰

22. The HRC has a directorate of Child Rights. Previously, the Directorate was a Unit within the HRC but was elevated to become a directorate with a clearer mandate to pursue the protection of rights of children more comprehensively.

23. The custodian, as it were, of the Optional Protocol is the MGCSW. The MGCSW is responsible for policy development and oversight on all matters concerning children. There is an obvious gap in implementation and coordination of the Protocol as the MGCSW to some extent is involved in the implementation and coordination of various aspects of the Protocol. Key partners to the Government in executing its obligations under the Protocol are the Ministries responsible for Home Affairs; Foreign Affairs and International Relations; Youth and Sports Development; Labour and Vocational Training; Health; Education, sports and Technology; Justice and Constitutional Affairs; Information and Civic Education; Local Government; the Human Rights Commission; NGOs and civil society organizations.

24. The HRC has been involved in several activities in the process of dissemination of the existing legal structures including international instruments. The MGCSW has also been undertaking several training facilities on the Constitution and the CCPJA and has been developing a Manual for Training implementers of the law nationally. Several NGOs have also been involved in the process of dissemination of the CRC and the existing legislation.

¹ Punishable by a fine of K100,000 and imprisonment for 3 years.

² Punishable by imprisonment for 5 years.

³ Punishable by a fine of K1,000,000 and imprisonment for 5 years.

⁴ Punishable by a fine of K2,000,000 and imprisonment for 7 years.

⁵ Punishable by imprisonment for 7 years.

⁶ Punishable by a fine of K2,000,000 and imprisonment for 7 years.

⁷ Punishable by imprisonment for 7 years.

⁸ Punishable by imprisonment for 3 years.

⁹ Punishable by a fine of K1,000,000 and imprisonment for 5 years.

¹⁰ Section 12, Human Rights Commission Act (Cap. 3:08).

However, there is need for training of judicial officers, police prosecutors and investigators on issues of child trafficking. Complementary to these efforts, other services being provided include the Community Victim Support Units (CVSU), the Police VSU and Social Rehabilitation Centres being operated by the Malawi Police Service to assist survivors of trafficking in persons. These services also include reintegration of trafficked children into their families; shelters; psycho-social counseling services; and awareness raising initiatives.

25. Malawian Nationals deployed as part of peace keeping missions undergo training in human rights including child rights and child trafficking

26. Notwithstanding efforts to disseminate the international and local instruments on matters covered by the OPSC, it is clear that no efforts have been specifically directed at dissemination of the OPSC. There is better knowledge of the CRC and ACRWC among stakeholders dealing with children than with the OPSC. It has also been noted that the provisions of the Penal Code on matters covered by the OPSC remain uncommunicated to the personnel dealing with children and child rights for them to make effective use of the provisions.

27. The constraint of resources, whether human in terms of numbers and skills, financial or material, is another outstanding constraint in the full realization of child rights especially the rights and obligations imposed by the OPSC. Poor capacity and co-ordination among stakeholders are also other problems faced in the rolling out of programmes and projects to cater for matters covered under the OPSC.

28. The MGCSW commissioned a study on Child Labour and Child Trafficking in 2007 to establish the scope and magnitude of the problems associated with children in need of special protection particularly those involved in various forms child labour and those that have been trafficked to work in various types of organizations including households.

III. Prohibition and related matters (arts. 3 to 7)

29. There has been limited research into the issues of child sale, prostitution and pornography in Malawi. The scanty data available indicates that various versions of the malpractices are done in Malawi. There is dearth of data on the number of women and children involved in sexual exploitation, including prostitution, pornography and trafficking, although, generally, these are recognized social problems.

30. The International Organization for Migration (IOM) reports on trafficking in persons indicate that women and girls are recruited along major trucking routes by longdistance truck drivers, who promise them jobs, marriage, or an education in South Africa. They cross the border at Beitbridge or Komatipoort with no documents into South Africa. Once in Johannesburg, the victims are held as sex slaves. Malawian businesswomen also traffic victims to brothels in Johannesburg. Of the 80 people deported to Malawi every month from South Africa, IOM reports that at least two are trafficking victims.

