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LAW COMMISSION REPORT NO. 27

CONSTITUTION OF MALAWI

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE  
ADOPTION OF CHILDREN ACT (CAP. 26:01 OF THE LAWS OF  
MALAWI)

The Report of the Law Commission on the Review of the Adoption of Children Act is hereby published and shall be laid in parliament pursuant to section 135 (d) of the constitution.

Dated this 23<sup>rd</sup> day of August, 2013.

Hon. RALPH KASAMBARA, SC  
*Minister of Justice and  
Constitutional Affairs*

(FILE NO. LC/01/67)

## REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE ADOPTION OF CHILDREN ACT (CAP. 26:01 OF THE LAWS OF MALAWI)

TO: THE HONOURABLE RALPH KASAMBARA, SC, MINISTER OF JUSTICE AND  
CONSTITUTIONAL AFFAIRS

This is the Report on the Review of the Adoption of Children Act by the special Law Commission on the Review of the Adoption of Children Act appointed under section 133 of the Constitution.

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

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**Changes in the team of Programme Officers**

Mrs. Fiona Atupele Mwale, LLB (Honours) (Leeds), LLM (Warwick), Deputy Chief Law Reform Officer who hitherto acted as lead programme officer at the start of the review process left the Law Commission to assume a new position at the SADC Tribunal in Namibia.

**Acknowledgements**

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## INTRODUCTION

In March 2009, the Law Commission received a submission from the Ministry of Gender, Children and Community Development, requesting the urgent review of the Adoption of Children Act. This request was made pursuant to operational challenges experienced by Social Welfare Officers and Probation Officers in the Ministry in implementing the Act and pursuant to submissions made by adoptive parents and prospective adoptive parents on problems they had experienced with the adoption system. The request to review the Adoption of Children Act was also a response to concerns raised by civil society on the need to modernise the law on adoption in view of various vices that have emerged as a result of globalisation.

Following the submission, the special Law Commission on the Review of the Adoption of Children Act was empanelled under section 133 of the Constitution to carry out the necessary law reform work. The special Law Commission commenced work in earnest in September 2009.

The general mandate of the special Law Commission was to review the Adoption of Children Act with a view to clarifying the concept of adoption and to improving the provision of adoption services in Malawi to ensure conformity with the Constitution and the broad framework of the generally accepted international practice and international law obligations to which Malawi is a party.

## Terms of Reference

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

- (a) to review the Adoption of Children Act;
- (b) to consult with any persons or bodies on areas of law and practice on the adoption of children;
- (c) to conduct research on issues arising out of the current status of adoption law in Malawi and gaps identified;
- (d) to conduct comparative studies at national, regional and international levels and where necessary carry out study visits;
- (e) to examine international instruments relevant to adoption such as the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption;
- (f) to utilize relevant local instruments in recognition of work already undertaken, having regard to all relevant policies and reports including—
  - (i) the National Plan of Action on Orphans and other Vulnerable Children (2004 to 2009); and

(ii) reports of the Law Commission, in particular, the Report of the Law Commission on the Review of the Children and Young Persons Act;

(g) to ensure compliance of any recommendations with the Constitution; and

(h) produce a Report containing findings and recommendations, accompanied by draft legislation based on the recommendations, to be submitted to the Minister of Justice for laying in Parliament.

### Work Methodology

The special Law Commission adopted the following methodology in reviewing the Act—

(a) submissions were invited from members of the general public through notices in the local papers and in the *Gazette*;

(b) a First National Consultative Workshop was held with a view to receiving submissions from the general public and stakeholders on key strategic issues;

(c) the Commission met for three days once a month for a total period of twenty-six months. During these meetings, the Commission scrutinised the Act according to thematic areas that were identified. The Commission also examined several comparable statutes from other common law jurisdictions and from selected countries within the region;

(d) the Commission undertook study visits to Namibia where some Commissioners and programme officers had occasion to observe and experience first-hand, the workings of adoption services in that country;

(e) the Commission arranged consultative meetings with Government officials from several ministries and departments with a view to assessing the impact of the recommendations of the Commission on Government policy;

(f) three regional workshops were held to consult stakeholders on the findings and recommendations made by the Commission;

(g) a Second National Consultative Workshop was held to subject the Commissions' final findings and recommendations to scrutiny;

(h) a meeting of the Commission was convened to review the deliberations of the workshop and to incorporate the recommendations made at the Second National Consultative Workshop; and

(i) the Commission then proceeded to produce this Report.

### Structure of the Report

The Report commences with a brief background and an overview of the Adoption of Children Act. This is followed by a synopsis of the proposed new legislation and then a detailed analysis of the Act. The Report presents findings



and recommendations from a thematic viewpoint based on the issues that were identified from the Act as being in need of review. All matters recommended for enactment have been indicated in bold.

Further, in the narrative part of the Report, the Commission has not assigned part numbers and section numbers to the new provisions being recommended but subsection numbers have been assigned to indicate structure and full content of the recommended provision.

### **Background and Overview of the Adoption of Children Act (Cap. 26:01)**

The Adoption of Children Act was enacted in 1949 as the Adoption of Children Ordinance. Following Malawi's independence, the Ordinance was formally adopted as the Adoption of Children Act, forming part of the Laws of Malawi. When the Bill for the Ordinance was presented before Parliament in 1949, in stating its purpose, the then Attorney General said—

“At present there is no legal means whereby children can be adopted in the Protectorate and recently there have been a number of childless couples inquiring as to the possibility of adopting children and the object of this Bill is to provide the necessary legal machinery.”

He also added that—

“The Bill is based on similar legislation in force in Northern Rhodesia which in turn is based on the English Adoption of Children Act, 1926.”

The 1926 English Adoption of Children Act from which the Adoption of Children Act of Malawi is derived was necessitated by the increased number of orphans in England following the First World War and subsequently the rise in the number of *de facto* adoptions. The pressures for reform following the initial enactment were numerous and resulted in a number of reforms culminating in the Adoption and Children Act of 2002 that made it easier for looked after children to be adopted.

Since 1929, the law of adoption in England has undergone numerous reforms reflecting the changing views of the general population on the legal concept of adoption itself, emerging international trends and international human rights treaties. On the other hand the law in Malawi as regards adoption has stood still despite the fact that the principles and the philosophy that led to its enactment have since changed. Childlessness is no longer the key focus of the adoption process. Rather, the emphasis is on the best interests of the child. Current social work practices place the care and protection of the child at the centre of the process. In addition, other countries whose adoption of children laws were based on the 1926 Adoption of Children Act have reviewed their laws. These include Uganda, Kenya, United States of America, Papua New Guinea, Western Australia, Queensland and Republic of South Africa.

The contents of the Adoption of Children Act may be summarised as follows—

Section 2 vests powers to make adoption orders in the courts. The provision in subsection (2) also defines an infant, the subject of an adoption, as a person under the age of twenty-one. In subsection (3) the Act prohibits the making of an adoption order for more than one person unless it is a couple jointly.

Section 3 provides for restrictions on the making of adoption orders, including that the applicant should not be below the age of twenty-one. There is however an exception in section 3 (1) (b) to the provision where the applicant and the infant are within the prohibited degree of consanguinity. The provision also prohibits male applicants from adopting female infants. In the proviso to section 3 the Act provides for the need for parent's or guardian's consent to the adoption, except where the parent or guardian is incapable of consenting.

Section 4 provides for the three things that the court must be satisfied with before making the adoption order .

The Act also provides in section 5 that all rights and duties of previous guardian shall be extinguished upon the making of the adoption order.

On continuity of certain interests of the child, the Adoption of Children Act provides in section 6 that, “the adoption order shall not deprive the infant of any rights or interests in property to which but for the order, the child would be entitled under any intestacy or disposition...”.

In section 7 the court is given discretionary power to make interim orders. For example, the court may make the order for a two year probationary period upon such terms as it thinks fit.

Section 10 provides for restriction on payments. It prohibits the paying or receipt of payment by the adopter or guardian except with sanction of the court, in consideration of the adoption under the Act.

Section 11 provides for legalization of *de facto* adoptions. The provision states that, “the court may upon application of such person or spouses notwithstanding that the applicant is male and the infant is female, make an adoption order, authorizing him or her to adopt the infant without requiring consent of parent or guardian upon being satisfied that all circumstances are just and equitable and for the welfare of the infant that no such consent should be required.”

The Adopted Children Register is to be kept and maintained by the Registrar of Births and Deaths, as provided under section 12 of the Act.

### **Draft Legislation**

The proposed draft legislation seeks to modernise the law on adoption of children in Malawi by putting emphasis on the best interests of the child. The

proposed legislation further seeks to modernise the law by incorporating provisions aimed at promoting the care and protection of a child undergoing the adoption process. To actualise this objective, new provisions have been introduced in the proposed legislation namely—

- (a) provisions on the purpose of adoption;
- (b) provisions on suitability for adoption and provisions on register of children eligible for adoption;
- (c) provisions elaborating on the eligibility of applicants for adoption;
- (d) provisions on rescission of an adoption order;
- (e) provisions on guardian *ad litem* by lifting from subsidiary legislation to the principal legislation;
- (f) provisions on the establishment of the Prospective Adoptive Parent Register;
- (g) provisions regulating intercountry adoptions; and
- (h) provisions on offences.

In view of the extensive nature of the recommended changes to the existing law, the Commission recommends the repeal of the law on adoption of children and its replacement with a new Act under the same title “Adoption of Children Act”. A draft Bill for the proposed Act is attached as part of this Report.

## SPECIFIC FINDINGS AND RECOMMENDATIONS

### 1. CONCEPT OF ADOPTION OF CHILDREN

The legal concept of adoption under the common law system refers to the process by which a child's legal parentage is entirely and irrevocably transferred from one set of adults, usually the birth parents, and vested in other parents, usually adoptive parents.<sup>1</sup> Unlike fosterage, guardianship, wardship or other systems designed for the care of the young outside the natural family structure, the adoption process deliberately intends to effect a permanent change in status. This change in status requires societal recognition and must therefore be sanctioned either through legal or religious processes. The emphasis in the legal recognition of the concept of adoption is on, "the complete severance of the relationship between birth parents and child and establishment of a new one between the child and adoptive parent".<sup>2</sup> This entails the transfer of parental responsibility to the adoptive parent. Historically, under the English common law, parental rights and duties were held to be inalienable. Adoption was thus not conceivable under this system.<sup>3</sup> This is what necessitated the introduction of statutory recognition of adoption.

The legal concept of adoption is to be distinguished from lay configurations of the term which can have wider meaning.<sup>4</sup> It may sometimes be said, "that a person, particularly a stranger in blood, who looks after a child in the event of parental death or abandonment, has 'adopted' him".<sup>5</sup> The consequences of such a relationship are not necessarily legal. As the relationship is not sanctioned through the courts, it cannot be classified as a legal adoption. In the Malawian context, the Commission noted that families engaged in informal kinship care are sometimes said to 'adopt' the children whose education and welfare they provide for. Such informal care systems are not always intended to be permanent as the children that are 'adopted' tend to have some living relatives, or parents who expect the child to be returned to them after the child has grown up or been educated.

In the Malawian socio-cultural and socio-economic context, children are highly valued. A childless family is considered abnormal. Once a child is born, the child's birth is considered a great event for the continuation of a clan or family. The birth is celebrated by all in the community. The community helps to raise the child. Relinquishing the child to a person outside the community is an alien concept. Children may also serve as an investment opportunity for their parents. A child who grows up to earn a decent living is expected to provide for his parents. Therefore, a child who has been brought up in a different family by a guardian will still be expected to provide for his birth parents and relatives after

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<sup>1</sup> Lowe N, and Douglas G, 1998, Bromley's Family Law, 9th edn. Butterworths. 611.

<sup>2</sup> *Ibid.* citing the Houghton Committees Report Cmnd. 5107, 1972, at para 14.

<sup>3</sup> See *Vansittart v. Vansittart* (1858) 2 de G & J 249; *Walrond v Walrond* (1858) John 18; *Humphreys v Polak* [1901] 2 KB 385, CA; and *Brookes v Blount* [1932] 1KB 257.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

he grows up. It is the perpetuation of practices based on the socio-cultural and socio-economic context that makes it difficult for most people to imagine a situation of care in which the child is permanently and completely taken away.<sup>6</sup>

The Commission noted that the view of permanent parental ownership over children held by many parents in *ad hoc* or informal adoption settings also influences the way in which the legal concept of adoption is understood. Members of the Commission who have actively been involved in legal adoption cases were able to cite examples where birth parents giving consent for adoption sometimes gave qualified consent by conditioning the adoption on the basis of having a continuing relationship with the child. Presumably, the continuing relationship would ease the child's integration after he or she is returned to his or her birth parents. Other parents expressly qualified their consent with the condition that the child is returned to them after his or her education is completed.

Participants at the First National Consultative Workshop held at Capital Hotel in Lilongwe on 16th March, 2010 displayed divergent views regarding the issue of adoption. Most participants were of the view that defining adoption in terms of "permanency" and "severance of parental responsibility" was alien to Malawian culture. It was considered that stressing these terms imply that children may be adopted for no other purpose than to effect a severance in parental responsibility and transfer the child to another family. It was thus felt that this approach does not advance the best interests of the child. In discussing these issues, the Commission recognised the importance of underscoring the principle of the best interests of the child in any adoption law and the need to ensure that adoption is understood as an alternative system of care for a child who cannot be cared for by his birth parents.

In view of the socio-cultural and socio-economic factors at play in adoption cases, the Commission emphasised the need for Government and civil society to undertake wide spread civic education to ensure that the legal concept is widely understood. Consequently, the Commission recommends as follows—

### 1.1 *Purpose of adoption*

In social welfare practice, the primary purpose of adoption is to help children who would not otherwise have a nurturing family of their own to become members of a family that can give them the care, protection, and opportunities essential for their healthy personal growth and development.<sup>7</sup> Therefore, adoption is the opening of a nurturing home to a child in need of the love, stability, support and security that only a permanent family can provide. Although all adoptive families share the goal of incorporating a child into their lives, there are many specific reasons why people of different ages, stages, backgrounds and circumstances choose to adopt a child. The Commission considered that ascertaining the purpose of adoption in every case is very important as not all

<sup>6</sup> The Commission did acknowledge that communities are stronger in some areas of the country than others.

<sup>7</sup> See Child Welfare League of America. See Department of Social Services South Carolina Website. <http://dss.sc.gov/content/customers/adoptions/index.aspx> visited 18 November 2009.

adoptions will involve orphans or children for whom there is no one available to take on full parental rights and responsibilities.

For example, in many cases involving legal adoptions by Malawian families, the purpose of the adoption has been to enable the adoptive family to travel abroad with the child, either on a diplomatic posting or any other international posting. By legally adopting the child who is normally a sibling, a grandchild, step child, nephew or niece, the child is able to enjoy the benefits as if the child was natural child of the adoptive parent such as education, health care and employment benefits. It was not clear to the Commission whether such an adoption, which normally takes place within family settings is intended to be permanent or whether the child is returned to his or her immediate family upon the adoptive family's return to Malawi.

Another example considered by the Commission occurs in situations where a birth parent remarries and the adoption is by the step-parent. The child may have the possibility of a permanent, stable and nurturing home with either parent, but for purposes of giving the child a sense of belonging and attachment with a step-parent, it would be in the best interests of the child to be adopted by the step-parent. The fact that the child is adopted may not however, necessarily absolve the birth parent of the responsibility of supporting the child even though the adoptive parent is also obliged to support the child.

While both examples go against the norm in social work practice, they are nonetheless viable options for the care and upbringing of the child. The Commission was aware that in the first example, the motives of a family wishing to adopt a child in those circumstances may be questionable in that it could either be for the benefit of the child or for exploitation. The Commission thus recommends that the guiding factor in every adoption should be to help a child who would not otherwise have a permanent nurturing family to become a member of a family that can give him or her the care, protection, and opportunities essential for healthy personal growth and development.<sup>8</sup> While emphasizing the need for permanence in such arrangements, the Commission recommends that the courts should be given power to inquire into the purpose of each adoption and the discretion to ascertain if this purpose is in the best interests of the child.

Additionally, the Commission considered it important to safeguard against the use of adoption as a tool to derogate from parental responsibility by birth parents. The Commission thus recommends that adoption should only be considered in situations where birth parents have been assessed as being incapable of providing care for their child. The Commission hence underscored the importance of proper pre-adoption preparations and investigations by social workers to provide a check against birth parents giving up their responsibilities in favour of more affluent adoptive parents. The Commission recommends the following provision in this regard—

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<sup>8</sup> Child Welfare League of America. See Department of Social Services South Carolina Website. <http://dss.sc.gov/content/customers/adoptions/index.aspx> visited 18 November 2009.

Purpose of adoption ... **The purpose of adoption is to—**  
**(a) protect and nurture a child in need of care and protection, by providing a safe and healthy environment with positive support; and**  
**(b) promote the goals of permanency planning by connecting a child to safe and nurturing family relationships intended to last a lifetime.<sup>9</sup>**

### 1.2 Severance of parental rights

Two standard models of adoption exist with regard to the severance of parental rights. In one model, found in Anglo-American jurisprudence and other legal systems following this model, the effect of adoption is that the birth parent's rights and duties end with respect to the adopted child. These rights and duties are acquired by the adoptive parents. Similarly, the adopted child loses the right to inherit from a birth parent who dies leaving no will, but acquires such a right to inherit from the adoptive parent.<sup>10</sup> Section 6 of the Adoption of Children Act follows this model. This section sets out the effect of the adoption order, which essentially, is to extinguish all rights, duties, obligations and liabilities of birth parents or guardians in relation to the future custody, maintenance and education of the child. This includes rights to appoint a guardian and rights to consent or dissent to marriage. These rights then vest in the adoptive parent as though the child was born to the adoptive parent.

In the second model common in *ad hoc* adoption arrangements and in jurisdictions where legal adoptions in the Anglo-American tradition are not practiced, a complete severance of the legal relationship between the adopted child and his or her birth parent does not occur. Instead, the adopted child acquires some rights and duties with respect to the adoptive parent, but retains others with respect to a birth parent.<sup>11</sup> It is this model that resonates with the view of adoption held by certain quarters in Malawian society. The Commission however found that such a model of adoption is used either in religious legal systems or in situations in which a step-parent adopts a child. It is normally birth parents who want to maintain a stake of ownership in the child so that they can benefit from the child in the future. It is not uncommon for such a birth parent to also expect the adoptive parent to provide for them materially in addition to supporting their child. The Commission underscored that such relationships are not in the best interests of the child. The Commission was of the view that adoption should be understood as a legal concept with legal consequences, and unless the severance of parental legal rights and responsibilities are among those consequences, there can be no effective guarantee that adoptive parents will be held accountable for assuming legal parental rights and responsibilities over the child.

<sup>9</sup> The Commission had recourse to the South African Children's Act, Act No. 38 of 2005.

<sup>10</sup> <http://family.jrank.org/pages/43/Adoption.html> "Adoption \_\_ Legal Consequences And Availability, History And Purpose, Process, International Adoptions"

<sup>11</sup> *Ibid.*



The Commission noted a number of crucial issues that may impact on the welfare and best interests of the child if the issue of severance of legal parental rights and responsibilities is not addressed. For example, if such severance does not occur, the adoptive parents cannot acquire such rights and responsibilities in relation to the adopted child. It follows therefore that such parents will not be legally bound to care for the child. In the event that the economic or social circumstances of such “adoptive parents” were to change negatively, there would be nothing to prevent them from reneging their responsibility over the adoptive child. In addition, in the absence of such legal rights and responsibilities, “adoptive parents” may view their role as one governed by philanthropy and thus any level of care they give to the child will be sufficient. The care they offer may consequently fall below the standard required for the best interests of the child. For example, in a family which has natural children, the “adopted child” may be treated differently from the natural children. These situations would be detrimental to the child’s overall well being and would thus be against the best interests of the child.

In addition, upon the death of these “adoptive parents”, if no will has been written expressly providing for the “adopted child”, it is quite likely that the child will inherit nothing from these parents, thus placing the child in a precarious position. The Commission noted that technically this would not pose a problem for the child as the Wills and Inheritance Act<sup>12</sup> permits dependants who feel they have been “inadvertently omitted” from a will to challenge the will. Dependants are defined in that Act as follows—

“dependant” in relation to a deceased person means a person who was maintained by that deceased person immediately prior to his death and who was—

- (a) a child, issue, wife, parent or *Mtsibweni* of that deceased person;
- (b) any other person living with that deceased person; or
- (c) a minor whose education was being provided for by that person, and who is incapable, wholly or in part, of maintaining himself”.

The Commission observed that although the Wills and Inheritance Act covers this category of children, the process of challenging a will is cumbersome. Further, there would need to be an adult championing the child’s cause. The Commission was also aware that a child who is not a natural child of the adoptive parent or who has not been formally adopted would only be entitled to inherit whatever the court may consider reasonable after all other competing legitimate interests are considered. The reality on the ground in view of the rise in property grabbing incidents is that there are so many adults wishing to disinherit even the natural children of the deceased that it is unlikely that anyone would want to forgo

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<sup>12</sup> Cap 10:02 of the Laws of Malawi, section 14.



what they perceive to be their part of the inheritance in favour of a child whom they perceive as a stranger.

The Commission considered that the optimal solution in the best interests of the child is to provide for an adoption system that sever the parental rights and responsibilities of birth parents. Such a system would counter the common misconception in which many consider adoption to merely signify a temporary break in the chain of responsibility of the child without the correlative break in chain of “ownership” of the child. The Commission thus recommends that the essence of section 6 of the Adoption of Children Act be retained in the proposed new legislation. In making this recommendation, the Commission was satisfied that the child’s best interests and not those of the birth parents will be served.

The issue of dependants greatly exercised the minds of the Commission. Some members of the Commission were concerned that dependants who have not been adopted would not be entitled to inherit from the estate of their guardians.

The Commission however recognised that the mere fact of dependence should create a right to claim from such an estate. While the Commission conceded that for all intents and purposes such dependants are the children of the people looking after them, it was considered that this is not a compelling reason to automatically entitle such dependants to a right of inheritance. The Commission thus opined that granting dependants an automatic right to inherit from their benefactors would serve to create back door adoptions. This would in turn water down the positive tradition and practices that are associated with adoption. The Commission thus reiterates its recommendation that despite the fact that the issue of dependants raises great concern, the solution lies, not in changing established principles of the law of adoption, but in civic education. Parents should be educated that there are consequences for dependants when it comes to inheritance. If these dependants are not formally adopted, they cannot automatically inherit from the estate of their benefactor.

The Commission noted that it is possible in some jurisdictions to have an adoption system where the two models co-exist. Thus, it may be possible for a child to be adopted with the birth parents retaining some parental rights and responsibilities over the child. Such adoptions take into account the purpose behind the adoption or the circumstances of the adoptive and birth parents and the adopted child. Examples cited earlier relating to adoptions pursuant to international postings or step-parenting fall under this category. In these circumstances the adopted child may be entitled to support from both the birth parents and the adoptive parents. Similarly, the child may be entitled to inherit from both the adoptive parents and perhaps their relatives, as well as from the birth parents and their relatives. The Commission considered circumstances of this nature exceptional and recommends that in the best interests of the child in such situations, the proposed provisions on adoption should, in the absence of these exceptional circumstances, entail a full severance of the parental rights of birth parents.

The Commission further considered that the question of parental responsibility pending the grant of the adoption of a child who is the subject of adoption proceedings is an issue demanding attention. Effectively, the fact that such a child was the subject of adoption proceedings may mean that there is no person who has parental responsibility and rights over him or her. If the adoption order is not granted, there may be need to allocate such responsibility to another person(s) or institution whether temporarily or permanently.

Under section 23 of Adoption of Children Act of Papua New Guinea, the Commission noted that the Director responsible for children in the appropriate ministry assumes legal guardianship of all children awaiting adoption. The Commission recommends that the Director responsible for Social Welfare should assume guardianship of all children awaiting adoption and that he or she should be given the powers to delegate to any other person or body to have custody of the child. The Commission also recommends that the court should be given powers to make an order as to custody every time an adoption order is not granted.

The Commission therefore recommends the following provision—

**Guardianship of child awaiting adoption ... —(1) The Director shall be the guardian of a child awaiting adoption until an adoption order is made in respect of the child.**

**(2) The Director may, on such terms and conditions as he thinks fit, place a child for whom he is the guardian in the care of a suitable person or body or other place of safety.**

**(3) Upon refusal by the court to make an adoption order, the court shall make such orders in respect of the parental responsibility, guardianship, or custody of the child as the court may think fit.**

### *1.3 Permanence of adoption and hierarchy of life environments in the best interests of the child*

There has been a paradigm shift over the years in social work practice from defining the concept of adoption from the legal parental rights severance point of view, to a rights based approach, concentrating on the right of the child to healthy emotional development. While the severance of parental responsibility used to be a vital feature distinguishing *ad hoc* adoption arrangements from legal adoptions, the Commission noted that the emerging practice in adoption law and practice particularly in England, has established that, “it is perhaps permanence rather than severance that is the most significant feature of an adoption order”.<sup>13</sup> The psychological importance of having the security of a permanent order has been consistently stressed by the English courts.<sup>14</sup> As a leading expert put it,

<sup>13</sup> *Ibid.* 613.

<sup>14</sup> See citing *Re F (A Minor) (Adoption: Parental Agreement)* [1982] 1 All ER 321, CA at 326 per Omrod LJ agreeing with Bridges LJ in *Re SMH and RAH* [1990] FCR 996n (decided in 1979).

“[a]lthough no one can guarantee what the future will hold, a permanent placement is one that is intended to last and which is given the legal security to make it possible. A permanent home provides the child with the basis for his healthy emotional development”.<sup>15</sup>

It is therefore in the best interests of the child to ensure that a permanent home is found for the child, and the Commission recommends that Government should make every effort to ensure that this feature of adoption is well understood.

The Commission also deliberated at length on the hierarchy of adoption as a measure of care for a child in any situation of abandonment, lack of parental care or the death of a parent(s). The Commission was concerned that adoption may be seen as the only measure aimed at optimising the best developmental outcome of such a child, while overlooking other measures such as reintegration with birth families. The Report of the special Law Commission on the Review of the Children and Young Persons Act,<sup>16</sup> identified several alternative measures to adoption as follows—

(a) the provision of support to families to address the cause of the problem leading to child neglect and thus enable the family to care for the child;

(b) long term permanent institutionalised care under the auspices or supervision of the State; and

(c) short term temporary foster care such as fostering or short term institutionalisation and care within the family with support from the community and the Government.

It is clear from those alternative measures that a child does not always have to be adopted to be guaranteed care and protection. The Commission therefore recommends that in implementing its recommendations in this Report, due regard should be had to whether all the other measures have been considered so that adoption is considered as the only measure in the best interests of the child. However, the Commission considered the alternative measure of long term permanent institutionalised care under the supervision of the State unacceptable. The Commission formed the opinion that long term institutional care is never in the best interests of the child.

In addition, the Commission also recommends that at any given time when dealing with a child in need of care and protection, the available measures for ensuring the best life environment for a child must themselves be prioritised. Such prioritization will guide social workers and the courts in making the best decision for each child. The International Social Service<sup>17</sup> presents the desired hierarchy

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<sup>15</sup> *Ibid.* 616 citing Adcock “Alternatives to Adoption” Adoption and Fostering Vol. 8, No 1 at 12, 1984.

<sup>16</sup> See Malawi Law Commission, 2005, Report of the Law Commission on the Review of the Children and Young Persons Act. Law Commission Report No. 14 Government Gazette Extraordinary.

<sup>17</sup> See International Social Service, 1999 “The Rights of the Child in Internal and Intercountry Adoption”, International Resource Centre for the Protection of the Child, Geneva.

of life environments that can be offered to a child in need of care and protection as follows—

(a) family solutions:

preventing child abandonment and keeping the child in his or her family, returning the child to his or her family of origin, foster care, internal or intercountry adoption must take precedence over long term institutionalisation;

(b) permanent solutions:

keeping the child in his or her family of origin, adoption must take precedence over temporary solutions that perpetuate themselves in other words, a degree of permanence is to be preferred over short term solutions that keep having to be renewed because the issues leading to the child's need for care and protection cannot be solved in the short term;

(c) temporary solutions

foster care, placement in an institution must give priority to the reintegration of the child in his or her family of origin, or else to search for a permanent solution; and

(d) national solutions

family reintegration, internal adoption must take precedence over international solutions (intercountry adoptions).

The Commission adopted this hierarchy and accordingly recommends that the Ministry responsible for children should develop policy and guidelines aimed at ensuring that all appropriate child protection measures are considered and exhausted in relation to each particular child, before that child is considered adoptable or eligible for adoption.

The Commission thus recommends the following provisions—

**Suitability for adoption ... Adoption shall be considered as a measure for the care and protection of a child only after the Director has certified, upon assessment of the child, that—**

**(a) the child is in need of permanent care solutions;**

**(b) the child is abandoned or can no longer be cared for by his birth parents;**

**(c) there have been sufficient attempts to rehabilitate the birth parents and to reintegrate the child into the birth family and there are reasonable grounds to believe that further attempts at rehabilitation and reintegration support are unlikely to succeed; and**

**(d) there are no other family members capable of and willing to take care of the child even with support from the community or the State.**

Register of  
Children  
Eligible for  
Adoption

**... —(1) The Director shall establish and maintain a register known as the Register of Children Eligible for Adoption.**

**(2) The Register of Children Eligible for Adoption shall record—**

**(a) the date on which a child was assessed as suitable for adoption; and**

**(b) the names of children assessed as suitable for adoption.**

... Schedule

**(3) The Register of Children Eligible for Adoption shall be in Form ... in the ... Schedule.**

#### *1.4 Post adoption contact*

The Commission was aware that experience in Malawian courts in adoption matters indicates that at times, adoptive parents are required to bring the child back to his or her birth parents for ongoing contact between the adopted child and other family members. This is in keeping with the cultural view that children are owned by a family and parental rights and responsibilities can never be severed. The Commission found this practice disturbing and detrimental to the proper psychological development and general well-being of children adopted as babies. The Commission was of the view that an adopted child should be brought up in a way that reflects the permanency of the adoption process. Consequently, while the Commission was not against an adopted child being told of his or her adopted status, it was keen to ensure that the child is allowed to bond with his or her adoptive family with minimal disruption.

In discussing this issue, the Commission was aware that adoption law and practice in a number of countries around the world has evolved to permit adopted children, once they reach a certain age of maturity, to obtain their original birth certificate and to establish contact with their birth family. This practice is known as an “open adoption”. Open adoption allows identifying information to be communicated between adoptive and birth parents and, perhaps, interaction between the child and birth family members. It may also entail involving birth parents in the selection of adoptive parents. In those jurisdictions in which open adoption is practiced, statutory laws provide for a child’s right to unaltered birth certificates and sometimes with the additional right to view adoption records as is the case in the United Kingdom.

This practice is known in the United Kingdom as “adoption with contact”. This entails an arrangement (subject to termination by adoptive parents who have sole parental rights and responsibility over the child) concerning visitation,

exchange of information, or other interaction with the birth parents and other family members, regarding the child.<sup>18</sup>

Open adoptions are to be contrasted with “closed adoptions” which tend to be more common around the world.<sup>19</sup> A closed adoption seals all identifying information, maintaining it as confidential and barring disclosure of the adoptive parents, birth families, and the child’s identities. Nevertheless, closed adoption, may allow the transmittal of non-identifying information such as medical history, religious and ethnic background.

While the Commission conceded that revealing identifying information at the time of adoption might facilitate detrimental post adoption contact, it considered it pertinent to ensure that some level of information would be available for the adopted child to trace his or her roots. The Commission was aware that a child has a right, under Article 8 of the Convention on the Rights of the Child to know his or her background.<sup>20</sup> The Commission however recommends that in adoptions where the parties are not related (stranger adoptions), such information should only be made available to the child when age and maturity permit. It was considered that this arrangement would facilitate the development of a unifying bond between the child and the adoptive parents. Similarly, the Commission considers post-adoption contact in stranger adoptions undesirable as it would interfere with the child’s upbringing and development.<sup>21</sup> It is therefore the Commission’s considered view that the law should provide for closed adoption in cases of stranger adoption. The Commission further recommends that relevant information should be accessible to the child once he or she turns eighteen.

The Commission also recommends that information relating to the adoption of the child should be protected from disclosure and may only be disclosed to the child once he or she has attained the age of eighteen. Nonetheless, the adopted child must be informed that he or she is adopted as soon as he or she reaches an age of understanding.

The Commission was aware that its sister Commission, the special Law Commission on the Review of the Children and Young Persons Act, had arrived at a similar conclusion in relation to disclosure of adoptive status. However that Commission had arrived at a different conclusion in relation to post adoption contact. That Commission was of the view that children who are adopted over the age of fifteen would need to maintain birth family contacts since it would not be in their best interests to cut such ties. The recommendations made by the special Law Commission were as follows—

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<sup>18</sup> Postadoption Contact Agreements Between Birth and Adoptive Families, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, 2005.

<sup>19</sup> Ellen Herman, Adoption History Project, University of Oregon, <http://www.uoregon.edu/adoption/topics/confidentiality.htm>.

<sup>20</sup> See also article 30 of Hague Convention.

<sup>21</sup> Cf Section 55 of the Children Act of Uganda which permits disclosure of identifying information after the child attains eighteen years or at an earlier age at the discretion of the adoptive parent.

"Disclosure of  
adoptive status

11A —(1) An adopter may inform the adopted child or person of the fact that the child or person is adopted and of his parentage but this disclosure shall only be made if it is in the best interests of the child or person after considering his age and mental maturity.

(2) No person other than the adopter shall disclose adoption information to the adopted child.

(3) Any person who contravenes this section commits an offence and upon conviction shall be liable to a fine of Fifty Thousand Kwacha (K50,000.00) and to imprisonment for one (1) year.

Post adoption  
contact with  
natural family  
members

11B. Where an adopted child or person knows of his adoptive status, the adopter shall not refuse or obstruct contacts by the child or person with his natural parents or with other members of the child’s natural family unless it can be shown on reasonable grounds that such contacts will not be in the best interests of the child or person.”

With regard to disclosure of adoptive status, the Commission, though acknowledging the reasoning behind these recommendations, nonetheless maintains its position in accordance with current practices in social work that adoptive status should be disclosed as early as possible to all children to prevent situations where a child may know his or her adoptive status from other sources. The Commission considered that this may be damaging psychologically to the child, particularly where the information does not come from the adoptive parents. The Commission recommends that all adoptive parents should be counseled prior to adoption especially in techniques that will enable them to disclose to the child that he or she was adopted. In South Africa, the practice at ABBA (AFM) Adoptions (an adoption agency owned by Apostolic Faith Missions) is to train adoptive parents on how to disclose to the child that he or she is adopted as early as possible, even if the child is a baby. This makes it easier for the parents to inform the child of his or her roots. The Commission also maintained its view that it is very important for the child, at whatever age, to be allowed an uninterrupted opportunity to bond with his or her adoptive family.

