



MALAWI FACT SHEET

JUSTICE FOR CHILDREN



BACKGROUND

The Bill was developed by the Malawi Law Commission following two submissions:

1. from the **Parliamentary Caucus on Women and Children** that wished to see certain aspects of the law on parentage and maintenance of children where women not married to the father of the child fall pregnant; and
2. from the **Association for Human Rights and Freedoms**¹ with regard to the enforcement of the rights of the child as enshrined in the 1989 United Nations Convention on the Rights of the Child (CRC).



¹ A Human Rights NGO established in 1998 and particularly concerned with the rising levels of child abuse and victimization in the country, both at state level (police) and at family level.



INTRODUCTION

JUVENILE JUSTICE AND CHILDCARE AND PROTECTION IN MALAWI

Malawi does not have comprehensive legislation on child justice, provisions relating to children spread out in various pieces of legislation.

THE CHILDREN AND YOUNG PERSONS ACT

- The Children and Young Persons Act (Cap 26:03 Laws of Malawi) which was enacted in 1969, is the primary legislation on child justice and child care and protection. The Act is however outdated and contradicts the Bill of Rights provided in the Constitution. In addition, it doesn't conform with the principles of the CRC.
- The Children and Young Persons Act focuses more on punishing child offenders rather than on reforming and rehabilitating them. The Act refers to children in conflict with the law as “juveniles,” a label that automatically gives the impression that the child ought to be punished.
- The Children and Young Persons Act focuses more on juvenile justice than care and protection. There are only four sections in the Act dealing with “Juveniles in need of care, control and supervision” and these provisions only address the situation where the child is in danger of coming into in conflict with the law because he or she is not properly cared for. There is no reference in this Act to the root causes of offending behaviour and measures that deal with that kind of behaviour in view of the vulnerability of the child. The causes of children offending are wide ranging and complex and include poverty, broken homes, orphanage due to the HIV and AIDS pandemic, lack of education, lack of employment opportunities, peer pressure and lack of parental guidance. These causes need to be tackled with a range of social interventions psycho-social care, support, alternative care, and economic intervention for such children.

THE AFFILIATION ACT

The Affiliation Act (Cap. 26:02) Laws of Malawi, enacted in 1948, is the current law that provides for proof of parentage where it is not known or it is disputed (i.e. in the case of illegitimate children) so as to make provision for the maintenance of the affected child.

There are various problems with this Act.

- The provisions for the maintenance of illegitimate children provided under the Affiliation Act are less favourable than those that apply to children who are not legitimate and hence discriminates against children on the basis of the circumstances of their birth. (Contrary to section 23 (1) of the Constitution).
- The Affiliation Act is very outdated. It does not provide for scientific proof of parentage, relying on the oral evidence of the woman and the alleged father.
- The Act also restricts the mothers from making an application for maintenance either before the birth of the child or after twelve months from the birth of the child unless the man alleged to be the father paid some money towards maintaining the child within twelve months after the birth of the child. In this case an application can be made at any time. The assumption is that if a father has paid money to maintain a child after the child is born then he is the father.

THE ADOPTION ACT

The Adoption Act (Cap. 26:01 Laws of Malawi) as an independent piece of legislation does not relate to the needs of the child for care and protection for the following reasons:

- The Act was enacted in 1949 and was intended for the non-Malawians employed in the colonial government intending to adopt children. The Act therefore fails to appreciate that in recent times, due to globalisation and the HIV and AIDS pandemic, many Malawians have found themselves in the care of children orphaned by HIV/AIDS and when these families have to migrate when employed elsewhere, benefits from the jobs can only be enjoyed by these children if they are formally adopted. The same is equally true of some internal jobs. The result is that more Malawians are adopting and the law needs to be more specific to the local context.
- Not every person who looks after an orphan wants to adopt them. Adoption is a final and permanent act, and sometimes children who are not orphans just need to be taken care of temporarily whilst the problem with their permanent home is being sorted out or while a permanent home is being found for them. The Adoption Act is silent on temporary measures of taking care of children according to their temporary needs.
- The Adoption Act doesn't really put the child at the centre of the adoption process. All it does is set out the procedures on how the adoption is to be carried out. The fact that the Act is outdated also means that it does not put the "best interests of the child" first in determining whether an adoption can take place or not.
- The Adoption Act prohibits people who are not resident in Malawi from adopting a child in Malawi and also prohibits adoption of any infant who is not resident in Malawi. Again there is no consideration as to whether this prohibition is in the best interests of the child considering that there might not be a suitable or willing parent resident in Malawi.

