

HIV AND AIDS (PREVENTION AND MANAGEMENT) BILL, 2017

MEMORANDUM

The HIV and AIDS (Prevention and Management) Bill seeks to introduce a new piece of legislation that will make provision for the prevention and management of HIV and AIDS in Malawi. The Bill originated from recommendations of the special Law Commission on the Development of HIV and AIDS legislation contained in a Report that was published in 2008.

The Bill combines a human rights, public health and criminal law approach to combating the HIV and AIDS epidemic. The Bill also makes provision for the responsibilities of the Minister responsible for issues of HIV and AIDS, among others, the responsibility for formulation of policy relating to HIV and AIDS and supervising and oversight of the national response to HIV and AIDS.

The Bill provides for rights and responsibilities with respect to HIV and AIDS. It provides for rights and duties of both people living with HIV or affected by HIV and AIDS.

The criminal law approach adopted in this Bill is human rights based as it seeks to offer effective remedies to victims infected with HIV deliberately, negligently or recklessly. These remedies are offered over and above the right to any person whose right is violated to seek other means of legal redress such as damages.

The Bill also establishes the National AIDS Commission as a State institution in order to properly and effectively coordinate the national response to HIV and AIDS. Currently, the Commission exists as a public trust. The special Law Commission noted that the current arrangement does not afford the Commission enough permanence since it can be easily dissolved by resolution of the Board of Trustees. The Bill therefore proposes the establishment of the Commission as a State institution in order to secure its existence and permanence and for better administration of the Commission.

Lastly, the Bill makes provision for financial and miscellaneous matters.

B. No. 12

HIV AND AIDS (PREVENTION AND MANAGEMENT)

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A BILL*entitled*

An Act to make provision for the prevention and management of HIV and AIDS; to provide for the rights and obligations of persons living with HIV or affected by HIV and AIDS; to provide for the establishment of the National AIDS Commission; and to provide for matters incidental thereto or connected therewith

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

- Short title 1.—(1) This Act may be cited as the HIV and AIDS (Prevention and Management) Act.
- (2) This Act shall come into force on a date the Minister may appoint by notice published in the *Gazette*.
- Interpretation 2. In this Act, unless the context otherwise requires—
- “AIDS” means Acquired Immune Deficiency Syndrome;
- “chairperson” means the chairperson of the Commission and includes any person acting in that capacity;
- “Chief Executive Officer” means the Chief Executive Officer of the National AIDS Commission appointed pursuant to section 57;
- “child” means any person below the age of eighteen years;
- “Commission” means the National AIDS Commission established under section 45 of this Act;
- “compulsory HIV testing” means HIV testing imposed upon a person characterized by the lack of consent;
- “diagnostic testing” means HIV testing done on an individual who shows signs and symptoms that are consistent with HIV infection to aid clinical diagnosis and management;
- “discrimination” refers to any distinction, exclusion or restriction made on the basis of the actual or perceived HIV infection of a person which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by that person or another individual associated with that person on a basis of equality with the other members of the community, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field;

“harmful practice” means any social, religious or cultural practice that—

- (a) puts a person at risk of HIV infection or re-infection; or
- (b) may catalyze progression of HIV infection to AIDS;

“health service provider” means—

(c) a medical practitioner, dentist, paramedical and allied health professional registered under the Medical Practitioners and Dentists Act; Cap. 36:01

(d) a nurse or midwife registered in any category of nurses and midwives registered under the Nurses and Midwives Act; Cap. 36:02

(e) a pharmacist, pharmacy technologist or pharmacy assistant registered under the Pharmacy, Medicines and Poisons Act; or Cap. 35:01

(f) where applicable, health service providers not registered under the Acts cited in this definition;

“HIV” means Human Immunodeficiency Virus, the virus which causes AIDS;

“living with HIV” refers to the presence of HIV in a human body as documented by the presence of HIV or HIV antibodies in the human sample being tested;

“HIV testing” refers to any validated, medically recognized and viral sensitive test for determining the presence or absence of HIV in a person or blood, tissue or other bodily products of a person;

“immediate family member” includes a spouse, parent, grandparent, sibling, child, grandchild, aunt, uncle, niece and nephew of a person;

“post-test counseling” refers to the process of providing risk reduction information and psycho-social support to a person who submits to HIV testing at the time or after the result of the testing is released;

“pre-test counseling” means the process of providing an individual information on the biomedical aspects of HIV and AIDS and psycho-social support to the implications of undergoing HIV testing and the test result before he is subjected to a test;

“routine testing” means HIV testing offered in the course of providing other health services to a person;

“tissue” includes an organ or part of a human body, semen, breast milk and any other substance or secretion, other than

blood, extracted from the human body or from a part of the human body;

“VCT” means voluntary counselling and testing for HIV infection.

