OVERVIEW OF LAW REFORM PROGRAMMES

1.0 Review of the Chiefs Act (Cap.22:03)

The special Law Commission on the Review of the Chiefs Act was empanelled in March, 2012. The mandate of the special Law Commission was to carry out a general review of the Chiefs Act with a view to developing a new legislative framework to regulate the office of chieftaincy that promotes democratic principles of transparency and accountability in accordance with the Constitution and international practice.

The special Law Commission comprise of members from the Judiciary, Ministry of Local Government and Rural Development, Ministry of Justice and Constitutional Affairs, Malawi Law Society, Civil Society and Chiefs. The special Law Commission commenced its work in the month of April, 2012.

The special Law Commission in fulfilling its mandate, has held five (5) Commission meetings during which it has substantially considered all the provisions contained in the Chiefs Act including its subsidiary legislation which deals with matters concerning Chiefs (Staff) (Emoluments, Terms and Conditions of Service).

The special Law Commission also conducted three regional consultative workshops in the central, southern and northern regions of the country on 9th August, 2012, 27th September, 2012 and 25th October, 2012 respectively. The aim of the consultative workshops was to present the special Law Commission's findings and tentative recommendations to stakeholders in order to solicit input and views on how best the tentative proposals could be improved on as well as additional proposals for remedying gaps and shortfalls that the Chiefs Act has.

One of the terms of reference adopted at the commencement of the special Law Commission on the Review of the Chiefs Act, was to ascertain about any reforms that have taken place within the SADC Region and other common law jurisdictions relating to chieftaincy and to draw lessons from neighbouring or similar jurisdictions. In fulfillment of this requirement to learn firsthand experiences relating to structural, institutional and procedural issues regarding the institution of the chieftaincy, the special Law Commission visited Namibia on 19th to 26th August, 2012 and Zambia on 25th August, 2012 to 2nd September, 2012.

The sixth Commission meeting took place on the 19th to 21th November, 2012. The Commission considered Reports from the regional workshops and study visits. As such, it has developed a Draft Report on its findings and tentative recommendations.

The Commission has dealt with the following issues in the review process:

(i) **appointment and removal of chiefs:** the special Law Commission is considering what should be the process for appointing a chief; who should be the appointing authority of a chief and what should be the role of the President; what should be the

eligibility criteria for appointment; what should be the period for filling vacancies in traditional leadership; whether appointments or elevation to Paramount Chief or Senior Chief be personal to holder or substantive; and who should be mandated to remove a chief from the position and what should be the grounds for removal of a chief;

(ii) **powers, duties and functions of chiefs:** what functions and responsibilities should chiefs perform in the democratic Malawi as a way of entrenching democratic principles of transparency and accountability; how gender mainstreaming may be entrenched in traditional leadership; what should be the role of chiefs in land matters, in particular, to what extent should chiefs have a role in customary land management and power or jurisdiction over land in municipalities, towns and cities; and whether chiefs should participate in politics and if so, to what extent and how should their participation in politics be regulated to ensure that there is no undermining of their traditional functions;

(ii) **definition and creation of village:** how should a village be defined in order to ensure that woman and child headed households are recognized; how should a village be created in terms of what criteria should be used in creating a village; and what should be the procedure for creating a village and a group of villages;

(iii) **remuneration of chiefs:** how should chiefs terms of remuneration be handled, whether chiefs should have terms and conditions of service; whether chiefs should receive a salary or allowance; what other benefits should accrue to chiefs; and whether a chief should retire from duties, and if so, under what circumstances;

(iv) **disciplinary mechanisms for chiefs:** should the law provide for disciplinary mechanisms for chiefs, if so, what should be the disciplinary mechanisms applicable to the office of chiefs including what should the disciplining authority consist of; what offences and penalties should be applicable; and whether or not a criminal conviction should expire.;

(v) **the Council of Traditional Leaders:** whether the law should provide for creation of a Council of Traditional leaders, if so, how should appointment to the Council be done; who should qualify to be appointed as a member of the Council; what functions should the Council have; and how its activities will be financed; and

(vii) **status of block leaders:** whether or not the law on chiefs should recognize block leaders.

The principal programme officer for this Programme is Mrs Eddah Chavula, Law Reform Officer and is assisted by Mr. Tony Lemucha, Assistant Law Reform Officer.