THE EMPLOYMENT ACT

Despite being a recent law, the Employment Act enacted (Cap. 55:02 Laws of Malawi) enacted in 2000, does not adequately address the issue of children as a vulnerable group for whom employment is attractive due to poverty, but has very harmful consequences for their health and physical and psychological development.

The act fails to specifically address the following issues:

- Child labour is prohibited because it is harmful to moral, psychological and physical well being of the child. Examples of child labour include forced labour in agricultural estates, factories and homes where children work long hours, often in dangerous and unhealthy conditions, and are exposed to lasting physical and psychological harm. "Light" child work is often acceptable where the child's work is helpful to him or her and to the family; working and earning can be a positive experience in a child's growing up. This however depends largely on the age of the child, the conditions in which the child works, and whether work prevents the child from going to school. This difference is not clearly captured in the Employment Act.
- The Employment Act only protects children between the ages of fourteen and eighteen from hazardous work, leaving out the younger children who are more vulnerable to abuse and exploitation. It is also not in the best interests of the child that children below the age of fourteen should be employed despite the safeguards in the Act.



HOW DOES THE CHILD (CARE, PROTECTION AND JUSTICE) BILL ADDRESS THESE ISSUES?

- It puts together all the issues of child protection and child and child justice that were in various laws and policies into one law. For the first time, there is an attempt to have a definition of child in this law which is consistent with the CRC.
- It is based on the rights of the child, recognizing the special needs of children and focuses on the best interests of the child as provided by the CRC.
- It modernizes the child justice system by applying principles of restorative justice (looking to restore the balance of the situation disturbed by crime or conflict rather than simply meting out punishment for an offence committed).
- It recognizes the vulnerability of the child, especially when that child comes into conflict with the law and treats that child as a “child” not as a “juvenile offender” because this label further adds to the child's victimization.
- It incorporates the principle of the “best interests of the child” as provided under CRC.
- Recognizes that prevention of crime is not just about protecting children who are about to fall into bad association but is also about providing the best possible care and socio-economic support as well as proper parenting either at family or institutional level to children so that the chances of them coming into contact with bad influences are reduced.
- It makes the processing of children through the formal justice system a last resort, and only for extreme cases, for the shortest amount of time, while taking into account the effects of the crime on the victim and the community.
- It repeals the Children and Young Persons Act.
- Amends the Adoption Act.
- Amends the Employment Act.



WHAT EXACTLY IS COVERED IN THE BILL?

PRELIMINARY ISSUES

NEW DEFINITION OF CHILD

The Children and Young Persons Act does not have one definition of a “child”, instead, it defines a child as a person below 14 years of age and a “young person” is defined as a person below the age of 18 years.

The Bill, in keeping with the CRC and sections 22 (6) - (8) of the Constitution, defines a child as a person below the age of 18 years.

“Best Interests of the Child”

Although the courts regularly already use the principle of the best interests of the child in cases involving custody of the child, it is rarely used in cases where the child is in conflict with the law. This is due not only to the fact that many magistrates are not trained to use the CRC but also because as there isn't a single court that deals with child issues, the different courts dealing with child fail to understand that the special needs and vulnerability require that they be guided by principles that always reflect on the special nature of children. The Bill recognizes and places importance on the principle of the best interests of the child.

Whenever a court is dealing with a child, either as an offender or in need of care and protection, the court shall give primary consideration to the rights of the child as recognised by the CRC.

CHILD JUSTICE

Arrest of Child

A child justice system that is fair and humane in its dealing with children as a group requiring special attention is one that recognizes that the child offender, is a child. That is, no matter what that child has done, the system must recognize that the child has made a mistake and the system should be addressing the mistake by looking at its causes and ways of dealing with those cause that do not interfere with the child's

childhood development. This is done by ensuring that the arrest of a child is not a traumatic experience by ensuring that the child's best interests are observed and that the welfare of the child is paramount during the arrest itself. The Bill does this by providing the following guidelines:

Guidelines on Arrest

- No harassment or physical abuse of the child.
- Use of handcuffs restricted, they can only be used where it is necessary and the child must be handcuffed to the arresting officer.
- Child offenders are a special needs category and must be separated from adult offenders.
- Child must be provided with medical attention (where necessary) and nutritious food.
- A parent must accompany the child to the police station
- If a parent is not present at arrest, they must be informed immediately after arrest.
- Where the offence is serious, legal representation must be provided.
- As far as possible, the child must be provided with counselling services.