In view of the Commission’s position on the foregoing issues, the Commission recommends the following provisions—

Effect of  
adoption  
order

... —(1) An adoption order shall—

**(a) sever all parental rights and responsibilities that a birth parent, a step-parent or a guardian had in respect of a child before the adoption order is granted; and**

**(b) confer full parental rights and responsibilities in respect of the child upon the adoptive parent.**



**(2) An adoption order terminates, except where provided otherwise—**

**(a) all claims of contact with the adopted child by a birth parent or a step-parent or a guardian or by a family member of that person;**

**(b) all rights and responsibilities the adopted child had in respect of a birth parent or a step-parent or a guardian or a family member; and**

**(c) any previous order made by a court in respect of the placement of the child.**

**(3) An adoption order may confer a new name or the surname of the adoptive parent on the adopted child.**

**(4) An adoption order shall not—**

**(a) sever parental rights of a birth parent over the adopted child where—**

**(i) the child has been adopted by a family member so that the adopted child may enjoy a benefit which could not otherwise be enjoyed in the absence of an adoption order; or**

**(ii) the child has been adopted by a step-parent;**

**(b) permit marriage or sexual relations between the child and a person within the prohibited degrees of kindred and affinity; or**

**(c) affect a right to property that a child acquired before the adoption order is granted.**

Disclosure of  
adoptive  
status

**... —(1) An adoptive parent shall inform a child that he is adopted at the earliest opportunity depending on the child's age and developmental capacity.**

**(2) An adopted child who has attained the age of eighteen (18) years has the right, at his request, to receive from the adoptive parents, the Ministry, or from the court which made the adoption order—**

**(a) information which would enable him to obtain a certified copy of the record of his birth, unless the court orders otherwise;**

**(b) mandatory information disclosed to the adoptive parents by the Ministry in accordance with section ...; or**



**(c) a copy of a prescribed document or an order relating to the adoption.**

## 2. THE CHILD ELIGIBLE FOR ADOPTION

The Commission noted with dissatisfaction that, other than age and marital status, the Adoption of Children Act does not give proper criteria or requirements as regards eligibility for adoption. For example, section 2 (2) of the Act restricts a person who is to be the subject of an adoption order to one under the age of twenty-one years and who has never been married. This is despite that the age of majority under the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) is eighteen years. This means that the Act envisages situations in which even adults can be adopted. The Commission found this to be unacceptable.

The Commission also observed that section 3 (3) of the Act dispenses with the requirement of consent regarding neglected and abandoned children. The Commission thus concluded that implicitly the provision recognises abandonment as a criterion for adoption under the Act. Further, the Commission observed that section 8 of the Act makes it possible for a child who was previously adopted, to be adopted again. The Commission considered the approach adopted by the statute inadequate and hence creates uncertainty as to who can be adopted. Notably missing from the criteria in the Act is any reference to the child's welfare needs which generally include medical needs, psychosocial needs, care and support. The Commission thus recommends that clear and specific criteria be established to prevent abuse of the process of adoption. The Commission then proceeded to discuss the various factors that should guide eligibility for adoption.

### *2.1 Age of the child*

The Commission noted that general practice in various jurisdictions with regard to the age of an adoptable child varies. In Queensland (Australia) an adoptable child is one who has not yet attained the age of eighteen years on the date when the order is made.<sup>22</sup> In Papua New Guinea<sup>23</sup> an adoptable child is one who has not yet attained the age of twenty-one years on the date when the order is made. The Uniform Adoption Act of 1994 of the United States defines the adoptable child without reference to age, as any "individual who may be adopted by another individual for the purpose of creating a parent-child relationship between them". The United Kingdom's position is similar to that of Queensland, setting the age at eighteen years. It therefore follows from practice around the world that a child can be deemed adoptable at any age up to the age of twenty-one as long as the relationship of parent and child can be created.

The commentary to the Uniform Adoption Act provides some insight as to why an adult, that is a person over the age of eighteen, may be adopted. The

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<sup>22</sup> See Adoption of Children Act 1964, section 11.

<sup>23</sup> See Adoption of Children Act 1968, section 6.

commentary states that the adoption of an adult may provide formal recognition of a *de facto* relationship that has existed for many years. An example given is that of an individual who has been raised by someone other than a parent, but no formal adoption proceedings have ever been instituted. Another example given is the case of a belated adoption by a step-parent in a situation in which a child's non-custodial parent never consented to the proposed step-parent adoption. Once the non-custodial step-parent dies or the child reaches his eighteenth birthday, the non-custodial parent can no longer block the adoption. An adoption of an adult may also occur simply to provide the adoptive parent with a legal heir to inherit the adoptive parent's estate. Commentators to this Act consider that adults, who are desirous to create a parent-child relationship between each other, should not be barred. It is only in cases where a relationship other than that of parent and child is intended that the courts should deny an application for adoption. An example cited is the case of *In re Robert Paul*,<sup>24</sup> where an adoption order between adults was denied because the applicant was a homosexual adult male who applied to adopt his adult male lover with the purpose of creating a legal relationship to circumvent the prohibition against such relationship under marriage laws.<sup>25</sup>

After lengthy deliberations on the findings made by the Commission on the age of a child, the Commission unanimously resolved to set the maximum age for a child to be adopted at eighteen years. It was the Commission's view that only children should be adopted since the purpose of adoption is to form a parent-child relationship and this cannot realistically be done where the adopted person is over eighteen years of age. This recommendation is also consistent with the recommendation of the special Law Commission on the Review of the Children and Young Person's Act which in conformity with the Convention on the Rights of the Child set eighteen years as the age of majority.

## 2.2 Psychosocial adoptability

In considering other additional requirements contributing to the adoptability of a child, the adoption process must be considered as a personalized life plan for the child in question. The Commission noted that there must therefore be some level of evidence to indicate that the decision to term a child "adoptable" has arisen after a preliminary psycho-medico-social study of the child and his or her birth family.<sup>26</sup> The conclusion that it is impossible for the birth family to care for the child, and the assessment of the child's capacity to benefit from a family environment, determine the child's psychosocial adoptability.

Invariably, the psychosocial evaluation of a child is not usually the subject of substantive adoption legislation. The practice in the United States, the United Kingdom, Papua New Guinea and Queensland has been to leave the issue of

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<sup>24</sup> 471 N.E.2d 424 (N.B.Y.,1984).

<sup>25</sup> The Uniform Adoption Act, 1994, National Conference of Commissioners on Uniform State Laws, pp105-106.

<sup>26</sup> *Ibid.*

psychosocial adoptability either to subsidiary legislation in the form of regulations or practice directions, for use by social workers. The Commission considers this good practice as it enables professionals in the field to develop rules that are practical and effective, and accordingly recommends the same approach. In this regard, a prescribed form for use in performing the psychological test has been attached to this Report as Annex I, titled “Report Concerning the Psychological and Social Circumstances of the Child”.<sup>27</sup> The Commission found the questions in the prescribed form appropriate to test the child’s psychological and social circumstances. The Commission, however, noted that the form uses testing tools such as rattles and toys which might not be readily available to all children. Nevertheless, the Commission was satisfied that as long as the child can replicate the actions involving the use of such tools, the tools themselves were not important. The Commission recommends that this form should constitute a *Schedule* in the proposed new law.

### 2.3 Medical adoptability

Since adoption is intended to be a permanent solution for the child, it is crucial that all information relating to the child’s medical history is available to prospective adoptive parents to enable them to take up their parenting role with seriousness, and make the right decisions especially where the child has any special medical needs. Adoption practice ethics worldwide consistently demand that all information regarding the child’s physical and mental status must be revealed to prospective adoptive parents.

In South Africa, the practice by various adoption agencies is that all children placed for adoption are tested for HIV, Syphilis and Hepatitis B. Children are then declared medically fit for adoption by a paediatrician before considering any matching between that child and a prospective adoptive parent. A child who has any medical condition will not be declared medically unfit for adoption. A child is only medically unfit for adoption if there is no record of the medical history of the child. A medical report is considered crucial to ensure that the general health of the child is maintained after adoption.

The Commission considered the South African approach progressive and reflecting the importance of adhering to the principle of the best interests of the child. It was the Commission’s considered view that the approach provides a proper balance protecting a child rights to privacy and ensuring that the general health of the child is maintained after adoption.

Notwithstanding this conclusion, the Commission was aware that experience from South Africa indicates that children who are HIV positive or have AIDS, neurological disorders, severe trauma or older children with psychiatric disorders are rarely declared medically adoptable and when they are, adoption agencies

<sup>27</sup> This is the model form recommended by The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Guide to Good Practice. Guide No. 1. 2008, Published by Family Law, Bristol. Annex 7 ISBN 978 1 84661 144 5.

have struggled to find homes for them.<sup>28</sup> The Commission thus concluded that the issue of medical adoptability, like psychosocial adoptability is one that should be provided for in subsidiary legislation, as a guide to practitioners. To this end, the Commission recommends adoption of a prescribed form for use in performing the medical test attached to this Report as Annex II, titled “Medical Report on the Child”<sup>29</sup> to constitute a *Schedule* in the proposed new law.

The Commission also recommends that medical tests should only be carried out by a registered medical practitioner with specialist knowledge on the diagnosis and treatment of children.

#### 2.4 *Legal adoptability-consent*

Once a child’s psychosocial adoptability has been determined, the filiation link between the child and his or her birth parents must be considered. Unless and until such links are severed, the birth parents retain parental responsibility and the child cannot be adopted until the parents consent to the adoption. There are various ways in which such links can be severed, and there are varying degrees to which the severance is effected. Section 4 of the Act is very clear that a child cannot be adopted unless there is consent. Consent by the birth parents remains a vital key to freeing the child to be put up for adoption as it will only be in exceptional circumstances where parental rights are extinguished as a result of abandonment, neglect or abuse that consent will not be required.<sup>30</sup>

##### (a) *Persons who may consent and timing of consent by birth mother*

Specific persons whose consent is required for adoption vary from jurisdiction to jurisdiction, but generally, birth parents or guardians of the child must consent. In the case of an unmarried mother, it is normally only the consent of the mother that is required. It appears from the practice in both the United Kingdom and the United States that fathers who exhibit parenting behaviour, such as contributing to the welfare of the child, earn a moral and sometimes legal right to veto an adoption. Consequently men who fail to perform parental duties would not be entitled to such a right. In other circumstances, unwed fathers may be prevented from meeting parental responsibilities because the mother disappears, lies about her plans for the pregnancy or marries another man. If such fathers do find out that they have a child who is put up for adoption, they may exercise their right to veto the adoption proceedings if they are aware of the institution of the proceedings. In order to exercise this right however, the father will have to prove that he did not know about the existence of the child. In these circumstances the father will only exercise his right to veto the proceedings if he can show an ability to look after the child.

<sup>28</sup> This fact was established during a study visit to AFM Abba Adoptions Agency, RSA 5-8 October 2009.

<sup>29</sup> This is the model form recommended by The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Guide to Good Practice. Guide No. 1. 2008, Published by Family Law, Bristol. Annex 7 ISBN 978 1 84661 144 5.

<sup>30</sup> There is no legislation in Malawi providing for the termination of parental rights as a result of abandonment, neglect, abuse and emancipation.

The Commission was satisfied that generally, both birth parents should consent to the adoption, however, in their absence, the consent of any person *in loco parentis*, such as a guardian, should suffice. The Commission was also of the view that an unmarried father who exhibits parenting behaviour should have the right to veto an adoption if he becomes aware of the fact that adoption proceedings have been instituted.

In terms of orphans living with relatives, the Commission was concerned that in Malawi, persons who assume guardianship over such children are not necessarily legal guardians. It would therefore be possible to challenge such persons in a court of law for their ability to consent or withhold consent for an adoption. The Commission also noted that in the Malawian context, depending on whether the family of the child is maternalistic or paternalistic, the informal guardian with custody of the child may not be the person whom that particular system imposes customary guardianship. In such cases, the person withholding or giving consent may therefore not be the appropriate person customarily. Further, the Commission also noted that outside the customary law system, parents may express a desire that their child be taken care of by a friend in the event of their demise. In cases where such desire is not expressed in a legally binding instrument such as a will, it is difficult to enforce that decision. The Commission therefore considered the issue in depth, cognizant that Malawian society dynamics are still largely determined by customary law and that very few people leave a will on how to cater for informal guardianship arrangements.

The Commission noted that the Adoption of Children (High Court) Rules and the Adoption of Children (Subordinate Courts) Rules both contain Form 2, a prescribed form for consent to the adoption by either—

- (i) the father of the child;
- (ii) the mother of the child;
- (iii) the guardian of the child;
- (iv) the person with actual custody of the child;
- (v) a person liable to contribute to the support of the child; or
- (vi) the spouse of the petitioner.

The Commission did not find conclusive guidance to resolve the current dilemma in this Form. The term “guardianship” as set out in the Form can only mean legal guardianship. The Commission also found the form lacking in that it does not elaborate on the requirement of consent for both a mother and father where both have parental rights.

Participants at the first National Consultative Workshop were asked to express their views on the issue of consent. The participants’ views suggested that the whole family should consent to adoption of the child. Those giving consent should be fully aware of parental rights and responsibilities. The participants did

not however elaborate as to the degrees of relationship within the family which should be allowed to consent. It would be unreasonable to expect a distant relative to have a say in the welfare of the child when such a person may not have had any say or interest in the upbringing of the child. Requiring family members to consent also brings in the added complication of what would happen if some members gave consent and others withheld it. Would the consent of some members and not all of them be sufficient in those circumstances?

In order to overcome the challenges posed by the issue of consent, the Commission decided to allow only those persons with parental rights; legal guardianship; actual custody; or obligations to contribute to the support of the child to consent to adoption. The Commission therefore recommends revising the two Forms to merge them into one common form for the Child Justice Court so that only the following persons can give consent—

- (i) the father of the child or the mother of the child depending on which of the two has parental rights and responsibilities over the child;
- (ii) both the father and the mother of the child if both have parental rights and responsibilities over the child;
- (iii) the guardian of the child;
- (iv) the person with actual custody of the child;
- (v) a person liable to contribute to the support of the child; or
- (vi) the spouse of the petitioner.

*(b) Legal capacity to consent*

The Commission also considered situations in which either or both the birth parents are themselves children and therefore lacking legal capacity to consent. In such cases, the Commission recommends that the birth parent should be assisted and guided by his or her parents in giving consent. The same would apply to a mentally ill parent who does not have capacity to give consent. The Commission was aware that mental illness may be temporary and that pregnancy or the process of birth may in some cases cause mothers to experience pre-natal or post-natal depression which may temporarily affect their reasoning and thus ability to give consent. The Commission observed that the International Social Service<sup>31</sup> recommends that consent in these circumstances should only be given after a child is born. Similarly, the Adoption and Children Act of England and Wales of 2002 provides that consent can only be made by a mother six weeks after the child is born. Such allowances of time give the mother or parents ample time to make a permanent and informed decision or to change their minds once they have seen the child, to which they may form an emotional attachment. These requirements prevent the issue of consent being given when hormonal imbalances may affect the mother's capacity to consent. In Queensland,<sup>32</sup> a mother can only

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<sup>31</sup> See footnote 23.

<sup>32</sup> See section 24 (2) of the Adoption of Children Act.



consent five days after the birth. In circumstances where she consents within five days of birth, a medical practitioner must certify that the mother was in a fit condition to consent.

In view of the foregoing, the Commission recommends that for pregnant mothers who express a desire to have their child adopted, consent should only be given once the child is born. The Commission however considered that six weeks after the birth of a child as a period after which consent may be given is too long. It was the Commission's view that unless the child is taken away from a mother who obviously wants to get rid of the child and carry on with her life, she may harm the child. The Commission therefore recommends that consent may be given five (5) days after birth or earlier, upon certification by a medical practitioner that the mother is fit to give such consent. The Commission recommends nonetheless that in all cases where a pregnant mother expresses a desire not to keep the child after birth, the child should be taken to a place of safety as soon as the child is born if the mother still maintains her desire after birth.

Further, the Commission also recommends that in situations where the child has the developmental capacity and age relevant for consent, the child should also consent to the adoption. In its comparative analysis of practises in other jurisdictions, the Commission found that in South Africa, such an age is set at 10 years or older, but if the child is under 10 years of age and understands the implications of consent due to his or her age, maturity and stage of development, such a child may consent. In Kenya, the age is set at 14 years. The Commission considered the age of 14 years too high and recommends that the flexible South African position be adopted.

### *(c) Dispensing with consent-abandonment*

In circumstances of abandonment, the need for consent is dispensed with and the child is legally adoptable. This is the position under section 3 (3) of the Adoption Act. The Commission however saw the need to elaborate on the terms "neglected" or "abandoned" to prevent unscrupulous persons from abusing this provision. The Commission first considered processes and time limits within which a child who is said to have been "abandoned" must have gone through in order to be certified as such. Legally, a child is deemed abandoned when the birth parents show intent to forgo parental rights and obligations. That intent can be inferred from a parent's failure to visit, communicate with, or provide support for the child. The burden is on the parent to maintain contact. In order to determine that the birth parents really intend to forgo their parental rights or obligations, a fair amount of time must have passed since the child was abandoned. The Commission was aware of incidents internationally where a child has been abandoned, subsequently adopted and then after some time, the birth parents return and say they never intended to permanently abandon the child, but simply wanted some time to get their life or finances in order.

In considering what would constitute a reasonable cut off period to infer abandonment, the Commission noted that the Children Act of Kenya stipulates a period of at least six months within which the person or institution having care and possession of the child has neither seen nor heard from a parent or guardian of the child.”<sup>33</sup>

The Commission was aware that, unlike Kenya, in other jurisdictions the time period is not expressly set out in legislation, but is left for the court to decide, during adoption proceedings, based on evidence provided by the prospective adoptive parents that the child is indeed abandoned. The prospective adoptive parents generally must establish conduct by the child’s birth parents that show neglect or disregard of parental duties, obligations, or responsibilities. They must also show intent by the child’s parent or parents to permanently avoid parental duties, obligations, or responsibilities. The Commission however found this approach to be lacking in certainty, making it impossible for prospective adoptive parents to know for sure whether the court will in fact declare a child abandoned. The Commission also considered that a six month time limit might be too long as it is always in the best interests of the child to prevent delays in finding permanent care solutions.

In the interest of fairness and consistency and in the best interests of the child, the Commission recommends that a time limit must be established. In deliberating what would constitute an appropriate time limit, the Commission discussed other processes that are necessary to ensure that all efforts have been taken to find the parents of the child. In South Africa and in the United States, the state of abandonment must first be reported to the police so that they can accordingly carry out investigations. Should such investigations fail to uncover the identity of the child’s birth parents, a public announcement is usually made in a local newspaper, prior to adoption proceedings, stating where the child was abandoned and informing the birth parents that the child will be adopted within a certain period if they do not come forward.

The Commission conceded the necessity of reporting to the police, and the importance of ensuring that the time limits for declaring a child abandoned is consistent with the length of time it would realistically take the police to investigate the abandonment. It was the Commission’s view that in reasonable circumstances, it should only take the police a few weeks to investigate as to whether a child has parents or not. The Commission did not consider it necessary to publicize the abandonment pending adoption in the print media with a view to getting birth parents to come forward considering that newspapers are inaccessible to most Malawians.

Having considered all the foregoing, the Commission considered three months to be an appropriate period following abandonment, to declare a child “abandoned” and recommends accordingly. In situations where a parent, guardian or any other person with parental rights and responsibilities neglects a child, the

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<sup>33</sup> See section 159 (1) (a) (i).



Commission considered that such neglect should also constitute abandonment. The Commission recommends that “neglect” should be presumed if no parent or guardian had contributed to the maintenance of the child for a period of at least three (3) consecutive months, except where the failure was due to circumstance beyond the control of the parent or guardian.

*(d) Fostering and adoption*

The Commission observed that adoption practice in Malawi requires that prospective adoptive parents foster a child for at least eighteen months before proceedings to adopt the child may be instituted. Information obtained by the Commission from the Department of Social Welfare, indicates that this fostering period enables the Department to monitor the prospective adoptive parents and to compile an assessment report. While the Commission agreed with the reasoning behind imposition of this period, it considered that the manner in which the timing for consent to adoption is handled during this process may be detrimental to the best interests of the child. According to the current practice, when a child is identified as suitable for adoption, the child is normally in an orphanage or a home and it may appear at first glance that the child has no family members to take care of him or her. There is no requirement to trace the background of the child to verify that the child is eligible for adoption at this stage. It is only after the period of fostering has been completed, after the adoptive family and the child have formed a bond, that the child’s background is traced so as to fulfill the requirement in the Act to obtain consent from relevant persons. The Commission considered that it would be emotionally devastating for both the adoptive parents and the child if after a period of almost two years, consent is denied by the parents or guardian during the legal process of adoption. For a very young child, it may mean being taken away from the only family that the child has ever known.

The Commission therefore recommends that the practice requiring fostering as a prerequisite to adoption should be abolished. Fostering with a view to adoption or otherwise may continue. The Commission also recommends that once children are identified as in need of care and protection and are brought into care, the process of tracing the child’s family should commence immediately so that consent for adoption may be obtained. This process will determine that a child is legally adoptable at an early stage so that if adoption is considered as the best care solution for the child, there will be no delays in initiating the processes that will lead to adoption. The practice will also ensure that by the time a child is matched with prospective adoptive parents, whether that child is placed temporarily with the prospective adoptive parents or not, there will be no uncertainty as to the legal status of the child as being free for adoption. The Commission further recommends that the process of initiating the search for persons who may consent should take place within three weeks of the child being declared in need of care and protection and having been placed in an orphanage, home or other place of safety.

In view of the foregoing, the Commission recommends adoption of the following provisions—

Consent to  
adoption

... —(1) An adoption order shall not be made in respect of a child unless the appropriate person has consented to the making of an adoption order in respect of that child.

(2) The appropriate person in respect of a child—

(a) is a person who is a parent or guardian of a child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child;

(b) whose mother is also a child, is a person who is a parent, mother or guardian of the mother of the child; or

(c) whose mother is mentally ill, is a person who is a father or a guardian of the child.

(3) A social worker facilitating an adoption shall, before consent for adoption of a child is granted, counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption.

Views of the  
child taken  
into account

... In addition to the consent obtained under section ..., an adoption order shall not be made in respect of a child—

(a) who is below the age of ten (10) years, but is at a stage of maturity and development to understand the implications of the proceedings, unless the views of that child are taken into account; or

(b) who is ten (10) years of age or older, unless the consent of the child is also obtained.

Timing of  
consent

... —(1) A mother of a new born child shall give consent to adoption of the child five (5) days after the birth of the child.

(2) The court may accept consent of a mother of a new born child given before the expiry of five (5) days from the date of birth of the child on certification of a medical practitioner that the mother was in a fit condition to give consent for the adoption of the child.

Power to  
dispense with  
consent

... —(1) The court may dispense with any consent required under section ... if it is satisfied that—

(a) a parent or a guardian of a child has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child;

**(b) a person liable by virtue of an order or agreement to contribute to the maintenance of the child has persistently neglected or refused to contribute to the maintenance of the child; or**

**(c) a person whose consent is required—**

**(i) cannot be found;**

**(ii) is incapable of giving consent; or**

**(iii) has unreasonably withheld consent under section ...<sup>34</sup>**

**(2) Abandonment may be presumed if—**

**(a) a child was deserted at birth;**

**(b) a person or institution having care or custody of a child has neither seen nor heard from a parent or guardian of the child for a period of at least three (3) months; or**

**(c) a period of three (3) months has elapsed since a report was made to the police with regard to a child's desertion and the child's parents have not been found.**

**(3) Neglect may be presumed where despite demands made, a parent or a guardian has not contributed to the maintenance of a child for a period of at least three (3) consecutive months and such failure is intentional.**

Un-  
reasonable  
withholding of  
consent

**... The court may, in determining whether consent has been unreasonably withheld, take into account all relevant factors, including—**

**(a) the nature of the relationship between a child and a person withholding consent during the last two years;**

**(b) the prospects of a sound relationship developing in the near future between a child and a person withholding consent;**

**(c) the withholding of consent on the grounds that a person withholding consent does not know the identity of the petitioner; or**

**(d) the withholding of consent by an appropriate person as punishment to a person who is putting a child up for adoption.**

<sup>34</sup> Section on "Unreasonable withholding of consent".

### 3. ELIGIBILITY REQUIREMENTS FOR PROSPECTIVE ADOPTIVE PARENTS

The Commission observed that the Adoption of Children Act does not make adequate provision for the assessment of persons wishing to adopt a child. The Commission considered that not every person who wishes to adopt may be suitable for that role and underscored the importance of incorporating stringent assessment in the proposed Act to address this gap. Such criteria shall determine whether prospective adoptive parents possess the personal abilities and qualities which will enable them to meet the particular needs of an adopted child. As each child is unique and will have different levels of needs, it is important that the criteria be made flexible enough to ensure that the child is always at the centre of the process, while maintaining consistency.

Section 3 of the Act sets out the following as criteria for assessing adoptive parents—

(a) the person making the application must be over the age of twenty-five years;

(b) the person making application must be more than twenty-one years older than the infant to be adopted unless this person and the infant are within the prohibited degrees of consanguinity;<sup>35</sup>

(c) a single male applicant cannot adopt a female infant unless the court is satisfied that there are exceptional circumstances;

(d) if the applicants are married, both must consent (exceptions apply); and

(e) the applicant and the infant must be resident in Malawi.

The above provisions are supplemented by administrative rules developed by the Department responsible for Social Welfare which generally requires the prospective adoptive parent to be-

(a) an adult not less than 25 years but not more than 60 years;

(b) a member of a stable family;

(c) preferably a married couple;

(d) of sober habits and not addicted to alcohol and drugs;

(e) without a criminal record; and

(f) willing to provide healthy inter-family relationship with the biological relations of the child.

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<sup>35</sup> The prohibited degrees of consanguinity refers to a list of close relatives, either by blood or by marriage, who are not allowed to marry under the Marriage Act (Cap 25:01 of the Laws of Malawi).

The Commission observed that though cumulatively, the above eligibility requirements aim to ensure that the prospective adoptive parents have the parenting capacity and all resources necessary to meet the needs of the child, the focus is on age, sex and marital status. The Commission considered that eligibility criteria needs to go beyond these factors to include ethical, psychological, social and medical factors established on the basis of a thorough psycho-medico-social and legal investigation of prospective adoptive parents. The Commission thus recommends that a more comprehensive list of eligibility criteria, accompanied by elaborate procedures on how to obtain particular background information on the prospective adoptive parents should be adopted.

Having resolved this issue, the Commission then proceeded to discuss the relevant criteria necessary to assess eligibility of prospective adoptive parents as follows—

### 3.1 Age

As discussed above, the Adoption of Children Act and the Department of Social Welfare Guidelines require the prospective adoptive parent to be an adult aged between twenty-five (25) years and sixty (60) years and that he or she should be 21 years older than the adopted child. These requirements are necessary to ensure that the adoptive parents are neither too young nor too old to have a meaningful parent and child relationship.

While the Commission was satisfied that twenty-five years would equip a person with sufficient maturity to take on parental responsibility, opinion was divided regarding the maximum age at which one should be allowed to adopt and whether indeed a maximum age limit was necessary. One view was that it may not be possible for a person aged sixty to have a meaningful parent-child relationship for long. The argument was that such a person may not cope with the demands of parenting which require youthful vigour. As has been argued elsewhere, the older the prospective adoptive parents, the greater the probability of their encountering health problems, resulting in diminished strength and vigour.<sup>36</sup> In all probability, the family network will be slightly older too and it follows that an adopted child will have no access to certain relatives such as grandparents, who are necessary for healthy development in a young child.<sup>37</sup> The adopted child may end up being a burden on the elderly persons and in the event of their death could end up being destitute.

The contrary opinion was that the cap of sixty years was rather low, considering that many elderly persons are already informally taking care of orphans in view of the AIDS pandemic in Malawi. The Commission however recognised the importance of first establishing whether the needs of children are being met by being placed in the care of elderly persons before advising the

<sup>36</sup> See Socialstyrelsen, 2009, “Adoption. Handbook for the Swedish Social Service.” ISBN 978-91-86301-26-2, p.61.

<sup>37</sup> *Ibid.*

continuation of the *status quo*. The Commission observed that in some cases, elderly persons are still very active and capable of providing for the needs of the child. Consequently, the Commission concluded that ultimately individual cases would have to be decided based on the circumstances surrounding the placement to ensure that the best interests of a particular child would be met.

Consequently, the Commission conceded that although not imposing a single upper age limit in the legislation on adoption may lead to uncertainty and vagueness, applying rigid rules by setting a cut-off point would have worse consequences for the child. The Commission therefore recommends a flexible approach that should empower a court to use discretion in adoption applications submitted by persons aged fifty and above but below the age of sixty-five. Thus upon a recommendation made by a social worker, a court may make an order to place a child with a person aged above fifty years but below the age of sixty-five if that would be in the best interests of the child. The social worker would therefore have to certify that the parent(s), albeit being above fifty years of age but below the age of sixty-five years, are healthy enough and have sufficient vigour to provide care for a child they are proposing to adopt. It was the Commission's view under this recommendation that while elderly persons over the age of fifty years but below the age of sixty-five years would be eligible to adopt, the entire assessment which would include other factors such as health and financial status would determine whether that elderly person would in fact be suitable to adopt. The mere fact of age should not preclude such persons from adopting but rather that, the best interests of the child must prevail. In addition, the Commission recommends that the requirement that adoptive parents must be at least twenty-one years older than the child must be retained to ensure an appropriate level of maturity towards meeting the needs of the child.

### 3.2 *Physical and mental health*

The Commission considered that special attention should be paid to the prospective adoptive parents' physical and mental health in determining their suitability. The Commission conceded that parenting a child is both physically and emotionally demanding. Unless the prospective parent is healthy enough, both physically and mentally, it is impossible for that parent to be able to perform all the functions of a parent, during the child's entire childhood and teenage years.

The Commission noted the practice in Sweden where one spouse's health problems cannot be compensated for by the health of the other. The reason is that each spouse must be capable of assuming complete parental responsibility in the event of the death or illness of the other.<sup>38</sup> According to the Swedish Social Service, examples of factors which might be considered during the assessment as indicators of unsuitable prospective adoptive parents on the basis of health are—

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<sup>38</sup> *Ibid.*

(a) an applicant is too old, ill, disabled or in constant pain; lifestyle factors which might indicate diminished parenting capacity, viewed over a period of twenty years (i.e. until the child has reached adulthood);

(b) lifestyle factors which can imply an unsuitable setting for raising a child;

(c) applicants who are on sick leave for a lengthy period of time;

(d) a history of recurrent periods on sick leave, possibly indicating the risk of further periods of sick leave in the future; and

(e) disability requiring wide ranging services and support which might in turn disturb or hinder a child's attachment to new parents.<sup>39</sup>

The Commission found this reasoning sound but considered that in the Malawian context where the HIV and AIDs pandemic has affected many,<sup>40</sup> it would be counter-productive to preclude any person with a chronic or terminal disease or disability from adopting. While conceding the importance of screening prospective adoptive parents for health problems, the Commission opined that such prospective adoptive parents should not be denied the opportunity to adopt unless the illness or disability is of such a nature as to impair parenting ability. Taking the example of HIV and AIDS, the Commission stressed that a person who is HIV positive and is living positively possesses the strength and vigour to parent a child. If, however, the prospective adoptive parent has developed full-blown AIDS and is debilitated both physically and mentally, that person would be assessed as unfit to parent not because he or she has AIDS but because such a person would not be able to provide the care necessary for the physical and psychological development of the child. The Commission therefore recommends that the assessment into eligibility for parenting should inquire into whether the illness or disability will make it difficult for the prospective adoptive parents to meet the needs of the child for secure attachment, stability, continuity, closeness, care, safety and stimulation. The Commission further recommends the adoption of guidelines to be used in the assessment process in a prescribed Form. The prescribed Form is attached to this Report as Annex III, titled Enquiry of Prospective Adoptive Parents to contribute a schedule in the proposed new law.

As regards mental health, the Commission was aware that adopted children, "need emotionally stable parents who have the inner security necessary for taking care of a child who might reject them, whose signals may be difficult or weak to interpret and whose behaviour might cause them anxiety or uncertainty".<sup>41</sup> In addition to assessing the adoptive family's psycho-emotional capacity to raise the child who may be placed in their care, the Commission also considered it important to assess the prospective adoptive parent's sense of self-reliance and the

<sup>39</sup> *Ibid*, p.42.

<sup>40</sup> The adult prevalence rate was estimated at 11.9% in 2009. Source CIA World Factbook. Visited 12 January 2010.

<sup>41</sup> See Socialstyrelsen, *supra* note 42, p.44.



emotional stability to cope with stress and strain. Similarly, prospective adoptive parents should be assessed for attentiveness and ability to respond positively so that the adoptive child forms a healthy attachment.

The Commission therefore recommends that prospective adoptive parents be screened for mental disabilities, mental illness, mental disorders, emotional vulnerabilities, recurrent depression or lengthier conditions characterised by anxiety, compulsive behaviour or psychosomatic symptoms. These conditions naturally present difficulties as regards parenting and meeting the needs of adopted children. Consequently, the Commission recommends the adoption of guidelines to facilitate the assessment process. To this end a prescribed Form is attached to this Report as Annex IV, “Medical Particulars of Prospective Adoptive Parents to constitute a schedule in the proposed new law.

### 3.3 *Personal characteristics*

The prospective adoptive parent’s personal characteristics play a major role in the determination as to whether he or she has the resources necessary to meet the particular needs of an adopted child. In conducting assessments on the personal characteristics of the prospective adoptive parent, the Commission considered it necessary that the process should enable the assessor to determine any risk factors relevant to the prospective adoptive parent’s ability to meet those needs.

#### *(a) Stable family and marital status*

It was the Commission’s view that marriage presents the best scenario for raising children. The Commission observed that the law is silent on the issue of adoption by cohabiting couples. The Commission was however cognisant of the fact that the Constitution recognises marriages by repute and permanent cohabitation under section 22 (5). The Commission thus recommends that cohabiting couples should be allowed to adopt. The Commission, however, was quick to emphasize that eligibility cannot be determined on the basis of marital status alone as it may ultimately be in the best interests of a particular child to be raised by a single parent or a cohabiting couple. Nonetheless, such a family must be stable.

To assess stability, the practice of social workers requires that families wishing to adopt, should obtain letters of reference from their neighbours, community members or religious institutions to attest for the stability of their family and overall suitability to adopt.

As regards same sex couples, the Commission observed that homosexuality is a criminal offence under Chapter XV of the Penal Code and that the Constitution recognises that marriage is essentially the union of a man and a woman. The Commission thus considered it inappropriate for same sex couples to be allowed to adopt. In debating this matter, the Commission had recourse to the Children Act of Kenya which provides under section 158 (3) (c) that an adoption



order cannot be made in favour of a person who is a homosexual. The Commission also took cognisance of the fact that participants at the First National Consultative Workshop were also unanimously agreed in opposing the adoption of children by persons professing or known to be homosexuals. The Commission therefore recommends that any person practising homosexuality or who has a conviction for unnatural offences under the Penal Code should be ineligible to adopt.

*(b) Criminal background*

Background checks are aimed at ascertaining whether a prospective adoptive parent has a record of criminal conviction. The Commission however noted that not all criminal convictions would render a person ineligible to adopt and therefore recommends the adoption of a Schedule that would list all offences that should render a prospective adoptive parent ineligible. The proposed schedule is attached to this Report as Annex VI.

*(c) Education and financial resources*

The Commission noted that an advanced education, economic comfort or the high social standing of adoptive parents are not, in themselves, sufficient guarantees of the best interests of the child. A family of modest means can provide satisfactorily for the child.<sup>42</sup> The Commission also considered a certain level of education as vital for ensuring that the welfare and best interests of the child are prioritized. The Commission was however of the view that issues of education and financial means should be considered during the assessment and recommends that provision for the assessment of education and financial means be included in the Form on “Enquiry on Prospective Adoptive Parent” in Annex III.