The Programme is funded by the European Union (EU).

2.0 Review of the Public Health Act (Cap. 34:01)

The Public Health Act came into force on 29th July, 1948, and was modeled on the Public Health Act of 1875 and Public Health Ordinance of 1932 of England and Wales. Some elements of the Act are over a hundred years old. The law and policy framework on public health has evolved considerably since 1948. At the international level, the World Health Organization (WHO), for example, has consistently developed standards to be followed by States in their health care programs; including public health. At the national level, the adoption of a new Constitution in 1994 necessitated the review of the Public Health Act to ensure its consistency with the supreme law and the policies on decentralization. The policy on decentralization calls for the review of the Act to properly restructure its powers. Government has also developed new policies on health which renders the Public Health Act obsolete. Indeed, public health law has moved from merely regulating the outbreak of epidemics in a country, to the development of quality healthcare frameworks within a value-system based on social justice. This demands a human rights-based approach to public health. In light of its mandate, the Law Commission received a submission from the Office of President and Cabinet (OPC) through the Ministry of Health (MoH) to review the Public Health Act.

The special Law Commission has since conducted nine (9) commission meetings. The following are the thematic areas being considered in the review process:

(i) **scope:** what should be the parameters of health and what should be the parameters of public health;

(ii) **regulatory framework and related issues:** what should be the regulation of health care services, which components must consist of or regulate training institutions and practice; whether to establish Health Boards; what powers must be given to local government, central government and other stakeholders; and what issues must be considered under health financing and health insurance;

(iii) **right to health:** what direction must the Act take in relation to the nature of the right to health under international law and policy and also the nature of the right to health under the Constitution of Malawi; what mechanisms must be put in place to allow wide and easy access to health services; how the Act must provide for establishment of access to or development of Essential Health Package**;** how to incorporate health services infrastructure; how to regulate quality of care; how to put in place and maintain level of care, (primary, secondary and tertiary care provision) emergency care and special programs like safe motherhood, management of unsafe pregnancies, sexual and reproductive health rights, maternal and child rights; how rights and duties of health workers, users of health care facilities and health care institutions must be provided for in the Act;

(iv) **public health and ethics:** how issues on consent of, or on behalf of a person must be included, and what must be put in place to regulate clinical trials and confidentiality;

(v) **control of use of "human tissue":** analysis of the Anatomy Act (Cap. 34:03) in relation to the Public Health Act; how the use of blood and blood products as well

as tissue and gametes in human being must be controlled; what procedure should be followed in the donation of human bodies and tissues of deceased persons; what conditions will necessitate post-mortem examination of human bodies; what should be the process for certification of death of a human being; what must be followed in the preparation, preservation and burial of deceased persons; what the Act will include in terms of human cloning;

(vi) **disease prevention and notification:** how disease surveillance or general epidemiological intelligence for containment should be conducted according to law; what the law should provide for in terms of bio-terrorism; what provisions on isolation and quarantine must be incorporated; how will the nature and purpose of notification of isolation and quarantine be; what will be the nature and requirement for listing of communicable disease, listing of infectious disease; who will have the duty to notify and to care in the context of notification; who will have the duty to observe confidentiality and privacy considerations; what issues to be considered under law to do with the responsibility, trans-border information sharing, and vaccination;

(vii) environment and waste: how should the law regulate sanitation and housing, building construction standards, construction and management of public sewers and drainage, disposal of waste (e-waste, medical waste and industrial waste, etc) and other hazardous materials (lead, paint, as bestos, e.t.c.) as well as noise pollution and other nuisance;

(viii) hospitality, utility and public gatherings: what course should the law take in terms of issues to do with water treatment, water supply and public health; food industry and public health; health and safety at public gatherings and public convenience facilities (banking halls, shopping malls, football stadia, etc.);

(ix) alcohol, tobacco and substance abuse: how the law should control the use of alcohol, tobacco and tobacco products, and other 'prohibited or banned substances'; what regulations must be put in place in relation to smoking of tobacco in public places, advertisement or promotion of alcohol and tobacco, and tobacco products to the public;

(x) enforcement and implementation: what powers of enforcement must be designated to ensure conformity and strict punitive measures; should the law consider sector-specific measures (hospitality industry, health workers, commercial sex workers, sports e.t.c); what will be the due process; which sanctions (administrative penalties, compulsory examination and testing, fines, terms of imprisonment, etc) must be applicable; and what measures must be put in place to ensure enforceability of orders; and

(xi) public health emergency: under what terms can a declaration of "public health emergency" be made to be in tandem with the Constitution of Malawi; what must be the reasons or situations to call for a public health emergency; how long can a public health emergency be; what must be introduced in terms of public health emergency, disaster preparedness and management.