31. According to a report by the Malawi Human Rights Commission, young girls from poor families are being sold to wealthy people as sex slaves in remote areas in the northern border districts of Karonga and Chitipa. Some parents are giving away their daughters to pay off debts. In the northern region of Malawi, a traditional custom known as *kupimbira* is practiced by the Nyakyusa and Nkhonde, who live along the shores of Lake Malawi, along the Tanzanian border, and in the Misuku Hills. Under this tradition, girls are held in perpetual bondage and are often subject to abuse.

32. European tourists have visited Malawi to engage in the sexual exploitation of children. They have recruited girls and boys in the holiday resorts along Lake Malawi.

33. In some instances, sex tourists are resident in Malawi engaged in various legitimate activities. For instance, in 2002, a British national was arrested on suspicion of sodomizing street children. He was convicted and his conviction was upheld by the Malawi Supreme Court of Appeal but he was pardoned by the former Head of State, in May 2003. He had been convicted on three counts and sentenced to 12 years of imprisonment with hard labour. He had served only 1 year and 6 months of his sentence and has since been deported.

34. Malawi has entered into bilateral agreements with other countries to extradite persons who are involved in criminal activities in Malawi and flee to those countries.

A. Sale of children

35. Under the Protocol, “sale of children” means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration. The Penal Code of Malawi prohibits the sale of children and some practices akin to it. Since the major amendments of 2010, the Penal Code has made comprehensive protection of children from various manifestations of sale of children.

36. Sale of children is often a conduit for creating an environment where other offences can be committed against children. Often children subject to sale are subjected to exploitation, especially labour or sexual oriented exploitation. The Penal Code has made provision for various sexual offences, children are likely to suffer. The offence of rape can now be suffered by girls above the age of 16 years as the age of sexual debut has been revised upwards to 16 years from 13 years. The offence of defilement comprises unlawful and non-consensual sexual intercourse with a person below the age of 16 years. In the case of a married woman, the offence may be committed by impersonating the husband. Both rape and defilement are punishable by death, in the case of rape and life imprisonment for both rape and defilement.

37. With respect to defilement, before 2010, it was a defence to a charge of defilement if the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of thirteen years. The Law Commission reviewing the Penal Code was of the view that the defence was not appropriate and needed to be strengthened in order to protect girls against acts of defilement. It was noted that other jurisdictions had a similar defence to the offence but had restricted its availability only to boys below a certain age and with certain safeguards. The Law Commission recommended that a new provision be introduced as subsection (3) to replace the proviso to section 138. The provision has been enacted as follows:

- “(3) It is a defence to a charge under this section if it is proved that—
- (a) the girl consented; and
 - (b) the person charged—
 - (i) was not more than twenty one years of age at the time of the commission of the offence and has not been previously charged with the same or similar offence; and
 - (ii) had reasonable cause to believe, and did believe, that the girl was sixteen years of age or more.”

38. It is also an offence to induce a woman or girl by false pretences, false representations or other fraudulent means to permit a man to have sexual intercourse with her. The punishment for this felony is 3 years imprisonment.

39. For offences under Chapter XV of the penal code, it is immaterial in the case of any of the offences committed with respect to a woman or girl under a specified age that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age.

40. The Penal Code has created several offences related to the procurement of young girls into prostitution under section 140. These offences include procuring a girl or woman under the age of twenty-one years to have unlawful carnal connexion, either in Malawi or elsewhere, with any other person or persons; procuring or attempting to procure any woman or girl to become, either in Malawi or elsewhere, a common prostitute; procuring or attempting to procure any woman or girl to leave Malawi with intent that she may become an inmate of or frequent a brothel elsewhere; or procures or attempts to procure any woman or girl to leave her usual place of abode in Malawi with intent that she may, for the purposes of prostitution, become an inmate of or frequent a brothel either in the Republic or elsewhere. Before the 2010 amendments, these offences were misdemeanors. After 2010, these same offences are felonies punishable with 14 years imprisonment. The proviso to this section 140 also called for corroborative evidence and a person charged under section 140 would not be convicted on the evidence of one witness only. In the view of the Law Commission, the requirement for corroborative evidence was found too onerous on the victim and that it would be better to leave it to the court to determine the sufficiency of the evidence in each case. The proviso was subsequently deleted.