In view of all the foregoing, the Commission recommends adoption of the following provisions—

**Applicants for adoption ... —(1) An adoption order may be made upon the application of a sole applicant or jointly by spouses where each applicant—**

**(a) has attained the age of twenty five (25) years but has not attained the age of fifty (50) years; and**

**(b) is at least twenty-one (21) years older than a child in respect of whom the application is made.**

**(2) An adoption order may, notwithstanding subsection (1), be made upon the application of—**

**(a) a spouse, with the consent of the other spouse;**

**(b) persons presumed to be married by repute or by permanent co-habitation; or**

<sup>42</sup> *Ibid*,

(c) an applicant who is less than twenty-one (21) years older than the child in respect of whom the application is made, where the applicant and the child are within the prohibited degrees of consanguinity.

(3) An adoption order shall not be made in favour of—

(a) a sole male applicant in respect of a female child;

(b) a sole female applicant in respect of a male child;

(c) an applicant who has a chronic medical condition or disability affecting their ability to provide for the needs or the welfare of the child; or

(d) an applicant who has attained the age of fifty (50) years but is under the age of sixty-five (65) years;

unless the court is satisfied, based on the recommendations of a Social Inquiry Report, that there are special circumstances that justify the making of the adoption order.

(4) An adoption order shall not be made if the applicant—

Cap 34:02 (a) is a person of unsound mind within the meaning of the Mental Treatment Act;

... Schedule (b) has been convicted by a court of competent jurisdiction of any of the offences set out in the ... Schedule to this Act, or similar offences;

(c) is a homosexual;

(d) is unsuitable to, or has been prohibited by a court of competent jurisdiction, from working with children; or

(e) has refused to undergo an eligibility assessment by a social welfare officer on his suitability as a prospective adoptive parent.

(5) For the purposes of this section “Social Inquiry Report” means an assessment carried out by a social worker on a petitioner’s character and circumstances to enable the court determine his suitability to adopt.

Matters court must be satisfied with ... The court shall, before making an adoption order, be satisfied that—

(a) a person whose consent is necessary under this Act and whose consent has not been dispensed with has

**consented to and understands the nature and effect of the adoption order for which the application is made, and in particular in the case of any parent, understands that the effect of the adoption order shall deprive him permanently of his parental rights;**

**(b) the applicant—**

**(i) has been assessed as fit and proper to be entrusted with full parental rights and responsibilities in respect of a child;**

**(ii) is willing to exercise and maintain full parental rights and responsibilities in respect of a child; and**

**(iii) has not received or agreed to receive, and that a person has not given or agreed to give to the applicant, a reward in consideration of the adoption except such as the court may sanction; and**

**(c) a social worker has matched the prospective adoptive parent and the child eligible for adoption in accordance with Form ... in the ... Schedule.**

... Schedule

#### 4. PROCEDURAL ISSUES

##### 4.1 Jurisdiction

The issue of jurisdiction greatly exercised the mind of the Commission. The Commission considered it important to set high standards for the adjudication of adoption cases so as to ensure that at all times the best interests of the child is a paramount consideration. The Commission observed that under the law, adoption matters may either be heard in the High Court or in the court of a magistrate, at the choice of the prospective adoptive parent. The difficulty with the current scenario is that some lawyers have taken advantage of the lower levels of competence in the lower courts and have applied for adoption in the court of a magistrate and been granted an order, having previously been denied an order on the same facts in the High Court.

The Commission was aware that its sister special Law Commission on the Review of the Children and Young Persons Act took time to consider the issue of competency of the courts, legal and other practitioners handling matters of children. The deliberations of that special Law Commission were as follows—

**“CHILD JUSTICE COURT: ESTABLISHMENT, JURISDICTION,  
COMPOSITION, PROCEDURE AND POWERS**

With regard to this matter of child justice courts a number of points were raised regarding the competence of officers both presiding over and assisting

during child justice proceedings. The Commission observed that although professional magistrates have undergone legal training, they too would need some specialised training on how to handle, most importantly, child witnesses in the courtroom before being designated by the Chief Justice to preside over child justice courts.

The importance of specialised training for officers of child justice courts cannot be over-emphasized. Indeed, as the Australian Law Reform Commission points out, paediatric workers in the medical profession for example, undergo special training for appropriate skills in dealing with children, and so too should those working in the legal profession. The Australian Law Commission's findings went further to reveal that most lawyers, magistrates and judges are not trained in talking to children and lack the necessary skills to elicit a coherent account from the child in court room interrogations<sup>43</sup>. These observations are equally true in Malawi. Further, the Beijing Rules provide that professional education and refresher courses should be used to ensure that all personnel dealing with juvenile justice cases maintain the necessary competence<sup>44</sup>.

Here in Malawi, the National Juvenile Justice Forum is already looking into developing specialised training for officers of the juvenile justice system and it is envisaged that eventually all professional magistrates and all magistrates of the first grade would undergo such training so that the Chief Justice designates all of them as being competent to preside over child justice courts.

The Commission however observed that the realities on the ground require lower grade magistrates to preside over children matters in minor cases. In light of that, the Commission recommends that in those cases, the Chief Justice should be able to designate other lower courts to preside over the cases if satisfied with the competence of the presiding officer.

The Commission further recommends that probation officers should similarly be competent in handling children.

The recommendations are incorporated in the following provisions—

### **CHILD JUSTICE COURT: ESTABLISHMENT, JURISDICTION, COMPOSITION, PROCEDURE AND POWERS**

**Establishment ... There is hereby established child justice court which of child justice shall be subordinate to the High Court and shall exercise court jurisdiction conferred on it by this Act or any other written law.**

**Composition ... —(1) A child justice court shall be presided over by a of child justice professional magistrate or a magistrate of the first grade. court**

<sup>43</sup> See Australian Law Reform Commission, Report No 84, Seen and Heard: Priority for Children in the Legal Process. Human Rights and Equal Opportunity Commission p. 345.

<sup>44</sup> See Rule 22.1.

**(2) The Chief Justice, having been satisfied as to the competence of the presiding officer, may designate a magistrate court of any grade to be a child justice court and shall publish a notice of the designation in the *Gazette*.**

**(3) A presiding magistrate shall, before commencement of proceedings in a child justice court, ensure that a probation officer of sufficient competence relevant to the requirements of this Act is present throughout the proceedings.**

**Jurisdiction of a child justice court ... —(1) Subject to subsection (2), a child justice court shall have jurisdiction over children matters.**

**(2) Where a matter involving a child is otherwise supposed to be heard by the High Court, it shall be heard by the High Court, but the High Court shall comply with the requirements of this Act in respect of the child.”<sup>45</sup>**

The Commission found the recommendations of its sister Commission satisfactory and accordingly recommends that child justice courts should also hear adoption cases. This decision enables specialist courts in children’s issues to handle adoption matters, and is consistent with the approach in South Africa where adoption applications are made to a children’s court<sup>46</sup>. In case of intercountry adoptions however, the Commission recommends that such cases should be heard by the High Court.

#### *4.2 Application for adoption order*

The Commission noted that the law does not make express provision for the content of the application for an adoption order in the principal legislation. Standard form petitions for both the High Court and the court of a magistrate are however attached in the subsidiary legislation. Both the Adoption of Children (High Court) Rules and the Adoption of Children (Subordinate Courts) Rules provide that the application for adoption must be made by petition.<sup>47</sup> In contrast, other jurisdictions make specific provision as to the nature of the application and what it should contain in the main body of the legislation, even though prescribed forms are also attached. South Africa, for example, requires that the application be made to the children’s court in a prescribed manner. The application must however be accompanied by a report, also in a prescribed format prepared by, an adoption social worker, containing information on whether the child is adoptable, whether the adoption is in the best interests of the child and prescribed medical

<sup>45</sup> See Malawi Law Commission, December 2005, Report of the special Law Commission on the Review of the Children and Young Persons Act, Law Commission Report No. 14. Government Printer, Lilongwe. pp.50-53.

<sup>46</sup> See section 239 (1) (a), Children’s Act, No. 38 of 2005.

<sup>47</sup> See Rule 3 of both the Adoption of Children (High Court) Rules and the Adoption of Children (Subordinate Courts) Rules.

information in relation to the child. Other documents that must accompany the application include the screening assessment, a letter from the Department of Social Development recommending the adoption and other prescribed particulars.<sup>48</sup>

The Adoption of Children Act of Papua New Guinea under section 10 requires that 14 days notice should be given prior to the making of the application. This notice is given to any person whose consent to the adoption is required and it need not specify the names of the applicants or identify them.

Having considered the practice in these other jurisdictions, the Commission came to the conclusion that the present situation needs to be improved upon by incorporating express provisions relating to the application itself in the principal legislation. The Commission however noted that the prescribed forms in the subsidiary legislation to the Act do not stipulate the documentation that should be attached to the petition. The Commission thus recommends that the petition should be accompanied by certain essential information.

In terms of the requirement of notice, as exemplified in the Papua New Guinea legislation, the Commission finds such requirement for notice unnecessary. The ordinary processes for making such a petition would ensure that all those that need to consent to the application have sufficient time to give consent.

Further, the Commission, fully cognisant of the risk to a child's welfare caused by delays in permanently placing a child up for adoption, recommends that the provisions in the proposed legislation should include a time limit following the matching process within which a petition for adoption should be filed. The Commission recommends that this time limit should be thirty (30) days.

As regards the nature of the adoption proceedings, the Commission resolved that a court appearance by the petitioner in person during the hearing of the application for adoption should be mandatory. It was the Commission's view that it is of the utmost importance that the court should have an opportunity to examine the petitioner and assess his or her suitability. The Commission therefore recommends that an adoption order should not be granted solely on submissions by the petitioner's lawyer or on the documentation filed before the courts. The Commission also recommends that if there are two petitioners both should attend. However, the court may dispense with the appearance of both or any petitioner, if necessary. The Commission noted that currently, the requirement for the parties to be present is provided for under rule 14 of both the Adoption of Children (Subordinate Courts) Rules and the Adoption of Children (High Court) Rules. The Commission however considers this requirement a crucial component of the proceedings and therefore recommends that it be provided for in the principal legislation.

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<sup>48</sup> See section 239 (1) (a), Children's Act, No. 38 of 2005.

To this end, the Commission recommends adoption of the following provisions—

Application for adoption	<p><b>... —(1) An application for adoption shall be made by petition in the prescribed form, with such variations as the circumstances may require.</b></p> <p><b>(2) The petition shall be accompanied by—</b></p>
... Schedule	<p><b>(a) Forms ...in the ... Schedule containing—</b></p> <p><b>(i) information on whether the child is suitable for adoption as contemplated in section ...<sup>49</sup></b></p> <p><b>(ii) information on whether the adoption is in the best interests of the child;</b></p> <p><b>(iii) prescribed medical information in relation to the child;</b></p> <p><b>(b) consent to the adoption in the prescribed form by every person required to give consent under section ...,<sup>50</sup></b></p> <p><b>(c) a pre-adoption screening assessment of the petitioner; and</b></p> <p><b>(d) a recommendation for the adoption by the Director.</b></p>
Time for petition	<p><b>... A petitioner shall file the petition for adoption within thirty (30) days after a child is matched with a petitioner unless the court, by order, permits late filing.</b></p>
Presence of the parties	<p><b>... —(1) Save as provided for in subsection (2), a court may refuse to make an adoption order or an interim order unless all parties including the child to be adopted attend the hearing.</b></p> <p><b>(2) A court shall have the power in its discretion to dispense with the attendance of any party, including the child, and may direct that any of the parties shall attend the hearing separately from the others.</b></p>
Terms and conditions of order	<p><b>... A court may, in an adoption order, impose terms and conditions as the court may deem fit and, in particular, require the adoptive parent by bond or otherwise to make provision for the adopted child.</b></p>

<sup>49</sup> Section on “Suitability for adoption”.

<sup>50</sup> Section on “Consent to adoption”.

4.3 *Rescission or discharge of adoption order*

As noted earlier, adoption is a permanent care solution for the adoptive child, and parents should be aware that the filiation ties created by the adoption order are for life. The Commission therefore reiterates this position by making it clear that an adoption order cannot be rescinded or discharged unless on technical grounds.

In the comparative legislation examined by the Commission, it was clear that rescission or discharge can only occur in exceptional circumstances and in the best interests of the child.

The Commission therefore recommends the following provisions—

**Rescission of adoption order**     ... —(1) A court that granted an adoption order may rescind the order on application by—

- (a) the adopted child;
- (b) a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption proceedings; or
- (c) social welfare officer.

(2) An application for rescission shall be lodged within reasonable time but not exceeding three (3) months from the date of the issuance of the adoption order.

(3) An adoption order may be rescinded on the grounds that—

- (a) rescission of the order is in the best interests of the child;
- (b) the grant of an adoption order was based on a material misrepresentation or suppression of facts, not discovered at the time of making the petition; or
- (c) consent for the adoption was obtained through fraud, misrepresentation, duress or any other improper means.

**Effect of rescission**     ... —(1) Where a court rescinds an adoption order, the effects of the adoption order under section ...<sup>51</sup> shall no longer apply in respect of the child concerned.

(2) All rights and responsibilities terminated by an adoption order shall be restored unless the court makes an additional order relating to the parental rights and responsibilities over the child.

<sup>51</sup> Section on “Effects of adoption order”.



**(3) A court may, on rescinding an adoption order—**

**(a) make an appropriate placement order in respect of a child concerned; or**

**(b) order that a child be taken to a place of safety until an appropriate placement order can be made.**

#### 4.4 *Interim orders*

The Commission observed that section 7 of the Adoption of Children Act gives the court power to make interim adoption orders for a probationary period not exceeding two years upon which such conditions as provision for maintenance and education as well as supervision for the welfare of the infant may be imposed. The court may dispense with the requirement for consent in interim orders. Interim orders are in effect supervision orders. Adoptive parents are supervised during the duration of the order and a final order is granted after satisfying the court as to any conditions imposed in the interim order.

The power of the court in section 7 is discretionary; a court need not grant an interim order. The Commission observed further that section 7 is similar to section 25 of the Children Act of 1989 of England, of which Butler-Sloss LJ stated in the case of *Re C and F (Adoption: Removal Notice)*—<sup>52</sup>

“Section 25 is not intended to preserve the *status quo* at an early stage or to define the interim position of the children and the parties. It has a different purpose. It is there to give additional powers to the court where all the necessary matters have been dealt with at a substantial hearing of the adoption application, including the requirements as to the residence and the decision about the agreement of the parent if he/she does not consent, but there is still some doubt about the wisdom of making the final and conclusive adoption order.”

The case of *In Re AW (Adoption Application)*<sup>53</sup> provides an illustration of how interim orders have been used in England. In the case, the Judge made an interim order in favour of elderly applicants who had breached some adoption requirements, but where the social worker nevertheless recommended that the child should stay with them. The interim orders gave an opportunity for further reports pending the final hearing. In another case, an interim order was made when the court was uncertain whether it was in the best interests of the child to be adopted or to go and live with a parent.<sup>54</sup>

However, the position regarding interim orders has changed in England following a recommendation by the Interdependence Working Group on Adoption Law<sup>55</sup> that found that there is no longer any role for interim orders, describing them as a relic of the past.

<sup>52</sup> [1997] 1 FLR 190, CA at 195.

<sup>53</sup> [1993] 1 FLR 62.

<sup>54</sup> See *S v Huddersfield Borough Council* [1975] Fam 113, [1974] 1 All ER 296, CA.

<sup>55</sup> England and Wales (1991), *The Adoption Process*, Discussion Paper, No. 3.

Consequently, the Adoption and Children Act of 2002 has discarded provisions relating to interim orders. The Commission however did not agree with the new position and considered that it may not always be possible for the court to make a final decision on an adoption and therefore making room for interim orders will allow the courts to seek additional information. The Commission was however quick to caution that such interim orders should not give social workers leave not to prepare adequately for an adoption knowing that the judge may request additional information. The Commission recommends that comprehensive reports should be prepared at all times. Further, the Commission recommends that an interim order should only be made in circumstances where an adoption order could have lawfully been made.

The Commission also noted that in jurisdictions in which interim orders are made, the maximum period of time in which the child can live with the adoptive parents pending a final order is between one (1) to two (2) years. This time period is consistent with professional social work practice and is considered by social workers in the Ministry of Gender, Children and Community Development, as ideal and would not cause too much disruption to the child. The Commission therefore recommends the one (1) to two (2) year time period for interim orders, and that guidance should be given to the courts to ensure that interim orders should only be made if they are in the best interests of the child.

The Commission therefore recommends the following provisions—

**Interim orders**

**... —(1) A court may, on the hearing of an application for an adoption order, postpone the determination of the application and make an interim order for the custody of the child in favour of the applicant if it is in the best interests of the child.**

**(2) An interim order shall not be an adoption order for the purposes of this Act and may be subject to such terms and conditions relating to the maintenance, education and welfare of the child as the court deems fit.**

**(3) A court shall not make an interim order in respect of a child unless the court could lawfully make an adoption order of that child in favour of the applicant.**

**(4) An applicant in whose favour an interim order is made shall have all rights and responsibilities created by section ....**

**Duration of interim orders**

**... —(1) An interim order remains in force for such period, not exceeding one (1) year, and for such further periods as the court may on application, from time to time, order.**

**(2) An interim order shall not be in force for periods exceeding in the aggregate two (2) years.**

#### 4.5 *Revocation of consent*

The Commission considered circumstances in which it may be necessary for a person who has consented to revoke his consent. In its comparative study of other jurisdictions, the Commission noted that consent is only revoked on the basis that it was improperly obtained and therefore defective. The Commission therefore underscored the responsibility of social workers to ensure that persons whose consent is required are properly counselled regarding the implications of their consent. This would eliminate the instances of defective consent and give security and permanence to the adoption process. With such safeguard in place, the Commission recommends that revocation of consent should only be permitted in exceptional circumstances.

#### 4.6 *Post adoption agreements*

The Commission noted that the practice in South Africa following the grant of an adoption order is to allow the adoptive parents and the birth parents to enter into a post adoption agreement setting out the terms of any further contact between the birth parents and the child. Typically, the post adoption agreement contains terms relating to communication and visitation. If the child is at an age, maturity and stage of development to consent to any one of these terms, such consent is taken into account.<sup>56</sup>

In view of the Commission's earlier recommendation against post adoption contact, the Commission, similarly, found the practice of post adoption agreements inappropriate. The Commission stands by its earlier recommendation in this Report that post adoption contact is unsuitable in most circumstances. Where there is a need for continued communication in the best interests of the child, this should be done by the order of the court and facilitated by social workers. The Commission therefore recommends that adoptive parents may send pictures and brief updates of the child twice a year until the child turns fifteen (15).

### 5. ADOPTION SERVICES

As noted earlier, the primary purpose of any adoption service is to help children who would not otherwise have a nurturing family of their own to become members of a family that can give them opportunities essential for their healthy personal growth and development. In order for the adoption service provider to fulfill this primary purpose, additional support services must be provided to the child, the birth parents, and the prospective adoptive parents. These services are offered either pre-adoption to prepare the relevant parties for adoption or post adoption to equip the parties with the necessary skills and support for their new roles.

The typical functions carried out by social workers in the provision of adoption services are—

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<sup>56</sup> See section 234, Children's Act, South Africa. Act No. 38 of 2005.

- (a) training and approval of adoptive parents (pre-adoption services);
- (b) matching children and families;
- (c) preparing Social Inquiry Reports and other reports to assist the court in deciding to make the adoption order;
- (d) representing the interests of the child in the adoption proceedings as a guardian *ad litem* and preparing necessary independent reports;
- (e) supervision and support to adoptive families after a child is adopted (post adoption services); and
- (f) provision of counselling to all parties in the adoption process.

Adoption services are provided by the State through social service personnel, either in central government, local government or accredited bodies. In Malawi, adoption services are currently provided by the Department responsible for social welfare in the Ministry of Gender, Children and Community Development. The Department employs and trains social workers in the disciplines of social work, psychology, child protection and related disciplines. Social workers provide these services in their capacities as social workers or court appointed guardians *ad litem*.

#### 5.1 *Adoption service providers: Guardians ad Litem and Social Workers: Roles and Functions*

##### (a) *Social worker*

The Commission was aware that in Malawi, social workers bearing the official designation of social welfare officers are civil servants who in the context of adoption play the role of certified investigators. They are trained by Government, up to certificate level which is not a requisite professional level in social work practice. The Commission noted that a number of institutions of higher learning in Malawi have introduced a degree course on social work.<sup>57</sup> In addition, Government does at times send officers outside the country for training. These social welfare officers complete background investigations prior to the final adoption hearing. There are many similarities between a guardian *ad litem* and a social welfare officer. Both have a duty to report to the court and be examined on their report. Both also have a duty to consider the welfare or interests of the child and thus to advise the court independently of the other parties as to what is best for the child.<sup>58</sup>

The specific duties of a social welfare officer include to—

- (i) conduct investigations, including the review of relevant documentation and to conduct meetings with the child and his family to gather, background information;

<sup>57</sup> Examples include the University of Malawi and Catholic University.

<sup>58</sup> Lowe and Douglas 1998, op.cit supra note ,553

- (ii) interview relevant persons with information necessary for the child's case;
- (iii) conduct background criminal checks;
- (iv) visit and monitor the child in a home environment;
- (v) maintain and update the child's file;
- (vi) present clear and comprehensive reports to the court and all parties privy to such information; and
- (vii) safeguard and promote the best interests of the child considering his or her wishes where appropriate, especially with reference to race, culture, religion, education and language.

In view of the foregoing, it was clear to the Commission that social welfare officers and guardians *ad litem* perform highly specialized roles and as such need to be backed by commensurate levels of training. The Commission found it unsatisfactory that this function should be performed by persons whose training falls short of degree level. The Commission therefore recommends that the Ministry should intensify its collaboration with institutions of higher learning to ensure that acceptable levels of training are provided to ensure proper attention to the special needs of children.

In deliberating this issue further, the Commission observed that human resource constraints undermine the functions of social workers and guardians *ad litem*. The Commission therefore recommends that in the meantime, while awaiting the training of larger numbers of such personnel, Government should consider using retired officers who still have the interest to perform the function to boost the numbers.

The Commission also noted that counselling is an integral part of the duties of a social worker. Currently St. John of God Training College and the College of Medicine offer counselling courses. The Commission recommends that all social workers employed in the Ministry be required to upgrade their training so that they provide quality services.

*(b) Guardian ad litem*

Article 12 of the Convention on the Rights of the Child obliges State Parties to accord the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her. The child's views are to be given due weight in accordance with his or her age and maturity. For this purpose, the child is in particular to be provided with the opportunity to be heard in any judicial and administrative proceedings affecting him or her, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Section 9 of the Act ensures that the child is able to express his or her views by giving power to the court hearing an adoption case to appoint a guardian *ad litem* for the purpose of safeguarding the interests of the child before the court.

The Commission however observed that there is no express definition of the role and functions of the guardian *ad litem* in the Act. Black's Law Dictionary<sup>59</sup> defines a "guardian *ad litem*" as—

"...a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of the guardian *ad litem* exists only in that litigation in which the appointment occurs. (*Bowen v Sonnenburg*, Ind. App., 411 N.E2d 390,39)."

Further, in the case of *In Re S (A Minor) Guardian ad litem/Welfare Officer*<sup>60</sup>, the English courts had occasion to define the role of a guardian *ad litem* as distinct from that of a social welfare officer. According to Butler Sloss LJ in that case, unlike welfare officers, guardians *ad litem* represent children in court proceedings. They are therefore party to proceedings in relation to children. They also have a duty to appoint legal representation for children. Under section 41 of the Children Act of England of 1989, courts are required in "specific proceedings" to appoint a guardian *ad litem* for the child, "unless satisfied that it is not necessary to do so in order to safeguard his interests." The practice of the English courts in care proceedings is that it is unusual for a child not to be represented by a guardian.

Comparative study conducted by the Commission indicates that a guardian *ad litem* is a social worker by qualification. However, in relation to a child's case, the guardian *ad litem* must be independent and therefore cannot be a serving probation officer or connected in any way to any of the parties of the proceedings for which he or she is appointed. A guardian *ad litem* is more likely to have more experience than the average social worker and works alone with limited supervision. The guardian *ad litem* must represent and promote the best interests of the child until the adoption order is made, advocate for the rights and welfare of the child and carry out an independent assessment of the situation of the child concerned. The guardian *ad litem* provides a written report to the court and makes appropriate recommendations. The guardian *ad litem* must also ensure that the birth parents fully understand the meaning and consequences of adoption. A guardian *ad litem*'s specific duties include duties to advise on—

(i) whether the child is of sufficient understanding for any purpose, including the child's refusal to submit to a medical examination or psychiatric assessment or other assessment that the court has power to direct or order;

(ii) the wishes of the child in respect of any matter relevant to the proceedings, including his attendance at court;

(iii) the appropriate forum for the proceedings;

(iv) the appropriate timing for the proceedings or any part of them; the options available to the court in respect of the child and the suitability of

<sup>59</sup> 1990, 6th Edition, West Publishing Co.

<sup>60</sup> [1993] 1 FLR 110. CA at 114-5

each such option and, what order should be made in determining the application; and

(v) any other matters on which the court seeks his advice or about which he considers the court should be informed.<sup>61</sup>

In order to discharge his duties, a guardian *ad litem* must investigate all the circumstances including interviewing such persons as he thinks appropriate or as the court directs. He must inspect records, and bring to the court's attention such records and documents which in his opinion may be of assistance in his case. He may also obtain such professional assistance as he thinks appropriate or which the court directs him to obtain. The practice in England is that a guardian *ad litem* is required to attend all court hearings unless specifically excused and can be questioned about the reports. As with court welfare reports, the evidence and recommendations of guardian *ad litem* are not binding on the court, but they are very influential and the court should give reasons for departing from them.<sup>62</sup>

The Children Act of Kenya under section 160 mandates the court, either on its own motion or on the application of the applicant, to appoint a guardian *ad litem* for the child pending the hearing and determination of the adoption application.

The Act outlines the duties of a guardian *ad litem* as follows—

“(a) to safeguard the interests of the child pending the determination of the adoption proceedings;

(b) to investigate and appraise the court as to the circumstances pertinent to the adoption of the child in the prescribed manner;

(c) to make recommendations as to the propriety of making any interim orders or an adoption order in respect of the child;

(d) to intervene on behalf of the child and arrange for the care of the child in the event of the withdrawal of any consent prescribed by this Act;

(e) to undertake such duties as the court may from time to time direct or as may be prescribed by the rules made under this Part.”

Further, in order to maintain the independence of the guardian *ad litem*, where arrangements for the adoption of any child have been made by an adoption society, the society cannot be appointed guardian *ad litem* of that child for the purposes of its adoption. The appointment of a guardian *ad litem* expires upon the making of a final order by the court unless the court, having regard to the interests of the child extends the period of the appointment.

Currently, all issues pertaining to a guardian *ad litem* are provided for under rules 8, 12 and 13 of the Adoption of Children (Subordinate Courts) Rules and the Adoption of Children (High Court) Rules. There is no mention of the guardian *ad*

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<sup>61</sup> FPCA1991 r12(1).

<sup>62</sup> See *Buckingham shire County Council v M* [1994 2FLR 506 CA].



*litem* in the principal legislation. The Commission found this to be an anomaly considering the centrality of the role of the guardian *ad litem* to the adoption process. The Commission, thus, recommends that provisions relating to the duties of the guardian *ad litem* should be incorporated in the principal legislation.

In view of the foregoing, the Commission recommends adoption of the following provisions—

Social welfare officer ... —(1) The Minister shall, by notice published in the *Gazette*, appoint a person qualified in social work and employed in the Ministry as a social welfare officer.

(2) The duties and functions of a social welfare officer shall be to—

(a) conduct investigations on a child and his birth family to gather background information necessary for the grant of an adoption order, including—

(i) opening and maintaining a file for the child;

(ii) conducting interviews with relevant persons with necessary information on a child's medical, social or legal status;

(iii) visiting and monitoring the child in his natural home or institutional environment; and

(iv) visiting the petitioner or petitioners in their home;

(b) conduct investigations on the petitioner or petitioners to ascertain eligibility to adopt under this Act and to make recommendations accordingly;

(c) keep and maintain a record of prospective eligible adoptive parents;

(d) keep and maintain a record of children eligible for adoption;

(e) match children eligible for adoption with prospective adoptive parents;

(f) prepare and present clear and comprehensive reports for the court and any other party who may require a report under this Act; and

(g) safeguard and promote the best interests of the child at all times during the adoption process, considering his wishes where appropriate.



Guardian *ad litem*

... —(1) A court shall, upon the application of a petitioner or on its own motion, appoint a guardian *ad litem* for a child pending the hearing and determination of an adoption application.

(2) The appointment of a guardian *ad litem* shall expire upon the making of a final adoption order by a court, unless the court, having regard to the best interests of the child, extends the period of appointment.

(3) Without prejudice to the generality of subsection (2), where an appeal is lodged against a final adoption order, a court shall have the power to extend the appointment of a guardian *ad litem* until the date of the determination of the appeal.

Duties of  
Guardian *ad litem*

... —(1) A guardian *ad litem* shall have a general duty to investigate fully all the circumstances of a child and a petitioner, and all matters relevant to the proposed adoption so as to safeguard the best interests of the child.

(2) The guardian *ad litem* shall, without prejudice to the generality of subsection (1)—

(a) safeguard the best interests of the child pending determination of adoption proceedings;

(b) investigate and appraise a court before which a petition for adoption is filed as to—

(i) whether the statements in the petition are true;

(ii) whether any payment or reward in consideration of the adoption has been received or agreed upon;

(iii) whether the means and the status of a petitioner are such as to enable him to maintain and bring up a child;

(iv) what right to or interest in property a child has;

(v) what insurance if any, has been effected on the life of a child;

(vi) whether it is desirable for the welfare of a child that the court should be asked to make an interim order or impose any particular terms or conditions, in the making of an adoption order, or

**require a petitioner to make any particular provision for the child;**

**(c) intervene on behalf of a child to arrange for the care of the child in the event of any withdrawal of any consent prescribed by this Act; and**

**(d) undertake such duties as the court may from time to time direct or as may be prescribed by rules made under this Act.**

## *5.2 Provision of adoption services*

The Commission noted that, historically, adoption has been viewed as a highly successful alternative family and community care practice for children whose parents are not able to care for them. Evidence of the benefits of adoption is obvious when comparing the more favorable medical, psychological, social, and educational outcomes for adopted children with the increased problems manifested by those children who grow up in institutional environments, foster care, or neglectful and abusive homes. Furthermore, adopted children, on average, also have been shown to fare significantly better than those who come from socioeconomic backgrounds similar to the ones of the adopted children's biological families.<sup>63</sup> However, the Commission was aware that merely transplanting a child from a dysfunctional family setting into a nurturing family unit does not automatically mean that the child would fare better in personal growth and development. It is therefore essential that adoption services incorporate pre-adoption support services aimed at supporting the adoption process if the child is to maximize on the benefits of adoption.

### *(a) Services for children*

Pre-adoption services for adopted children are a crucial component of the adoption process. These include identification of children in need of care and protection, matching and counselling. Such services are not only provided by the Government but also by other stakeholders such as non-governmental organizations. These services help alleviate possible psychological risks posed to adopted children. Although research has documented that the vast majority of adopted children are well within the normal range of psychological and academic adjustment, the data also show that adopted children are more likely than their non-adopted age-mates to be referred for mental health services and to display a variety of diagnosable psychiatric conditions.<sup>64</sup> In most cases, these conditions are associated with one or more of the following problems: inattention, impulsivity, defiance, aggressiveness, attachment difficulties, depression, learning disabilities, and in other cases, substance abuse. Although numerous

<sup>63</sup> Adoption - Psychological And Social Service Issues In Adoption <http://social.jrank.org/pages/18/Adoption-Psychological-Social-Service-Issues-in-Adoption.html#ixzz0mOOOXycG>. Visited 28 April 2010.

<sup>64</sup> *Ibid.*

theories have been offered to explain the adjustment difficulties of adopted children, a common theme that runs through most of them is the psychological impact of adoption-related loss.<sup>65</sup> A growing number of children enter adoptive homes after experiencing life either in orphanages or foster homes. In some cases, these children are adopted at an older age and thus have histories of neglect and abuse. Some have significant medical problems while others manifest serious psychological and learning difficulties.<sup>66</sup>

It is therefore essential that children who are eligible for adoption be prepared psychologically for their new life with an adoptive family before they are placed. Pre-adoption support will therefore entail time and professional support in order to help the child understand the administrative and judicial measures that adoption entails and also to help the child come to terms with his emotions in view of the major changes that are about to take place in his life. A child needs to be counselled on the loss and grief he may experience as a result of not having birth parents capable of taking care of him. Issues of identity development and self esteem which continue to plague such children as they grow up also have to be tackled at an early stage.

Once children are adopted, the need for adoption support services does not decrease. While recognising the crucial role that the Ministry of Gender, Children and Community Development needs to play to ensure that extensive preparations that include pre-adoption support services actually take place, the Commission realizes that there is no foolproof process that may guarantee the success of the pre-adoption services. It is therefore equally important that post adoption services also be provided for children. These services, primarily, in the form of post adoption counselling and follow up visits, must address a variety of issues including—

(i) the great transition: the new geographic, cultural surroundings, language and social expectations affecting the adopted child;

(ii) illness and growth delays: the child may require medical attention and improvements in diet and hygiene to catch up on physical growth and to treat any illness which may cause anxiety; and

(iii) emotional needs: the trauma and emotionally disturbing experiences of neglect and abuse before adoption may negatively affect the adoption.

*(b) Services for birth parents*

The Commission was aware that birth parents giving up children for adoption normally face a number of emotional issues after making the decision to place the child for adoption, in surrendering the child, and in handling the feelings that often persist afterwards. It is difficult to generalize about the feelings or

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

experiences of all birth parents. Each has faced a unique experience and coped in his or her own way. A number of birth parents have written personal accounts of their experiences in placing their children for adoption. There are also a few research studies of the experiences of birth parents and the emotions that often linger long after the adoption. Certain themes emerge in both types of literature, including themes of loss, guilt, and resolution.<sup>67</sup>

It can be very difficult for birth parents who have given up a child to let go of the child. As the Commission recommends against direct post adoption contact, birth parents need to understand the consequences of their consent and to be counselled to handle their grief and sense of loss, guilt and resolution. The counselling offered to birth parents should equip them with sufficient information to make the right decision so that when they give up a child for adoption, it should be out of an informed choice.

The information given to birth parents in these counselling sessions should include at a minimum—

(i) information about all possible alternatives;

(ii) information regarding legal issues and responsibilities; and

(iii) information that the records in the child's file regarding the birth parents are retained in the event that the adopted child wishes to contact the birth family at the age of maturity.

*(c) Services for prospective adoptive parents*

The Commission was aware that not every person who applies to be an adoptive parent will have experience in raising children. Even in cases where the adoptive family has other children, adopted children sometimes come from traumatised background and thus parenting such children should take their special needs into account. Adoptive parents are also in the unique situation that they will one day have to tell the adopted child that he or she is not their birth child and hence have to be prepared to discharge this duty.