The principal programme officer for this programme is Mr. Chizaso Eric Nyirongo, Assistant Chief Law Reform Officer and is assisted by Mr. Francis Ekari M'mame, Assistant Law Reform Officer

The Programme is funded by UNICEF, Government of Malawi and MoH

3.0 Review of Prevention of Domestic Violence Act (Cap. 7:05)

The Review of the Prevention of Domestic Violence Act (PDVA) commenced in March, 2010 following submissions from the Ministry of Gender, Children and Community Development on the problems that were faced in implementing the Act. The Ministry among others identified the following gaps:

(a) that the definition of a "child" is too broad as there may be children under the age of eighteen (18) years living within a household residence, but who may be parents. Should such persons be protected under the Act?
(b) that the law does not include children as a class of persons who may apply for orders, more especially considering that vulnerable children need direct access to courts;
(c) that the definition of a "court" is problematic as it is inconsistent with the definition of courts under the Courts Act; and
(d) that there is lack of subsidiary legislation to regulate procedure in the courts on matters of domestic violence.

The review of the PDVA is therefore of a technical nature that seeks to propose solutions to the problems which have been perceived to hamper the smooth implementation of the Act.

The special Law Commission on the review of the PDVA conducted two regional consultative workshops in the northern and southern regions of Malawi. The remaining activities before completion of the programme are to hold one regional consultative workshop for the central region, a national consultative workshop, three commission meetings, a press briefing and printing and publication of the Report.

The special Law Commission on the PDVA has been meeting in plenary and has come up with a draft Report containing the recommendations for reform. The main issues considered so far are:

(i) definition of a "court": the special Law Commission has also noted that the definition is jurisdictional based on the geographical position of both the complainant and the court. It further, observed that there is concurrent jurisdiction between the High Court and Subordinate Courts.

(ii) definition of "Domestic Violence": the definition as it currently stands presupposes that any act of domestic violence should be criminal in nature. The special Law Commission noted that there may be acts which constitute domestic violence but are not

criminal in their own respect. The special Law Commission found the definition unduly restrictive as it leaves out very important aspects of violence which are not criminal offences but would amount to domestic violence. The special Law Commission has recommended that the definition be deleted and replaced with a new one.

(iii) Section 17: the section makes provision for the effect of a tenancy order. The special Law Commission noted that the provision does not make it clear as to who shall be responsible for the payment of rent. For example, in situations where the court grants a tenancy order to a victim who is not the tenant and not responsible for paying rent, who will be responsible for paying rent? As such the special Law Commission recommends that the court should be given power to order a party who was paying rent prior to the tenancy order to continue paying the whole or part of the rent taking into consideration the financial circumstances of the parties.

The officer responsible for this programme is Mr. William Yakuwawa Msiska, Deputy Chief Law Reform Officer.

The programme is funded by the UNFPA.

4.0 Development of Statutory Sentencing Guidelines

The Law Commission has since 1998 been undertaking major reforms to the criminal justice system in Malawi. The work was initiated pursuant to the findings and recommendations made by the Task Force on Legal and Judicial Reforms in its report published in 1996 which recommended a complete overhaul of the criminal justice system and identified a number of statutes in need of reform. The Penal Code, the Criminal Procedure and Evidence Code, Probation of Offenders Act and statutes governing the administration of the courts among others.

The Commission has so far completed the review of three (3) statutes: the Penal Code, the Criminal Procedure and Evidence Code, the Children and Young Persons Act and has also developed the Bail Guidelines Act and the Fines (Conversion) Act. It was in the course of reviewing the Criminal Procedure and Evidence Code that the Commission identified that sentencing is an area that needs to be separately addressed. Such a decision was made against the background that there is lack of consistency and uniformity of approach in sentencing practices. In an effort to address the problems in sentencing, member institutions to the Democratic Governance Programme, a successor to the EU Rule of Law Programme, resolved that the Law Commission carry out investigation to establish whether indeed there are discrepancies in the sentencing approach that require immediate address.