PART II—RESPONSIBILITY FOR PREVENTION AND MANAGEMENT OF HIV AND AIDS

Responsibilities of Minister 3. On matters of HIV and AIDS, the Minister shall be responsible for—

- (a) formulation and review of national policies;
- (b) leading the national response;
- (c) commissioning research and innovation;
- (d) monitoring and evaluating the national response;
- (e) supervising sectoral policies relating to HIV and AIDS;
- (f) overseeing the activities and finances of the Commission;
- (g) facilitating mainstreaming of HIV and AIDS in all sectors of society; and
- (g) the proper administration of this Act.

PART III—HARMFUL PRACTICES

Prohibition of harmful practices First Schedule 4.—(1) A harmful practice listed in the *First Schedule* is hereby prohibited.

(2) Any person who practices a harmful practice contrary to subsection (1) commits an offence and shall be liable, upon conviction to a fine of K5,000,000 and imprisonment for five years.

Subjecting another to a harmful practice 5. Any person who subjects, permits or encourages another person to indulge in a harmful practice commits an offence and shall be liable, upon conviction to a fine of K5,000,000 and imprisonment for five years.

PART IV—PROHIBITION OF DISCRIMINATION

Prohibition of HIV and AIDS discrimination 6.—(1) Discrimination on a basis related to HIV or AIDS is hereby prohibited.

(2) A person who discriminates contrary to subsection (1) commits an offence and shall be liable, upon conviction to—

- (a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

7.—(1) Subject to section 27, and in addition to any other rights conferred by any written law, a person who is living with HIV, shall have the right to—

Rights and duties of persons living with HIV

(a) dignity of his person, physical integrity, life and health;

(b) practice a profession of choice;

(c) compensation associated with the restriction of his enjoyment of his rights; and

(d) free medication, at a State medical institution, necessary for anti-retroviral therapy or treatment of an HIV related disease listed in the *Second Schedule*.

Second Schedule

(2) In addition to any other duties conferred by any written law, a person who is living with HIV shall have the duty to take medicine as provided in subsection (1)(d).

(3) A person who contravenes this section commits an offence and shall be liable, upon conviction, to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

8.—(1) In addition to any other rights conferred by any written law, a person related to or associated with another person who is living with HIV has the right to—

Rights of persons affected with HIV

(a) dignity, physical integrity, life and health; and

(b) compensation associated with the restriction of the enjoyment of his rights.

(2) A person who violates a right contrary to subsection (1) commits an offence and shall be liable, upon conviction to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

PART V—DISCLOSURE

9.—(1) A person living with HIV has the right to privacy and confidentiality with regard to information concerning his status.

Right to privacy and confidentiality

(2) It shall be the duty of every health service provider to strictly observe confidentiality in handling all medical information concerning a person living with HIV.

Disclosure by
health service
provider

10.—(1) A health service provider shall not disclose any information concerning a person's HIV status to another person, except—

(a) with the written consent of the first person, his guardian, partner or parent, as the case may be;

(b) to a health service provider directly involved in providing health care to that person, where knowledge of the patient's diagnosis of HIV infection is necessary or relevant to making clinical decisions in the best interests of the person;

(c) for the purpose of an epidemiological study, where the release of information cannot be expected to identify the person to whom it relates; or

(d) upon an order of a court, where the information contained in the medical file is directly relevant to the proceedings before the court.

(2) A health care provider providing treatment, care or service to a person living with HIV may notify a sexual partner of the person living with HIV,—

(a) where the following circumstances exist—

(i) in the opinion of the health service provider, there is a significant risk of transmission of HIV by the person living with HIV to the sexual partner;

(ii) counseling of the person living with HIV has failed to achieve change in behaviour necessary to sufficiently reduce the risk of HIV transmission to the sexual partner;

(iii) the person living with HIV has refused to notify or consent to the notification of the sexual partner;

(iv) the health service provider gives the person living with HIV advance notice for a period that is reasonable in the circumstances;

(v) in the opinion of the health service provider, the person living with HIV is not at risk of serious harm as a consequence of any notification to the sexual partner;

(vi) the person living with HIV is dead, unconscious or otherwise unable to give consent to the notification; or

(vii) the person living with HIV is unlikely to regain consciousness or the ability to give consent; and

(c) in the opinion of the health service provider, there is or was a significant risk of transmission of HIV by the person living with HIV to the sexual partner.

11. A person who discloses the HIV status of another person otherwise than as provided for under this Act commits an offence and shall be liable, upon conviction, to—

Unlawful disclosure

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, to a fine of K10,000,000.

PART VI—PUBLIC HEALTH

12.—(1) In this Act, the recognized modes of transmission of HIV shall include transmission of HIV through—

HIV transmission and testing

(a) sexual activity;

(b) mother to child during pregnancy, labour, delivery or breastfeeding;

(c) transfusion of infected blood;

(d) transplant of an infected organ;

(e) contact of broken skin or mucus membrane with infected blood, blood products or tissue; and

(f) contact of broken skin or mucus membrane with contaminated wet objects.