The Commission was also aware that bonding does not always automatically take place between an adopted child and adoptive parents, no matter how well the matching exercise has been carried out. In order to ensure a successful adoption in which the parents are comfortable enough to discharge their role of parental responsibility, the adoption service should include the component of education and training for prospective adoptive parents. Such a service primarily serves to assist prospective adoptive parents decide whether in fact, adoption is the right course of action for them. The training prepares them for the particular responsibilities of adoptive parenthood.

The nature and duration of pre-adoption training for adoptive parent vary from jurisdiction to jurisdiction. The Commission did however find that such

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<sup>67</sup> *Ibid.*

training is in fact mandatory in many European countries, the United States of America, and Canada. An adoptive parent is only considered eligible to adopt in these jurisdictions if that parent has undergone the minimum requirement of pre-adoption counselling and training.

The Commission therefore recommends that the Department of Social Welfare in the Ministry of Gender, Children and Community Development should initiate policy measures aimed at ensuring the necessary pre-and post adoption services for children, birth parents and adoptive parents. The Commission also recommends that the Department of Social Welfare should come up with counselling guidelines as an administrative measure noting that it would be impracticable to legislate for the guidelines.

### 5.3 *Matching children and families*

According to the Hague Convention Guide to Good Practice, “one of the challenges in developing a functional national adoption system is determining how to match adoptable children in need of families with approved adoptive families.”<sup>68</sup> If a family cannot be found locally for the child, adoptive families are then sought from other parts of the world.

In an attempt to define “matching” and to investigate its content, the Commission had recourse to documentation from the International Social Service’s International Resource Centre for the Protection of Children in Adoption which describes “matching” as follows—

Matching is not the adoption decision. It is a proposal to establish an adoptive relationship between a particular child and a particular family. The adoption decision itself comes later.<sup>69</sup>

The International Social Service also gives the following guidance on matching,

“An adoption in the best interests of the child is one that creates both a situation which respects the biological family and family relationships that satisfy the child and the adoptive family. Matching is therefore a key point in time. It is the convergence of two life plans: that of the child, and that of the family in whose care he/she is to be placed. Matching should be *the proposal of an adoptive family for a child* that fits the life experience, characteristics and needs of that child.”<sup>70</sup> [Emphasis added]

It was therefore the Commission’s view that matching is an essential service in adoption. Good practice established by the International Social Service also suggests that matching should take place after the psycho-medico-social and legal

<sup>68</sup> The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Guide to Good Practice. Guide No. 1. 2008, para 303, p.77.

<sup>69</sup> See International Social Service, 1999, Brochure No. 1 "The Rights of the Child in Intercountry Adoption: Ethics and Principles. Guidelines for Practice." ISS Secretariat, Geneva p.14.

<sup>70</sup> *Ibid.* para 18.

adoptability of the child have been established. Further, matching should take place after the psycho-medico-social and legal adoptive eligibility of the possible prospective adoptive parents have been established.<sup>71</sup> This practice reduces the incidence of trauma being experienced by either the child or adoptive parents if it is discovered after placement that the needs of the child, skills and capacity of potential carers have not been properly matched.

Historically, “matching” used to entail the search for similar physical characteristics between adoptive parents and the child, as well as some level of similarity between their socioeconomic backgrounds, religion, and race. Eligibility for adoption was also affected by clan, tribal, or caste membership.<sup>72</sup> This is still the case in some jurisdictions such as Colombia<sup>73</sup> where the concern is that neglecting race or tribal membership, for example, will adversely affect the adopted child and lead to the erosion of the relevant group and its culture. Currently prevailing social work holds many factors to be crucial in placement choices. Such factors include socio-economic status of the adoptive parents, their health, their lifestyle, their reasons for adopting, and whether or not they have other children. Investigations carried out by social workers and the consequent reports they produce help to answer some of these questions, although the debate is often entangled with beliefs, moral values, political and ideological positions rather than outcomes. The child’s best interests should be held up as the main concern, although since many factors contribute to a child’s interests sometimes these may be pitted against each other.

Matching is therefore a highly professional service requiring a commensurate level of excellence in skills and qualifications. The practice recommended by the International Social Service for adoption service providers is that matching should be assigned to a team of professionals and not be left to the responsibility of an individual. The team should be composed of child protection professionals trained in adoption policies and practices<sup>74</sup>. Further, they should preferably be specialists in psychosocial fields.<sup>75</sup> In the case of intercountry adoption, the International Social Service also recommends that it is desirable to invite a lawyer to join the team to ensure that the legal requirements are met and are compatible between the States concerned.<sup>76</sup>

The necessary information concerning a child who is the subject for adoption would be the Social Inquiry, a full medical record of the child as well as his or her birth parents and also any special needs of the child. For example, a child could be HIV positive and this would mean matching the child with adoptive parents who are willing and capable to look after the child. Adoptive parents should be

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<sup>71</sup> *Ibid.* para 19.

<sup>72</sup> See Okumu Wengi, J. (1997). *Weeding the Millet Field: Women’s Law and Grassroots Justice in Uganda*. Kampala: Uganda Law Watch Center.

<sup>73</sup> See Monroy, P. A. (1998). “Adoption Law in Colombia.” In *The International Survey of Family Law 1996*, ed. A. Bainham. The Hague, Netherlands: Kluwer Law International.

<sup>74</sup> International Social Service *ibid.* para 22.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

aware of the needs of a child they intend to adopt. This information is kept confidential and it is only if a prospective adoptive parent has indicated that he or she is willing to adopt and has the capacity to adopt an HIV positive or disabled child that a match will be made between that child and a prospective parent. The prospective adoptive parent is only told that a child has been found, with certain health status without revealing the identity of the child. If the prospective adoptive parent agrees to the match, more information is then revealed. Matching therefore provides a platform for screening both the child and the prospective adoptive parents.

The Commission noted from its review of various case studies of adopted children in their new families in South Africa, that in the majority of cases, a good match was created between the adoptive parents and the child, such that the family seemed a natural coherent unit. Such cohesion or bonding is the result of a professional matching service and takes many months of dedicated study and work. The social worker assigned to any case must balance the wishes of the birth parents who may want their child placed in a particular family environment, the best interests of the child and character, traits and personalities of the adoptive parents.

Not all children's needs will be the same. Even if a child is not assessed as being a special needs child, the social worker must assess the child's needs to ensure that the adoptive parent who ultimately ends up with that child will be able to accommodate those needs. It is at this point where the age and health of the prospective adoptive parents become relevant. Old age or poor health are not in themselves bars to adopting, but where the prospective adoptive parent is elderly or has a chronic health condition, he or she must be assessed for vigour if the child to be adopted is very young as it takes a lot of energy to keep up with such a child. If the spouse or partner of that person is younger or healthier and can take up the parenting role, this is taken into account. However, it would not be in the best interests of a young child to be placed with such an adoptive parent, but conversely it may be in the best interests of an older child of fifteen years, for example, to be placed with that family. If the child has special medical needs, the prospective adoptive parents must not only have the financial resources to accommodate such needs, they must also have the vigour and temperament necessary for such conditions. Most importantly, they must also have indicated a genuine willingness to adopt a child with those particular needs.

As regards the wishes of birth parents to have their children brought up in a particular environment, the Commission was hesitant to make this a condition for matching. While a birth parent may wish for their child to be brought up in a particular religion, culture or way of life, the Commission reiterated that it is the best interests of the child and not the wishes of the birth parents that should take precedence in the matching exercise and subsequent placement. In cases of new born children, the wishes of the birth parent would be given very little weight to allow the adoptive parents unfettered discretion in the upbringing of the child.



The Commission noted that the situation in Malawi is that prospective adoptive parents personally identify the children they want to adopt, either by picking them out during orphanage visits or at the invitation of members of the birth families. This practice colloquially termed “child-shopping” is disapproved of in social work practice as it by-passes the highly professional and necessary service of matching. The notorious practice of “child-shopping” is very common in intercountry adoptions where adoptive parents select either in person on visits to the respective countries or from photo listings, children that satisfy their needs. Normally only healthy looking and attractive children are selected, without any actual background checks on the psycho-medico-social and legal adoptability of such children. Pre-adoption assessments and a comprehensive consideration of the child’s needs are often absent in this process. Ultimately, such selections are never in the best interests of the child. For example, such selection may lead to the separation of children from siblings and may also lead to a child with severe latent health problems for which the adoptive parents have neither the skills nor the capacity to deal with being selected.<sup>77</sup>

The Commission therefore recommends that in keeping with the guidance of the International Social Service, “child-shopping” should be prohibited. Matching should—

“never be left to the initiative of prospective adoptive parents choosing a child among others when visiting institutions for children, during visits to families in the State of origin, or from catalogues. Matching must not be left to the initiative of prospective adoptive parents choosing a child from a catalogue of public advertisements on internet.”<sup>78</sup>

The Commission further recommends that matching should neither be left to the initiative of the birth family nor to the sole initiative of the staff of child care institutions, or the child’s guardian, scenarios that the Commission was aware have occurred in Malawi. Even though these people know the child, they are not professionally qualified to perform this service. They may however, either be included in, or consulted by the team that makes the proposal, as far as possible.<sup>79</sup>

The Commission however recommends that these requirements may be relaxed in cases where the adoption is by a step-parent or a relative. In such cases, there is no need for matching as the person wishing to adopt is not a stranger to the child unless the step-parent or relative is ineligible to adopt under the eligibility requirements prescribed earlier in this Report. Similarly, in cases where the child in question is a special needs child, if a prospective adoptive parent identifies the child fully aware of all his needs and has the facilities to adopt the

<sup>77</sup> See Dickens J, 2202, “The paradox of intercountry adoption - Romania” International Journal of Social Welfare 11, 2002, pp76-93 and

Saclier, 2000, “In the best interests of the child?” in Selman P (ed). Intercountry Adoption: Developments, Trends and perspectives. London BAAF.

<sup>78</sup> International Social Service, 1999, *supra*, para 26.

<sup>79</sup> *Ibid.* para 24



child, the prospective adoptive parent may be allowed to adopt the child. The prospective adoptive parent will still be screened for eligibility, and will have to satisfy the court that the adoption is in the best interests of the child. The Commission considered this measure necessary to increase the chances of special needs children being adopted.

In the case of intercountry adoption, the Commission recommends that in keeping with the practice of the International Social Service, professionals from the country of origin and from the receiving country must be jointly responsible for matching. As far as possible, the proposal should be put forward following consultations between—

- (a) a professional who knows the child in the country of origin and a representative of the central authority; and
- (b) a representative who knows the chosen family, in the receiving country and a representative of the central authority.<sup>80</sup>

The matching process is facilitated by a register that pools prospective adoptive parents and children eligible for adoption together. Under the English Adoption and Children Act 2002, the Secretary of State is empowered to set up an Adoption and Children Register to facilitate matching of prospective adoptive parents and children waiting to be adopted. Similarly, the Commission recommends that the Department responsible for social welfare should set up a national register of prospective adoptive parents from which children who are eligible for adoption can be matched using all the best practices in matching services recommended above.

The Commission therefore recommends the following legislative provisions on matching—

PART ... —REGISTERS

- |   |   |
|---|---|
| Prospective<br>Adoptive<br>Parent<br>Register | ... —(1) The Minister shall establish and maintain a register of all persons who have expressed an interest to adopt a child in writing and have been assessed as suitable to adopt under the provisions of this Act, to be known as a “Prospective Adoptive Parent Register”.              |
| ...<br>Schedule                               | (2) The Prospective Adoptive Parent Register shall be in Form ... in the ... <i>Schedule</i> and shall indicate the temporal order in which the names were recorded in the Register.  |
|   | (3) Subject to subsection (4) an application for adoption under this Act shall only be made in respect of a child whose name appears in the Register of Children Eligible for Adoption and by a prospective adoptive parent whose name appears in the Prospective Adoptive Parent Register. |

<sup>80</sup> *Ibid.* para 27.

**(4) Subsection (2) shall not apply in respect of—**

- (a) applicants interested to adopt a special needs child; or**
- (b) applicants who are related to the child.**

5.4 *Records*

“Adoption is not a single event, but a lifetime process.”<sup>81</sup> An adopted child does not cease to have need for adoption services after the grant of the adoption order. An adopted child may still seek to find out about his or her roots many years after his or her adoption. Similarly, a birth mother may decide to search for her child at a very late point in life. There have been cases reported in New Zealand where an adoptee as old as 96 years applied for his original birth certificate and a birth mother as old as 89 years instituted a search for her child.<sup>82</sup> Preservation of information relating to the child’s origins is therefore a very important adoption service. It is vital that the adoption service provider preserves all documentation or records pertaining to an adoption.

For countries that have ratified the Hague Convention, article 30 imposes an obligation to preserve any information relating to the child on his or her origins. There is also an obligation to ensure that the child has access to certain information under certain conditions. Article 30 regulates two important components of the preservation of information that the Commission considered crucial to a comprehensive provision of adoption services. The first is the collection and preservation of information concerning the child’s origins. The second is the availability of, or access to information by such a child. This information, according to the Commission, forms the basis of the records that the adoption service providers must as a minimum requirement keep and maintain to ensure that the demand for information by adult adopted children and birth parents is met. The preservation of such information must however be maintained in a strictly confidential manner, with the disclosure of any information only being made to concerned parties who are eligible to receive it.

The Commission thus recommends that the proposed provisions on adoption should prescribe that all identifying information relating to a child’s birth parents and the child’s original birth certificate should be preserved.<sup>83</sup>

The Commission therefore recommends the following provisions—

<b>Adopted Children Register</b>	<b>... —(1) The Director of National Registration shall, notwithstanding anything contained in the National Registration Act, establish and maintain a register to be called the Adopted Children Register, in which entries shall</b>
<b>Act No. 13 of 2010</b>	

<sup>81</sup> *Ibid.* para 565, p.124.  
<sup>82</sup> *Ibid.*  
<sup>83</sup> In England, sections 56-60 of the Adoption and Children Act enables regulations to be passed which may prescribe information that an adoption agency must keep in relation to an adoption and the form and manner in which such information must be kept.

be made as directed by an adoption order and no other entries.

(2) A certified copy of an entry in the Adopted Children Register sealed or stamped with the seal of the Director of National Registration shall, be *prima facie* evidence of the adoption to which it relates.

(3) Where a certified copy of an entry contains a record of the date of birth or country of birth of the adopted person, the entry shall be *prima facie* evidence of the date of birth or country of birth in all respects as if the copy was a certified copy of an entry in the Register of Births.

(4) The Director of National Registration shall cause an index of the Adopted Children Register to be made and a person shall be entitled to search the index upon payment of a fee as may be prescribed.

(5) An entry in the Adopted Children Register shall not be open to public inspection or search, except—

(a) by a person who requests information about his own adoption;

(b) under the order of a court of competent jurisdiction; or

(c) where an adopted person who has attained the age of eighteen (18) years has applied to the Director of National Registration to have an entry of “No objection” entered against his records so that any birth parent wishing to access information about that adopted person may be permitted to search or inspect the entry in the Adopted Children Register.

Registration  
of adoption  
orders

... —(1) An adoption order shall contain a direction to the Director of National Registration to make in the Adopted Children Register an entry recording the adoption in the prescribed form.

Act. No. 22 of  
2010

(2) For purposes of complying with the requirements of subsection (1), where the precise date of the child’s birth is not known, the court shall use the procedures for determining the age of a child under Part IV of the Child Care, Protection and Justice Act and specify that date in the adoption order as the date of birth.

(3) An adoption order shall contain a further direction to the Director of National Registration to cause an entry in the Register of Births, to be marked with the word

**“Adopted”, and to include an entry in the Adopted Children Register recording the adoption.**

**(4) Where an adoption order is made by the court in respect of a child who has previously been the subject of an adoption order, the order shall contain a further direction to the Director of National Registration to cause such entry in the Register of Births, to be marked with the word “Re-adopted” and to include an entry in the Adopted Children Register recording the adoption.**

**(5) The Registrar of the High Court shall cause every adoption order to be communicated in the prescribed manner to the Director of National Registration, and upon receipt of such communication, the Director of National Registration shall comply with the direction contained in the order with regard both to marking any entry in the Register of Births with the words “Adopted” or “Re-adopted” and with regard to making the appropriate entry in the Adopted Children Register.**

**Registration of ... —(1) After an adoption order has been granted in respect  
birth of a child of a child born outside Malawi, the adoptive parents shall  
born outside of Malawi apply in terms of the National Registration Act to register  
Malawi the birth of the child in the Register of Births.**

**Act. No. 13 (2) Where the country of birth of the child is not proved  
of 2010 to the satisfaction of the court, the particulars of that  
country may, notwithstanding anything in section ...<sup>84</sup> be  
omitted from the order and from the entry in the Adopted  
Children Register.**

**Duties of the ... —(1) The Registrar of the High Court shall—  
Registrar of (a) keep and maintain a record of all adoption  
the High cases heard in any court, including adoption orders  
Court issued by any court;  
(b) within twenty-one (21) days after the receipt of  
a final adoption order from a subordinate court,  
transmit the adoption order to the Director of National  
Registration; and  
(c) in the case of an intercountry adoption, forward  
copies of documents referred to in paragraph (b) to the  
Central Authority.**

**(2) A subordinate court shall transmit a final adoption order to the Registrar of the High Court within fourteen (14) days from the date of the order.**

<sup>84</sup> Section on “Adopted Children Register”.

Supplementa-  
ry Register of  
Adoption

... —(1) The Minister shall establish and maintain a supplementary register to be called the Supplementary Register of Adoption which shall record information pertaining to—

(a) the registration numbers allocated to records of adoption cases;

(b) the personal details of adopted children, of their birth parents and of their adoptive parents;

(c) particulars of successful appeals against adoption orders and rescissions of adoption orders; and

(d) any other information in connection with adoption.

(2) The Supplementary Register of Adoption shall not be open for public search or inspection except to the persons and in the circumstances specified in section ...<sup>85</sup>.

(a) *Confidentiality*

As the object of preserving the foregoing information is to ensure that the adopted child's right to trace his origins is realized, the Commission noted that it had already made recommendations as to circumstances when this information can be made available to the child. The Commission however considered that there is need to also make provision to enable birth parents wishing to trace their children to access such information, albeit with some safeguards as some children may not want to be contacted. The Commission was however concerned about the balance between the need to preserve the information and the possibility of misuse of personal data that is disclosed throughout the adoption process.

The Hague Convention Implementation Guide<sup>86</sup> requires States to ensure that implementing measures contain safeguards to preserve confidentiality of information about the adoptive parents and the child. This means that confidentiality must be maintained throughout the adoption process and should not be restricted to adoption records. The Uniform Adoption Act of the United States<sup>87</sup> clearly exemplifies the optimal position by ensuring, among other things, the following—

(i) the confidentiality of the adoption proceedings; and

(ii) the confidentiality of all records pertaining to the adoption after an adoption becomes final.

The Commission therefore recommends the following provisions with regard to confidentiality —

<sup>85</sup> Section on “Adopted Children Register”

<sup>86</sup> The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention. Guide to Good Practice. Guide No. 1. 2008, *supra* para578, p.126.

<sup>87</sup> Sections 6-101 to 6-110.

Confidentiality of records

... — (1) All records on file or in possession of a court, the Central Authority, a legal practitioner or any other service provider in connection with an adoption shall be confidential and may not be inspected except as provided under this Act.

(2) During proceedings for adoption, records shall not be open to inspection except with the leave of the court.

(3) In determining whether to grant leave under subsection (2), the court shall review the records of the relevant proceedings for adoption and may grant or deny the application upon determination that a good cause exists based on specific findings concerning—

(a) the reason for which the information is sought;

(b) the views of any of the parties about whom the information is sought;

(c) whether it is possible to satisfy the applicant's request without disclosing the identity of parties;

(d) the likely effect of the disclosure on the child, the adoptive parents, the birth parents and other members of the child's birth and adoptive families;

(e) the age, maturity, and expressed needs of a child;

(f) whether there is a compelling reason for the disclosure of the information; and

(g) whether the benefit to the applicant is greater than the harm to any other individual of disclosing the information.

The Commission also recommends criminal penalties for unwarranted failure to disclose information that should be disclosed and for unauthorized disclosure of confidential information. These penalties are discussed in Chapter 7 which specifically deals with offences.

## 6. INTERCOUNTRY ADOPTION

Intercountry adoption has become a common occurrence in today's society.<sup>88</sup> Despite its increasing popularity, the Commission noted that internationally, there are diverging and competing viewpoints on its merits. The typical scenario in intercountry adoption involves wealthy, western, industrialized nations with low birth rates and relatively small numbers of children in need of

<sup>88</sup> See Ryan E.J., "For the Best Interests of Children: Why the Hague Convention on Intercountry Adoption Needs to Go Further, As Evidenced by the Implementation in the Romania and the United States" (2006) 29 B.C. Int'l and Comp. L. Review, 353.

homes taking in children from poor countries with high birth rates and high numbers of homeless or institutionalized children.<sup>89</sup> Critics of intercountry adoption condemn it on the grounds that it is exploitative, imperialistic and detrimental to children because of the separation from their home, culture and society.<sup>90</sup> On the other hand, supporters of intercountry adoption consider it to be the only realistic chance for many children to have a permanent home and family.<sup>91</sup>

The immense popularity of intercountry adoptions presents dangers of child trafficking and other forms of abuse or exploitation. Fortunately, there are three relevant international and regional instruments aimed at protecting children from exploitation by ensuring that their best interests are taken into account. These are the Convention on the Rights of the Child (CRC),<sup>92</sup> the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>93</sup> and the Hague Convention in respect of Intercountry Adoption (the Hague Convention).<sup>94</sup>

Malawi ratified the Convention on the Rights of the Child on 2nd January 1991. The Convention is the most widely ratified human rights treaty in international human rights law,<sup>95</sup> and contains several provisions outlining rights and principles that are particularly relevant to children in the context of adoption. The African Charter on the Rights and Welfare of the Child adds to the rights and principles of the CRC, by requiring States to monitor post adoption well being of the child. This is very important in the African context especially in relation to Malawi where the supervision machinery is weak.

The Hague Convention came into force in 1993 to address specific problems relating to intercountry adoptions. The Convention,

“protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. The Convention, which operates through a system of national Central Authorities, reinforces the UN Convention on the Rights of the Child (art. 21) and seeks to ensure that intercountry adoptions are made in the best interests of the child and with respect to his or her fundamental human rights, and to prevent the abduction, the sale of, or traffick in children”.<sup>96</sup>

Although the Hague Convention is widely believed to have been specifically created to facilitate intercountry adoptions,<sup>97</sup> there are some divergent views as

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> UN Convention adopted by the General Assembly in 1989

<sup>93</sup> Adopted by Organisation of African Unity later African Union in 1990

<sup>94</sup> The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, Treaty Doc. No. 105-51, intro., 32 I.L.M at 1134.

<sup>95</sup> See Tobin J, 2004, “The Convention on the Rights of the Child: The Rights and Interests of Children Conceived through Assisted Reproduction”, Victoria Law Reform Commission, Melbourne. 1 (Only Somalia and the United States of America are yet to ratify the CRC).

<sup>96</sup> See the Introduction to the Hague Convention.

<sup>97</sup> See Martin J, “The Good, the Bad and the Ugly? A new way of looking at the intercountry adoption debate.” (2006-2007) 13 University of California, Davis Journal. International Law and Policy. 190 .173-216.



to the original aim. It is mainly Western states that view the aim of the Hague Convention as being to facilitate intercountry adoptions. Many delegates at the Conference at which the Convention was agreed who came from countries where children are mainly adopted, viewed it as an instrument aimed to curtail abuse.<sup>98</sup> Whatever the reason for its creation, the Hague Convention marked the first major development of international minimum standards in international adoption law procedures. The Hague Convention addresses the problems associated with intercountry adoption by—

(a) creating legally binding standards to regulate the process of international adoptions;

(b) creating a system of supervision to ensure the observation of those legal standards; and

(c) facilitating communication and cooperation between authorities in both countries involved in any particular adoption.

Overall, the Hague Convention emphasizes the general principle that all international adoptions must be guided by the best interests of the child.<sup>99</sup> Malawi is not a signatory to the Hague Convention. The Commission was however aware that there are plans within the Ministry responsible for social welfare and children to engage the Ministry of Foreign Affairs and the Ministry of Justice and Constitutional Affairs with a view to initiating the processes of ratification.

Cumulatively, these international instruments, with specific reference to the Hague Convention, advocate the principle of subsidiarity. The Preamble to the Hague Convention states that for children who cannot remain with their family of origin, “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.”<sup>100</sup> In addition, article 4 (b) of the Convention provides that—

*“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin [...] have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.”*

According to the “Hague Convention Guide to Good Practice”,<sup>101</sup> “subsidiarity” means that the States Party to the Convention recognizes that a child should be raised by his or her birth family or extended family. If that is not possible or practicable, other forms of permanent care in the country of origin should be considered. It is only when due consideration has been given to national

<sup>98</sup> See Carlson R R, “The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference of Intercountry Adoption.” 30 Tulsa Law Journal. 1994. 243, 248-249. Cited by Martin J, *ibid*.

<sup>99</sup> See Sargent S, “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption on the United States and Romania”. 10 Texas Wesleyan Law Review 2004. 351, 354-355.

<sup>100</sup> Preamble to the Hague Convention.

<sup>101</sup> *supra* note 99.



solutions and they have been exhausted that intercountry adoption should be considered. In this case, intercountry adoption must serve the best interests of the child if it provides a permanent loving home.

For a long time in Malawi, the position as regards intercountry adoptions was not conclusive. Section 3 (5) of the Adoption of Children Act states—

*“An adoption order shall not be made in favour of any applicant who is not resident in Malawi nor in respect of any infant who is not so resident.”*

This section, read with section 7 (1) which gives the court discretion to grant an interim adoption order, “for the purposes of the provision of maintenance and education and supervision of the welfare of the infant and otherwise as the court may think fit,” for a period not exceeding two years, have been cumulatively interpreted as prohibiting intercountry adoption. While section 3 (5) expressly imposes a residency requirement, section 7 (1) has, on the other hand, been used as a matter of practice, by the Department responsible for social welfare to require prospective adoptive parents to foster the child for two years.

The Supreme Court of Appeal decision *In the Matter of CJ (A Female Infant)*<sup>102</sup> has finally settled the issue of residence as a requirement for adoption in the Adoption of Children Act and thus permitting intercountry adoption. In this case, the learned Justices of Appeal construed the residence requirement in section 3 (5) of the Adoption of Children Act widely. This wide construction allowed the court to consider residence, not as a primary consideration, but as one of the factors having given due consideration also to the welfare of the child under section 4 (b) of the Act. The Court also upheld the principle of subsidiarity by allowing the intercountry adoption after satisfying itself that no family in Malawi had come forward to foster or adopt the child in question. Therefore, the court found that her adoption by a foreigner, was a better option for the welfare of the child than her stay at an orphanage. The Supreme Court also rejected the caution raised by the trial judge that removing the prohibition of intercountry adoption in section 3 (5) could actually facilitate trafficking as the facts of the case did not give rise to any inference of trafficking.

Although the Supreme Court of Appeal decision has left no doubt that intercountry adoptions are permissible under the Act, some questions still remain to be settled from the judgment, so as to provide certainty in the law. The Supreme Court of Appeal viewed the contentious section 3 (5), not as an arbitrary impediment to adoption which is inconsistent with several sections in the Constitution, but viewed it as “a beacon of protection and safety against unscrupulous aliens and therefore goes to enhance the welfare of the infant”.<sup>103</sup> In the absence of enhancing legislative provisions to ensure that children are protected from “unscrupulous aliens” it is highly likely that children may fall into the very hands of such “unscrupulous aliens”. Further, there is also need for procedural guidance as to subsidiarity. Intercountry adoption should not take

<sup>102</sup> MSCA Adoption Appeal No. 28 of 2009.

<sup>103</sup> *Ibid.* p5.

precedence over national solutions and the Supreme Court decision did not emphasize this point.

The Commission noted that the Hague Convention which has been widely ratified<sup>104</sup> fills in the gaps left by the Supreme Court by setting up the structures necessary for follow up interaction between the country in which the child was adopted and the country in which the child ends up. Without a minimum requirement for the structures and uniform procedures agreed by a number of countries in place, it is inconceivable that children adopted from Malawi will be adequately protected. The Commission therefore recommends that Malawi adopts legislative provisions that conform to the Hague Convention so as to facilitate intercountry cooperation and communication in safeguarding intercountry adoptions. The Commission also noted that its sister special Law Commission on the Review of the Children and Young Person's Act had made some recommendations as to intercountry adoptions which included permitting intercountry adoptions only with respect to countries that have ratified the Hague Convention.<sup>105</sup> The Commission thus endorses these recommendations and consequently recommends that "Convention" should be accordingly defined in the interpretation section as follows—

**"Convention" means the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption signed at The Hague on 29th May, 1993;**

Consequently, the Commission recommends adoption of a separate **Part** to deal exclusively with matters of intercountry adoption. The Commission further recommends that the terms "intercountry adoption" and "Convention country" should be defined in the interpretation section. To this end, the Commission had recourse to the definition of intercountry adoption in article 2 of the Hague Convention. Article 2 qualifies as intercountry adoptions those adoptions where

"a child *habitually resident*<sup>106</sup> in one country (the State of origin) has been, is being, or is to be moved to another country (the receiving State) either after his or her adoption in the State of origin by spouses or a person *habitually resident*<sup>107</sup> in the receiving state or for the purposes of such an adoption in the receiving state."

The Commission considered that such a definition would cover situations where a foreigner residing in Malawi on a business or work permit adopts a child, but eventually takes the child out of Malawi. This will ensure that the authorities in Malawi still have the opportunity to follow up on the progress of the child. The Commission, however, recommends deletion of the word "habitually" from the definition for ambiguity. The Commission also underscored the need to clearly state the purpose of the provisions on intercountry adoption to ensure that there is no doubt as to the position taken on intercountry adoptions.

<sup>104</sup> As of February 26, 2008, there are 75 countries that have ratified the Convention.

<sup>105</sup> Malawi Law Commission, 2005, *supra* note 53, p.106.

<sup>106</sup> Emphasis supplied.

<sup>107</sup> Emphasis supplied.

Additionally, the Commission recommends the following definition of “Convention country”—

**“Convention country” means a country which is signatory to, and has implemented the Convention;**

The Commission considered that it is important that the law is clear in terms of this meaning because there are several countries that have signed the Convention that have not implemented it by among other things domesticating the provisions of the Convention. The Commission opined that being a signatory alone is not enough.

Specific procedures and requirements of the Hague Convention necessary to ensure that children are granted the best possible protection during intercountry adoptions were discussed as follows—

### 6.1 *Central Authority*

Article 7 of the Hague Convention provides for a system of Central Authorities in all States Parties and imposes specific obligations on them. Central Authorities are the mechanisms used by the States Parties to provide adoption services. This function may be delegated to accredited bodies. The essential obligations of the Central Authority under Article 7 include cooperation with one another through the exchange of general information concerning intercountry adoption, the elimination of any obstacles to the Convention and a responsibility to deter all practices contrary to the Convention.<sup>108</sup>

There is no specific requirement under the Hague Convention as to how the Central Authority should be established. The Commission recommends that the Central Authority should be established by legislation under the new provisions on adoption. It further recommends that the Department responsible for social welfare should be assigned the role of performing the functions of the Central Authority. As the obligations placed on the Central Authority by the Hague Convention are onerous, the Commission recommends that the Central Authority should be granted sufficient powers to effectively carry out its responsibilities, functions and international obligations. The Commission thus recommends the following definition of “Central Authority”—

**“Central Authority” means the Directorate of Social Welfare in the Ministry responsible for children;**

In keeping with the requirements set out in the Hague Convention Guide to Good Practice, the Commission recommends that Government should ensure that the Central Authority has adequate and well qualified personnel as well as adequate resources to function effectively.

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<sup>108</sup> The Hague Convention Guide to Good Practice, op.cit supra foot note 104 p.45.

The Commission thus recommends the incorporation of the following Part on intercountry adoption—

**PART ... —INTERCOUNTRY ADOPTION**

Purposes of  
this Part

... —(1) The purpose of this Part is to—

(a) facilitate intercountry adoption through the Central Authority in Malawi and a central authority in a country that is a signatory to the Convention subject to the provisions of this Act;

(b) provide for the recognition of foreign adoptions;

(c) find fit and proper adoptive parents for a child elsewhere if such fit and proper parents cannot be found within Malawi; and

(d) generally regulate intercountry adoptions.

(2) Any person who adopts a child otherwise than in accordance with the provisions under this Part shall not, without leave of the Court, take the child to another country for permanent residence.

High Court to  
have  
jurisdiction

... The High Court shall have jurisdiction on all matters of intercountry adoption.

Powers of  
Central  
Authority

... The Central Authority shall have the power to—

(a) perform all functions necessary to facilitate an intercountry adoption;

(b) develop and advise on the development of policy, procedures, standards and guidelines for intercountry adoption processes; and

(c) directly or through other public bodies take appropriate measures to prevent improper financial or other gain in connection with an intercountry adoption.

Duties of  
Central  
Authority

... In the exercise of its powers under this Act, the Central Authority shall perform the following duties—

(a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents so far as is necessary to complete the adoption;

(b) facilitate, follow and expedite proceedings with a view to obtaining an adoption order;

(c) promote the development of adoption counselling and post adoption services in Convention countries;

(d) cooperate with other central authorities and exchange information on general evaluation reports about experiences with intercountry adoption; and

(e) comply with justified requests for information about a particular adoption situation from other central authorities so far as such requests are not inconsistent with any written law.

**Performance of powers and duties of the Central Authority** ... The Director shall perform powers and duties of the Central Authority.

**Delegation** ... The Director may delegate such powers and duties to any qualified person in the public service acting as his subordinate subject to his general or special direction or to an Act of Parliament.

**International co-operation** ... —(1) The Minister responsible for international co-operation may, on the request of the Minister responsible for children, enter into an agreement with a State Party to the Convention on any matter pertaining to the intercountry adoption of children for the purposes of supplementing the provisions of the Convention or to the application of the principles contained therein.

(2) An agreement contemplated in subsection (1) shall not be in conflict with the provisions of this Act.

**Adoption by a person in a Convention country** ... —(1) A person resident in a Convention country who wishes to adopt a child resident in Malawi shall apply to the central authority of the country concerned.

(2) If the central authority of the Convention country is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the Convention and forward the report to the Central Authority in Malawi.

(3) If a child eligible for adoption is available for adoption, the Central Authority shall prepare a report on the child in accordance with this Act and forward it to the central authority of the Convention country concerned.

(4) If the Central Authority and the central authority of the Convention country concerned both agree on the

adoption, the Central Authority shall refer the application for the adoption together with all relevant documents and reports contemplated in subsections (2) and (3) to the High Court for consideration under section ....<sup>109</sup>

(5) The court may make an order for the adoption of the child if the requirements under sections ...<sup>110</sup> and ...<sup>111</sup> are complied with and the court is satisfied that—

(a) the adoption is in the best interests of the child;

(b) the child is in Malawi;

(c) the child is not prevented from leaving Malawi—

(i) under any written law; or

(ii) because of a court order;

(d) the arrangements for the adoption of the child are in accordance with the requirements of the Convention;

(e) the central authority of the Convention country has agreed to the adoption of the child;

(f) the Central Authority has agreed to the adoption of the child; and

(g) the name of the child has been on the Register of Children Eligible for Adoption for not less than sixty (60) days and no fit and proper adoptive parent for the child is available in Malawi.

(6) This section does not apply to a child resident in Malawi who is to be placed for adoption outside Malawi with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent.