Pursuant thereto, the Commission carried out consultations with magistrates from all the four judicial regions. Thereafter the Commission also held consultations with judges from all the four judicial regions. The main objective of these consultations was to find out whether indeed there are discrepancies in sentencing, and if they are existent, how best to address the problem. The findings of the consultation exercise are contained in the Commission's "Development of Sentencing

Guidelines: Consultation Report" which is ready for publication. Pursuant to the findings of the consultations, the Commission has decided to empanel a special Law Commission to develop the sentencing guidelines and appointment of Commissioners is underway. The Commission has already developed a Research Paper on the Development of Sentencing Guidelines which is ready for publication and is in the process of developing the Issues Paper and the Discussion Paper.

The principal programme officer for this programme is Mr. William Yakuwawa Msiska, Deputy Chief Law Reform Officer, who is being assisted by Mr. Chikumbutso Nichodemus Sitima, Assistant Law Reform Officer. Dr. Janet Banda, the then Chief Law Reform officer, was supervising the programme.

This programme is being funded by the EU Democratic Governance Programme.

5.0 Review of Sheriffs Act (CAP. 3:05)

The Sheriff's Act (Cap. 3:05) (hereinafter the Act) came into force on 1st February, 1968. Its main object is to make provision for the appointment of Sheriffs and other officers, to set out their respective powers and duties and the manner of the exercise thereof. Generally the Act governs the legal procedures that a person who has obtained judgement for the payment of money may use to enforce the payment of that judgement. The enforcement is effected through the execution of a warrant of execution issued by a court against the property of a judgment debtor.

So many changes have, however, occurred since 1968 which jointly and cumulatively continue to render the Act as unjust and irrelevant to current society needs. Malawi has since adopted a new Constitution and constitutional framework. The conceptualisation of what constitutes property continues to change and is always in flux, for instance, the recognition of married women as proper property holders and owners, individually or otherwise, worthy of State and thus legal protection, among others. It is, therefore, for these reasons that the Commission received several submissions from the public requesting it to seriously consider the revision and reform of the Sheriffs Act with the aim of developing a regulatory regime that is relevant, effective, and exhaustive. The Commission has since commenced the Sheriffs law reform process.

Objectives

The objectives of the reform process among others, is:

(i) to align the Sheriffs Act with the dictates of the 1994 Constitution of Malawi;
(ii) to reconsider the scope of executable property in light of the various developments that have occurred in the field of property law in so far as the conceptualisation of 'what' constitutes property is concerned;
(iii) to re-assess categories of protected property;
(iv) to recognise, protect, and enforce married women's proprietary interests and rights;
(v) to establish a clear regulatory regime for Sheriffs and Bailiffs; and
(vi) to develop a clear, user friendly, and context relevant regulatory regime.

The special Law Commission on the Sheriffs Act has so far held eight (8) Commission meetings and three (3) more regional consultative workshops and also held a national consultative workshop. The special Law Commission has, tentatively and subject to continuing consultations, made the following key recommendations:

(a) **independence of the Sheriff**: that the Sheriff Office should be independent of and from the judiciary;
(b) **qualifications of the sheriff:** that the Sheriff should be a legal practitioner with a minimum of ten (10) years' experience as a legal practitioner;
(c) **accountability of sheriff officers:** the proposed Legislation has developed specific duties for sheriff officers to ensure that they are accountable;
(d) **property:** the proposed Legislation intends to expand the scope of executable property to cater for other forms of property which hitherto had been excluded from categories of executable property and has also expanded the category of property exempt from execution;
(e) **procedure on seizure and sale:** the proposed Legislation has refined the procedure on seizure and sale of property to ensure that it is effective and speedy and has developed safeguards to curb malpractices associated with seizure and sale of property;
(f) **interpleader proceedings:** the procedure on interpleader has also been revisited to ensure that it is expedient;
(g) **execution against land:** the procedure on execution against land has also been revisited and several safeguards developed to ensure that land is only sold as a last resort; and
(h) **offences:** several offences that are sheriff specific have also been developed.

The principal programme officer for this programme is Mr. Mtamandeni Liabunya, Law Reform Officer and he is assisted by Mr. Chikumbutso Sitima, Assistant Law Reform Officer.