(2) The modes of HIV testing shall include—

(a) VCT;

(b) routine testing;

(c) diagnostic testing;

(d) compulsory testing; and

(e) any other mode of HIV testing that the Minister may prescribe.

13. A person who is at least thirteen years of age may access VCT without the consent of a parent or a legal guardian.

Age for accessing VCT without parental or guardian consent

(2) Where a person below the age of thirteen years who does not have a parent or legal guardian seeks VCT, the health service provider whose services are requested in order to access VCT may apply to court for the appointment of a legal guardian of the applicant.

14. A person shall not test another person for HIV infection except—

Consent to HIV testing

(a) with voluntary informed consent of the person to be tested;

(b) where the person to be tested is below the age of thirteen years, with the voluntary informed consent of a parent or legal guardian of that person; or

(c) where the person to be tested has a disability which in the opinion of the person providing the pre-test information, renders the person incapable of understanding the meaning and consequences of HIV testing, with the voluntary informed consent of one of the following persons, said consent to be sought from these persons in the order in which they are listed—

- (i) his partner or spouse;
- (ii) his legal guardian;
- (iii) an immediate family member; or

(d) where a person is required to undergo HIV testing under the provisions of this Act or any other written law.

Testing donated
body tissues

15.—(1) A person who offers to donate any tissue shall, immediately before the donation, undergo HIV testing.

(2) A health service provider shall not accept a donation of any tissue unless the donor has undergone HIV testing pursuant to subsection (1) and the result is HIV negative.

(3) Notwithstanding subsections (1) and (2), the proposed recipient of the donated tissue or his immediate family member shall have the right to demand further HIV testing on the donated tissue.

Testing of
donated blood

16.—(1) A health service provider shall, as soon as practicable after donation, among other tests, subject donated blood to testing for transfusion transmissible HIV infection.

(2) Any blood tested under subsection (1) which is found to be infected with HIV shall immediately be disposed of in accordance with the prescribed guidelines on the disposal of medical waste.

Consent to be
deemed

17. Consent to undergo HIV testing shall be deemed to have been given in the following circumstances where—

- (a) a person offers to donate any tissue;
- (b) a person offers to donate blood; or
- (c) it is prudent for a health service provider responsible for the treatment of a person to undertake HIV testing in respect of that person and—
 - (i) the person is unconscious and unable to give consent; or
 - (ii) the health service provider reasonably believes that HIV testing is clinically necessary in the interest of that person.

Prohibition of
compulsory
testing

18.—(1) Compulsory testing for HIV infection is hereby prohibited.

(2) Notwithstanding subsection (1), compulsory testing for HIV infection shall be permissible in the following instances—

(a) under an order of the court, for any person who is convicted of a sexual offence; or

(b) for pregnant women and their sexual partners.

(3) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable, upon conviction, to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, to a fine of K10,000,000.

(4) In addition to the penalties imposed under subsection (3), a court may, upon conviction, order—

(a) in the case of a legal person, the revocation of any permit or licence; or

(b) in the case of an individual, the revocation of a licence to practice the person's profession.

19.—(1) A health service provider who carries out an HIV test on any person shall be required to provide free pre-test and post-test counseling to the person. Pre-test and post-test counseling

(2) Notwithstanding subsection (1), a person who carries out HIV testing on any person for purposes of blood transfusion or body tissue extraction shall not be required to conduct pre-test and post-test counseling.

20. A health service provider who carries out HIV testing has a duty to give monthly reports of the number of HIV tests conducted and the incidence of HIV infection to the District Health Officer, for statistical and epidemiological purposes only. Duty to report HIV infection

21.—(1) A person shall not be denied access to health services or be charged a higher fee for any health services, at a health facility, on the grounds of actual or perceived HIV infection of the person. Prohibition of discrimination in health facility

(2) Any person who contravenes subsection (1) commits an offence and shall be liable, upon conviction, to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, to a fine of K10,000,000.

(3) Notwithstanding the provisions of subsection (2), a court may, in addition to any penalty imposed on a person convicted, order—

(a) in the case of an individual, revocation of a licence to practice the person's profession; or

(b) in the case of a legal person, revocation of the business permit or licence in respect thereof.

PART VII—INFORMATION

Access to HIV and AIDS information 22.—(1) A person has the right to access information in connection with HIV and AIDS held by the State or any organ of the State, where the information is necessary for the exercise of his rights.

(2) A person who is in charge of information on HIV and AIDS has a duty to ensure that the information is relevant to the exercise of the rights of a person requesting the information.