(7) The provisions of Part ...<sup>112</sup> shall apply to the adoption of a child referred to in subsection (6).

Adoption  
compliance  
certificate

... Where the High Court approves the adoption of a child under section ...,<sup>113</sup> the Central Authority may issue an Adoption Compliance Certificate.

<sup>109</sup> Section on "Matters court must be satisfied with".

<sup>110</sup> Section on "Applicants for adoption".

<sup>111</sup> Section on "Matters court must be satisfied with".

<sup>112</sup> Part on Adoption.

<sup>113</sup> Section on "Adoption of a child from Malawi by a person in a Hague Convention country".

Adoption of  
child from  
Convention  
country

... —(1) A person resident in Malawi who wishes to adopt a child resident in a Convention country shall apply to the Central Authority of a Convention country concerned.

(2) If the Central Authority is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the Convention and forward the report to the central authority of the country concerned.

(3) If a child eligible for adoption is available for adoption, the central authority of a Convention country shall prepare a report on the child in accordance with the Convention and forward it to the Central Authority.

(4) If the Central Authority and the central authority of the Convention country concerned both agree to the adoption, the central authority in the country concerned shall refer the application for adoption for the necessary consent in that country.

Recognition  
of inter-  
country  
adoption

... —(1) The adoption in a Convention country of a child resident in that Convention country by a person resident in Malawi shall be recognized in Malawi if an adoption compliance certificate issued in that country is in force for the adoption.

(2) The adoption in a Convention country of a child resident in another Convention country shall be recognized in Malawi if an adoption compliance certificate is issued in the Convention country where the adoption was granted and is in force for the adoption.

(3) The Central Authority may issue a declaration recognizing the adoption if an adoption compliance certificate was not issued in the relevant Convention country.

(4) A declaration under subsection (3) shall, upon production by a person, be admissible as evidence in any proceedings before the court.

(5) The adoption of a child referred to in subsections (1) and (2) shall not be recognized if a declaration is made under section ...<sup>114</sup> that an adoption or decision under article 27 of the Convention has no effect in Malawi.

<sup>114</sup> Section on “Refusal to recognize inter-country adoption or Article 27 decision”



Evidential  
value of  
compliance  
certificate

... Subject to section ..., an adoption compliance certificate shall be evidence, for the purposes of any written law, that the adoption to which the certificate relates—

(a) was agreed to by the central authorities mentioned in the certificate; and

(b) was carried out in accordance with the Convention.

Effect of  
recognition  
of  
intercountry  
adoption

... If the adoption of a child is recognized under section ..., <sup>115</sup> the adoption has in Malawi the effect set out in section .... <sup>116</sup>

Refusal to  
recognize  
intercountry  
adoption or  
article 27  
decision

... —(1) The Central Authority may make a declaration with the effect that the adoption to which section ... <sup>117</sup> applies or a decision made in terms of article 27 of the Convention may not be recognized in Malawi if the adoption or decision is manifestly contrary to public policy in Malawi, taking into account the best interests of the child.

(2) If the Central Authority declares that an adoption or decision referred to in subsection (1) may not be recognized, the adoption or decision shall have no effect in Malawi.

Application  
to High  
Court for  
intercountry  
adoption of  
child

... —(1) Where the Central Authority refuses to recognize an intercountry adoption under section ... <sup>118</sup>, an application for the adoption of a child from a Convention country may be made to the High Court.

(2) The provisions of Part ... <sup>119</sup> may, with the necessary changes, where the context requires, apply to the adoption of the child referred to in subsection (1).

Access to  
information

... Subject to the provisions of section ..., <sup>120</sup> the Central Authority may disclose to a person over the age of eighteen (18) years who, as a child, was adopted in accordance with the Convention, any information in the records of the Central Authority relating to that person's origin.

Prohibition  
on processing  
or facilitating  
intercountry  
adoption

... —(1) A person shall not process or facilitate an intercountry adoption otherwise than under this Part.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of two

<sup>115</sup> Section on "Recognition of intercountry adoption from Convention country".

<sup>116</sup> Section on "Effect of adoption order".

<sup>117</sup> Section on "Recognition of intercountry adoption from convention country".

<sup>118</sup> Section on "Refusal to recognise intercountry adoption or Article 27 decision".

<sup>119</sup> Part on Adoption.

<sup>120</sup> Section on "Confidentiality on records".

**million Kwacha (K2,000,000) and to imprisonment for five (5) years.**

## 7. OFFENCES

Adoption is an emotional process and for many prospective adoptive parents the possibility of having a long awaited child of their own may influence them to engage in illegal or unethical practices. The lengthy legal process, stringent screening, counselling and other administrative processes are known to drive a person, whose reasoning is impaired by the emotions stirred by the very processes, to bypass certain requirements or to speed up the process by offering money or other payments. Desperate birth parents, especially mothers who may have no other form of support may also be tempted to offer up their children in exchange for some kind of payments. The Commission observed that with the global demand for children in the illicit sex trade, unethical adoptions, organ extraction and forced labour services, a number of criminal syndicates have taken advantage of weak adoption laws to traffick children. The Commission therefore decided that in order to ensure the protection of the best interests of children and to prevent the abduction, sale or trafficking of children, it was important to identify known areas of abuse or bad practices associated with adoption and to come up with provisions aimed at curbing or eliminating such practices.

### *7.1 Suppression of improper financial gain*

The Commission noted that sections 4 and 10 of the Adoption of Children Act prohibit the exchange of payment or reward as consideration for the adopted child. It is irrelevant whether such payment is direct or indirect. The Act does not however, attach any penal sanctions as a consequence to accepting or offering the exchange of payments for a child. The court may refuse to grant an adoption order if there is evidence of exchange of payments. It was the view of the Commission however, that an offence as serious as this which is referred to in article 8 of the Hague Convention must be dealt with severely.

It is customary in many jurisdictions to have penalties and sanctions attached to various activities that are prohibited in relation to adoption. The fines under the American Uniform Adoption Act range from \$5,000 to \$10,000 for such things as paying or giving to any other person, or requesting, receiving, or accepting money or anything of value, directly or indirectly, for the placement of a minor for adoption; the consent of a parent, a guardian, or an agency to the adoption of a minor; or the relinquishment of a minor to an agency for the purpose of adoption.<sup>121</sup>

The Commission recommends creation of a similar offence in the proposed law punishable by 7 years imprisonment and a fine of one million Kwacha (K1,000,000).

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<sup>121</sup> Title 7:02.

## 7.2 *Failure to disclose information*

The adoption process thrives on information. In order for proper decisions to be reached by the courts and for all the parties to make informed decisions, proper information must be available. Under the American Uniform Adoption Act, this offence is committed by a person other than a parent, who has a duty to disclose non-identifying information and fails to do so. The offence attracts civil penalties but also attracts criminal penalties where the perpetrator intentionally destroys information meant to facilitate the right of access to information for the adopted child and adoptive parent. The Commission recommends the inclusion of this offence to be punishable by three (3) years imprisonment and a fine of five hundred thousand Kwacha (K500,000) regardless of who commits the offence and regardless of whether the information is deliberately destroyed.

## 7.3 *Unauthorized disclosure of information*

As noted earlier, information disclosed during the adoption process is of a highly confidential nature and all parties in the process that are privy to or keep adoption records are placed under a duty to ensure confidentiality. The Commission thus recommends that unauthorized disclosure of information from reports or records made confidential by the Act should be an offence punishable by three (3) years imprisonment and a fine of five hundred thousand Kwacha (K500,000).

## 7.4 *Advertising*

The Commission was aware that in certain jurisdictions, adoption service providers, especially adoption agencies or societies, routinely advertise children for adoption. Catalogues or photo-listings of such children are posted on websites so that prospective adoptive parents can pick out the child they want to adopt.

The Commission has already expressed its dissatisfaction with a system that does not provide for a professional matching service, facilitated by accredited social workers. The Commission was therefore of the view that advertising children or any form of adoption services should be proscribed by the law. Laurie Frisch, an internet anti-adoption advertising activist condemns this practice as follows—

“This is such an invasion into these kids lives, exposing to the entire world that they are an orphan or making it out that they haven’t got anyone to love them.”<sup>122</sup>

Furthermore, some internet advertisers advertise the children, especially girls in such an inappropriate manner that it looks as if they are advertising their sexuality. Ultimately advertising attracts the wrong people, such as pedophiles or traffickers.<sup>123</sup>

<sup>122</sup> Laurie Frisch, Internet Photolistings of Children—Not in the child’s Best Interests. <http://www.exiledmothers.com/speaking-out/adoption-photolistings.htm>.

<sup>123</sup> *Ibid.*

In order to deter the practice of advertising, the Commission recommends that the offence of advertising should be punished not by a fine, but by a prison sentence. The Commission recommends that the prison sentence should be 7 years.

### *7.5 Interfering with the child's upbringing*

The Commission reiterated its earlier recommendation against permitting post adoption contact. The Commission considered that such contact is generally detrimental to the best interests of the child since birth parents may wish to have a say in the child's upbringing in terms of religion or education and their views on these issues may be contrary to the views of the adoptive parents. The divergence in opinions may have a detrimental effect on the child. In other cases, birth parents unable to come to terms with the feelings of loss and guilt associated with consenting to the adoption have been known to kidnap or abduct the child for the purposes of reunification. In order to prevent or curtail this kind of behaviour the Commission recommends that any unauthorized contact or communication between the birth parents and the child and his or her adoptive parents should be proscribed. Where the unsolicited contact does not go any further than communicating with or visiting the child, or interfering with the upbringing of a child the Commission recommends that this offence should be punishable by a fine of two hundred thousand Kwacha (K200,000).

Cases where the birth parent commits the more serious offences of kidnapping, abduction and harbouring a kidnapped or abducted child are already adequately provided for under the Penal Code. Section 257 of the Penal Code criminalizes the offence of kidnapping from the Republic, and section 258 criminalizes the offence of kidnapping from lawful guardianship. The penalties for both offences are seven (7) years imprisonment. Abduction is criminalized under section 259 of the Penal Code. The penalty is the same as kidnapping. The Commission did not find it necessary to duplicate these offences.

### *7.6 Offences relating to tampering with documents*

The Commission noted that various jurisdictions specifically provide for offences connected to tampering with documents in their laws on adoption. These offences typically include forgery, improperly consenting to adoption, uttering false documents and making false statements. The Commission noted that proscribing these activities is of the utmost importance to a process such as adoption, the existence of which can only be evidenced by certified documentation. A properly signed adoption order is conclusive evidence that a child has been legally adopted. It is the adoption order that facilitates the transfer of the benefits of the adoptive parents to the child. These benefits include immigration status, social security benefits, inheritance rights and employment related child benefits. Traffickers wishing to pass off the child as their own may forge either adoption orders or any other adoption documents that would enable the child to be transported from country to country without raising suspicion. In

other instances, unscrupulous persons may forge the signatures of birth parents so that they can put a child up for adoption with the possibility of benefitting from the adoption. All these instances of abuse have severe consequences on the child. It is therefore very important to protect the integrity of the adoption process so that it is not abused.

The Commission however noted that all the offences related to the falsification of documents are already criminalized under the Penal Code. These offences are the general offences of forgery under section 351, forgery of official or judicial documents under section 358, uttering false documents under section 360, procuring execution of documents by false pretences under section 362 and making documents without authority under section 364. The penalty for all these offences is seven (7) years imprisonment.

The Commission was satisfied that the Penal Code provides adequate penalties for these offences.

### *7.7 Undue influence or duress*

The integrity of the adoption process depends upon consent that is given freely by the birth parents. Most forms of improper conduct in adoption proceedings stem from improperly obtained consent. Birth parents can either be forced or unduly influenced by threats or inducements of a pecuniary nature or other forms of benefit or advantage. The Commission therefore proposes that unduly influencing any person to facilitate any of the processes required by adoption should be specifically criminalized with a penalty of seven (7) years imprisonment.

### *7.8 Unauthorized adoption arrangements*

In order to ensure that only those authorities recognized under the law provide adoption services, the Commission recommends that any person who does anything not specifically provided for in the law and not covered by the proposed offences, should be punished under general offences. The Commission recommends that the penalty for these general offences should be imprisonment for a term of seven (7) years.

The Commission therefore recommends the following Part on offences—

## **PART ... —OFFENCES**

**Unauthorised ... —(1) A person, who by reason of the adoption of a child  
communicati has ceased to be and is no longer the parent or guardian of  
on the child, shall not—**

**(a) take, lead or entice the child away, or detain the child with intent to deprive the adoptive parents of possession of the child;**

(b) interfere in or influence the upbringing of the child, or the relationship of the child with the adoptive parents; or

(c) communicate with the child, or with any other person who, to the knowledge of the person, is the adoptive parent of the child, except where—

(i) the court that granted the adoption made an order for continued contact between that person, the child and the adoptive parents; or

(ii) the adoptive parent is related to the child.

(2) Any person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of five hundred thousand Kwacha (K500,000) and to imprisonment for three (3) years.

Habouring a child taken from adoptive parents

... A person who knowingly receives or harbours a child who has been taken, led or enticed from his adoptive parents commits an offence and shall, upon conviction, be liable to imprisonment for five (5) years.

Payments in consideration for adoption

... —(1) A person shall not make, give or receive or agree to make, give or receive, a payment or reward for or in consideration of—

(a) the adoption or proposed adoption of a child;

(b) the giving of consent to or the signing of an instrument of consent, for the adoption of a child;

(c) the transfer of possession or custody of a child with a view to the adoption of a child; or

(d) the making of arrangements with a view to the adoption of a child.

(2) Any person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of one million Kwacha (K1,000,000) and to imprisonment for five (5) years.

Prohibition on advertising

... —(1) A person shall not publish, or cause to be published in any form of media, public exhibition, news item or other communication indicating that—

(a) a parent or guardian of a child wishes to have a child adopted;

(b) a person wishes to adopt a child; or

(c) a person is willing to make arrangements in order to facilitate the adoption of a child.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to fine of two million Kwacha (K2,000,000) and to imprisonment for seven (7) years.

Undue  
influence

... A person who—

(a) promises or uses a pecuniary or other advantage;

(b) uses or threatens to use any force or restraint;

(c) does or threatens to do any injury; or

(d) causes or threatens to cause any detriment of any kind,

to a parent or a guardian of a child with a view to—

(i) inducing the parent or guardian to offer or refrain from offering the child for adoption under this Act;

(ii) influencing the parent or guardian in the expression of any wishes contained in an instrument of consent to the adoption of a child; or

(iii) inducing the parent or guardian to revoke a consent to the adoption of the child given by the parent or guardian,

commits an offence and shall, upon conviction, be liable to imprisonment for seven (7) years.

Restriction  
on  
publication of  
identity of  
parties

... A person who publishes or causes to be published in any form of media, public exhibition, news item or any other communication in relation to an application under this Act or an application to be considered for entry in the Prospective Adoptive Parents Register—

(a) the name of the applicant;

(b) the name of a child;

(c) the name of a father or mother or guardian of the child; or

(d) any other matter reasonably likely to enable any of the persons referred to in paragraph (a), (b) and (c) to be identified,



**commits an offence and shall, upon conviction, be liable to a fine of two million Kwacha (K2,000,000) and to imprisonment for seven (7) years.**

Unauthorised  
adoption  
arrangement

**... —(1) A person shall not unless duly authorised by the Minister, conduct or attempt to conduct any negotiation or make or attempt to make any arrangement or do anything with a parent or guardian of a child for or towards facilitating the adoption of the child.**

**(2) Any person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to imprisonment for seven (7) years.**

Failure to  
disclose  
information

**... A person who fails to provide any information required under this Act commits an offence and shall, upon conviction, be liable to imprisonment for three (3) years.**

Unauthorised  
disclosure of  
confidential  
information

**... A person who, having possession of, or control over any documents, records or information who at any time communicates or discloses any such information or anything contained in such documents or records to any person other than—**

**(a) the court, the Minister or the Director of National Registration;**

**(b) a legal practitioner representing an applicant or a guardian *ad litem* appointed under this Act; or**

**(c) for the purposes of this Act,**

**commits an offence and shall, upon conviction, be liable to a fine of one million Kwacha (K1,000,000) and to imprisonment for five (5) years.**

## 8. FEES AND CHARGES

Adoption services generate a lot of costs as service providers are usually highly skilled professionals who must be paid for the services they render. In addition, the process involves various transaction costs, such as transportation costs to carry out home visits and attend court and costs associated with the production of reports and maintenance of records. After the adoption process, persons wishing to trace their roots also do so at a cost. In Malawi, as the adoption service is provided by the State, the expectation is that the service is free. This expectation is reinforced by the lack of prescribed fee structure in the Adoption of Children Act.

At times, adoptive parents provide social workers with either actual transport or money for fuel but this practice is not regulated by law. In order to dispel perception of collusion and improper financial gain between adoptive parents and

social workers, the Commission recommends adoption of provisions that should regularize the practice and give powers to the Minister to prescribe fees and charges for the various services provided in relation to adoption. The Commission was aware that the Convention advocates the establishment of a transparent fee structure to prevent improper financial gain. The Commission thus recommends the following items for which reasonable fees may be charged—

- (a) medical, hospital, nursing, pharmaceutical, travel or other similar expenses incurred by a mother or her minor child in relation to the birth or any illness of the minor;
- (b) counselling services for a parent or minor for a reasonable time before and after the adoption;
- (c) expenses incurred in ascertaining information on background;
- (d) court costs, and any travel or other administrative expenses connected with adoption, including any legal services performed for a parent who consents to the adoption of a minor;
- (e) expenses incurred in obtaining a pre-placement evaluation and an evaluation during the proceedings for adoption; and
- (f) any other expenses incurred in connection with an adoption that the court may find reasonable.

The Commission recommends that these payments should not be made contingent on a birth parent’s performance of any promise to place a child up for adoption, consent to an adoption, or relinquish the child. The Commission further recommends that the rates charged for these services should be in the form of a sliding scale so that those who have the means to pay should be charged higher fees than those with less resources.

The Commission therefore recommends adoption of the following provisions—

Fees and charges	<p><b>... —(1) Notwithstanding the provisions of section ..., <sup>124</sup> fees and charges may be payable for the provision of the following adoption services—</b></p> <p><b>(a) medical, hospital, nursing, pharmaceutical, travel or other similar expenses incurred by the birth mother with respect to the birth of the child or in connection with any illness of the child where the application for adoption is filed within three (3) months of the birth or the illness;</b></p> <p><b>(b) counselling services for the birth parents, the adoptive parents or the child for a period not exceeding three (3) months or such other period as may be necessary;</b></p>
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<sup>124</sup> Section on “Payments in Consideration for adoption”.

(c) expenses incurred in ascertaining information on the background of the child;

(d) expenses incurred in ascertaining information for any report prepared under this Act;

(e) court costs and travel or administrative expenses in connection with an adoption; or

(f) any other service approved by the court.

(2) The adoptive parent shall pay the fees and charges for adoption services as prescribed by the Minister.

## 9. SUBSIDIARY LEGISLATION

### 9.1 *Power to make regulations*

The Commission noted that the Adoption of Children Act does not give the Minister express power to make regulations or rules. This is quite an omission considering that it is standard practice to give the Minister power to make rules and regulations in a piece of legislation. The Commission therefore recommends the following provision—

Rules and  
regulations

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

(2) Without prejudice to the generality of subsection (1), such regulations may provide for the following—

(a) the keeping and maintaining of the Prospective Adoptive Parents Register, the Register of Children Eligible for Adoption and the Adopted Children Register;

(b) prescribing procedures for determining whether a child has been abandoned by a parent or other person who has parental responsibilities and rights in respect of the child;

(c) determining procedures to be followed to locate persons whose whereabouts are unknown for obtaining their consent to adoptions;

(d) regulating the making of intercountry adoptions and prescribing safeguards therefor;

(e) prescribing the manner in which arrangements for adoption shall be conducted; and

(f) regarding any other ancillary or incidental administrative or procedural matter that may be

**necessary to facilitate the proper implementation or administration of this Act.**

**9.2 *Adoption of Children (Subordinate Court) Rules/Adoption of Children (High Court) Rules***

The Commission noted that the Adoption of Children Act has two sets of subsidiary legislation. These are the Adoption of Children (Subordinate Court) Rules and the Adoption of Children (High Court) Rules. The two sets of Rules are very similar each providing for procedural issues regarding the conduct of adoption proceedings, the form of documents to be used and costs. The Commission considered this a duplication. The Commission therefore recommends that the new law should contain a set of Rules to cover the practice and procedure in both the Child Justice Court and the High Court.

The Commission then took time to review the Rules, with a view to deciding which ones to maintain or discard. The Commission's deliberations in this regard were as follows—

**RULE 3 [*Application to be by Petition*]<sup>125</sup>**

The rule provides that an application for an adoption should be made by petition. The Commission considered this a substantive matter and more appropriate for inclusion in the principal legislation as has been recommended earlier. The Commission thus recommends deletion of the rule.

**RULE 4 [*Who are to be served*]**

The rule lists down the people who may be served with a petition in adoption proceedings. The Commission was satisfied that each of the persons listed, namely the parent or parents of the child; the guardian or guardians of the child; person(s) having actual custody; or person (s) liable to contribute support to the child, should be served with the adoption application, with the court exercising its discretion to dispense with the service to any of these persons or include any other person to be served.

**RULE 5 [*Consents in Writing*]**

The rule requires every consent to be in writing in accordance with a prescribed form and to be attested by one witness. The Commission endorses the rule but recommends that the attesting witness should be the Commissioner for Oaths.

**RULE 6 [*Mode of Service*]**

The rule requires service to be by post in a registered envelope and that service is deemed to have been effected at the expiration of such period of time

<sup>125</sup> The numbering of the rules applies to both the Adoption of Children (Subordinate Court) Rules and the Adoption of Children (High Court) Rules.

as may seem proper to the court. The Commission found this requirement to be outdated in view of advances in telecommunication. The Commission observed that the Rules of the Supreme Court for service stipulate service by fax and in person in addition to postal service. The Commission found no reason why adoption proceedings should have their own set of service rules. The Commission was of the view that the rules of the particular court in which the matter is heard should apply. The Commission therefore recommends that the rule be redrafted as follows—

Mode of service	<b>... A petition or any other document shall be served in accordance with the practice and procedure for the time being obtaining in the court in which the application for adoption is made.</b>
-----------------	--

RULE 7 [*Verification by Affidavit*]

Rule 7 requires that the adoption petition be verified by affidavit evidence unless either the Judge or the magistrate thinks proper to direct that evidence be given orally. The Commission recommends the retention of this provision subject to the substitution of the reference to both the Judge and the magistrate with “**court**” in view of the recommendation to merge the rules. The new rule shall read as follows—

Verification by affidavit	<b>... —(1) A petition shall be verified by affidavit.</b>
	<b>(2) Notwithstanding sub rule (1), the court may direct that the evidence be given orally.</b>

RULE 8 [*Guardian ad litem*]

This rule requires the magistrate or judge to appoint a guardian *ad litem* to the child and cause the petition to be served on the guardian *ad litem*. The Commission noted that it had already recommended provisions in the principal legislation in which a guardian *ad litem* is to be appointed as soon as is practicable at the application of the petitioner or of its own motion. The Commission recommends the retention of this rule only in so far as it relates to the requirement of service of the petition to be effected on the guardian *ad litem* and also recommends that the term “infant” be deleted and replaced with “**child**” as follows—

Guardian <i>ad litem</i>	<b>... The child shall be a respondent to the petition and the court shall cause the petition to be served on the guardian <i>ad litem</i>.</b>
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RULE 9 [*Notice of Hearing*]

The Commission recommends the retention of this provision subject to deletion of the reference to either “Judge” or “magistrate” and replacement with “**court**”. Similarly, the Commission recommends that the prescribed form in the

Schedule be amended to include both the Child Justice Court and the High Court in view of the recommendation to merge the two sets of rules.

RULE 10 [*Secrecy*]

The Commission noted that several provisions have already been proposed in relation to secrecy and confidentiality in the principal legislation and recommends deletion of this rule subject to shifting the second sentence requiring the hearing of petitions and applications on adoption in camera to the main Act, specifically in the provision dealing with applications for adoption.

RULE 11 [*Copies of order*]

The Commission observed that this rule is an extension of the confidentiality requirements. It provides that the copies of an order can only be served on the Registrar of Births and Deaths and the petitioner, unless the court direct otherwise. The Commission recommends the retention of this provision subject to replacing the “Registrar of Births and Deaths” with the “**Director of National Registration**” as this function has now ceded to him under the **National Registration Act**, Act No. 13 of 2010. The Commission also recommends that the term “magistrate” should be replaced with the term “**court**” as this is the court seized with adoption matters under the Child (Care, Protection and Justice) Act.

RULE 12 [*Duty of guardian ad litem*]

The Commission has already recommended in this Report that the duties of the guardian *ad litem* should be included in the principal legislation and recommends deletion of the rule.

RULE 13 [*Information to be confidential*]

The Commission noted that the requirement for information to be confidential has already been included in the principal legislation. However, the Commission decided to retain this provision to emphasize the point.

RULE 14 [*Presence of parties*]

The Commission has already recommended in this Report, that the requirement for the parties to be present in person should be in the principal legislation.

The Commission therefore recommends deletion of the provision.

RULE 15 [*Previous applications*]

The rule requires that the court should not make an adoption order where a petitioner has made a previous application under the Act in respect of the same infant and that such application has been refused, unless satisfied that there has been a substantial change in the circumstances since the previous application. The

Commission recommends the retention of this provision subject to amendment by deleting the word “infant” and replacing it with the word “**child**”.

RULE 16 [*Cases more fit for High Court and cases more fit for subordinate court*]

Each of the Rules makes provision for the transfer of cases more suited for either the subordinate court or the High Court. The court dealing with such a matter should not make an order. In view of the recommendation to merge the Rules, the Commission considers that the power to refer the case to the alternative court should be made clear and recommends adoption of the following provision—

- |                   |  |
|-------------------|--|
| Referral of cases | <p>... —(1) If, owing to special circumstances, an application appears to the Judge to be more suitable to be dealt with by a Child Justice Court, the Judge may, on that ground, expressly refuse to make an order.</p> <p>(2) If, owing to special circumstances, an application appears to the magistrate to be more fit to be dealt with by the High Court, the magistrate may, on that ground expressly, refuse to make an order.</p> <p>(3) Where the court seized with the matter refuses to make an order pursuant to sub rule (1) or (2), the court shall refer the case to the appropriate court and the court to which the matter is referred shall proceed as though the petition was filed in that court.</p> |
|-------------------|--|

RULE 17 [*Supervision of infant*]

The rule provides that an interim order may provide for the court supervision of the infant by the guardian *ad litem* or otherwise as the magistrate or High Court may think advisable.

The Commission recommends retention of this provision subject to replacing “magistrate/High Court” with “**court**” and the word “infant” to be substituted with the word “**child**”.

RULE 18 [*Sealed copy of order to Registrar General*]

The rule requires the court to forward a sealed copy of an adoption order to the Registrar General of Births and Deaths upon the making of such order. In view of the recently passed National Registration Act, the Commission recommends that the reference to “Registrar General of Births and Deaths” be replaced with the “**Director of National Registration**”.

RULE 19 [*Costs*]

The Commission recommends deletion of this rule on the basis that the issue of costs has been recommended for inclusion in the principal legislation.



RULE 20 [*Safe custody of documents*]

The rule requires the court to keep petitions, consents and other documents to any application or order made under the Act in a place of special security.

The Commission recommends retention of this provision.

RULE 21 [*Subordinate court practice to apply and High Court practice to apply*]

In view of the recommendations made under rule 6 relating to practice and procedure in adoption proceedings, the Commission recommends redrafting of this provision to read as follows—

<p><b>High Court and Child Justice Court practice to apply</b></p>	<p><b>... The practice and procedure for the time being obtaining in the High Court and the Child Justice Court shall apply to all proceedings under the Act.</b></p>
--	---

RULE 22 [*Schedule Form*]

The rule provides for the forms to be used in applications under this Act. The Commission recommends retention of this provision.

### 9.3 *Other Provisions*

The Commission also took time to consider the subsidiary legislation of other countries in order to determine other issues of procedure and practice to include in its recommendations. The Commission's deliberations as to which additional issues were pertinent to Malawi were as follows—

#### (a) *International Cooperation*

The Commission was mindful that although it has made recommendations compliant to the Hague Convention in as far as intercountry adoption is concerned, Malawi is not yet a signatory to that Convention. In order to further assist in the facilitation of intercountry adoption, the Commission recommends that the Government should ratify the Convention.

#### (b) *Matching and placements*

The Commission was of the opinion that the provisions it has recommended for matching the child with prospective adoptive parents before any placement, would require more detailed rules to assist in practice. These details relate to the length of time between assessment of the prospective adoptive parents as eligible and hence their inclusion in the Prospective Adoptive Parents Register and the length of time taken to place a child with them. The lapse of time would enable social workers to guard against placing the child with a prospective adoptive parent whose circumstances have changed since the assessment, whether financially, socially, morally or in terms of criminal record.

The Commission therefore recommends the inclusion of the following provision in the Rules—

Review of suitability of prospective adoptive parents

**... Where a person has been assessed and approved as a suitable prospective adoptive parent by the Director and his name has been entered in the Prospective Adoptive Parent Register, the Director shall not recommend that such person adopt a child if more than twenty four (24) months have elapsed since the date of entry into the Prospective Adoptive Parent Register unless—**

**(a) the Director is of the opinion that at the time of filing the adoption petition, the person is still a suitable prospective adoptive parent; or**

**(b) the Director has reviewed the person’s circumstances and is satisfied that the person is still a suitable prospective adoptive parent.**

The Commission also recommends that the Prospective Adoptive Parents Register should not be perceived as unchangeable. Parents who are considered eligible may subsequently experience such a change in circumstances as to necessitate their removal from the Register. In such circumstances rules of natural justice require that the affected parties be given a chance to be heard before their names are removed and that provisions should be made for re-entering the names if circumstances change again.

The Commission thus recommends the following provisions—

Deletion of names from the Prospective Adoptive Parent Register

**... For the purposes of section ... <sup>126</sup> of the Act, the name of a person may be deleted from the register if—**

**(a) the person so requests;**

**(b) the person is found by the Director to be unsuitable to adopt a child;**

**(c) the person no longer satisfies the criteria applying to that person under section ... <sup>127</sup> of the Act; or**

**(d) the person adopts a child under the Act.**

Notification of deletion

**... A person whose name has been deleted from a register shall be advised in writing—**

**(a) that his name has been deleted and the reason for the deletion; and**

<sup>126</sup> Section on “Prospective Adoptive Parent Register”.

<sup>127</sup> Section on “Application for adoption”.

**(b) that he may apply to the Director in the manner set out in rule ...<sup>128</sup> to have his name re-entered in the register.**

**Application to have name re-entered in register ... If a person's name has been deleted from the register on the basis that the person has been assessed to be no longer suitable as an adoptive parent, the person may apply to the Director to have his name re-entered in the register.**

**Grounds for re-entering name in register ... Where a person applies to the Director that his name be re-entered in the register, the Director may re-enter that person's name in the register if—**

**(a) he is satisfied that there has been a proper review of the decision to remove this name and it is consistent with the outcome of the review to re-enter the person's name in the register; or**

**(b) he is satisfied that the person continues to satisfy the criteria applying to that person under section ...<sup>129</sup> of the Act.**

**Names re-entered in previous position ... If the Director decides to re-enter a name in a register, he may also direct that the name be placed in the same position that it was in before the name had been deleted.**

**(c) *Means of proving identity***

The verification of a person's identity is a crucial requirement in all matters connected to or pertaining to an adoption. Primarily, prior to the proceedings, it must be ascertained that the rightful persons are consenting to the adoption. Also equally important is the issue of releasing confidential information to appropriate persons. It would be unfortunate if confidential information relating, for example, to an adopted person's birth parents, was revealed to the wrong person. Therefore, in order to ensure that confidentiality is maintained and ensure the integrity of the adoption process, the Commission considered it prudent to provide for procedure for proving identity.

The Commission recommends the following provisions—

**Proof of identity ... —(1) A person may prove his identity by producing for inspection to the Director one of the following—**

**(a) identity card;**

**(b) the person's valid passport; or**

**(c) the person's valid motor driver's licence.**

**(2) Where a person is required to prove, or satisfy another person concerned with adoption as to his identity,**

<sup>128</sup> Rule on "Application to have name re-entered in the Register".

<sup>129</sup> Section on "Applicants for adoption".

**the person is to prove his identity by producing any one of the documents issued under subsection (1).**

10. MISCELLANEOUS

10.1 *Social Workers Regulatory Body*

The Commission expressed grave concern at the fact that although social workers play a central role in the adoption process, social work as a profession is not regulated in Malawi. The Commission noted, for example, in contrast that the legal profession, the medical and nursing professions are regulated by professional bodies that ensure the quality of services provided and regulate matters of discipline and ethics. The regulatory bodies for these professions also ensure that the professionals are educated up to the requisite level in order to hold themselves out as members of that profession. With the advent of social work professional training being offered in the country and the Ministry’s quest to have social workers educated up to degree level in the future, the Commission recommends that the Government, through the Ministry responsible should also establish mechanisms to regulate social work.

10.2 *Repeal of the Adoption of Children Act*

In view of the extensive nature of the recommendations made in this Report, the Commission recommends repeal of the Adoption of Children Act and recommends the following provision in this regard—

Repeal and savings Cap. 26:01	<p><b>... —(1) The Adoption of Children Act is hereby repealed.</b></p> <p><b>(2) Any subsidiary legislation made under the Act repealed by subsection (1), in force immediately before the commencement of this Act—</b></p> <p><b>(a) shall remain in force unless inconsistent with this Act and be deemed to be subsidiary legislation made under this Act; and</b></p> <p><b>(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.</b></p>
Transitional	<p><b>... Where at the commencement of this Act, adoption proceedings have been commenced under the Adoption of Children Act (now repealed) the proceedings and all related matters shall be dealt with as if they have been commenced under this Act and any court dealing with the matter shall continue as if it has jurisdiction under this Act.</b></p>

## ADOPTION OF CHILDREN ACT

*Section ...*ANNEX I: REPORT CONCERNING THE PSYCHOLOGICAL AND  
SOCIAL CIRCUMSTANCES OF THE CHILD

Please respond to each statement as appropriate for children aged 0-5 years

**Activity with toys:**

- ☐ The child's eyes follow rattles/toys, that are moved in front of the child
- ☐ The child holds on to a rattle
- ☐ The child plays with rattle: putting it in the mouth, shaking it, moving it from one hand to the other, etc.
- ☐ The child puts cubes on top of each other
- ☐ The child plays purposely with toys: pushes cars, puts dolls to bed, feeds doll, etc.
- ☐ The child plays role-play with toys with other children
- ☐ The child draws faces, human beings or animals with distinct features
- ☐ The child cooperates in structured games with other children (ball games, card games, etc.)
- ☐ No observation available

**Language development:**

- ☐ The child vocalizes in contact with caregiver
- ☐ The child repeats different vowel-consonant combinations (ba-ba, da-da, ma-ma, etc.)
- ☐ The child uses single words to communicate needs
- ☐ The child speaks in sentences
- ☐ The child understands prepositions as: on top of, under, behind, etc.
- ☐ The child uses prepositions as: on top of, under, behind, etc.
- ☐ The child speaks in past tense
- ☐ The child writes his own name
- ☐ The child reads simple words
- ☐ No observation available

**Motor development:**

- ☐ The child turns from back to stomach from age: .....
- ☐ The child sits without support from age: .....
- ☐ The child crawls/moves forwards from age: .....
- ☐ The child walks with support from furniture from age: .....
- ☐ The child walks alone from age: \_\_\_\_\_
- ☐ The child walks up and down stairs with support where applicable from age: \_\_\_\_\_

- ☐ The child walks up and down stairs without support from age: \_\_\_\_\_
- ☐ The child rides a bicycle without support from age: \_\_\_\_\_

**Contact with adults:**

- ☐ The child smiles in contact with known caregiver
- ☐ The child is more easily soothed when held by known caregiver
- ☐ The child cries/follows known caregiver, when the caregiver leaves the room
- ☐ The child actively seeks known caregiver when he/she is upset or has hurt him/herself
- ☐ The child seeks physical contact with all adults, that come into the room
- ☐ The child communicates his feelings in words to caregivers

**Contact with other children:**

- ☐ The child shows interest in other children by looking or smiling at their activity
- ☐ The child enjoys playing beside other children
- ☐ The child engages actively in activities with other children

**General level of activity:**

- ☐ Passive
- ☐ Active
- ☐ Overactive

**General mood:**

- ☐ Sober, serious
- ☐ Emotionally indifferent
- ☐ Fussy, difficult to soothe
- ☐ Happy, content

Any additional comments?