41. The Law Commission also found the offences dealing with procuring the defilement of a woman or a girl through threats, fraud or administration of drugs under section 141 as aggravating the commission of the offences related to procurement. The Law Commission recommended the conversion of the offences from being misdemeanours to becoming felonies and accordingly, they are now punishable by imprisonment for 14 years.

42. The amended Penal Code in section 142 also prohibits an owner or occupier of premises or having or acting or assisting in the management or control of the premises from inducing or knowingly suffering a girl under the age of 13 years to have sexual intercourse with a particular man or generally. The proviso which previously provided a defence similar to that provided under section 138 has also been deleted. Similarly, the offence of detaining a woman or girl against her will on any premises or in a brothel for purposes of sexual intercourse with a particular man or generally is punishable by 5 years imprisonment and is no longer a misdemeanour. Constructive detention by withholding clothes is similarly punishable.

43. Operation of brothels (keeping a house, room, set of rooms, or place of any kind whatsoever for purposes of prostitution) was prohibited as a misdemeanour and the Law Commission argued on the basis of the scourge of HIV and AIDS that the offence should be elevated to a felony punishable by 7 years imprisonment.

44. The amended Penal Code, in section 157, prohibits incest by a man with knowledge his grand-daughter, daughter, sister, mother or grandmother. It is immaterial that the sexual intercourse was had with the consent of the female person. Section 158 provides against incest by females with their grandfather, father, brother, son or grandson. "Brother" and "sister", respectively, include half-brother and half-sister, and the said sections shall apply whether the relationship between the person charged with an offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock. The felonies are punishable by imprisonment for 5 years except where the female person is below the age of 16 years and it is punishable by life imprisonment.

45. Since it had been observed that cases of sexual abuse of minors who are under the charge or care of adult persons by those same adults often goes unpunished, the amended Penal Code has now created an offence to address this matter. The offence is also a felony

punishable by 5 years and prohibits sexual intercourse with a person below the age of 20 years who is that person's stepchild, foster child, dependant or ward; or is, at the time of the intercourse, living with the accused person as a member of that person's family or is under the accused person's care or protection.

46. The CCPJA under Division 6 on protection of Children from Undesirable Practices prohibits a number of vices aimed at children. These include abduction, trafficking, harmful cultural practices, forced marriage or betrothal and pledging a child as security. Child abduction under the CCPJA means unlawfully taking, retaining or concealing a child without the consent of the parent or without the consent of any other person who has lawful custody of the child. The punishment for this is 10 years imprisonment.

47. Although a harmful cultural practice has under the CCPJA only been defined as a social or customary practice that is harmful to the health or general development of the child, it is clear that some of the practices in question are cultural or traditional in nature. However, it is also trite that all such practices are social in nature and therefore are covered by the provision.

48. The practice of *kupimbira* or *kupawila* practised mainly in the northern part of Malawi is where a girl's parents get into debt and as payment for the debt they offer a daughter to the creditor for marriage. The girl's age is immaterial as girls as low as 9 years have had been pledged. In such cases, the girl even attains puberty while in the custody of the husband. The husband, on the contrary, maybe quite advanced in age. A variant of the practice also takes place in northern Malawi. Under the variant, parents eye a male tenant on an estate who is hard working and shows high prospects for doing well financially. The parents can ask the tenant to do some piecework for them at their house. At the end of the service, some parents claim that they cannot pay for the services rendered but can instead give the tenant their daughter. In such cases, the tenant is not asked to pay *lobola* as is usually the case. In another form, parents send girls as young as 9 years old to stay with a rich man. The parents and the rich man would already have agreed and money or cattle would already have changed hands. The child would be oblivious of the arrangement that her stay with the rich man is going to graduate into a marriage.