Powers in relation to HIV and AIDS information 23. The Commission shall, in addition to the powers conferred on it by this Act, have the power to develop, co-ordinate and disseminate information on HIV and AIDS.

Accrediting authority 24.—(1) The Commission shall accredit any piece of information on HIV and AIDS before it is disseminated to the public.

(2) A person who develops information on HIV and AIDS shall submit the information to the Commission for screening and verification in order to establish its accuracy before dissemination.

(3) The Commission has a duty to ensure that information on HIV and AIDS is accurate and has been accredited by the Commission.

Publication of misleading information 25. A person who proclaims, utters, publishes misleading, false or inaccurate information concerning HIV and AIDS to any other person or the public commits an offence and shall be liable, upon conviction, to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

Publication of unaccredited information 26. A person who publishes information on HIV and AIDS which is not accredited by the Commission to any other person or the public commits an offence and shall be liable, upon conviction, to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

PART VIII—EMPLOYMENT

Prohibition of pre-recruitment testing 27. An employer shall not require any person to undergo HIV testing as a pre-condition for recruitment:

Provided that pre-employment HIV testing may be permissible for purposes of assessing—

(a) fitness to serve in—

(i) the Defence Force;

- (ii) Malawi Police Service;
- (iii) the Prison Service; and
- (iv) the Immigration Department;

(b) the health of a domestic worker;

(c) any other matter the Minister may, on the recommendation of the Commission, prescribe.

28.—(1) An employer shall not terminate the employment of an employee solely on the ground that the employee is living with HIV or is perceived to be living with HIV:

Prohibition of termination of employment on grounds of HIV or AIDS

Provided that where the capacity of an employee to discharge his duties is affected by reason of poor health, the general principles of employment law shall apply.

(2) A person who contravenes this subsection (1) commits an offence and shall be liable, upon conviction to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, to a fine of K10,000,000.

29.—(1) An employee shall not be discriminated against or be subjected to unfair treatment solely on the ground that he is perceived to be or is living with HIV:

Prohibition of discrimination

(2) A person who contravenes this subsection (1) commits an offence and shall be liable, upon conviction to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, to a fine of K10,000,000.

30. A person who procures another person to conduct HIV testing as a condition for recruitment, training, promotion, termination of employment or other matters arising out of an employment relationship commits an offence and shall be liable, upon conviction to—

Procuring another to conduct HIV test for recruitment, etc

(a) in the case of an individual, a fine of K2,500,000 and to imprisonment for three years; or

(b) in the case of a legal person, a fine of K5,000,000.

31. A person who aids, abets or assists another person to conduct HIV testing as a condition for recruitment, training, promotion, termination of employment or other matters arising out of an employment relationship commits an offence and shall be liable, upon conviction to—

Aiding, abetting or concealing act of subjecting another to HIV test for recruitment

(a) in the case of an individual, a fine of K5,000,000 and to imprisonment for five years; or

(b) in the case of a legal person, to a fine of K10,000,000.

Compassionate
leave for
parents and
spouses

32.—(1) An employee whose child or spouse is suffering from an HIV related illness shall have the right to provide care for the child or spouse outside employment for a maximum of two weeks on full pay and to a subsequent two weeks on half pay, every two years.

(2) An employee who is temporarily incapacitated from work under subsection (1) shall be deemed to be in continuous service for purposes of promotion, increments in personal emoluments, leave and any other employment benefits.

Employer
responsible for
minimizing risk
of infection at
workplace

33.—(1) Where a person is employed in an occupation or is required to provide services where there may be a risk of transmitting or acquiring HIV, the employer shall provide appropriate training, protective equipment and clear and accurate information and guidelines on minimizing the risk of the spread of HIV.

(2) In the case of accidental exposure to HIV occurring in the workplace, the employer shall ensure free access to post-exposure prophylaxis and counseling for the employee in accordance with the law.

Workplace
policy

34.—(1) The State shall ensure that employers adopt and implement an HIV and AIDS policy at the workplace.

(2) The design and content of the workplace policy shall be in accordance with the policy guidelines issued by Government.

Compensation

35.—(1) An employee who is been infected with HIV in the course of employment shall have the right to claim compensation in accordance with the Workers' Compensation Act.

Cap. 55:03

(2) An employee who is infected with HIV in the course of his employment is entitled to higher compensation, where he is able to show that his infection is due to non-compliance, by the employer, of section 33 or is otherwise due to negligence of the employer.

PART IX—EDUCATION

Prohibition of
HIV testing for
educational
opportunities

36.—(1) A person shall not be required to undergo HIV testing as a condition for—

(a) entry into an education or training institution;

(b) an award of a scholarship, grant, bursary, benefit or other scholarly endowment; or

(c) remaining as a student or trainee in any education or training institution.