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
Stamp of the examining person

\_\_\_\_\_  
Date

ANNEX II: MEDICAL REPORT ON THE CHILD

A duly licensed physician should complete this report.

Please answer all questions.

If the information in question is not available please state “unknown”.

<b>A. Medical History of the child</b>			
Name of the child:			
Date of birth:			
Sex:			
Place of birth:			
Nationality:			
Name of the mother:			
Date of her birth:			
Name of the father:			
Date of his birth:			
Name of the guardian:			
Date of birth:			
Name of the present institution:		placed since:	
Weight at birth:	kg.	At Examination:	kg.
Length at birth:	cm.	At Examination:	cm.
Was the pregnancy and delivery normal?			
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know			
Where has the child been staying?			
<input type="checkbox"/> with his/her mother	from	to	
<input type="checkbox"/> with relatives	from	to	
<input type="checkbox"/> in private care	from	to	
<input type="checkbox"/> in institution or hospital	from	to	
(please state below the name of the institution or institutions concerned)			



Has the child had any diseases in the past?

(If yes, please indicate the age of the child with respect to each disease, as well as any complication)

☐ Yes      ☐ No      ☐ Do not know

If yes:

Ordinarily children's diseases (whooping cough, measles, chicken-pox, rubella, mumps)?

Tuberculosis? ☐ Yes      ☐ No      ☐ Do not know

Convulsions (incl. Febrile convulsions)? ☐ Yes      ☐ No      ☐ Do not know

Any other disease? ☐ Yes      ☐ No      ☐ Do not know

Exposure to contagious disease? ☐ Yes      ☐ No      ☐ Do not know

Has the child been vaccinated against any of the following diseases:

☐ Yes      ☐ No      ☐ Do not know

If yes:

Tuberculosis (B.C.G.)      Date of injection

Diphtheria?      Date of injection

Tetanus?      Date of injection

Whooping cough?      Date of injection

Poliomyelitis?      Date of injection      Date of oral vaccinations:

Hepatitis A?      Date of injection

Hepatitis B?      Date of injection

Other immunizations?      Date of injection

Has the child been treated in hospital?

☐ Yes      ☐ No      ☐ Do not know

If yes state hospital, age of child, diagnosis and treatment:

Give if possible a description of the mental development, behaviour and skills of the child.

Visual <input type="checkbox"/> unknown	When was the child able to fix?
Aural <input type="checkbox"/> unknown	When was the child able to turn its head after sounds?
Motor <input type="checkbox"/> unknown	When was the child able to sit by itself?

Stand with support?

Walk without support?

Language

☐ unknown      When did the child start to prattle?  
Say single words?  
Say sentences?

Contact When did the child start to smile?  
☐ unknown How does it react towards strangers?  
 How does it communicate with adults and other children?

Emotional  
☐ unknown How does the child show emotions (anger, uneasiness, disappointment, joy)?

## B. Medical examination of the child

Date of the medical examination:

Weight: kg date:

Height: cm date:

Head circumference cm date:

Colour of hair: Colour of eyes: Colour of skin:

Through my complete clinical examination of the child I have observed the following evidence of disease, impairment or abnormalities of:

Date of the examination:

Head (form of skull, hydrocephalus, craniotabes)

Mouth and pharynx (harelip or cleft palate, teeth)

Eyes (vision, strabismus, infections)

Ears (infections, discharge, reduced hearing, deformity)

Organs of the chest (heart, lungs)

Lymphatic glands (adenitis)

Abdomen (hernia, liver, spleen)

Genitals (hypospadias, testis, retention)

Spinal column (kyphosis, scoliosis)

Extremities (pes equinus, valgus, varus, pes calcaneovarus, flexation of the hip, spasticity, paresis)

Skin (eczema, infections, parasites)

Other diseases?

Are there any symptoms of syphilis in the child?

Result of syphilis reaction made (date and year):

☐ Positive ☐ Negative ☐ Not done

---

Any symptoms of tuberculosis?

Result of tuberculin test made (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

---

Any symptoms of Hepatitis A?

Result of tests for hepatitis A made (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

---

Any symptoms of Hepatitis B?

Result of tests for HBsAg (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

Result of tests for anti-HBs (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

Result of tests for HBeAg (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

Result of tests for anti-HBe (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

---

Any symptoms of AIDS?

Result of tests for HIV made (date and year):

☐ Positive                      ☐ Negative                      ☐ Not done

---

Symptoms of any other infectious disease?

---

Does the urine contain

Sugar?

Albumen?

Phenylketone?

---

Stools (diarrhoea, constipation):

Examination for parasites:

☐ Positive (species):                      ☐ Negative                      ☐ Not done

---

Is there any mental disease or retardation of the child?

---

Give a description of the mental development, behaviour and skills of the child.  
This is of particular value for advising the prospective parents.

---

Any additional comments?

Signature and stamp of the examining physician

Date

Name

Qualification

ANNEX III: ENQUIRY ON PROSPECTIVE ADOPTIVE PARENT

Particulars of female prospective adoptive parent

Full Names .....  
Physical Address.....  
Email Address..... Telephone No.....  
Postal Address.....  
Date of Birth..... Place of birth.....  
ID/Passport No.....  
Occupation.....  
Education.....  
Qualification.....  
Marital Status.....  
Date of Marriage..... Place of marriage.....  
Have you ever been convicted of an offence other than a traffic offence? .....  
If married do you intend to make a joint application for an adoption order?.....  
If No, give reasons.....  
.....  
Country of domicile..... Nationality.....  
Race..... Religion.....  
Immigration status.....  
Length of previous residence in Malawi.....  
Intended length of future residence in Malawi.....  
Income per month/other sources of income..... How far is the  
earning of the other persons living in the home included in the income?.....

Particulars of male prospective adoptive parent

Full Names .....  
Physical Address.....  
Email Address..... Telephone No.....  
Postal Address.....  
Date of Birth..... Place of birth.....  
ID/Passport No.....  
Occupation.....  
Education.....  
Qualification.....  
Marital Status.....  
Date of Marriage..... Place of marriage.....  
Have you ever been convicted of an offence other than a traffic offence? .....  
If married do you intend to make a joint application for an adoption order?.....  
If No, give reasons.....  
Country of domicile..... Nationality.....  
Race..... Religion.....  
Immigration status.....

Length of previous residence in Malawi.....  
Intended length of future residence in Malawi.....  
Income per month/other sources of income..... How far is the earning of the other persons living in the home included in the income?.....

Other Children in the Prospective Adoptive Family

Full Names	Date of Birth	Sex	Occupation
1. ....	.....	.....	.....
2. ....	.....	.....	.....
3. ....	.....	.....	.....

How many of the children are living at home?.....

What is the opinion of the children on the proposed adoption?.....  
.....

Have you adopted a child before? Yes..... No.....

If yes, give details.

Name	Date of Birth	Sex	Occupation
1. ....	.....	.....	.....
2. ....	.....	.....	.....
3. ....	.....	.....	.....

Details of their health status.....

Has any previous application for adoption been rejected? yes/no.....  
If yes give reasons.....  
.....  
.....

Accommodation and Condition of the Home

Description of the home.....  
Number of bedrooms..... Source of water.....  
Type of toilet / bathroom.....  
Type of house (permanent/semi-permanent/traditional).....  
Owner occupied or rented.....  
Assets/property.....  
Liabilities (loan, mortgage, etc.) .....  
Details of other people living in the home.....

Full names	Age	Sex	Relationship	Occupation
1. ....	.....	.....	.....	.....
2. ....	.....	.....	.....	.....
3. ....	.....	.....	.....	.....

Are the people living in the home in apparent good health?.....

Give names of responsible persons who can confirm or attest for your character and means—

	Name	Title/Occupation	Address	Tel/Email
1.	.....	.....	.....	.....
2.	.....	.....	.....	.....
3.	.....	.....	.....	.....

I certify that the information given above is true to the best of my knowledge.

Name..... Signature..... Date.....



#### ANNEX IV: MEDICAL PARTICULARS OF PROSPECTIVE ADOPTIVE PARENT

(The medical report must be signed by a medical practitioner)

1.
  - (a) Name of prospective adoptive parent;
  - (b) Date of birth;
  - (c) Sex;
  - (d) Address;
2. Is the prospective adoptive parent able to have natural children of his or her own and if not is the reason why he or she is unable to have such children known?
3. If any fertility tests have been made to the prospective adoptive parent what are/were the results of such tests?
4. Has the prospective adoptive parent suffered or is suffering from any of the following?
  - (a) tuberculosis;
  - (b) chronic bronchitis or recurrent chest illness;
  - (c) cardiovascular disease;
  - (d) any form of rheumatism;
  - (e) any form of neurosis or mental disorder;
  - (f) epilepsy;
  - (g) genitor-urinary disease;
  - (h) diabetes;
  - (i) any neurological disorder;
  - (j) leprosy; and
  - (k) any illness which might shorten the expectation of life or cause recurrent disability.
5. Has the prospective adoptive parent undergone any major surgical procedure?
6. Is there any relevant family history of mental or physical disease?
7. Is there any relevant abnormality in the following?
  - (a) cardiovascular system (blood pressure should be stated);
  - (b) respiratory system (if a chest X-ray is taken state date and result of such test);
  - (c) urogenital (state quality of albumin and sugar in urine);
  - (d) abdomen and alimentary;
  - (e) central nervous system;
  - (f) eyes and vision;
  - (g) ears and hearing; and
  - (h) skin.
8. Is there normal use of limbs?

- 9. Does the prospective adoptive parent appear mentally balanced and emotionally secure?
- 10. Are there any other facts, medical or otherwise, about the prospective adoptive parent which should be known?

Signature: .....

Name: .....

Qualification: .....

Date: .....

ANNEX V: GUIDELINES FOR MATCHING

MATCHING INFORMATION ON THE CHILD

Basic Facts

Name of the child:	Passport size picture
Date of birth:	
Sex:	
Place of birth:	
Nationality:	
Language spoken:	
Legal status and any outstanding proceedings:	
Religious background:	
Siblings and their whereabouts:	
Parents or guardian and their whereabouts:	

Child’s History and Experience

Current situation of the child:
Custodian of the child:
Signs of trauma:
History of abuse (physical and psychological) or neglect:
Conditions of home and school environment:
Distinct personal traits:
Health and Medical History:

Child’s Individual Needs

Physical, social and psychological development:
Health and medical condition:
Hereditary conditions:
Education (including history, needs, and experience):
Personality:
Understanding of adoption (including wishes and feelings):
Any other concerns:

Background Information on Birth Family

Name and address:
Social history of birth parents (substance abuse and domestic violence):

Medical history of birth parents:

Cultural beliefs and social interaction:

Family coherence:

**INFORMATION ON THE ADOPTIVE PARENT**

Name:

Passport size picture

Date of birth:

Sex:

Place of birth:

Nationality:

Residence:

Occupation:

Religion:

Language spoken:

Family membership:

Social history of the family (including criminal history, substance abuse, and domestic violence):

Family coherence:

Cultural beliefs and social interaction:

Health and medical history:

Personality:

Other children in the family and their views on the adoption:

Linkages with adoption support networks:

Understanding of adoption issues:

Acceptance of adoptive child's name and identity:

Attitude towards contact proposals:

Ability to meet adoptive child's assessed needs:

Areas of potential concern:

Adoption support needs required:

**SUITABILITY OF PROPOSED MATCH**

Age compatibility:

Sex compatibility:

Social, religious, and cultural compatibility:

Health and psychological needs compatibility:

Home and family suitability:

Economic ability:

Contact proposals:

Outstanding concerns and how they will be resolved:

Outstanding issues with regard to the adoption process:

Other:

ADOPTION OF CHILDREN ACT

section ...

ANNEX VI: OFFENCES RENDERING PROSPECTIVE ADOPTIVE PARENTS INELIGIBLE

Conviction of any person of any of the following offences shall render a person ineligible as a prospective adoptive parent.

- 1. Offences under this Act.
- 2. Penal Code (Cap.7:01)
  - CHAPTER XI - Offences relating to the administration of justice
  - CHAPTER XV - Offences against morality
  - CHAPTER XVI - Offences relating to marriage and domestic obligations
  - CHAPTER XIX - Murder and manslaughter
  - CHAPTER XX - Duties relating to the preservation of life and health
  - CHAPTER XXI - Offences connected with murder and suicide
  - CHAPTER XXII - Offences endangering life or health
  - CHAPTER XXIII - Criminal recklessness and negligence
  - CHAPTER XXIV - Assaults
  - CHAPTER XXV - Offences against liberty
  - CHAPTER XXVI - Theft
  - CHAPTER XXVII - Offences allied to stealing
  - CHAPTER XXVIII - Robbery and extortion
  - CHAPTER XXIX - Burglary, housebreaking and similar offences
  - CHAPTER XXXI - False pretence
  - CHAPTER XXXIII - Frauds by Trustees and Persons in a position of trust and false accounting
- 3. Any other offence the penalty for which is 7 years imprisonment or more.
- 4. Any other offence as the Minister may from time to time prescribe by notice published in the *Gazette*.

## **APPENDIX I**

### **ADOPTION OF CHILDREN BILL, 20...**

## ADOPTION OF CHILDREN BILL, 20...

## ARRANGEMENT OF SECTIONS

## SECTION

## PART I—PRELIMINARY

1. Short title
2. Interpretation
3. Purpose of adoption

## PART II —ADOPTION PROCESS

4. Guardianship of child awaiting adoption
5. Suitability for adoption
6. Register of Children Eligible for Adoption
7. Consent to adoption
8. Views of the child to be taken into account
9. Timing of consent
10. Power to dispense with consent
11. Unreasonable withholding of consent
12. Applicants for adoption
13. Matters court must be satisfied with
14. Application for adoption
15. Time for petition
16. Presence of parties
17. Terms and conditions of order
18. Effect of adoption order

## PART III—RESCISSION AND DISCHARGE OF ADOPTION ORDER

19. Rescission of order
20. Effect of rescission

## PART IV—INTERIM ORDERS

21. Interim orders
22. Duration of interim orders

## PART V—PROVISION OF ADOPTION SERVICES

23. Accreditation of social workers
24. Social welfare officer
25. Guardian *ad litem*
26. Duties of Guardian *ad litem*

## PART VI—REGISTERS

27. Prospective Adoptive Parent Register
28. Adopted Children Register
29. Registration of adoption orders
30. Registration of birth of a child born outside Malawi



## SECTION

31. Duties of Registrar of High Court
32. Supplementary register of adoption
33. Confidentiality of records

## PART VII—INTERCOUNTRY ADOPTION

34. Purpose of this Part
35. High Court to have jurisdiction
36. Powers of Central Authority
37. Duties of Central Authority
38. Performance of powers and duties
39. Delegation
40. International cooperation
41. Adoption by a person in a Convention country
42. Adoption compliance certificate
43. Adoption of child from Convention country
44. Recognition of intercountry adoption
45. Evidential value of compliance certificate
46. Effect of recognition of intercountry adoption
47. Refusal to recognize intercountry adoption or article 27 decision
48. Application to High Court for intercountry adoption of child
49. Access to information
50. Processing or facilitating intercountry adoption

## PART VIII—OFFENCES

51. Unauthorized communication
52. Habouring a child taken from adoptive parents
53. Payments in consideration for adoption
54. Prohibition on advertising
55. Undue influence
56. Restriction on publication of identity of parties
57. Unauthorized adoption arrangement
58. Failure to disclose information
59. Unauthorized disclosure of confidential information
60. General offence and penalty

## PART IX—MISCELLANEOUS PROVISIONS

61. Disclosure of adoptive status
62. Fees and charges
63. Regulations
64. Court rules
65. Repeal and savings
66. Transitional

## SCHEDULES

A B I L L

*entitled*

**An Act to provide for the adoption of children, regulate  
intercountry adoption and related matters.**

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

1. —(1) This Act may be cited as the Adoption of Children Act. Short title and  
commence-  
ment
- (2) This Act shall come into force on such date as the Minister may  
appoint by notice published in the *Gazette*.
2. In this Act, unless the context otherwise requires— Interpretation
- “Central Authority” means the Directorate of Social Welfare in the  
Ministry responsible for children;
- “Convention” means the Hague Convention on Protection of  
Children and Cooperation in respect of Intercountry Adoption  
signed at the Hague on 29th May, 1993;
- “Convention country” means a country which is a signatory to, and  
has implemented the Convention;
- “court” means the High Court or the Child Justice Court;
- “Director” means the Director responsible for social welfare;
- “guardian” in relation to a child, includes—
- (a) a person having the custody of the child under a court order;
  - (b) a person appointed as guardian under a will; or
  - (c) a guardian by custom;
- “intercountry adoption” means an adoption where a child resident  
in one country (the State of origin) has been, is being, or is to be  
moved to another country (the receiving State) either after his  
adoption in the State of origin by spouses or a person resident in  
the receiving State or for the purposes of such an adoption in the  
receiving State;
- “petitioner” means a person applying for adoption;
- “records” include all documents, exhibits, registers and data  
pertaining to an adoption.
3. The purpose of adoption is to— Purpose of  
adoption
- (a) protect and nurture a child in need of care and protection by  
providing a safe and healthy environment with positive support;  
and

(b) promote the goals of permanency planning by connecting a child to other safe and nurturing family relationships intended to last a lifetime.

PART II —ADOPTION PROCESS

Guardianship  
of child  
awaiting  
adoption

4. —(1) The Director shall be the guardian of a child awaiting adoption until an adoption order is made in respect of the child.

(2) The Director may, on such terms and conditions as he thinks fit, place a child for whom he is the guardian in the care of a suitable person or body or other place of safety.

(3) Upon refusal by the court to make an adoption order, the court shall make such orders in respect of the parental responsibility, guardianship, or custody of the child as the court may think fit.

Suitability for  
adoption

5. Adoption shall be considered as a measure for the care and protection of a child only after the Director has certified, upon assessment of the child, that—

(a) the child is in need of permanent care solutions;

(b) the child is abandoned or can no longer be cared for by his birth parents;

(c) there have been sufficient attempts to rehabilitate the birth parents and to reintegrate the child into the birth family and there are reasonable grounds to believe that further attempts at rehabilitation and reintegration support are unlikely to succeed; and

(d) there are no other family members capable of and willing to take care of the child even with support from the community or the State.

Register of  
Children  
Eligible for  
Adoption

6. —(1) The Director shall establish and maintain a register known as the Register of Children Eligible for Adoption.

(2) The Register of Children Eligible for Adoption shall record—

(a) the date on which a child was assessed as suitable for adoption; and

(b) the names of children assessed as suitable for adoption.

First Schedule

(3) The Register of Children Eligible for Adoption shall be in Form 1 in the *First Schedule*.

Consent to  
adoption

7. —(1) An adoption order shall not be made in respect of a child unless the appropriate person has consented to the making of an adoption order in respect of the child.

(2) The appropriate person in respect of a child—

(a) is a person who is a parent or guardian of a child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child;

(b) whose mother is also a child, is a person who is a parent, mother or guardian of the mother of the child; or

(c) whose mother is mentally ill, is a person who is a father or a guardian of the child.

(3) A social worker facilitating an adoption shall, before consent for adoption of a child is granted, counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption.

8. In addition to the consent obtained under section 7, an adoption order shall not be made in respect of a child—

Views of the child taken into account

(a) who is below the age of ten (10) years, but is at a stage of maturity and development to understand the implications of the proceedings, unless the views of the child are taken into account; or

(b) who is ten (10) years of age or older, unless the consent of the child is also obtained.

9. —(1) A mother of a new born child shall give consent to adoption of the child five (5) days after the birth of that child.

Timing of consent

(2) A court may accept consent of a mother of a new born child given before the expiry of five (5) days from the date of birth of that child on certification of a medical practitioner that the mother was in a fit condition to give consent for the adoption of the child.

10. —(1) A court may dispense with any consent required under section 7 if it is satisfied that—

Power to dispense with consent

(a) a parent or a guardian of a child has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child;

(b) a person liable by virtue of an order or agreement to contribute to the maintenance of the child has persistently neglected or refused to contribute to the maintenance of the child; or

(c) a person whose consent is required—

(i) cannot be found;

(ii) is incapable of giving consent; or

(iii) has unreasonably withheld consent under section 11.

(2) Abandonment may be presumed if—

(a) a child was deserted at birth;

(b) a person or institution having care or custody of a child has neither seen nor heard from a parent or guardian of the child for a period of at least three (3) months; and

(c) a period of three (3) months has elapsed since a report was made to the police with regard to a child's desertion and the child's parents have not been found.

(3) Neglect may be presumed where despite demands made, a parent or a guardian has failed to contribute to the maintenance of a child for a period of at least three (3) consecutive months and such failure is intentional.

Unreasonable  
withholding of  
consent

**11.** A court may, in determining whether consent has been unreasonably withheld, take into account all relevant factors, including—

(a) the nature of the relationship between a child and a person withholding consent during the last two years;

(b) the prospects of a sound relationship developing in the near future between a child and a person withholding consent;

(c) the withholding of consent on the ground that a person withholding consent does not know the identity of the petitioner; or

(d) the withholding of consent by an appropriate person as punishment to a person who is putting a child up for adoption.

Applicants for  
adoption

**12.** —(1) An adoption order may be made upon the application of a sole applicant or jointly by spouses where each applicant—

(a) has attained the age of twenty five (25) years but has not attained the age of fifty (50) years; and

(b) is at least twenty-one (21) years older than a child in respect of whom the application is made.

(2) An adoption order may, notwithstanding subsection (1), be made upon the application of—

(a) a spouse, with the consent of the other spouse;

(b) persons presumed to be married by repute or by permanent co-habitation; or

(c) an applicant who is less than twenty-one (21) years older than the child in respect of whom the application is made, where the applicant and the child are within the prohibited degrees of consanguinity.

(3) An adoption order shall not be made in favour of—

(a) a sole male applicant in respect of a female child;

(b) a sole female applicant in respect of a male child;

(c) an applicant who has a chronic medical condition or disability affecting his ability to provide for the needs or the welfare of the child; or

(d) an applicant who has attained the age of fifty (50) years but is under the age of sixty-five (65) years,

unless the court is satisfied, based on the recommendations of a Social Inquiry Report, that there are special circumstances that justify the making of the adoption order.

(4) An adoption order shall not be made if the applicant—

(a) is a person of unsound mind within the meaning of the Mental Treatment Act;

Cap. 34:02

(b) has been convicted by a court of competent jurisdiction of any of the offences set out in the *Second Schedule* to this Act, or similar offences;

*Second  
Schedule*

(c) is a homosexual;

(d) is unsuitable to, or has been prohibited by a court of competent jurisdiction, from working with children; or

(e) has refused to undergo an eligibility assessment by a social welfare officer on his suitability as a prospective adoptive parent.

(5) For the purposes of this section, “Social Inquiry Report” means an assessment carried out by a social worker on a petitioner’s character and circumstances to enable the court determine his suitability to adopt.

**13.** The court shall, before making an adoption order, be satisfied that—

Matters court  
must be  
satisfied with

(a) a person whose consent is necessary under this Act and whose consent has not been dispensed with has consented to and understands the nature and effect of the adoption order for which the application is made; and in particular, in the case of any parent, understands that the effect of the adoption order shall deprive him permanently of his parental rights;

(b) the applicant—

(i) has been assessed as fit and proper to be entrusted with full parental rights and responsibilities in respect of a child;

(ii) is willing to exercise and maintain full parental rights and responsibilities in respect of a child; and

(iii) has not received or agreed to receive, and that a person has not given or agreed to give to the applicant, a reward in consideration of the adoption except such as the court may sanction; and

(c) a social worker has matched the prospective adoptive parent and the child eligible for adoption in accordance with Form 5 in the *Third Schedule*.

*Third Schedule*

Application  
for adoption

**14.**—(1) An application for adoption shall be made by petition in the prescribed form, with such variations as the circumstances may require.

(2) The petition shall be accompanied by—

*Third  
Schedule*

(a) Forms 1, 2, 3 and 4 in the *Third Schedule* containing—

(i) information on whether the child is suitable for adoption as contemplated in section 5;

(ii) information on whether the adoption is in the best interests of the child; and

(iii) prescribed medical information in relation to the child;

(b) consent to the adoption in the prescribed form by every person required to give consent under section 7;

(c) a pre-adoption screening assessment on the petitioner; and

(d) a recommendation for the adoption by the Director.

(3) Every petition and every application shall be heard and determined *in camera*.

Time for  
petition

**15.** A petitioner shall file the petition for adoption within thirty (30) days after a child is matched with a petitioner unless the court, by order, permits late filing.

Presence of  
parties

**16.**—(1) Save as provided for in subsection (2), a court may refuse to make an adoption order or an interim order unless all parties including the child to be adopted attend the hearing.

(2) A court shall have the power in its discretion to dispense with the attendance of any party, including the child, and may direct that any of the parties shall attend the hearing separately from the others.

Terms and  
conditions of  
order

**17.** A court may, in an adoption order, impose terms and conditions as the court may deem fit and, in particular, require the adoptive parent by bond or otherwise to make provision for the adopted child.

**18. —(1) An adoption order shall—**

Effect of  
adoption order

(a) sever all parental rights and responsibilities that a birth parent, a step-parent, a guardian or a family member had in respect of a child before the adoption order is granted; and

(b) confer full parental rights and responsibilities in respect of a child upon the adoptive parent.

**(2) An adoption order terminates, except where provided otherwise—**

(a) all claims of contact with the adopted child by a birth parent or a step-parent or a guardian or by a family member of that person;

(b) all rights and responsibilities the adopted child had in respect of a birth parent or a step-parent or a guardian or a family member; and

(c) any previous order made by a court in respect of the placement of the child.

**(3) An adoption order may confer a new name or the surname of the adoptive parent on the adopted child.**

**(4) An adoption order shall not—**

(a) sever parental rights of a birth parent over the adopted child where—

(i) the child has been adopted by a family member so that the adopted child may enjoy a benefit which could not otherwise be enjoyed in the absence of an adoption order; or

(ii) the child has been adopted by a step-parent;

(b) permit marriage or sexual relations between the child and a person within the prohibited degrees of kindred and affinity; or

(c) affect a right to property that a child acquired before the adoption order is granted.

**PART III—RESCISSION AND DISCHARGE OF ADOPTION ORDER**

**19. —(1) A court that granted an adoption order may rescind the order on application by—**

Rescission of  
adoption order

(a) the adopted child;

(b) a parent of the adopted child or other person who had guardianship in respect of the child immediately before the adoption proceedings; or

(c) a social welfare officer.



(2) An application for rescission shall be lodged within reasonable time but not exceeding three (3) months from the date of the issuance of the adoption order.

(3) An adoption order may be rescinded on the ground that—

(a) rescission of the order is in the best interests of the child;

(b) the grant of an adoption order was based on a material misrepresentation or suppression of facts, not discovered at the time of making the petition; or

(c) consent for the adoption was obtained through fraud, misrepresentation, duress or any other improper means.

Effect of  
rescission

**20.**—(1) Where a court rescinds an adoption order, the effects of the adoption order under section 18 shall no longer apply in respect of the child concerned.

(2) All rights and responsibilities terminated by an adoption order shall be restored unless the court makes an additional order relating to the parental rights and responsibilities over the child.

(3) A court may, on rescinding an adoption order,

(a) make an appropriate placement order in respect of a child concerned; or

(b) order that a child be taken to a place of safety until an appropriate placement order can be made.

#### PART IV—INTERIM ORDERS

Interim orders

**21.**—(1) A court may, on the hearing of an application for an adoption order, postpone the determination of the application and make an interim order for the custody of the child in favour of the applicant if it is in the best interests of the child.

(2) An interim order shall not be an adoption order for the purposes of this Act and may be subject to such terms and conditions relating to the maintenance, education and welfare of the child as the court deems fit.

(3) A court shall not make an interim order in respect of a child unless the court could lawfully make an adoption order of that child in favour of the applicant.

(4) An applicant in whose favour an interim order is made shall have all rights and responsibilities created by section 18.

Duration of  
interim orders

**22.**—(1) An interim order remains in force for such period, not exceeding one (1) year, and for such further periods as the court shall on application, from time to time, order.

(2) An interim order shall not be in force for periods exceeding in the aggregate two (2) years.

PART V—PROVISION OF ADOPTION SERVICES

23. The Minister may, on a recommendation of the Director, accredit a social worker in private practice to provide social services in adoption proceedings.

Accreditation of social workers

24. —(1) The Minister shall, by notice published in the *Gazette*, appoint a person qualified in social work and employed in the Ministry as a social welfare officer.

Social welfare officer

(2) The duties and functions of a social welfare officer shall be to—

(a) conduct investigations on a child and his birth family to gather background information necessary for the grant of an adoption order, including—

(i) opening and maintaining a file for the child;

(ii) conducting interviews with relevant persons with necessary information on the child’s medical, social or legal status;

(iii) visiting and monitoring the child in his natural home or institutional environment; and

(iv) visiting the petitioner in his home;

(b) conduct investigations on the petitioner or petitioners to ascertain eligibility to adopt under this Act and to make recommendations accordingly;

(c) keep and maintain a record of prospective eligible adoptive parents;

(d) keep and maintain a record of children eligible for adoption;

(e) match children eligible for adoption with prospective adoptive parents;

(f) prepare and present clear and comprehensive reports for the court and any other party who may require a report under this Act; and

(g) safeguard and promote the best interests of a child at all times during the adoption process, considering the wishes of the child, where appropriate.

25. —(1) A court shall, upon the application of a petitioner or on its own motion, appoint a guardian *ad litem* for a child pending the hearing and determination of an adoption application.

Guardian *ad litem*

(2) The appointment of a guardian *ad litem* shall expire upon the making of a final adoption order by the court, unless the Court, having regard to the best interests of the child, extends the period of appointment.

(3) Without prejudice to the generality of subsection (2), where an appeal is lodged against a final adoption order, a court shall have the power to extend the appointment of a guardian *ad litem* until the date of the determination of the appeal.

Duties of  
Guardian  
*ad litem*

**26.** —(1) A guardian *ad litem* shall have a general duty to investigate fully all the circumstances of a child and a petitioner, and all matters relevant to the proposed adoption so as to safeguard the best interests of the child.

(2) The guardian *ad litem* shall, without prejudice to the generality of subsection (1)—

(a) safeguard the best interests of the child pending determination of adoption proceedings;

(b) investigate and appraise a court before which a petition for adoption is filed as to—

(i) whether the statements in the petition are true;

(ii) whether any payment or reward in consideration of the adoption has been received or agreed upon;

(iii) whether the means and the status of a petitioner are such as to enable him maintain and bring up a child;

(iv) what right to or interest in property a child has;

(v) what insurance if any, has been effected on the life of a child; and

(vi) whether it is desirable for the welfare of a child that the court should be asked to make an interim order or impose any particular terms or conditions in the making of an adoption order, or require a petitioner to make any particular provision for the child;

(c) intervene on behalf of a child to arrange for the care of the child in the event of any withdrawal of any consent prescribed by this Act; and

(d) undertake such duties as the court may from time to time direct or as may be prescribed by rules made under this Act.

## PART VI —REGISTERS

**27.** —(1) The Minister shall establish and maintain a register of all persons who have expressed an interest to adopt a child in writing and

Prospective  
Adoptive  
Parent  
Register

have been assessed as suitable to adopt under the provisions of this Act, to be known as a Prospective Adoptive Parent Register.

(2) The Prospective Adoptive Parent Register shall be in Form 2 in the *First Schedule* and shall indicate the temporal order in which the names were recorded in the Register.

(3) Subject to subsection (4) an application for adoption under this Act shall only be made in respect of a child whose name appears in the Register of Children Eligible for Adoption and by a prospective adoptive parent whose name appears in the Prospective Adoptive Parent Register.

(4) Subsection (3) shall not apply in respect of each of—

- (a) applicants interested to adopt a special needs child; or
- (b) applicants who are related to the child.

**28.** —(1) The Director of National Registration shall, notwithstanding anything contained in the National Registration Act, establish and maintain a register to be called the Adopted Children Register, in which entries shall be made as directed by an adoption order and no other entries.

Adopted  
Children  
Register

Act No.13 of  
2010

(2) A certified copy of an entry in the Adopted Children Register sealed or stamped with the seal of the Director of National Registration shall, be *prima facie* evidence of the adoption to which it relates.

(3) Where a certified copy of an entry contains a record of the date of birth or country of birth of the adopted person, the entry shall be *prima facie* evidence of the date of birth or country of birth in all respects as if the copy was a certified copy of an entry in the Register of Births.

(4) The Director of National Registration shall cause an index of the Adopted Children Register to be made and a person shall be entitled to search the index upon payment of a fee as may be prescribed.

(5) An entry in the Adopted Children Register shall not be open to public inspection or search, except—

- (a) by a person who requests information about his own adoption;
- (b) under the order of a court of competent jurisdiction; or
- (c) where an adopted person who has attained the age of eighteen (18) years has applied to the Director of National Registration to have an entry of “No objection” entered against his

records so that any birth parent wishing to access information about that adopted person may be permitted to search or inspect the entry in the Adopted Children Register.

Registration of  
adoption  
orders

**29.** —(1) An adoption order shall contain a direction to the Director of National Registration to make in the Adopted Children Register an entry recording the adoption in the prescribed form.

Act No. 22  
of 2010

(2) For purposes of complying with the requirements of subsection (1), where the precise date of the child's birth is not known, the court shall use the procedures for determining the age of a child under Part IV of the Child Care, Protection and Justice Act and specify that date in the adoption order as the date of birth.

(3) An adoption order shall contain a further direction to the Director of National Registration to cause an entry in the Register of Births, to be marked with the word "Adopted" and to include an entry in the Adopted Children Register recording the adoption.

(4) Where an adoption order is made by the court in respect of a child who has previously been the subject of an adoption order, the order shall contain a further direction to the Director of National Registration to cause such entry in the Register of Births, to be marked with the word "Re-adopted" and to include an entry in the Adopted Children Register recording the adoption.

(5) The Registrar of the High Court shall cause every adoption order to be communicated in the prescribed manner to the Director of National Registration, and upon receipt of such communication, the Director of National Registration shall comply with the direction contained in the order with regard both to marking an entry in the Register of Births with the words "Adopted" or "Re-adopted" and with regard to making the appropriate entry in the Adopted Children Register.

