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REFLECTIONS ON BEHALF OF THE SCOTTISH LAW COMMISSION

*(Response to presentation on Duty of Care: Constitutional and Law Reform, in Malawi,
by Dr Janet Chikaya-Banda)*

Introduction

Many thanks to Dr Chikaya-Banda for her fascinating presentation on reforming the constitution and the law in Malawi, and on the vital role of the Malawi Law Commission in that context. The publication of her paper on that topic by the Africa Research Institute, as part of the Policy Voices series, is a valuable contribution to thinking about the challenges that Malawi face, and not only Malawi but also other African countries in similar circumstances seeking to embed the rule of law and consolidate democracy.

Can I thank also Edward Paice, the Director of the African Research Institute, for inviting me to give a short presentation following that of Dr Chikaya-Banda. It is an honour for me to be here today.

Outline

What I wish to do is to explain something about the links between Malawi and Scotland, and between the Malawi Law Commission and Scottish Law Commission, that bring us together here today; and offer a few thoughts on:-

- why law reform matters;
- in particular why law reform matters in Malawi, and in countries similarly placed;
- and on promoting law reform generally, by outlining some of the steps that the Scottish Law Commission have taken over the past few years to do so.

Links: Scotland and Malawi

There are long-standing links between Malawi and Scotland, dating back to missionary times including the work of Dr David Livingstone. This work extended into health and education, with the establishment of hospitals and schools. We will be hearing a lot more about these ties next year, when we celebrate two hundred years since the birth of Dr Livingstone. Following the constitutional settlement in the UK in 1999, with the establishment of a new Scottish administration and a Scottish Parliament with devolved powers, the Scottish administration wished to play a role in the world, and in international development. It made sense to build on existing and historic links between Scotland and countries such as Malawi in particular, in order to focus energy on co-operation and assistance within established relationships. The then Scottish First Minister, now Lord McConnell, led us into the establishment of a Governmental agreement between Scotland and Malawi, signed in 2005, which provided for co-operation and assistance between the 2 countries in a number of areas. The work continued at first in the areas of education, and health, and then in the development of enterprise. In 2009 the Scottish and Malawi Governments agreed to launch a further programme under the Agreement, in the area of governance, entitled "Capacity Building in the Justice Sector". Scottish Ministers appointed an Edinburgh-based development charity, Challenges Worldwide to prepare the Programme and deliver it, and provided funding for the Programme. The Programme is not intended to be one providing finance, it envisages the building of local capacity, in other words the building up of skills, knowledge and experience of people in Malawi. This is to happen during visits to Malawi bodies from their equivalent partner bodies in Scotland. The Programme is therefore based on the value of interaction between people and bodies, in the context of a continuing link between partner bodies with similar functions. Any activities under the Programme follow on from requests from Malawi based on needs identified by the Malawian bodies themselves.

Against that background, the link between the Malawi Law Commission and the Scottish Law Commission was agreed in the summer of 2010, and the link forms part of the wider

picture of relationships between a number of bodies in the justice sector in Malawi and Scotland. Further to this link, a number of things have taken place to assist where possible with the promotion of law reform in Malawi.

Last week, on 7 November, the Scottish Parliament debated the relationship between Scotland and Malawi. The Scottish Minister for External Affairs and International Development, Mr Humza Yousaf, outlined current and proposed activities in various sectors under the Scotland-Malawi Governmental agreement. Full support to the relationship and the work was given by all party spokesmen. The focus of the discussion was on activities in health, education, the provision of water, and new work such as conservation of heritage and renewable energy provision, in which Scotland has world-class expertise. Mention was made of some work needed in the justice sector: as regards prisons, and advocacy training. Work in all these areas is of course important.