(2) A person who contravenes subsection (1) commits an offence

and shall be liable, upon conviction to—

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

37.—(1) An education or training institution shall not, solely on the grounds that the person is living with HIV or is perceived to be living with HIV,—

Prohibition of discrimination in education and training institutions

(a) refuse the person admission into the institution;

(b) expel a person from the institution;

(c) discriminate against the person;

(d) refuse the person participation in an event or activity; or

(e) deny any benefits or services to a person.

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

(a) in the case of an individual, a fine of K5,000,000 and imprisonment for five years; or

(b) in the case of a legal person, a fine of K10,000,000.

(3) Notwithstanding the provisions of subsection (2), a court may, in addition to any penalty imposed on a person convicted, order—

(a) in the case of an individual, revocation of the licence to practice his profession; or

(b) in the case of a private education or training institution, revocation of the business permit, licence or certificate.

38.—(1) The Minister shall, in consultation with the Minister responsible for Education, the Commission and other relevant authorities, ensure that materials on HIV and AIDS are integrated and mainstreamed into the school curricula for all education and training facilities at all levels.

HIV and AIDS materials in school curricula

(2) Pursuant to subsection (1), the Minister shall ensure that the materials on HIV and AIDS developed and integrated into the school curriculum are—

(a) appropriate for the level of education it is intended, having regard to the following factors—

(i) the age of learners;

(ii) the level of mental maturity of the learners; and

(iii) the objective of the materials used;

(b) free from all forms of stigmatization and discrimination against persons living with HIV;

(c) the content of the education is scientifically accurate and appropriate;

(d) not sexually explicit; and

(e) materials are available in key languages taking into account matters of disability and location.

Teachers and instructors to be trained on matters of HIV and AIDS

39. The Minister shall ensure that teachers and instructors are trained on matters of HIV and AIDS before commencing teaching or instruction on any subject related to HIV and AIDS.

HIV and AIDS information in non-formal education systems

40. The Minister shall ensure that official information on modes of transmission and ways of preventing HIV infection is progressively integrated in non-formal or indigenous learning systems.

PART X—PERSONAL CONDUCT AND RESPONSIBILITY

Person with HIV or AIDS to undergo counseling

41. A person diagnosed as having HIV infection shall be required to—

(a) undergo counseling by a health service provider; and

(b) comply with precautions and safety measures prescribed by a health service provider.

Acts likely to spread HIV infection

42.—(1) A person who knows that he is living with HIV shall not do an act or omit to do an act which is likely to transmit or spread HIV infection to another person unless, before the act or omission takes place, the other person—

(a) has been informed of the risk of contracting HIV from him; and

(b) has voluntarily agreed to accept that risk.

(2) Any person who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for five years.

(3) In this section, a person shall be deemed to be living with HIV, if HIV testing was carried out on him and the test result indicates that he is living with HIV.

Deliberate infection with HIV

43.—(1) A person who deliberately infects another person with HIV commits an offence and shall be liable, upon conviction, to imprisonment for twenty-one years.

Negligent or reckless infection with HIV

44.—(1) A person who negligently or recklessly infects another person with HIV commits an offence and shall, upon conviction, be liable to imprisonment for fourteen years.

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(2) Where the offence under subsection (1) arises out of exposure to infection in the course of employment, then lack of provision of preventive measures by the employer shall be a defence.

(3) Notwithstanding subsection (1), a person shall not be held responsible for infecting another person with HIV under this provision, if the person—

- (a) disclosed that he is living with HIV to the person at risk;
- (b) took reasonable measures to reduce the risk of infection; or
- (c) previously agreed on a level of mutually acceptable risk with the other person.

PART XI—NATIONAL AIDS COMMISSION

45.—(1) There is hereby established a body to be known as the National AIDS Commission (in this Act referred to as “the Commission”).

Establishment
of National
AIDS
Commission

(2) The Commission shall be an independent State institution.

46.—(1) The Commission shall, with respect to HIV and AIDS,—

Functions of
the
Commission

- (a) implement, co-ordinate and facilitate the national response;
- (b) manage and co-ordinate the implementation of Government policies;
- (c) provide technical support to Government in the formulation and review of HIV and AIDS policies;
- (d) develop and maintain an up-to-date information system and establish suitable mechanisms of disseminating and utilizing the information;
- (e) in liaison with the Secretary responsible for HIV and AIDS, monitor and evaluate progress and impact of the national response;
- (f) mobilize and equitably disburse resources towards the national response;
- (g) monitor distribution, and effective and efficient utilization of resources towards the national response;
- (h) promote and commission research, information sharing and documentation;
- (i) liaise with all Government Ministries, Departments and Agencies on matters relating to the national response and to ensure that there are no barriers to information;
- (j) advocate for a strong, sustained and visible role of political,

civil and traditional leaders;

(k) accredit information produced by any person before dissemination;

(l) develop and maintain profiles;

(m) provide technical guidance, capacity building and support to stakeholders; and

(n) submit reports to the Minister on the implementation of the national response.