49. In Chitipa and Mzimba (still in northern Malawi), there is a practice where an arrangement between parents of a boy and a girl become very close and in an attempt to strengthen their relationship, they arrange that their children should grow to marry each other. In the end they force their children into marriage. This is similar to a practice found in some areas in Chitipa where people seek assistance of birth attendants to determine the sex of the unborn child. The girl child born in such circumstances is then pledged to another family before it is born (*kutomera*).

50. *Kutomera* may also involve an old man offering to marry a girl when she is still at tender age. This offer is made through the parents of the young girl. Generally the man or boy periodically provides gifts for the young girl. This kind of *kutomera* cuts across all the ethnic groups in the southern part of Malawi.

51. In order to address harmful practices, whether of a cultural or traditional nature, a number of efforts are being implemented at national level. Several areas in Malawi under traditional leadership, bye-laws are being developed and being implemented effectively which prohibit certain harmful practices. Several organizations including Government itself, are promoting awareness of the harmful nature of some practices which are most prevalent and also which put people at risk of various undesirable consequences including violation of human rights and exposure to risk of infection with sexually transmitted infection (STIs).

52. The prohibition of child trafficking is provided for by law since the enactment of the CCPJA in 2010. Child trafficking has been defined as recruitment, transaction, transfer,

harbouring or receipt of a child for purposes of exploitation. The punishment for child trafficking is life imprisonment. Malawi is a source and transit route for trafficking in children en route to neighbouring countries, Africa and the world.

53. Between 2004 to 2011, the Law Commission had a programme to develop legislation on trafficking in persons. The resultant Report contains the proposed legislation which combines criminal law sanctions and a human rights approach. The proposed Bill has criminalized trafficking in persons; child trafficking and aggravated forms of trafficking. The proposed penalties are 14 years; 21 years; and life imprisonment, all without an option of a fine. The Trafficking in Persons Bill provides that a person who is convicted of offences under it is ineligible to work in any capacity with children for a minimum period of 7 years. If an offence under the proposed law is committed by a person acting or purporting to act in an official capacity for an NGO or other establishment or body, the court may, upon conviction, order the closure and de-registration of the NGO, institution or body under which the person acted.

54. It is also an offence under the proposed legislation for a person to intentionally benefit from the exploitation of a trafficked person for any purpose. The proposed legislation has also criminalized all inchoate offences related to trafficking in persons or children including attempts, aiding or abetting the offences and procuring others to commit the offences. Counselling or procuring another person to commit an offence under the proposed legislation entails the same consequences as committing the offence.

55. The Minister responsible for Home Affairs and Internal Security is responsible for the appointment of Protection Officers who have the responsibility of ensuring that trafficking survivors are accorded proper treatment and are provided with the necessary care and support; and are conducted and treated in accordance with principles provided for under the law. Child witnesses, whether they are survivors of trafficking in children or not, are entitled to protection from having their identity known or from disclosure of any information concerning them. Any violation of the witness protection provisions makes the offender liable to imprisonment for 7 years.

56. Under the Guiding Principles in Conducting Screening Interviews for the Identification of Trafficked Persons, with respect to children under Part III, the proposed legislation provides that interviews for children should take place as soon as possible after the allegations are brought to the attention of authorities; safety and support is paramount; there is need for age and sex appropriateness for the interviewers; and that the interviews must be conducted in the presence of a familiar adult. As much as it is possible, the interviews must be done in an informal setting and that the language of the interview should be the child's own. There is need for the interview to take into account the child's possible attention span, developmental stage and unique characteristics.

Adoption

57. The adoption of David Banda by pop star, Ms. Madonna Ciccone in 2006 placed the issues of international adoption in the limelight in Malawi. Although there were and are several cases of international adoption, the legislative framework needed to be re-examined. In response to the captioned adoption and another one by the same pop star, a number of initiatives were undertaken to improve the protection of children in cases of international adoption. The Chief Justice published a Practice Direction regarding cases of international adoption and directed that all matters of international adoption be handled by no court lower than the High Court. The MGCSW also made a submission to the Law Commission in 2006 asking the Commission to review the Adoption of Children Act. The Act is currently under review and the Programme shall conclude in 2014. The HRC conduct regular visits to orphanages to check the conditions under which children live in Child Care

Institutions. Government is also developing guidelines for all stakeholders in matters of adoption to complement the statute under revision.