Importance of law reform

But equally important, and I suggest in need of recognition with a higher profile, is the promotion of law reform as part of strengthening a comparatively new democracy, and the democratic institutions; and hence promoting stability and good governance in the country. The Malawi Law Commission is after all at the cutting edge of law reform, in that its remit includes the power to recommend changes to the Constitution of Malawi; and in addition to undertake reviews of the domestic law to ensure that they are consistent with and integrated with the Constitution. It is work on these fronts that will provide a stable legal structure for the country, and help to safeguard a multi-party democracy, and the separation of powers. Not getting this right has the potential to compromise other efforts to improve the health, education, and infrastructure of the country.

The law reform work of the Malawi Law Commission is also important in reviewing and recommending the updating of the statute book, which can sometimes pre-date

independence and reflect ideals of a different age; and in recommending reforms to implement in domestic law international instruments, including on human rights, which Malawi has signed (for example in the field of intellectual property, Malawi as a member of the World Trade Organisation is obliged to have minimum standards as prescribed by TRIPS – Trade Related Aspects of Intellectual Property). Law reform proposals can also assist in setting the legal framework in which businesses can set up and operate, providing a framework within which economic growth can occur and so help to provide employment opportunities, and assist in raising standards of living. Laws to provide for business interests, such as ease of incorporation for companies and of land registration, can encourage foreign direct investment.

So I think that our 2 Law Commissions, in Scotland and Malawi, share a common view with other law reform bodies on the strategic importance of law reform in any country; and in particular, in relatively new democracies where there is a need to embed the rule of law. We share the objective of striving to bring the law up-to-date; to make the law fair; and accessible; and reflect the changing needs of society in a fast-changing world. We have common ground also in that we both are established and independent law reform bodies, set up by legislation: in the case of Malawi, under the Constitution; as regards the Scottish Law Commission, established by an Act of the UK Parliament in Westminster in 1965, at the same time as the Law Commission for England and Wales was established. Both Commissions are therefore permanent or standing bodies, independent from Government, with a constitutional or statutory remit: to review areas of law and recommend changes. The Commissions are therefore advisory bodies. Law reform bodies do not have the power to initiate and enact legislation. We submit our reports and recommendations for reform to Ministers, and it is then for Ministers and the legislature to consider recommendations and implement where they choose to do so.

Role of an independent standing law reform body

Law reform, in general, is for us all – judges, politicians, policy people, legislators, pressure groups as well as law reform bodies. But an established or permanent law reform body provides continuity for law reform. It allows the development of expertise in law reform and the development of innovation in consultation for example. An independent law reform body, separate from Government, allows reform of the law to be approached in a systematic and objective basis. A law reform body can carry out work under an agreed programme, of individual law reform projects looking at a variety of discrete areas of the law. The body can approach particular areas by assessing the current defects in the law; undertake research, including looking to see whether there are any appropriate models for reform which are already in use in other comparable jurisdictions; and put forward questions or proposals for consultation. Key to the methodology of a law reform body is consultation on questions and proposals: in order to obtain the views of key bodies and interests in the particular area of policy and law in question, and of members of the public. The law reform body then considers the results of the consultation and forms its own proposals for reform; so that the final stage of the law reform project, the submission of a report to Ministers, is based on as wide a consultation as possible, and on careful consideration of the results of the consultation.

Our Law Commissions also share the fervent wish to see our recommendations implemented by the Government and the Parliament. We look for a steady rate of implementation of law reform recommendations. How do we go about achieving that, in the face of disappointments on the implementation front.

It does not, I suggest, compromise the independence of the law reform body, as regards the critical task of framing recommendations for reform, to work closer with Government Ministers and Government officials, and with Parliamentarians and their advisers, in order to facilitate or improve the enactment of law reform measures. Working at these different

levels, with Government and Parliament, can be regarded as part of the business planning for reform, and hopefully increase the rate of reform.

Working with Government

The question is how to work closer with Ministers and with Government officials, to encourage Government planning for law reform: to take into consideration Government's overall plans for the future; identify with them which areas of law to address; seek a Government commitment to legislate to implement reforms where a project is taken on; look for ways for the Government to respond formally to the submission of a law reform report and thereafter be held accountable, for example in Parliament. Equally, in relation to the Parliament, to look at the scope for enhancing capacity or procedures within the Parliament to enact law reform measures; and identify any other opportunities whereby law reform measures may be taken other than by Government through the Parliament.