Powers of the Commission

47. The Commission shall have powers to—

(a) sponsor, support or organize conferences, seminars, workshops and meetings on any matter under its consideration or generally for the promotion of its functions and objects;

(b) receive and allocate donations of funds, materials and technical assistance for the furtherance of its work and ensure the effective utilization of those funds;

(c) engage persons having suitable qualifications and experience as consultants to the Commission;

(d) determine its own procedures for carrying out consultancies for the general conduct of its work;

(e) establish committees as it considers necessary for the performance of its functions and assign to the committees any of its functions without prejudice to the power of the Commission itself to perform those functions;

(f) co-opt any person to attend any of its meetings but that person shall not vote on any matter for decision by the Commission; and

(g) do and perform all other things or acts that are necessary or expedient for the implementation of this Act.

Composition of the commission

48.—(1) Membership of the Commission shall not exceed seven commissioners and shall consist of—

(a) four commissioners, appointed by the Minister, one of whom—

(i) is professionally qualified in the medical sciences or a relevant social science field;

(ii) is a member of the civil society, representing people living with HIV;

(iii) is professionally qualified and practicing accountant;

(iv) represents the private sector;

(b) as *ex-officio* commissioners,—

- (i) the Secretary responsible for HIV and AIDS;
- (ii) the Secretary responsible for gender or children; and
- (iii) the Secretary responsible for Local Government.

(2) The Minister shall place advertisements in at least two daily papers of widest circulation in Malawi in order to solicit names of persons for appointment to the Commission.

(3) An *ex-officio* commissioner or any person employed in the public service shall not be eligible to be elected chairperson of the Commission but shall have the right to vote on any matter at the meetings of the Commission.

(4) Non *ex-officio* commissioners shall not, by virtue of their appointment to the Commission, be deemed to be officers in the public service.

(5) The names of all commissioners, as first constituted and every change in the membership thereof shall be published in the *Gazette*.

49.—(1) A commissioner, other than an *ex-officio* commissioner, shall hold office for a period of three years from the date of appointment and be eligible for re-appointment at the expiry of that period.

Tenure of office

(2) When making appointments after the expiry of the three years, the Minister shall have regard to the need to maintain a reasonable degree of continuity in the membership of the Commission, so that at least half of the appointed commissioners shall be re-appointed for the next term of office.

(3) A vacancy in the office of an appointed commissioner shall occur, if the commissioner—

- (a) dies;
- (b) is adjudged bankrupt;
- (c) is sentenced for an offence against any written law to any term of imprisonment;
- (d) is absent, without the permission of the Commission, from three successive meetings of the Commission of which he has had notice;
- (e) becomes incapacitated by reason of physical or mental disability; or
- (f) resigns in accordance with subsection (4).

(4) An appointed commissioner may at any time resign his office by giving one month written notice to the Minister.

(5) A vacancy in the membership of the Commission shall be filled by the appointment of a new commissioner by the Minister.

(6) A person appointed to fill the vacancy shall serve for the remainder of the term of office but no person shall be so appointed where the remainder of the term of office is a period of less than six months.

Chairperson

50.—(1) There shall be a chairperson of the Commission who shall be elected by the Commission from among the appointed commissioners at the first meeting of the Commission.

(2) Subject to subsection (3), the chairperson shall hold office until the expiry of his term of office as member of the Commission.

(3) The chairperson may be removed from office as chairperson by the Commission upon the unanimous decision of the rest of the members of the Commission for misconduct, incapacity or any other good cause.

Commission may establish committees

51.—(1) For the better carrying into effect of the provisions of this Act, the Commission may establish committees that the Commission shall deem appropriate, to perform any functions and responsibilities that the Commission shall determine subject to the directions of the Commission.

(2) The Commission shall appoint a chairperson for each committee from amongst the commissioners.

(3) The provisions of this Act relating to the meetings of the Commission shall apply *mutatis mutandis* to the meetings of the committees.

Commission may co-opt

52. The Commission may, in its discretion, at any time and for any length of period, co-opt any person on account of his special knowledge or expertise to attend any deliberations of the Commission, but the person shall not be entitled to vote on any matter at any meeting of the Commission.

Meetings of the Commission

53.—(1) The Commission shall meet as often as its business requires and in any event not less than once in every three months.

(2) Meetings of the Commission shall be held at a place and a time that the Commission shall determine.

(3) The chairperson shall convene the ordinary meetings of the Commission by giving commissioners at least fourteen days written notice.

(4) The chairperson may, in his discretion, or shall, at the written request of more than four commissioners and within seven days of the request, convene an extraordinary meeting of the Commission to

be summoned at a place and time that he may appoint.