Registration of  
birth of child  
born outside  
Malawi  
Act No. 13  
of 2010

**30.** —(1) After an adoption order has been granted in respect of a child born outside Malawi, the adoptive parents shall apply in terms of the National Registration Act to register the birth of the child in the Register of Births.

(2) Where the country of birth of the child is not proved to the satisfaction of the court, the particulars of that country may, notwithstanding anything in section 28 be omitted from the order and from the entry in the Adopted Children Register.

Duties of  
Registrar of  
High Court

**31.** —(1) The Registrar of the High Court shall—

(a) keep and maintain a record of all adoption cases heard in any court, including adoption orders issued by any court;

(b) within twenty-one (21) days after the receipt of a final adoption order from a subordinate court, transmit the adoption order to the Director of National Registration; and

(c) in the case of an intercountry adoption, forward copies of documents referred to in paragraph (b) to the Central Authority.

(2) A subordinate court shall, transmit a final adoption order to the Registrar of the High Court within fourteen (14) days from the date of the order.

**32.** —(1) The Minister shall establish and maintain a supplementary register to be called the Supplementary Register of Adoption which shall record information pertaining to— Supplementary register of adoption

(a) the registration numbers allocated to records of adoption cases;

(b) the personal details of adopted children, of their birth parents and of their adoptive parents;

(c) particulars of successful appeals against adoption orders and rescissions of adoption orders; and

(d) any other information in connection with adoption.

(2) The Supplementary Register of Adoption shall not be open for public search or inspection except to the persons and in the circumstances specified in section 28.

**33.** —(1) All records on file or in the possession of a court, the Central Authority, a legal practitioner, or any other service provider in connection with an adoption, shall be confidential and may not be inspected except as provided under this Act. Confidentiality of records

(2) During proceedings for adoption, records shall not be open to inspection except with the leave of the court.

(3) In determining whether to grant leave under subsection (2), the court shall review the records of the relevant proceedings for adoption and may grant or deny the application upon determination that a good cause exists based on specific findings concerning—

(a) the reason for which the information is sought;

(b) the views of any of the parties about whom the information is sought;

(c) whether it is possible to satisfy the applicant's request without disclosing the identity of parties;

(d) the likely effect of the disclosure on the child, the adoptive parents, the birth parents and other members of the child's birth and adoptive families;

- (e) the age, maturity, and expressed needs of a child;
- (f) whether there is compelling reason for the disclosure of the information; or
- (g) whether the benefit to the applicant is greater than the harm to any other individual of disclosing the information.

PART VII—INTERCOUNTRY ADOPTION

Purpose of  
this Part

**34.**—(1) The purpose of this Part is to—

- (a) facilitate intercountry adoption through the Central Authority in Malawi and a central authority in a country that is a signatory to the Convention subject to the provisions of this Act;
- (b) provide for the recognition of foreign adoptions;
- (c) find fit and proper adoptive parents for a child elsewhere if such fit and proper parents cannot be found within Malawi; and
- (d) generally regulate intercountry adoptions.

(2) Any person who adopts a child otherwise than in accordance with the provisions under this Part shall not, without leave of the court, take the child to another country for permanent residence.

High Court to  
have  
jurisdiction

**35.** The High Court shall have jurisdiction on all matters of intercountry adoption.

Powers of  
Central  
Authority

**36.** The Central Authority shall have the power to—

- (a) perform all functions necessary to facilitate an intercountry adoption;
- (b) develop and advise on the development of policy, procedures, standards and guidelines for intercountry adoption processes; and
- (c) directly or through other public bodies take appropriate measures to prevent improper financial or other gain in connection with an intercountry adoption.

Duties of  
Central  
Authority

**37.** In the exercise of its powers under this Act, the Central Authority shall perform the following duties—

- (a) collect, preserve and exchange information about the situation of a child and the prospective adoptive parents so far as is necessary to complete the adoption;
- (b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- (c) promote the development of adoption counselling and post adoption services in Convention countries;

(d) cooperate with other central authorities and exchange information on general evaluation reports about experiences with intercountry adoption; and

(e) comply with justified requests for information about a particular adoption situation from other central authorities so far as such requests are not inconsistent with any written law.

**38.** The Director shall perform the powers and duties of the Central Authority.

Performance of powers and duties of the Central Authority

**39.** The Director may delegate such powers and duties to any qualified person in the public service acting as his subordinate subject to his general or special direction or to an Act of Parliament.

Delegation

**40.** —(1) The Minister responsible for international cooperation may, on the request of the Minister responsible for children, enter into an agreement with a State Party to the Convention on any matter pertaining to the intercountry adoption of children for the purposes of supplementing the provisions of the Convention or to the application of the principles contained therein.

International cooperation

(2) An agreement contemplated in subsection (1) shall not be in conflict with the provisions of this Act.

**41.** —(1) A person resident in a Convention country who wishes to adopt a child resident in Malawi shall apply to the central authority of the country concerned.

Adoption by a person in a Convention country

(2) If the central authority of the Convention country is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the Convention and forward the report to the Central Authority in Malawi.

(3) If a child eligible for adoption is available for adoption, the Central Authority shall prepare a report on the child in accordance with this Act and forward it to the central authority of the Convention country concerned.

(4) If the Central Authority and the central authority of the Convention country concerned both agree on the adoption, the Central Authority shall refer the application for the adoption together with all relevant documents and reports contemplated in subsections (2) and (3) to the High Court for consideration under section 13.

(5) The court may make an order for the adoption of the child if the requirements under sections 12 and 13 are complied with and the court is satisfied that—

(a) the adoption is in the best interests of the child;



(b) the child is in Malawi;

(c) the child is not prevented from leaving Malawi—

(i) under any written law; or

(ii) because of a court order;

(d) the arrangements for the adoption of the child are in accordance with the requirements of the Convention;

(e) the central authority of the Convention country has agreed to the adoption of the child;

(f) the Central Authority has agreed to the adoption of the child; and

(g) the name of the child has been on the Register of Children Eligible for Adoption for not less than sixty (60) days and no fit and proper adoptive parent for the child is available in Malawi.

(6) This section does not apply to a child resident in Malawi who is to be placed for adoption outside Malawi with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent.

(7) The provisions of Part II shall apply to the adoption of a child referred to in subsection (6).

Adoption  
compliance  
certificate

**42.** Where the High Court approves the adoption of a child under section 41, the Central Authority may issue an Adoption Compliance Certificate.

Adoption of  
child from  
Convention  
country

**43.—**(1) A person resident in Malawi who wishes to adopt a child resident in a Convention country shall apply to the central authority of a Convention country concerned.

(2) If the Central Authority is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on the applicant in accordance with the Convention and forward the report to the central authority.

(3) If a child eligible for adoption is available for adoption, the central authority of the Convention country shall prepare a report on the child in accordance with the Convention and forward it to the Central Authority.

(4) If the Central Authority and the central authority of the Convention country concerned both agree to the adoption, the central authority in the country concerned shall refer the application for adoption for the necessary consent in that country.

**44.** —(1) The adoption of a child resident in a Convention country by a person resident in Malawi shall be recognized in Malawi if an adoption compliance certificate issued in that country is in force for the adoption.

Recognition of  
intercountry  
adoption

(2) The adoption in a Convention country of a child resident in another Convention country shall be recognized in Malawi if an adoption compliance certificate is issued in the Convention country where the adoption was granted and is in force for the adoption.

(3) The Central Authority may issue a declaration recognizing an adoption if an adoption compliance certificate was not issued in the relevant Convention country.

(4) A declaration under subsection (3) shall, upon production by any person, be admissible as evidence in any proceedings before the court.

(5) The adoption of a child referred to in subsections (1) and (2) shall not be recognized if a declaration is made under section 47 that an adoption or decision under article 27 of the Convention has no effect in Malawi.

**45.** Subject to section 47, an adoption compliance certificate shall be evidence, for the purposes of any written law, that the adoption to which the certificate relates—

Evidential  
value of  
compliance  
certificate

(a) was agreed to by the central authorities mentioned in the certificate; and

(b) was carried out in accordance with the Convention.

**46.** If the adoption of a child is recognized under section 44, the adoption has in Malawi the effect set out in section 18.

Effect of  
recognition of  
intercountry  
adoption

**47.** —(1) The Central Authority may make a declaration with the effect that the adoption to which section 44 applies or a decision made under article 27 of the Convention may not be recognized in Malawi if the adoption or decision is manifestly contrary to public policy in Malawi, taking into account the best interests of the child.

Refusal to  
recognise  
intercountry  
adoption or  
article 27  
decision

(2) If the Central Authority declares that an adoption or decision referred to in subsection (1) may not be recognized, the adoption or decision shall have no effect in Malawi.

**48.** —(1) Where the Central Authority refuses to recognize an intercountry adoption under section 47, an application for the adoption of a child from a Convention country may be made to the High Court.

Application to  
High Court for  
intercountry  
adoption of  
child

(2) The provisions of Part II may, with the necessary changes, where the context requires, apply to the adoption of the child referred to in subsection (1).

Access to  
information

**49.** Subject to the provisions of section 33, the Central Authority may disclose to a person over the age of eighteen (18) years who, as a child, was adopted in accordance with the Convention, any information in the records of the Central Authority relating to that person's origin.

Prohibition of  
processing or  
facilitating  
intercountry  
adoption

**50.** —(1) A person shall not process or facilitate an intercountry adoption otherwise than under this Part.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of two million Kwacha (K2,000,000) and to imprisonment for five (5) years.

#### PART VIII—OFFENCES

Unauthorized  
communication

**51.** —(1) A person, who by reason of the adoption of a child has ceased to be and is no longer the parent or guardian of the child, shall not—

(a) take, lead or entice the child away, or detain the child with intent to deprive the adoptive parents of possession of the child;

(b) interfere in or influence the upbringing of the child, or the relationship of the child with the adoptive parents; or

(c) communicate with the child, or with any other person who, to the knowledge of the person is the adoptive parent of the child, except where—

(i) the court that granted the adoption made an order for continued contact between that person, the child and the adoptive parents; or

(ii) the adoptive parent is related to the child.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of one hundred thousand Kwacha (K100,000) and to imprisonment for three (3) years.

Harbouring a  
child taken  
from adoptive  
parents

**52.** A person who knowingly receives or harbours a child who has been taken, led or enticed from his adoptive parents commits an offence and shall, upon conviction, be liable to imprisonment for five (5) years.

**53.** —(1) A person shall not make, give or receive or agree to make, give or receive, a payment or reward for or in consideration of— Payments in consideration for adoption

- (a) the adoption or proposed adoption of a child;
- (b) the giving of consent to or the signing of an instrument for consent, to the adoption of a child;
- (c) the transfer of possession or custody of a child with a view to the adoption of a child; or
- (d) the making of arrangements with a view to the adoption of a child.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of one million Kwacha (K1,000,000) and to imprisonment for five (5) years.

**54.** —(1) A person shall not publish, or cause to be published in any form of media, public exhibition, advertisement, news item or other communication indicating that— Prohibition on advertising

- (a) a parent or guardian of a child wishes to have a child adopted;
- (b) a person wishes to adopt a child; or
- (c) a person is willing to make arrangements in order to facilitate the adoption of a child.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to a fine of two million Kwacha (K2,000,000) and to imprisonment for seven (7) years.

**55.** A person who— Undue influence

- (a) promises or uses a pecuniary or other advantage;
- (b) uses or threatens to use any force or restraint;
- (c) does or threatens to do any injury; or
- (d) causes or threatens to cause any detriment of any kind,

to a parent or a guardian of a child with a view to—

- (i) inducing the parent or guardian to offer or refrain from offering the child for adoption under this Act;
- (ii) influencing the parent or guardian in the expression of any wishes contained in an instrument of consent to the adoption of a child; or
- (iii) inducing the parent or guardian to revoke a consent to the adoption of the child given by the parent or guardian,

commits an offence and shall, upon conviction, be liable to imprisonment for seven (7) years.

Restriction on  
publication of  
identity of  
parties

**56.** A person who publishes or causes to be published in any form of media, public exhibition, news item or any other communication in relation to an application under this Act or an application to be considered for entry in the Prospective Adoptive Parent Register—

(a) the name of the applicant;

(b) the name of a child;

(c) the name of a father or mother or guardian of the child; or

(d) any other matter reasonably likely to enable any of the persons referred to in paragraph (a), (b) and (c) to be identified,

commits an offence and shall, upon conviction, be liable to a fine of two million Kwacha (K2,000,000) and to imprisonment for seven (7) years.

Unauthorized  
adoption  
arrangement

**57.** —(1) A person shall not, unless duly authorized by the Minister, conduct or attempt to conduct any negotiation or make or attempt to make any arrangement or do anything with a parent or guardian of a child for or towards facilitating the adoption of the child.

(2) A person who contravenes subsection (1) commits an offence and shall, upon conviction, be liable to imprisonment for seven (7) years.

Failure to  
disclose  
information

**58.** A person who fails to provide any information required under this Act commits an offence and shall, upon conviction, be liable to imprisonment for three (3) years.

Unauthorized  
disclosure of  
confidential  
information

**59.** A person who having possession of, or control over any documents, records or information who at any time communicates or discloses any such information or anything contained in such documents or records to any person other than—

(a) the court, the Minister or the Director of National Registration;

(b) a legal practitioner representing an applicant or a guardian *ad litem* appointed under this Act; or

(c) for the purposes of this Act,

commits an offence and shall, upon conviction, be liable to a fine of one million Kwacha (K1,000,000) and to imprisonment for five (5) years.

**60.** A person who contravenes the provisions of this Act for which no other penalty is specifically provided for commits an offence and shall, upon conviction, be liable to two (2) years imprisonment.

General offence and penalty

PART IX—MISCELLANEOUS PROVISIONS

**61.** —(1) An adoptive parent shall inform a child that he is adopted at the earliest opportunity depending on the child’s age and developmental capacity.

Disclosure of adoptive status

(2) An adopted child who has attained the age of eighteen (18) years has the right, at his request, to receive from the adoptive parents, the Ministry, or from the court which made the adoption order—

(a) information which would enable him to obtain a certified copy of the record of his birth, unless the court orders otherwise;

(b) mandatory information disclosed to the adoptive parents by the Ministry in accordance with this Act; or

(c) a copy of a prescribed document or an order relating to the adoption.

**62.** —(1) Notwithstanding the provisions of section 53, fees and charges may be payable for the provision of the following adoption services—

Fees and charges

(a) medical, hospital, nursing, pharmaceutical, travel or other similar expenses incurred by the birth mother with respect to the birth of the child or in connection with any illness of the child where the application for adoption is filed within three (3) months of the birth or the illness;

(b) counselling services for the birth parents, the adoptive parents or the child for a period not exceeding three (3) months or such other period as the case may be;

(c) expenses incurred in ascertaining information on the background of the child;

(d) expenses incurred in ascertaining information for any report prepared under this Act;

(e) court costs and travel or administrative expenses in connection with an adoption; or

(f) any other service approved by the court.

(2) The adoptive parent shall pay the fees and charges for adoption services as prescribed by the Minister.

## Regulations

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

(2) Without prejudice to the generality of subsection (1) regulations may provide for the following—

(a) the keeping and maintaining of the Prospective Adoptive Parents Register, the Register of Children Eligible for Adoption and the Adopted Children Register;

(b) prescribing procedures for determining whether a child has been abandoned by a parent or other person who has parental responsibilities and rights in respect of the child;

(c) determining procedures to be followed to locate persons whose whereabouts are unknown for obtaining their consent to adoptions;

(d) regulating the making of intercountry adoptions and prescribing safeguards therefor;

(e) prescribing the manner in which arrangements for adoption shall be conducted; and

(f) regarding any other ancillary or incidental administrative or procedural matter that may be necessary to prescribe to facilitate the proper implementation or administration of this Act.

## Court rules

**64.** The Chief Justice may make rules regulating practice and procedure in adoption proceedings.

Repeal and  
savings  
Cap. 26:01

**65.** —(1) The Adoption of Children Act is hereby repealed.

(2) Any subsidiary legislation made under the Act repealed by subsection (1), in force immediately before the commencement of this Act—

(a) shall remain in force, unless inconsistent with this Act, and be deemed to be subsidiary legislation made under this Act; and

(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.

## Transitional

**66.** Where at the commencement of this Act, adoption proceedings have been commenced under the Adoption of Children Act (now repealed) the proceedings and all related matters shall be dealt with as if they have been commenced under this Act and any court dealing with the matter shall continue as if it has jurisdiction under this Act.

FIRST SCHEDULE  
MALAWI GOVERNMENT

section 6

## Form 1 REGISTER OF CHILDREN ELIGIBLE FOR ADOPTION

This is a permanent record of information and should contain accurate details of the child

[illegible]



MALAWI GOVERNMENT  
THE ADOPTION OF CHILDREN ACT

## Section 27

Form 2

REGISTER FOR PROSPECTIVE ADOPTIVE PARENTS

[illegible]

SECOND SCHEDULE  
ADOPTION OF CHILDREN ACT

*section 15*

Offences rendering prospective adoptive parents ineligible

Conviction of any person of any of the following offences shall render a person ineligible as a prospective adoptive parent.

1. Offences under this Act.
2. Penal Code (Cap.7:01)

CHAPTER XI	—	Offences relating to the administration of justice
CHAPTER XV	—	Offences against morality
CHAPTER XVI	—	Offences relating to marriage and domestic obligations
CHAPTER XIX	—	Murder and manslaughter
CHAPTER XX	—	Duties relating to the preservation of life and health
CHAPTER XXI	—	Offences connected with murder and suicide
CHAPTER XXII	—	Offences endangering life or health
CHAPTER XXIII	—	Criminal recklessness and negligence
CHAPTER XXIV	—	Assaults
CHAPTER XXV	—	Offences against liberty
CHAPTER XXVI	—	Theft
CHAPTER XXVII	—	Offences allied to stealing
CHAPTER XXVIII	—	Robbery and extortion
CHAPTER XXIX	—	Burglary, housebreaking and similar offences
CHAPTER XXXI	—	False pretence
CHAPTER XXXIII	—	Frauds by Trustees and Persons in a position of trust and false accounting
3. Any other offence the penalty for which is 7 years imprisonment or more.
4. Any other offence as the Minister may from time to time prescribe by notice published in the *Gazette*

Form 1                  Report Concerning the Psychological and Social Circumstances  
of the Child

Please respond to each statement as appropriate for children aged 0-5 years

### Activity with toys:

<input type="checkbox"/>	The child's eyes follow rattles/toys, that are moved in front of the child
<input type="checkbox"/>	The child holds on to a rattle
<input type="checkbox"/>	The child plays with rattle: putting it in the mouth, shaking it, moving it from one hand to the other, etc.
<input type="checkbox"/>	The child puts cubes on top of each other
<input type="checkbox"/>	The child plays purposely with toys: pushes cars, puts dolls to bed, feeds doll, etc.
<input type="checkbox"/>	The child plays role-play with toys with other children
<input type="checkbox"/>	The child draws faces, human beings or animals with distinct features
<input type="checkbox"/>	The child cooperates in structured games with other children (ballgames, card games, etc.)
<input type="checkbox"/>	No observation available

**Language development:**

<input type="checkbox"/>	The child vocalizes in contact with caregiver
<input type="checkbox"/>	The child repeats different vowel-consonant combinations (ba-ba, da-da, ma-ma, etc)
<input type="checkbox"/>	The child uses single words to communicate needs
<input type="checkbox"/>	The child speaks in sentences
<input type="checkbox"/>	The child understands prepositions as: on top of, under, behind, etc.
<input type="checkbox"/>	The child uses prepositions as: on top of, under, behind, etc.
<input type="checkbox"/>	The child speaks in past tense
<input type="checkbox"/>	The child writes his own name
<input type="checkbox"/>	The child reads simple words
<input type="checkbox"/>	No observation available

### Motor development:

<input type="checkbox"/>	The child turns from back to stomach from age: .....
<input type="checkbox"/>	The child sits without support from age: .....

- |                          |  |
|--------------------------|--|
| <input type="checkbox"/> | The child crawls/moves forwards from age: .....                                  |
| <input type="checkbox"/> | The child walks with support from furniture from age: .....                      |
| <input type="checkbox"/> | The child walks alone from age:.....   |
| <input type="checkbox"/> | The child walks up and down stairs with support where applicable from age: ..... |
| <input type="checkbox"/> | The child walks up and down stairs without support from age: .....               |
| <input type="checkbox"/> | The child rides a bicycle without support from age: .....                        |

**Contact with adults:**

- |                          |   |
|--------------------------|---|
| <input type="checkbox"/> | The child smiles in contact with known caregiver                                      |
| <input type="checkbox"/> | The child is more easily soothed when held by known caregiver                         |
| <input type="checkbox"/> | The child cries/follows known caregiver, when the caregiver leaves the room           |
| <input type="checkbox"/> | The child actively seeks known caregiver when he/she is upset or has hurt him/herself |
| <input type="checkbox"/> | The child seeks physical contact with all adults, that come into the room             |
| <input type="checkbox"/> | The child communicates his feelings in words to caregivers                            |

**Contact with other children:**

- |                          |  |
|--------------------------|--|
| <input type="checkbox"/> | The child shows interest in other children by looking or smiling at their activity |
| <input type="checkbox"/> | The child enjoys playing beside other children                                     |
| <input type="checkbox"/> | The child engages actively in activities with other children                       |

**General level of activity:**

- |                          |            |
|--------------------------|------------|
| <input type="checkbox"/> | Passive    |
| <input type="checkbox"/> | Active     |
| <input type="checkbox"/> | Overactive |

**General mood:**

- |                          |                            |
|--------------------------|----------------------------|
| <input type="checkbox"/> | Sober, serious             |
| <input type="checkbox"/> | Emotionally indifferent    |
| <input type="checkbox"/> | Fussy, difficult to soothe |
| <input type="checkbox"/> | Happy, content             |

Any additional comments?

.....  
*Signature*.....  
*Name*.....  
*Occupation*.....  
*Stamp of the examining person*.....  
*Date*

ADOPTION OF CHILDREN ACT

Form 2 Medical Report on the Child

A duly licensed physician should complete this report.

Please answer all questions.  
If the information in question is not available please state “unknown”.

Medical History of the child

Name of the child: .....

Date of birth: .....

Sex: .....

Place of birth: .....

Nationality: .....

Name of the mother: .....

Date of birth:.....

Name of the father: .....

Date of birth: .....

Name of the guardian: .....

Date of birth: .....

Name of the present institution: placed since:

Weight at birth: kg. At Examination: kg.

Length at birth: cm. At Examination: cm.

Was the pregnancy and delivery normal?

☐ Yes ☐ No ☐ Do not know

Where has the child been staying?

☐ with his/her mother from to

☐ with relatives from to

☐ in private care from to

☐ in institution or hospital from to

(please state below the name of the institution or institutions concerned)

Has the child had any diseases in the past?

(If yes, please indicate the age of the child with respect to each disease, as well as any complication)

☐ Yes ☐ No ☐ Do not know

If yes:

Ordinarily children's diseases (whooping cough, measles, chicken-pox, rubella, mumps)?

Tuberculosis?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Do not know
Convulsions (incl. Febrile convulsions)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Do not know
Any other disease?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Do not know
Exposure to contagious disease?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Do not know

Has the child been vaccinated against any of the following diseases:

☐ Yes   ☐ No   ☐ Do not know

If yes:

Tuberculosis (B.C.G.)	Date of injection	
Diphtheria?	Date of injection	
Tetanus?	Date of injection	
Whooping cough?	Date of injection	
Poliomyelitis?	Date of injection	Date of oral vaccinations:
Hepatitis A?	Date of injection	
Hepatitis B?	Date of injection	
Other immunizations?	Date of injection	

Has the child been treated in hospital?

☐ Yes   ☐ No   ☐ Do not know

If yes state hospital, age of child, diagnosis and treatment:

Give if possible a description of the mental development, behaviour and skills of the child.

#### Visual

☐ unknown   When was the child able to fix?

#### Aural

☐ unknown   When was the child able to turn its head after sounds?

#### Motor

☐ unknown   When was the child able to sit by itself?  
Stand with support?  
Walk without support?

#### Language

☐ unknown   When did the child start to prattle?  
Say single words?  
Say sentences?

#### Contact

☐ unknown   When did the child start to smile?  
How does it react towards strangers?

How does it communicate with adults and other children?

### Emotional

☐ unknown

How does the child show emotions (anger, uneasiness, disappointment, joy)?

### Medical examination of the child

Date of the medical examination:

Weight: kg date:

Height: cm date:

Head circumference cm date:

Colour of hair: Colour of eyes: Colour of skin:

Through my complete clinical examination of the child I have observed the following evidence of disease, impairment or abnormalities of:

Date of the examination:

Head (form of skull, hydrocephalus, craniotabes)

Mouth and pharynx (harelip or cleft palate, teeth)

Eyes (vision, strabismus, infections)

Ears (infections, discharge, reduced hearing, deformity)

Organs of the chest (heart, lungs)

Lymphatic glands (adenitis)

Abdomen (hernia, liver, spleen)

Genitals (hypospadia, testis, retention)

Spinal column (kyphosis, scoliosis)

Extremities (pes equinus, valgus, varus, pes calcaneovarus, flexation of the hip, spasticity, paresis)

Skin (eczema, infections, parasites)

Other diseases?

Are there any symptoms of syphilis in the child?

Result of syphilis reaction made (date and year):

☐ Positive ☐ Negative ☐ Not done

Any symptoms of tuberculosis?

Result of tuberculin test made (date and year):

☐ Positive ☐ Negative ☐ Not done

Any symptoms of Hepatitis A?

Result of tests for hepatitis A made (date and year):

☐ Positive      ☐ Negative      ☐ Not done

Any symptoms of Hepatitis B?

Result of tests for HBsAg (date and year):

☐ Positive      ☐ Negative      ☐ Not done

Result of tests for anti-HBs (date and year):

☐ Positive      ☐ Negative      ☐ Not done

Result of tests for HBeAg (date and year):

☐ Positive      ☐ Negative      ☐ Not done

Result of tests for anti-HBe (date and year):

☐ Positive      ☐ Negative      ☐ Not done

Any symptoms of AIDS?

Result of tests for HIV made (date and year):

☐ Positive      ☐ Negative      ☐ Not done

Symptoms of any other infectious disease?

Does the urine contain

Sugar?

Albumen?

Phenylketone?

Stools (diarrhea, constipation):

Examination for parasites:

☐ Positive (species):      ☐ Negative      ☐ Not done

Is there any mental disease or retardation of the child?

Give a description of the mental development, behaviour and skills of the child.  
This is of particular value for advising the prospective parents.

Any additional comments?

.....  
*Signature and stamp of the examining physician*

.....  
*Date*

.....  
*Name*

.....  
*Qualification*



## ADOPTION OF CHILDREN ACT

Form 3

Enquiry on Prospective Adoptive Parent

Particulars of female prospective adoptive parent

Full Names .....  
 Physical Address .....  
 Email Address ..... Telephone No .....  
 Postal Address .....  
 Date of Birth ..... Place of birth .....  
 ID/Passport No .....  
 Occupation .....  
 Education .....  
 Qualification .....  
 Marital Status .....  
 Date of Marriage ..... Place of marriage .....  
 Have you ever been convicted of an offence other than a traffic offence? .....  
 If married do you intend to make a joint application for an adoption order?.....  
 If No, give reasons .....  
 .....  
 Country of domicile ..... Nationality .....  
 Race ..... Religion .....  
 Immigration status .....  
 Length of previous residence in Malawi .....  
 Intended length of future residence in Malawi .....  
 Income per month/other sources of income ..... How far is the earning of the other persons living in the home included in the income?.....

Particulars of male prospective Adoptive Parent

Full Names .....  
 Physical Address .....  
 Email Address ..... Telephone No .....  
 Postal Address .....  
 Date of Birth ..... Place of birth .....  
 ID/Passport No.....  
 Occupation .....  
 Education .....  
 Qualification .....  
 Marital Status .....  
 Date of Marriage ..... Place of marriage .....  
 Have you ever been convicted of an offence other than a traffic offence? .....  
 .....  
 If married do you intend to make a joint application for an adoption order?.....  
 If No, give reasons .....

Country of domicile ..... Nationality .....  
Race..... Religion .....  
Immigration status .....  
Length of previous residence in Malawi.....  
Intended length of future residence in Malawi .....  
Income per month/other sources of income ..... How far is the  
earning of the other persons living in the home included in the income?.....

Other Children in the Prospective Adoptive Family

	Full Names	Date of Birth	Sex	Occupation
1.	.....	.....	.....	.....
2.	.....	.....	.....	.....
3.	.....	.....	.....	.....

How many of the children are living at home?.....  
What is the opinion of the children on the proposed adoption?.....  
.....

Have you adopted a child before? Yes ..... No.....  
If yes, give details.

	Name	Date of Birth	Sex	Occupation
1.	.....	.....	.....	.....
2.	.....	.....	.....	.....
3.	.....	.....	.....	.....

Details of their health status.....  
Has any previous application for adoption been rejected? yes/no..... If  
yes give reasons.....  
.....  
.....

Accommodation and Condition of the Home

Description of the home.....  
Number of bedrooms..... Source of water .....  
Type of toilet / bathroom.....  
Type of house (permanent/semi-permanent/traditional).....  
Owner occupied or rented.....  
Assets/property.....  
Liabilities (loan, mortgage, etc.) .....  
Details of other people living in the home.....

	Full names	Age	Sex	Relationship	Occupation
1.	.....	.....	.....	.....	.....
2.	.....	.....	.....	.....	.....
3.	.....	.....	.....	.....	.....

Are the people living in the home in apparent good health?.....

Give names of responsible persons who can confirm or attest for your character and means—

	Name	Title/Occupation	Address	Tel/Email
1.	.....	.....	.....	.....
2.	.....	.....	.....	.....
3.	.....	.....	.....	.....

I certify that the information given above is true to the best of my knowledge.

Name ..... Signature ..... Date .....

## ADOPTION OF CHILDREN ACT

## Form 4 Medical Particulars of Prospective Adoptive Parent

(The medical report must be signed by a medical practitioner)

1. (a) Name of prospective adoptive parent:  
(b) Date of birth:  
(c) Sex:  
(d) Address:
2. Is the prospective adoptive parent able to have natural children of his own and if not is the reason why he is unable to have such children known?
3. If any fertility tests have been made to the prospective adoptive parent what are/were the results of such tests?
4. Has the prospective adoptive parent suffered or is suffering from any of the following?
  - (a) tuberculosis;
  - (b) chronic bronchitis or recurrent chest illness;
  - (c) cardiovascular disease;
  - (d) any form of rheumatism;
  - (e) any form of neurosis or mental disorder;
  - (f) epilepsy;
  - (g) genitor-urinary disease;
  - (h) diabetes ;
  - (i) any neurological disorder;
  - (j) leprosy; and
  - (k) any illness which might shorten the expectation of life or cause recurrent disability.
5. Has the prospective adoptive parent undergone any major surgical procedure?
6. Is there any relevant family history of mental or physical disease?
7. Is there any relevant abnormality in the following?
  - (a) cardiovascular system (blood pressure should be stated);
  - (b) respiratory system (if a chest X-ray is taken state date and result of such test);
  - (c) urogenital (state quality of albumin and sugar in urine;
  - (d) abdomen and alimentary;
  - (e) central nervous system;
  - (f) Eyes and vision;
  - (g) Ears and hearing; and
  - (h) Skin.
8. Is there normal use of limbs?
9. Does the prospective adoptive parent appear mentally balanced and emotionally secure?

10. Are there any other facts, medical or otherwise, about the prospective adoptive parent which should be known?

Signature: .....

Name: .....

Qualification: .....

Date: .....

ADOPTION OF CHILDREN ACT

Form 5 Guidelines for Matching

MATCHING INFORMATION ON THE CHILD

Basic Facts

Name of the child:	Passport size picture
Date of birth:	
Sex:	
Place of birth:	
Nationality:	
Language spoken:	
Legal status and any outstanding proceedings:	
Religious background:	
Siblings and their whereabouts:	
Parents or guardian and their whereabouts:	

Child’s History and Experience

Current situation of the child:
Custodian of the child:
Signs of trauma:
History of abuse (physical and psychological) or neglect:
Conditions of home and school environment:
Distinct personal traits:
Health and medical history:

Child’s Individual Needs

Physical, social and psychological development:
Health and medical condition:
Hereditary conditions:
Education (including history, needs, and experience):
Personality:
Understanding of adoption (including wishes and feelings):
Any other concerns:

Background Information on Birth Family

Name and address
Social history of birth parents (substance abuse and domestic violence):
Medical history of birth parents:
Cultural beliefs and social interaction:
Family coherence:

**INFORMATION ON THE ADOPTIVE PARENT**

Name:	Passport size picture
-------	-----------------------

Date of birth:

Sex:

Place of birth:

Nationality:

Residence:

Occupation:

Religion:

Language spoken:

Family membership:

Social history of the family (including criminal history, substance abuse, and domestic violence):

Family coherence:

Cultural beliefs and social interaction:

Health and medical history:

Personality:

Other children in the family and their views on the adoption:

Linkages with adoption support networks:

Understanding of adoption issues:

Acceptance of adoptive child's name and identity:

Attitude towards contact proposals:

Ability to meet adoptive child's assessed needs:

Areas of potential concern:

Adoption support needs required:

**SUITABILITY OF PROPOSED MATCH**

Age compatibility:

Sex compatibility:

Social, religious, and cultural compatibility:

Health and psychological needs compatibility:

Home and family suitability:

Economic ability:

Contact proposals:

Outstanding concerns and how they will be resolved:

Outstanding issues with regard to the adoption process:

Other:

**APPENDIX II**  
**ADOPTION OF CHILDREN (COURT)**  
**RULES, 20...**



ADOPTION OF CHILDREN (COURT) RULES, 20...

ARRANGEMENT OF RULES

Rule

- 1. Citation
- 2. Interpretation
- 3. Form of petition
- 4. Persons to be served
- 5. Consent in writing
- 6. Mode of service
- 7. Verification by affidavit
- 8. Guardian *ad litem*
- 9. Notice of hearing
- 10. Adoption order
- 11. Information to be confidential
- 12. Previous applications
- 13. Referral of cases
- 14. Interim order
- 15. Sealed copy of order to Director of National Registration
- 16. Safe custody of documents
- 17. High Court and Child Justice Court practice to apply
- 18. Forms
- 19. Review of suitability of prospective adoptive parent
- 20. Deletion of names from the Prospective Adoptive Parent Register
- 21. Notification of deletion
- 22. Application to re-enter name
- 23. Grounds of entering
- 24. Names re-entered in previous position
- 25. Proof of identity

1. These Rules may be cited as the Adoption of Children (Court) Rules.

Interpretation

2. In these Rules, unless the context otherwise requires—

“child” means child proposed for adoption;

“Registrar” means the Registrar of the High Court.

3. A petition for adoption shall be in accordance with Form 1 in the *Schedule*.

Form of  
petition  
*Schedule*

4. —(1) A petition shall be served on—

Persons to be  
served

(a) the parent of a child;

(b) the guardian of a child;

(c) a person having actual custody of a child; and

(d) a person liable to contribute to the support of a child.

(2) A court may dispense with service on any of the persons in subrule (1), and may order the petition to be served on any other person.