This programme is being funded by the EU Democratic Governance Programme.

6.0 REVIEW OF THE PATENTS ACT (CAP. 49:02)

The review of the Patents Act is the second phase of the review of industrial property laws in Malawi. The review of the Act started in October, 2011.

A patent registration system is designed to foster innovation by granting protection to inventors of novel technologies. In return for disclosing the details of the technology through registration, a patent holder is granted an absolute monopoly over that technology for a limited time. Since the enactment of the Patents Act, however, there has been a growth in the number of international instruments relating to patent law, to which Malawi is a signatory. These instruments include the Patent Cooperation Treaty (PCT), the Harare Protocol, the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Patent Law Treaty (PLT). These international instruments have set up new international cooperation procedures and minimum standards which any national patent law should reflect. In addition to the changes brought about by international instruments, technological advancement has led to the emergence of new fields which

require to be considered as part of a modern patent registration system; for example, software patents, patents of genetic material and plant varieties. The rationale for the review of the Patents Act is, therefore to modernize the law and bring it into conformity with the Constitution, international instruments and technological advancement.

An in-house research, field research in Southern Malawi and data collection for use by the special Law Commission has so far been conducted. The programme has stalled due to lack of funds.

The principal programme officer for this Programme is Mr. Chizaso Eric Nyirongo, Assistant Chief Law Reform Officer. Mr. Gary Maclean of the Scottish Law Commission is providing technical support to the Programme.

The Programme is funded by the Government of Malawi.

7.0 REVIEW OF THE WITCHCRAFT ACT (CAP. 7:02)

The Commission continues the process of reviewing the Witchcraft Act which commenced in 2009 following submissions from the public and various organizations. It was submitted that the Act, which was enacted on 12th May, 1911, is not in tandem with realities on the ground. The submissions varied in the points of interest. For instance, on the one hand, some members of society have argued that the law should be reviewed on the basis of their belief that witchcraft exists. On the other hand, others have made their submissions based on their belief that witchcraft does not exist. Based on the submissions, the following have emerged as issues for consideration, among others:

(a) existence or non-existence of witchcraft and whether the law should recognize the two contrasting beliefs;
(b) protection of victims of witchcraft;
(c) constitutionality of the Act, that is, to say whether by punishing persons who pretends to be practitioners of witchcraft, the Act infringes freedom of conscience as provided by section 33 of the Constitution; and
(d) evidential and jurisdictional matters in case witchcraft is recognized by the law.

Extensive consultations were conducted within Malawi. Following these consultations, it became clear that consultations with relevant institutions in other countries within the region were necessary to share practical experiences on matters relating to witchcraft and legislation. In this regard, the Commission has been to Zambia on a three day study visit. It is also anticipated that, funds permitting, another delegation visit Zimbabwe. In the meantime, if funds become available, the Commission will continue with the substantive review of the Act.

The principal programme officer for this Programme is Mr. Allison Mbang'ombe, Deputy Chief Law Reform Officer, and is assisted by Mr. Chizaso Eric Nyirongo, Assistant Chief Law Reform Officer and Mr. Francis Ekari M'mame, Assistant Law Reform Officer, respectively.

The Programme is funded by Government of Malawi. UNFPA has also funded some aspects of the Programme. The programme has stalled due to lack of funds.

8.0 New Programmes

There Commission also received submissions on new programmes most of which came after the Notice of Work Programmes for 2012 was published. The programmes have failed to commence due to lack of funds and they include the following:

(a) **the Review of Intra-party Democracy Regulation:** the programme was taken aboard with the aim to contribute to the upholding of intra-party democracy;

(b) **the Review of Certain Aspects of the Penal Code:** the programme was initiated with a call from certain sectors in society who are advocating for the respect of the rights of individuals through amendment and review of certain aspects of the Penal Code;

(c) **the Review of Certain Aspects of the Constitution:** the programme was incorporated in the Annual Work Programme with a view to fill the gap identified in the regulation of the office of the vice presidency and to improve on the electoral system;

(d) **the Review of Laws Regulating the Extractive Industry:** the programme is a resultant of the need to bring up-to date the laws regulating the mining industry as they are archaic; and

(e) **the Review of the Prison Act:** the programme was assigned to the Commission to put in place a law that will bring about the alignment of reformatory centers with constitutional and international standards.