(4) A quorum for any meeting of the Commission shall be formed by the presence of more than half of the commissioners or members of a committee.

(5) In the absence of a chairperson, the commissioners present and forming a quorum shall elect one of their number to preside over the meetings of the Commission, and the commissioner so elected shall exercise all the powers, duties and functions of the chairperson.

(6) Subject to the provisions of this Act, the Commission shall regulate its procedure.

(7) The Commission, and every committee of the Commission, shall record and keep minutes of its meetings.

54. If a commissioner or a member of staff of the Commissioner acquires any pecuniary interest, direct or indirect, in any contract, proposed contract or other matter and is present at a meeting of the Commission at which the contract, proposed contract or the other matter is the subject of consideration by the Commission, he shall at the meeting, as soon as practicable after the commencement of the meeting, disclose the fact to the Commission, and shall not take part in the consideration or discussion of or vote on any question with respect to, the contract, proposed contract or the other matter.

Disclosure of
interest

55. Commissioners shall be paid remuneration for membership and allowances when discharging their duties determined by the Minister responsible for Finance.

Remuneration

56. The Commission shall report to the Minister and keep the Minister fully informed on matters concerning the general conduct of the affairs of the Commission.

Reporting

57.—(1) There shall be the office of the Chief Executive Officer of the Commission which shall be a public office.

Chief
Executive
Officer

(2) The Chief Executive Officer shall be appointed by the Minister, on the recommendation of the Commission, on terms and conditions that the Minister determines.

(3) The office of the Chief Executive Officer shall be held by a person who has had experience and shown capacity in a profession or in activities devoted or relevant to HIV and AIDS.

(4) The Chief Executive Officer shall hold office for a period of three years, subject to renewal on account of satisfactory service.

B. No. 12

Procedure for appointment of Chief Executive Officer 58.—(1) The chairperson shall sign and issue a public advertisement inviting applications, in writing and within thirty days, for the post of Chief Executive Officer.

(2) The Commission shall assess the applications received pursuant to subsection (1), and—

(a) may seek other or further information pertaining to an applicant, from the applicant or any other person or source;

(b) shall interview each eligible short listed applicant; and

(c) shall recommend to the Minister, the most eligible candidate for appointment as Chief Executive Officer.

Duties of Chief Executive Officer 59. Subject to the general and special directions of the Commission, the Chief Executive Officer shall be responsible for the day to day management of the Commission and administrative control of other members of staff of the Commission and, in that regard, shall be answerable and accountable to the Commission.

Removal of Chief Executive Officer 60. The Chief Executive Officer may be removed from office on the following grounds—

(a) misconduct;

(b) incompetence or unfitness to discharge duties; or

(c) incapacity, by reason of physical or mental illness.

Staff of the Commission 61.—(1) There shall be employed in the service of the Commission, subordinate to the Chief Executive Officer, other management, professional, research, technical, administrative and other support staff as the Commission shall consider necessary for the exercise of its powers and the performance of its duties and functions, who shall be officers in the public service.

(2) The staff of the Commission under subsection (1) shall be appointed by the Commission on the terms and conditions that the National Assembly shall determine:

Provided that the Commission may, by directions in writing, delegate to the Chief Executive Officer, the appointment of its staff in other junior ranks as it shall specify and the Chief Executive Officer shall report to the Commission every appointment made pursuant to this subsection.

Attendance of meetings by staff 62.—(1) The Chief Executive Officer, or any other officer of the Commission as the Chief Executive Officer may designate with the approval of the Commission, shall attend meetings of the Commission or any committee of the Commission to record the minutes of the meetings and take part in the deliberations thereof subject to the directions of the Commission or committee but shall not be entitled to vote.

(2) Where in any meeting, the deliberations of the Commission or of a committee of the Commission concerns the Chief Executive Officer or any officer of the Commission designated to attend the meeting, the Commission or the committee, as the case may be, may exclude the Chief Executive Officer or the officer from the meeting.

PART XII—FINANCIAL PROVISIONS

63.—(1) The funds of the Commission shall consist of—

Funding of
the
Commission

(a) sums appropriated by Parliament for the purposes of the Commission;

(b) donation of funds, materials or any other resources for the purposes of its functions, powers and duties;

(c) funds that are derived from the sale of any property by or on behalf of the Commission; and

(d) other lawful sources of funding.

(2) The Commission shall, at all times, comply with the provisions of the Public Audit Act, the Public Finance Management Act and the Public Procurement Act.

Cap. 37:01
Cap. 37:02
Cap. 37:03

64.—(1) The Commission shall cause to be kept proper books and other records of accounts in respect of receipts and expenditures of the Commission in accordance with acceptable principles of accounting.

Accounts and
audit

(2) The accounts of the Commission shall be audited annually by the Auditor General or by independent professional auditors appointed by the Commission in consultation with the Auditor General, and the expenses of the audit shall be paid out of the funds of the Commission.