58. It is hoped that these initiatives shall prevent adoption from becoming a conduit through which the sale of children is facilitated.

B. Child prostitution and child pornography

59. Prostitution *per se* is not criminal in Malawi. However, although there is a dearth of statistics on the matter, there appears to be an increase in cases of children offering themselves as prostitutes. The basis is often found to be poverty with children living or working on the streets becoming easy victims to the vice. There is need for comprehensive support and re-integration services for children who become prostitutes either out of their own volition, as is the case for children on the streets, and for those that are either survivors of child trafficking or otherwise.

60. In Malawi, some elements of prostitution are criminalized as provided for above. Although the offence of operating brothels was elevated to a felony in light of the prevalence of the HIV and AIDS scourge, the Law Commission further proposed that a separate offence for promoting prostitution should be provided for. The amended Penal Code, therefore, provides for definitions of prostitution and sexual activity as follows:

“‘prostitution’ means any sexual activity with another person for money or something of economic value, or the offer or acceptance of an offer made to engage in sexual activity in exchange for money or something of economic value;

‘sexual activity’ includes sexual intercourse whether in the form of genital, oral-genital or anal-genital contact or otherwise, whether between persons of the same or opposite sex, masturbation, touching of the genitals, buttocks, breasts, sadistic or masochistic abuse and other deviant sexual relations”.

61. The Penal Code prohibits the promotion of prostitution as follows:

“(1) Any person who–

(a) owns, controls, manages, supervises or otherwise keeps, alone or in association with another person, a house or business for prostitution; or

(b) procures, encourages, induces, or otherwise purposely causes another person to become or remain a common prostitute; or

(c) solicits another person to patronize a prostitute; or

(d) transfers or transports any person into or out of or within Malawi with the purpose to engage that other person in prostitution; or

(e) rents or permits any place to be regularly used for prostitution or promotion of prostitution; or

(f) fails to disclose or notify the relevant authorities by any available means, of the existence of any house or business for prostitution,

shall be guilty of an offence and shall be liable to imprisonment for fourteen years.”

62. The Law Commission, on the basis of written and oral submissions regarding offences of a sexual nature against children, found that the submissions clearly attest to the fact that such abuses are on the increase in Malawi as they are in other parts of the world and that they are committed in various and diverse forms not adequately addressed by under the Penal Code. Upon examining studies that have been carried out in Malawi particularly those under the auspices of the Ministry responsible for gender and children

which have documented some of the cases, the Law Commission took the view that it would be better for Malawi to legislate against these activities under the Penal Code so that they form part of the general code of crimes. The amended Penal Code has, as a result, a new Chapter XV A which provides for Offences against Morality relating to Children.

63. Sexual activity as defined above is prohibited if it involves a person under the age of 16 years and is punishable by imprisonment for 14 years. And if the offence is committed under circumstances of aggravation, the penalty is for 20 years.

64. Chapter XV A also prohibits indecent practices with or in the presence of a child and punishes the same with 14 years imprisonment. The circumstances include instances where the accused person is a step parent, foster parent, teacher, guardian or is a person who has the guardianship or charge of the child or is a person with whom the child is living as part of the accused's family.

65. As child pornography has been defined as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes", section 160E of the Penal Code criminalizes several activities related to children. The first line of offence is causing or permitting a child to be engaged in a prohibited sexual act or simulation thereof knowingly so that the act may be photographed, filmed, reproduced, reconstructed in any manner or may become part of an exhibition or performance. The second line is the actual photographing or filming of the child in a prohibited sexual act or simulation thereof and the third line is receiving for purpose of selling or purposely selling, procuring, manufacturing, giving, providing, lending, trading, mailing, delivering, sending, transferring, publishing, distributing, circulating, disseminating, presenting, exhibiting, advertising, offering or agreeing to offer a recording depicting a child in a prohibited or simulated sexual act. Possession or viewing of the materials prohibited under the section 160E is punishable by 14 years imprisonment.