For the Scottish Law Commission this is continual work in progress and of course it takes time to achieve something. Nevertheless some things have been achieved, and others we hope to achieve over the next year or so.

Raising the issue

Our current stage of addressing these issues began 3 years ago. We began by raising, in public, the need to do more in Scotland on law reform implementation. Our then Chairman, a senior judge, Lord Drummond Young, raised this as an issue in our annual report, which is published along with a press release. This resulted in media attention to the issue, and then a public response from the Scottish Government. There followed discussions with our sponsor department in the Scottish Government, the Directorate of Justice; followed by meetings with the Cabinet Secretary for Justice, and the Minister for Parliamentary Business. This resulted in further activity agreed on a number of fronts: Government officials began a review of outstanding Law Commission reports, to see what could be implemented;

a commitment was made to look at the ways in which the capacity of or procedures in the Scottish Parliament to enact law reform measures could be increased or enhanced, whether by way of a special procedure for law reform measures or otherwise.

As regards working with Government, we had regard to the arrangements now between the UK Government and the Law Commission for England and Wales whereby certain duties are now set out in statute, following the passing of the Law Commission Act 2009, amending the Law Commissions Act 1965. This Act now provides for a statutory duty on the Lord Chancellor to make an annual report to the UK Parliament on implementation of Law Commission recommendations over the preceding year, and there is statutory provision for a protocol on working arrangements between the Government and the Law Commission. A protocol has been agreed and published. In Scotland the context in which we work is different. Things operate in Scotland on a much smaller scale; for example the Scottish Law Commission's primary relationship with Government is with the Scottish Government itself, and the Commission does not therefore have to negotiate on projects with a number of large Government departments. Arrangements in Scotland can therefore be more flexible and can be agreed administratively. There was no appetite in Scotland for going so far as to seek to impose similar statutory duties upon the Government. But we may look to make further agreements with the Government on working arrangements, as an administrative measure.

Liaison with Scottish Government

On the Governmental issues, as part of the strategic approach of thinking ahead for law reform implementation, the Commission has closer working relationships now with the Scottish Government. These are primarily with our sponsors in the Directorate for Justice, but also with policy leads for other subject areas. By way of regular meetings, the Commission keeps the Scottish Government officials aware of progress with our work both generally and in relation to specific law reform projects. Where a law reform project is

nearing the final stages towards a report, a meeting is held between the lead Commissioner and his team and the Government policy leads.

Response by Government to Commission reports

Further, as part of the accountability of the Government for law reform, the Cabinet Secretary for Justice agreed to provide a written response to the Law Commission within 3 months following the submission of a report. This agreement seeks to elicit the Government's views on the recommendations put forward, and any plans that the Government has as regards steps to implement the report. The Government's response is by agreement made public. It is placed on the Commission's website. The Government's response can therefore be discussed further or raised by interested parties, or indeed within the Scottish Parliament.

Part of the closer relationship with the Scottish Government includes planning ahead, for implementation of current law reform projects; for example considering whether a committee other than the Justice Committee of the Scottish Parliament might be the lead committee for any particular law reform Bill, thus breaking the log-jam of the heavy workload of the Justice Committee.

Engagement with Scottish Parliament

The Commission also engaged with the Scottish Parliament to increase the profile of the Commission and to underline the importance of law reform measures; in so doing seeking to increase the sense of the responsibility of the Scottish Parliament, as the legislature for Scotland, for the statute book of Scotland and in keeping it up-to-date. To that end, the Commission held receptions at the Scottish Parliament at Holyrood, inviting members of the Parliament, their researchers, Parliamentary officials, and key Government Ministers and senior officials; an address was given by the Chairman on law reform and functions of the

Commissions, and on our current projects, followed by discussion of how to address the issue of improving work on law reform.