Procedures Following Arrest

Preliminary Inquiry

In order to ensure that the child's experience with the criminal justice system will not be stressful and will be for the shortest time possible, the Bill has introduced a new procedure that will determine whether the offence the child has committed should be dealt with in the criminal justice system or not. This procedure is called a preliminary inquiry.

Age of Criminal Responsibility

- The age for criminal responsibility in Malawi is currently 7 years. However, the Law Commission



proposed in its 2001 Review of the Penal Code that the age be increased to 10 years so that any child below this age who commits a criminal offence, shall not be held criminally responsible. The Bill proceeds on the assumption that the proposed amendment to the Penal Code will have been passed.

- In the absence of compulsory birth registration, it is not always possible to know how old a child is for the purpose of determining whether that child should be held criminally responsible or not and how that child is to be treated by the criminal justice system.

- The Bill lists various ways of determining the age of child which are consistent with modern scientific methods but also recognize the importance of other methods such as health, school and religious records.

Diversion

Dealing with the child as offender within the criminal justice system can be counter productive as going through its processes makes the child feel and believe that he or she is a criminal. Where the offence is not serious and the child voluntarily admits responsibility, a decision can be taken at the preliminary inquiry to divert the child.

Diversion is a process of diverting an offender away from the ordinary processes of the criminal justice system which promotes the dignity and well-being of the child and the development of his sense of self-worth and ability to contribute to society.

Diversion is already currently being practiced in Malawi even though it is not provided for under the Children and Young Persons Act. The Bill therefore provides a legal basis for diversion with structures and diversion options in place.

Legal Representation

Any person who comes into conflict with the law is vulnerable and has to be protected within the system through legal representation. The right to legal representation at state expense under section 42 (1) of the Constitution and the Legal Aid Act (Cap. Laws of Malawi) is expressed generally and is tailored specifically to the needs of children who are doubly vulnerable.

The Bill therefore takes special note of this double vulnerability and makes sure that children are provided with representation in one way or the other, especially in serious cases, even if the child does not want the representation.



Establishment of the Child Justice Court

The Bill recognizes that children are a special group who need to be presided over by specially trained legal and judicial officers and that their trials should be private. This has necessitated the establishment of special Child Justice Courts.

Although these are special courts, they will not necessarily require new building structures. They will just require (as is the case at present) that the courts sit at different times and in different rooms from adult trials. The court proceedings will be informal in nature and no robes/uniforms to be worn. Sessions shall be structured to child's convenience.

A child below the age of fourteen years shall not be tried by a jury unless it is necessary and in the best interests of the child.

Children in Custody

The Children and Young Person Act already recognizes that children are not to be mixed with adult offenders. Again the double vulnerability of children on account of their age and their offence means that they are liable to abuse. Therefore, according to the Bill, children should be separated from adults:

On Remand

Children must not be detained in police stations after arrest, before or during trial but must be placed in specially created 'safety homes'.

A "Safety home" means a place or part thereof for the purposes of reception, education, counselling and safety of children before conclusion of trial or in circumstances requiring placement of a child for care and protection.

After Trial

Nobody gains when children are sent to prison. The child loses out on childhood experiences. Family and community ties are broken and the child ends up mixing with hardened criminal who expose him or her to a life that is morally inappropriate for him or her. Society and the victims also lose out as the child is not rehabilitated and becomes a burden on them. Generally imprisoning children increases the chances of re-offending. Under the Bill, no child shall be sent to prison after trial. Children shall instead be sent to Reformatory Centres.

CHILD CARE AND PROTECTION

Child Care and Protection by the Family

First and foremost the Bill recognizes that primary duty of child care rests with the parents or guardians (see section 22 of the Constitution). This is the only way to ensure that the Malawian way is preserved, with families and communities bringing up their children in their own cultures

The provisions in the Bill underscore the duty of parents by specifically providing that parents provide care, guidance, maintenance and protection from abuse and neglect.

In keeping with Malawian tradition and culture, children are also expected to have duties and responsibilities towards their parents and other elders in the community. The Bill expects children to include respect for parents and guardians and to strengthen community and preserve national unity.