Consent in  
writing  
*Schedule*

**5.** A consent required under section 9 of the Act shall be in writing and in accordance with Form 2 in the *Schedule* and shall be attested by a Commissioner for Oaths.

Mode of  
service

**6.** A petition or any other document shall be served in accordance with the practice and procedure for the time being obtaining in the court in which the application for adoption is made.

Verification by  
affidavit

**7.—** (1) A petition shall be verified by affidavit.

(2) Notwithstanding subrule (1), the court may direct that evidence be given orally.

Guardian  
*ad litem*

**8.** The child shall be a respondent to the petition and the court shall cause the petition to be served on the guardian *ad litem*.

Notice of  
hearing

**9.—** (1) When a guardian *ad litem* has been appointed, the court shall appoint a day for hearing of the petition, and shall give notice to all persons who must be served in accordance with rule 4.

(2) The notice shall be served seven (7) clear days before the day appointed for the hearing.

*Schedule*

(3) The notice shall be in accordance with Form 3 in the *Schedule*.

Adoption  
order  
*Schedule*

**10.—**(1) An adoption order shall be in accordance with Form 4 in the *Schedule*.

(2) No copy or duplicate of any order made by the court shall be given or served upon any person other than the petitioner and the Director of National Registration, unless the court otherwise directs.

Information to  
be confidential

**11.** The guardian *ad litem* and, where a body of persons is appointed guardian *ad litem*, any officer or agent of that body, shall regard all information obtained in the course of the investigation or otherwise in relation to the matter as confidential, and shall not divulge any part of it to any person save as may be necessary for the proper execution of his duty.

Previous  
application

**12.** If it appears that the petitioner has made previous application under the Act in respect of the same child and that such application has been refused, the court shall not make an adoption order or an interim order unless satisfied that there has been a substantial change in the circumstances since the previous application.

Referral of  
cases

**13.—**(1) If, owing to special circumstances, an application appears to a Judge to be more suitable to be dealt with by a magistrate in

Child Justice Court, the Judge may, on that ground, expressly refuse to make an order.

(2) If, owing to special circumstances, an application appears to a magistrate to be suitable to be dealt with by the High Court, the magistrate may, on that ground expressly, refuse to make an order.

(3) Where a court seized with a matter refuses to make an order, the court shall refer the matter to an appropriate court and the court to which the matter is referred shall proceed as if the petition was filed in that court.

**14.**—(1) An interim order made under section 21 may provide for the supervision of the child by a guardian *ad litem* or otherwise as the court may deem appropriate. Supervision of child

(2) An interim order shall be in accordance with Form 5 in the *Schedule*. *Schedule*

**15.** Upon the making of an adoption order the court shall forward a sealed copy of the order to the Director of National Registration. Sealed copy of order to Director of National Registration

**16.** A court shall cause all petitions, consents and other documents relating to any application or order made under the Act to be kept in a secure place. Safe custody of documents

**17.** The practice and procedure for the time being obtaining in the High Court or the Child Justice Court shall apply to proceedings under the Act. High Court and Child Justice Court practice to apply

**18.** The Forms in the Schedule shall be used in applications and for orders made under the Act, and, in any case where no form is included in the Schedule, the Forms in use in the applicable court may be adopted with such variations as may be necessary. Forms

**19.** Where a person has been assessed and approved as a suitable prospective adoptive parent by the Director, and his name has been entered in the Prospective Adoptive Parent Register, the Director shall not recommend that such person adopt a child if more than twenty four (24) months have elapsed since the date of entry into the Prospective Adoptive Parent Register unless— Review of suitability of prospective adoptive parents

(a) the Director is satisfied that at the time of filing the adoption petition, the person is still a suitable parent; or

(b) the Director has reviewed the person’s circumstances and is satisfied that the person is still a suitable parent.

Deletion of  
names from  
the  
Prospective  
Adoptive  
Parent  
Register

**20.** For the purposes of section 28 of the Act, the name of a person may be deleted from the Register if—

- (a) the person so requests;
- (b) the person is found by the Director to be unsuitable to adopt a child;
- (c) the person no longer satisfies the criteria applying to that person under section 14 of the Act; or
- (d) the person adopts a child under this Act.

Notification of  
deletion

**21.** A person whose name has been deleted from the Register shall be advised in writing—

- (a) that his name has been deleted and the reason for the deletion; and
- (b) that he may apply to the Director in the manner set out in rule 22 to have his name re-entered in the Register.

Application  
to re-enter  
name

**22.** If a person's name has been deleted from the Register on the basis that the person has been assessed to be no longer suitable as an adoptive parent, the person may apply to the Director to have his name re-entered in the Register.

Grounds for  
re-entering  
name in  
register

**23.** Where a person applies to the Director that his name be re-entered in the Register, the Director may re-enter that person's name in the Register if—

- (a) he is satisfied that there has been a proper review of the decision to remove his name and it is consistent with the outcome of the review to re-enter the person's name in the Register; or
- (b) he is satisfied that the person continues to satisfy the criteria of a suitable adoptive parent, stipulated under the Act.

Names  
re-entered in  
previous  
position

**24.** If the Director decides to re-enter a name in the Register, he may also direct that the name be placed in the same position that it was in before the name had been deleted.

Proof by  
single  
document

**25.—(1)** A person may prove his identity by producing for inspection to the Director one of the following—

- (a) an identity card;
- (b) the person's valid passport; or
- (c) the person's valid motor driver's licence

(2) Where a person is required to prove, or satisfy another person concerned with adoption as to his identity, the person is to prove his identity by producing any one of the documents issued under subrule (1).

SCHEDULE  
ADOPTION OF CHILDREN ACT

Form 1 PETITION FOR ADOPTION r. 3

In the High Court of Malawi/Child Justice Court\* .....  
Sitting at .....

In the Matter of the Adoption of Children Act, and  
In the Matter of A.B. of ..... a (here state whether the  
child is male or female) child.

To the Magistrate/Registrar of the said Court.\*  
The Petition of C.D., of ..... (and E.D. his or her spouse,  
of the same address)—

- SHOWS THAT—
1. Your Petitioner(s) is(are) desirous of adopting the said A.B. under the provisions of the Adoption of Children Act.
  2. Your Petitioner(s) is(are)resident at .....
  3. Your Petitioner C.D. is unmarried (was married to your Petitioner E.D. at ..... on the ..... day of ..... 20.....)
  4. Your Petitioner C.D. is by occupation a .....
  5. Your Petitioner C.D. is ..... years of age and your Petitioner E.D. is ..... years of age.
  6. Your Petitioner(s) has (have) resident with him (them) the following persons, namely, .....
  7. Your Petitioner(s) C.D. (and E.D.) is (are) related to the said A.B. as follows— ..... (or, Your Petitioner(s) is not (are not nor is either of them) related to the said A.B.).
  8. The said A.B. is—
    - (a) of the ..... sex;
    - (b) unmarried;
    - (c) a child of ..... and ..... both of .....
    - (d) a citizen of Malawi (or as the case may be) .....
    - (e) ..... years of age, having been born on the ..... day of ..... 20....., Search has been made in the Register of Births of the Director of National Registration; the birth of the said A.B. was (not) registered (at entry No. ..... dated .....);
    - (f) resident at .....
    - (g) now in the actual custody of ..... of .....

(h) under the guardianship of ..... of .....

(i) entitled to the following property, .....

9. .... of ..... (and ..... of ..... ) is/are liable to contribute to the support of the said A.B.

10. The said A.B. has not been the subject of an adoption order or an application or petition for an adoption order, save that (state order and application or petition, if any).

11. Your Petitioner(s) undertakes(undertake), if an order is made on this Petition, to make for the said A.B. the following provision, namely, .....

Your Petitioner(s) will, if required, secure the above provision by bond or otherwise as the Court may require.

12. Consent to this Petition has been obtained from—

- (a) the father of the child;
- (b) the mother of the child;
- (c) the guardian of the child;
- (d) the person with actual custody of the child;
- (e) a person liable to contribute to the support of the child; or
- (f) the spouse of the petitioner.

13. Your Petitioner(s) has not (have not nor has either of them) received or agreed to receive and no person has made or given or agreed to make or give to the Petitioner(s) (or either of them) any payment or reward in consideration of the adoption of the said A.B. (except as follows—)

14. It is proposed that the costs of this Petition shall be provided for as follows—

Your Petitioner(s) prays(pray)—

- (a) that an order for the adoption of the said A.B. by your Petitioner(s) may be made in pursuance of the Adoption of Children Act, with all necessary directions;
- (b) that the costs of this Petition may be provided for as above mentioned or otherwise as the Court may direct; and
- (c) such further or other order as the nature of the case may require.

NOTE.— It is intended to serve this Petition on .....

\* *Delete whichever is inapplicable.*

ADOPTION OF CHILDREN ACT

Form 2

CONSENT TO ADOPTION ORDER

r. 5

(Title as in Petition)

In the Matter of a Petition by ..... of  
..... for an order for the adoption of .....  
.....the said child.

I, the undersigned ..... of ..... being—

- (a) the father of the child or the mother of the child (depending on which of the two has parental rights and responsibilities over the child);
- (b) both the father and the mother of the child if both have parental rights and responsibilities over the child;
- (c) the guardian of the child;
- (d) the person with actual custody of the child;
- (e) a person liable to contribute to the support of the child; or
- (f) the spouse of the petitioner,

hereby state that I understand the nature and effect of the adoption for which application is made (and that in particular I understand that the effect of the order will be permanently to deprive me of my parental rights and responsibilities). And I hereby consent to the making of an adoption order in favour of the petitioner(s).

In Witness whereof, I (We) have signed this consent on the .....  
day of ..... 20....., at .....

(Signature) .....

BEFORE

.....  
Commissioner for Oaths/Magistrate

ADOPTION OF CHILDREN ACT

Form 3

NOTICE OF HEARING

r. 9

(Title as in Petition)

To ..... of .....

Take notice that a Petition has been presented in the above matter praying that an order may be made for the adoption of the above-named ..... by ..... of ..... and that..... of ..... has been appointed guardian *ad litem* to the said child, and that the said Petition will be heard at a court sitting at ..... on the ..... day of ..... 20., at..... o'clock in the ..... noon.

Dated this ..... day of ..... 20....

.....  
Registrar/Magistrate



ADOPTION OF CHILDREN ACT

Form 4

ADOPTION ORDER

r. 10

(Title as in Petition)

In the High Court/Child Justice Court\*.....

Sitting at .....

In the Matter of the Adoption of Children Act, and

In the Matter of A.B. of .....

a (here state whether the child is male or female) child.

(to be used where the name or surname which the child is to bear after the adoption does not differ from his original name or surname.

In the Matter of X.Y. (formerly A.B.) of ..... a (here state whether the child is male or female) child.

(to be used where the name or surname which the child is to bear after the adoption differs from his original name or surname).

Upon reading the Petition of ..... (here state the address and occupation of the petitioner),

(and ..... ) and upon reading the affidavits of ..... and ..... and the exhibits thereto (refer to the affidavits filed in the matter and the exhibits thereto) and upon hearing ..... and the evidence of ..... (state names and addresses of witnesses examined orally).

And being satisfied that the allegations in the said Petition are true and being also satisfied with the undertaking of the said ..... (and ..... ) as to the provision to be made for the above-named child and with the securing thereof and being further satisfied that it is for the benefit of the said child that (s)he should be adopted by the said ..... and ..... and that all the requirements of the Adoption of Children Act have been complied with.

It is ordered that the said ..... (and ..... ) be authorized to adopt the said child.

(.....)

And it is ordered that the parties to these proceedings other than the said ..... (and ..... ) do recover their costs against the said ..... (and ..... ), and that the said ..... (and ..... ) do pay the amount of the said costs to this Court within fourteen days hereof.

And it is directed that the Director of National Registration shall make an entry recording this adoption in the Adopted Children Register in the form set out in the Schedule to the said Act.

And it having been proved to the satisfaction of the court that the said child was born on the ..... day of ..... 20....., and is identical with ..... to whom an entry numbered ..... and made on the ..... day of ..... 20....., in the Register of Births for ..... relates, it is further directed that the Director of National Registration shall cause such birth entry or entries to be marked with the word “adopted” and shall include the above date of birth in the entry recording the adoption in the manner indicated in the Schedule to the National Registration Act.

*\* Delete whichever is inapplicable*

ADOPTION OF CHILDREN ACT

Form 5

INTERIM ORDER

r. 14

(Title as in Petition)

Upon reading, etc.  
And upon reading, etc.  
And upon hearing, etc.  
And the evidence, etc. } As in adoption order.

And being satisfied that the allegations in the said Petition are true and also being satisfied with the undertaking of the said ..... (and ..... ) as to the provision to be made for the above-named child and with the securing thereof and being further satisfied that it is for the benefit of the said child that (s)he should for the present be in the custody of the said ..... (and ..... ) and that all the requirements of the Adoption of Children Act have been complied with.

The following payment is sanctioned, viz—

And it is ordered that the determination of the Petition be postponed and that the custody of the said child be given to the said ..... (and ..... ) for the period of ..... from the date of this order by way of a probationary period (and subject to the supervision of ..... of ..... who shall be at liberty at all reasonable times to visit and interview the child alone and to make all necessary inquiries as to the comfort and well-being of the child).

And as regards costs it is ordered that .....  
And any of the parties including the guardian *ad litem* of the said child to be at liberty to apply as they may be advised.

# **APPENDIX III**

## **LIST OF WORKSHOP PARTICIPANTS**

**FIRST NATIONAL WORKSHOP: SPECIAL LAW COMMISSION ON  
THE REVIEW OF THE ADOPTION OF CHILDREN ACT**

**SUNBIRD CAPITAL HOTEL, 16 MARCH 2010**

<b>No.</b>	<b>Name</b>	<b>Designation</b>	<b>Organization</b>	<b>Sector</b>
1.	His Hon. Texious Masoamphambe	Assistant Registrar	High Court of Malawi	Judiciary
2.	Chief Phambala	Traditional Leader	Local Government	Ntcheu Traditional Authority
3.	Associate Professor Golden Msilimba	Dean of Education	Mzuzu University	Academia
4.	Chief Makwangwala	Traditional Leader	Local Government	Mbvimbo Headquarters Traditional Authority
5.	Rev. Annie Chikhwaza	Executive Director	Kondanani OrphanCare	Thyolo Orphanage
6.	Chief Ngabu	Traditional Leader	Local Government Chikwawa	Traditional Authority
7.	Sheikh Dr. S.I. Omar Idruss	Regional Chairman -South	Muslim Association of Malawi	Faith organisation
8.	Professor Anaclat Phiri	Vice Chancellor	Catholic University of Malawi Chiradzulu	Academia
9.	Dr. Ngeyi Ruth Kanyongolo	Lecturer	Chancellor College	Academia
10.	Mr. Boniface Mandele	Advocacy and Research Officer	Eye of the Child	NGO
11.	Mr. Mike Mkhwimba	Assistant Controller of News	MBC	Media
12.	Mr. Paul M'manjamwada	HIV and AIDS and Gender Programme Coordinator	Norwegian Church Aid	International NGO
13.	Mrs. Jacqueline Kabambe	Child Protection Specialist, OVC	UNICEF	Diplomatic missions/ development partners
14.	Mr. John Soo Phiri	Capacity Development Officer	Malawi Human Rights Resource Centre	NGO

15.	Mrs. Faless Moyo	Programme Officer	MANET +	NGO
16.	Miss Martha Chizuma	Member	Women Lawyers	Professional Body Association
17.	Mr. Peter J. Ganger	Consul	US Embassy	Diplomatic missions/development partners
18.	Rebekah Bayliss	Vice Consul	British High Commission	Diplomatic missions/development partners
19.	Mrs. Thandizo V. Mphwiyo	Civic Education Coordinator	Centre for Human Rights and Rehabilitation	NGO
20.	Angela Odiachi	Care and OVC Advisor	USAID	Diplomatic missions/development partners
21.	Miss Maria Chidzanja Nkhoma	Women and Children Affairs	Zodiak Broadcasting Station	Media
22.	Miss Zilani Gondwe	Deputy Editor	Guardian Publications	Media
23.	Mr. Daniel Mwale	Student on Internship	NGO Gender Coordination Network	NGO
24.	Mrs. Olive Chikankheni	PS	Ministry of Gender, Children and Community Development	Government Department
25.	Mr. Brian O'Brien	Consul 2 <sup>nd</sup> Secretary	Embassy of Ireland	Diplomatic missions/development partners
26.	Suzgo Khunga	Reporter	Daily Times	Media
27.	Mrs. Mary Dominica Kachale	Senior Assistant Chief State Advocate	Ministry of Justice	Government Department

28.	Mr. Vincent Moyo	Country Representative	Tearfund UK	International NGO
29.	His Worship Boswell B. Kamphonda	Magistrate	Magistrate Court	Judiciary
30.	Ms. Ruth Maulana	Programme Officer-ECD	Consul Homes	Orphanage
31.	Ms. Solrun Olafsdottir	Programme Officer	Royal Norwegian Embassy	Diplomatic missions/development partners
32.	Mr. Phillip Tegha	National FSP Coordinator	SOS Children's Villages Malawi	Orphanage NGO
33.	Mr. Darlington Akambadi	Youth, Schools Outreach and Child Protection Desk Officer	National Police Headquarters	Government Department
34.	Mr. M.J. Makande	Senior Clerk Assistant	National Assembly	Government Arm
35.	Hon. Joyce Azizi Banda	MP	National Assembly	Government Arm
36.	Mr. Manuel Mbendela	Programs Coordinator Salima	Quadria Muslim Association of Malawi	Faith organisation
37.	Inkosi Chekucheku	Chief	Traditional Leader Neno	Traditional Authority
38.	Tamandani Chimomboh	Child MP	Neno Social Welfare	Government Department
39.	Rodrick Gotoma	Child MP	Neno Social Welfare	Government Department
40.	Mr. Yohane Gadama	Child MP	Blantyre	Government Department
41.	Hon. Gladys Tembo		MP Neno South Assembly Arm Constituency	National Government
42.	Hon. Eunice J.N. Makangala	MP Mulanje	National Assembly	Government Arm
43.	Inkosi Mpherembe	Traditional Leader M'mbelwa District Council	Local Government Authority	Traditional

# **WORKSHOP ON THE REVIEW OF THE ADOPTION OF CHILDREN ACT CAPITAL HOTEL-17TH AUGUST 2010**

## **LIST OF PARTICIPANTS**

<b>NO.</b>	<b>NAME OF PARTICIPANT</b>	<b>ORGANISATION AND ADDRESS</b>
1	Mike Chipalasa	Daily Times
2	Mallick Mnela	Zodiac Broadcasting Station
3	Timothy Dawa	Consol Homes, Box 162, Nathenje
4	Ernest Chikuni	Social Welfare, Mchinji
5	Inkosi Nyoka, STA	Mchinji District Assembly
6	Gladstone Kachale	Dedza District Assembly
7	Inkosi Kachere	Dedza District Assembly
8	Peter Makawa	MBC-TV
9	Redson Mtitila	“
10	John Washali	Dowa Social Welfare
11	T/A Makwangwala	Ntcheu District Assembly
12	Mike Makalande	Ministry of Gender, Children & Co
13	M. Chipeta	Home of Hope Orphanage
14	M. Chibwatiko	Social Welfare Office, Salima
15	C.M. Thombozi	Nkhotakota District Assembly
16	H. Thindwa	Nkhotakota Social Welfare
17	R.W. Malemia	Ministry of Labour, Box 69, LL
18	Y.L. Chiwanda	Kasungu District Social Welfare
19	Paul Kalilombe	Lilongwe District Assembly
20	Ainabyana Joshua	NOVOC, Box 1266, LL
21	Macloud Kadammanja	Ntcheu District Council, P/B 1
22	Sylvester Namiwa	MIJ FM
23	Isaac Jali	MBC Radio
24	Beatrice Chirwa	Malawi Council of Churches
25	H.M. Londe	Kasungu District Council
26	Denis Chipao	Central Region Police
27	Martha Kwengwere	Office of the Ombudsman
28	James Manyetera	Dowa District Council
29	Beatrice Mkanda	Catholic Commission for Justice and Peace
30	Paul M'manjamwada	Norwegian Church Aid
31	Lucky Mbewe	NGO Gender Network
32	Wilson Kambewa	Ntchisi District Social Welfare
33	Modester Sekeleza	Malawi News Agency



34	B.M Muva	National Registration Bureau
35	Lloyd Mtalimanja	Evangelical Association of Malawi
36	Chief Nthondo	Ntchisi District Council
37	Chief Khombedza	Salima District Council
38	Chief Madzama	Nkhotakota District Council
39	Jim Wotchi	Mchinji District Social Welfare
40	Jones Mwengo	Village of Hope, Mchinji
41	Hyacinth Kulemeka	Ministry of Gender, Children and Community Development
42	Inkosi (Chief) Mponela	Dowa District Assembly
43	Grace Masanga	Plan International-MW
44	Imran Saidi	Muslim Association
45	A.B. Ndooko	Ntchisi District Assembly
46	S.G.S Phiri	RSWO
47	V. Khonje	Star Radio
48	L.F. Nhlane	Salima District Council
49	Senior Chief Lukwa	Kasungu District Assembly
50	Violet Chipao	Judiciary
51	Chisomo Zileni	National Youth Council of Malawi
52	Esther Masika	Norwegian Church Aid

**REGIONAL CONSULTATION WORKSHOP FOR THE SOUTHERN  
REGION MOUNT SOCHE HOTEL: 16 SEPTEMBER, 2010**

**PARTICIPANTS**

**Judiciary**

1.	Justice Twea	Justice of Appeal Supreme Court P. O. Box 30244, Blantyre 3
2.	Mrs. Esmie Tembenu	Child Justice Magistrate Child Justice Court P/Bag 524, Blantyre

**Chiefs**

3.	TA Kalembo	c/o Balaka District Council Private Bag 1, Balaka
4.	Sen. Chief Kadewere	P. O. Box 122 Chiradzulu
5.	Chief Chowe	P. O. Box 138 Mangochi

6.	TA Mbenje P/Bag 1 Nsanje
7. TA Kaduya	Migowi Hqs. P/Bag 32, Phalombe
8. TA Nanseta	Nangunda Hqs. Private Bag 5 Luchenza, Thyolo
9. TA Maseya	Chikhwawa District Council P/Bag 1, Chikhwawa
10. TA Kanduku	Mwanza District Council P/Bag 3, Mwanza
11. TA Mlumbe	P. O. Box 23, Zomba
12. TA Likongwe	P. O. Box 11, Neno
13. TA Chikumbu	Ntenjere Hq. P. O. Box 17 Chisitu, Mulanje
14. TA Chamba	Machinga District Assembly Private Bag 1, Machinga
15. TA Machinjiri	Blantyre District Council P/Bag 97, Blantyre

#### NGOs/Orphanages

16. Mr. H. Mhango	Finance and Administration Officer Gender Support Programme P/Bag 443, Blantyre
17. Mr. McKennedy Abdulaziz Yassin	Projects Coordinator Mai Aisha Trust P. O. Box 5866, Limbe
18. Mr. Kachere Khumalo	Executive Director The Samaritan Trust P. O. Box 2835, Blantyre
19. Mr. Brian Muyaya	Program Officer Orphan Support Africa -Malawi P. O.Box 119, Zomba
20. Mr. Dickens Mahwayo	Malawi Children's Village, Mangochi
21. Miss Diana Pilirani Magombo	Project Officer (Youth Dev. Human Rights and Democracy) YONECO P. O. box 471, Zomba

22. Rev. Ann Chikhwaza	Executive Director Kondanani Children's Home P. O. Box 30871, BT 3
23. Mr. Ken William Chisale	YARD, Nsanje
24. Mr. Godfrey Msoliza	Administration Officer Youth Arm Organization P. O. Box 4008, Blantyre
25. Miss Lusako Phambana	Paralegal Officer Centre for Human Right Education Advice and Assistance P. O. Box E604 Post Dot Net, Blantyre
26. Miss Mtisunge Chaponda	Programme Officer Blantyre Synod Health and Development Commission P. O. Box 413, Blantyre
27. Mr. Neville Bevis	Director Open Arms Infant Homes

#### **District Social Welfare Officers**

28. Mr. Charles Salamu	District Social Welfare Officer P. O. Box 287, Balaka
29. Mrs. Esther Ndaipalero	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 1234, Blantyre
30. Mr. M. E. Maulidi	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 55, Chiradzulu
31. Mr. Joshua Saini Luhana	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 41, Mwanza
32. Miss Esther Damaseke	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 63, Nsanje
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34. Miss Grace L. Mvula	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 148, Thyolo
35. Mr. Alexander Mwale	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 223, Mangochi
36. Miss Bertha L. Mijoya	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 10, Machinga
37. Mr. James Simbi Dzumbila	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 2, Chikhwawa
38. Mr. Peter Magomero	Ministry of Gender, Children and Community Development District Social Welfare Office P. O. Box 113, Neno
39. Mrs. Olive Msyamboza	Ministry of Gender, Children and Community Development District Social Welfare Office P/Bag 61, Zomba
40. Miss Claire J. Kachapira	Ministry of Gender, Children and Community Development District Social Welfare Office P/Bag 12, Mulanje

#### **DCs office**

41. Mr. C. M. Namalweso	Dir. of Adm. Blantyre District Council P/Bag 97, Blantyre
42. Miss Mercy Chisuwo Banda	DC's rep. Chiradzulu District Council P/Bag 1, Chiradzulu
43. Mr. Chabuka	DC's rep. Mangochi P/Bag 138, Mangochi
44. Mr. Eric Nema	DC's rep., (Dir. of Administration) Nsanje District Council Private Bag 1, Nsanje

45. Mrs. Elestina M'mame	DC's rep., Thyolo Acting Dir. of Administration P/Bag 5, Thyolo
46. Mr. Jack Kafoteka Nguluwe	DC P/Bag 9, Mulanje
47. Miss G. Zione Chirwa	DC's representative Zomba District Council P. O. Box 23, Zomba
48. Mr. Lawford T.L. Palani	DC Neno District Council P. O. Box 11, Neno
49. Mr. Felix Ngoleka Mkandawire	DC Chikhwawa District Council P/Bag 1, Chikhwawa
50. Mr. Lovemore Chitawo	Director of Admin. Balaka District Council P/Bag 1, Balaka
51. Mr. Smart Lans Gwedemula	DC Mwanza District Council P/Bag 3, Mwanza
52. Mr. Mbawaka K. Mwakhwawa	DC's rep. Assistant District Council Private Bag 1, Machinga
53. Mr. L. J. Kandiado	DC's rep. Phalombe District Council Private Bag 32, Phalombe

### Government Departments

54. Mr. Hudson Mankhwala	Passport Officer Immigration Headquarters P. O. Box 331, Blantyre
55. Mr. Kenneth Mtago	Southern Reg. Youth Office P. O. Box 2595, Blantyre
56. Mrs. Elizabeth Chinguo	Senior Assistant Immigration Officer Mwanza Immigration Border P. O. Box 201, Mwanza
57. Inspector Cosmas A. P. Chidothi	Reg. Prosecutions Inspector Eastern Reg. Police Hdq. P. O. Box 31, Zomba

**Media**

58.	Mr. Macdonald Thom	Blantyre Newspapers P/bag 39, Blantyre
59.	Mr. Patrick Tawakali	Chief Editor MBC P. O. Box 30133, Blantyre 3
60.	Mr. Robert Kumwenda	Big Issue Magazine P. O. Box 51131, Limbe
61.	Mr. Emmanuel Muwamba	Nation Publications Limited  P. O. Box 30408, Blantyre 3
62.	Mr. Charles Chatoza	Star FM Radio
63.	Mr. Godfrey Maotcha	Guardian Publication Lornho Building Limbe
64.	Mr. Joseph Chirwa	Capital FM

**REGIONAL CONSULTATIVE WORKSHOP ON THE REVIEW  
OF THE ADOPTION OF CHILDREN ACT**

**16TH SEPTEMBER, 2010, MZUZU HOTEL**

<b>NO.</b>	<b>NAME</b>	<b>ADDRESS</b>
1.	Hon. Justice Chombo	High Court of Malawi P/Bag 15, Lilongwe
2.	Ms. H. Kulemeka	Ministry of Gender/ Bag 330, Lilongwe 3
3.	Mr. D.C.C. Mwandira	Rumphi District Council Box 224, Rumphi
4.	Mr. P. Dokali	Mm'belwa District Council Box 132, Mzimba
5.	Chief Mwenemisuku	Ministry of Local Government Box 19, Chitipa
6.	Mrs. M. Mwamlima	P.O. Box 210, Mzuzu
7.	Mr. M. D. Hara	MOGCCD Box 99, Nkhatabay
8.	Ms. Edith Kayira	Power 101 FM Radion Box 20079, Mzuzu
9.	Mr. S.K. Mlenje	Kaviwale Orphan Care Centre Box 955, Mzuzu

10.	Mr. T. Nthali	Likoma District Council Box 77, Likoma
11.	Mr. Dalitso Chimwala-Phiri	MBC-TV Box 61 Mzuzu
12.	Mr. Ian Chibambo	Doors of Hope Support Care Group Box 20060 Mzuzu 2
13.	Mr. C. Masulani	St. John of God Box 744, Mzuzu
14.	Mr. F. Ndala	Nation Publications Ltd P/Bag 93, Mzuzu
15.	Ms. H. Mpata	Youth Hope Box 764, Mzuzu
16.	Mr. S. Zimba	Zodiak Broadcasting Station P/Bag 240, Mzuzu
17.	Mr. Wezi Moyo	Action Aid P/Bag 149, Mzuzu
18.	Mr. B. Mhango	BNL (Daily Times)
19.	Mr. S. Ngwira	Orphan Support Africa Box 20034, Mzuzu 2
20.	Mr. A. Banda	Box 60, Mzuzu
21.	Mr. I. Mkandawire	Mzuzu Youth Association Box 764, Mzuzu
22.	Mr. V. Pindikani	Box 106, Rumphi
23.	Mr. Alan Chinula	P.O. Box 30636 Lilongwe 3
24.	Mrs. M. Banda	Chitipa D. Council Box 1, Chitipa
25.	Mr. M. Mphande	Mmbelwa District Council Box 86, Mzimba
26.	Mr. M. Mwamatandala	Regional Immigration Officer Box 600, Mzuzu
27.	Mr. P. Dokali	Mmbelwa District Council Box 132, Mzuzu
28.	Mr. J. R. Hara	LISAP Box 112, Ekwendeni
29.	Mr. A. Munde	MIJ FM Box 1142, Mzuzu

30.	Mr. W. Mtawali	STAR Radio Box 20374, Mzuzu
31.	Mr.E. Kantuseya	Youth Watch Society Box 324, Mzuzu
32.	Mr. D. Nyirenda	Youth Crime Watch Box 53, Mzuzu
33.	Mrs. Esther Masika	Norwegian Church Aid Box 30793, Lilongwe 3
34.	Mr. P. Kilembe	Ministry of Disability P/Bag 380, Lilongwe 3
35.	Mr. S.F. Chima	Karonga D. Council Box 35, Karonga
36.	Mr. H. Jaji	P.O. Box 225, Karonga
37.	Mr. F. Mtambo	Karonga District Council Box 35, Karonga
38.	T.A. Mwakaboko	Local Government Box 35, Karonga
39.	Mr. L. White	Immigration Department Box 20, Karonga
40.	Mr. G. Kayimboni	Malawi Young Voices Box 955, Nkhatabay
41.	Mr. M. Chimbalanga	Nkhatabay District Council P/Bag 1, Nsanje
42.	Mr. V. Phiri (T.A.)	District Council Box 1, Nkhatabay
43.	Mr. R. Chunga	District Council Box 47, Chitipa
44.	Mr. E. Kachipapa	Box 46, Mlowe Rumphi
45.	His Worship J. Kalambo	Judiciary Box 77, Chitipa
46.	Mr. M. Kauteka	Regional Youth Office Box 2, Enyезini
47.	Mr. D. Simfukwe	Lusubilo Community Base Orphan Care Box 42, Karonga
48.	Mr. P. Kacheche	Likoma D. Council Box 77, Likoma
49.	Mr. P. Chitanda	Likoma D. Council Box 77, Likoma



## SECOND NATIONAL WORKSHOP: SPECIAL LAW COMMISSION ON THE REVIEW OF THE ADOPTION OF CHILDREN ACT

**SUNBIRD CAPITAL HOTEL: 5 OCTOBER, 2011**

<b>No.</b>	<b>Name</b>	<b>Position</b>	<b>Organization</b>
1.	Ms. Nellie Nthakomwa	Paralegal/Child Protection Officer	Youth Watch Society
2.	Annie Omega Namagonya	Chief Social Welfare officer	Ministry of Gender, Children & Community Development
3.	Idruss Salmin Omar		Muslim Association of Mw
4.	Brussels Martins Mughogho	Country Director	Everychild Malawi
5.	Ken Mkwinda	Acting Executive Director	Chisomo Children's Club
6.	Jacqueline Mpanyula		Centre for Social Concern
7.	Treza Iman	Social Worker	St. John of God
8.	Stephen Mwale	DG Specialist	USAID
9.	Anacklet Phiri	Vice Chancellor	Catholic University
10.	Robert Ngaiyaye	Executive Director	Malawi Interfaith AIDS Association
11.	Jacqueline Kabambe	Child Protection Specialist	UNICEF
12.	Maxwell Matewere	Executive Director	Eye of the Child
13.	Dorothy Chingaibe	Youth & Schools / Child Protection Officer	Central Region Police Hqs.
14.	Alex Richard Nkosi	Program Coordinator	St. John of God
15.	Victor Pindikani	District Social Welfare Officer	Min. of Gender
16.	Macleod Mphande	District Social Welfare Officer	Min. of Gender
17.	Weandroff Chipeta	Youth Officer	Lusubilo Orphan Care Project
18.	Yolam Chiwanda	Social Welfare	Min. of Gender
19.	Davis Bandawe		American Embassy
20.	His Worship Kamphonda	Magistrate	Judiciary
21.	Christina Nthenda	PO/Civic Education	Centre for Human Rights and Rehabilitation

22.	Wilson Maduka	Social Welfare	Min. of Gender
23.	Dominic D. Misomali	District Social Welfare Officer	Min. of Gender
24.	Chief Ngabu	Traditional Leader	Chikhwawa District Council
25.	Yohane Gadama	Child MP	Blantyre
26.	Chrissie Yanjanani Ngauma	Senior Deputy Commissioner of Police	Min. of Home Affairs and National Defence
27.	Priscilla Thawe	Child Rights Coordinator	Malawi Human Rights Commission
28.	James Sherry	Second Secretary	Embassy of Ireland
29.	Rev. Dr. Joda-Mbewe	General Secretary	Malawi Council of Churches
30.	Chrismay Dzinza	Snr. Personal Secretary	Min. of Gender
31.	Laston Kadzungu	Youth Outreach & Child Protection Officer	Police-Eastern Region
32.	Byson Golden	Youth Outreach & Child Protection Officer	Police, Southern Region
33.	Lucy Malitowe Chipeta	Executive Director	Home of Hope
34.	Sympathy George Makwangwala	Senior Chief	Local Government -Ntcheu
35.	Justice Tujilane Chizumila	Ombudsman	Office of the Ombudsman
36.	Ms. Carrie Auer	Resident Representative	UNICEF
37.	Mr. Rogers Newa	Treasurer	NGO Gender Network
38.	Heather Watson-Ayala	Consul	U.S. Embassy



MALAWI LAW COMMISSION

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