

CHAIRPERSON'S PRESENTATION

INTRODUCTION

Members of the Press, Distinguished guests, Ladies and Gentlemen

Today is yet another special day in the life of the special Law Commission when we have invited you to present our final findings and recommendation in the process of developing legislation on trafficking in persons.

The findings and recommendations that I shall be presenting to you are premised on a process that commenced sometime in 2004 at the Law Commission secretariat.

BACKGROUND

The initiative to develop legislation to combat trafficking in persons started in November, 2004. This initiative was a direct reaction to the ratification of Protocol to the United Nations Convention against Transnational Organized Crime to Suppress, Prevent and Punish Trafficking in Persons, especially Women and Children by Malawi (the Trafficking Protocol). Between 2004 and 2006, the Commission carried out a number of preparatory activities for the launch of its programme in 2007.

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 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 restructure its legislative review programme so as to address issues pertaining to the plight of OVC who fall easy prey to traffickers and by virtue of the sexual exploitation that largely follows trafficking, are more susceptible to HIV and AIDS.

The Commission adopted its Terms of Reference which, among others, included the development of legislation on effective implementation and enforcement mechanisms against trafficking in persons; creation of an institutional legal framework for regulation and co-ordination of matters pertaining to trafficking in persons; review of any relevant national policies including the Malawi Growth and Development Strategy; conducting international and local consultations; and examining international instruments.

The Commission also developed a methodology for carrying out its work.

Without much ado, I shall now proceed to address you on the key recommendations of the special Law Commission:

The main piece of legislation proposed under this programme is termed “Trafficking in Persons Act”. The Trafficking in Persons Bill provides a comprehensive legislative framework for combating and preventing trafficking in persons using human rights based approach. In summary, the proposed Bill therefore provides for the following issues:

- a) establishment of institutional framework for effective regulation and coordination of matters of trafficking in persons and related matters;
- b) protection of trafficked persons and potential victims of trafficking in persons;
- c) prevention of incidents of trafficking in persons;
- d) prosecution of offenders; and

- e) increasing participation of individuals, communities and institutions in the fight against trafficking in persons.

SCOPE

The Commission recognized that trafficking in persons is both a national issue and a transnational one. The Commission recommends that in cases where the trafficking in persons offences are transnational in nature, the law should apply especially where foreigners undergo sham proceedings that are purely intended to protect them from punishment.

The Commission also recommends that the offences should apply to both natural and legal persons.

PREVENTION

Poverty alleviation

The Commission identified poverty as one of the major causes of trafficking in persons and decided to tackle it as a factor that sustains supply of victims of trafficking. The Commission took note of the current legal and policy framework that Government has employed to tackle poverty and advises Government.

Training and awareness-raising

The Commission understood training and awareness-raising as essential components to prevention of trafficking in persons and identified specific groups which it understood as most relevant targets for the exercise: clients and end-users of trafficked persons; trafficked persons; law enforcement officers; members of the Judiciary; the tourism and hospitality industry; civil society; and general service providers. The Commission has actually made recommendations on the amendment of the Tourism and Hotels Act

so that it specifically provides for prevention of trafficking in persons.

CRIMINALIZATION OF TRAFFICKING IN PERSONS

The Commission understood trafficking in persons as a growing industry which is particularly attractive because human beings are recyclable after abuse. For as long as they are alive, they can be used and reused and are still usable upon death in case of organ trafficking.

The Commission understood trafficking in persons as a human rights issue with regard to criminalization. It deliberated at length on the issue what constitutes trafficking in persons; whether to criminalize trafficking in children separately; and whether intention is necessary in criminalizing trafficking in persons.

In criminalizing trafficking in persons, the Commission distinguished it from smuggling which is not only a subject matter of a different instrument but is essentially distinct from trafficking in many material respects.

Before creating the trafficking offences, the Commission also examined existing legislation on matters that are akin to trafficking and made several recommendations especially regarding the penalties that are being provided for since those offences were conceived outside trafficking concerns.

The Commission therefore recommends that an offence of trafficking in persons be created under the law apart from the offence of trafficking in children. It also recommends that exploitation be specifically provided for and that the age of a child be defined as eighteen years.

The Commission further recommends that specific instances be specifically provided for as aggravated forms of trafficking under the proposed law such as:

- (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 organised 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 exercise is an 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.

The Commission further recommends that trafficking in children is an offence of moral turpitude under the Constitution. And further that a person convicted of trafficking shall be ineligible to work in any capacity with children for a period of ten years following conviction.

Where an offence is being committed by a legal person, all managers shall be liable for the offence unless they show lack of knowledge or that they exercised due diligence to prevent the commission of the offence.

The Commission further decided to create criminal liability for carriers that do not exercise due diligence when transporting trafficked persons.