In order to hold parents of children accountable to looking after their children and not run away from their duties, the Bill has introduced modern ways of proving parentage and the time in which applications for proving parentage can be made.

- Determination of parentage can be applied for either before a child is born or anytime up to the child attains the age of 18 years;

- an application for determination can be made by either the child/parent/guardian/probation/social welfare officer;

Parents are expected to maintain their children all the time, whether the parents are married or not, and an application can be made for the maintenance of a child by any of a number of people who notice that the child is neglected.

Failure to maintain a child is a criminal offence which attracts a fine of K50,000 and one year imprisonment. (These provisions replace the current Affiliation Act)

Substitute Care and Protection

The Bill recognizes that the family unit or the community may fail or they may need support in caring for and protecting the child as well as in maintaining the child. The State may step in or other measures are

provided in the Bill to assist in these situations.

The following factors determine whether a child is in need of care and protection under the Bill -

- Physical or sexual abuse
- Emotional or physical neglect
- Violence or conflict between parents
- General lack of stable or adequate care and protection
- Parent/guardian is unfit/unable or neglects to exercise proper supervision or control and the child is falling into undesirable association (e.g. seduction, corruption and prostitution)
- Child is abandoned/has no parent/guardian (or allowed on the street to beg etc.)
- Child is unruly or uncontrollable
- Child is assessed as in need of care and protection by Social Welfare Officer

Procedures for Providing Care

- The child may be taken into temporary custody or place of safety
- The child must however be brought before a Child Justice Court within 48 hours unless the child is in immediate need of medical attention . If the Child Justice Court finds that the child is in need of care and protection, it may -

- > order parents/guardian to exercise proper care;
- > place the child with a fit and proper person.

- A Child Case Review Board has been established to deal with all procedural and administrative issues on reformatory centres, safety homes and foster homes.

Substitute Care Arrangements

Temporary Arrangements

Guardianship

The Children and Young Persons Act is silent on the issue of guardianship which is the arrangement made when a fit person assumes or is appointed to take responsibility for the care and protection of a child until the child is eighteen years.

Foster Care

Where a family on its own cannot provide all the essential requirements for the upbringing of a child, the community at large as well as local government and NGOs can assist. Foster care is intended to be short term either through a placement in a residential home or with foster parents.

Permanent Arrangements for Substitute Care

Adoption

Adoption is the legal process which joins a child to parents to which he or she may not be related. It is a permanent option.

The Bill does not review all of the Adoption Act, only specific parts.

Foster parents can, under the Bill apply at any time to adopt a child in accordance with the Adoption Act.

New provisions are added to the Adoption Act to make provision for: -

Inter-country Adoption

Inter-country adoption means one in which the child is taken out of Malawi one year after the application.

This can sometimes be the only solution for a child who cannot be placed under foster care and a suitable adoptive family cannot be found in Malawi. Inter-country adoption is really a last resort and can be done by family members and should therefore not be seen as a way of encouraging foreigners to take our children away. Such adoptions will only be allowed when:

- > the applicant is eligible to adopt;
- > the applicant has been counseled as necessary;
- > the child will be allowed to enter and live permanently in receiving country;
- > the applicant has while in Malawi fostered the child for a period of one year prior to the application (if this applicant is not a relative);
- > the receiving country is a signatory to the UN Convention on Protection of Children and Cooperation in respect of Inter-country Adoption.

- Any other adoptive parent shall not take a child out of Malawi without the courts permission.

- An adopted child will still be able to inherit property left to that child either under a will or under intestacy whether this property was left to the child before or after the making of the adoption child.

- If an adoptive parent dies without living a will, the property of that parent shall go to the child as if the child had been a natural child.

- Adoptive parents are to disclose adoptive status to adopted children and post adoption contract with child if it is in his or her best interests is encouraged.

The Role of Local Authorities

In view of decentralisation and in view of local authorities strategic placement in the community to play a pivotal role in the provision of child care and protection services at state level but within the interests of the community, the Bill proposes that the local authority should -

- Safeguard and promote the welfare of children within their jurisdiction;
- keep a register of -
 - > children with disabilities;
 - > births and deaths of children;
 - > children living with or affected by HIV and AIDS.
- be under a duty to receive reports from the community on the infringement of child rights;
- parents of abandoned children;
- provide shelter to homeless children.