66. In section 160F, the Penal Code criminalizes the procurement of a child to take part in public entertainment that is immoral in nature or is dangerous to life, prejudicial to health, physical fitness and kind treatment of a child. It is within the realm of public entertainment of an immoral nature that child pornography also manifests itself. Some people consider pornography as a form of entertainment and as such, if a child is involved in such activities, the Penal Code as amended, is contravened. The punishment for this offence is a imprisonment for 7 years or a fine of K100,000.00.

67. To complement section 160F of the Penal Code, section 23(2) of the CCPJA provides that a child is deemed sexually abused if he or she takes part, whether as a participant or observer in any activity of a sexual nature for purposes of a pornographic or indecent material, photograph, recording, film, videotape or performance; or sexual exploitation for sexual gratification or commercial gain.

C. Penal and criminal procedure

68. The principal piece of legislation regulating procedure of criminal matters of the Criminal Procedure and Evidence Code (Cap. 8:01) (the CPEC). The CPEC governs all criminal law generally and there is no specific provision for children with respect to the issues under this law other than those generally provided for under general criminal law in Malawi. The rules apply irrespective of whether the child is the offender or the accused person without special provision on matters raised by the OPSC.

D. Protection of the rights of child victims

1. Prevention Measures

Identification of vulnerable children

69. The CCPJA provides some guidance on the process of identification of children as vulnerable. Section 23 of the CCPJA which falls under Division 2 of the Act on Children in Need of Care and Protection provides, by way of listing, a number of scenarios under which a child will be deemed to be in need of care and protection. The grounds also include circumstances where the child has suffered or is facing substantial risk of abuse.

Social programmes and policies

70. Government has made effort to provide social support services to vulnerable children. This initiative is guided by the Malawi Social Support Policy (MSSP). The MSSP was developed as a medium term policy aimed at facilitating implementation of programmes that will provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks and enhance the rights and social status of the marginalized. The MSSP notes that these groups include the elderly, the chronically sick, orphans and other vulnerable children, persons with disabilities and destitute families. The four themes of the policy are welfare support; protection of assets; promotion through productivity enhancement; and policy linkages and mainstreaming.

71. The National Social Support Programme (NSSP) operationalizes the MSSP. It has main five components of public works under the Public Works Programme, Fertilizer Input Subsidy Programme (FISP), School Bursaries, School Feeding, Village Saving Loan Schemes and Community Savings Investment Promotion (COMSIP). These programmes strengthen capacities of families and households to take care and meet the basic needs of children.

72. The Social Cash Transfer Programme (SCTP) was initiated in 2006 with the aim of providing small cash grants to ultra-poor households without any able-bodied adult household members (labour constrained households). It is currently operational in 9 districts with plans to scale up to all the 28 districts. The objectives of the SCTP are to reduce extreme poverty and hunger; increase school enrolment and attendance; and improve nutrition and health, well-being and protection of children in beneficiary households.

Administrative or legal measures

73. Beyond criminalization measures which have been provided for under the Penal Code and the CCPJA, the Employment Act prohibits child labour under Part IV on Employment of Young Persons. The Employment Act prohibits the employment of persons below the age of 14 years except in homes, vocational technical schools or other training institutions. Hazardous work for persons between the ages of 14 and 18 years is also prohibited. Hazardous work includes work that is harmful to the health, safety, education, morals or development of the child.

74. It is a legal requirement that all employers of persons below the age of 18 years should maintain a register for such employees. Violation of these provisions of the Employment Act attract penalties of up to a K100,000 fine and 5 years imprisonment.