Notwithstanding the availability of the criminal justice machinery under the proposed law, a trafficked person may institute civil

proceedings or seek compensation, restitution and damages from a person convicted under the proposed law or from a public officer.

Further in order to ensure that the law protects trafficked persons, there is provision for immunity of trafficked persons from prosecution.

ENFORCEMENT

The Commission deliberated on how the law would be enforced generally in light of existing mechanisms of law enforcement. The Commission recommends that specially designated officers should be empowered to enforce the law by:

- a) carrying out investigations;
- b) arresting suspects;
- c) interrogating suspects;
- d) conducting searches and seizures, among other things.

These officers could be from the Malawi Police Service; the Immigration Department; or from any other public office as the Minister may deem fit.

INSTITUTIONAL FRAMEWORK

The Commission noted that the Trafficking Protocol does not oblige parties to adopt any particular institutional framework and deliberated on the best mechanism for Malawi. The Commission weighed between the establishment of an ad-hoc institution comprising membership from stakeholders and establishment of a permanent, independent and specialized body. Among the functions of the institution, however established, are:

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

- (d) initiate education and awareness programmes;
- (e) coordinate and oversee training of all relevant law enforcement and judicial officers;
- (f) coordinate and manage activities with Government agencies and NGOs;
- (g) take responsibility and management of a specially created fund;
- (h) coordinate research and data collection;
- (i) perform any other duties necessary to coordinate and monitor the implementation of the proposed law.

The Commission, after consultations, and conducting comparative studies recommends the adoption of the ad-hoc institutional framework by way of a Board styled “Trafficking in Persons Board” which shall be housed under the Ministry of Internal Affairs and Public Security. Membership shall comprise Principal Secretaries of Internal Affairs and Public Security; Gender and Children; Local Government; Health; and Labour; the director of Public Prosecutions; the Inspector general of Police; the Chief Immigration Officer; two representatives from civil society organizations and four members appointed by the President two of whom shall be women.

FINANCES

The Commission considered how the Board would be funded and recommends that Government should adequately fund the Board. The Commission further recommends that the Board should have powers to receive donation of funds or assistance directly.

The Commission further considered that if property of a trafficker is confiscated and sold, the proceeds should be deposited into the Fund in order to boost resources for combating trafficking in persons. The Fund would be managed by the Board.

CARE AND PROTECTION

The Commission further considered that the proposed law should provide for care, assistance and support to trafficked persons in a manner that is consistent with full respect of their rights. This,

among other things, would ensure that trafficked persons are not treated as a homogenous group on account of age, sex, or nature of exploitation. The Commission further considered that care and support would go beyond physical needs and cover issues of medical, psychological, linguistic, rehabilitation, legal, educational and accommodation needs.

The Commission therefore recommends that a system for identifying and registering victims after screening them. The Commission also observed that the issue of the immigration status of trafficked persons is an issue connected with care and support. The Commission therefore recommends that, upon satisfying a number of clearly articulated conditions, a trafficked person should be eligible to remain in Malawi.

The Commission has also recommended that Government should appoint protection officers and establish shelters for trafficked persons.

WITNESS PROTECTION

The Commission observed that criminal or civil proceedings are critical in the enforcement of the proposed law. In order to ensure that witnesses are free to participate in this process, the Commission bemoaned the absence of statutory witness protection in general and recommends that witnesses should be accorded physical protection for them as witnesses or where necessary for their families through relocation and that where necessary, special arrangements when giving evidence should be deployed. Other means shall include use of special safe houses.

Alongside the means afforded above, the Commission further recommends that there should be a statutory restriction on publication or reporting in the media on court proceedings or the identity of a trafficked person. Any reporting or publication can only be done with leave of the court.

MISCELLANEOUS AMENDMENTS

The Commission has also proposed amendments to other legislation such as the Immigration Act; Extradition Act; and the Tourism and Hotels Act.

Under the Immigration Act, the Commission recommends that a trafficked person should not be subject to declaration that he or she is a prohibited immigrant and may be issued a temporary residence permit during investigations and court proceedings. The Commission has also proposed the upward revision of penalties for sections 34 and 36 on and respectively.

Under the Extradition Act, the Commission recommends the addition of offences under the proposed law which are punishable by a sentence of seven years or more as extraditable offences.

Under the Tourism and hotels Act, the Commission proposes the addition of a definition for child sex tourism and child sex tourism as a separate unlawful activity at a hospitality institution.

Members of the Press, ladies and gentlemen, this is the overview of what is contained in the proposed legislation on trafficking in persons.

On this note, allow me, on behalf of the Government of Malawi, the Law Commission and the people of Malawi, convey our sincere gratitude to the Global Fund round 5 which, through the National AIDS Commission funded the programme. The Government of Malawi has also demonstrated its commitment to prevention and elimination of trafficking in persons in Malawi.

Thank you