(3) The Commission shall as soon as practicable, but not later than six months after the end of the financial year, submit to the National Assembly an annual report on all financial transactions of the Commission and on the work, activities and operations of the Commission.

(4) The report referred to in subsection (3) shall include a balance sheet and an income and expenditure account, shall be laid before the National Assembly in accordance with the provision of Public Audit Act.

PART XIII—MISCELLANEOUS

65. The Minister may, by notice in the *Gazette*,—

Powers of the
Minister

B. No. 12

- (a) make regulations for the better carrying out of this Act;
- (b) amend any schedule to this Act.

Agreements,
licences,
permits, etc

66.—(1) Any agreement, document or permission, made, granted or approved by the Registered Trustees of the National AIDS Commission shall, in so far as it is consistent with the provisions of this Act and except as otherwise expressly provided in this Act or in any other written law, continue and be deemed to have been made, granted or approved by the Commission or the Minister as the case may be, under the corresponding provisions of this Act.

(2) Any property and undertakings owned by the Registered Trustees of the National AIDS Commission and used by them, immediately before the commencement of this Act, for the functions which by this Act are transferred to or vested in the Registered Trustees of the National AIDS Commission shall, on the date aforesaid, by virtue of this Act be transferred to and vested in the Commission by the same title by which they were held immediately before the said date.

(3) Where, immediately before commencement of this Act, any legal proceedings are pending to which the Registered Trustees of the National AIDS Commission were entitled to be a party, the Commission shall, as from the date of commencement of this Act, continue in such proceedings, or shall be made a party thereto in like manner as the Commission could have become, and the proceedings shall not abate by reason of the substitution.

Transfer of
assets, funds,
liabilities, etc

67.—(1) Property, assets, funds, liabilities, obligations, and other arrangements existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the Registered Trustees of the National AIDS Commission, shall, on the commencement of this Act, be deemed to have vested in, or to have been acquired, incurred or entered into by or on behalf of the Commission and shall become enforceable by, or against, the Commission to the same extent as they were enforceable by or against the Registered Trustees of the National AIDS Commission.

(2) Where the transfer of any property transferred to or vested in the Registered Trustees of the National AIDS Commission under subsection (1) is required by any written law to be registered, the Commission shall, within one year from the commencement of this Act, or within any other period as the written law may prescribe, apply to the appropriate registering authority for the registration of the transfer, and thereupon the registering authority shall, at no cost

to the Commission or any person by way of registration fees, stamp or other duties—

(a) make such entries in the appropriate register as shall give effect to the transfer;

(b) where appropriate, issue to the Commission certificate of title or other statutory evidence of ownership of the property or make such amendments on such certificates or in the appropriate register as may be necessary; and

(c) make any necessary endorsement on such deeds or other documents as may be presented on such registering authority relating the title, right or obligation concerned.

68.—(1) All appointments of staff of the Registered Trustees of the National AIDS Commission made prior to the commencement of this Act and subsisting at the date of commencement of this Act shall be deemed to have been made in accordance with this Act. Transfer of employees

(2) Any person who, immediately prior to the commencement of this Act is employed by the Registered Trustees of the National AIDS Commission shall be deemed to have been transferred to the employment of the Commission under his former terms and conditions of service, and, for the purpose of determining his rights thereunder, his service shall be regarded as continuous from the time he was appointed by the Registered Trustees of the National AIDS Commission.

FIRST SCHEDULE

s.4

HARMFUL PRACTICES

1. *Chimwanamaye*
2. *Fisi*
3. *Hlazi*
4. *Chijura mphinga*
5. *Kuchotsa fumbi*
6. *Chiharo*
7. *Kuika mwana kumalo*
8. *Kujura nthowa*
9. *Kulowa or kupita kufa*
10. *Kulowa or kupita ngozi*
11. *Kupimbira*
12. *Kupondera guwa*

13. *Kusamala mlendo*
14. *Kutsuka mwana*
15. *Mbirigha*
16. *Gwamula*
17. *Mwana akule*
18. *Bulangete la mfumu*

SECOND SCHEDULE

s.7

HIV RELATED DISEASES

1. Kaposi's sarcoma
2. Chronic and recurrent diarrhoea
3. Oral and oesophageal candidiasis
4. Herpes zoster
5. High Grade B cell malignant lymphoma
6. Cryptococcal and other fungal meningitis
7. Pneumocystic carini pneumonia
8. Pulmonary or disseminated tuberculosis

OBJECTS AND REASONS

The principal object of the Bill is to provide for a new piece of comprehensive and harmonized legislation for the proper prevention and management of HIV and AIDS in Malawi and to prescribe the proper institutional arrangements for the control and management of HIV and AIDS.

KALEKENI KAPHALE, SC
Attorney General