Protection of Children from undesirable practices

Another new area not in the Children and Young Persons Act and stretching out to other legislation to address issues of: -

Child Labour

- The Bill is guided by the International Labour Organisation Minimum Age Convention (No. 132) calling for abolition of child labour and protection of children.

- The Bill proposes that children under the age of 10 years should not be employed at all, even in homes or training institutions. This is done by proposing an amendment to the Employment Act.



- There is also a prohibition of child labour at night, proposed as an amendment to the Employment Act.

Child Abduction

Article 41 of the CRC obliges Malawi to take measures to prevent abduction. Child abduction encompasses the taking, retention or concealment of a child by a parent, other family member, agent, in derogation of custody rights, including visitation rights, of another family member.

The Bill makes abduction an offence punishable by 10 years imprisonment.

Child Trafficking

Against the backdrop of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention Against Trans-national Organized Crime, the Bill recognises the rising global challenge of child trafficking and prohibits it. This is largely due to the demand for cheap labour or for sexual exploitation.

Child Sexual Abuse

Although section 138 of the Penal Code makes it an offence to defile girls under 13 years of age, there is no provision for child abuse which is wider than defilement and can be perpetrated on either boys or girls without the act of penetration.

The Penal Code (Amendment) Bill 2001 fills this gap and therefore no proposals were made in this Bill on child sexual abuse.

Harmful Cultural Practices

- The CRC obliges Malawi to eliminate harmful cultural practices relating to children and these are therefore prohibited in the Bill.
- Specific practices relating to forced marriage and pledging a child as security for a loan are expressly prohibited.

Any person engaging in the prohibited acts above commits an offence and can be punished by three years imprisonment.

CONCLUSION

In short the Bill does the following:

1. Gives a new definition of "Child" i.e. 18 years
2. Introduces the CRC principle of "Best Interests of the Child" into law
3. Introduces the concept of CHILD JUSTICE and not juvenile justice which incorporates new child friendly provisions on:
 - Guidelines on Arrest
 - Age of Criminal Responsibility
 - Diversion
 - Legal Representation
 - Establishment of the Child Justice Court
 - Prohibition of child imprisonment
4. Makes comprehensive provisions on CHILD CARE AND PROTECTION as follows:
 - Child Care and Protection by the Family; and where this fails:
 - Substitute Care and Protection which includes:
5. Foster Care
6. Adoption
7. The Role of Local Authorities
8. Protection of Children from undesirable practices
 - Child Labour
 - Child Abduction
 - Child Trafficking
 - Child Sexual Abuse
 - Harmful Cultural Practices

MALAWI AT A GLANCE

- **Total population: 13.2 million** (estimated)
- **Children under 18 years: 7.3 million** (estimated)
- **GNI per capita: US\$160** (State of the World's Children, 2007)
- **People living below the poverty line: 52%** (2005, Integrated Household Survey)
- **Life expectancy at birth: 47 years** (estimated)
- **Under-five mortality rate: 118** (Multiple Indicator Cluster Survey 2006)
- **National HIV prevalence: 14%** (2005, National AIDS Commission)
- **Net primary attendance ratio: 82%** (2006, MICS)
- **Gender parity: 1.06** (2006, MICS)

CHILD PROTECTION	Child labour	28.8	Per cent
	Marriage before age 15	10.6	Per cent
	Marriage before age 18	50.2	Per cent
	Young women 15-19 currently married or in union	32.1	Per cent
HIV/AIDS & ORPHANHOOD	Comprehensive knowledge about HIV prevention (15-24 women)	41.6	Per cent
	Comprehensive knowledge about HIV prevention (15-24 men)	40.7	Per cent
	Condom use at last high-risk sex (15-24 women)	39.6	Per cent
	Condom use at last high-risk sex (15-24 men)	59.6	Per cent
	Children not living with a biological parent	17.4	Per cent
	Prevalence of orphans	12.6	Per cent
	School attendance of orphans versus non-orphans	0.97	

MINISTRY OF WOMEN AND
CHILD DEVELOPMENT
Gemini House, 5th Floor
Private Bag 330
Capital City
Lilongwe 3, Malawi

UNICEF COUNTRY OFFICE
P.O. Box 30375, Lilongwe 3, Malawi
Tel: +265 1 770 770
Fax: +265 1 773 162
Email: lilongwe@unicef.org