Prevention of abuse

75. As a general measure, the CCPJA provides that as a matter of preventing abuse or exploitation of a child, where a child is deemed in need of care and protection, a police

officer, social welfare officer, a chief or any member of the community may take the child and place the child into his or her temporary custody or a place of safety. If the person is not a social welfare officer, it is required by law that a social welfare officer be immediately informed of the taking. Within 48 hours of being placed in a place of safety, a child is required to be brought before a Child Justice Court or any other magistrate for determination that the child be placed in a place of safety or under the care of a fit and proper person.

76. Records at the court indicate that 21 children were targets of 21 criminal offences, including six defilement cases in the Southern Region in February and March, 2013 alone.

77. Some officers continue undergoing training in combating sale of children, child prostitution and child pornography. In September, 2010, 3 Malawi Police Officers underwent training on how to track down child pornography on the internet in Toronto, Canada. However, the officers are not utilized for the work they were trained in as they have been assigned to other duties.

78. Government has maintained its efforts to ensure victims' access to appropriate services but has not yet established systematic procedures for proactively identifying victims of trafficking among vulnerable populations, especially women and girls in prostitution. Government funded one rehabilitation drop-in center in Lilongwe for victims of trafficking and gender-based violence. The figures regarding the number of trafficking victims the center assisted during the reporting period remain obscure. Over 101 police stations throughout the country house Victim Support Units (VSUs) to respond to gender-based violence, including trafficking crimes. Complementary to this, there are 300 Community VSUs operating in Malawi. The VSUs provide limited counseling and, in some places, temporary shelter to victims. Government-run hospitals also provide trafficking victims with limited access to medical and psychological services. At district level, Government also refers victims to various NGO-run shelters, which cater largely to vulnerable children and youth, with some providing specialized care for women, though not for men.

Promotion of public awareness

79. There has not been exclusive public awareness on the OPSC. Most of the awareness programmes have surrounded the CRC as reported in the Combined Report. However, initiatives have been made on the Child Care, Protection and Justice Act and the Penal Code by public sector institutions and civil society organizations.

80. However, there is a gap of information among stakeholders on the legislation that falls under the OPSC. The level of awareness of legislation such as the Penal Code, as amended in 2010, the Censorship and Control of Entertainment Act and the proposed legislation on Trafficking in Persons is very limited. Most of the training has actually taken place with public officers and civil society organizations as participants. This leaves out most of the vulnerable people themselves. As such, there is need for more comprehensive and systematic training and awareness raising programmes for the stakeholders including the ultimate beneficiaries of the legislation.

81. More critical to the group of participants for the awareness programme is the children themselves. One of the key principles of the CRC is the respect of the views of the child. The child's views can only emanate from an informed position. As such, there is need for children to know what the instruments that protect them provide for in order for them to demand compliance by the State and other stakeholders. The instruments in question include local pieces of legislation which offer remedies in cases of violation of rights.

2. International cooperation

82. There are a number of international institutions and countries that Malawi is cooperating with in dealing with child sale, prostitution and pornography.

83. Malawi is also a signatory to the SADC Charter on Fundamental Social Rights and, by virtue of its membership, is party to the SADC Code of Conduct on Child Labour. The key institution on matters falling under the OPSC is the Malawi Police Service which is a member of the Southern African Regional Police Chiefs Cooperation Organization (SARPCCO). Malawi is also a member of the International Police Organization (Interpol) with 189 partners in combating crime. The networks formed at regional and global levels are key in fighting transnational crime especially that is done by organized groups. Issues under the OPSC are interconnected and need a comprehensive and coordinated approach to combat it. However, the Malawi Police Service has indicated that its partnerships with the above-captioned organizations and its sister institutions in neighbouring countries have borne fruit not only in terms of arresting fugitives and suspects but also in conducting joint initiatives to prevent crime, especially that targeted at children.

84. There are also several pieces of legislation in Malawi which assist law enforcement agencies in Malawi to combat sale, prostitution and pornography of children. The key pieces of legislation are the Extradition Act (Cap. 8:03); Mutual Assistance in Criminal Matters Act (Cap. 8:04); and the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (Cap. 8:07).