The Commission also met separately with key people in the Scottish Parliament: the Chief Executive and his advisers; individual members of the Parliament with an interest in our work; the Convener of the Justice Committee, which has lead responsibility for many of the subject areas of the law reform projects. Subsequent to that, the Chairman and I attended a business planning day of the Justice Committee, highlighting again the role of the Commission, our pending law reform reports that may be of interest to the Committee, and contributing to the thinking on the future workload of the Justice Committee. Our involvement with the Justice Committee led to an inquiry by the Justice Committee into the implementation of our reports; resulting in an exchange of correspondence between the Convener of the Justice Committee and the Cabinet Secretary for Justice, looking into the current state of implementation of past reports. This identified the suggestion that the Justice Committee may at some stage themselves be interested in introducing, as a Committee Bill rather than a Government Bill, one of the law reform Bills prepared by the Law Commission; depending of course on the heavy pressure of business falling upon the Committee.

Scottish Parliament capacity for technical law reform Bills

I mentioned that the Commission has also worked closely with the Scottish Government and the Scottish Parliament to examine ways of increasing the capacity within the Scottish Parliament to address law reform measures. Issues looked at included consideration of a special procedure for Law Commission Bills, the possibility of the Parliament providing for 2 justice committees rather than the one existing committee; and enhancing the remit of an existing committee, so as to cover in addition to their current work, technical law reform measures. A working party of officials from the Government, the Parliament and the Commission was formed to consider this matter and issued a report to the Government and

the Parliament. That report is not in the public domain as yet. We hope that the recommendations of this report will be implemented next year within the Parliament, and that a pilot Law Commission Bill would be put through the new process, with an assessment thereafter of how this worked for all concerned.

Special Commission Bill procedure – House of Lords

In putting the case for a new process in the Scottish Parliament, the Commission has pointed to a special procedure in the House of Lords for certain types of Law Commission Bill available in the UK Parliament at Westminster. This procedure is available to Scottish Law Commission Bills, on reserved areas of Scots law, as well as to Bills by the Law Commission for England and Wales. Last week, the first Scottish Law Commission only Bill was introduced using this procedure in the House of Lords, by the Advocate General for Scotland – the UK Law Officer for Scotland. It is the Partnerships (Prosecution) (Scotland) Bill, aimed at closing the loophole in the criminal law of Scotland that currently allows partnerships to evade prosecution by dissolving. This procedure was recommended by the House of Lords Procedure Committee in 2008 on a trial basis and adopted in 2010. The Second Reading under this procedure takes place in Committee, followed by a formal motion in the House, and Committee stage is conducted by a Special Bill Committee which has the power to take written and oral evidence. This does not speed up procedure as such but does make it more likely for a Commission Bill to be introduced, as no time is required for debate on the floor of the House. Only one Bill can be introduced in this way at a time, though it is possible for there to be a Commission Bill in the Commons at the same time as one in the Lords. Four Law Commission Bills have previously been introduced using the procedure, 2 Bills as regards England and Wales only, and 2 Bills following a joint report the Scottish Law Commission and the Law Commission for England and Wales.

Commission Bills –accompanying documents

One other result of negotiations with Government to increase the implementation of Commission Bills is that the Government now look to the Commission to take on extra work as part of our law reform projects; namely that the Commission prepare further documents in relation to a Bill that are required by the standing orders of the Scottish Parliament. This involves the Commission preparing not only explanatory notes on the provisions of the Bill; but also policy memorandum explaining the policy behind the Bill; a financial memorandum; and, critically, an impact assessment – assessing the impact of the law reform recommendations, for consideration by the Government and the Parliament. The Commission undertakes this work now, to facilitate the handling of our Bills and hopefully ease the passage to introduction in Parliament; we do this in recognition of the current pressures of work on the existing resources within the Government.

Conclusion

I hope these comments on the links between Scotland and Malawi on law reform, on law reform generally, and on recent Scottish experience, are of interest to you and that you can support the call of Dr Chikaya-Banda, and work of the Malawi Law Commission at the cutting edge of law reform.

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